No. ___

IN THE

Supreme Court of the United States

TOSHIBA CORPORATION,

Petitioner,

v.

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 07/17/2018]

Docket No. 16-56058

MARK STOYAS, individually and on behalf of all others similarly situated,

Plaintiff,

and

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Plaintiffs-Appellants,

v.

TOSHIBA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(No. 2:15-cv-04194-DDP-JC)

ARGUED AND SUBMITTED NOVEMBER 9, 2017
PASADENA, CALIFORNIA

Before:

WARDLAW and FLETCHER,* *Circuit Judges*, and DANIEL,** *District Judge*.

OPINION

SUMMARY***

Securities Fraud

The panel reversed the district court's dismissal and remanded to allow amendment of the complaint in an action in which purchasers of American Depository Shares or Receipts alleged violations of §§ 10(b) and 20(a) of the Securities Exchange Act based on Toshiba Corp.'s fraudulent accounting practices.

ADRs are financial instruments that enable investors in the United States to buy and sell stock in foreign corporations such as Toshiba, whose common stock is publicly traded on the Tokyo Stock Exchange. The district court concluded that under the test set forth in *Morrison v. Nat'l Australia Bank*

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* This case was submitted to a panel that included Judge Stephen R. Reinhardt. Following Judge Reinhardt's death, Judge W. Fletcher was drawn by lot to replace him. Ninth Circuit General Order 3.2.h. Judge W. Fletcher has read the briefs, reviewed the record, and listened to oral argument.

** The Honorable Wiley Y. Daniel, United States District Judge for the U.S. District Court for Colorado, sitting by designation.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Ltd., 561 U.S. 247 (2010), the Exchange Act, which does not apply extraterritorially, did not apply to the purchase of Toshiba ADRs because the over-the-counter market by which the Toshiba ADRs were sold was not a "national exchange," and there was no domestic transaction between the ADR purchasers and Toshiba.

Reversing, the panel declined to resolve the question of whether, under *Morrison*, the Exchange Act applied to "domestic exchanges" or only "national securities exchanges" because the over-the-counter market was not an "exchange" within the meaning of the Exchange Act. The panel nevertheless concluded that the Exchange Act could apply to the Toshiba ADR transactions, as domestic transactions in securities not registered on an exchange. The panel concluded that Toshiba ADRs were "securities" under the Exchange Act. Adopting the Second and Third Circuits' "irrevocable liability" test, looking to where purchasers incurred the liability to take and pay for securities, and where sellers incurred the liability to deliver securities, the panel further concluded that plaintiffs must be allowed to amend their complaint to allege that the purchase of Toshiba ADRs on the over-the-counter market was a domestic purchase, and that the alleged fraud was "in connection with" the purchase.

COUNSEL

Susan K. Alexander (argued), San Francisco, California, for Plaintiffs-Appellants.

Christopher M. Curran (argued), Washington, D.C., for Defendants-Appellees.

OPINION

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Supreme Court held that the presumption against extraterritorial applicability of congressional legislation renders the U.S. Securities Exchange Act of 1934 ("the Exchange Act") applicable to deceptive conduct only in connection with the purchases or sales of any securities registered on a national securities exchange or domestic transactions in other securities not so registered. The Court reasoned that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266. Appellants Automotive Industries Pension Trust Fund ("AIPTF") and New England Teamsters & Trucking Industry Pension Fund (together, the "Funds") are named plaintiffs in a putative class action alleging violations of the Exchange Act and the Financial Instruments and Exchange Act of Japan ("JFIEA") against Toshiba Corporation ("Toshiba") based on its now-admitted fraudulent accounting practices that caused hundreds of millions of dollars in loss to U.S. investors. The complaint alleges (1) violation of Section 10(b) of the Exchange Act and Rule 10b-5 on behalf of American Depository Shares or Receipts ("ADRs") purchasers, (2) violation of Section 20(a) of the Exchange Act on behalf of ADR purchasers, and (3) violation of JFIEA Article 21-2 on behalf of ADR purchasers and purchasers of Toshiba common stock. The district court dismissed the case with prejudice on the grounds that the over-the-counter market by which ADRs are sold was not a "national exchange" within the meaning of *Morrison*, and that there was not any domestic transaction between ADR

purchasers and Toshiba. Having dismissed the Exchange Act claims, the district court dismissed the Japanese law claim under principles of comity and *forum non conveniens*.

Thus, at the heart of this appeal is the question of the nature of ADRs and their transactions, and whether Toshiba ADRs are covered by the Exchange Act through either registry on a national exchange, or through domestic sales and purchases.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the wake of Toshiba's admission of substantial institutional accounting fraud and accompanying restatements of pre-tax profits,[1] Mark Stoyas filed this securities fraud class action on June 4, 2015, against Toshiba, its current chief executive officer, and its former chief executive officer based on his ownership of thirty-three Toshiba ADRs and a loss of $180.53. Later, AIPTF became lead plaintiff based on its purchase on March 23, 2015, of 36,000 Toshiba ADRs in the United States on an over-the-counter

[1] On September 7, 2015, Toshiba restated its pre-tax profits for fiscal years 2008 through 2014, eliminating $2.6 billion in profit, or about a third of its total reported profit during the period. Toshiba also restated shareholder equity, eliminating $9.9 billion in equity. The restatements followed a series of internal investigations prompted by a Japanese government order that revealed widespread, deliberately fraudulent accounting practices designed to inflate Toshiba's profit statements over an at least six-year period. As a result, Toshiba's stock price declined by more than 40 percent, a loss of $7.6 billion in market capitalization, and nine senior executives resigned.

market run by OTC Markets Group and a loss of $196,913.47.[2]

The Funds filed the first amended complaint ("FAC") on December 17, 2015. The FAC added New England Teamsters & Trucking Industry Pension Fund as a named plaintiff; unlike AIPTF, it had purchased 343,000 shares of Toshiba common stock on the Tokyo Stock Exchange.

The FAC alleges three class action claims for relief against Toshiba.[3] The first two claims are brought on behalf of a class of all persons who acquired Toshiba ADRs ("ADR class") between May 8, 2012, and November 12, 2015 ("Class Period"). The first claim alleges violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5. Class members "acquired" Toshiba ADRs "in reliance upon the truth and accuracy" of Toshiba's fraudulent financial statements, paid artificially inflated prices, and suffered economic loss when the ADRs declined in value after the fraud was revealed and pre-tax profits were restated.

The second claim alleges violation of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a). Toshiba,

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[2] Following the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(3)(A)(i), notice of the action was published in Business Wire. On August 3, 2015, AIPTF filed a motion for appointment as lead plaintiff; in light of AIPTF's larger financial interest, Stoyas did not oppose the motion and the district court granted it. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb) (rebuttable presumption that the party with the largest financial interest at stake is the most adequate plaintiff).

[3] AIPTF dismissed the claims against the Toshiba chief executive officers before filing the FAC.

despite having the ability to control its directors, officers, and managers, including twenty-four specific individuals, failed to prevent their fraudulent conduct or, alternatively, "actively controlled and directed those actions so as to cause the violations" of securities laws.[4]

The third claim alleges violation of JFIEA Article 21-2. It is brought on behalf of both the ADR class and a class of "all citizens and residents of the United States who otherwise acquired shares of Toshiba common stock during the Class Period." Appellants claim that "Toshiba breached its duty to make a reasonable and diligent investigation of the statements" in its financial reports and "to ensure that the statements contained therein were truthful and accurate." The material false information and omissions artificially inflated the price of Toshiba common stock, and class members were harmed when the value of the stock declined due to the revelation of fraudulent accounting.

The district court dismissed the FAC with prejudice on May 20, 2016. Applying *Morrison*, the district court held that the over-the-counter market was not a "stock exchange" within the meaning of the Exchange Act, and that the FAC failed to allege Toshiba's involvement in the ADR transactions at issue, rendering Section 10(b) inapplicable. Having dismissed the Funds' Exchange Act claims, the district court dismissed the Japanese law claim on

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[4] "Controlling person" liability under Section 20(a) requires a primary violation of the Exchange Act, so the Funds' Section 20(a) claim turns on the viability of their Section 10(b) claim. *Morrison*, 561 U.S. at 253 n.2. For clarity, the balance of the opinion discusses only the Section 10(b) claim.

the basis of comity and *forum non conveniens*. Finding any amendment would be futile, the district court dismissed the case with prejudice. The Funds timely appeal. Fed. R. App. P. 4(a)(1).

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the Exchange Act claims pursuant to Exchange Act Section 27(a), 15 U.S.C. § 78aa(a). The district court had jurisdiction over the JFIEA claim based on diversity jurisdiction, as Toshiba is a foreign corporation, as well as supplemental jurisdiction, because it arises from the same case or controversy as the Exchange Act claims. 28 U.S.C. §§ 1332(a)(2), (d)(2); 28 U.S.C. § 1367.

We have jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's order and final judgment dismissing the Funds' claims with prejudice. *See* Fed. R. Civ. P. 54(b).

"We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018) (quotation omitted). "[R]eview is generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of judicial notice." *New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). In other words, we inquire "whether the complaint at issue contains 'sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face.'" *Harris v.*

Cty. of Orange, 682 F.3d 1126, 1131 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Denial of leave to amend is reviewed for abuse of discretion. *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 598 (9th Cir. 2014). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Harris*, 682 F.3d at 1331 (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (*per curiam*)). "A district court's failure to consider the relevant factors [set forth in *Foman v. Davis*, 371 U.S. 178 (1962)] and articulate why dismissal should be with prejudice instead of without prejudice may constitute an abuse of discretion." *Eminence Capital*, 316 F.3d at 1052.

III. DISCUSSION

Toshiba's common stock is publically traded on the Tokyo Stock Exchange. The Funds' Exchange Act claims are in connection with Toshiba ADR transactions on the over-the-counter market as opposed to direct purchases of Toshiba common stock. Nevertheless, the Exchange Act applies to Toshiba ADR transactions because Toshiba ADRs are "securities" under the Exchange Act and AIPTF's purchase of Toshiba ADRs on the over-the-counter market is a domestic "purchase or sale of . . . any security not" registered on a national securities exchange. 15 U.S.C. § 78j(b); *see Morrison*, 561 U.S. at 269–70.

A. Toshiba ADRs are "Securities"

The Exchange Act of 1934 applies to "securities," defined to include "any note, stock, treasury stock,

security future, . . . transferable share, investment contract, . . . any instrument commonly known as a 'security'; or any . . . receipt for . . . any of the foregoing." 15 U.S.C. § 78c(a)(10); *Sec. & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 297 (1946) (describing the definition as encompassing "documents traded for speculation or investment"). This expansive list, along with the Exchange Act's remedial purpose, precludes "a narrow and literal reading of the definition of securities." *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009); *see*, *e.g.*, *Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) (noting that Congress "painted with a broad brush" the "scope of the market that it wished to regulate" through federal securities laws); *Marine Bank v. Weaver*, 455 U.S. 551, 555–56 (1982) ("[T]he term 'security' was meant to include 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" (quoting H. R. Rep. No. 85 at 11 (1933))); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality.").

Toshiba ADRs fit comfortably within the Exchange Act's definition of "security," specifically as "stock." To constitute "stock" under the Exchange Act, an instrument must possess "some of the significant characteristics typically associated" with common stock: "(i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value." *Landreth Timber*

Co. v. Landreth, 471 U.S. 681, 686 (1985) (quotation omitted).

ADRs "allow U.S. investors to invest in non-U.S. companies and give non-U.S. companies easier access to U.S. capital markets." Sec. & Exch. Comm'n, Office of Inv'r Education and Advocacy, "Investor Bulletin: American Depository Receipts" at 1 (August 2012) [hereinafter "ADR Bulletin"]; *see Waggoner v. Barclays PLC*, 875 F.3d 79, 84 n.3 (2d Cir. 2017). Specifically, ADRs are negotiable certificates issued by a United States depositary institution, typically banks, and they represent a beneficial interest in, but not legal title of, a specified number of shares of a non-United States company.[5] *See Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002). The depositary institution itself maintains custody over the foreign company's shares.[6] *Id.*; ADR Bulletin at 1.

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[5] Technically, ADRs are receipts that evidence ownership of an "American Depository Share" or "ADS," which is the actual negotiable certificate. *See* In re Additional Form F-6 Eligibility Requirement, Securities Act Release No. 8287, Exchange Act Release No. 48482 [hereinafter "2003 SEC ADR Release"], 68 Fed. Reg. 54,644, 54,644 n.4 (Sept. 17, 2003). The parties, documents, and other opinions use both terms interchangeably, but for clarity we use only the acronym ADR in this opinion. In any event, if an ADS constitutes "stock" within the meaning of the Exchange Act, then the corresponding ADR is also a "security" within the Exchange Act because 15 U.S.C. § 78c(a)(10) includes receipts for stock.

[6] General background on ADRs can be found in Pinker; Bruce L. Hertz, *American Depository Receipts*, 600 P.L.I./Comm. 237 (1992); Adee et al., DR programmes, Bloomenthal and Wolff, 10C International Capital Markets & Securities Regulation § 49:58 (April 2018 Update); Amendola et al., American Depository Receipts, 69 American Jurisprudence 2d, Securities Regulation—Federal § 760 (May 2018 Update);

There are four depositary institutions for Toshiba ADRs: Bank of New York Mellon, Citibank N.A., Deutsche Bank Trust Company Americas, and Convergex Depositary, Inc.

Toshiba ADRs are registered with the Securities and Exchange Commission through the filing of Form F-6.[7] 17 C.F.R. § 239.36; ADR Bulletin at 2; *see City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655–56 & n.2 (6th Cir. 2005); *Bruns, Nordeman & Co. v. Am. Nat. Bank & Tr. Co.*, 394 F.2d 300, 304 n.4 (2d Cir. 1968) (stating that the Securities and Exchange Commission started requiring registration of ADRs in 1955). Toshiba ADRs are unsponsored, which means that the depositary institutions each filed Form F-6 without Toshiba's "formal participation" and possibly without

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and Adee et al., Depository receipt program, 3F Securities & Federal Corporate Law § 28:15 (2d ed. & March 2018 update).

[7] Form F-6 "relates only to the contractual terms of deposit under the deposit agreement. . . . [It] contains no information about the non-U.S. company." ADR Bulletin at 2; *see also* 2003 SEC ADR Release at 54,644–45; *Pinker*, 292 F.3d at 367. In Form F-6s for the Toshiba ADRs, the depositary institutions attested that they exercised "reasonable diligence" in forming a "reasonable, good-faith belief" that Toshiba ADRs were exempt from Securities and Exchange Commission registration pursuant to Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b). Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Exchange Act Release No. 58465, 73 Fed. Reg. 52,752, 52,762 (Sept. 5, 2008) [hereinafter "2008 SEC ADR Rulemaking"] (to be codified at 17 C.F.R. pts. 239, 240, 249). Toshiba ADRs are automatically exempt, since (1) a foreign stock exchange is the primary trading market for Toshiba's common stock and (2) Toshiba electronically publishes in English "information that is material to an investment decision" in its securities, including annual reports, financial statements, and press releases. 17 C.F.R. § 240.12g3-2(b)(3)(i).

its acquiescence. American Depository Receipts, Securities Act Release No. 33-6984, Exchange Act Release No. 34-29226, 56 Fed. Reg. 24,420, 24,422 (May 23, 1991) [hereinafter "1991 SEC ADR Release"]; 2003 SEC ADR Release at 54,645. Accordingly, when AIPTF purchased Toshiba ADRs, it was entering into "essentially a two-party contract" with the depositary institution.[8] 2003 SEC ADR Release at 54,645. The contractual terms are specified in the ADR itself, to which ADR holders are "deemed to have agreed . . . by their acceptance and holding of ADRs." *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (quoting 1991 SEC ADR Release).

Toshiba ADRs share many of the five significant characteristics typically associated with common stock. *See Landreth Timber*, 471 U.S. at 686. First, depositary institutions transfer the dividends they receive on deposited Toshiba common stock to the corresponding Toshiba ADR owner.[9] Second, Toshiba

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[8] In contrast, ADRs are sponsored when a depositary institution and the foreign company jointly file Form F-6 to register the ADRs. 2003 SEC ADR Release at 54,645. Accordingly, purchasers of sponsored ADRs enter into essentially a three-party contract with the depositary and the foreign company. *Id.* Sponsored ADRs are further subdivided into three levels, corresponding to where the ADRs are listed and whether the foreign company is using the ADRs to raise capital. ADR Bulletin at 2; *see In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 66281, at *6 n.5 (N.D. Cal. Jan. 4, 2017); Burch and Foerster, Capital Markets Handbook § 5.19 (6th ed. 2018); Bloomenthal and Wolff, Securities and Federal Corporate Law § 28:15 (2d ed. & March 2018 update). A sponsored ADR precludes another depositary's issuance of an unsponsored ADR. *See* 1991 SEC ADR Release at 24,422–23.

[9] Each Toshiba ADR corresponds to six Toshiba common shares.

ADRs are negotiable: they are traded through U.S. broker-dealers; collectively, the depositary institutions have registered 205 million Toshiba ADRs; Toshiba ADRs are owned "by hundreds of thousands of persons"; and Toshiba ADR holders may split or combine Toshiba ADRs into new instruments as they see fit. *Pinker*, 292 F.3d at 367 ("ADRs are tradeable in the same manner as any other registered American security."); *In re Hawaii Corp.*, 829 F.2d 813, 815 (9th Cir. 1987) (defining negotiability). Third, nothing in the Toshiba ADRs restricts pledging or hypothecation. Fourth, each of the four Toshiba ADR depositary institutions is willing to exercise the voting rights associated with the deposited Toshiba common stock as directed by the Toshiba ADR owners. Fifth, Toshiba ADRs have the same "interest . . . in the management, profit and assets" of Toshiba as investors in Toshiba common stock, *Comm'r of Internal Revenue v. Scatena*, 85 F.2d 729, 732 (9th Cir. 1936), because ADR value is directly linked to the value of Toshiba common stock: Toshiba ADRs decreased in value "in tandem" with the decrease in Toshiba common stock price.[10]

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[10] The FAC alleges that Toshiba's actions "affect[ed] the price of Toshiba's ADRs in the same manner and to the same extent" as they affected the price of Toshiba common stock. We note, however, that one Second Circuit case raised several reasons why that may not be the case. *See Law Debenture Tr. Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 469–71 (2d Cir. 2010) ("[T]he price at which an [ADR] is traded is not simply a function of the value of the foreign issuer's underlying security. 'The ADR trading price is also a function of,' *inter alia*, 'foreign currency exchange rates,' the risks of fluctuation in those rates, the administrative costs of establishing, maintaining, and operating the depositary, and 'inefficient

More broadly, the economic reality of Toshiba ADRs is closely akin to stock. *See Waggoner*, 875 F.3d at 85 n.3 (expert testifying that ADRs are the "rough . . . equivalent" of stock); *Law Debenture Tr. Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 464 (2d Cir. 2010) (ADRs "share several of the same characteristics as ordinary shares."). They are designed to allow seamless investment in foreign companies akin to owning shares of U.S. companies—ADRs are denominated in U.S. dollars, cleared through U.S. settlement systems, and are listed alongside U.S. stocks. ADR Bulletin at 1; *Morrison*, 561 U.S. at 251. Prospective investors in Toshiba ADRs have electronic access to English translations of "information that is material to an investment decision" in Toshiba's common stock, including annual reports, financial statements, and press releases. 17 C.F.R. § 240.12g3-2(b)(3)(i). And Toshiba ADR owners can obtain legal ownership of Toshiba common stock in exchange for their ADRs at any time. *Reese v. Malone*, 747 F.3d 557, 563 n.1 (9th Cir. 2014), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017).

Accordingly, ADRs are consistently referred to and treated as securities by the parties, depositary institutions, the Securities and Exchange Commission, courts, and scholars. *See, e.g.*, *Bank of New York Mellon Corp. v. Comm'r of Internal Revenue*, 801 F.3d 104, 116 (2d Cir. 2015); *Reese*, 747 F.3d at 563 n.1 (analyzing Exchange Act claim based on purchase of ADRs); *Reese v. BP Expl. (Alaska)*

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market dissemination of news about the issuer of the deposited securities.'" (quoting 1991 SEC ADR Release at 24,424)).

Inc., 643 F.3d 681, 684–85 (9th Cir. 2011) (same); *City of Monroe*, 399 F.3d at 655–56 (same); *Pinker*, 292 F.3d at 367; *Compaq Computer Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 277 F.3d 778, 779–80 (5th Cir. 2001); *IES Indus., Inc. v. United States*, 253 F.3d 350, 351 (8th Cir. 2001); 17 C.F.R. § 230.405 (defining "depository share" as "a security, evidenced by an American Depositary Receipt"); ADR Bulletin at 1; 2008 SEC ADR Rulemaking at 52,763; 2003 SEC ADR Release at 54,644 n.4 & 54,646 ("For the purposes of Securities Act registration, ADRs and the deposited securities are separate securities, requiring separate registration or exemption from Securities Act registration.");

1991 SEC ADR Release at 24,421 n.5; Nanda et al., American Depository Shares, 2 Litigation of International Disputes in U.S. Courts § 8:38 (April 2018 update); Dickerson et al., Open questions after *Morrison*—American Depository Receipts, Litigating International Torts in U.S. Courts § 7:7 (August 2017 update); Amendola et al., American Depository Receipt, 18 C.J.S. Corporations § 251 (March 2018 update); Lewkow, American depositary shares, Marans et al., 1 *Manual* of Foreign Investment in the U.S. § 6:26 (3d ed. & December 2013 update); *see also United States v. Martoma*, No. 12 CR 973 PGG, 2013 WL 6632676, at *3 n.1 (S.D.N.Y. Dec. 17, 2013) (collecting post-*Morrison* securities fraud actions that proceeded based on ADRs).[11]

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[11] Toshiba characterizes *Securities and Exchange Commission v. Ficeto*, 839 F. Supp. 2d 1101, 1115 (C.D. Cal. 2011) as concluding that ADRs "fall entirely outside" of the Exchange Act because "they are 'merely placeholders for the

B. The Exchange Act

The Exchange Act of 1934 "anchor[s] federal regulation of vital elements of our economy." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."). Exchange Act Section 10(b) makes it "unlawful for any person, directly or indirectly . . . [t]o use or employ . . . any manipulative or deceptive device or contrivance in contravention" of Securities and Exchange Commission rules and regulations "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j(b). As a "'catchall' clause" enabling the Securities and Exchange Commission "to deal with new manipulative (or cunning) devices," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976) (quotation omitted), Section 10(b) is an essential component of the regulatory scheme.

In 1942, the Securities and Exchange Commission promulgated Rule 10b-5 to implement Section 10(b).

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ordinary shares traded on foreign exchanges.'" But in that passage from *Ficeto*, the district court is summarizing the holdings of two cases, one of which is questionable and the other of which is directly contrary. The first case, *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010), has been criticized as incorrect and contrary to *Morrison*. *See Martoma*, 2013 WL 6632676, at *4 & n.3 (noting *In re Société Générale's* reliance on pre-*Morrison* authority); *Wu v. Stomber*, 883 F. Supp. 2d 233, 253 (D.D.C. 2012), *aff'd*, 750 F.3d 944 (D.C. Cir. 2014). The second, *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011), *aff'd sub nom. In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016), explicitly refers to ADRs as a separate security. *Id.* at 521 n.2.

Sec. & Exch. Comm'n Release Notice, Release No. 3230, 1942 WL 34443 (May 21, 1942). Rule 10b-5 makes it unlawful for

> any person, directly or indirectly, . . .
>
> > (a) To employ any device, scheme, or artifice to defraud,
> >
> > (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> >
> > (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5(b); *see Dabit*, 547 U.S. at 78; *Sec. & Exch. Comm'n v. Clark*, 915 F.2d 439, 448, 450 (9th Cir. 1990) (stating that Rule 10b-5 has become "the centerpiece of federal securities regulation"). Notably, Section 10(b) and Rule 10b-5 repeatedly use the qualifier "any," and therefore "are obviously meant to be inclusive." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *see also Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 312 (1985) (Section 10(b) and Rule 10b-5 have "broad reach.").

Section 10(b) and Rule 10b-5 "may well be the most litigated provisions in the federal securities

laws." *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 465 (1969). However, it was not until 2010 that the Court first addressed whether Section 10(b) and Rule 10b-5 apply extraterritorially. *Morrison*, 561 U.S. at 265.

In *Morrison*, three Australian individuals sought to bring Exchange Act securities fraud claims in the Southern District of New York against National Australia Bank Limited ("Australia Bank"), then the largest bank in Australia. *Id.* at 251–53. One of Australia Bank's subsidiaries, headquartered in Florida, and its executives had allegedly engaged in deceptive conduct and publically made misleading statements, which were repeated in Australia Bank's annual reports and other public documents. *Id.* at 251–52. While Australia Bank ADRs were listed on the New York Stock Exchange, the Australians had purchased Australia Bank's ordinary shares, which were "traded on the Australian Stock Exchange and other foreign securities exchanges, but not on any exchange in the United States," and they sought to represent a class of foreign purchasers of Australia Bank's ordinary shares. *Id.* at 251, 253.

Analyzing the text of Section 10(b), the Court found "no affirmative indication" that it applied extraterritorially. *Id.* at 265; *see also id.* at 262 ("On its face, § 10(b) contains nothing to suggest it applies abroad."). Unless Congress "clearly expressed" its "affirmative intention" of extraterritorial effect "we must presume it is primarily concerned with domestic conditions." *Id.* at 255 (quotation omitted). Therefore, the Court held that Section 10(b) does not apply extraterritorially. *Id.* at 265.

To define what constitutes the permissible, non-extraterritorial application of Section 10(b) and Rule 10b-5, the Court articulated a transactional test rooted in the text of Section 10(b). *Id.* at 266–70 & 267 n.9; *see also id.* at 261–62 ("Rule 10b-5 . . . was promulgated under § 10(b), and does not extend beyond conduct encompassed by § 10(b)'s prohibition." (quotation omitted)). Section 10(b) focuses "not upon the place where . . . deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266. In other words, "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Id.* (quoting Section 10(b), 15 U.S.C. § 78j(b)); *see also id.* at 272 ("Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of the statute.").

The Court drew a line delineating categories of transactions Congress sought to regulate and parties whom Congress sought to protect: in its view, Section 10(b) applies to "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 267. The transactional test the *Morrison* Court adopted—whether the purchase or sale (1) involves a security listed on a domestic exchange or (2) takes place in the United States—avoided "the interference with foreign securities regulation" that application of the Exchange Act to foreign transactions would produce. *Id.* at 269.

Thus, the Court squarely held that the Exchange Act did not apply where Australia Bank's shares were not listed on a United States exchange and "all

aspects of the purchases" took place outside the United States, even though a subsidiary of Australia Bank and its executives "engaged in the deceptive conduct" in the United States. *Id.* at 252–53, 273. Deceptive domestic conduct or the presence of other, non-transactional domestic activity cannot substitute for *Morrison*'s requirement of a security's presence on a domestic exchange or of a security's domestic transaction. As the Court reasoned, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* at 266.

1. *"Registered on a National Securities Exchange"*

The Court derived its first category of transactions to which Section 10(b) applies from Section 10(b)'s language: "any security registered on a national securities exchange." 15 U.S.C. § 78j(b); *see Morrison*, 561 U.S. at 268 n.10 (stating that the second category arises from the other half of Section 10(b), "any security not so registered"). But when articulating the rule, the *Morrison* Court repeatedly describes the regulated category as "securities listed on *domestic* exchanges."[12] *Morrison*, 561 U.S. at 267 (emphasis added); *see id.* at 268, 270 (same); *id.* at 273 ("security listed on an American stock exchange" and "securities listed on a domestic exchange").

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[12] Under *Morrison* and in today's common parlance, the terms "registered" and "listed" are essentially equivalent. *See In re Vivendi*, 765 F. Supp. 2d at 528 n.13.

Facially, the terms are distinct: "national security exchange" is a term of art referring to a *subset* of "exchanges" that are registered with the Securities and Exchange Commission and that abide by the requirements set out in 15 U.S.C. § 78f and its regulations. Twenty one exchanges are currently so registered, and two are exempt based on a limited volume of transactions.[13] No over-the-counter market is a "national security exchange," and the Funds do not argue otherwise.

Toshiba urges us to eliminate any discrepancy by reading the term "domestic exchange" as used in *Morrison* as the equivalent of "national securities exchange." But Toshiba incorrectly characterizes *Morrison*'s discussion of "domestic exchange" as mere shorthand for what Toshiba believes the Court must have meant to write—national securities exchange. The Court uses the term "domestic exchange" interchangeably both when defining the first category of transactions to which Section 10(b) applies and throughout the remainder of the opinion. And there is little wonder that the Court did so: the entire focus of the *Morrison* opinion is the "longstanding principle" that Congressional legislation, including Section 10(b), is meant to apply only within the territorial jurisdiction of the United States, and its announcement of the "transactional test" to separate

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[13] The Securities and Exchange Commission maintains a website listing national securities exchanges. Sec. & Exch. Comm'n, *Fast Answers: National Securities Exchanges*, https://tinyurl.com/ycox23jn (last modified Nov. 1, 2017). As of briefing in this appeal, eighteen national securities exchanges were so registered.

domestic from foreign purchases and sales.[14] *Morrison*, 561 U.S. at 255, 269.

We need not and do not resolve this argument, although from our reading the Funds have the better of it. The over-the-counter market on which Toshiba ADRs trade is simply not an "exchange" under the Exchange Act.

The Exchange Act defines "exchange" as

> any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

15 U.S.C. § 78c(a)(1). The Securities and Exchange Commission's implementing regulation sets forth two requirements—the organization, association, or group of persons must (1) bring "together the orders for securities of multiple buyers and sellers" and (2) use "established, non-discretionary methods . . . under which such orders interact with each other, and the

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[14] Toshiba relies on the Third Circuit's decision in *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015). But rather than analyzing Section 10(b) or the text of *Morrison*, *Georgiou* cites *Morrison*'s concluding summation paragraph, which used "American stock exchange," and simply treats that term as "national security exchanges." *Id.* at 134 (quoting *Morrison*, 561 U.S. at 273).

buyers and sellers entering such orders agree to the terms of the trade." 17 C.F.R. § 240.3b-16(a)(1)–(2).

Toshiba ADRs trade on OTC Link,[15] an over-the-counter market operated by OTC Markets Group.[16] Since May 2012, OTC Link has registered with the Securities and Exchange Commission as a "broker-dealer" alternative trading system.[17]

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[15] Formerly called OTC Pink, OTC Link is a "electronic inter-dealer quotation system that displays quotes from broker-dealers. . . . OTC Link does not require companies whose securities are quotes on its systems to meet any listing requirements." Sec. & Exch. Comm'n, *Fast Answers: OTC Link LLC*, https://tinyurl.com/yaas8nr9 (last modified May 9, 2013); *see Sec. & Exch. Comm. v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1251 (9th Cir. 2013); *Sec. & Exch. Comm. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1081 (9th Cir. 2010). The Funds allege that OTC Link is a "highly efficient and automated market" and that Toshiba ADRs are owned "by hundreds of thousands of persons." OTC Link contrasts with two other OTC markets, OTCQX and OTCQB, which both have additional listing and disclosure requirements. *See* OTC Markets Group, *Reporting Standards*, https://tinyurl.com/y773bmlc (last visited July 9, 2018); OTC Markets Group, *Information for Pink Companies*, https://tinyurl.com/y98g2q3j (last visited July 9, 2018).

[16] The FAC does not specify on which OTC market Toshiba ADRs trade, but we sua sponte take judicial notice of the materials submitted with the Funds' appellate briefing. *See* Fed. R. Evid. 201.

[17] The Securities and Exchange Commission maintains a website containing lists of alternative trading systems. The lists have been posted monthly since August 2014 and were posted approximately every four months between January 2009 and August 2014. Sec. & Exch. Comm'n, *Alternative Trading System ("ATS") List*, https://tinyurl.com/p3k5l44 (last modified June 30, 2018). We take judicial notice of the Securities and Exchange Commission's list of registered alternative trading systems. *See, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.2 (9th Cir. 2007) (taking judicial notice of government-published documents).

As an alternative trading system, OTC Link is separately regulated by the Securities and Exchange Commission and is specifically exempt from the Exchange Act's definition of "exchange." *See* 15 U.S.C. § 78mm(a)(1);[18] 17 C.F.R. §§ 242.300–303 ("Regulation ATS") (regulations that apply to alternative trading systems); 17 C.F.R. § 240.3a1-1(a)(2) (exempting entities in compliance with Regulation ATS from 15 U.S.C. § 78c(a)(1)'s definition of "exchange"); Regulation of Exchanges and Alternative Trading Systems, 63 Fed. Reg. 70,844 (Dec. 22, 1998). The Securities and Exchange Commission's regulation is a reasonable exercise of the express delegation of authority in 15 U.S.C. § 78mm to the Securities and Exchange Commission, so we give controlling weight to the Securities and Exchange Commission's categorization of OTC Link as not an "exchange" within the meaning of the Exchange Act. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (regulations promulgated pursuant to express

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In addition, OTC Markets Group's website describes OTC Link as an "SEC regulated" and "SEC-registered" alternative trading system. *See* OTC Markets Group, *Our Company*, https://tinyurl.com/yavh7396 (last visited July 9, 2018); OTC Markets Group, *How To Get Traded*, https://tinyurl.com/yangt6cj (last visited July 9, 2018).

[18] 15 U.S.C. § 78mm(a)(1) authorizes the Securities and Exchange Commission to, "notwithstanding any other provision of this chapter, . . . conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors" by "rule, regulation, or order."

Congressional delegations of authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); *Sharemaster v. Sec. & Exch. Comm'n*, 847 F.3d 1059, 1066 n.5 (9th Cir. 2017) (holding that "Congress vested the Commission with general authority to administer the Exchange Act," thereby meeting the preconditions for *Chevron* deference).

The Funds present the Exchange Act's definition of "exchange" but do not respond to Toshiba's argument that OTC Link is an alternative trading system, not an exchange. Instead, they urge us to follow *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), in which the Second Circuit noted that in Ficeto the Securities and Exchange Commission "successfully argued that the first prong of *Morrison* is satisfied because the case involves securities traded on the over-the-counter securities market, not securities sold on foreign exchanges." *Id.* at 66 n.3 (citing *Ficeto*, 839 F. Supp. 2d at 1112). As *Absolute Activist* expressly took no position on whether *Morrison*'s first category included over-the-counter markets, the Funds are actually asking us to adopt *Ficeto*. *See id.* at 66 ("The case at hand does not concern the first prong of *Morrison*."). But *Ficeto's* analysis failed to consider whether over-the-counter market trades fell within *Morrison*'s second category of regulated transactions, and incorrectly assumed that over-the-counter market trades must be regulated, if at all, only if they come within *Morrison*'s first category.

The Funds also urge us to follow the Eleventh Circuit's decision in *United States v. Isaacson*, 752 F.3d 1291 (11th Cir. 2014), which they argue had "no

trouble" holding that over-the-counter markets such as OTC Link are "exchanges." But *Isaacson*'s brief discussion of *Morrison* actually had "no trouble" concluding that the criminal conduct at issue satisfied *Morrison*'s requirement of a U.S. nexus. *Isaacson*, 752 F.3d at 1299. *Isaacson* mentioned expert testimony explaining that over-the-counter "exchanges were 'similar to'" the New York Stock Exchange and NASDAQ, but did not state that such evidence *established* that they were domestic exchanges under *Morrison*. Instead, after citing evidence supporting the inference that the securities at issue were purchased in the United States, *Isaacson* concluded that *Morrison*'s requirements were satisfied. *Isaacson*, 752 F.3d at 1299. As discussed below, we agree with *Isaacson* and the Funds that the Exchange Act regulates over-the-counter markets, but nothing in *Isaacson* convinces us that OTC Link is an "exchange" under the Exchange Act.

2. *"Or any Security not so Regulated"*

The Court's second category of transactions reached by Section 10(b) is "domestic transactions in other securities," derived from Section 10(b)'s text, "any security not so registered." *Morrison*, 561 U.S. at 268 & n.10 (quoting 15 U.S.C. § 78j(b)); *see also id.* at 273 (defining category as "the purchase or sale of any other security in the United States"). *Morrison* did not describe the contours of this category at length, but did say that it exclusively focuses on "*domestic* purchases and sales." *Id.* at 268; *see id.* at 273 (holding this category inapplicable to the transactions at hand because "all aspects of the

purchases complained of . . . occurred outside the United States").

Cases since *Morrison* have articulated an "irrevocable liability" test to determine when a securities transaction is domestic. The test originated in the Second Circuit's decision in *Absolute Activist*, which held that "a securities transaction occurs when the parties incur irrevocable liability." *Absolute Activist*, 677 F.3d at 67. Because irrevocable liability determines the timing of a transaction, it also determines the location: a plaintiff must plausibly allege "that the purchaser incurred irrevocable liability within the United States to take and pay for a security, or that the seller incurred irrevocable liability within the United States to deliver a security." *Id.* at 68. The Second Circuit also found an alternative means of alleging a domestic transaction: alleging that title to the shares was transferred within the U.S. *Id.* (citing *Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307, 1310–11 (11th Cir. 2011) (reversing dismissal under *Morrison* when the complaint alleged domestic transfer of title)). The Second Circuit detailed factual allegations in a complaint that could sufficiently allege a domestic transaction: "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Id.* at 70. The irrevocable liability test has been adopted by the Third Circuit.[19] *See Georgiou*, 777 F.3d at 137.

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[19] The Second Circuit has repeatedly reaffirmed the irrevocable liability test. *See, e.g.*, *Myun-Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60, 66 (2d Cir. 2018); *In re Petrobras Sec.*, 862 F.3d 250, 262 (2d Cir. 2017); *In re Vivendi*, 838

We recently indicated approval of the irrevocable liability test in *Securities and Exchange Commission v. World Capital Market, Inc.*, 864 F.3d 996 (9th Cir. 2017). There, we cited *Absolute Activist* and the irrevocable liability rule as support for holding that, where "the undisputed evidence . . . shows that far more than $5 million in investor transactions took place in the United States," the district court properly rejected the argument that application of the Exchange Act was impermissibly extraterritorial. *Id.* at 1008. While we avoided explicitly adopting the test, we deemed *Absolute Activist* "instructive." *Id.* at 1008 n.11 ("We have yet to address what constitutes a domestic transaction under *Morrison*."). Consistent with *World Capital Market* and the irrevocable liability test, in *Securities and Exchange Commission v. Levine*, 462 F. App'x 717 (9th Cir. 2011), we held that the Securities Act governed particular transactions "because the actual sales closed in Nevada when [the individual] received complete stock purchase agreements and payments." *Id.* at 719 (citing *Morrison*); *see Morrison*, 561 U.S. at 268–69 (indicating that the Exchange Act extraterritoriality analysis applies to the Securities Act). And in

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F.3d at 265; *United States v. Mandell*, 752 F.3d 544, 548 (2d Cir. 2014). The test has also been adopted by numerous district courts in our circuit. *See*, *e.g.*, *In re Volkswagen*, 2017 WL 66281, at *4 & n.3; *Sec. & Exch. Comm'n v. Yin Nan Michael Wang*, No. LACV1307553JAKSSX, 2015 WL 12656906, at *10–11 (C.D. Cal. Aug. 18, 2015); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, No. CV09CV02487DMGPLAX, 2013 WL 12203024, at *6 (C.D. Cal. Apr. 4, 2013); *MVP Asset Mgmt. (USA) LLC v. Vestbirk*, No. 2:10-CV-02483-GEB, 2013 WL 1726359, at *3–7 (E.D. Cal. Mar. 22, 2013); *Sec. & Exch. Comm'n v. Geranio*, No. CV 12-04257 DMG, 2013 WL 12146516, at *4 (C.D. Cal. Jan. 29, 2013).

Securities and Exchange Commission v. Fujinaga, 696 F. App'x 203 (9th Cir. 2017), we held that the Exchange Act applied because the "sales of securities were 'made' in the United States." *Id.* at 206 (citing *Morrison*, 561 U.S. at 269–70). We elaborated that "to complete an investment, investors' funds were wired to [a] United States bank account, their paperwork was forwarded to [an] office in Nevada," which "issued the Certificate of Investment." *Id.*

We are persuaded by the Second and Third Circuits' analysis and therefore adopt the irrevocable liability test to determine whether the securities were the subject of a domestic transaction. Looking to where purchasers incurred the liability to take and pay for securities, and where sellers incurred the liability to deliver securities, *Absolute Activist*, 677 F.3d at 68, hews to Section 10(b)'s focus on transactions and *Morrison*'s instruction that purchases and sales constitute transactions, *Morrison*, 561 U.S. at 267–68. Furthermore, factual allegations concerning contract formation, placement of purchase orders, passing of title, and the exchange of money are directly related to the consummation of a securities transaction. *See Absolute Activist*, 677 F.3d at 70.

As Toshiba acknowledges, the FAC alleges that AIPTF's Toshiba ADRs were purchased in the United States. The FAC also alleges that Bank of New York, one of the depositary institutions, sold Toshiba ADRs in the United States. Missing from the FAC, however, are specific factual allegations regarding where the parties to the transaction incurred irrevocable liability. *Cf. In re Petrobras Sec.*, 862 F.3d at 263, 273 (identifying the relevant facts as

including who sold the relevant securities and how those transactions were effectuated, as evidenced by documentation such as confirmation slips). But AIPTF is a United States entity; its executives direct, control, and coordinate its activities in the United States; and its headquarters are in Alameda, California. OTC Markets Group operates OTC Link in the United States. And the four Toshiba ADR depositary institutions' principal executive offices, agents for service, and offices where ADR holders can exchange their ADRs for Toshiba common shares are all in New York. Accordingly, an amended complaint could almost certainly allege sufficient facts to establish that AIPTF purchased its Toshiba ADRs in a domestic transaction.[20] *See Morrison*, 251 U.S. at 273 & 251 n.1 (indicating that at least some aspects of an ADR transaction for an ADR listed on the New York Stock Exchange occur in the United States).

Rather than challenging whether the transactions were domestic, Toshiba argues that the existence of a domestic transaction is necessary but not sufficient under *Morrison*, relying on the Second Circuit case *Parkcentral Global Hub v. Porsche Automobile Holdings*, 763 F.3d 198 (2d Cir. 2014). Specifically, Toshiba argues that because the Funds did not allege any connection between Toshiba and the Toshiba ADR transactions, *Morrison* precludes the Funds' Exchange Act claims. But this turns *Morrison* and Section 10(b) on their heads: because we are to

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[20] The FAC defines the ADR class as "all persons who acquired Toshiba" ADRs, regardless of the location of irrevocable liability. Any class definition in an amended complaint, however, should comport with *Morrison* and the irrevocable liability test.

examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction. For the Exchange Act to *apply*, there must be a domestic transaction; that Toshiba may ultimately be found not liable for causing the loss in value to the ADRs does not mean that the Act is inapplicable to the transactions.

Parkcentral is distinguishable on many grounds.[21] First, *Parkcentral* did not involve ADRs but instead involved "securities-based swap agreements." *Parkcentral*, 763 F.3d at 205. Unlike ADRs, those entirely private agreements do not constitute investments in the company on whose securities they are based nor do they confer any ownership interest in those reference securities. *Id.* at 205–07. Furthermore, the swap agreements' value is wholly unconstrained by the amount of reference security available and is not directly pegged to the value of the reference security. *Id.* at 205–07 & 206 n.8. Second, the private swap agreements are not traded on Securities and Exchange Commission-regulated platforms, systems, or exchanges. *Id.* at 207. Third, the reference securities in the company at issue, Volkswagen, were traded entirely on foreign exchanges, implicating concerns that incompatible U.S. and foreign law would almost certainly regulate the same security. *Id.* at 207, 215–17. Fourth, there was no allegation that Volkswagen knew about or facilitated the swap agreements. *Id.* at 207, 215.

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[21] *Parkcentral* explicitly cautioned against extending its rule, instructing that its analysis should not be "perfunctorily applied to other cases based on the perceived similarity of a few facts." *Parkcentral*, 763 F.3d at 217.

But the principal reason that we should not follow the *Parkcentral* decision is because it is contrary to Section 10(b) and *Morrison* itself. It carves-out "predominantly foreign" securities fraud claims from Section 10(b)'s ambit, *id.* at 216, disregarding Section 10(b)'s text: the domestic "purchase or sale of *any* security registered on a national securities exchange or *any* security not so registered," 15 U.S.C. § 78j(b) (emphases added). The basis for the carve-out was speculation about Congressional intent, *Parkcentral*, 763 F.3d at 215, an inquiry *Morrison* rebukes, *Morrison*, 561 U.S. at 256. *Parkcentral*'s test for whether a claim is foreign is an open-ended, under-defined multi-factor test, *Parkcentral*, 763 F.3d at 217, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a "clear," administrable rule, *Morrison*, 561 U.S. at 257–59, 269–70. And *Parkcentral*'s analysis relies heavily on the foreign location of the allegedly deceptive conduct, *Parkcentral*, 763 F.3d at 215–16, which *Morrison* held to be irrelevant to the Exchange Act's applicability, given Section 10(b)'s exclusive focus on transactions, *Morrison*, 561 U.S. at 266–68.[22]

C. The Sufficiency of the Funds' Exchange Act Allegations

Toshiba argues forcefully that applying the Exchange Act to these unsponsored ADRs would undermine *Morrison*'s animating comity concerns. Nevertheless, that is not a basis for declining to

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[22] Notably, no Second Circuit case, nor any other Circuit, has applied *Parkcentral*'s rule. *See Myun-Uk Choi*, 890 F.3d at 66–67 (citing *Absolute Activist*, not *Parkcentral*, for *Morrison*'s second category); *In re Petrobras*, 862 F.3d at 261–62 (same); *In re Vivendi*, 838 F.3d at 265 (same).

follow the Court's clear instructions in *Morrison*. And it may very well be that the *Morrison* test in some cases will result in the Exchange Act's application to claims of manipulation of share value from afar.

Toshiba's argument, however, is directly relevant to whether the Funds have sufficiently alleged an Exchange Act claim.[23] *Morrison* delineates the transactions to which the Exchange Act can theoretically apply without being impermissibly extraterritorial, but while applicability is necessary, it is not sufficient to state an Exchange Act claim.

Section 10(b) of the Exchange Act makes it unlawful "[t]o use or employ, *in connection with* the purchase or sale" of a security "any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b) (emphasis added). Accordingly, there must be "a connection between the misrepresentation or omission and the purchase or sale of a security." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 157 (2008). We have held that for fraud to be "in connection with the purchase or sale of any security," it must "touch" the sale—i.e., it must be done to induce the purchase at issue. *Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 619 (9th Cir. 1981) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13 (1971)); *see also Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1026 (9th Cir. 1999) (The fraud "must have more than some tangential relation to the securities transaction."). Even though "in connection with" "should be construed not technically and restrictively,

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[23] Toshiba did not challenge personal jurisdiction before the district court and expressly disclaimed any such argument on appeal.

but flexibly to effectuate [the Exchange Act's] remedial purposes," *Chadbourne*, 134 S. Ct. at 1069 (quotation omitted), the FAC falls short, *Ambassador Hotel*, 189 F.3d at 1026 ("The court should consider whether the plaintiff has shown some causal connection between the fraud and *the securities transaction in question*. Deception related to the value or merit *of the securities in question* has sufficient connection to securities transactions to bring the fraud within the scope of § 10(b)." (emphases added) (citations omitted)); *see generally Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 871–72 (9th Cir. 2010).

First and foremost, sufficiently pleading Toshiba's connection to the ADR transactions requires clearly setting forth the transactions. However, the FAC omits basic details about ADRs. It also fails to include factual allegations regarding the over-the-counter market on which Toshiba ADRs are listed, whether Toshiba ADRs are sponsored, the depositary institutions that offer Toshiba ADRs, the Form F-6's they used to register the Toshiba ADRs, the trading volume of Toshiba ADRs, and the Toshiba ADRs' contractual terms (along with relevant variants between depositary institutions). And it lacks detail regarding AIPTF's purchase of the Toshiba ADRs, including how the purchase was made and which particular depositary institution holds the corresponding Toshiba common stock. Instead, the FAC erroneously ignores the distinction between ADRs and common stock, alleging simply that AIPTF "acquired Toshiba common stock during the Class Period through the purchase on March 23, 2015 of 36,000 shares of [Toshiba ADRs] in the United States," that OTC Link is a "highly efficient and

automated market," and that "shares of Toshiba common stock and [ADRs] are owned by hundreds of thousands of persons."

Second, before the district court and on appeal, the Funds argued that "it is likely that Toshiba was indeed involved in the establishment" of the ADRs. In support, the Funds rely on (1) a letter sent by Deutsche Bank (one of the Toshiba ADR depositary institutions) to the Securities and Exchange Commission during ADR rulemaking in 2008 stating that "in practice, depositary banks typically obtain the issuer's consent before establishing an unsponsored ADR facility," 2008 SEC ADR Rulemaking at 52,762 n.113; (2) a Paul, Weiss memorandum about the 2008 rulemaking which states that depositary issuers of unsponsored ADRs "typically request[] a letter of non-objection" from the foreign company; and (3) the fact that Toshiba made it possible for depositary institutions to issue unsponsored Toshiba ADRs by meeting the requirements in 17 C.F.R. § 240.12g3-2(b), including posting its annual report in English on its website and by not establishing a sponsored ADR (which would preclude unsponsored ADRs), *see* 1991 SEC ADR Release at 24,422–23. However, none of these facts is alleged in the FAC.[24]

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[24] We disagree with the Funds to the extent they argue that Toshiba's exemption under Rule 12g3-2(b), and specifically its maintenance of an English website with English translations of relevant documents and conference calls, without more, is sufficient to connect Toshiba to the Toshiba ADR transactions. The FAC does not allege that Toshiba provided English materials to support unsponsored ADRs, and Rule 23g3-2(b) exemption is automatic. 2008 SEC ADR Rulemaking at 52,767. And as Toshiba points out, there are many plausible reasons for a

Third and finally, the FAC alleges that Bank of New York Mellon is one of Toshiba's largest ten shareholders and that during the Class Period institutional investors in the United States owned "at least 485 million shares of Toshiba common stock, representing more than 11% of the Company's outstanding shares." Absent from the FAC, however, is the Funds' assertion at oral argument that Bank of New York Mellon is unlikely to have acquired over fifty million Toshiba shares without Toshiba's involvement. Oral Arg. at 27:36–28:30 (Nov. 9, 2017), https://tinyurl.com/ydfsrvyw.

IV. CONCLUSION

The district court misapplied *Morrison*. And, without significant analysis, it concluded that leave to amend would be futile. It therefore dismissed the Funds' case with prejudice. For the reasons discussed above, we believe the FAC does not sufficiently allege a domestic violation of the Exchange Act, but that allowing leave to amend would not be futile. Therefore, we reverse and remand to allow the Funds to amend their complaint. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014).[25]

REVERSED; REMANDED.

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company to provide English materials, precluding the inference that Toshiba's actions were to support unsponsored ADRs.

[25] The district court predicated dismissal of the Funds' JFIEA claim on dismissal of the Exchange Act claims. We decline to address in the first instance whether dismissal of the JFIEA claim remains appropriate notwithstanding the Exchange Act claims' viability.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 08/08/2018]

Docket No. 16-56058

MARK STOYAS, Individually and on behalf of all others similarly situated,

Plaintiff,

and

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND AND NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Plaintiffs-Appellants,

v.

TOSHIBA CORPORATION,

Defendant-Appellee.

Before:

WARDLAW and FLETCHER, *Circuit Judges*, and DANIEL,* *District Judge*.

ORDER

Toshiba's motion for stay of the issuance of the mandate pending application for writ of certiorari, Dkt. No. 43, is granted. Fed. R. App. P. 41. Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

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* The Honorable Wiley Y. Daniel, United States District Judge for the U.S. District Court for Colorado, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed 05/20/2016]

Docket No. 2:15-cv-04194-DDP-JC

MARK STOYAS; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND; AND AUTOMOTIVE INDUSTRIES PENSION TRUST FUND, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TOSHIBA CORPORATION,

Defendant.

ORDER RE: DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION TO STRIKE WADA DECLARATION

Presently before the Court are (1) Defendant Toshiba Corporation's Motion to Dismiss and (2) Plaintiffs' Motion to Strike the Declaration of Ayumi Wada in Support of Defendant Toshiba Corporation's Motion to Dismiss. (Dkt. Nos. 44, 54.) After hearing oral argument and considering the parties' submissions, the Court adopts the following Order.

I. BACKGROUND

A. Procedural History

This case is a putative securities class action lawsuit. Plaintiff Mark Stoyas filed this case in June 2015, alleging Defendant and two of its former Chief Executive Officers had violated U.S. securities laws by selling stock with an inflated price caused by Defendants' false profit reports. (*See generally Compl.*, Dkt. No. 1.) In August 2015, Plaintiff Mark Stoyas did not oppose the Motion of Automotive Industries Pension Trust Fund to be appointed Lead Plaintiff. (*See* Dkt. Nos. 10-20.) The Court appointed Automotive Industries Pension Trust Fund as Lead Plaintiff and its counsel as lead counsel for the class in September 2015. (Dkt. No. 22.)

In December 2015, Plaintiffs filed a First Amended Complaint ("FAC") that named a new plaintiff, New England Teamsters & Trucking Industry Pension Fund, and that dismissed the two individual Defendants under Federal Rule of Civil Procedure ("FRCP") 4(a)(1)(A)(i). (FAC, Dkt. No. 34; Notice of Dismissal, Dkt. No. 33.) Pursuant to a stipulation, the Court set a briefing schedule for Defendant's response to the FAC, which would be a Motion to Dismiss. (Dkt. Nos. 39, 40.) In February 2016, Defendant filed its Motion to Dismiss under FRCP 12(b)(6), as well as principles of comity and *forum non conveniens*. (Mot. Dismiss, Dkt. No. 44.) Defendant also filed a Request for Judicial Notice ("RJN") with twenty-one exhibits. (RJN, Dkt. No. 45.)

Plaintiffs opposed both the RJN and the Motion to Dismiss, as well as filed a Motion to Strike the Declaration of Ayumi Wada in support of Defendant's Motion to Dismiss. (Opp'n to Mot. Dismiss, Dkt. No.

50; Mot. Strike Wada Decl., Dkt. No. 54; Obj. RJN, Dkt. No. 56.) All three issues are now fully briefed before the Court.

B. Factual Allegations in the FAC

The FAC alleges Defendant violated the U.S. Securities Exchange Act of 1934 and Japan's Financial Instruments & Exchange Act ("JFIEA"). (FAC ¶ 1.) The proposed class is defined as: (i) all persons who acquired Toshiba American Depositary Shares or Receipts ("ADSs")[1] between May 8, 2012 and November 12, 2015 (the proposed class period) and (ii) all citizens and residents of the United States who otherwise acquired shares of Toshiba common stock during the Class Period. (*Id.* ¶¶ 2, 270.) Plaintiffs refer to the first group as the "ADS Purchasers" and the second group as the "6502 Purchasers," the latter named after the ticker name of Toshiba on the Tokyo Stock Exchange. (*See id.* ¶¶ 25, 270.)

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[1] The Court notes that Defendant refers to these securities as ADRs in its Motion. However, the FAC refers to the securities as ADSs. Therefore, the Court will primarily use the term "ADS," but notes the terms are interchangeable references to the same type of security. According to Plaintiffs,

> Toshiba's common stock is publicly traded on the Tokyo Stock Exchange under the ticker symbol "6502" and on the Over the Counter ("OTC") market operated by OTCMarkets Group in the United States under the ticker symbols "TOSBF" and "TOSYY." One share of TOSBF represents ownership of one share of Toshiba common stock sold under the ticker symbol 6502 on the Tokyo exchange. One share of TOSYY represents ownership of six shares of Toshiba common stock. OTCMarkets Group identifies TOSYY as an ADS and TOSBF as "Ordinary Shares" on its website.

FAC ¶ 25.

According to Plaintiffs, "[t]his case arises from Toshiba's deliberate use of improper accounting over a period of at least six years to inflate its pre-tax profits by more than $2.6 billion . . . and conceal at least $1.3 billion . . . in impairment losses at its U.S. nuclear business, Westinghouse Electric Co." (*Id.* ¶ 3.) The alleged accounting fraud "was orchestrated by three successive CEOs of Toshiba and dozens of top executives who directed the manipulation of financial results reported by scores of Company subsidiaries and business units." (*Id.* ¶ 4.) This fraud "was uncovered by a series of investigations that took place beginning in February 2015" that "revealed numerous instances of deliberate violations of generally accepted accounting principles ("GAAP") carried out at the direction or with the knowledge and approval of Toshiba's most senior executives." (*Id.* ¶ 5.)

Plaintiffs allege that these investigations "resulted in the September 7, 2015 restatement of more than six years of reported financial results that eliminated approximately one-third ($2.6 billion) of the profits Toshiba had reported from 2008 to 2014." (*Id.* ¶ 6.) Plaintiffs claim that "Toshiba assured investors that there was no need to write down the $2.8 billion . . . in goodwill still carried on Toshiba's books as a result of its 2006 acquisition of Westinghouse, falsely claiming that its nuclear business had strengthened since the acquisition, even after the March 2011 meltdown of the Fukushima Daiichi nuclear reactor." (*Id.*) But on November 6, 2015, Toshiba did admit that Westinghouse "had written down goodwill in both FY12 and FY13," but that those write-downs were not disclosed in financial statements at the time. (*Id.*) Plaintiffs claim a

business news report on November 12, 2015, "revealed that the secret write-downs had totaled $1.3 billion: $926 million in FY12 and $400 million in FY13." (*Id.*)

Specifically, Plaintiffs allege that the investigation into the accounting fraud showed that "Toshiba deliberately violated GAAP by failing to timely record losses on unprofitable construction contracts; channel stuffing manufacturing parts sold at inflated prices; deferring operating expenses until they could be reported without causing an earnings loss; failing to record charges for obsolete inventory or impaired assets; manipulating foreign conversion rates; and engaging in the other fraudulent practices alleged herein." (*Id.* ¶ 7.) Plaintiffs claim that Toshiba took these actions to prevent its stock price from dropping to reflect the actual financial situation at Toshiba. (*Id.* ¶ 10.) Plaintiffs state that "[b]etween April 3, 2015, when the internal investigation into Toshiba's accounting practices was first announced, and November 13, 2015, following the issuance of Toshiba's restatement and the revelation of the impaired goodwill at Westinghouse, the price of Toshiba securities declined by more than 40%, resulting in a loss of $7.6 billion . . . in market capitalization that caused hundreds of millions of dollars in damages to U.S. investors in Toshiba securities." (*Id.* (footnote omitted).)

Plaintiffs have filed suit under U.S. federal securities laws, making claims under sections 10(b) and 20(a) of the Securities Exchange Act of 1934, codified at 15 U.S.C. §§ 78j(b), 78t(a), and SEC rule 10b-5, codified at 17 C.F.R. § 240.10b-5. (FAC ¶ 11.) Both of these claims for relief (those under § 10(b)

and rule 10b-5 (First Claim for Relief) and those under § 20(a) (Second Claim for Relief)) are made only on behalf of the ADS purchasers. (*Id.* at 100-04.) Plaintiffs also make claims under the JFIEA, over which they argue the Court has diversity and supplemental jurisdiction. (*Id.* ¶¶ 12-13.) This third claim for relief is made on behalf of both ADS purchasers and 6502 purchasers. (*Id.* at 105-06.) These claims all relate to the allegations of Defendant's fraudulent accounting and misrepresentations. (*Id.* ¶ 273.)

Lead Plaintiff Automotive Industries Pension Trust Fund is a member of the alleged class because it "acquired Toshiba common stock during the Class Period through the purchase on March 23, 2015 of 36,000 shares of TOSYY ADSs in the United States." (*Id.* ¶ 19.) Plaintiff New England Teamsters & Trucking Industry Pension Fund is a member of the alleged class because it made seven different purchases of Toshiba common stock on the Tokyo Stock Exchange during the class period, totaling over 100,000 shares. (*Id.* ¶ 20.) Plaintiff Mark Stoyas is an individual who "purchased Toshiba securities at artificially inflated prices during the class period." (Compl., Dkt. No. 1, ¶ 7; FAC ¶ 21 (citing Compl., Dkt. No. 1).)

Defendant Toshiba Corporation is alleged to be "a worldwide enterprise that engages in the research, development, manufacture, construction, and sale of a wide variety of electronic and energy products and services, including semiconductors, disc drives, storage devices, computers, televisions, appliances, nuclear power plants, elevators, lighting systems,

and medical equipment." (*Id.* ¶ 22.) Plaintiffs allege the headquarters of Toshiba is in Tokyo, Japan. (*Id.*)

II. LEGAL STANDARD

A. Motion to Dismiss

12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted requires a court to determine the sufficiency of the plaintiff's complaint and whether it contains a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a court must (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001).

In order to survive a 12(b)(6) motion to dismiss, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678. Dismissal is proper if the complaint "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

A complaint does not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

B. Motion to Strike

Rule 12(f) of the Federal Rules of Civil Procedure states that the "court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Immaterial matter is that which has no bearing on the claims for relief or the defenses being pled. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010). Impertinent matter consists of statements that do not pertain and are not necessary to the issues in question. *Id.* Under Rule 12(f), the court has the discretion to strike a pleading or portions thereof. *MGA Entm't, Inc. v. Mattel, Inc.*, No. CV 05-2727 NM (RNBx), 2005 WL 5894689, at *4 (C.D. Cal. Aug. 26, 2005). Generally, motions to strike are "disfavored" and "courts are reluctant to determine disputed or substantial questions of law on a motion to strike." *Whittlestone*, 618 F.3d at 1165-66; *see also Miller v. Fuhu, Inc.*, No. 2:14-cv-06119-CAS (ASx), 2014 WL 4748299, at *1, (C.D. Cal. Sept. 22, 2014). In considering a motion to strike, the court views the pleadings in the light most favorable to the non-moving party. *See In re 2TheMart.com Secs. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)).

C. Requests for Judicial Notice

"On a motion to dismiss, we may take judicial notice of matters of public record outside the

pleadings." *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). A court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1), (2).

III. DISCUSSION

Defendant makes two main arguments in its Motion: (1) there are no facts pled — or that could be pled — to support a U.S. Securities Exchange Act cause of action by Plaintiffs, or any other potential class member, because there are no securities sold or listed in the United States by Toshiba Corporation; and (2) the Japanese law claim should be dismissed under principles of comity and *forum non conveniens*.

First, however, the Court addresses Plaintiffs' Motion to Strike and Objections to Defendant's Request for Judicial Notice. (Dkt. Nos. 54, 56.) Plaintiffs object to Defendant's Request for Judicial Notice because they argue that Defendant seeks to use these exhibits to support factual arguments, not undisputed adjudicative facts. (Obj. RJN, Dkt. No. 56, at 3.) Plaintiffs object specifically to exhibits 1, 2, 3, 4, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20 (*Id.* at 3-4.) Plaintiffs do not contest the RJN with respect to exhibits 5-8 and 11. (*Id.* at 9.) The Court GRANTS the RJN with respect to Defendant's exhibits 5-8 and 11 because those exhibits are unopposed. The Court notes that none of the other exhibits are argued by Plaintiffs to be inaccurate or unauthentic. (*See generally* Obj. RJN.) However, none were considered

by the Court in making its decision on the Motion to Dismiss.

As to the Motion to Strike, Plaintiffs argue that the Wada Declaration offered in support of Toshiba's Motion to Dismiss should be stricken because Defendant seeks to use the declaration to establish facts contrary to the FAC, which is inappropriate at the Motion to Dismiss stage. (Mot. Strike, Dkt. No. 54, at 1, 4-5.) Further, Plaintiffs argue that the declaration lacks foundation and is irrelevant. (*Id.* at 1, 5-10.) Defendant responds that the Wada Declaration is properly before the Court as support for Defendant's argument that the Japanese claims should be dismissed under comity and *forum non conveniens* principles. (Opp'n, Dkt. No. 59, at 1, 3-4.) Further, Defendant claims that the Court can consider the declaration in the FRCP 12(b)(6) motion because the general rule against extrinsic evidence is subject to several exceptions relevant here. (*Id.* at 2; 5-16.)

Due to the nature of the assertions in the Wada Declaration and the fact that these assertions are contested by Plaintiffs or not in the FAC, the Court does not consider the declaration appropriate to be used in making a determination on the FRCP 12(b)(6) motion. However, the Court will consider the assertions in the Wada Declaration to the extent the declaration is relevant to the *forum non conveniens* argument. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) ("[T]he district court's inquiry does not necessarily require extensive investigation, and may be resolved on affidavits presented by the parties.").

A. Whether Plaintiffs Can Allege a U.S. Securities Exchange Act Cause of Action

Plaintiffs have made claims under § 10(b) and § 20(a) of the U.S. Securities Exchange Act of 1934 and SEC rule 10b-5. Section 20(a) extends liability for violations of U.S. securities law to "controlling persons" as well as to the underlying person or entity responsible for the violation. 15 U.S.C. § 78t(a). Section 10(b) states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange–

. . . .

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Rule 10b-5 states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the

mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Defendant argues that Plaintiffs have not properly alleged a U.S. Securities Exchange Act cause of action because Plaintiffs have not (and cannot) allege that they purchased a Toshiba security listed on a U.S. exchange and Plaintiffs have not (and cannot) allege that Toshiba was involved in any domestic transaction. (*See* Mot. Dismiss at 9-16.) Defendant relies fundamentally on the U.S. Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Defendant claims that *Morrison* established that the U.S. Securities Exchange Act "does not apply to securities-fraud claims against a foreign issuer that did not list its securities on a U.S. exchange or otherwise trade its securities in the United States." (Mot. Dismiss at 9.) Here, Defendants argue, Toshiba is a foreign issuer and does not list its securities on a U.S. exchange —

only in Tokyo and Nagoya, according to Defendant — and Toshiba does not otherwise trade securities, including ADSs, in the United States. (*Id.*)

According to the Supreme Court in *Morrison*, the question it was addressing was "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." *Id.* at 250-51. The Australian bank traded its common stock on foreign security exchanges, but not on any exchanges in the United States. *Id.* at 251. The bank did list ADSs on the New York Stock Exchange. (*Id.*) The plaintiffs there were Australians who had purchased common stock of the bank on foreign exchanges. *Id.* at 252. Therefore, the Court was addressing whether the foreign plaintiffs who had purchased securities abroad could raise their claims in the United States.

The Court held that § 10(b) of the Securities Exchange Act did not have an extraterritorial reach. *Id.* at 265. The plaintiffs there argued that the Court's holding regarding extraterritoriality did not resolve the case because the deceptive conduct alleged took place in the United States. *Id.* at 266. However, the Supreme Court held that "it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.* at 267 (footnote omitted); *see also id.* at 269-70 (referring to this as a "transactional test"). This holding limited § 10(b)'s reach to securities listed or transacted in the United States, thus avoiding conflicts with foreign laws and procedures. *Id.* at 269. The Court noted

that "foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction." *Id.* Further, "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters." *Id.* Therefore, the Court held that the plaintiffs had not stated a claim because § 10(b) "reache[d] the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Id.* at 273.

According to Defendant, the rule in this case means that Plaintiffs cannot state a claim because Toshiba neither (1) lists its stocks on a U.S. exchange nor (2) sells any other security in the United States (or, as Defendant puts it, "transacts in unsponsored ADRs in the United States (or anywhere else for that matter)"). (Mot. Dismiss at 11-12.)

1. **First Prong: Transaction in Securities Listed on Domestic Exchanges**

Defendant claims that OTC markets — where Plaintiffs here bought the TOSYY ADSs — are not national stock exchanges under the first prong of the rule in *Morrison*. (*Id.* at 12-13 (citing *United States v. Georgiou*, 777 F.3d 125, 134-35 (3d Cir. 2015)).) The Third Circuit in *Georgiou* noted that the Securities Exchange Act "refers to 'securities exchanges' and 'over-the-counter markets' separately, which suggests that one is not inclusive of the other."

Georgiou, 777 F.3d at 134-35. Thus, to the extent the Supreme Court in *Morrison* was discussing "national securities exchange[s]" and "American stock exchange[s]," the Third Circuit in *Georgiou* held that OTC markets were not the exchanges contemplated by the Court for satisfying the first prong. *Id.* According to Defendant, because the only securities alleged in the FAC for this cause of action are ADSs sold on OTC markets, § 10(b) cannot apply here based on the first prong of *Morrison* because the ADSs were not listed on national stock exchanges.

Plaintiffs disagree with this distinction between national security exchanges and OTC markets. (Opp'n, Dkt. No. 50, at 6-9.) Plaintiffs claim that *Morrison* drew a distinction between foreign exchanges and domestic exchanges, not domestic stock exchanges and domestic over-the-counter markets. (*Id.* at 6-7 (citing *United States v. Isaacson*, 752 F.3d 1291, 1299 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 990 (2015); *S.E.C. v. Ficeto*, 839 F. Supp. 2d 1101, 1107-09 (C.D. Cal. 2011)).) Further, Plaintiffs point to the definition of an "exchange" in the statute:

> any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

15 U.S.C. § 78c(a)(1) (defining "exchange"). Lastly, Plaintiffs argue that the Third Circuit's holding in *Georgiou* is not persuasive authority in comparison to the courts' analyses in *Ficeto* and *Isaacson*, but note that *Georgiou* did find that the ADSs involved in that case survived the motion to dismiss under *Morrison*'s second prong. (Opp'n, Dkt. No. 50, at 7-8.)

In reply, Defendant argues that Plaintiffs' argument ignores the plain language of the Court in *Morrison*, which referred not simply to "exchanges," but to "national securities exchanges." (Reply, Dkt. No. 63, at 3-5.) Defendant claims that any reference in *Morrison* to "domestic exchanges" is "simply synonymous shorthand for 'national securities exchanges.'" (*Id.* at 4.) Further, the OTC market involved in this case is not an exchange as defined by the statute, Defendant claims, because it does not satisfy the requirement to register as a national securities exchange or obtain an exemption from the SEC. (*Id.* at 5-6 (citing 15 U.S.C. § 78(e); SEC Rule 3a1-1(a)).)

The Court notes that the Supreme Court in *Morrison* focused on the purposes of the Securities Exchange Act in making its determination that § 10(b) was not intended by Congress to be applied extraterritorially. *See Morrison*, 561 U.S. at 263. The statute's statement of purpose explicitly references over-the-counter markets as well as securities exchanges, stating that both "are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto." 15 U.S.C. § 78b ("Necessity for regulation"). The statute thus recognizes a

distinction between securities exchanges and OTC markets. And looking to the plain language of the statute's requirements for an "exchange" as cited by Plaintiffs, Plaintiffs have not pled or argued that the OTC market at issue here satisfies the requirements to be an "exchange," or that the OTC market satisfies the SEC's regulatory exemptions from those requirements. *See* 15 U.S.C. § 78c(a)(1); SEC Rule 3a1-1(a), codified at 17 C.F.R. § 240.3a1-1. Thus, the OTC market at issue here is likely just that — an OTC market, not an exchange as meant by *Morrison* or as defined and regulated by the statute.

Plaintiffs' cases are also not entirely persuasive. The Eleventh Circuit in *Isaacson* did not squarely address this question and its analysis simply found "a U.S. nexus," whether based on the OTC markets being exchanges or the fact that the purchase of the securities at issue took place in the United States. *See* 752 F.3d at 1299. The court in *Ficeto* noted that the Supreme Court in *Morrison* was not addressing OTC markets at all because that was not relevant to the facts in *Morrison*. 839 F. Supp. 2d at 1108-09, 1112-14. But the court in *Ficeto* did hold that OTC markets were part of the purpose of the Securities Exchange Act and that case law demonstrated that the two markets (OTC markets and stock exchange markets) were meant to be protected under the law, although ultimately holding that ADRs were foreign transactions. *Id.* at 1110-12, 115. However, a statute protecting and mentioning both kinds of markets does not mean the markets are the same, particularly when applying *Morrison*'s two pronged test. Instead, by creating a distinction between listing stocks on a domestic exchange or otherwise transacting in securities in the United States, *Morrison* indicates to

this Court that domestic securities sales that are not listed on a securities exchange are analyzed under the second prong.

Therefore, the Court holds that the OTC market in this case is not a domestic exchange satisfying the first prong of *Morrison*.

2. Second Prong: Domestic Transactions in Other Securities

For the second prong, purchases or sales of securities in the United States, Defendant argues that any domestic transaction alleged by Plaintiffs was not done by Toshiba and did not involve Toshiba. (Mot. Dismiss at 14.) Instead, the underlying Toshiba common stock was purchased by the depositary bank on a foreign exchange (a foreign transaction), and the depositary bank then sold ADSs based on those common stocks to Plaintiffs in the United States. (*Id.*) Thus, the domestic transaction was between depositary banks and ADS purchasers, not between Defendant and ADS purchasers. (*Id.*)

Further, Defendant argues that the ADSs here "are unsponsored and 'set up without the cooperation' of Toshiba" and that "ADR holders have no direct relationship with, and no ownership in, Toshiba." (*Id.* at 14 (citing *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings, SE*, 763 F.3d 198, 207 n.9 (2d Cir. 2014); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002)).) Defendant thus focuses on the distinction between "sponsored" and "unsponsored" ADSs. As the Third Circuit explained in *Pinker*,

> An ADR is a receipt that is issued by a depositary bank that represents a specified

> amount of a foreign security that has been deposited with a foreign branch or agent of the depositary, known as the custodian. The holder of an ADR is not the title owner of the underlying shares; the title owner of the underlying shares is either the depositary, the custodian, or their agent. ADRs are tradeable in the same manner as any other registered American security, may be listed on any of the major exchanges in the United States or traded over the counter, and are subject to the Securities Act and the Exchange Act. This makes trading a ADR simpler and more secure for American investors than trading in the underlying security in the foreign market.
>
> ADRs may be either sponsored or unsponsored. An unsponsored ADR is established with little or no involvement of the issuer of the underlying security. A sponsored ADR, in contrast, is established with the active participation of the issuer of the underlying security. An issuer who sponsors an ADR enters into an agreement with the depositary bank and the ADR owners. The agreement establishes the terms of the ADRs and the rights and obligations of the parties, such as the ADR holders' voting rights.

Pinker, 292 F.3d at 367 (citations omitted). Defendant claims that cases after *Morrison* have dismissed claims based on unsponsored ADSs because those cases do not involve actions taken by the alleged defendant in a domestic transaction; by contrast, other cases (like *Pinker*) have been allowed to continue because they were based on sponsored

ADSs where the alleged defendant was involved in the transaction. (Mot. Dismiss at 14-15 (citing *Parkcentral*, 763 F.3d at 198 (involving securities-based swap agreements); *Pinker*, 292 F.3d at 361 (involving sponsored ADRs, but examining personal jurisdiction pre-*Morrison*); *Copeland v. Fortis*, 685 F. Supp. 2d 498, 506 (S.D.N.Y. 2010) (pre-*Morrison* case examining personal jurisdiction with collateralized debt obligations and ADRs); *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6 (S.D.N.Y. Sept. 29, 2010) (post-*Morrison* case involving ADRs)).)

Comparing Plaintiffs' unsponsored ADRs to the securities-based swap agreements in *Parkcentral*, Defendant claims "the ADRs here are 'synthetic' investments, in that the security is 'a separate and distinct financial instrument from the security it references.'" (Mot. Dismiss at 16 (quoting *Parkcentral*, 763 F.3d at 205-06).) Thus, Defendant argues that as in *Parkcentral*, there is no basis for a § 10(b) claim here, or a § 20(a) claim that relies on the primary violation of a § 10(b) claim. (*Id.* (citing *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009)).)

Plaintiffs take issue with Defendant's understanding of *Morrison*, as well as the focus on sponsored versus unsponsored ADSs. (Opp'n, Dkt. No. 50, at 4-21.) First, Plaintiffs argue that the Court in *Morrison* was expressly carving out sales and purchases of ADSs in the United States from its holding, as the only U.S. citizen plaintiff in that case, Morrison, had purchased ADSs in the United States, but had been previously dismissed from the case on other grounds. (*Id.* at 5-6 (citing *Morrison*, 561 U.S.

at 253 n.1, 273).) According to Plaintiffs, the Court in *Morrison* contemplated that domestic transactions subject to U.S. securities laws included domestic sales and purchases of ADSs, even those not listed on a national security exchange but instead on some kind of domestic exchange or OTC market. (*Id.* at 6-7.) And Plaintiffs argue that even if the OTC market is not considered a domestic exchange, the ADS purchases here are domestic transactions under the second prong of *Morrison* because the purchases and sales all took place in the United States where the OTC market is located. (*Id.* at 9.)

Second, Plaintiffs state that the status of an ADS as sponsored or unsponsored does not matter for determining the applicability of § 10(b). Plaintiffs argue that Toshiba's claim about the ADSs here being unsponsored raises factual issues not appropriate for a motion to dismiss regarding Toshiba's involvement in the ADSs' sale. (*Id.* at 9-10; 16.) Additionally, all ADSs, whether sponsored or not, are held by a depositary bank, which ultimately holds the underlying security and sells the ADS. (*Id.* at 10.) Plaintiffs cite cases where ADS sales by a depositary bank were held subject to § 10(b) claims, and Plaintiffs distinguish Defendant's key cases, *In re Société Générale Security Litigation and Parkcentral*. (*Id.* at 10 & n.10; 17-21.) Further, and contrary to Defendant's argument, Plaintiffs claim that ADS holders have a beneficiary interest in the underlying stock and "the right to obtain the foreign shares on demand as well as other rights providing indicia of ownership, such as the right to receive the dividends payable to and obtain tax credits associated with the underlying shares." (*Id.* at 11 (citing 17 C.F.R. § 239.36(a)).)

Lastly, Plaintiffs argue that the unsponsored nature of the ADSs is irrelevant for the purposes of *Morrison*, particularly as the difference between a sponsored and unsponsored ADS is somewhat artificial. (*Id.* at 12-14.) Plaintiffs cite SEC Rule 12g3-2, codified at 17 C.F.R. § 240.12g3-2, and its allowance of foreign unsponsored ADS sales if "the issuer maintains its listing on a foreign exchange and complies with the requirements to provide American investors with electronic access to English-language translations of the information provided to their foreign-investors." (Opp'n, Dkt. No. 50, at 13.) To Plaintiffs, the only difference between the sponsored and unsponsored ADSs, then, is that an unsponsored ADS can be sold without a formal application by the foreign issuer to establish a ADS program; the disclosure requirements are otherwise the same. (*Id.*) Toshiba complied with the disclosure requirements and never objected to the sale of its securities in the United States. (*Id.* at 14.) Thus, Plaintiffs argue that finding that Toshiba is subject to the U.S. securities laws through the ADS sales in the United States would prevent Toshiba from "evad[ing] liability by refusing to memorialize its consent to the sale of ADSs," as was mentioned in *Morrison* and section 30(b) of the Exchange Act. (*Id.* at 14 & n.15.)[2]

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[2] Plaintiffs note that based on the opening Motion, evading liability is what Toshiba appears to be seeking to do:

> Toshiba's carefully-worded brief asserts only that the *depositary banks* that sold the ADSs to investors "*may*" have a claim in Japan against Toshiba for the benefit of investors who purchased Toshiba's ADSs, apparently meaning to suggest that the ADS purchasers themselves have no such claim. Toshiba ignores, in this regard, that the depositary agreements governing the sale of its stock

In reply, Defendant argues that Plaintiffs seek to extend the reach of *Morrison*'s second prong and U.S. securities laws to "a foreign issuer . . . where the issuer . . . is not alleged to have participated in securities transactions in the United States." (Reply, Dkt. No. 63, at 8-9.) That is, Defendant Toshiba did not sell the ADSs to any Plaintiffs because the ADSs were sold by a depositary bank without any connection to Toshiba; therefore, Toshiba had no connection to any domestic transaction. (*Id.* at 8-14.) "As *Morrison* states, the U.S. Exchange Act expressly does not apply to 'any person insofar as he transacts a business in securities without the jurisdiction of the United States.'" (*Id.* at 8 (quoting *Morrison*, 561 U.S.

> as ADSs specifically provide that the depositary banks will *not* institute or participate in any such action. Thus, in Toshiba's view, American investors who purchased its shares as ADSs should not have a remedy for fraud anywhere in the world simply because those securities were "unsponsored."

(Opp'n, Dkt. No. 15, at 15 (citation and footnote omitted).) However, Defendant states that this cannot be a relevant consideration. (Reply, Dkt. No. 63, at 13.) To the extent that a depositary bank wants to, it can initiate litigation, Defendant argues, because the language in the Form F-6 states that depositary banks "shall be under no obligation" to sue, not that they cannot or may not sue. (*Id.*) Defendant also argues that the agreements between the depositary banks and ADS purchasers further demonstrate that the relationship is between those two, not between ADS purchasers and Toshiba. (*Id.* at 13-14.)

The Court notes that even if depositary banks have the power to sue on behalf of ADS purchasers, there is no indication why or how the banks would do so. But Defendant correctly notes that there is no contractual obligation preventing depositary banks from making claims for ADS purchasers based on the evidence Plaintiffs provided or the allegations in the FAC.

at 268 (quoting Section 30(b) of the Act, 15 U.S.C. § 78dd(b))).) Defendant argues that "every one of the cases [Plaintiffs] cite in footnote 10 involved sponsored ADRs (or similar instruments) registered on a national securities exchange." (*Id.* at 9-10.) And Defendant states that it is without precedent to find that an entirely passive security issuer like Toshiba waives objections or impliedly consents to ADS sales of its securities or is subject to the full force of U.S. securities laws simply because it is subject to SEC Rule 12g3-2. (*Id.* at 12-13.)

Further, Defendant argues that the court in *Ficeto*–one of Plaintiffs' cases — ultimately held that ADR transactions are essentially foreign transactions outside the scope of § 10(b) and the test in *Morrison*:

> Cases have similarly held that § 10(b) does not reach transactions in a foreign company's shares that are traded only on a foreign exchange but where American Depository Receipts (ADRs) representing those shares are listed and traded on an American exchange. In these cases, courts have held that ADRs are merely placeholders for the ordinary shares traded on foreign exchanges, and thus allowing § 10(b) claims to survive would likewise be contrary to the spirit of *Morrison*.

Ficeto, 839 F. Supp. 2d at 1115 (citing *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011); *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6 (S.D.N.Y. Sept. 29, 2010)); *see also* Reply, Dkt. No. 63, at 7-8.

The Court holds that the transactions at issue here do not fall under the second prong of *Morrison*.

Facially, the ADS transactions are securities transactions that occurred domestically: they were both sold and purchased in the United States. However, Plaintiffs have not argued or pled that Defendant was involved in those transactions in any way — or pointed to how discovery could assist Plaintiffs in making such a claim.

Plaintiffs state that discovery might show that Toshiba was involved in some fashion in the otherwise unsponsored ADSs. But Plaintiffs must do more than speculate about what discovery might yield in that regard.

Additionally, Plaintiffs' argument that the defendant does not have to be involved in the domestic transaction under *Morrison* is without support. The Court acknowledges that privity or some other kind of direct transactional relationship is not required between a plaintiff and a defendant in a § 10(b) case; a defendant security issuer can be liable for fraud even if the issuer did not sell its securities to the plaintiff. But while *Morrison* did not squarely address the question, nowhere in *Morrison* did the Court state that U.S. securities laws could be applied to a foreign company that only listed its securities on foreign exchanges but whose stocks are purchased by an American depositary bank on a foreign exchange and then resold as a different kind of security (an ADR) in the United States. In fact, all the policy and reasoning in *Morrison* point in the other direction. Plaintiffs' proffered understanding would create essentially limitless reach of § 10(b) claims because even if the foreign defendant attempted to keep its securities from being sold in the United States, the independent actions of depositary banks selling on

OTC markets could create liability. This is inconsistent with the spirit and law of *Morrison*.

Instead, *Morrison* properly limited the reach of § 10(b) claims based on the plain language of the statute, the presumption against extraterritorial reach of U.S. laws, and comity concerns. The ADRs that *Morrison* did not address were listed on the New York Stock Exchange, unlike the unsponsored and unlisted ADRs here. *See Morrison*, 561 U.S. 251. Thus while *Morrison* did not address the sale of ADRs that are listed on domestic exchanges, even if the Court in *Morrison* had addressed the sales, the securities at issue in this case are not listed on a domestic exchange.

Most importantly, Plaintiffs have not alleged or provided any evidence (or pointed to where Plaintiffs reasonably expect to find evidence) of any affirmative act by Toshiba related to the purchase and sale of securities in the United States. Some affirmative act in relation to the purchase or sale of securities is required under the Supreme Court's holding: "Section 10(b) reaches ***the use of a manipulative or deceptive device or contrivance only in connection with*** the purchase or sale of a security listed on an American stock exchange, and ***the purchase or sale of any other security in the United States***." *Id.* at 273 (emphasis added). There is no allegation that Toshiba used a manipulative or deceptive device or contrivance in connection with the purchase or sale of any security in the United States. There are allegations that Toshiba committed accounting fraud and misrepresented its profits to investors around the world. But there is no allegation that those fraudulent actions were connected to Toshiba selling

its securities *in the United States*. Plaintiffs have not pled that Toshiba listed its securities in United States or sponsored, solicited, or engaged in any other affirmative act in connection with securities sales in the United States; thus, § 10(b) does not apply to Toshiba.

Therefore, Plaintiffs have failed to plead § 10(b), Rule 10b-5, and § 20(a) causes of action in the FAC based on *Morrison*'s two-prong test because Toshiba neither lists its securities on a domestic exchange nor was involved in the transaction of ADSs in this country.

B. Whether the Japanese Law Claim Is Properly in this Court

Defendant argues that Plaintiffs' Japanese law claim should be dismissed under principles of comity and *forum non conveniens*. (Mot. Dismiss at 16.)

1. Comity

Comity was one of the major policy concerns underlying the Supreme Court's holding in *Morrison* that Congress did not intend for the extraterritorial application of the Security Exchange Act in § 10(b) claims. *Morrison*, 561 U.S. at 267-70. "Comity similarly rests on respect for the legal systems of members of the international legal community — a kind of international federalism — and thus 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 605 (9th Cir. 2014) (quoting *E.E.O.C. v. Arabian Am. Oil*, 499 U.S. 244, 248 (1991)). In determining whether comity concerns call for dismissal, the Ninth Circuit has evaluated three

factors as "a useful starting point for analyzing comity claims": (1) the strength of the United States' interest; (2) the foreign government's interest; and (3) the adequacy of the alternative forum. *Id.* at 603.

(a) U.S. Interests

"The (nonexclusive) factors we should consider when assessing U.S. interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." *Id.* at 604.

Defendant claims that the United States' interests are "weak — especially compared to Japan's interests." (Mot. Dismiss at 19.) Defendant argues that *Morrison* explicitly warned against inserting the United States into foreign securities regulation. (*Id.* (citing *Morrison*, 561 U.S. at 269).) Further, Defendant claims all the relevant statements and omissions were made in Japan, thus giving U.S. interests less weight because the actions at issue in the suit did not take place here. (*Id.*) Instead, U.S. investors who purchased common stock can reasonably be expected to pursue their claims in Japan, where they purchased that stock. (*Id.* at 19-20.) Defendant argues that the court in *In re Toyota Motor Corp. Securities Litigation*, No. CV 10-922 DSF (AJWx), 2011 WL 2675395, at *6-7 (C.D. Cal. July 7, 2011), held that Japanese law claims against Toyota were dismissed on the basis of comity to Japanese courts and law. (Mot. Dismiss at 20-21.) That was true even though Toyota sold ADRs in the United States, listed on the New York Stock Exchange, filed disclosures with the SEC, and solicited investors in the United States. (*Id.* at 20.) Thus, Defendant

claims that, even more so here, comity demands that the Japanese law claim be heard in Japan. (*Id.*)

Plaintiffs first argue that "this action bears none of the hallmarks of a case that is subject to dismissal under comity" because "this case involves no issue of the extraterritorial application of U.S. law to events taking place in Japan, nor any risk that this case will interfere with the adjudication of any past, present or anticipated civil, criminal, regulatory or investigative proceeding in Japan." (Opp'n, Dkt. No. 50, at 22.) Thus, Plaintiffs argue that this case is unlike *Mujica* and *Toyota*. In *Toyota*, the court was faced with the question of whether to exercise supplemental jurisdiction over a worldwide class of investors, which is not the situation in this case, Plaintiffs point out (*Id.* at 23.)

In *Mujica*, the Ninth Circuit was also faced with a dissimilar case: it "involved federal and California state law claims for wrongful death, torture, war crimes and other acts arising from the bombing of a Colombian village by members of the Colombian air force allegedly acting on behalf of oil companies headquartered in the U.S." (*Id.* at 24 (citing *Mujica*, 771 F.3d at 586).) The State Department had provided the court with "two démarches . . . from the Colombian government objecting to the prosecution of the case in this country." (*Id.* (citing (*Mujica*, 771 F.3d at 584-86).) Thus, Plaintiffs argue that comity is not appropriate here because no such objection or claims are raised in this case as in *Mujica*. (*Id.* at 24.) In contrast, Plaintiffs claim that "significant aspects of Toshiba's fraud occurred with respect to business and transactions in this country." (*Id.* at 28.) And unlike Mujica, a suit in this country has not

raised objections from the Japanese government, courts, or other litigants. (*Id.* at 29.) As Plaintiffs put it, "[e]ven Toshiba's own expert admits that 'the ruling of the U.S. court would have no precedential weight in Japan.'" (*Id.* at 30 (citing Ishiguro Decl. ¶ 21).)

Lastly, Plaintiffs argue that Defendant has failed to show that "adjudicatory comity or 'comity among courts'" is needed here because the Japanese cases are not brought by the same investors as in this case. (*Id.* at 25.) Plaintiffs note that Toshiba does not address whether the class members here, such as the ADS purchasers, could even sue in Japan for their claims involving ADSs purchased in the United States. (*Id.* at 25-26.) Plaintiffs argue that *Morrison* also did not address the situation where Japanese law would be applied to foreign transactions in a U.S. court, as would be the case here for the 6502 purchaser class. (*Id.* at 26.) Instead, the interests of the United States are strong here because the class members are U.S. investors and the United States has a strong interest in protecting such investments. (*Id.* at 28.)

(b) Foreign Government Interests

"The proper analysis of foreign interests essentially mirrors the consideration of U.S. interests. Foreign states, no less than the United States, have legitimate interests in regulating conduct that occurs within their borders, involves their nationals, impacts their public and foreign policies, and implicates universal norms." *Mujica*, 771 F.3d at 607. The factors considered are essentially the same: "the territoriality of the

questioned activity, its effects, the nationality of the parties, and the interests of the foreign state." *Id.*

Defendant argues that "the public misstatements and omissions were made in Japan by a Japanese corporation listed on Japanese stock exchanges," and further that "the Toshiba executives identified in the Amended Complaint and [the internal investigation] Report appear overwhelmingly to be citizens and residents of Japan," all of which shows that Japan has a very strong interest in adjudicating this Japanese law claim. (Mot. Dismiss at 17 (citing Wada Decl. ¶ 5).) Further, "[a]pproximately 75 percent of Toshiba stockholders are Japanese citizens, companies, or institutions, while the remainder is dispersed globally." (*Id.* at 18 (citing FAC ¶ 243(g)).) Defendant also cites examples of the Japanese government speaking publicly about the interest in and ramifications of Toshiba's accounting revelations on Japan. (*Id.*) Japanese courts are "handling at least three lawsuits against Toshiba involving a total of 52 investors" and Japanese courts are developing their interpretation of the relevant part of the law, Article 21-2 of the Japanese Exchange Act. (*Id.*)

Plaintiffs' response is the same as put forth above, primarily focusing on the fact that this case involves the claims of U.S. citizens and residents based on transactions subject to Japanese law. (*See generally* Opp'n, Dkt. No. 50, at 22-31.) Thus, Plaintiffs acknowledge that Japan has an interest in the case, but they claim that it is weaker compared to the United States's interest, and the interest would be respected by the application of Japanese law in this Court. (*Id.*)

(c) Adequacy of Alternative Forum

"[C]ourts consider decisions rendered by the alternative forum and ask (1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial and repugnant to fundamental principles of what is decent and just." *Mujica*, 771 F.3d at 608 (internal quotation and alteration omitted). "Typically, courts ask whether one side has presented specific evidence that the judgment of the alternative forum was significantly inadequate." *Id.*

Neither party disputes that Japan is a more than adequate forum for these claims based on the above standard.

(d) The Court's Analysis

The Court holds that the comity issues raised in this case weigh in favor of dismissal, as in *Toyota*, due to the cause of action being based on Japanese securities law for actions of a Japanese company that only lists its securities in Japan (which is also where the fraudulent accounting primarily took place). As Plaintiffs acknowledge, other cases have been filed in Japan directly relating to this accounting fraud.

Plaintiffs' concern that ADS purchasers — who Plaintiffs earlier argued engaged in domestic (U.S.) transactions — will not be able to sue in Japan under Japanese securities laws is perhaps based on the proper application of the Japanese securities laws, not an indication that this Court should keep this cause of action. Further, this Court may also have found that the ADS purchasers would not have a

Japanese cause of action; thus, the inclusion of this potential class in the case does not sway the Court's comity analysis.

In all, *Morrison* teaches U.S. courts to consider comity carefully in determining the application of U.S. securities laws.

No less should the Court consider comity in deciding whether a Japanese securities law claim is more properly heard here or in Japan, particularly where this Court has already dismissed the U.S. securities law causes of action based on the foreign issuer's noninvolvement and lack of any affirmative act in any domestic transaction. Thus, the Court holds that principles of comity lead this Court to dismiss the Japanese law cause of action.

2. ***Forum non Conveniens***

"[A] plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] in appropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). As in the comity analysis, courts consider private interest factors and public interest factors in making this determination:

> The factors pertaining to the private interests of the litigants included the "relative ease of

> access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."
>
> The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. at n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)) (internal citation omitted) (paragraphing added).

Defendant argues here that under the practical considerations of *forum non conveniens*, this Court should dismiss Plaintiffs' Japanese law claim. (Mot. Dismiss at 21.) Defendant argues that there is an adequate alternative forum in Japan, where Toshiba is "amenable" to suit (*Id.* at 22.) Further, the private interest factors weigh in favor of dismissal, Defendant claims. The "overwhelming majority" of evidence is in Japan and relates to accounting issues in Japan. (*Id.*) The key executives identified in the FAC are no longer employees of Defendant and could

not be compelled to appear at trial in the United States under FRCP 45. (*Id.* at 22-23.)

Additionally, unwilling Japanese witnesses require complicated letters rogatory through Japanese government officials in order to be required to testify, and that requirement is still at the discretion of a Japanese court. (*Id.* at 23.) Depositions of willing Japanese witnesses would still be costly and complicated; among other things, Japan requires the use of a U.S. consulate or embassy, with a consular officer presiding over the deposition and a special deposition visa for the U.S. participants. (*Id.* at 23-24.) These practical discovery problems weigh in favor of dismissal, Defendant claims. (*Id.*)

Further, Defendant argues that the public interest factors favor dismissal. The claim is brought under Japanese law, which under *Piper Aircraft Co.* weighs toward dismissal. (*Id.* at 24.) Defendant claims that Japanese courts are still developing the law around Article 21-2, which means that the Court will have trouble interpreting and applying it. (*Id.*) This also could result in inconsistent judgments and duplicative recovery because Japanese courts are already addressing claims against Toshiba under the same law. (*Id.*)

Plaintiffs respond that Defendant has the burden in raising *forum non conveniens* and that Defendant has failed to meet that burden. First, Plaintiffs reassert their argument that ADS purchasers will not have an adequate forum in Japan. (*Id.* at 32.) Plaintiffs also claim that a plaintiff's choice of forum — even in a class action — is entitled to deference and is presumptively convenient, particularly for domestic plaintiffs choosing their home forum. (*Id.*)

Additionally, Plaintiffs argue that there will be a "substantial" amount of discovery in the United States for this case, including for events related to Westinghouse, U.S. auditors at Ernst & Young, and U.S. transactions in Toshiba securities. (*Id.* at 33-34.) Plaintiffs claim that the Japanese evidence could be stipulated to and authenticated, as most of it has been turned over to internal and governmental investigators. (*Id.* at 34.) The depositions can also take place in Japan using the method Toshiba identified. (*Id.* at 34-35.) And Toshiba has not shown that any witness is unavailable or unwilling to come to the United States for trial, Plaintiffs claim. (*Id.*)

Additionally, Plaintiffs argue that Toshiba has failed to weigh the inconvenience to the American witnesses and parties if they were required to this litigate this case in Japan. (*Id.* at 36.) Further, Toshiba has its American headquarters in this district, Plaintiffs argue, and is subject to personal jurisdiction here and has information relevant to discovery here. (*Id.*)

Lastly, Plaintiffs argue that applying Japanese law in this case would not be difficult. According to Plaintiffs, "Japanese law is readily determinable by this Court, the relevant statutes have been translated into English, and relevant case law and treatises are available to this Court." (*Id.* at 37.) Plaintiffs point out that the Court can appoint a special master or expert in Japanese law if needed. (*Id.* (citing FRCP 44.1; Fed. R. Evid. 706).) Plaintiffs also cite several cases where U.S. federal courts applied Japanese law. (*Id.* at 38.) Thus, Plaintiffs argue that the Japanese law is not so uncertain as to be impractical to apply in this Court. (*Id.* at 38-39.)

As an alternative to the Court's holding on comity, the Court also holds that the doctrine of *forum non conveniens* makes dismissal proper for the Japanese law cause of action. Both the private and public factors weigh in favor of dismissal. There are many practical issues with fully litigating this cause of action in this Court, particularly with taking discovery from and deposing non-Toshiba employees that Plaintiffs have identified as key witnesses and perpetrators of the accounting fraud. Even taking discovery from and deposing willing witnesses will be a challenge.

Most of the evidence and witnesses identified by both parties as material are in Japan, and Japan has the strongest factual connection to the Japanese law claim. The Court recognizes its duty to hear cases over which it has jurisdiction, but the Court also finds that Japanese courts are more than competent to hear these claims.

And while the Court is capable of determining and applying Japanese securities law, such a challenge need not be surmounted in this case because other considerations weigh in favor of a more convenient forum being used for both the Court and the witnesses in this case. Therefore, Plaintiffs' Japanese law cause of action is dismissed with prejudice.

IV. CONCLUSION

For all the reasons discussed above, the Court GRANTS in part and DENIES in part Plaintiffs' Motion to Strike the Wada Declaration, as described above. The Court GRANTS Defendant's Motion to Dismiss. The Court finds that leave to amend would

be futile; therefore, the case is dismissed with prejudice.

IT IS SO ORDERED.

DEAN D. PREGERSON
United States District Judge

Dated: May 20, 2016

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Docket No. 2:15-cv-04194-DDP-JC

MARK STOYAS; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND; AND AUTOMOTIVE INDUSTRIES PENSION TRUST FUND, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TOSHIBA CORPORATION,

Defendant.

AMENDED AND CONSOLIDATED CLASS ACTION COMPLAINT FOR VIOLATION OF THE SECURITIES LAWS OF THE UNITED STATES AND JAPAN

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I. INTRODUCTION

1. This is a class action complaint seeking damages from Toshiba Corporation ("Toshiba" or the "Company") for violation of the U.S. Securities Exchange Act of 1934 ("Exchange Act") and the Financial Instruments & Exchange Act of Japan ("JFIEA").

2. The claims alleged herein are brought on behalf of the class of persons defined in ¶ 270 below (the "Class"), which consists of: (i) all persons who acquired Toshiba American Depository Shares or Receipts (collectively, "ADSs") between May 8, 2012 and November 12, 2015, inclusive (the "Class Period"); and (ii) all citizens and residents of the United States who otherwise acquired shares of Toshiba common stock during the Class Period.

3. This case arises from Toshiba's deliberate use of improper accounting over a period of at least six years to inflate its pre-tax profits by more than $2.6 billion (¥225 billion) and conceal at least $1.3 billion (¥128.2 billion) in impairment losses at its U.S. nuclear business, Westinghouse Electric Co. ("Westinghouse").

4. The Company's accounting fraud was orchestrated by three successive CEOs of Toshiba and dozens of top executives who directed the manipulation of financial results reported by scores of Company subsidiaries and business units. An internal investigation concluded that the fraudulent accounting had been "carried out . . . in an institutional manner" under an oppressive command and control environment in which subsidiaries and subordinates were required to falsify financial results

in order to demonstrate purported compliance with profit projections that Toshiba's senior management had established knowing the targets were unattainable under current business conditions. Investigators found that Toshiba's control over the accounting fraud was so strict that "correcting such situation became practically impossible."

5. Toshiba's accounting fraud was uncovered by a series of investigations that took place beginning in February 2015. The ever-widening probe quickly revealed numerous instances of deliberate violations of generally accepted accounting principles ("GAAP") carried out at the direction or with the knowledge and approval of Toshiba's most senior executives, including CEOs Atsutoshi Nishida, Norio Sasaki, and Hisao Tanaka; Audit Committee Chairman Fumio Muraoka; and CFO Makoto Kubo, who was also the Company's chief conference call spokesman during the Class Period.

6. The investigations resulted in the September 7, 2015 restatement of more than six years of reported financial results that eliminated approximately one-third ($2.6 billion) of the profits Toshiba had reported from 2008 to 2014. In issuing the restatement, Toshiba assured investors that there was no need to write down the $2.8 billion (¥344 billion) in goodwill still carried on Toshiba's books as a result of its 2006 acquisition of Westinghouse, falsely claiming that its nuclear business had strengthened since the acquisition, even after the March 2011 meltdown of the Fukushima Daiichi nuclear reactor. It was not until Toshiba issued its 2Q15 results on November 6, 2015 that it admitted that, in fact, Westinghouse had written

down goodwill in both FY12 and FY13. (Those charges were neither disclosed nor reflected in Toshiba's financial statements at the time they were taken.) Six days later, on November 12, a shocking report in the Nikkei Business journal revealed that the secret write-downs had totaled $1.3 billion: $926 million in FY12 and $400 million in FY13. Toshiba has since admitted that it should have disclosed the FY 12 impairment charges at the time Westinghouse recorded the write-down.

7. The fraudulent accounting practices described herein were ingrained in Toshiba's business and carried out for the purpose of meeting earnings forecasts that were unattainable by any other means. As detailed in the report of an independent committee formed to investigate the fraud, Toshiba deliberately violated GAAP by failing to timely record losses on unprofitable construction contracts; channel stuffing manufacturing parts sold at inflated prices; deferring operating expenses until they could be reported without causing an earnings loss; failing to record charges for obsolete inventory or impaired assets; manipulating foreign currency conversion rates; and engaging in the other fraudulent practices alleged herein. *See* Ex. 1 to the Appendix of Exhibits ("Appendix" or "Apx.") to this Complaint; *infra* §VI.

8. By deliberately overriding its own internal control procedures and taking advantage of known internal control weaknesses that it deliberately failed to correct, Toshiba was able to inappropriately consolidate its subsidiaries' results into its own financial statements while avoiding detection by investors or, in many instances, outside auditors.

9. When auditors recognized an overstatement of earnings on a Westinghouse project in FY13, Toshiba refused to apply the correct accounting in order to avoid a negative earnings impact, and then pressured the auditor to ignore the deliberate overstatement by improperly classifying it as an immaterial error. When U.S. auditors ordered Westinghouse to write down its goodwill based on worsening business conditions, Toshiba similarly threatened to replace its outside auditor in an effort to force the auditor to back off on the requirement. After that effort failed, Toshiba pressured the auditor to replace the U.S. audit manager with a manager from Japan, while making extensive efforts to ensure that the fact that Westinghouse had taken a writedown would not be publicly disclosed or recorded on Toshiba's consolidated financial statements.

10. By falsifying its earnings and failing to take required write-downs and charges, Toshiba avoided stock price declines that would have accompanied revelation of the Company's actual financial condition and results. Between April 3, 2015, when the internal investigation into Toshiba's accounting practices was first announced, and November 13, 2015, following the issuance of Toshiba's restatement and the revelation of the impaired goodwill at Westinghouse, the price of Toshiba securities declined by more than 40%, resulting in a loss of $7.6 billion (¥908 billion)in market capitalization that caused hundreds of

millions of dollars in damages to U.S. investors in Toshiba securities:[1]

II. JURISDICTION & VENUE

11. The Exchange Act claims are asserted on behalf of purchasers of ADSs or other Toshiba securities acquired in the United States and arise under §§10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§78j(b) and 78t(a), and SEC Rule 10b-5, 17 C.F.R. §240.10b-5. Jurisdiction over the Exchange

[1] The chart below reflects the movement of Toshiba's common stock sold on the Tokyo Stock Exchange. The price of common stock sold as ADSs in the United States moved in tandem with the price of common stock on the Tokyo exchange, such that the movements of the latter as reflected in the chart below are also illustrative of the movements of the former. See infra ¶251.

Act claims is conferred by §27 of the Exchange Act, 15 U.S.C. §78aa.

12. Lead Plaintiff Automotive Industries Pension Trust Fund and named plaintiff New England Teamsters & Trucking Industry Pension Fund are both citizens of the United States. Defendant Toshiba is a citizen of Japan. The amount in controversy under the JFIEA claims exceeds $5 million. Jurisdiction over the JFIEA claims is therefore conferred by 28 U.S.C. §1332(a)(2), and by 28 U.S.C. § 1332(d)(2).

13. The JFIEA claims are so related to the Exchange Act claims that they form part of the same case or controversy. Jurisdiction over the JFIEA claims is therefore also conferred by 28 U.S.C. §1367.

14. Toshiba is subject to personal jurisdiction in the United States and in this District because, as alleged in further detail below: (i) it engaged in the fraudulent scheme and course of conduct described herein, including by engaging in fraud that arose from transactions and occurrences that took place in and caused foreseeable losses in the United States and this District; (ii) in committing the fraudulent acts complained of herein, Toshiba operated as a unitary business and an integrated enterprise with its wholly-owned subsidiaries, including those based in this District and elsewhere in the United States, and controlled the internal affairs and operations of the subsidiaries to the extent that they became mere instrumentalities of their parent; and (iii) Toshiba has had and continues to have continuous and systematic contacts with this

forum that render it at home in the United States and in this District.

15. Venue is proper in this District pursuant to §27 of the Exchange Act and 28 U.S.C. §1391(b) and (c)(3) because Toshiba's principal places of business in the United States are located in and around Irvine, California within this District, and because some of the fraudulent acts alleged herein occurred or were related to transactions and occurrences that occurred in the United States and caused economic harm in the United States, including in this District.

16. In prior judicial proceedings, Toshiba has asserted that this District is a convenient forum for litigation and discovery of disputes in which it is involved.

17. Toshiba provides products for sale in this District and in the United States to its Irvine-based subsidiary, Toshiba America Information Systems ("TAIS"). Toshiba is the parent corporation of Toshiba America, Inc., which in turn is the parent corporation of TAIS. Toshiba is aware and intends that its products are or have been marketed and sold to customers in this District and the United States. The business documents and records relating to the marketing, sales, and financials of products sold in the United States are located at TAIS in this District.

18. In connection with the acts alleged in this Complaint, Toshiba, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, the Internet, interstate telephone communications, and the facilities of the national securities markets.

III. PARTIES

A. Plaintiffs

19. Lead Plaintiff Automotive Industries Pension Trust Fund ("AIPTF") is a pension fund formed for the benefit of auto industry workers. AIPTF is based in Alameda, California. As set forth in the certification attached hereto as Exhibit A, AIPTF acquired Toshiba common stock during the Class Period through the purchase on March 23, 2015 of 36,000 shares of TOSYY ADSs in the United States.

20. Named plaintiff New England Teamsters & Trucking Industry Pension Fund ("NETPF") is a pension fund formed for the benefit of New England trucking industry workers. NETPF is based in Burlington, Massachusetts. As set forth in the certification attached hereto as Exhibit B, NETPF made the following purchases of Toshiba common stock on the Tokyo Stock Exchange during the Class Period:

Date Acquired	No. of Shares	Price
4/1/15	110,400	¥ 503.42
4/2/15	66,600	¥ 512.26
9/4/15	58,000	¥ 356.51
10/22/15	57,600	¥ 340.53
10/23/15	9,000	¥ 343.35
10/26/15	23,400	¥ 356.66
10/27/15	18,000	¥ 349.00

21. Named plaintiff Mark Stoyas filed the initial complaint in this action. *See* Dkt. No. 1.

B. Defendant Toshiba and Its Business

22. Toshiba is a worldwide enterprise that engages in the research, development, manufacture, construction, and sale of a wide variety of electronic and energy products and services, including semiconductors, disc drives, storage devices, computers, televisions, appliances, nuclear power plants, elevators, lighting systems, and medical equipment. The Company was founded in 1875 and is headquartered in Tokyo, Japan.

23. Toshiba operates its business through a worldwide network of subsidiaries and affiliated companies whose activities and financial reports were closely directed and tightly controlled by the Company's top executives during the Class Period, as described below. During the Class Period, Toshiba treated its subsidiaries and business units as mere instrumentalities of itself, ordering them to inflate revenues and delay recognition of expenses in order to meet profit expectations that Toshiba had established even knowing the targets could not be attained without falsifying financial results. Toshiba used the phrase "Toshiba Group" throughout its public filings to refer to Toshiba and its consolidated subsidiaries.

24. Toshiba's Board of Directors was composed of 14-16 members during the Class Period, the majority of whom were then members of the Company's executive management team or had been in the recent past. As reflected in the letters to shareholders and corporate governance disclosures on Toshiba's website and in its annual reports, Toshiba's Board of Directors took an active role in supervising

the Company's executive management, received detailed reports and had thorough discussions of the Company's results of operations and forecasts, and made important decisions on the Company's basic policies to exert direct supervision over executive officers' business operations.

25. By the outset of the Class Period, Toshiba had issued more than 4.2 billion shares of common stock. Toshiba's common stock is publicly traded on the Tokyo Stock Exchange under the ticker symbol "6502" and on the Over the Counter ("OTC") market operated by OTCMarkets Group in the United States under the ticker symbols "TOSBF" and "TOSYY." One share of TOSBF represents ownership of one share of Toshiba common stock sold under the ticker symbol 6502 on the Tokyo exchange. One share of TOSYY represents ownership of six shares of Toshiba common stock. OTCMarkets Group identifies TOSYY as an ADS and TOSBF as "Ordinary Shares" on its website.

26. The Bank of New York Mellon ("BNY"), one of the depositary institutions for Toshiba common stock sold as ADSs in the United States is one of Toshiba's largest ten shareholders. At the end of FY14, Toshiba reported that BNY held 1.3% (~55 million shares) of the Company's outstanding common stock.

27. During the Class Period, institutional investors in the United States owned at least 485 million shares of Toshiba common stock, representing more than 11% of the Company's outstanding shares.

28. The Company regularly communicates with investors through periodic filings with the

Financial Services Agency ("FSA") and Securities Exchange and Surveillance Commission ("SESC") of Japan and in press releases, conference calls, and investor and analyst presentations. During the Class Period Toshiba maintained both English- and Japanese-language corporate websites at http://www.toshiba.co.ip, on which it established an Investor Relations section where regulatory filings, press releases, conference call transcripts, corporate profiles, descriptions of its business, and other information about the Company is made available to investors. Toshiba's annual reports included detailed financial information presenting results in both Japanese and U.S. currency.

29. On an ongoing basis and for each fiscal year, Toshiba published on its Internet website English-language versions of its annual and quarterly reports, earnings and other press releases, investor presentations, governance and business policies, and other information reflecting the Company's results of operations or financial condition, changes in business, acquisitions or dispositions of assets, changes in management or control, and other information required to maintain compliance with SEC Rule 12g3-2, 17 C.F.R. §240.12g3-2.

30. Toshiba operates on an April 1 - March 31 fiscal year, with the fiscal year identified by the year in which it starts.[2]

31. From FY09 through FY13, Toshiba reported net sales in North America ranging from

[2] Toshiba's FY13, for example, started on April 1, 2013 and ended March 31, 2014.

$11.3 billion to $13.9 billion, representing approximately 18% of its worldwide sales in each fiscal year. According to its most recent corporate profile, Toshiba employs 22,585 people – 11.8% of its workforce – in North America.

32. Toshiba organized its business into worldwide segments differentiated by the products or services offered. In FY11 and FY12, Toshiba organized its business into four segments: Digital Products (personal computers, televisions, and related products), Electronic Devices (memory, hard drives, other storage devices, semiconductors, and similar products), Social Infrastructure (utility and power plant construction, medical devices, elevators and building systems, and similar activities), and Home Appliances (refrigerators, washing machines, lighting systems, air conditioning, etc.).

33. Starting in FY13, Toshiba reorganized its business activities into five segments, primarily by splitting the Social Infrastructure segment into three new segments: Energy & Infrastructure (power plant and utility construction), Community Solutions (building facilities such as elevators, lighting, and air conditioning systems), and Healthcare Systems & Services (medical devices and related services and equipment). The Digital Products and Home Appliances segments were combined in the reorganization to form the Lifestyle Products & Services segment, while the Electronic Devices segment stayed the same, and was renamed Electronic Devices & Components.

34. Toshiba maintains a substantial presence in the United States through its business

activities, operations, and corporate representatives in the United States. Many of Toshiba's largest and most significant subsidiaries and affiliates, including those directly involved in the fraud alleged herein, were based in or had significant business operations in the United States, including Westinghouse, based in Township, PA; TAIS, Toshiba America Medical Systems, Inc., Toshiba America Electronic Components, Inc., and Toshiba America Business Solutions, Inc., all based in or around Irvine, CA; Toshiba International Corp., based in Houston, TX; Toshiba America Nuclear Energy Corp., based in Charlotte, NC; and Toshiba America, Inc. San Francisco, which "functions as a U.S.-based purchasing and export agent for Toshiba companies around the world."

35. Toshiba's Power Systems Company (part of its Energy & Infrastructure segment) includes the nuclear power plant operations of Westinghouse. Westinghouse is a Limited Liability Company under U.S. law with its headquarters in Pennsylvania, and with a principal business of designing, manufacturing, and maintaining nuclear fuel and nuclear power generating facilities. Westinghouse is a consolidated subsidiary of Toshiba, with all of its equity effectively held by Toshiba Nuclear Energy Holdings (US) Inc. ("TNEH"). Toshiba holds 87% of the voting rights of TNEH.

36. In addition to Westinghouse, Toshiba's Power Systems Company ("TPSC") includes business operations in or around: San Francisco, CA (Toshiba International Corp. Power Systems Division headquarters); Charlotte, NC (Toshiba America Energy Systems ("TAES") Nuclear Business Unit,

TAES headquarters, and TPSC US Corp.); West Allis, WI (Toshiba America Energy Systems Thermal Business Unit); Littleton, CO (Toshiba America Energy Systems Hydro Business Unit); Rogers, MN (TurbinePROSs, L.L.C.); Lafayette, IN and Pequot Lakes, MN (Landis+Gyr regional offices); and Alpharetta, GA (Landis+Gyr North America regional headquarters).

IV. OVERVIEW OF SCHEME TO DEFRAUD

A. Government Inquiry Sparks Widening Probes into Toshiba's Fraudulent Accounting

37. On February 12, 2015, Toshiba received an order from the SESC pursuant to JFIEA Article 26 requiring an inspection of projects using the percentage of completion ("POC") method of accounting, and submission of a report to the agency detailing the findings. No public announcement or disclosure of the order was made. The Company carried out an investigation pursuant to the order and by late March 2015 had discovered extensive evidence of GAAP violations in projects using POC accounting.

38. On April 3, 2015, Toshiba issued a press release announcing the establishment of a "Special Investigation Committee" ("SIC") to look into the Company's use of POC accounting on "certain infrastructure projects undertaken by the Company." The SIC was composed of six members: Toshiba's chairman of the Board, a member of its Audit Committee, a representative from its legal and its audit departments, an outside lawyer, and an outside auditor.

39. Over the course of the next five weeks, the SIC identified instances in which POC accounting had been improperly applied to underestimate contract costs with the result that contract losses (including provisions for contract loss) were not recorded in a timely manner. During that time period, the committee also identified other instances in which POC accounting was used in a suspect manner that required further investigation.

40. On May 8, 2015, Toshiba issued a press release announcing that, as a result of the findings described in the preceding paragraph, the SIC would be reconstituted as an "Independent Investigation Committee" ("IIC") consisting solely of impartial outside experts with no interests in Toshiba. The May 8 press release alerted investors that the scope of the investigation had broadened to include investigations of accounting in areas other than POC contracts and that, as a result, "there has emerged a possibility that past financial results for 2013 or earlier may be corrected, and the Company is currently ascertaining the amount of the impact on the financial results for fiscal 2015." The Company issued two additional press releases the same day announcing that, as a result of the investigations into its financial reporting and accounting, it was withdrawing its FY14 earnings forecast and cancelling the expected payment of its FY14 dividend. The May 8 disclosures caused an immediate 16.6% decline in the price of Toshiba common stock.

41. Five days later, on May 13, 2015, Toshiba announced that it expected to restate its financial results from FY11 to FY13 to reduce

operating income by ¥50 billion (~$420 million[3]) due to improper use of POC accounting for projects undertaken through its Power Systems Company, Social Infrastructure Systems Company, and Community Solutions Company. The Company cautioned that the ¥50 billion reduction was "only the current expected amount" and the final adjustment could differ after the IIC completed its investigation. The release then went on to describe additional categories of accounting that would be investigated by the SIC, including the appropriateness of the timing and amount of recorded loss provisions, the appropriateness of the timing of recorded operating expenses, and the appropriateness of valuations of inventory. The release stated that these matters would be subject to "a Company-wide, comprehensive investigation, which includes its in-house companies other than the above three, as well as its consolidated subsidiaries." The release stated that it was "undetermined" whether the investigation into these matters would result in the restatement of periods prior to FY11.

42. On May 15, 2015, Toshiba issued a press release announcing that it had appointed two attorneys and two CPAs to form the IIC. The press release revealed additional details regarding the SIC's findings, including that, in addition to discovering improper POC accounting, the SIC investigation had raised questions regarding "the

[3] All conversions from ¥ to $ contained herein use the same year-end exchange rates that were used by Toshiba to convert yen to dollars in its annual financial reports: FY14 (¥120 = $1); FY13 (¥103); FY12 (¥94); FY11 (¥82); FY10 (¥83); FY09 (¥93); and FY08 (¥98).

appropriateness of the timing and recorded amounts of provisions for losses, the timing of recording operating expenses, and valuations of inventory." The release also said Toshiba had "identified some of the cause of inappropriate accounting practice[s]," including "the high priority of budget achievement in the Company, and the imperfect function of internal controls for accounting."

43. On May 22, 2015, Toshiba issued a press release announcing that, in addition to POC accounting, the IIC would also be looking at the accounting for operating expenses in Toshiba's Visual Products Business, the valuation of inventory in the Semiconductor Business, and the accounting for component (parts) transactions in the PC Business. The release also stated that Toshiba was conducting a "self check" of accounting practices throughout its entire business in parallel with the IIC's investigation. To carry out the self check, Toshiba sent a list of specific types of inappropriate accounting to each of its 585 business units and asked them to self report any violations of accounting principles or Company rules that occurred from FY09 thru FY14. The Company said it would also conduct a second round of self checks aimed primarily at misreporting of income, expenses, profits, and losses at the 83 consolidated subsidiaries that it "considered particularly important to closing the Company's financial accounts."

44. The purported results of Toshiba's self check were contained in a press release issued on

June 12, 2015.[4] Apx. Ex. 2-A. In the June 12 press release, as corrected, Toshiba identified additional types and instances of inappropriate accounting that it said were being examined by the IIC, including additional violations of POC accounting rules and untimely or inaccurate reporting of promotional and other general expenses, inventory costs, and profits and losses, including nine specific cases of improper accounting that had been referred to the IIC for further investigation and 12 additional cases that would not be referred to the IIC for further investigation. The report described specific failures to accurately or timely post contract expenses and anticipated losses and described other instances of improper accounting used to understate costs or overstate income, including: failures to timely or accurately record provisions for warranty claims; postponements of selling, general and administrative ("SG&A") expenses including advertising, promotion, and marketing expenses; understating parts and inventory costs; failing to timely post losses for obsolete inventory; and failing to post write-downs for changes in foreign currency exchange rates. Toshiba said that it estimated that the 21 specific projects identified in the self check report had caused a cumulative overstatement of Toshiba's operating income of ¥54.8 billion from FY09 to FY13.

45. On June 25, 2015, Toshiba held an Ordinary General Meeting of Shareholders, at which time it provided additional details on the nature of

[4] On June 17, 2015, Toshiba filed a further press release to correct factual errors in the June 12 release, mostly related to the fiscal years in which specific cases of accounting fraud had occurred. Apx. Ex. 2-B.

the accounting fraud, including by revealing that: (i) the Company had "identified unrealistic cost reduction measures [that] were included in percentage-of-completion method accounting producing inappropriate estimates of total contract costs"; (ii) the Visual Products business had "coordinated] with vendors to adjust the purchase price of materials and carry over part of the payment to the following period" to lower reported materials costs in the periods in which they were incurred; (iii) in addition to artificially lowering production costs in the semiconductor business, the Company had manipulated the recorded value of inventories of discontinued products stocked for customers; and (iv) PC profits had been inflated by failing to accurately record costs of parts and components supplied to original design manufacturers ("ODMs"). Apx. Ex. 3.

46. On July 17, 2015, the Company announced that the IIC report would be made public on July 20 and a press conference to discuss its findings would be conducted on July 21. On July 20, 2015, the Company issued a press release announcing that it had received the IIC report, and released a summary version of the report in Japanese. The July 20 press release stated that, based on the IIC report, Toshiba expected to restate its financial results from FY08 through FY13 to reduce income before income taxes and noncontrolling interests by ¥185.8 billion. The release also stated that Toshiba expected the restatement to include fixed asset impairment charges of up to ¥246 billion and annual valuation allowances of up to ¥270 billion regarding long-term deferred tax assets.

47. The full version of the IIC report, in Japanese with portions redacted, was released on July 21, 2015. The report was based on internal information of Toshiba that the IIC had reviewed. Toshiba claimed prior to and after the issuance of the report that it had cooperated fully with the IIC in its investigation, and claimed to have provided it with access to any relevant information that it asked to review.

48. Also on July 21, the Company announced that Tanaka, Sasaki, and seven other senior executives had resigned as a result of the "substantial amount of inappropriate accounting over a long period of time" and the IIC's findings that "pointed to the involvement of top management in respect to the causes of the inappropriate accounting."

49. On July 25, 2015, Toshiba published an English translation of the summary version of the IIC report. Apx. Ex. 1.

B. Investigators Find that Toshiba Deliberately Inflated Profits by Forcing Subsidiaries to Misrepresent Their Financial Results

50. The IIC report, together with Toshiba's public statements and restated annual reports, provides a detailed account of the deliberate misuse of accounting standards on a worldwide basis that was perpetrated pursuant to the directions and demands of Toshiba's most senior executives. The manipulations were designed and used to achieve market expectations and conceal poor business

performance from investors over a period of at least 27 consecutive quarters.

51. The IIC found direct and circumstantial evidence of deliberate and repeated instances of accounting fraud in Toshiba's accounting for POC contracts and its recording of revenues and expenses in its Visual Products, Semiconductor, and PC businesses. *Infra* §VI; Apx. Ex. 1. The POC accounting violations occurred primarily in the Power Systems Business, which formed a major part of the Social Infrastructure and, later, the Energy Infrastructure segment. Other fraudulent accounting practices, including channel stuffing and cookie jar accounting, were carried out in Toshiba's Semiconductor business, which formed the primary part of the Electronic Devices segment; and in the Visual Products and PC businesses, which formed the substantial parts of the Digital and, later, Lifestyle Product segments. Additional instances of fraud were uncovered by Toshiba's self check report, and by its outside auditor, as also described below.

52. The IIC limited its review to specific issues and transactions that had been identified by Toshiba and specifically delegated to the IIC for review. The IIC was not permitted to, and did not, undertake investigations with respect to issues of potential accounting fraud other than those that were delegated to it or uncovered in the course of its investigation of the delegated matters. The IIC report specifically recognized that the restatement required by its findings could lead to secondary effects, including requirements to restate inventory valuations, take fixed asset impairment charges, or write-down the value of deferred tax assets. However,

the IIC said that it had "not considered" such secondary effects, which were beyond the scope of the authority delegated to it. Apx. Ex. 1 at 17.

53. Following the July 21, 2015 press conference where the IIC discussed its gs, one analyst wrote:

> **Limitations of scope of independent investigation**
>
> The independent investigative committee held a press conference at 7pm JST on 21 July, largely reiterating points from the committee's report. The point that came up a number of times in the Q&A session was that the scope of the committee's investigation was determined by Toshiba's requirements. Some key areas of interest to investors, including the financial situation at subsidiaries Westinghouse and Landis Gyr, were not part of the investigation, and we will have to rely on the opinions of auditors for the time being. The fact that the committee did not look into every item on Toshiba's balance sheet certainly needs to be noted.

Mitsubishi UFJ Morgan Stanley, *Resignation of top management merely the start of a long restructuring road* (July 21, 2015) at 1.

54. The IIC found that Toshiba's top management directed and demanded the accounting fraud to be carried out in order to meet their objective of overstating current period profits. Apx. Ex. 1 at 67-69. Toshiba's management did this by exerting strong pressure on subordinates to achieve budgeted targets

by any means necessary, including by the deliberate misapplication of accounting standards. Toshiba's executives did so knowing that the Company's employees were unable to act contrary to the intent of their superiors, even when superiors were instructing them to falsify the reported results of their business. *Id.* By carrying out their fraud through subtle changes in accounting that were difficult for outsiders to detect, and then deliberately concealing the true facts from external auditors (including by deliberately falsifying corporate records), Toshiba's executive management was able to falsify Toshiba's financial results over a period of more than six years. *Id.* at 17-18, 69, 7374. Management's ability to carry out their scheme was enhanced by their efforts to foster confusion among subordinates about proper accounting requirements, and their deliberate failure to adopt internal controls that would be effective in detecting or preventing their fraud. *Id.* at 69-73.

55. Toshiba and its senior executives operated the Company as a unitary enterprise, enforcing their will on each of Toshiba's consolidated business units and subsidiaries by requiring them to falsify earnings reports where necessary to meet the targets that Toshiba's executives had established. Toshiba did so by establishing and enforcing a strict command and control culture throughout the Company's operations.

56. As the IIC concluded:

> The inappropriate accounting treatment that was carried out or continued in a number of Companies simultaneously and in an institutional manner with the involvement of

> Corporate-level top management . . . should be considered a management decision, and correcting such situation was practically impossible. *Id.* at 67.

57. To carry out their will, Toshiba's executive management held monthly meetings with the CEOs of all of Toshiba's companies where they demanded that each company meet performance targets that the executives had established. The targets were established based only on Toshiba's desire to meet quarterly profit objectives. The targets were communicated to each of Toshiba's subsidiaries at CEO Monthly Meetings. Although referred to internally as "Challenges," they were in fact mandatory requirements. Subsidiaries were *required* to report results in line with the "Challenge" targets, even if fraudulent accounting was the only way to do so.

58. As described by the IIC:

> At the CEO Monthly Meetings, etc., P [Toshiba's President, Tanaka] indicated targets for improved income set as "Challenges" to each CP [Company President], with the strong suggestion that those targets needed to be achieved, and sometimes implied that under-performing Companies would have to withdraw from their business if they did not improve their profit. In particular, from FY 2011 to FY 2012 when inappropriate accounting treatments were carried out broadly, those Companies were required by P to set out strict Challenges (excessive targets) in order to achieve budget. Therefore, the CP of

each Company was faced with strong pressure to achieve these targets.

Most of the Challenges indicated by P were based not on long-term profit targets, but on target values to achieve, set with a view to maximizing current year or current quarter profits (over-riding current profit policy). Also, toward the end of each quarter, when it was difficult to achieve a large amount of profit improvement even with a concerted sales effort, a "'Challenge" was given to achieve an overstated budget that exceeded the capabilities of the Company. Given this management policy, in order to achieve the Challenge, each Company was driven into a situation where it was forced to engage in inappropriate accounting treatments, instead of carrying out accounting treatment reflective of performance at the end of the applicable period, by way of bringing apparent current-period profits closer to the budget and Challenge values substantially with pre-emption of profits for subsequent accounting periods or with postponement of recording of current losses and expenses to subsequent accounting periods. Even though pre-empting profits or postponing the recording of expenses and losses in order to overstate apparent profits in one period would make the recording of profits in subsequent periods difficult, an excessive Challenge was set for that subsequent period as well, and this resulted in Companies being forced to carry out inappropriate accounting treatment in an even larger amount in order to achieve it, the

> repetition of which caused the inappropriate accounting treatments to continue and expand in scale.

59. The IIC found that Toshiba attained its unreasonable targets by imposing its will on subsidiaries to force them to falsely report results that met the challenge:

> A corporate culture existed at Toshiba whereby employees could not act contrary to the intent of their superiors. For this reason, when certain top management established a "Challenge", the CPs, who were subject to the will of such top management, the business division heads under the CPs, and in turn the employees under the heads continuously engaged in inappropriate accounting treatments to achieve the targets in line with the will of their superiors.

Id. at 68-69.

60. Toshiba's control over its subsidiaries was so complete that executive consent was even needed to *comply* with stated accounting policies, where doing so would negatively impact the Company's performance:

> Moreover, under this corporate culture, a de facto rule existed for Toshiba accounting practices, whereby approval from a progressively senior personnel was required before making an accounting treatment in accordance with an express rule provided for in the Company's accounting rules, etc., with respect to any matter that entailed a

> significant amount of impact, such that if at any point a superior's approval was not obtained, then the appropriate accounting treatment itself, based on an express rule, would not be carried out.

Id. at 69.

61. The IIC found that misstatements of accounting had been deliberately concealed from Toshiba's outside auditors:

> [M]ost of the instances of accounting treatment in question were the intentional operation of internal accounting treatment, and were instances of inappropriate accounting treatment carried out in an institutional manner, and skillfully utilizing circumstances where confirming the facts based on external evidence was difficult, such as by using methods that were difficult for the accounting auditor to detect and, in response to questions and requests for materials from the accounting auditor, hiding facts and providing explanations by presenting materials creating stories different from the facts.

Id. at 73.

62. The accounting fraud was directed, approved, or ratified by Nishida, Tanaka, Sasaki, and other members of Toshiba's top-level management. The IIC specifically found repeated instances where Toshiba's most senior executives directed or deliberately turned a blind eye to accounting fraud:

(i) "members of top management were aware of the intentional overstating of apparent current-period profits and the postponement of recording expenses and losses, or the continuation thereof, but did not give instructions to stop or correct them" *(id.* at 67);

(ii) "although the Company requested approval to record provisions for contract losses [on contracts subject to POC accounting], certain top management either rejected it or instructed the recording to be postponed" (id.);

(iii) "while certain top management was aware that [achieving performance targets] would inevitably lead to a situation where Channel Stuffing of ODM Parts was necessary, still they imposed strict "Challenges" onto the Company and drove it into such situation, or showed reluctance when the Company expressed its intent to eliminate the overstating of apparent profits by way of the Channel Stuffing of ODM Parts" (id.);

(iv) "Company-level top management like the CP and business unit heads were involved in carrying out or the continuation of inappropriate accounting treatments" and "Company-level top management [] actively instructed that inappropriate accounting treatments be carried out" (id.);

(v) "certain Corporate or Company-level top management had the objective to carry out the 'overstating of apparent current-period profits'" and "executive officials [] carried out or continued inappropriate accounting treatments under such objective of certain top management" *(id.* at 68);

(vi) "the involvement of certain top management and key executives led to the deviation from and ineffectiveness of the internal control function for financial reporting, with inappropriate accounting treatments then being carried out by instructions, etc. from outside of the internal control framework" *(id.* at 70);

(vii) "accounting personnel knew of a fact that made an accounting treatment necessary, such as recording a provision, but did not take any action ... there were many projects where no action was taken in accordance with the instruction of a superior such as a business unit head or CPs" (id.); and

(viii) "several members of the Audit Committee were aware that inappropriate accounting treatments were being carried out with respect to several projects . . . [but] no action was taken" *(id.* at 73).

C. Toshiba Admits Wrongdoing; Fires, Disciplines, and Sues Its Top Executives

63. Toshiba has repeatedly acknowledged its responsibility for the fraud alleged herein, and admitted that the fraud was carried out at the direction and under the control of its most senior executives. At least nine senior executives of the Company resigned or were fired as a result of their participation in the misconduct alleged herein. Dozens more were reprimanded or had their salaries reduced, and Toshiba has sued five of its most senior executives - Tanaka, Sasaki, Nishida, Kubo, and Muraoka - for damages arising from their roles in the fraud.

64. In a July 21,2015 press release, Toshiba acknowledged responsibility for the misconduct:

> **Clarification of managerial responsibility**
>
> Although the Company is currently committed to reviewing and closely checking the investigation report, it wishes at this juncture to express its sincere apologies to shareholders, investors and all other stakeholders for what has been identified as a substantial amount of inappropriate accounting over a long period of time, from fiscal 2008 to fiscal 2014. The outcome is that the cumulative amount of income before income tax to be corrected, discovered within the scope of the investigation carried out by the Independent Investigation Committee, is minus 151.8 billion yen. The Company also wishes to apologize for any concerns or inconvenience arising from not yet being able to announce the Company's financial results for fiscal year 2014 as at July 21.
>
> In light of the foregoing, and effective as of July 21, Hisao Tanaka, Representative Executive Officer, President and Chief Executive Officer and Director; Norio Sasaki, Vice Chairman of the Board and Director; Hidejiro Shimomitsu, Representative Executive Officer, Corporate Senior Executive Vice President and Director; Masahiko Fukakushi, Representative Executive Officer, Corporate Senior Executive Vice President and Director; Kiyoshi Kobayashi, Representative Executive Officer, Corporate Senior Executive

> Vice President and Director; Toshio Masaki, Representative Executive Officer, Corporate Senior Executive Vice President and Director; and Makoto Kubo, Chairman of the Audit Committee and Director, will all resign from their positions in the Company; and Keizo Maeda, Representative Executive Officer, Corporate Executive Vice President and Director, will resign from his positions as Representative Executive Officer and Director. In addition, Atsutoshi Nishida, Adviser to the Board, will also resign from his position, effective as of today.

65. Toshiba made similar admissions of responsibility in nearly every other press release it issued to provide updates on the status of the investigations or disclose additional findings about the nature, cause, extent, or impact of the accounting fraud. *E.g.,* Apx. Ex. 2-A ("The Company expresses sincere apologies to its shareholders, investors, and all other stakeholders for any concerns or inconvenience caused by the current investigation into accounting practices."); Apx. Ex. 4 ("The Company will make every effort to regain the trust of shareholders, investors, all other stakeholders and the public, and asks for your understanding and ongoing support."); Apx. Ex. 7 ("The Company deeply apologizes to our shareholders, investors and stakeholders for causing the state of matters this time. The Company, under its new management team, will endeavor with all of its effort to regain trust in the Company from all shareholders, investors and other stakeholders, and humbly requests your ongoing support.").

66. On July 29, 2015 Toshiba announced "further personnel measures to be taken in respect of inappropriate accounting," including the resignation of another executive officer - Corporate Senior Vice President, Masaaki Osumi - and salary reductions for other executive officers and Board members. Apx. Ex. 4. The release stated that the Company "will seek to establish a new corporate culture under new management and governance structures" and would immediately begin to implement measures recommended by the IIC. Toshiba stated that it would effect a "[c]hange in [the] mindset of top management" by removing incentives to achieve short-term budget targets, reform its accounting policies, enhance its internal controls, and increase the number of outside directors. Among the measures that Toshiba said needed to be undertaken was the elimination of budgets that were not "commensurate with company capability." The release stated:

> The Company has confirmed, company-wide, that it will not focus only on short-term profit in the current period, but, taking a long-term perspective, first disclose actual results and then stress consideration of how to improve those results. In order to guarantee this, the Company has decided to abolish the CEO Monthly Meeting held at the end of every month, which mainly dealt with figures for snort-term outlooks.

67. On August 18, 2015, Toshiba described how it would reform its governance structure, improve its internal controls, and take other measures needed to correct the problems identified in the IIC report. Apx. Ex. 5. In announcing the

formation of a Management Revitalization Committee to propose measures for the i of Toshiba's corporate governance, Toshiba stated:

> The investigation report by the Independent Investigation Committee found the direct causes of inappropriate accounting to include: the involvement of top management; a policy that placed an over-riding concern on current profit; and strong pressure to achieve budget targets. The report noted, as the indirect causes why the Company was unable to prevent these actions, that the involvement of top-level management resulted in deviation from or the non-functioning of internal controls, and also found that an internal control structure that anticipated top management's involvement in inappropriate accounting had not been established. The report also determined that internal control structures did not function efficiently, at both the corporate and in-house company level. As measures toward preventing recurrence of such actions, the report recommends the enhancement of corporate governance by strengthening the internal control function of the Board of Directors and the Audit Committee; establishing a new and stronger internal control department; and such as increasing the number of Outside Directors and revising the membership of the Board.

68. On September 17, 2015, Toshiba formed an Executive Liability Investigation Committee to investigate wrongdoing by its senior executives. The stated, in part:

> Toshiba Corporation . . . received an Investigation Report from the Independent Investigation Committee on July 20 containing findings on the facts and causes of the series of inappropriate accounting practices at the Company, and recommendations on prevention of any recurrence. The Company carefully reviewed the report and took steps necessary to restate past financial statements and compile its fiscal year 2014 financial results.
>
> * * *
>
> Separately from the restatement of past financial results and compilation of financial results, and discussions on the management structure, reform of corporate governance and measures to prevent recurrence, the Company has also validated the facts contained in the report, and discussed the methods to determine whether there is a need to enforce liability of current and former directors and executive officers for inappropriate accounting.

69. On November 7, 2015, the Company announced that the committee had investigated 98 individuals who had been directors or executive officers of the Company between FY08 and 3Q14 regarding their involvement in the accounting fraud. Apx. Ex. 8. On November 10, 2015, the Company filed suit against five of its former executives - Nishida, Sasaki, Tanaka, Kubo, and Muraoka - seeking damages arising from their participation in the accounting fraud. The Company also said that, in addition to previously-announced personnel measures taken against other directors and executive officers,

the Company would implement disciplinary measures against 26 additional employees suspected of involvement, "mainly the top managerial employees mentioned in the [IIC report]."

D. Toshiba Restates Five Years of Results

70. As a result of the false accounting described above, Toshiba falsified its reported financial results for at least 27 consecutive quarters from 1Q08 through 3Q14, as summarized in the charts at ¶¶76, 111-112 & 115-116. Toshiba did not officially restate its FY08 financial statements to correct the errors found by the IIC and the other investigations described herein, presumably because, by the time of the restatement, the FY08 financial reports were no longer formally available for public inspection pursuant to Article 25 of the JFIEA.[5] Restated FY08 results are, however, included in Toshiba's restated FY09 financial statements.

71. On August 18, 2015, Toshiba provided an initial outline of the anticipated restatement of its financial results from FY08 through 3Q14. The release stated that Toshiba planned to issue its restatement when its FY14 results were released at the end of the month. Apx. Ex. 5.

72. On August 31, 2015, Toshiba announced that it would be unable to meet the August 31 deadline for submitting its FY14 annual report and restatement, and had obtained an extension until September 7 to do so. On the same day, UBS reported that:

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[5] The IIC also found errors in Toshiba's FY07 financial reports.

> Reasons for delay include 1) discovery of multiple new instances of inappropriate accounting and the need for investigation, 2) miscalculation of impairment amounts for fixed assets that required restatement 3) inappropriate timing for booking provisions for a project in which the percentage-of-completion method was used at a US subsidiary, and 4) an audit of a US subsidiary taking longer than scheduled.

The delay announcement caused Toshiba's stock to drop by 5.3%, its largest decline since the May announcement of the broader inquiry into accounting fraud.

73. When Toshiba's restatement was issued, the restatement of income (loss) before taxes had grown by ¥11.8 billion from what had been reported on August 18. The largest contributors to the increase were adjustments to POC accounting used by a US subsidiary on a hydroelectric project, increases in the amount of unrecognized FY14 costs at U.S. subsidiaries, and a reserve for an administrative monetary penalty.

74. On September 7, 2015, Toshiba issued its FY14 annual report and earnings release, including details of its restatement. Because the IIC and other investigations were limited in scope, as described above, Toshiba's restatement is likely to have significantly understated the true extent of the fraud or its impact on Toshiba's previously reported financial results.

75. The restatement eliminated more than ¥l90.5 billion (~$2.1 billion) in previously reported

net income from FY08 through FY13, and resulted in Toshiba recording an additional ¥90.6 billion (~$1.0 billion) in delayed asset impairment charges that should have been taken in FY08 (¥41.7 billion) and FY11 (¥48.9 billion). Although net income for the first three quarters of FY14 increased as a result of the restatement, this was simply due to moving expenses that the Company had deliberately delayed reporting until FY14 back to the earlier periods in which they should have been recognized, thereby reducing FY 14 expenses by the same amount.

76. The restatement reduced Toshiba's cumulative pre-tax profit for FY08 through 3Q14 by ¥225 billion ($2.6 billion), which was 39% lower than the previously reported amounts:

Cumulative restatements					
	¥ billions	**FY08**	**FY09**	**FY10**	**FY11**
Pre-tax Profit	Before	-259.7	27.2	145.4	194.7
	After	-336.1	-14.3	61.4	201.8
	Change	-76.4	-41.5	-84	7.1
Net Profit	Before	-343.6	-19.7	70.1	137.8
	After	-398.9	-53.9	3.2	158.3
	Change	-55.3	-34.2	-66.9	20.5
	$ millions	**FY08**	**FY09**	**FY10**	**FY11**
Pre-tax Profit	Change	-779.6	-446.2	-1024.4	85.5
Net Profit	Change	-564.3	-367.7	-815.9	247.0

Cumulative restatements					
	¥ billions	**FY12**	**FY13**	**1Q-3Q14**	**Total**
Pre-tax Profit	Before	159.6	180.9	134.9	583.0
	After	74.9	182.3	188.2	358.2
	Change	-84.7	1.4	53.3	-224.8

Net Profit	Before	77.4	50.8	71.9	44.7
	After	13.4	60.2	107.2	-110.5
	Change	-64	9.4	35.3	155.2
$ millions		**FY12**	**FY13**	**1Q-3Q14**	**Total**
Pre-tax Profit	Change	-901.1	13.6	444.2	-2608.0
Net Profit	Change	-680.9	91.3	294.2	-1796.3

Source: Macquarie Research, Sept. 9, 2015

77. The restatement also eliminated ¥953.2 billion (~$9.9 billion) in previously reported shareholder equity from Toshiba's books, reducing equity by as much as 20% below the amounts the Company had previously reported:

Restatement of Shareholder Equity					
Reported Equity		**FY08**	**FY09**	**FY10**	**FY11**
Before Restatement		447.3	797.4	868.1	863.5
After Restatement		385.2	705.9	793.9	718.7
Change in S/H Equity	¥ billions	(62.1)	(91.5)	(74.2)	(144.8)
	$ millions	(633.7)	(983.9)	(894.0)	(1,765.9)
	% change	-13.9%	-11.5%	-8.5%	-16.8%

Restatement of Shareholder Equity					
Reported Equity		**FY12**	**FY13**	**1Q-3Q14**	**Total**
Before Restatement		1,034.3	1,229.1	1,426.5	6,666.2
After Restatement		824.6	1,027.2	1,257.5	5,713.0
Change in S/H Equity	¥ billions	(209.7)	(201.9)	(169.0)	(953.2)
	$ millions	(2,230.9)	(1,960.2)	(1,408.3)	(9,876.8)
	% change	-20.3%	-16.4%	-11.8%	-14.3%

78. The restatement confirmed the breadth of the fraud and the extensive efforts that were used to conceal the manipulations from the Company's

investors. As one analyst noted following Toshiba's investor conference call to discuss the restatement:

> We were not impressed by the old president's *mea culpa:* it takes a certain discipline to fiddle accounts over half a dozen years. Generally, any fool can tweak the P&L, it is more difficult to twiddle effectively the balance sheet and quite hard to fiddle the cashflow. To get whole teams to do such in a way consistent with each other and tenable against general reporting requires care and systematic deceit. Foreign subsidiaries, if they are to be involved, need be involved similarly. Alternatively, their numbers, though reported locally, are not reported in Japan in such a way that comparisons can be made.

Mirabaud 1819, *What they did* (Sept. 10, 2015) at 3.

E. Toshiba Belatedly Reveals Westinghouse Goodwill Impairment

79. Toshiba acquired Westinghouse in 2006, paying $5.4 billion. At the time of the acquisition many analysts pointed to the huge amount of goodwill as evidence that Toshiba had paid too much for Westinghouse.[6] Analysts again raised questions about the need to write-down goodwill following the

[6] See, e.g., UBS, Toshiba earnings potential highest ever (Aug. 8, 2011) at 7 ("[T]he purchase consideration was an unprecedented ¥621bn, and at the time the acquisition was announced, there was a number of reports indicating that it would be difficult to generate a sufficient return on investment at such a high purchase price.").

Fukushima nuclear accident in March 2011.[7] Questions were raised again in FY11, when Toshiba became obligated to pay approximately ¥125 billion after the Shaw Group exercised its option to sell its o 20% interest in Westinghouse.[8] At each of these times, Toshiba told investors that Westinghouse's goodwill was not impaired, including by assuring investors in the from fuel and maintenance contracts insulated it from the larger impacts in the industry arising from weakened demand for construction of new nuclear power plants.

80. In FY12 and FY13 Westinghouse took goodwill impairment charges totaling $1.3 billion.

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[7] See, e.g., Deutsche Bank, Pessimism excessive; still a Buy (Apr. 10, 2011) at 4 ("[F]uture profit expectations in the nuclear power business will have a large impact on the application of impairment of goodwill."); UBS, Toshiba earnings potential highest ever (Aug. 8, 2011) at 44 (noting risk of goodwill impairment if "opinion moved against nuclear power in the US"); Macquarie Research, Whether thou goest, Westinghouse? (Dec. 28, 2012) at 1 ("[P]rospect of goodwill impairment taken upon the disposal of stakes in Westinghouse has been a perennial concern of investors.").

[8] *See, e.g.*, UBS, *Re-iterating our Buy rating* (Sept. 14, 2012) at 7 ("the possibility arises of impairment losses on the Westinghouse goodwill" as result of Shaw Group exercise of option); Macquarie Research, *Production cut brings NAND to the nadir* (July 25, 2012) at 6 (noting "creditor wariness over worsened balance sheet" and potential for impairment if investor replacing Shaw Group were to value Westinghouse on a lower assessed fair value accepted by Toshiba); *see also* UBS, *OP growth likely in FY11, but shares volatile on nuclear power* (Apr. 11, 2011) at 1 ("Financial risks from nuclear power market changes include 1) partial write-down of ¥350.8bn in Westinghouse goodwill and 2) the need for roughly ¥100bn if the Shaw Group exercises put options. This impact cannot be overlooked since the balance sheet at end-Dec was not solid . . .").

Toshiba did not publicly disclose the impairment charges taken by Westinghouse. Toshiba did not write-down any of the Westinghouse goodwill in its consolidated financial statements in FY12, FY13, or any subsequent period.

81. When the Shaw Group exercised the option requiring Toshiba to purchase its interest in FY12, Toshiba initially claimed it had an offer from a third party to acquire the interest. Toshiba ultimately chose to acquire rather than resell the Shaw Group interest, even though doing so required the majority of the cash on its balance sheet. Had Toshiba accepted an offer to sell the Shaw Group interest to a third party at a price lower than the value of Westinghouse that was reflected on Toshiba's books, accounting practices generally accepted in the United States ("US- GAAP") would likely have required Toshiba to write-down goodwill. *See infra* §VI(D).

82. One of the ways that Toshiba avoided taking an impairment charge was to restructure its business at the outset of FY13. *See* ¶¶32-33, *supra.* In Toshiba's FY12 annual report, Sasaki explained the restructuring of the Company's segments as

> One key part of our basic management strategy is to press ahead with the "restructuring of businesses." Using FY2008 as a reference point, over a period of three years starting from FY2009, we have achieved a reduction in fixed costs of about ¥1,500 billion, and with regard to variable costs, we have also significantly reduced procurement and logistics costs. As a result, operating income, income

> before taxes and net income were all brought back to the levels attained prior to the financial crisis. . . .
>
> Based on the results of our efforts to build a strong profit-making business structure, which we have been implementing over the past three years, we are now moving ahead along the path of growth.

83. Contrary to Sasaki's statements, the reduction in costs was achieved not by successful management but through improper accounting, as described above. Moreover, the reorganization of Toshiba's segments therefore was not designed to capitalize on successful cost-reduction strategies. Rather, it appears to have been undertaken, in whole or in part, to avoid taking a write-down of the Westinghouse goodwill on a consolidated basis. *Infra* §VI(D).

84. The goodwill associated with the Westinghouse transaction represented more than 60% of all the goodwill on Toshiba's books. Goodwill impairment charges would have reduced Toshiba's earnings at a time when Toshiba and its top executives were falsifying financial results on a massive scale to avoid much smaller negative earnings impacts. Goodwill charges would have also had significant derivative impacts on the Company, potentially requiring it to cancel its dividend payments and giving rise to violations of the covenants attached to its ¥600 billion in long-term debt.

85. On November 17, 2015, Toshiba issued a press release describing the circumstances leading to

the recording of the write-downs at Westinghouse. At the end of the release, Toshiba admitted that, at least for FY12, the write-downs were required to be disclosed at the time they were taken:

> Although impairment recorded by Westinghouse Group did not influence Toshiba's financial consolidated statement, impairment recorded by Westinghouse Group in fiscal 2012 fell under the guidelines for timely disclosure, and the Company should have disclosed it appropriately at the appropriate timing.

86. According to a November 17, 2015 Nikkei Business report describing the Company's failure to write down its Westinghouse goodwill:

> Internal documents reveal the gap between Toshiba's claims and the actual state of affairs at Westinghouse. As the nuclear unit fell into a prolonged slump Toshiba's management tried a number of methods to prevent it from affecting the parent's bottom line. An internal document clearly states that if Toshiba had had to write down its goodwill related to Westinghouse, there might have been "insufficient funds for cash dividends. Executives appear to have been concerned about this and other possibilities.

Apx. Ex. 9.

87. The Nikkei Business article quotes at least six internal Toshiba e-mails from 2013 and 2014 reflecting the Company's efforts to avoid Westinghouse's write-down of goodwill and, after that

could not be avoided, to conceal the write-downs from investors. On July 23, 2013, Westinghouse's U.S.-based auditor, Ernst & Young ("E&Y"), signed its FY12 audit report requiring the write-down of $926 million in goodwill. According to the Nikkei Business report:

> Ernst & Young had clear reasons for recommending a write-down in view of the difficulties Westinghouse was experiencing. An internal e-mail from Westinghouse from the time stated that it "had a particularly serious shortage of funds in the second quarter. This fiscal year, the failure to meet sales targets for uranium and the drop in revenue due to deferred plant construction [could] have a large impact on the bottom line."

Id.

88. On July 28, 2013, five days after the Company received E&Y's audit Kubo sent the following e-mail to Westinghouse executives describing his efforts to get the auditor to change its mind:

> EY . . . has tried to cut off debate. It's completely inappropriate for an auditor to say they can't change their conclusion. I brought this up with H, partner at [EY] ShinNihon. I told him we'll be soliciting bids, and we hope EY will put its best foot forward with a new team.

Id. Toshiba subsequently pressured EY to replace Westinghouse's U.S.-based audit manager with a Japanese manager for subsequent audits.

89. Despite the level of internal concern at Toshiba regarding the goodwill write-downs taken at Westinghouse, the write-downs were not publicly disclosed. As reported by Nikkei Business:

> If Westinghouse's troubles became publicly known, Toshiba would have been pressured to write down the unit's value on its consolidated statement. Given the size of the write-down - over 100 billion yen - Toshiba no doubt wanted to contain the damage to its subsidiary.

Id.; see also id. (Quoting April 2014 e-mail from executive at Toshiba's nuclear power division: "The Westinghouse impairment test is extremely important for Toshiba. Even when on the premises, be careful not to needlessly share information with people who are not directly involved, and do not discuss company matters outside the office (during lunch, in taxis, etc.).").

90. Throughout the investigations into Toshiba's accounting, analysts and investors again questioned whether the concealed losses and other circumstances revealed by the inquiries would require a write-down of the $2.9 billion (¥344.1 billion) in goodwill remaining on Toshiba's books from the 2006 acquisition of Westinghouse. Following the April release announcing the SIC investigation, analysts expressed relief that Westinghouse did not appear to be involved.[9] But on May 8, 2015 when

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[9] *See, e.g,* MorganStanley MUFG, Our Take on Infrastructure Business Accounting Probe and Lifestyle Business (Apr. 13, 2015) at t ("we do not think [the April 3 announcement ofthe SIC investigation] has anything to do with .

Toshiba announced the formation of the IIC to conduct a wider probe, analysts grew more concerned over the potential impact on Westinghouse goodwill.[10]

91. Following the July 21 release of the IIC report, analysts again questioned whether Toshiba was addressing the impact of the business conditions concealed by accounting fraud on the Westinghouse goodwill.[11] For example:

. . Westinghouse"); SMBC Nikko, Cut to hold on white goods deterioration, accounting investigation (Apr. 21, 2015) at 5 ("Westinghouse Electric (nuclear power-related) is probably not involved.").

[10] *See, e.g.,* J.P. Morgan, *Westinghouse Already Included as Potential Investigation Target* (May 16, 2015) at 1 ("[W]e question whether overseas actions to achieve quotas differ from those in Japan. Westinghouse was included as a potential investigation target, but we still see risk of uncertainty because it was not actually subject to investigation."); Mitsubishi UFJ Morgan Stanley, *Independent Committee plans to report in mid-July; Securities filing deadline extended by two months* (May 29, 2015) at 1 ("We will probably have to wait to hear the conclusions of the independent investigation committee to find out if there are problems at Westinghouse."); UBS, *The heart of the matter* (June 10, 2015) at 1 ("When we discuss Toshiba's accounting irregularities with investors, interest centers on whether Westinghouse assets will be impaired.").

[11] *See, e.g.,* Macquarie Research, *Set to clean the slate* (July 21 2015) at 2 ("We continue to see risk of further provisioning in FY3/16-19 related to cost overruns, notably in the AP1000 projects in the US[9]"); UBS, *Still stuck* (July 21, 2015) at 3 ("We believe the probability has increased of the Westinghouse impairment risk that we have been concerned with not being taken care of now. . . . [W]e believe there is a high probability that there has been no improvement since the time of the acquisition and that operations are below levels planned at that time.").

Explanation of past profits/losses at Westinghouse on shaky ground

> We note that certain aspects of the report's content differ from Toshiba's own past explanations of profit fluctuations. We take for example Westinghouse (WEC), mentioned as Project G on page 27. Based on Toshiba's previous explanation, we understand that a total of JPY30bn in additional costs related to WEC were posted: JPY10bn in 2Q and JPY20bn in 3Q FY3/14. Moreover, Toshiba wrote down the South Texas Project, an overseas nuclear power project operated independently of WEC, by JPY30bn in 4Q FY3/14. This caused a total impact on the overseas nuclear power business from one-time factors of JPY60bn. However, according to the investigation report, WEC reported to Toshiba that the risk of additional cost was $385mn in 2Q and $401mn in 3Q for a total of $786mn. ***The amount of costs recognized in each quarter and their accompanying explanation differ considerably, raising the possibility that Toshiba misled investors on the actual situation in the nuclear power business.***

Mitsubishi UFJ Morgan Stanley, *Hit to net assets may be up to JPY448.2bn; risk of capital increase a concern* (July 21, 2015) at 1.

92. In another July 21, 2015 research report, UBS similarly noted that:

> [I]n business plans unveiled in FY06, immediately after the acquisition, company targeted FY15 sales for the overall nuclear

> business (Toshiba + Westinghouse) of ¥700bn. However, we estimate that actual sales have remained at about ¥600bn. Furthermore, the OPM target for Westinghouse was 12%, much higher than at the time of acquisition (7%), and here too the business has likely fallen short. We believe the only way that Toshiba can convince equity markets that there is no need to write down the value of the business despite it being below medium-term business plan targets and despite the unforeseen nuclear accident in FY11 is to disclose absolute earnings levels.

UBS, *Still stuck* (July 21, 2015) at 3.

93. When Toshiba provided its initial outline of the restatement on August 18, 2015, it sought to address concerns like those raised by Macquarie Research and UBS by telling investors that no impairment charges had been taken because Westinghouse had performed as expected since the acquisition, achieving cumulative earning before interest, taxes, depreciation, and amortization ("EBITDA") of ¥370 billion since 2006. Toshiba assured investors that goodwill had been repeatedly tested for impairment and nothing had been detected to indicate even a "potential" for impairment. On an August 18, conference call, Kubo told investors that annual impairment testing of Westinghouse's goodwill had been conducted every year since the acquisition, and there had been "no change" and "no event [that] happened" to show any impact on goodwill.

94. When Toshiba issued its FY14 and restated FY09-3Q14 financial results on September 7, 2015, it confirmed that no goodwill impairment charge would be included in either the restated or current results. Investors were buoyed by the assurances that Westinghouse's business had remained strong through the meltdowns in the financial markets and at Fukushima. Although the market continued to question whether future write-downs would be required in light of the continuing high valuation placed on Westinghouse in Toshiba's books, the assurances that no past write-downs had been required led investors to believe that any write-down, should one be required, would be relatively slight.[12]

95. However, when Toshiba issued its 2Q15 financial results on November 6, 2015, it admitted, for the first time, that Westinghouse itself had taken goodwill impairment charges in FY12 and FY13. On a conference call the same day, Toshiba spokesman, CFO Masayoshi Hirata acknowledged that the

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[12] *See, e.g.,* SMBC Nikko, *NAND slowdown in 1H andfull-FY3/16 could dent core profits* (Sept. 16, 2015) at 6 (even though "Mumors abound concerning the risk of impairment losses at nuclear power-related US subsidiary Westinghouse (WEC)" based on Toshiba's description of its nuclear power business "the risk from WEC write-downs is relatively minor."); UBS, *Disappointing Results* (Sept. 14, 2015) at 2 ("A key point for the company's irregular accounting issue was whether Westinghouse's assets would be impaired or not. No impairment loss was taken and the company has only recorded ¥528.2bn (UBS estimate) in related intangible assets on its balance sheet. However, the impression given is that impairment was not recorded this time but has not been ruled out going forward, and the market has not likely entirely disregarded the risk of impairment losses.").

impairment charges were "not fully disclose[d] in the past on the side of the Westinghouse."

96. According to a November 17, 2015 Nikkei Business report:

> The write-downs were first discovered by Nikkei Business in Toshiba internal e-mails and documents, and Toshiba did not disclose them until questioned by Nikkei Business reporters. In response to the newly revealed accounting issues, the Tokyo Stock Exchange is launching a probe.

Apx. Ex. 9.

97. When Toshiba first disclosed the existence of the impairment charges, it refused to quantify the amounts. On November 12, 2015, however, Nikkei Business reported that Westinghouse had written down its assets by $926 million in FY 12 and $400 million in FY13. On November 13, 2015, Toshiba issued a press release confirming the amounts of the impairment charges. These developments stunned investors:

> The report comes after Toshiba said in July that Westinghouse was more profitable today than when Toshiba bought it in 2006. It could be a sign that Toshiba is yet to draw a line under its $1.3 billion accounting scandal.
>
> * * *
>
> The writedowns mainly reflected sluggish demand for new nuclear power plants, the report said, citing Toshiba's internal documents. The Japanese laptops-to-nuclear

> conglomerate does not disclose results for the nuclear power business alone.

Reuters, *Toshiba's Westinghouse unit booked losses in 2012, 2013 - report* (Nov. 12, 2013).

98. By the close of trading on November 12, Toshiba shares had fallen more 11% below their closing price on November 5, before the impairments were revealed. As the *Wall Street Journal* reported on November 13, 2015:

> Toshiba Corp. shares fell sharply Friday after the Japanese electronics and industrial giant said its U.S. nuclear business, Westinghouse Electric Co., booked $1.3 billion in impairment charges, raising investor concerns about a new phase in a drawn-out accounting scandal.
>
> It was the latest in a series of unusual financial disclosures that have shaken investor trust, even after Toshiba overhauled its board and senior management this summer to try to move on from the scandal.
>
> Toshiba said at an earnings briefing last weekend that Westinghouse's plant construction business stalled after the Fukushima nuclear disaster in Japan four years ago, but didn't reveal the amount written down until late Thursday. The company confirmed the $1.3 billion impairment charges, which took place during the 2012 and 2013 fiscal years, after a report in Japanese magazine Nikkei Business.

> "It's a big amount," said Naoki Fujiwara, fund manager at Shinkin Asset Management. "It would have been fairer had they disclosed that from the beginning."

Wall Street Journal, Toshiba Shares Dive as Westinghouse Disclosure Spooks Investors (Nov. 13, 2015).

V. FRAUDULENT STATEMENTS, OMISSIONS & COURSE OF BUSINESS DURING THE CLASS PERIOD

99. During the Class Period, Toshiba made at least three types of materially and misleading statements and omissions: (i) false financial statements that misrepresented the Company's financial results and financial condition (*infra* §V.A.); and the impairment of the goodwill associated with Toshiba's acquisition of Westinghouse *(infra* §V.B.); and (iii) misrepresentations about the existence and effectiveness of internal controls to detect or prevent the misrepresentation of financial results or other information about the Company's operating results and condition *(infra* §V.C.*)*.

A. False Financial Statements

100. As a result of the improper and inaccurate accounting described herein, Toshiba's quarterly and annual earnings reports included numerous materially false and misleading statements about its financial condition and results. These statements were made in the press releases, conference calls, and presentation materials Toshiba issued to report its earnings, and in the quarterly and annual reports it filed with the FSA and SESC.

101. The Company's financial results were initially reported in quarterly earnings releases issued about a month after the end of the quarter for the first three quarters of the year, and about two months after the end of the fiscal year. These releases consisted of two parts: (i) a press release describing Toshiba's financial results for the period, and (ii) a set of presentation slides used at the quarterly conference calls Toshiba hosted to discuss its results with analysts and investors. References herein to earnings releases refer collectively to both parts. Toshiba issued both English and Japanese versions of each earnings release.

102. The Company's financial results were also reported in the quarterly and annual reports that Toshiba was required to file with the FSA and SESC. The reports were signed by Nishida and Sasaki in FY11-FY13, and by Masashi Muromachi and Tanaka in FY14. Toshiba's annual reports were also issued in two parts: an Operational Review containing the CEO's report and a narrative description of the Company and its business; and a Financial Review containing the Company's financial statements. References herein to annual reports refer collectively to both parts. Toshiba issued its quarterly and annual reports in both Japanese and English.

103. According to Toshiba's Disclosure Policy, before the Company's earnings releases, annual and quarterly reports, and other disclosure materials were released they were reviewed and approved by the Company's Finance & Accounting Division, Legal Affairs Division, Corporate Communications Division, and then by the Company's executive officers. The materials were also discussed with the Board of

Directors before being publicly released. Pre-announcements of earnings, dividend payments, and earnings forecasts were specifically approved by the Board of Directors before being released.

104. The quarterly and annual reports were filed on the Tokyo stock exchange's Electronic Disclosure for Investors Network ("TDnet"). Pursuant to JFIEA Art. 25, copies of the annual reports were made available for public inspection for a period of five years from the date of filing on TDnet, and copies of the quarterly reports were made available for public inspection for a period of three years from the date of filing. The Company's Disclosure Policy states that "Toshiba makes full use of the electronic facilities provided by the Tokyo stock exchange's TDnet. Information disclosed on TDnet is also promptly disclosed via other media, including the Toshiba Web site and direct e-mail." The policy states that Toshiba "makes every effort to assure full disclosure to investors by appropriate methods." Pursuant to this policy, Toshiba's annual and quarterly reports, earnings releases, investor presentations, financial statements, and other information were published and continuously made available for viewing and download on the investor relations portion of the Company's website.

105. On the day that each earnings release was issued, Toshiba also hosted a conference call to discuss the Company's financial results with investors and analysts. During the Class Period, Kubo or another senior executive of Toshiba began each call with a power point presentation and discussion of the Company's financial results for the quarter. Toshiba provided an interpreter for the call,

who was present on the live call and provided spoken translations of the statements into English. The calls were publicized in advance by the Company, and written transcripts of the call were published and disseminated by Thomson Reuters and other sources.

106. The contents of the Company's earnings releases, annual and quarterly reports, and other information published on its website and disclosed on its conference calls was disseminated further by news organizations, financial analysts, investor websites, and other sources of information for investors and, as a result, the information communicated in the Company's statements became widely available to investors and reflected in the market price for Toshiba securities.

107. Toshiba's annual and quarterly financial reports misrepresented the Company's net sales and operating income and other financial results and metrics derived therefrom, as described below. Net sales and operating income were the basic key performance indicators that the Company and its management used to assess its performance, as the Company told investors in its FY12 and FY13 annual reports.

108. The misstatement of net sales and operating income in turn caused numerous other statements included with Toshiba's financial results to be materially false and misleading, including Toshiba's segment results as well as the three other key performance indicators identified by Toshiba's annual reports: operating income ratio (ratio of operating income to net sales), shareholders' equity ratio (ratio of equity attributable to shareholders of

the Company to total assets), and debt-to-equity ratio.

109. The accounting practices that caused Toshiba's net sales, operating income, and other financial results and metrics to be falsely reported are described in the IIC report (Apx. Ex. 1) and summarized in §VI below.

110. The facts giving rise to a strong inference of scienter are detailed in the IIC report and the Company's admissions of wrongdoing, as described in §IV, *supra* and §VI, *infra.* In particular, the improper accounting resulted from acts that were intended to conceal Toshiba's true financial condition and results by delaying recognition of losses, expenses, and required charges. Toshiba deliberately used accounting methods that its senior executives knew to be improper, leading to the publication of financial results that were known to be inaccurate at the time they were issued. The false accounting was systemic to the business and was directed or knowingly permitted by Tanaka, Sasaki and Nishida during the time periods when they served as Toshiba's CEO and numerous other senior Company executives. The false financial information resulted from earnings requirements imposed on Toshiba's business units that Toshiba executives knew were unattainable without falsifying the entities financial results.

1. False Annual Financial Reports

111. Toshiba's annual earnings reports for FY11, FY12, and FY13 were published in the following earnings releases and annual reports that were issued during the Class Period and that falsely

reported the following amounts of net sales and operating income:

Class Period Annual Financial Reports				*(¥ billions)*
Period	**Type**	**Date**	**Net Sales**	**Op. Income (loss)**
FY11	Release	May 8, 2012	6,100.3	206.6
	Report	June 22, 2012	6,100.3	206.6
FY12	Release	May 8, 2013	5,800.3	194.3
	Report	June 25, 2013	5,800.3	194.3
FY13	Release	May 8, 2014	6,502.5	290.8
	Report	June 25, 2014	6,502.5	290.8

112. The Company's Class Period annual reports and earnings releases incorporated or referenced the Company's FY08, FY09, and FY10 financial results, which were originally reported in the following earnings releases and annual reports that falsely reported the following amounts of net sales and operating income:

Pre-Class Period Annual Financial Reports				*(¥ billions)*
Period	**Type**	**Date**	**Net Sales**	**Op. Income (loss)**
FY08	Release	May 8, 2009	6,654.5	(343.6)
	Report	June 24, 2009	6,654.5	(343.6)
FY09	Release	May 7, 2010	6,381.6	117.2
	Report	June 23, 2010	6,381.6	117.2
FY10	Release	May 9, 2011	6,398.5	240.3
	Report	June 22, 2011	6,398.5	240.3

113. The Company's FY08, FY09, and FY10 net sales and operating income, along with other pre-Class Period financial data, was presented in the Company's Class Period financial statements as bases for investors to compare the Company's results or understand business trends across multiple earnings periods. Toshiba's FY08, FY09, and FY10 earnings releases and annual reports remained available for public inspection and continued to be made available for viewing or downloading on Toshiba's website during the Class Period.

114. The false financial information in Toshiba's FY09 and FY10 reports was not corrected prior to the commencement of the Class Period. At the outset of the Class Period, Class members therefore did not know, and could not in the exercise of reasonable diligence have discovered, that the information in those releases and reports was materially false, or had been based on deliberate manipulations of accounting practices for the purpose of concealing losses and improving reported results. As a result, the uncorrected false information that predated the Class Period remained alive in the market and continued to mislead investors during the Class Period.

115. Toshiba's financial reports from FY09 through 3Q14 misrepresented its net sales, operating income, and other financial results and metrics by at least the amounts of the Company's restatement, as summarized in the following chart issued by the Company on September 7, 2015.[13]

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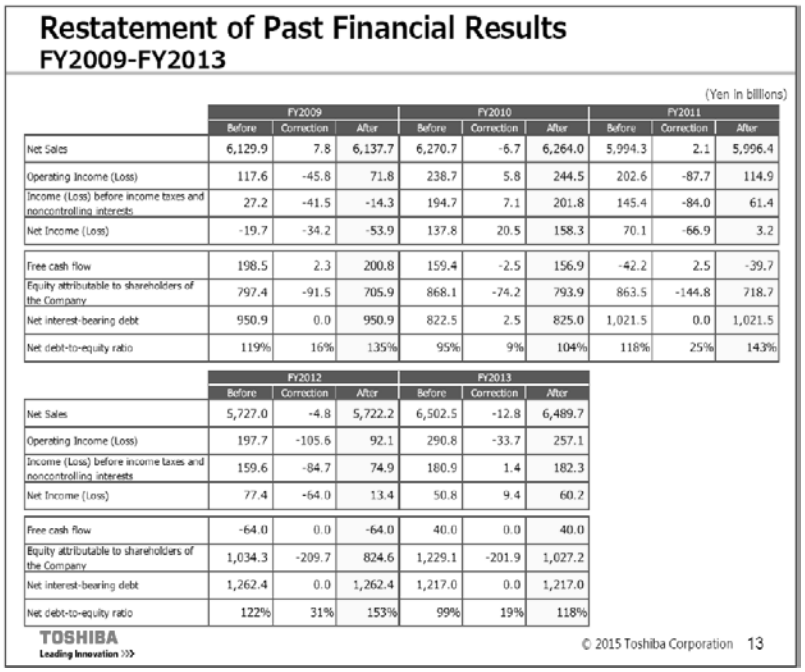
[13] The "before" figures in the chart below do not precisely match the previously reported results because, in preparing the



Restatement of Past Financial Results
FY2009-FY2013

(Yen in billions)

	FY2009			FY2010			FY2011		
	Before	Correction	After	Before	Correction	After	Before	Correction	After
Net Sales	6,129.9	7.8	6,137.7	6,270.7	-6.7	6,264.0	5,994.3	2.1	5,996.4
Operating Income (Loss)	117.6	-45.8	71.8	238.7	5.8	244.5	202.6	-87.7	114.9
Income (Loss) before income taxes and noncontrolling interests	27.2	-41.5	-14.3	194.7	7.1	201.8	145.4	-84.0	61.4
Net Income (Loss)	-19.7	-34.2	-53.9	137.8	20.5	158.3	70.1	-66.9	3.2
Free cash flow	198.5	2.3	200.8	159.4	-2.5	156.9	-42.2	2.5	-39.7
Equity attributable to shareholders of the Company	797.4	-91.5	705.9	868.1	-74.2	793.9	863.5	-144.8	718.7
Net interest-bearing debt	950.9	0.0	950.9	822.5	2.5	825.0	1,021.5	0.0	1,021.5
Net debt-to-equity ratio	119%	16%	135%	95%	9%	104%	118%	25%	143%

	FY2012			FY2013		
	Before	Correction	After	Before	Correction	After
Net Sales	5,727.0	-4.8	5,722.2	6,502.5	-12.8	6,489.7
Operating Income (Loss)	197.7	-105.6	92.1	290.8	-33.7	257.1
Income (Loss) before income taxes and noncontrolling interests	159.6	-84.7	74.9	180.9	1.4	182.3
Net Income (Loss)	77.4	-64.0	13.4	50.8	9.4	60.2
Free cash flow	-64.0	0.0	-64.0	40.0	0.0	40.0
Equity attributable to shareholders of the Company	1,034.3	-209.7	824.6	1,229.1	-201.9	1,027.2
Net interest-bearing debt	1,262.4	0.0	1,262.4	1,217.0	0.0	1,217.0
Net debt-to-equity ratio	122%	31%	153%	99%	19%	118%

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2. False Quarterly Financial Reports

116. The quarterly earnings reports Toshiba issued during the Class Period falsely reported the following amounts of net sales and operating income:[14]

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chart, the Company did not revise or reclassify prior results to reflect subsequent discontinuation of businesses, changes in the organization of its segments, or a change in the allocation method for administrative and overhead expenses.

[14] The 1Q reports were typically filed in the first week of August. However, the dates of the 1Q12 and 1Q13 reports are

Class Period Quarterly Financial Reports				*(¥ billions)*
Period	**Type**	**Date**	**Net Sales**	**Op. Income (loss)**
1Q12	Release	July 31, 2012	1,268.9	11.5
	Report	Aug.__ , 2012	1,268.9	11.5
2Q12	Release	Oct. 31, 2012	1,417.0	57.5
	Report	Nov. 13, 2012	1,417.0	57.2
3Q12	Release	Jan. 31, 2013	1,357.1	29.3
	Report	Feb. 8, 2013	1,357.1	29.6

Class Period Quarterly Financial Reports				*(¥ billions)*
Period	**Type**	**Date**	**Net Sales**	**Op. Income (loss)**
1Q12	Release	July 31, 2013	1,390.6	24.3
	Report	Aug.__ , 2013	1,371.1	25.1
2Q12	Release	Oct. 30, 2013	1,648.6	81.3
	Report	Nov. 12, 2013	1,629.6	81.8
3Q12	Release	Jan. 30, 2014	1,549.6	47.7
	Report	Feb. 10, 2014	1,531.3	48.3
1Q14	Release	July 31, 2014	1,408.0	39.5
	Report	Aug. 8, 2014	1,414.0	47.7
2Q14	Release	Oct. 30, 2014	1,700.4	75.6
	Report	Nov. 11, 2014	1,700.0	75.6
3Q14	Release	Jan. 29, 2015	1,607.8	49.7
	Report	Feb. 9, 2015	1,608.0	49.7

117. As with the Company's annual reports, Toshiba's Class Period quarterly earnings releases

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presently unknown because those reports are no longer publicly available.

and reports also included net sales, operating income, and other financial metrics and information that had been falsely reported in prior quarters as bases for investors to compare the Company's results or understand business trends across multiple earnings periods. For the first three quarters of FY12, this included false pre-Class Period information that had been reported in the first three quarters of FY11. In addition, all of the quarterly earnings releases and quarterly reports that Toshiba had issued in FY08, FY09, FY10, and FY11 remained available for public inspection at the outset of the Class Period and continued to be made available for viewing or downloading on Toshiba's website during the Class Period.

118. The false financial information in Toshiba's FY08, FY09, FY10, and FY11 quarterly earnings releases and reports was not corrected prior to the commencement of the Class Period. At the outset of the Class Period, Class members therefore did not know, and could not in the exercise of reasonable diligence have discovered, that the information in those releases and reports was materially false, or had been based on deliberate manipulations of accounting practices for the purpose of concealing losses and improving reported results. As a result, the uncorrected false information that predated the Class Period remained alive in the market and continued to mislead investors during the Class Period.

119. The IIC found that the matters delegated to it for investigation had caused the net sales and net income originally reported in the false earnings releases and false SESC reports to have

been misstated for every quarter between 1Q08 and 3Q14, in at least the following amounts (Apx. Ex. 1 at Ex. 1 (Quarterly Correction List):

¥100 million	**FY08**					**FY09**				
Period	**Q1**	**Q2**	**Q3**	**Q4**	**Year**	**Q1**	**Q2**	**Q3**	**Q4**	**Year**
Sales	--	5	20	15	40	4	(8)	(3)	7	--
Net Profit	31	142	90	20	282	131	167	(13)	115	400
	FY10					**FY11**				
Period	**Q1**	**Q2**	**Q3**	**Q4**	**Year**	**Q1**	**Q2**	**Q3**	**Q4**	**Year**
Sales	1	(54)	--	--	(53)	43	(10)	--	(28)	5
Net Profit	201	(94)	(187)	4	(84)	224	157	(112)	42	312
	FY12					**FY13**				
Period	**Q1**	**Q2**	**Q3**	**Q4**	**Year**	**Q1**	**Q2**	**Q3**	**Q4**	**Year**
Sales	32	5	8	(16)	28	(11)	252	(139)	(24)	78
Net Profit	240	116	131	371	585	(134)	471	(196)	(87)	54
	FY14									
Period	**Q1**	**Q2**	**Q3**	**Q4**	**Year**					
Sales	59	5	8	(16)	52					
Net Profit	(69)	116	131	371	(304)					

120. The actual quarterly misrepresentations were greater than the amounts identified in the chart above, which does not include adjustments required for improper accounting on issues outside of the matters delegated to or specifically investigated by the IIC, alleged above.

B. False Statements About Westinghouse Goodwill Impairment

1. Failure to Disclose or Record Goodwill Impairment Charges in FY 12 and FY13

121. Failure to comply with GAAP. Toshiba's FY12 financial statements falsely reported goodwill and other intangible assets of $9.8 billion (¥919.3 billion) without further disclosure. Toshiba's annual

report stated that "[t]he Group tested goodwill for impairment in accordance with ASC No. 350[15] applying a fair value based test and has concluded that there was no impairment for the years ended March 31, 2013 and 2012."

122. Toshiba's FY13 financial statements falsely reported goodwill and other intangible assets of $9.8 billion (¥1,006.6 billion) without further disclosure. Toshiba's annual report stated that "[t]he Group tested goodwill for impairment in accordance with ASC No.350, applying a fair value based test and has concluded that there was no impairment for the years ended March 31, 2014 and 2013."

123. Westinghouse took goodwill impairment charges of approximately $930 million in FY12 and $390 million in FY13. Toshiba did not include any impairment charge for Westinghouse goodwill in either its FY12 or FY13 annual reports. Neither did Toshiba disclose the goodwill impairment charges that had been taken by Westinghouse until November 2015. After the goodwill impairment charges taken by Westinghouse were revealed, Toshiba asserted that the impairment charges were not required to be taken on a consolidated basis because there were sufficient overall cash flows to support the goodwill on its balance sheet. However, on November 17, 2015 Toshiba admitted that the impairment charges that had been taken by Westinghouse were material and were required to have been disclosed at the time they were taken.

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[15] Accounting Standard Codification ("ASC") Topic 350, *Intangibles-Goodwill and Other*.

124. Toshiba's recent assertions that GAAP did not require the Westinghouse impairment charges to be taken at the corporate level and reflected in Toshiba's consolidated financial statements are conclusory and insufficiently particularized to establish that this is, in fact, correct. Toshiba had both the motive and opportunity to manipulate its financial reporting in a manner that was designed to avoid recording the impairment charge at the corporate level, including by manipulating the segments and reporting units used to evaluate the impairment, and falsifying actual or projected earnings at Westinghouse or other business units in a manner designed to avoid recording an impairment.

125. Toshiba's efforts to avoid taking a charge at the subsidiary level and then to prevent public disclosure of the charges after they were taken, together with the other deliberate and extensive manipulations of reported revenues and earnings designed to avoid negative charges on the Company's financial statements, render Toshiba's recent assertions of GAAP compliance uncredible. Toshiba's FY12 and FY13 annual reports were materially false and misleading to investors to the extent that the reported goodwill amounts (¥1,006.6 billion for FY13) were not stated in compliance with GAAP.

126. **Omission of impairment charges taken by Westinghouse**. Toshiba's omission to disclose the impairment charges taken by Westinghouse in FY12 and FY13 was also materially misleading to investors. At the time of the Westinghouse acquisition, Toshiba projected that the transaction

would enable it to secure contracts to build over 30 new reactors and increase revenue to ¥1 trillion by FY15. By 2015, however, Toshiba had won only ten contracts for new nuclear plants. A decline in cash flows resulting from the failure to secure new contracts and project delays on other contracts was the primary reason that E&Y's U.S.-based auditors required an asset write-down in FY13, according to a November 17, 2015 Nikkei Business article based on internal Toshiba documents. Apx. Ex. 9.

127. To avoid recording the FY13 impairment charge on its consolidated financial statements, Toshiba changed the way it valued goodwill by combining Westinghouse with its nuclear business in Japan for valuation purposes, and then valuing the business based only on its own internal projections of earnings, which were (as the other accounting fraud described herein illustrates) easily manipulated. *See* Apx. Ex. 9. Avoiding the charge at the corporate level was necessary to protect Toshiba from having to cancel payment of its annual cash dividend or breach the debt covenants in the agreements covering its ¥600 billion in long-term debt. Taking the charges - or even disclosing that the charges had been taken at Westinghouse - also would have alerted investors to the magnitude of the business decline in the wake of the March 11, 2011 accident at the Fukushima Daiichi nuclear reactor, causing a substantial decline in Toshiba's stock price.

128. **Materially incomplete disclosures about Shaw Group put option**. Toshiba's FY11 annual report stated the following with respect to the Shaw Group's exercise of its put option:

> In December 2011, The Shaw Group Inc. announced that its put options to sell to the Group all or a part of its stake in the holding companies of Westinghouse Electric (20% of the holding companies of Westinghouse Electric) which are currently held by Nuclear Energy Holdings LLC, a wholly owned subsidiary of the Shaw Group Inc., the announcement of which was made in September 2011, will be exercised automatically in October 2012 in accordance with the contractual terms between Shaw Group and the Group because it did not receive the consent from the third party in order to exercise its put options. In the case such put options are exercised, the Group will seek for the participation of new strategic partner in investment in Westinghouse, however the Group may bear substantial amount of investment funds during the period from January 2012 when the Group acquires the stakes to the time of such investment by new strategic partner. Several companies have already expressed an interest in investing in Westinghouse and it remains open to the idea of inviting the participation of new investors in Westinghouse, if the Company and such potential investors could share a long-term vision and business strategy with respect to Westinghouse business.

129. Following Toshiba's acquisition of the Shaw Group's stake in Westinghouse, Toshiba's ownership interest in Westinghouse stood at 87%. Toshiba's FY12 cash flow statement reflected the $1.3 billion (¥124.7 billion) purchase of the Shaw Group

interest. The FY12 annual report continued to state that:

> Several companies have already expressed an interest in investing in Westinghouse and the Company is considering inviting the participation of new investors in Westinghouse, on the condition that the Company retains a majority-in-interest.

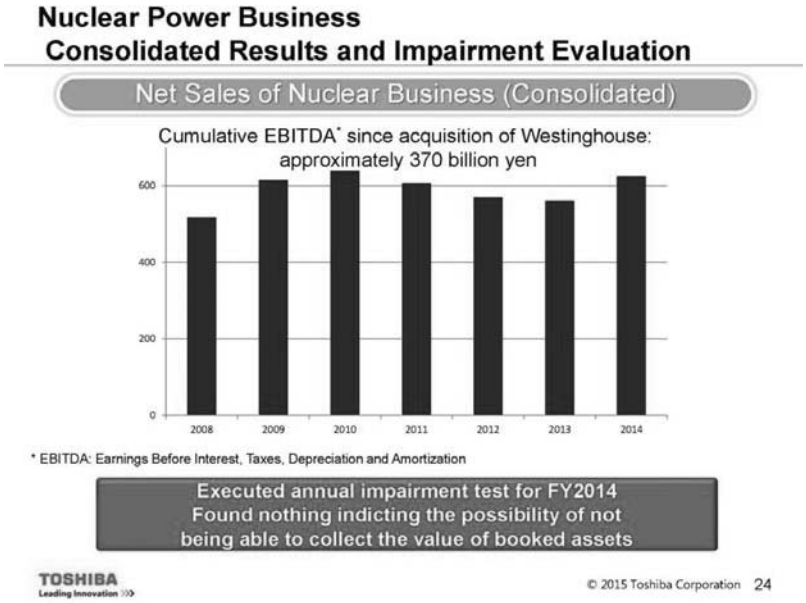
130. Toshiba did not sell the Westinghouse stake acquired from the Shaw Group, or any other portion of its Westinghouse ownership interests, to a new investor. The note about the expressions of outside interest in acquiring a stake in Westinghouse was not included in the notes to Toshiba's FY14 financial statements. The most likely reason that Toshiba failed to sell any part of its Westinghouse stake to outside investors is that the offers to acquire the Westinghouse interests were at a value below that reflected on Toshiba's financial statements, such that accepting the offer would have required Toshiba to test and likely write-down the value of the Westinghouse goodwill on its financial statements. *See* ASC Topic 350-20-35-22 (quoted market prices are best evidence of fair value and should be used as basis for measurement where available).

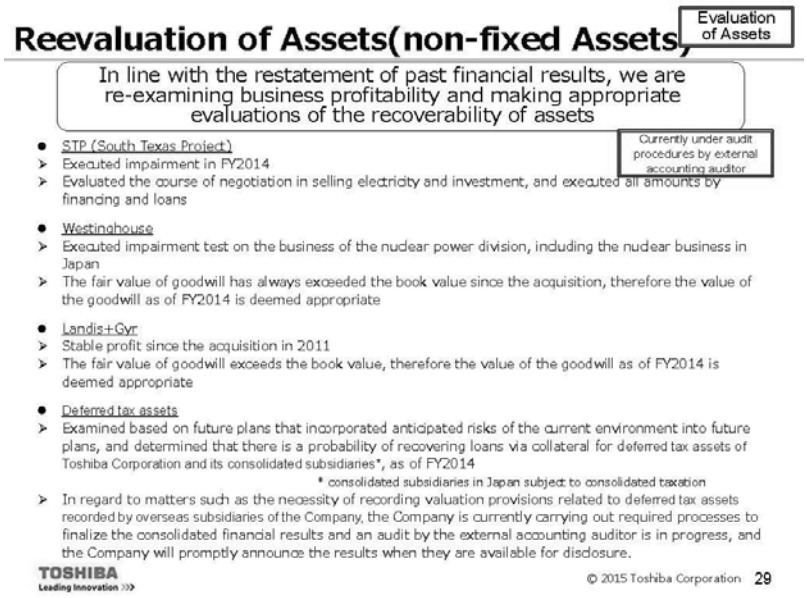
131. The statements about the acquisition and potential resale of the Shaw Group interests were materially misleading to investors in the absence of disclosure of the significant goodwill impairment charges that had been taken at Westinghouse. The concealment of the impairment charges, together with Toshiba's failure to reflect those charges on its consolidated financial statements

and its assertions about the interest expressed by outside investors were designed to, and did, falsely assure investors about the strength of Westinghouse's business and the adequacy of support for the values ascribed to Westinghouse in Toshiba's consolidated financial statements.

2. Continuing Concealment of Goodwill Impairment Charges During 2015 Investigations of Accounting Fraud

132. When Toshiba released its preliminary restatement on August 18, 2015, it told investors that no impairment charges had been required for the goodwill booked on the Westinghouse acquisition. A power point presentation that Toshiba provided to investors along with its August 18 press release included the following two slides:





Reevaluation of Assets(non-fixed Assets)

Evaluation of Assets

In line with the restatement of past financial results, we are re-examining business profitability and making appropriate evaluations of the recoverability of assets

Currently under audit procedures by external accounting auditor

- STP (South Texas Project)
  - Executed impairment in FY2014
  - Evaluated the course of negotiation in selling electricity and investment, and executed all amounts by financing and loans
- Westinghouse
  - Executed impairment test on the business of the nuclear power division, including the nuclear business in Japan
  - The fair value of goodwill has always exceeded the book value since the acquisition, therefore the value of the goodwill as of FY2014 is deemed appropriate
- Landis+Gyr
  - Stable profit since the acquisition in 2011
  - The fair value of goodwill exceeds the book value, therefore the value of the goodwill as of FY2014 is deemed appropriate
- Deferred tax assets
  - Examined based on future plans that incorporated anticipated risks of the current environment into future plans, and determined that there is a probability of recovering loans via collateral for deferred tax assets of Toshiba Corporation and its consolidated subsidiaries*, as of FY2014

    * consolidated subsidiaries in Japan subject to consolidated taxation
  - In regard to matters such as the necessity of recording valuation provisions related to deferred tax assets recorded by overseas subsidiaries of the Company, the Company is currently carrying out required processes to finalize the consolidated financial results and an audit by the external accounting auditor is in progress, and the Company will promptly announce the results when they are available for disclosure.

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133. On the August 18, 2015 conference call, Toshiba CEO Muromachi explained the slides as follows:

> Compared to the time of the acquisition of Westinghouse in 2006, EBITDA has reached – accumulated JPY370 billion, since its acquisition.
>
> In terms of the impairment evaluation of Westinghouse goodwill, we are conducting impairment tests every year for there was no change or no event happened to confirm that the - there was not the impact on the book value of the asset. We will continue to have the strict test carried out with the audit house.

134. When Toshiba issued its restated financial results on September 7, 2015 it did not include any charges in any period reflecting the

impairment of Westinghouse goodwill. Neither did Toshiba disclose the goodwill write-downs that had been taken by Westinghouse in FY12 and FY13.

135. Toshiba's deliberate omission to disclose the $1.3 billion in write-downs that had been taken of Westinghouse goodwill in FY12 and FY13 was materially misleading to investors, particularly given the contemporaneous circumstances surrounding the investigation into Toshiba's accounting fraud, the restatement of its results for those fiscal years, and the heightened investor concern over the potential impairment of Westinghouse goodwill.

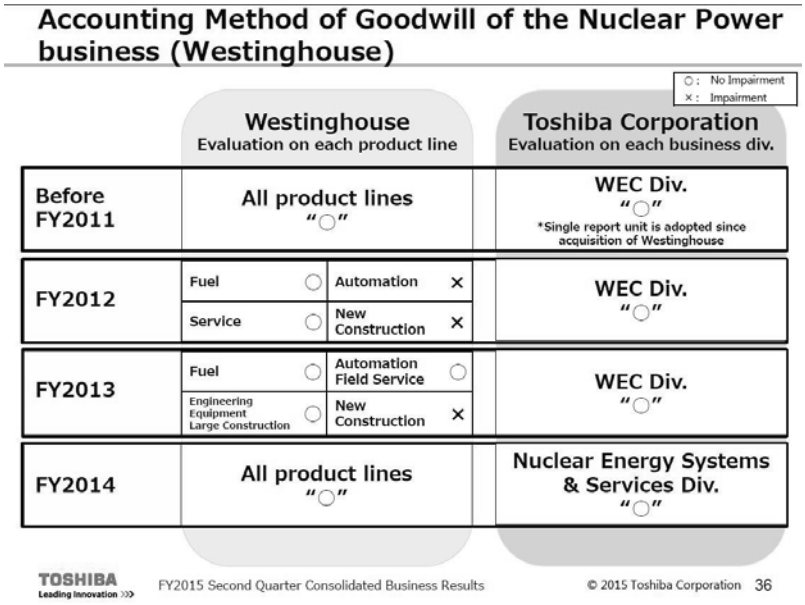
136. Toshiba's statements in the August 18, 2015 presentation materials showing the growth in EBITDA resulting from the Westinghouse acquisition and its assurances that it had "[f]ound nothing indicating the possibility" of an impairment charge were highly misleading to investors in the absence of a disclosure of the $1.3 billion in Westinghouse goodwill write-downs, as they presented a misleading picture of financial strength and growth that was at odds with the true condition of Westinghouse's business since the acquisition.

137. The statements that "there was no change or no event [that] happened to confirm" that Westinghouse goodwill was impaired, and that "the fair value of goodwill has always exceeded the book value since the acquisition" were misleading both affirmatively and by omission of the FY12 and FY13 goodwill charges, which demonstrate that there had, in fact, been changes and events that had demonstrated that Westinghouse goodwill was

overstated and had been written down by Westinghouse.

138. Toshiba knew or recklessly disregarded that its statements about Westinghouse goodwill were materially misleading to investors, or would be without disclosure of the $1.3 billion in goodwill write-downs that they knew had been taken in FY12 and FY13. Throughout the disclosures of the findings from the fraud investigations, Toshiba studiously avoided disclosing the historical charges against Westinghouse goodwill, even as the Company was assuring investors that it was providing complete disclosure in an effort to restore shareholder confidence and trust in the Company. When the goodwill charges were revealed in its 2Q15 earnings report, Toshiba then took the unusual step of holding its earnings conference call on a Saturday, hoping that the weekend disclosure would blunt market reaction to the announcement.

139. In its November 7, 2015, conference call with investors at which the goodwill write-downs had been taken, Toshiba spokesman Hirata, using the slide reproduced below, acknowledged that the Company had "not fully disclose[d] in the past" the circumstances surrounding the evaluation or need to write-down Westinghouse goodwill.



140. After directing investors to the chart above, Hirata stated:

> This slide, I believe will help you better understand the overall stations in terms of impairment, which I'm afraid we did not fully disclose in the past on the side of the Westinghouse. So I would like to now go through this conceptual graph to help your better understanding. The left is the Westinghouse stand-alone and the right is Toshiba on a consolidated basis. Westinghouse in the left shows it has four product lines on its own. As on FY 2012 Fuel, Automation Services, and New Construction, as of FY 2013, Fuel, Automation Field Services and Engineering Equipment and the Large Construction and the New Construction. So these are the four operating lines in operation

> even before the acquisition which took place back in 2006.
>
> Westinghouse had believed that impairment should be recorded by each line after the M&A done. So in FY 2012 impairment, we had impairments recorded in Automation and in New Construction and in FY 2014, in New Construction.

141. Toshiba did not disclose the amount of the impairment charges until November 13, 2015, when it issued a press release generally confirming the amounts reported the prior day by the Nikkei Business journal.

142. Toshiba contended on the November 7 conference call and in its November 13 press release that the goodwill impairment reflected on Westinghouse's books was not required to be taken at the corporate level. Westinghouse's contentions are not credible in light of the Company's repeated misrepresentations about the accuracy of its accounting. *Infra* §VI. Even if Toshiba was correct that goodwill was not impaired at the corporate level, the failure to disclose the historical impairment charges that had been taken by Westinghouse was misleading, particularly in light of the statements the Company had made when the restatement was announced about the historical performance and financial condition of Westinghouse since the acquisition.

143. Toshiba's efforts to conceal the write-downs at Westinghouse were deliberate, and designed to prevent investors from discovering the significant difficulties being experienced in its

nuclear business. As the November 17, 2015 Nikkei Business article reported:

> Toshiba has been consistently upbeat regarding its nuclear power business until now. But it has become clear that there is a gap between the company's public statements and its actual state of affairs.

Apx. Ex. 9.

144. Toshiba had significant motives to avoid taking required write-downs of the Westinghouse goodwill or disclosing the goodwill write-downs that Westinghouse itself had taken. As alleged above, writing down goodwill would have: (i) reduced earnings at a time when Toshiba was engaging in widespread accounting fraud to avoid reporting any negative earnings; (ii) given rise to potential liquidity problems arising from breaches of debt covenants attached to the debt it had incurred in acquiring Westinghouse; (iii) forced cancellation of the Company's payment of an annual dividend to investors; and (iv) required Toshiba to acknowledge that it had paid too much for the acquisition, and that Westinghouse's business had suffered to a far greater extent than was revealed following the Fukushima disaster in FY11.

C. False Statements About Internal Controls

145. Each of the operational review portions of the annual reports issued by Toshiba during the Class Period contained the following statement:

Toshiba's Internal Control Systems

Toshiba Group constantly refines its system of internal controls, towards ensuring management effectiveness and efficiency and reliable reporting on operations and finances, and to secure high level legal compliance and risk management.

We also ensure that domestic Group companies, regardless of the scale of their operations, establish internal control systems based on those of the parent company.

The following website provides detailed information on the structure of our internal control systems. http://www.toshiba.co.jp /about/ir/en/governance/governance_ system.htm

2012 Annual Report Operational Review at 46; 2013 Annual Report Operational Review at 44; 2014 Annual Report Operational Review at 60.

146. The financial review portion of Toshiba's annual reports issued during the Class Period each contained the following statement regarding the risks related to internal control:

Compliance and internal control

The Group is active in various businesses in regions worldwide, and its business activities are subject to the laws and regulations of each region. The Group has implemented and operates necessary and appropriate internal control systems for a number of purposes, including compliance with

> laws and regulations and strict reporting of business and financial matters.
>
> However, there can be no assurance that the Group will always be able to structure and operate effective internal control systems. Furthermore, such internal control systems may themselves, by their nature, have limitations, and it is not possible to guarantee that they will fully achieve their objectives. Therefore, there is no assurance that the Group will not unknowingly and unintentionally violate laws and regulations in future. Changes in laws and regulations or changes in Management's Discussion and Analysis interpretations of laws and regulations by the relevant authorities may also cause difficulty in achieving compliance with laws and regulations or may result in increased compliance costs. On these grounds, the Group makes every effort to minimize these risks by making periodic revisions to the internal control systems, continuously monitoring operations, and so forth.

2012 Annual Report Financial Review at 16; 2013 Annual Report Financial Review at 16; 2014 Annual Report Financial Review at 15.

147. The operational review portion of Toshiba's 2012, 2013, and 2014 annual reports also contained the following statement, or a substantially identical statement:

Risk Management

At Toshiba, throughout our worldwide operations, we strive to ensure compliance with laws and regulations, social and ethical norms and internal rules. According top priority to human life and safety and to compliance in everything we do underpins our commitment to promoting business activities through fair competition and serving the interests of customers to the best of our ability.

We consider thorough adherence to the Toshiba Group Standards of Conduct (SOC), which embodies the Basic Commitment of the Toshiba Group, to be the foundation of our compliance. Thus we are working toward the SOC becoming an integral part of the entire Toshiba Group. Every year, priority themes regarding compliance are established and promoted in light of business circumstances. By implementing a Plan-Do-Check-Action (PDCA) cycle of self-assessment, not only at each in-house company but also at group companies worldwide, we are stepping up our efforts to ensure compliance.

The Risk Compliance Committee, headed by the CRO [Chief Risk Compliance Management Officer], manages serious risk and compliance issues and works with the relevant divisions to strengthen the risk management system by developing countermeasures to specific risks, plus measures to prevent their spread and recurrence.

2012 Annual Report Operational Review at 46; 2013 Annual Report Operational Review at 44; 2014 Annual Report Operational Review at 60.

148. Toshiba's Standards of Conduct were made available to investors on Toshiba's corporate website throughout the Class Period. The Standards of Conduct included the following provisions:

> **13. Accounting**
>
> **1. Toshiba Group Corporate Policy**
>
> Toshiba Group Companies shall comply with all applicable laws and regulations regarding accounting and conduct proper accounts management and financial reporting in accordance with generally accepted principles.
>
> **2. SOC for Toshiba Group Directors and Employees**
>
> Directors and Employees shall:
>
> 1. maintain proper and timely accounts in accordance with generally accepted accounting principles;
> 2. promote the prompt release of accurate accounts; and
> 3. endeavor to maintain and improve the accounting management system, and establish and implement

internal control procedures for financial reporting.

14. Corporate Communications

1. Toshiba Group Corporate Policy

Toshiba Group Companies shall:

1. endeavor to obtain the understanding of stakeholders, including customers, shareholders and the local community, with respect to corporate activities, products and services, and further improve public recognition of Toshiba Group and its corporate image by means of positive and timely corporate communications activities on business information (Note), such as corporate strategy and financial data; and

2. ensure that management policies are well communicated within the company, and promote information sharing as a means of raising morale and creating a sense of unity.

2. SOC for Toshiba Group Directors and Employees

Directors and Employees shall:

1. Conduct corporate communications with integrity on the basis of objective facts;

2. Conduct corporate communications by appropriate means, to enable customers, shareholders, potential investors and the members of the community of each country or region to obtain a reasonable understanding of Toshiba Group's activities; and

3. obtain prior consent from the persons responsible for corporate communications before disclosing business information to analysts and to the media, including newspapers, magazines and television stations.

Note: Herein, "business information" includes but is not limited to information regarding actions or activities which may raise the suspicion of such actions prohibited by these SOC (hereinafter called "Risk Compliance Information").

149. The operational review section of Toshiba's 2012, 2013, and 2014 annual reports stated:

Status of Internal Audits and Audits by the Audit Committee

The Corporate Audit Division . . . reports directly to the president. It is responsible for

> internal audits from the perspectives of appropriate operational procedures, accountability of results and legal compliance.
>
> The Division holds advance discussions with the Audit Committee on each year's audit policy and plans. It also holds semimonthly liaison meetings with the Audit Committee for pre-audit discussions and to share information on the divisions subject to audit.
>
> The Corporate Audit Division carries out on-site inspections and reports its results to the Audit Committee. However, if it deems it necessary, the Audit Committee has the right to carry out its own on-site inspections.
>
> Furthermore, in addition to receiving explanations from independent auditors (CPA) on their audit plans at the beginning of each fiscal year, the Audit Committee can also request reports on the status of audits during the course of each term, and explanations and reports on end-of-year audits, as necessary.

2012 Annual Report Operational Review at 47; 2013 Annual Report Operational Review at 45; 2014 Annual Report Operational Review at 60-61.

150. Each of the foregoing representations was materially false and misleading to investors. Each of the representations falsely assured investors that Toshiba had an adequate and functioning system of internal controls that was reasonably designed to prevent the type of misconduct and accounting fraud herein alleged.

151. The IIC specifically found that a lack of adequate internal controls had caused or permitted the accounting violations to occur. Apx. Ex. 1 at 70-74; *see also id.* at 46-49, 56-58, 78-79. The IIC found that "each internal control system at Toshiba did not function sufficiently," including because "[t]here was no Internal Audit Department at any Company, other than the Accounting Division, such as could check for inappropriate accounting treatment" and the Accounting Division was not doing its job:

> In the case subject to this investigation, accounting personnel knew of a fact that made an accounting treatment necessary, such as recording a provision, but did not take any action, or although they easily could have known of a fact that made a certain accounting treatment necessary, they did not take any action, and further, there were many projects where no action was taken in accordance with the instruction of a superior such as a business unit head or CPs, etc., and the internal control by the Accounting Division was not functioning.

Id. at 70.

152. The IIC found that: (i) Toshiba's Finance Division performed no internal control measures such as checking whether or not accounting treatment was appropriate; (ii) no internal control measures were performed by other corporate divisions tasked with control responsibilities, including the Risk Management Division and the Securities Report, Etc., Disclosure Committee; (iii) the Corporate Audit Division was mainly concerned with providing

management consulting services to Toshiba's business units, and "rarely conducted any services from the perspective of an accounting audit into whether or not an accounting treatment was appropriate"; (iv) internal control measures at the Board of Director level were routinely ignored; and (v) outside auditors were deliberately misled to prevent detection of the Company's fraudulent accounting activities. *Id.* at 70-74.

153. Thus, it was materially false and misleading to investors for Toshiba to assert that:

(a) Toshiba was "constantly refin[ing] its system of internal controls" to assure "reliable reporting on operations and finances, and to secure high level legal compliance and risk management";

(b) Toshiba had "implemented and operates necessary and appropriate internal control systems" to achieve "compliance with laws and regulations and strict reporting of business and financial matters";

(c) The internal controls were functioning in a manner such that only "unknowing[]" and "unintentional[]" violations were at risk of escaping detection, and Toshiba was "mak[ing] every effort to minimize these risks by making periodic revisions to the internal control systems, continuously monitoring operations, and so forth"; or

(d) Toshiba's risk management department was "striving] to ensure compliance with laws and regulations, social and ethical norms and internal rules" by "developing countermeasures to

specific risks" and taking actions designed to require adherence to Toshiba's Standards of Conduct, including standards requiring Toshiba's companies, directors, and employees to "conduct proper accounts management and financial reporting in accordance with [GAAP]," to "establish and implement internal control procedures for financial reporting," and to provide timely and accurate disclosure of Toshiba's business information, including information regarding actions or activities raising suspicions of violations of GAAP or internal control requirements.

154. The accounting fraud perpetrated prior to and during the Class Period was not the type of concealed or difficult-to-detect activity that could escape detection by an adequate and functioning system of internal controls. To the contrary, as found by the IIC, the accounting manipulations were open and obvious, well known to and directed by management, and of a type that could not have been perpetrated if Toshiba had a functioning system of controls. The IIC findings establish a strong inference of scienter on the part of Toshiba and its management:

> At Toshiba, the involvement of certain top management and key executives led to the deviation from and ineffectiveness of the internal control function for financial reporting, with inappropriate accounting treatments then being carried out by instructions, etc. from outside of the internal control framework. It also must be noted that an internal control (risk management) structure that anticipates inappropriate

> accounting treatment being carried out by such persons' involvement had not been established.

Id. at 70.

VI. SUMMARY OF ACCOUNTING FRAUD

155. Toshiba's consolidated financial statements were based on accounting principles generally accepted in the United States (US-GAAP). US-GAAP are those principles recognized by the accounting profession as the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time. The audit reports from Toshiba's independent auditor, Ernst & Young ShinNihon LLC ("E&Y ShinNihon"), which were included within Toshiba's annual reports opined on whether Toshiba's consolidated financial statements were presented fairly, in all material respects, in conformity with US-GAAP.

156. The SIC and IIC investigations focused primarily on, and found repeated instances of fraud in, Toshiba's accounting for POC contracts and the improper recording of revenues and expenses in Toshiba's Visual Products, Semiconductor, and PC businesses, as described below. Apx. Ex. 1 at 13.

157. Toshiba's self check report identified other similar instances of improper accounting, including cases where the Company had improved its operating results by overstating the value of inventory; using outdated (more favorable) currency conversion rates; postponing the recording of advertising, marketing, and other SG&A expenses; understating anticipated warranty expenses and materials costs; failing to recognize incurred labor

costs; and not reporting actual or anticipated contract losses. Apx. Ex. 2-A (Attachment 1 at 2-3).

158. Additional accounting violations were detected by E&Y ShinNihon during the review of Toshiba's FY14 results in connection with the restatement. Apx. Ex. 6. Toshiba has admitted the accounting for the additional violations described in its self check report and detected by E&Y ShinNihon was improper. Toshiba claims to have included a correction of such violations in its restatement.

159. Due to the nature of the fraud and its perpetration on a worldwide basis over a number of years, the internal investigations conducted to date have not yet uncovered all of the instances of improper accounting or the full extent of Toshiba's accounting fraud.

160. In reporting the results of its self check at its June 25, 2015 general meeting, Toshiba cautioned that, due to the geographic and temporal scope of the misconduct and the manner in which it was carried out, the amounts that needed to be corrected due to improper accounting could be incorrect because the financial impact was very difficult to determine, particularly in the Visual Products and PC businesses. Apx. Ex. 3 at 6-7 (amounts difficult to determine because "the volume of transactions requiring examination is massive," "the scale of transactions subject to investigation is expansive," and "the transactions include those involving countries other than Japan").

161. The IIC based its analyses on a limited sampling of Toshiba's accounting during the Class Period. For example, the IIC's analysis of Toshiba's

violations of POC accounting rules was based on reviewing a limited number of POC projects that had been selected from a group of such projects that had (i) been undertaken by Toshiba or eight of its largest subsidiaries and (ii) identified as candidates for review based on the size of the contract, amount of loss, or other criteria. Apx. Ex. 1 at 2223. The IIC similarly limited its review of improper recording of operating expenses and parts transactions in the Visual Products and PC businesses to a subset of transactions selected for review, and did not conduct a complete review of all transactions over the entire time period under study.

162. Thus, the specific cases of improper accounting found by the IIC and SIC or described in Toshiba's self-check report or by its outside auditor only represent examples of the type of misconduct that occurred, and are not a definitive determination of the full nature or extent of Toshiba's fraudulent accounting. Subject to this understanding, examples of the misconduct detected to date are summarized below.

A. False Accounting of Percentage of Completion Contracts

163. POC accounting rules represent an exception to the rule that revenues are to be recognized only after services are performed or products are delivered and the money is earned. POC rules apply to construction and other contracts involving performance over a long period of time, and permit revenues to be recognized throughout the life of the contract in proportion to the amount of services that have been performed *(i.e.,* in proportion to the

percentage of completion of the contract), subject to certain requirements. One of those requirements is that as soon as it becomes apparent that the company will suffer a loss on the contract, the entire expected loss must be recognized, including losses that are expected to be incurred in future quarters as additional (unprofitable) work required by the contract is performed.

164. To inflate reported income, Toshiba understated the estimated costs associated with construction projects accounted for under the POC method. This had the direct effect of overstating revenue and profits associated with the projects, delaying recognition of losses on unprofitable contracts, and overstating the Company's net income during the Class Period.

165. Toshiba's improper accounting violated US-GAAP, including ASC Topic 605-35, *Revenue Recognition [for] Construction-Type and Production-Type Contracts.* Profits reported based on POC accounting must be based on the difference between estimated contract revenues and costs over the life of the contract, not just the revenues and costs incurred as of the date of the reported financial results. ASC Topic 605-35-25-37f, 82. Estimates of the total cost to complete a contract must also be periodically reviewed and revised to reflect new information. ASC Topic 605-35- 25-44e. A provision for loss on the entire contract (not just the portion completed) must be recognized when the estimated cost for the contract exceeds its estimated revenue. ASC Topic 605-35-45-1.

166. The Summary of Significant Accounting Policies in Toshiba's annual reports assured investors that the Company's use of POC accounting was consistent with US-GAAP, including the provisions of ASC Topic 605-35 described above:

> Revenue on long-term contracts is recorded under the percentage of completion method. To measure the extent of progress toward completion, [Toshiba] generally compares the costs incurred to date to the estimated total costs to complete based upon the most recent available information. When estimates of the extent of progress toward completion and contract costs are reasonably dependable, revenue from the contract is recognized based on the percentage of completion. A provision for contract losses is recorded in its entirety when the loss first becomes evident.

See, e.g., 2011 Annual Report Operational Review at 25.

167. The IIC found that Toshiba had manipulated POC accounting rules to overstate profits from FY09 through FY14, primarily by recognizing POC revenues under contracts known to be unprofitable while refusing to recognize anticipated project expenses in order to delay taking required provisions for the expected losses. Apx. Ex. 1 at 19-42. The IIC reported that violations of POC accounting requirements had resulted in an overstatement of pre-tax income of ¥36 billion ($367 million) in FY08, ¥79 billion ($963 million) in FY11, ¥180 billion ($1.915 billion) in FY12, ¥245 billion

($2.379 billion) in FY13, and ¥9 billion ($75 million) in the first three quarters of FY14.

1. Westinghouse ("Project G")

168. The manner in which Toshiba accounted for significant cost overruns on a $7.6 billion power plant construction contract obtained by Westinghouse provides an illustrative example of the type of accounting fraud that was perpetrated during the Class Period. As a result of design changes and construction delays on the project (referred to as "Project G" in the IIC report), Westinghouse reported that it expected to incur additional costs of $385 million in 2Q13 and $401 million in 3Q13. However, Toshiba recorded the risks at just $69 million for 2Q13 and $293 million for 3Q13.

169. According to the IIC report, during the 3Q13 quarterly review, Toshiba's outside auditor "insisted" that Toshiba use the $401 million amount reported by Westinghouse because "there were no specific grounds for the [$293 million] figure adopted by Toshiba." Apx. Ex. 1 at 31. Toshiba refused to do so, and then got the auditor to agree to overlook the misrepresentation by improperly treating it as an immaterial error. Based on the unsubstantiated cost reduction, Toshiba understated its 3Q13 losses from the project by $107 million. The IIC concluded that the unsubstantiated cost reduction was made at the direction of Power Systems Company President Igarashi, and known to Tanaka (Toshiba's President) and Kubo (its CFO) before the financials were released:

> There is a high possibility that the cause of this treatment was that Hisao Tanaka P and

> Makoto Kubo CFO, with an intention to avoid a substantial negative impact that would result from recording losses in the consolidated financial statements for that quarter based on a large increase in the total estimated cost of contract work of Project G in accordance with the estimated increase amount reported by WEC [Westinghouse Electric Co.] and to postpone that until a subsequent period, used an unsubstantiated figure of negative USD 225 million[16] without a detailed statement as grounds for that as an increase in the total estimated cost of contract work.

Id. at 32.

2. Landis + Gyr ("Project H")

170. Another example of the type of fraud committed by defendant is provided by Toshiba's refusal to record losses on a ¥31.9 billion contract (Project H in the IIC report) calling for its Social Infrastructure Systems Company ("SIS Co.") to develop a communication system for utility smart meters, which is referred to as Project H in the IIC report. The contract was being performed by Landis + Gyr, a Swiss subsidiary that Toshiba had acquired in 2012, announcing plans to use the acquisition to enter the U.S. smart home energy market.

171. In September 2013, Toshiba received an order under the contract, on which it immediately

[16] The $225 million was the loss on the project reported in Toshiba's consolidated financial statements based on the understated expenses. Based on the amounts reported by Westinghouse, the actual loss was $332 million, a material discrepancy of $107 million. *See* Apx. Ex. 1 at 31-32.

forecast incurring an ¥8 billion loss. The SIS Co. sought approval for recording contract losses of at least ¥4.2 billion even before the contract was awarded, but Tanaka and Hideo Kitamura refused to permit it to do so. No provision for contract losses was ever recorded.

172. The IIC found that Tanaka, CFO Kubo and other Toshiba executives "were fully aware of the need to record provisions for contract losses in each quarter from [2Q13]." Apx. Ex. 1 at 34. The IIC report stated:

> It can be surmised that both Hisao Tanaka P and Hideo Kitamura GCEO intended to postpone recording a loss. It can also be surmised that no provision for contract losses was recorded in the second quarter of FY 2014 because SIS Company understood from prior statements by P and others that, from the perspective of budgetary control, it would be necessary to generate profits equivalent to such provision to be recorded.

Id. at 33.

3. TIC America ("Project I")

173. The IIC found that Toshiba had similarly failed to record losses incurred due to cost increases under "Project I," a $129 million order received in December 2010 by its U.S.-based subsidiary, TIC America, to provide electrical equipment for 364 subway cars in the U.S., with an option to add an additional 384 cars to the order for another $122 million. Although the project was accounted for using inspection- based rather than

POC accounting *(i.e.,* recording sales as equipment passed inspection), the relevant accounting rules still required provisions to be made for anticipated contract losses. By the time TIC America was ready to conduct its Final Design Review in March 2012, it had projected that it would cost $207 million to fill the requirements of the $129 million initial order, resulting in an anticipated loss of $78 million on the project. The IIC found that a provision for the loss should have been recorded at the end of FY11, with additional losses reported in subsequent periods during FY12. "However, despite the absence of any reasonable grounds, no provision for losses was recorded on receipt of the order." Apx. Ex. 1 at 35.

174. The IIC found that the decision to postpone recording the loss was made by Kitamura and Kubo on March 16, 2012. *Id.* at 35. Although the need to record the losses was discussed and the accounting treatment was deliberated at that time, "Makoto Kubo CFO made the decision to not record provisions and no appropriate instructions were given since the end of FY 2011 despite an awareness of the need to record provisions for losses every quarter." *Id.* at 36. Sasaki knew about and ratified that decision:

> Norio Sasaki P was also aware of both the multi-billion yen of anticipated losses and the lack of provisions for losses regarding Project I, and should have either instructed or demanded the recording of provisions for losses but there is no evidence that he did so. Rather, it is presumed that he did not instruct or demand the recording of provisions in order to avoid recording losses regarding Project I for that period.

Id. at 35.

175. By the end of 2Q13, Toshiba had still recorded only a portion of the required provision for losses on Project I, because sufficient profits to offset the remaining losses on the project still had not been generated. Tanaka and Kitamura only approved the recording of a ¥2 billion loss for the project, even though "[i]t was highly probable that both of them were able to recognize that the figure of such provision was not adequate to cover the reasonably expected loss." *Id.* at 35-36. The loss remained understated at the end of FY13 because sufficient profits had still not been generated to cover the loss. Tanaka and Kitamura were advised during CEO Monthly Meetings and quarterly review sessions that a ¥6 billion loss needed to be recorded, but Toshiba only recorded a loss of ¥2.5 billion. "There is no evidence of instruction or demand to record provisions. It can be surmised that there is a high possibility that Hisao Tanaka P and Hideo Kitamura GCEO intended to postpone recording losses for that period." *Id.* at 36.

4. Other Instances of False POC Accounting

176. Despite limiting its review to just a sampling of projects where POC accounting was used, the IIC found repeated instances of deliberate violations of those rules. The IIC report identified 19 examples of projects where POC rules had been intentionally misused to improve financial results: (i) Toshiba won contracts by agreeing to do work for less than the expected cost but refused to report the expected losses at the outset of the contract, as POC

rules required (Projects A, H, I, M); (ii) Toshiba chose not to apply POC accounting rules where required to do so in order to avoid reporting losses on unprofitable contracts (Projects B, L); (iii) Toshiba did not report costs incurred for additional contract work required to be performed, in order to delay reporting a contract loss (Projects C, N); and (iv) in projecting expected profits and losses on POC contracts, Toshiba chose to ignore expected cost increases caused by higher materials acquisition costs, changed foreign currency conversion rates, or other known circumstances (Projects D, E, F, K, O), or simply reduced expense projections without any reasonable basis to do so (Projects G, J). Apx. Ex. 1 at 19-42.

177. The IIC report identified repeated instances where the false accounting was directed by or known to and not corrected by senior executives of Toshiba, or carried out based on expectations they had set that losses should be deferred or concealed rather than reported. *E.g., id.* at 25 ("recording a provision for contract losses would not be accepted by Yasuhuru Igarashi CP"); *id.* at 26 (same); *id.* at 28 (subordinates "intended to delay recording a provision for contract losses under heavy pressure to achieve their sales target"); *id.* at 29 ("CP did not give approval for recording a provision for contract losses because he intended to postpone recording losses"); *id.* at 30 ("the sales managers were convinced that it would not be possible to receive approval to record a provision for contract losses"); *id.* at 32 (Tanaka and Kubo ordered that projected losses be reduced or deferred to later quarters, as described further below); *id.* at 33 ("Hisao Tanaka P and Toshio Kitamura GCEO intended to postpone recording a loss"); *id.* at 34 (Kubo was "fully aware of the need to

record provisions for contract losses" but "no appropriate instructions were given to record provisions"); *id.* at 35 ("Hideo Kitamura GCEO and Makoto Kubo CFO intended to postpone recording a loss in this period. Norio Sasaki P was also aware of both the multi-billion yen of anticipated losses and the lack of provisions for losses regarding Project I, and should have either instructed or demanded the recording of provisions for losses, but there is no evidence that he did so."); id.at 38 ("Hisao Tanaka P and Hideo Kitamura GCEO were informed of the situation at the time, but there is no evidence of instruction or demand for SIS Company to record provisions for contract losses in that period."); *id.* at 39 ("Tanaka P was informed that the target for Project K would result in prospective losses of JPY 8.7 billion . . . but indicated a course of action to the effect that the contract losses of JPY 3.5 billion be recorded").

B. Cookie Jar Accounting in Visual Products Business

178. From 2008 or earlier through 2014, Toshiba used a form of cookie jar accounting to reduce or avoid reporting losses in its Visual Products Business. Toshiba did so through a variety of schemes designed to defer operating expenses and charges incurred in one period so that they would not be reported until a later date when Toshiba was able to generate sufficient earnings to incur the expense without reporting a loss. As the IIC later recognized, "it can generally be understood by anyone without any accounting expertise that this sort of treatment is a diversion from appropriate accounting practice." Apx. Ex. 1 at 46.

179. The 2007 financial crisis in the United States and ensuing recession caused a significant and sustained slump in Toshiba's sales of televisions and related products, causing a sustained loss of profitability in its Visual Products Business. In response, corporate executives issued "Challenges" to the presidents, business division heads, accounting executives and subsidiaries in the Visual Products Business requiring them "to achieve the profits and losses required by each budget and to meet improvements in the profits and losses mandated during each relevant period." *Id.* at 45. "What was fundamentally merely an estimate to be seen as a budget or goal amount from Corporate to the Visual Products Company was transformed into a mandatory profit and loss figure that needed to be achieved within Toshiba at some stage, driving the Visual Product Company to be in the situation where it had no choice but to push forward and achieve those figures." *Id.* To achieve these targets, "profits were intentionally overstated at the Visual Products Company through Inappropriate [carryover of expenses]." *Id.*

180. Toshiba referred to the deferred operating expenses as "carryover," or "C/O" for short. By the end of FY10, the C/O balance had risen to ¥19.6 billion (~$236 million). However, the business "continued to generate losses, and the Challenges set by Corporate became more severe. From FY 2011 at the latest, the CEO Monthly Meetings and individual exchanges often featured stern rebukes and Challenges from the CEO of Corporate, directed at the Visual Product Company executives." *Id.* In response, the Visual Products Business established express C/O requirements in amounts needed to meet

Challenge goals. The C/O requirements were then communicated to area managers by division business heads with authorization from the Company President. In this manner, the instructions from Toshiba's President were conveyed throughout the business, and "a culture came to be established in the Visual Products Company of using every available means to meet Challenges or avoid losses." *Id.* "[T]he root cause of the Inappropriate C/O stems from excessive demands to meet Challenges from certain top management at Corporate level." *Id.*

181. Toshiba used a variety of schemes to generate fraudulent C/O in response to the Challenge directives from FY11 through FY14, including: (i) using cash-based accounting where accrual accounting was required; (ii) requesting vendors to delay submission of invoices for services that had already been provided; (iii) increasing the price of products shipped to affiliated companies outside of Japan while concurrently decreasing cost of manufactured goods for that quarter to generate false profits; and (iv) recognizing cost reductions that had been requested from manufacturers but not yet approved, even when they were unlikely to be achieved.

182. Toshiba's use of C/O violated accounting rules. US-GAAP requires expenses to be recorded in the period they are incurred. *See, e.g.*, FASB Statement of Financial Accounting Concerts No. 5, *Recognition and Measurement in Financial Statements of Business Enterprises,* ¶¶ 85-87, and ASC Topic 450-20, *Loss Contingencies*. The concept that expenses be recorded in the same period in which the corresponding benefit is realized is one of

the most basic tenets underlying accrual accounting. Toshiba deliberately ignored this basic rule and instead systematically engaged in a scheme of improper timing of expense recognition, understating its expenses in a current period and/or improperly delaying expense recognition to inflate profits.

183. Toshiba's use of C/O in its Visual Products concealed the impact of the economic downturn precipitated by the U.S. financial crisis on Toshiba's business and misrepresented actual demand for the Company's televisions and other Visual

184. The IIC found that, through its improper use of C/O, Toshiba had ted its profits and losses in the following amounts over a six-year period:

(¥100 million)

FY08	FY09	FY10	FY11	FY12	FY13	3Q14
53	78	65	(115)	37	(13)	(47)

185. The IIC concluded that the misstatements were deliberate:

> [A]ccording to C/O reports provided to Corporate, it is evident that Norio Sasaki P was aware that C/Os were conducted to overstate the profit in the Visual Products Company by November 2011 at the latest while Hisao Tanaka P was aware by either August 2013 or March 2014 at the latest. . . .
>
> It is considered that both Norio Sasaki P and Hisao Tanaka P were aware that the C/O adjustments including Inappropriate C/Os

> were conducted to overstate profits, but took no action to address this issue.

Apx. Ex. 1 at 46.

186. Accounting and finance personnel at both the Visual Products Company and Toshiba headquarters also knew about the inappropriate use of C/Os to inflate profits but did nothing to stop the practice. As found by the IIC:

> [T]he C/O balances including the Inappropriate C/Os . . . were shared with the accounting department, which recognized that Inappropriate C/Os were conducted, but no evidence indicates that the accounting department tried to stop or prevent the implementation of Inappropriate C/Os. From 2012 at the latest, the accounting department itself played a proactive role by examining and proposing Inappropriate C/O items, assessing the possibility of Inappropriate C/Os and communicating that to the accounting managers at overseas affiliated companies, or preparing explanations for audit corporations.

Id. at 46-47.

187. Toshiba's internal audit personnel were also made aware of the use of but did nothing to investigate further, due to the fact that the Corporate Audit Division put emphasis on advising how to improve business performance and ignored their internal control function.

188. To avoid detection, the use of C/Os was concealed from Toshiba's outside auditors. "[T]he

Visual Products Company did not disclose to the accounting auditors materials or information indicating the existence of C/Os, and devised explanations so that the existence of C/Os would not be revealed to the accounting auditors." *Id.* at 49.

189. The improper C/O balances were eliminated in FY14 in connection with Toshiba's plans to spin off the Visual Products Business. "It can be surmised that one of the reasons for this lies in the fact that Inappropriate C/O would be difficult to continue because of the spin-off . . . causing an issue with respect to auditing and also because of the substantial withdrawal from overseas business . . . scheduled for FY 2015." *Id.* at 46.

C. Channel Stuffing in PC Business

190. In reaction to a business decline triggered by the 2007 financial crisis in the U.S., Toshiba began a long running scheme to inflate the profitability of its PC business through channel stuffing.[17] The practice continued uninterrupted through 2014, resulting in "enormous amounts of Channel Stuffing" (Apx. Ex. 1 at 55) that masked true demand for and misrepresented worldwide sales

[17] Channel stuffing has been defined by the American Institute of Certified Public Accountants ("AICPA") as: "[A] marketing practice that suppliers sometimes use to boost sales by inducing distributors to buy substantially more inventory than they can promptly resell. Inducements to overbuy may range from deep discounts on the inventory to threats of losing the distributorship if the inventory is not purchased. Channel stuffing without appropriate provision for sales returns is an example of booking tomorrow's revenue today in order to window-dress financial statements." AICPA *Indicators of Improper Revenue Recognition*.

of Toshiba's PCs. The IIC found that the practice had caused *operating profit to exceed PC sales* in the last month of some quarters, when channel stuffing typically occurred.

> The Challenge was often set in the CEO Monthly Meetings, etc. held when there was only a short time left until the end of that quarter. Since it was difficult for the Company issued with the Challenge to achieve such large amounts of profit improvement during the short time remaining until the end of the quarter, even if they made every effort in sales, it seems that they were often forced to use the inappropriate method of Channel Stuffing of ODM Parts in order to overstate profits as the only way available to them to achieve the Challenge.

Id. at 56.

191. Toshiba's channel stuffing was "conducted in an institutional manner by Toshiba, involving certain top management" and was "intentionally conducted with the firm aim of overstating current-period profit." *Id.* These illegal practices were known to and continued through the tenures of three successive Toshiba Presidents, Nishida, Sasaki, and Tanaka:

> It can be found that, against the above backdrop, the Company was forced to embark on Channel Stuffing of ODM Parts because Atsutoshi Nishida P and Norio Sasaki P demanded the Company to be sure to reach the Challenge with high profit improvement. Moreover, although Atsutoshi Nishida P and

> Hisao Tanaka P were aware that the profit was overstated by Channel Stuffing of ODM Parts, they did not take action such as giving instructions to immediately correct this, and instead allowed the situation to continue.

Id. at 55-56.

192. During his tenure as Toshiba's President, Sasaki recognized the overstatement of profits due to channel stuffing but would not permit the practices to be stopped or the past overstatements to be corrected unless the PC business could do so without reporting a loss, which was not possible. *Id.* at 55. Although Tanaka sought to bring an end to the practice in FY14 after he became President, he similarly did not permit Toshiba to correct the misstatements all at once, but instead sought to do so gradually in a manner that was calculated to avoid revealing the fraud or alarming investors. *See id.*

193. Toshiba's channel stuffing scheme was based on its ability to sell large volumes of parts at inflated prices to the third party ODMs responsible for building Toshiba's computers to its specifications. Because Toshiba determined both the price and volume of the parts supplied to the ODMs, it had the ability to, and did, sell more parts to ODMs than were required to meet actual demand for its PCs.

194. Under its manufacturing agreements with the ODMs, Toshiba supplied parts like hard drives and RAM sticks in amounts needed to support production volumes that had been determined by Toshiba. Toshiba supplied the parts to ODMs through an overseas subsidiary, Taiwan Toshiba International Procurement Corp. ("TTIP"). TTIP

charged the ODMs prices that were four-to-eight times higher than Toshiba's actual cost, *i.e.*, well above the wholesale value of the parts.[18] Toshiba did so to prevent its true acquisition cost from being leaked to competitors by the ODMs. ODMs agreed to pay inflated parts prices because Toshiba was obligated to purchase the ODMs' inventories of assembled computers, work-in-progress ("WIP") and unused parts within a specified amount of time after TTIP had supplied the parts, and to do so at prices that would include the full price of the delivered parts. Pursuant to the terms of its production agreements, Toshiba "in fact purchased incontrovertible extra inventories every term" – *i.e.,* inventory exceeding actual demand for its products.

195. The difference between Toshiba's actual procurement price and the price charged to the ODMs was called the "masking difference." At the time the parts were supplied to the ODMs, Toshiba recorded a receivable from TTIP in the amount of the masking difference. When the assembled computers were delivered back to Toshiba through TTIP, the receivable would be marked paid and the masking difference eliminated, such that the final cost of goods sold ("COGS") ("would reflect only the actual procurement price of the parts. However, during the time that the parts (or finished goods and WIP using the parts) remained in ODM inventories, the TTIP

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[18] In most cases, Toshiba or TTIP obtained the parts from an outside vendor, then TTIP supplied the parts to the ODM at an inflated price. From 2Q12 to 4Q12 Toshiba used a more complicated series of internal transactions involving two other Toshiba subsidiaries – Toshiba Trading, Inc. ("TTI") and Toshiba Information Equipment (Hanghzhou) Co. Ltd. ("TIH") – that had the same effect. *See* Apx. Ex. 1 at 52-53.

receivable (i.e., the masking difference) was reflected as a negative cost of manufactured goods on Toshiba's books, thereby inflating its profits. By shipping more products than needed to support actual demand, Toshiba was able to cause the ODMs to hold excess inventory and inflate its profits by the amount of the masking difference of unused Toshiba-supplied parts still sitting in ODM inventories.

196. Through the foregoing transactions, the masking difference became a phantom profit on Toshiba's books during the period that parts remained with the ODMs. Recording profits at the time the parts were supplied to the ODMs was improper, as it did not accurately represent the actual series of transactions or their economic reality. Because the purchase of parts by an ODM was premised on Toshiba's obligation to purchase the ODM's inventories of finished goods, WIP and parts within a set amount of time, the original parts sale was required to be treated as a transaction subject to repurchase conditions. As a result, Toshiba was not permitted to recognize any profit on the parts transactions at the time they were made, and was required to deduct the masking price of all parts still in ODM inventories from its profits on a quarterly basis, which it did not do.

197. A major objective of GAAP in accounting for inventories is the proper determination of income through the process of matching appropriate costs with revenues. ASC Topic 330-10-05, *Inventory.* This requires determining what portion of the cost of goods available for sale should be deducted from current period revenue, and what portion should be carried forward as inventory to be matched against the

revenue of a subsequent period in which it is sold. The proper determination of profits and income takes precedence over other goals. In measuring the gross profit on sales earned during an accounting period, the COGS is subtracted from sales. If COGS is understated *(i.e.,* because some of the costs are held up in inventory at the ODMs), then current period profits will be overstated. Thus, by causing the ODMs to hold excess inventory, Toshiba caused the masking difference for those parts to be recognized as negative costs of manufactured goods on the parts transactions, thereby reducing COGS and inflating current period profits.

198. In addition, at least during FY12, Toshiba also sold parts held as inventory by Toshiba at an inflated price to fully owned subsidiaries, TTI and TIH, and improperly recorded profits without eliminating the intercompany profit in violation of ASC Topic 810, *Consolidation.*

199. Toshiba's FY13 Corporate Audit Report asserted that E&Y had detected the improper accounting for ODM parts transactions but agreed to accept it based on Toshiba's representations that the parts were only in ODM inventories for a short period of time such that the improper accounting had only an immaterial impact on Toshiba's reported results:

> "Under the accounting policies the resale profit from Buy-Sell cannot be realized until it becomes sales revenue after shifting to products. However, Buy-Sell parts held by ODMs as inventory are ordinarily equivalent to three days' worth of production. Therefore, it was explained to the auditor that the impact

> on unrealized profit and loss from this situation would be very limited and approval of the current accounting treatment was obtained."

Apx. Ex. 1 at 58.

200. By using channel stuffing to keep PC parts sold at inflated prices in ODM inventories for an extended period of time, Toshiba was able to conceal the impact of the economic downturn precipitated by the U.S. financial crisis on Toshiba's business and misrepresented actual demand for the Company's PCs. The IIC found that, through the improper recording of profits on buy-sell ODM parts transactions, Toshiba had misstated its profits and losses in the following amounts:

(¥100 million)

FY08	FY09	FY10	FY11	FY12	FY13	1Q-3Q14
198	286	(105)	166	296	1	(247)

201. "Successive CFOs and Finance and Accounting Division heads and managers were aware that the Company had recorded a large profit at the end of every quarter since 2009 and that a large portion of such profit was overstated by using Channel Stuffing of ODM Parts." *Id.* at 57. To conceal the improper recording of profits from detection, Toshiba's Finance and Accounting Division "intentionally provided insufficient explanations to the accounting auditors so that they would not be criticized by them, and acted in ways that could be seen to conceal the issues in an institutional manner." *Id.* Even when the audit department,

despite these efforts at concealment, "noted that there was a possibility that Buy-Sell Transactions were being used to cause ODMs to retain excess volumes of parts, [] they did not go so far as to make any clear comment regarding the intentional Channel Stuffing of ODM Parts," thereby permitting the illegal practices to continue. *Id.*

202. Toshiba's Audit Committee similarly failed to take any action prior to January 2015 to stop or correct the overstatement of profits due to channel stuffing, despite the fact that former CFOs who were aware of the practices were members of the committee from June 2011 forward. *Id.* In November 2015, Toshiba filed suit against Muraoka for damages arising from his participation or acquiescence in the fraudulent channel stuffing activities, including for breaching his duty of care of monitoring and supervision as a director and chairman of the Company's Audit Committee from 1Q11 to 1Q14, and as a director and executive officer in charge of the Finance & Accounting Division from 3Q08 to 1Q11.

D. Failure to Report Westinghouse Goodwill Impairment Charges, or to Record Charges on Consolidated Financial Statements

203. Goodwill represents the excess of the purchase price over the fair value of the net assets acquired in a business combination. Goodwill is an asset representing the future economic benefits arising from the other assets acquired in the acquisition that are not individually identified and separately recognized. ASC Topic 350-10-20. In other words, goodwill is considered to be an asset because

future economic benefits are expected from it in combination with the future economic benefits of the other assets acquired.

204. Westinghouse took goodwill impairment charges totaling $1.3 billion in FY12 and FY13. Toshiba was required to, but did not, publicly disclose those charges. Toshiba also did not record the charges on its consolidated financial statements. Toshiba's recent assertions that GAAP did not require it to do so are not credible, and appear to be incorrect.

205. GAAP, specifically ASC Topic 350, requires that goodwill be tested for impairment at the "reporting unit" level. ASC Topic 350-20-20. A reporting unit is an operating segment or one level below an operating segment. *Id.* A component of an operating segment is a reporting unit if the component constitutes a business or a nonprofit activity for which discrete financial information is available and segment management regularly reviews the operating results of that component. ASC Topic 350-20-35. Two or more components of an operating segment can be aggregated and deemed a single reporting unit, but only if the components have similar economic characteristics. *Id.* The Company therefore had the opportunity to manipulate its reporting units in a manner that was designed to avoid recording an impairment charge. The fact that Toshiba was changing its operating segments during this time raises the possibility that it did so.

206. If the goodwill evaluation shows that the carrying value of the reporting unit exceeds its book value, then the goodwill is considered impaired and an impairment charge must be recorded in that

period. ASC Topic 350-20-35-11. The consideration of carrying value includes consideration of the reporting unit's actual and anticipated earnings. Falsification of earnings or projections can affect the need to take an impairment charge. Toshiba was falsifying its financial results at Westinghouse, the Power Company, and throughout the Social Infrastructure (in FY12) and Energy (in FY13) segments during the time that the impairment charges were recorded at the subsidiary level. The nature, extent, and intent of the manipulations, as described above, raises the possibility that Toshiba's false accounting was perpetrated, at least in part, to avoid recording an impairment charge on the consolidated financial statements.

207. Toshiba has not disclosed sufficient information to demonstrate the accuracy of its assertion that GAAP did not require the impairment charges to be reported at the corporate level. However, the information that *has* since been publicly revealed since the Westinghouse impairment charges were publicly revealed strongly indicates that Toshiba violated GAAP by not taking an impairment charge in its consolidated financial statements for FY12 and FY13.

208. Additional evidence strongly suggesting that Toshiba manipulated its consolidated accounting at the corporate level to avoid recording the Westinghouse write-down is found in a November 17, 2015 Nikkei Business article based on internal e-mails and corporate records. Apx. Ex. 9. The article recounts how Toshiba initially fought with Westinghouse's U.S. auditor over the FY13 write-down, then got the auditor to replace the U.S.-led

team with one led by its Japanese office for subsequent audits, under threat of losing the ¥1 billion audit contract. After Toshiba recognized, in March 2014, that "'it would be very hard for even [the new audit team leader] to alter Ernst & Young's position'" that another write-down be recorded in FY14, it began intensive efforts to "'minimized the impact of a write-down on consolidated performance.'" *Id.* As an executive at Toshiba's energy division wrote in an April 2014 e-mail:

> We need to make an argument that will convince [EY] ShinNihon to evaluate our consolidated results using slightly different methods than Ernst & Young proper, that is, using methods that the Japan side takes the initiative in applying.

Id.

209. According to the Nikkei Business article, at the end of FY13, Toshiba executives recognized the Company would have to take an impairment charge of up to ¥150 billion on its consolidated financial statements if the Westinghouse impairment charge exceeded $500 million, "meaning," according to an e-mail quoted in the report, that "'there would be no funds for cash dividends.'" Apx. Ex. 9. To avoid this, Toshiba changed the way it was evaluating and accounting for goodwill. First, Toshiba integrated Westinghouse with its Japanese nuclear power division, which had the effect of increasing projected cash flows for the reporting unit used to evaluate goodwill, thus lessening the impact of the goodwill charges taken at Westinghouse. Second, Toshiba stopped using competitor stock prices as a measure of

the value of the business, and instead began valuing it exclusively on the basis of projected future cash flows, which made it easier to inflate the value of the business.

210. Toshiba's decision to stop using market prices in its goodwill valuation methodology is particularly suspicious in light of its failure to resell the Shaw Group's equity stake in Westinghouse after assuring investors in FY12 that it had received significant interest from qualified purchasers of that interest. Sale of the Shaw Group stake at a price that was lower than that reflected on Westinghouse's books would have required Toshiba to test for goodwill impairment. US-GAAP would have required the Company to use prices in active markets, rather than internal discounted cash flow projections, as the best evidence of value. ASC Topic 350-20-35-3; ASC Topic 350-20-35-22. Eliminating market prices as a basis for comparison appears to have been designed to avoid the impairment findings that could have resulted from such a review. That the FY13 impairment charge at Westinghouse was limited to $400 million – below the threshold that Toshiba executives had recognized would require a consolidated write-down - provides additional strong circumstantial evidence that the change in accounting procedures was designed solely to avoid taking the charge.

211. Even if Toshiba was not required to write down goodwill on a consolidated level, Toshiba's statements in the FY12 and FY13 annual reports that there was no goodwill impairment were materially misleading.

212. Toshiba violated the Tokyo Stock Exchange's ("TSE") timely disclosure rules which stipulate that a company must disclose information about losses if a subsidiary included in the company's securities report incurs losses that account for 3% or more of the parent company's net assets. The $930 million write-down represented approximately 6% of Toshiba's net assets of $15.1 billion at March 31,2013. Toshiba's reported goodwill overstated the future benefit Westinghouse would provide by at least that amount.

213. The TSE's parent, Japan Exchange Group, confirmed on November 17, 2015 that Westinghouse's FY12 write-downs met the timely disclosure guidelines and should have been communicated to investors. Toshiba's publicly-issued Disclosure Policy states that its information disclosure policies meet the TSE standards, as well as the disclosure standards of the Securities Exchange Law, other legislation, and rules on timely disclosure defined by any other stock exchanges on which Toshiba is listed.

214. Toshiba's Disclosure Policy also requires it to disclose information *not* required under rules of timely disclosure "in the event that such information is considered to have the potential to impact investment decisions by interested parties." The impairment charges taken by Westinghouse were information that had the potential to impact investment decisions by interested parties. Toshiba stated that its policy was to disclose such matters "as promptly and comprehensively as possible."

215. In its November 17, 2015 press release, Toshiba admitted that the approximately $930 million impairment of goodwill recorded by Westinghouse Group in FY12 "fell under the guidelines for timely disclosure, and [Toshiba] should have disclosed it appropriately at the appropriate timing."

E. Other False Accounting Practices

216. The IIC and other internal investigations found proof of additional instances of fraudulent accounting by the Company, including the practices described below. These practices, individually and collectively, had the purpose and effect of materially overstating Toshiba's reported profits or minimizing its reported losses.

1. Failure to Record Asset Impairment Charges

217. Toshiba's restatement also revealed that the Company had failed to write down the value of impaired fixed assets in violation of US-GAAP, including ASC Topic 360-10-35, *Property, Plant, and Equipment,* which requires that an impairment loss be recognized if the carrying amount of a long-lived asset is not recoverable and exceeds its fair value.

218. Although the IIC recognized in its July 20, 2015 report that the required restatements resulting from Toshiba's inappropriate accounting methods could require fixed asset impairment and inventory charges to be booked, it did not investigate or attempt to quantify the amount of those adjustments.

219. On August 18, 2015, the Company acknowledged that fixed asset impairment charges would be required in the PC Business, Visual Products business, and Semiconductor business. The Company said that the charges would reduce pretax income by ¥41.8 billion ($427 million) in FY08 and ¥49.0 billion ($598 million) in FY11. Apx. Ex. 5 at 4-5. The Company release stated that the FY08 impairment was related to the PC and Visual Products businesses, and the FY11 impairment was in the Semiconductor business.

220. Toshiba's FY14 financial report, released at the same time as the restatement, revealed an additional ¥127 billion (~$1.1 billion) in asset impairment charges in FY14, including a ¥41 billion (~$342 million) full impairment charge for the Company's investment in the South Texas Project, a Houston-area nuclear power plant being built by Westinghouse. Toshiba also took a ¥41.9 billion (~$349 million) partial impairment charge in the Semiconductor business that Muromachi attributed to a "business downturn in white LEDs." Although Toshiba claimed that these and other assets did not become impaired until the end of FY14, based on the nature and extent of the misconduct alleged herein, there is a significant probability that the actual charges were required to be taken much earlier than they were.

2. Failure to Devalue Obsolete Semiconductor Inventory

221. In connection with plans to transfer manufacturing of semiconductor parts from one plant to another in FY08, Toshiba manufactured a

considerable number of extra parts before the first plant was shutdown to assure sufficient parts would be on hand during the period in which the new plant was being brought on line. However, forecast demand for those parts never materialized and Toshiba was left holding a large amount of excess inventory, much of it designated for specific customers who no longer needed or wanted it. The excess and obsolete inventory was not disposed of until FY13, when Toshiba recorded a total loss of approximately ¥8.0 billion for disposed inventory. Although some of the inventory had been partially devalued before then, for most of the inventory no valuation loss was recorded before the FY13 loss was recorded.

222. Toshiba violated applicable accounting rules in delaying recognition of the loss until FY13, and in only partially devaluing the excess and obsolete inventory before then. Toshiba did so by: (i) not providing for any method for its semiconductor business to devalue obsolete or unsaleable parts based on their disposal value; (ii) failing to make any devaluation of its manufacturing inventory *(i.e.,* parts designated for use by third parties in manufacturing other products) prior to FY13; and (iii) using a combined allocation method for determining cost variances where a process specific method was required due to variations in the manner in which the increased unit cost of manufacturing due to lower plant utilization was allocated to inventory. *See* Apx. Ex. 1 at 61-66. This accounting was carried out "in such a way that made it difficult to detect from outside the Company." *Id.* at 66.

223. Toshiba's accounting for semiconductor inventory violated US-GAAP, including ASC Topic

330-10-35, *Inventory.,* which requires that inventory be written down to market value "when the utility of the goods is no longer as great as their cost." "Where there is evidence that the utility of goods, in their disposal in the ordinary course of business, will be less than cost, whether due to damage, physical deterioration, obsolescence, changes in price levels, or other causes, the difference shall be recognized as a loss of the current period." *Id.*

224. Both Sasaki and Tanaka "were aware of the fact that the apparent quarterly profits had been overstated as a result of [using the combined allocation method]." Apx. Ex. 1 at 66. The IIC found that the inappropriate accounting treatment was continued until FY13 in order to meet the "strong demands" of Toshiba's management at CEO Monthly Meetings to meet Challenges for improved performance. *Id.*

225. The IIC found that the use of combined allocation method for semiconductor inventory caused Toshiba to overstate its profits and losses in the following amounts:

(¥100 million)

FY09	FY10	FY11	FY12	FY13	3Q14
32	16	104	308	(165)	5

226. Toshiba's failure to properly account for inventory was not limited to the excess semiconductor parts described above.

227. Toshiba's self check report identified other similar instances of fraudulent and improper accounting, including: (i) failing to post a loss in FY13 when inventory was discarded due to discontinuation

of sales activities; (ii) postponing the discard of obsolete inventory in an attempt to avoid posting a loss, and failing to post a provision for such loss at the time the inventory became obsolete; and (iii) under-recording the cost of inventory by failing to reflect increased unit costs of inventory. Apx. Ex. 2-A (Attachment 1 at Case Nos. 1, 3, 7).

3. Recognition of Phantom Profits in the Visual Products Business

228. Toshiba applied a masking difference to increase the price of parts supplied to ODMs for its Visual Products Business, and accounted for the difference between the actual acquisition cost and the inflated parts cost in the same manner as it engaged in the fraudulent practices in its PC business that are described above. This caused Toshiba to recognize the masking difference as a negative cost of manufactured goods at the time parts were supplied, artificially inflating its profits. Apx. Ex. 1 at 49-50.

229. The accounting for ODM parts transactions in the Visual Products Business violated US-GAAP for the same reasons described above with respect to ODM parts transactions in the PC business. *See supra* §VI.C.

230. The IIC found that Toshiba's improper accounting for ODM parts transactions in the Visual Products Business caused Toshiba to misstate its profits and losses in the following amounts:

(¥100 million)

FY08	FY09	FY10	FY11	FY12	FY13	1Q-3Q14
(5)	6	(7)	(5)	14	3	(8)

4. Improper Deferral of Operating Expenses in the PC Business

231. Toshiba deferred operating expenses in its PC Business using improper C/O adjustments to overstate profits in the same manner and for the same reasons in which it did so in the Visual Products Business. Apx. Ex. 1 at 58-60.

232. The accounting for C/O expenses in the PC Business violated US-GAAP for the same reasons described above with respect to expense accounting in the Visual Products Business. *See supra* §VI.B.

233. The IIC found that Toshiba's improper accounting for C/O expenses in the PC Business caused Toshiba to misstate its profits and losses in the following amounts:

(¥100 million)

FY10	FY11	FY12	FY13	1Q-3Q14
17	83	(36)	(17)	(17)

5. Manipulation of Foreign Currency Exchange Rates

234. Toshiba failed to apply accurate foreign currency exchange rates, where using the correct rate would have caused profits to decline or expenses to increase due to the performance of the Japanese yen against the U.S. dollar or other currencies.

235. In FY11, for example, Toshiba obtained a contract to construct a power plant, and utilized estimates of the cost of work to be performed under

the contract that were denominated in U.S. dollars. Throughout the project, Toshiba continued to use the exchange rate prevailing at the time the order was received ($1~85¥) from FY11 through 3Q14, by which time the value of the yen ($1~104¥) had fallen significantly. Apx. Ex. 1 at 27-28 (Project D). Using the incorrect conversion rate had inflated Toshiba's gross profit by ¥1,600 million (~$ 19.5 million).

236. By the end of FY13 the contract was in a loss position, as the total estimated costs exceeded the total estimated income under the contract when using current exchange rates. Toshiba's Power Systems Company nevertheless failed to record a loss and deferred taking the required loss for three more quarters. The IIC found that there was a "reasonable degree of possibility" that the delay in recording the loss was due to "heavy pressure to achieve their sales target" and that "there was no evidence of any specific consideration" of whether the losses could be avoided. *Id.* at 28.

237. Toshiba's self-check report described a similar instance where the Company had taken advantage of foreign currency fluctuations to improve reported results. Apx. Ex. 2-A (Attachment 1 at Case No. 2). There, the Company had valued a claim for unpaid accounts receivable on a cancelled contract using foreign currency rates prevailing at the time the contract was in force. Toshiba admitted that the Company should have taken a write down to reflect the lowered expectancy under the claim based on current foreign currency exchange rates.

6. Delayed Charge and Expense Recognition

238. Toshiba's self check report, E&Y ShinNihon's audit and the SIC and IIC investigations detected additional instances of fraudulent deferral of charges and expenses to improve reported results. These instances further illustrate the extent and institutional nature of the accounting fraud that was perpetrated by Toshiba.

239. Deferred recognition of contract and production losses: (i) In FY11, Toshiba failed to register an order resulting in a loss, and improperly delayed taking the required provision for the contract loss until FY12; (ii) Toshiba improperly transferred losses under a consumables contract to a related contract, thereby delaying recognition of a loss that should have been recorded when the consumables order was received; (iii) Toshiba waited until FY14 to record an impairment or loss provision for orders that fell short of expectations in FY12 under a development contract for which Toshiba had recorded development expenses as an asset; and (iv) in FY11, Toshiba failed to record the actual estimated costs of materials, using an under-estimated amount and improperly waiting until FY12 to record the difference.

240. Deferral of SG&A and other expenses: (i) In FY12, Toshiba improperly postponed recording advertising, promotional and other SG&A expenses until FY13; (ii) Toshiba improperly postponed recording advertising expenses incurred in FY10 until FY 11; (iii) Toshiba understated its provision for product warranties by delaying inclusion of anticipated warranty costs until a subsequent fiscal period; and (iv) Toshiba failed to record FY13 labor

costs, then improperly transferred those costs to another department in FY14.

241. Additional errors detected by E&Y ShinNihon. During its review of the restatement, Toshiba's outside auditor detected four additional items of inappropriate accounting: (i) a delay in recording losses under an overseas contract to build a hydroelectric power plant; (ii) a failure to record provisions for manufacturing costs under a components transaction; and (iii & iv) misstatements of the amount of depreciation and profit and loss on a sale accompanying the impairment of assets, and following the evaluation of assets of an acquired overseas subsidiary.

VII. PRESUMPTION OF RELIANCE (FRAUD ON THE MARKET)

242. Through the efficient operation of the markets in which Toshiba's common stock was publicly traded, plaintiffs and the other members of the proposed Class may be presumed to have relied upon each of the false and misleading statements alleged herein.

243. At all relevant times, the market for Toshiba's common stock was an efficient market. The efficiency of the market for Toshiba's common stock may be established by the following facts, among others:

(a) Toshiba's stock met the requirements for listing, and was listed and actively traded on the Tokyo Stock Exchange, a highly efficient and automated market;

(b) Toshiba common stock was also actively traded as ADSs on the OTC market in the United States, which is also a highly efficient and automated market;

(c) As a regulated issuer, Toshiba filed periodic public reports with the FSA and the SESC. Toshiba was also required to comply with the formal requirements for listing on the Tokyo Stock Exchange, as set forth in Rule 601 of the Securities Listing Regulations, including minimum market capitalization requirements;

(d) Toshiba published its quarterly and annual reports, press releases, presentation materials, and other material information of significance to investors on its website, including contemporaneous English-language versions of materials submitted to regulators in Japanese;

(e) Toshiba regularly communicated with public investors via established market communication mechanisms, including through regular dissemination of press releases on the worldwide circuits of major news services, publications on its website and other Internet sites, and through other wide-ranging public disclosures, such as through conference calls, communications with the financial press, and other similar reporting services;

(f) During the Class Period, Toshiba was followed by securities analysts employed by major brokerage firms with worldwide influence, including Citigroup, Credit Suisse Securities, UBS Securities, JP Morgan Securities, Macquarie Capital Securities, BNP Parnibas, Deutsche Bank, Morgan

Stanley MUFG Securities, SBC Nikko, and others. Analysts employed by each of these firms regularly wrote reports based upon the publicly available information disseminated about Toshiba. These reports were distributed to the sales force and certain customers of their respective brokerage firms;

(g) During the Class Period, financial institutions in Japan collectively owned approximately 37% of Toshiba's outstanding shares, and other Japanese companies, including securities companies, owned approximately 6% of the outstanding shares. Overseas investors, including financial institutions based in the United States, owned approximately 25% of Toshiba's outstanding shares during the Class Period. Each of these institutional investors regularly analyzed and reported on the publicly available information about Toshiba and its operations; and

(h) During the Class Period, the average daily trading volume of Toshiba's common stock was approximately 36 million shares.

244. Information that affected the price of Toshiba's common stock also affected the price of Toshiba's ADSs in the same manner and to the same extent. The price of Toshiba's common shares and ADSs traded on the OTC market in the United States during the Class Period was based upon and moved in tandem with the price of Toshiba's common stock traded on the TSE, as illustrated by the chart in ¶ 251 below. The price of TOSBF shares generally tracks the currency-adjusted price of Tokyo common stock on the Tokyo exchange. The price of TOSYY shares, which reflect an ownership interest in six

shares of Toshiba's common stock, is generally six-times the currency-adjusted price of Toshiba's common stock traded on the TSE. As a result, the same facts that support the finding that the market for Toshiba common stock sold on the TSE in Japan was efficient also support a finding that the market for Toshiba's common stock sold on the OTC market in the United States was efficient.

245. Through the foregoing mechanisms, the information publicly disseminated by defendant about the Company and its operations, and the import thereof, became widely available to and was acted upon by investors in the marketplace such that, as a result of its transactions in Toshiba stock and ADSs, the information disseminated by defendant, including the false and misleading statements described above, became incorporated into and were reflected by the market price of Toshiba securities.

246. Under these circumstances, all purchasers of Toshiba's common stock and ADSs during the Class Period are presumed to have relied upon the false and misleading statements and material omissions alleged herein.

VIII. LOSS CAUSATION & DAMAGES

247. Each member of the proposed Class suffered economic losses as a direct and proximate result of the misleading conduct alleged herein. Each Class member suffered similar injury as a result of: (i) their purchase of Toshiba securities at prices that were higher than they would have been had defendant made truthful and complete disclosures of information about the Company as necessary to prevent the statements, omissions, and course of

business alleged herein from being materially false or misleading to investors; and (ii) their retention of those securities through the date of one or more declines in the market price of those shares that was caused by the revelation of facts, transactions, occurrences, or risks concealed from investors by defendant's scheme to defraud, including the actual or anticipated financial consequences of its concealed actions.

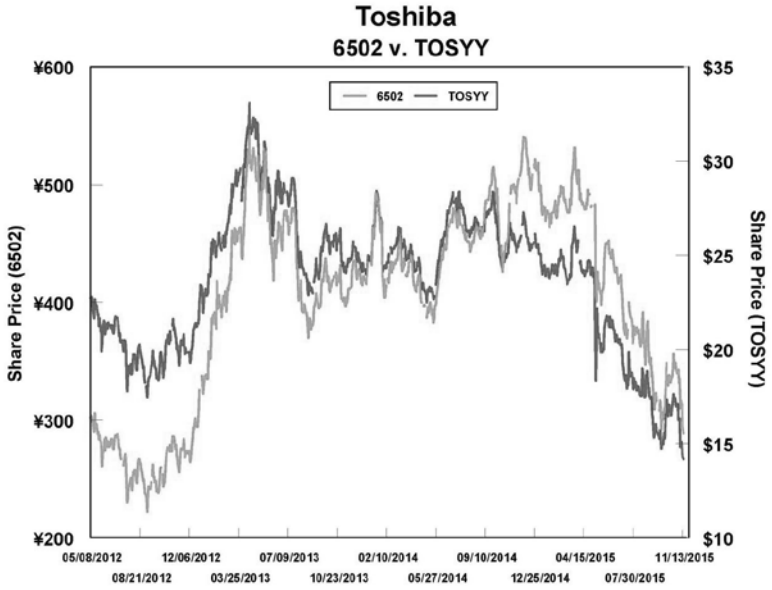
248. The fraudulent accounting and the other misrepresentations and omissions alleged herein caused Toshiba securities to trade at prices higher than they would have during the Class Period had the Company disclosed accurate and truthful information about the financial condition, results, and operations of its business.

249. Because the misrepresentations and omissions that occurred before the start of the Class Period remained uncorrected at the outset of the Class Period, they continued to impact the price of Toshiba securities during the Class Period by causing securities to trade at prices that were higher than they would have traded had accurate and complete information been disclosed at the time of those misrepresentations or omissions, or had Toshiba, prior to the start of the Class Period, corrected the misrepresentations and disclosed the omitted facts that rendered them misleading to investors.

250. Even when Toshiba reported results or information that caused its stock price to decline the disclosures were incomplete and misleading. The false and concealed information described herein therefore continued to maintain artificial inflation in

the price of Toshiba's shares by preventing the share price from suffering even steeper declines that would have occurred had accurate and complete information been disclosed, or had investors learned that Toshiba had long been manipulating its reported results through deliberately false accounting, discovered the specific manner in which Toshiba had done so at the time of each of the false earnings reports described herein, or understood the impact that those manipulations had on current, previously reported, or anticipated financial results.

251. As illustrated by the chart below, the price of Toshiba's common stock sold as ADSs (*e.g.*, TOSYY) tracked and followed the price movements of Toshiba's common stock sold on the Tokyo exchange (6502) during the Class Period. The prevailing prices on both markets were therefore inflated to a similar extent by the false and misleading information alleged herein, and both reacted similarly to the disclosure of corrective information that revealed the facts, transactions, and occurrences concealed by Toshiba's fraud, or the actual or potential impact of those occurrences on the Company's financial condition, results, or prospects.



252. The facts, transactions, and occurrences concealed from investors by defendant's scheme to defraud reached the market through a series of partial disclosures. Though each of the disclosures was incomplete, each revealed some of the business conditions and risks concealed by defendant's fraud scheme, leading to price declines that partially corrected Toshiba's stock price by reducing the extent to which it had been inflated by defendant's fraud. These price declines caused economic injury to plaintiffs and other members of the Class who had purchased Toshiba securities during the Class Period at prices that had been artificially inflated by the fraudulent course of business and misleading statements and omissions alleged herein.

253. The price of Toshiba shares declined precipitously from the time it announced the formation of the SIC to investigate its use of POC

accounting to the time it issued its restated earnings and FY14 financial results detailing the full impact of the accounting fraud on its financial condition and prospects and disclosed the existence and magnitude of the goodwill impairment at Westinghouse. From April 3, 2015 thru November 13, 2015 (the "Corrective Period"), the price of Toshiba's common stock dropped by 41.8%, falling from ¥512 to ¥298 and resulting in a loss of more than ¥907 billion ($7.5 billion) in market capitalization, the majority of which was caused by the revelation of the risks, conditions, and circumstances that had been concealed by the fraud alleged herein. During the same period, the price of TOSBF ADSs traded in the United States declined by 44.1% ($1.89/share) and the price of TOSYY ADSs traded in the United States declined by 44.6% ($11.49/share).[19]

Loss in Value Over Corrective Period			
Closing Price	**6502**	**TOSBF**	**TOSYY**
4/2/2015	¥ 512.6	$ 4.29	$ 25.79
11/13/2015	¥ 298.3	$ 2.40	$ 14.30
% decline	**-41.8%**	**-44.1%**	**-44.6%**

254. By comparison, the Nikkei 225 Index (the "Nikkei") declined by 1.3% during the same period.[20]

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[19] Because the U.S. markets were closed on April 3, 2015 (Good Friday), the TOSBF and TOSYY data is based on the closing price on April 2, the last trading day before the information in the April 6 disclosure reached the market.

[20] The Nikkei, traded under the symbol NKY, is a price-weighted index of the 225 largest industrial stocks traded on the TSE. Because the Nikkei includes Toshiba as part of its index, a portion of the decline of the index during the Corrective Period

255. The decline in value during the Corrective Period exceeded the decline in value, if any, caused by general macroeconomic factors or industry-specific conditions, and was caused by the continued disclosure of information regarding the nature and extent of Toshiba's accounting fraud and delayed impairment charges and its impact on the Company's financial condition and prospects.

256. The average trading volume of Toshiba common stock exceeded 46 million shares per day during the Corrective Period, nearly double the average volumes during the first three months of the year, and well above the 35 million share/day average from 2010 thru 2014. The increased level of activity in the market during the Corrective Period reflects the volume of new information revealed during this period about the extent to which Toshiba's past results had been improved through false accounting, the measures that would be needed to correct and remediate the harm from those violations, and the impact that those circumstances would have on Toshiba's financial condition and earnings prospects.

257. The disclosures that corrected the market price of Toshiba securities during the Corrective Period to eliminate fraud-induced inflation include those identified and described below. The corrective events identified herein are based upon plaintiffs' analysis and investigation to date. Upon further investigation and discovery and additional

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reflects the decline in the value of Toshiba shares. Thus, the disparity between the movement of Toshiba's share price and the overall market during this period is even greater than is reflected by the data presented above.

analyses, plaintiffs may change, alter, or amend their theory of damages, including by identifying additional corrective events that caused or contributed to the damages claimed in this action.

258. On April 6, 2015, the next trading day following Toshiba's April 3 announcement of the investigation into POC accounting issues and the formation of the SIC, the price of Toshiba common stock dropped by 4.9%, while the price of TOSYY fell by 4.8% and the price of TOSBF declined by 3.8%. By comparison, the Nikkei fell 1.4% that day. Market reaction was muted by the lack of information in the press release about the extent of the accounting violations, leading analysts, and market observers to anticipate a relatively modest impact on earnings.[21]

259. On May 8, 2015, Toshiba announced that the initial findings of the SIC would require it to

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[21] *See, e.g.,* J.P. Morgan, *We Expect Company to Target May 15 for End of Accounting Audit in Infrastructure Business* (April 6, 2015) at 1 ("The information disclosed by the company is extremely limited . . . but we think that any impact on earnings due to the audit will be only temporary. We think that any ongoing overreaction by the share price to the results of the audit could offer a good opportunity to increase exposure to the stock."); Macquarie Research, *Looking for a change in Lifestyle* (April 13, 2015) at 5 ("We do not have enough information to accurately estimate the amount at risk. However, . . . a wide impact is likely ruled out."); MorganStanley MUFG, *Our Take on Infrastructure Business Accounting Probe and Lifestyle Business* (April 13, 2015) at 1 ("we do not foresee a sizable numerical impact"); SMBC Nikko, *Cut to hold on white goods deterioration, accounting investigation* (April 21,2015) at 5 ("Toshiba's press release says that the investigation is into non-consolidated accounts, which we take to mean that major US subsidiary Westinghouse Electric (nuclear power-related) is probably not involved.").

delegate the investigation to the IIC for a broader investigation into the "appropriateness" of Toshiba's accounting. The price of TOSBF and TOSYY shares declined by 12.34% and 13.21% respectively. Although the Tokyo stock market was closed at the time Toshiba issued its announcement on May 8, when the market reopened on May 11, 2015, Toshiba's common stock fell by 16.55%.

260. The lack of detailed information in the May 8 announcement prevented analysts, investors, and other market participants from reaching firm conclusions about the scope of the problems or their impact on previously reported earnings, leading to uncertainty in the market and volatility in Toshiba's stock price. As more information was released and further analyses were conducted, the price of Toshiba's common stock continued to fall, and by May 12 had declined by 16.8% from its closing price on May 7 prior to the announcement. TOSBF and TOSYY shares declined by 16.4% and 17.5%, respectively, during the same period, while the Nikkei dropped by just 1%. The declines over these three trading days[22] reflect the cumulative impact of the information that reached the market during this period about the scope and causes of the internal

[22] May 8, 2015 was a Friday. The markets in both Japan and the United States were closed on May 9 and 10, 2015. It should be noted that the difference in time zones between the United States and Japan can affect when market reactions are reflected in the stock price, particularly with respect to information released at a time when markets in Japan are closed but those in the United States remain open (or vice versa).

investigation and its potential impact on Toshiba's financial condition and results.[23]

261. On May 13, 2015, Toshiba provided additional details of the accounting violations discovered by the SIC and announced that correcting the errors would require a ¥50 billion restatement of previously reported operating income. This led to a temporary increase in Toshiba's stock price, as investors wary of uncertainty over the impact of the accounting violations returned to the market. But following Toshiba's May 15 press conference to discuss the SIC findings and IIC investigation, at which CEO Tanaka revealed more information about the SIC findings and scope of the IIC's mandate that revealed broader problems and continued uncertainty, the price of Toshiba's shares again began to decline.[24] By May 22, 2015, when Toshiba issued a

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[23] *See, e.g.,* Macquarie Research, *Taking a harder, deeper look* (May 8, 2015) at 1 ("We are lowering our rating to Neutral until we have further clarity on the scope and scale of accounting irregularities, potential restatements of historical financials, and risk of organisational disruptions."); MorganStanley MUFG, *Suspending Rating Given Uncertain Outlook* (May 9, 2015) at 1 ("We suspend our rating, price target on Toshiba: However, we intend to continue researching the company and exchanging views with investors."), Mitsubishi UFJ Morgan Stanley, *Changing to Not Rated, from Neutral* (May 11, 2015) at 1 ("Depending on the findings ofthe committee, we see a possibility that the firm may have to restate earnings for earlier fiscal years.

[24] *See, e.g.*, Macquarie Research, *Pain, with no gain* (May 15, 2015) at 1 ("Our impression is that the level of market concern is likely to rise; we think the market will perceive a high likelihood that the amount of improperly-booked profit will be larger than the >¥50bn already found, given risk of systematic accounting abuses and poor oversight. Our estimate remains ¥100bn."); UBS, *Far from out of the woods* (May 15, 2015) at 1 ("As of now,

press release announcing the specific scope of the investigation delegated to the IIC, the gains in the price of Toshiba's common stock following the May 13 announcement had been completely erased.

262. Thereafter, the price of Toshiba's shares in Japan and the United States continued to be volatile as the market reacted to new information and analyses about the extent of the fraud and the size of the required restatement, just as J.P. Morgan had predicted in a May 11, 2015 research report. *See* J.P. Morgan, *Downgrade to Neutral on Withdrawal of Guidance* (May 11, 2015) at 1 ("[W]e expect the share price to be based more on the related news flow than on business fundamentals until the results [of IIC investigation] report."). Despite the volatility in Toshiba's daily share price in reaction to the frequent updates and analyses of the fraud investigation, the

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the required adjustments exceed ¥50bn, which would amount to minor impact based on the size of the company's assets. This is likely to be welcomed by the stock market. The share priced declined though, probably because management's explanation that this basically wraps things up seems insufficient. . . .The market generally dislikes uncertainties."); MorganStanley MUFG, *Selection of Members of Independent Investigation Committee* (May 18, 2015) at 1 (Investigative findings that false accounting had resulted from weak controls and unrealistic budget targets suggest that the scope of misconduct could be broader than revealed: "Over the last few years many analysts have presumably noticed that as earnings in Toshiba's struggling business fell far short of the company's targets, other segments were being tasked with high profit targets."); J.P. Morgan, *Westinghouse Already Included as Potential Investigation Target* (May 16, 2015) at 1 ("[W]e question whether overseas actions to achieve quotas differ from those in Japan. Westinghouse was included as a potential investigation target, but we still see risk of uncertainty because it was not actually subject to investigation.").

market for Toshiba securities remained efficient, keeping Toshiba's stock price on a consistent downward trend that reflected the repeated negative news during the Corrective Period.

263. For example, Toshiba's common stock rose 3% following CEO Tanaka's comment on May 29, 2015 that Toshiba's self check report had not uncovered significant new concerns, leading investors to conclude that the restatement would be limited to the ¥50 billion previously reported. The stock price then fell by the same amount following a July 4, 2015 report in Japan's leading financial newspaper, the Nikkei Business Daily (Nikkei Sangyo Shimbun, the publisher of the Nikkei index), that Toshiba's restatement was expected to rise to ¥150 billion. Toshiba shares declined further following a July 12 Business Daily report that the restatement had climbed to ¥170-¥200 billion.[25] On July 13, 2015,

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[25] *See, e.g.*, UBS, *Expected to avoid delisting* (May 29, 2015) at 1 ("at this point it appears that no major problems have been found"); MorganStanley MUFG, *Approval of Postponed Deadlines for Submitting Securities Reports* (May 30, 2015) at 1 ("assuming that the only issue at this point is the anticipated ¥50bn downward revision" that was previously disclosed, "we expect the share price to rebound in the near term"); MorganStanley MUFG, *Nikkei Shimbun Reports Further Cases of Inappropriate Accounting* (July 6, 2015) at 1 ("If the cumulative negative effect relating to inappropriate accounting on OP through [FY14] exceeds ¥150bn . . . shareholders' equity (¥1.2991trn) would be reduced by ~7%. . . . [W]e do not think the stock will be regarded as investable for the medium and long term until there is clarity on fundamental improvement in management, taking into account the findings of the [IIC]."); Macquarie Research, *Waiting for resolution* (July 9, 2015) at 1 ("persistent uncertainty on strategic and financial development keeps us on the sidelines").

Toshiba's share price closed at ¥372, which was 17% lower than the ¥450 it had reached following Tanaka's May 29 press conference. The price of TOSBF and TOSYY shares declined by similar amounts (losing 16% and 15%, respectively) over the same period, while the Nikkei did not (dropping just 0.2%).

264. When the IIC issued its report on July 21, 2015, Toshiba's share price initially increased as the scope of the accounting adjustments was in line with the Business Daily report. However, the price soon began to decline again with the disclosure of additional information and analyses revealing that the scope of the problems and extent of the risks were larger even than what had been reported in the IIC report.[26] By July 29, 2015, following the release of the English translation of the IIC summary report (Apx. Ex. 1), the gains had been completely erased, and Toshiba shares were trading below the level they were at prior to the initial release of the IIC report. Toshiba's common stock, which had closed at ¥377 prior to the report's release was down to ¥366, a 3% price decline. TOSYY and TOSBF were down as well (dropping 2% and 4%, respectively).

265. Toshiba shares were trading at the same level on August 18, 2015, when the Company issued a press release outlining the expected restatement, updating its financial forecasts, and describing the governance reforms that would be implemented to

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[26] *See, e.g.*, UBS, *Still Stuck* (July 21, 2015) at 1 ("We do not expect the skepticism that has gradually become widespread in the markets to be completely dispelled by the investigative report and President Hisao Tanaka's Q&A session. . . . We do not expect a continued share price rise.").

address the IIC findings. The initial stock price reaction to Toshiba's announcement was again positive, as the restatement and guidance changes were generally consistent with the market's already-lowered expectations, and the announced reforms seemed to indicate that Toshiba was putting the problems behind it. The price gains were again only temporary, however, as subsequent analyses and information revealed that significant risks arising from or revealed by the accounting fraud remained unaddressed by the anticipated restatement, including the risk of impairment charges against the goodwill that had been booked in connection with Toshiba's acquisition of Westinghouse, and the potential for additional write-downs of deferred tax assets rendered unusable as a result of Toshiba's continued lack of profitability.[27] By August 24, 2015, the temporary gains had been erased and Toshiba's common stock had fallen back to ¥360.

266. On September 7, 2015, following Toshiba's release of its FY15 earnings and a partial restatement of its prior earnings, the price of Toshiba's common stock fell even further, closing at

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[27] *See, e.g.,* Macquarie Research, *After the Deluge* (Aug. 19, 2015) at 1 ("We are satisfied that bulk of negative newsflow surrounding the accounting scandal is now out."); UBS, *Risks receding slightly* (Aug. 18, 2015) at 1 ("Our impression is that the main uncertainties remaining in connection with the inappropriate accounting are now limited to the financial statement details. In the short term we expect a share price rise, but the long-term issues for the company remain unchanged."); Mitsubishi UFJ MorganStanley, *Toshiba (6502): Restatements leave three major balance sheet risks* (Aug. 19, 2015) at 1 ("What the market is mainly worried about, though, are the three major balance sheet risks, which Toshiba has effectively left unaddressed at this point.").

¥336, a 4.4% drop from its prior-day close. The price reaction in the United States was delayed by the Labor Day holiday, but on September 8, 2015, the price of TOSBF dropped by 5.12% and the price of TOSYY shares declined 5.26%. Between September 8 and September 11, 2015 additional details and analyses of the restatement and its impact on Toshiba's financial condition and results reached the market, causing Toshiba's common stock to lose an additional 8.8% in value, closing at ¥316 at the end of the trading week on Friday, September 11. TOSBF and TOSYY shares similarly fell by 9.3% and 8.7%, respectively, during this period.

267. The price decline continued the following week after Toshiba issued its 1Q15 earnings report on Monday, September 14, which revealed the extent to which Toshiba's profits had declined once the improper accounting ceased, and the expectations that profits would continue to lag as the Company struggled to change the business practices and correct the problems that had been concealed by its false accounting.[28] On this news, the price of Toshiba's common stock fell as low as ¥292, before closing at ¥309 on September 15, a further decline of 6.9% in value since the end of the prior week. TOSYY and TOSBF fell by 5.6% and 7.2%, respectively, over the same period.

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[28] *See, e.g.,* MorganStanley MUFG, *Jun Q Results: Profit Deterioration in All Segments, Inventories Also Rising* (Sept. 15, 2015) at 1 ("Toshiba's priority is evidently to stem the losses in unprofitable business (especially PCs, LCD TVs, home appliances), and it will need to restructure and pull out of businesses speedily without giving undue emphasis to near-term earnings.").

268. Toshiba's stock declined an additional 2.3% on September 18, 2015, following the Company's announcement that it had formed an Executive Liability Investigation Committee to investigate the potential for bringing suit against its former executives and directors. The Nikkei rose by 2.7% the same day, resulting in a net decline in Toshiba shares of approximately 5% on the news of continuing investigations into misconduct by Toshiba's officers and directors.

269. On November 9, 2015, following Toshiba's weekend disclosure of the FY12 and FY13 write-downs of Westinghouse goodwill, the price of Toshiba ADSs declined by more than 7%. Toshiba's common stock fell more than 5% on November 9 and 10, and then dropped a further 5% on November 13, following the Nikkei report quantifying the amounts of the write-downs.

IX. CLASS ACTION ALLEGATIONS

270. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of: (i) all persons who acquired Toshiba ADSs during the Class Period ("ADS Purchasers"); and (ii) all citizens and residents of the United States who acquired shares of Toshiba's common stock during the Class Period ("6502 Purchasers") (collectively, the "Class"). Excluded from the Class are defendant, all subsidiaries, business units, and consolidated entities of Toshiba, and any person who was an officer or director of Toshiba or any of its subsidiaries, business units, or consolidated entities at any time from 2008 to the present (collectively, "Excluded Person(s)"). Also excluded

from the Class are all members of the immediate families of any Excluded Person, all legal representatives, heirs, successors, or assigns of any Excluded Person or any member of their immediate families, all entities in which any Excluded Person has or had a controlling interest, and any person or entity claiming under any Excluded Person.

271. The members of the Class are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. There are over 4.2 billion shares of Toshiba common stock outstanding. The shares of Toshiba common stock and ADSs are owned by hundreds of thousands of persons.

272. Reliance on the alleged misrepresentations and material omissions is presumed. The market for Toshiba securities is efficient, as alleged above. Public information regarding the Company is rapidly incorporated into and reflected by the market price for Toshiba securities. The omitted information described herein was not known to, and could not have been discovered through reasonable investigation by, members of the Class. Investors who purchased Toshiba securities at the prices prevailing in the market during the Class Period therefore presumptively did so in reliance upon each of the false and misleading statements and material omissions alleged herein.

273. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the

members of the Class which predominate over questions which may affect individual Class members include:

(a) whether the Exchange Act or the JFIEA was violated by Toshiba;

(b) whether Toshiba omitted and/or misrepresented material facts;

(c) whether Toshiba's statements omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;

(d) with respect to the Exchange Act claims, whether Toshiba knew or deliberately disregarded that their statements were false and misleading;

(e) whether and to what extent the price of Toshiba securities was affected by the alleged misrepresentations; and

(f) the extent of damage sustained by Class members and the appropriate measure of damages.

274. Plaintiffs' claims are typical of those of the Class because plaintiffs and the members of the Class both purchased Toshiba securities at the prices prevailing in the market during the Class Period and sustained damages from Toshiba and its management's wrongful conduct. Damages under the JFIEA and under the Exchange Act will both be calculated using common and reliable methodologies that are based on the movement of Toshiba's stock price during and after the Class Period, including

calculations based on the price at which the Class member obtained Toshiba securities, the market price of Toshiba securities at the time corrective information was disclosed, and analysis of the public information that impacted the market price of Toshiba securities at those times.

275. Plaintiffs will adequately protect the interests of the Class and have retained counsel who are experienced in class action securities litigation. Plaintiffs have no interests which conflict with those of the Class. There are no conflicts between ADS Purchasers and 6502 Purchasers, as all purchasers seek to hold defendant liable based on the same alleged misrepresentations and omissions and seek damages based on the same corrective events.

276. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

X. CLAIMS FOR RELIEF

First Claim for Relief (Violation of §10(b) of the Exchange Act & Rule 10b-5) (On Behalf of ADS Purchasers Only)

277. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

278. By engaging in the acts, practices, and omissions previously alleged, Toshiba violated § 10(b) of the Exchange Act and Rule 10b-5 by:

(a) employing devices, schemes, and artifices to defraud;

(b) making untrue statements of material facts or omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) engaging in acts, practices, and a course of business that operated as a fraud or deceit upon plaintiffs and others similarly situated in connection with their purchases of Toshiba securities during the Class Period.

279. During the Class Period, Toshiba made, disseminated, and/or approved each of the statements specified in §V, *supra.*

280. Each of the statements specified in §V, *supra,* were materially false or misleading at the time they were made, in that they contained misrepresentations of fact or failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

281. The statutory safe harbor conditionally provided by 15 U.S.C. §78u-5 for certain forward-looking statements does not apply to any of the statements alleged herein to be materially false or misleading because:

(a) the statements were not forward-looking, or identified as such when made;

(b) the statements were not accompanied by meaningful cautionary language that

sufficiently identified the specific, important factors that could cause actual results to differ materially from those in the statement;

(c) the statements were included in a financial statement prepared in accordance with GAAP; or

(d) the statements were made by defendant with actual knowledge that the statements were false or misleading.

282. Toshiba made, disseminated, or approved the statements specified in §V, *supra,* while knowing or recklessly disregarding that the statements were false or misleading, or omitted to disclose facts necessary to prevent the statements from misleading investors in light of the circumstances under which they were made.

283. Plaintiffs purchased Toshiba securities in reliance upon the truth and accuracy of the statements specified in §V, *supra,* and the other information that was publicly reported by Toshiba about its operations, and without knowledge of the facts, transactions, circumstances, and conditions fraudulently misrepresented to or concealed from the market during the Class Period, as specified above.

284. Plaintiffs and the Class have suffered damages in that they:

(a) paid artificially inflated prices for publicly-issued shares of Toshiba securities;

(b) purchased their Toshiba securities on an open, developed, and efficient public market; and

(c) incurred economic losses when the price of those securities declined as the direct and proximate result of the public dissemination of information that was inconsistent with defendant's prior public statements or otherwise alerted the market to the facts, transactions, circumstances, risks, and conditions concealed by Toshiba's misrepresentations and omissions, or the economic consequences thereof.

285. Plaintiffs and the Class would not have purchased Toshiba securities at the prices they paid, or at all, if they had been aware that the market prices had been artificially inflated by the false and misleading statements and omissions specified above.

Second Claim for Relief
(Violation of §20(a) of the Exchange Act)
(On Behalf of ADS Purchasers Only)

286. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

287. Toshiba and/or persons under its control violated § 10(b) of the Exchange Act and Rule 10b-5 by their acts and omissions described above, causing economic injury to plaintiffs and the other members of the Class.

288. By virtue of its position as a controlling person, Toshiba is liable pursuant to §20(a) of the Exchange Act for the acts and omissions of its directors, executive officers, subsidiaries, and affiliates in violation of the Exchange Act.

289. Toshiba, through its ability to hire, fire, appoint, compensate, supervise, direct, and discipline employees, had the ability to control the actions of the directors, executive officers, managers, and other employees of the Company and of its business subsidiaries and affiliates, including the capacity to control the actions of each of the individuals identified in the chart below.

Hisao Tanaka	Norio Sasaki	Hideo Kitamura
Makoto Kubo	Fumio Muraoka	Atsutoshi Nishida
Hidejiro Shimomitsu	Masahiko Fukakushi	Kiyoshi Kobayashi
Toshio Masaki	Yasuharu Igarashi	Keizo Maeda
Naoto Nishida	Fumiaki Ushio	Seiya Shimaoka
Masaaki Osumi	Yasuo Naruke	Shigenori Tokumitsu
Shinichiro Akiba	Takeshi Yokota	Yoshihiro Aburatani
Masakazu Kakumu	Kiyoshi Okamura	Hidehito Murato

290. Toshiba had the power to prevent or correct the actions of its directors, executive officers, managers, and employees to prevent the actions in violation of the federal securities laws or the securities laws of Japan.

291. Toshiba failed to act to prevent the actions of its directors, executive officers, managers, and employees in violation of the federal securities laws or the securities laws of Japan, or actively controlled and directed those actions so as to cause the violations of the federal securities laws and the securities laws of Japan complained of herein.

292. Toshiba, through its ownership of the subsidiaries and affiliates involved in the fraudulent conduct herein, and its ability to hire, fire, appoint, compensate, supervise, and discipline the officers, directors, and employees thereof, had but failed to exercise the capacity to control the actions of its

business subsidiaries and affiliates, and the actions of the officers and employees of those subsidiaries and affiliates, in violation of the federal securities laws and the securities laws of Japan, including by failing to act to prevent the actions of the persons named in the chart above who exercised direct control over Toshiba's subsidiaries and affiliates in order to carry out the fraudulent actions complained of herein, or directing the actions they took in violation of those laws.

293. Toshiba's executive officers and the other persons identified in the chart above had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, are presumed to have had the power to, and did, control or influence the business practices or conditions giving rise to the securities violations alleged herein, and the contents of the statements which misled investors about those conditions and practices, as alleged above. By virtue of their high-level positions, participation in or awareness of the Company's operations, and intimate knowledge of the matters discussed in the public statements filed by the Company with the SESC and disseminated to the investing public, Toshiba's executive officers had the power to influence and control, and did influence and control, directly or indirectly, the decision-making of the Company, including the contents and dissemination of the false and misleading statements alleged above.

294. Toshiba and its executive officers and directors, because of their positions with the Company, possessed the power and authority to control the contents of Toshiba's quarterly reports,

press releases, quarterly conference calls, and other presentations to securities analysts, money and portfolio managers, and institutional investors. Toshiba and its executive officers were provided with copies of the Company's reports and press releases alleged herein to be misleading prior to or shortly after their issuance and had the ability and opportunity to prevent their issuance or cause them to be corrected.

Third Claim for Relief
(Violation of JFIEA Article 21-2)
(On Behalf of ADS Purchasers & 6502 Purchasers)

295. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

296. Toshiba was the Issuer of the securities acquired by plaintiffs and other members of the Class.

297. Toshiba submitted the annual reports and quarterly reports identified in ||111-112 & 116 above (collectively, the "Reports") to the FSA via the TDnet.

298. Each of the Reports contained false statements about material particulars, omitted statements as to material particulars that were required to be stated, or omitted statements of material fact that were necessary to prevent the Reports from being misleading, as alleged in §V.A.-C. above.

299. Toshiba breached its duty to make a reasonable and diligent investigation of the

statements in the Reports and any incorporated or attached documents and to ensure that the statements contained therein were truthful and accurate, and that no material information necessary to prevent the statements from being misleading had been omitted.

300. During the period that the Reports were required to be made available for public inspection, plaintiffs and the other members of the Class acquired securities issued by Toshiba.

301. The false statements and omissions were concealed by defendant and unknown to the investing public, as alleged above. At the time plaintiffs and the other members of the Class acquired the securities issued by Toshiba they did not know, and in the exercise of reasonable diligence could not have known, that the statements in the Reports were false or that the Reports omitted statements of material particulars or material facts that were required to be stated therein or necessary to prevent the Reports from being misleading.

302. The material false information and omissions in the Reports artificially inflated the prices of the securities acquired by plaintiffs and the other members of the Class.

303. Plaintiffs and other members of the Class suffered damages arising from the statements alleged herein being false or having omitted material information due to the declines in the market value of Toshiba securities that occurred during the Corrective Period, as alleged above. The damages sustained by plaintiffs and other members of the Class were not due to circumstances other than the

decline in the value of Toshiba securities arising from the false and misleading statements alleged herein.

304. Toshiba is therefore liable under Article 21-2 to compensate plaintiffs for damage arising from the false statements and omissions in the Reports.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

A. Declaring this action to be a proper class action pursuant to Fed. R. Civ. P. 23;

B. Awarding compensatory damages in favor of plaintiffs and the other Class members against defendant for all damages sustained as a result of defendant's wrongdoing in an amount to be proven at trial, including interest;

C. Awarding plaintiffs and the Class reasonable costs and expenses incurred in this action, including attorneys' fees; and

D. Awarding such equitable/injunctive or other relief as the Court may deem just and proper.

XII. JURY DEMAND

305. Plaintiffs demand a trial by jury on all issues so triable.

DATED: December 17, 2015

ROBBINS GELLER RUDMAN & DOWD LLP
DENNIS J. HERMAN
WILLOW E. RADCLIFFE

JOHN H. GEORGE

/s/ Dennis J. Herman
DENNIS J. HERMAN

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94104
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415/288-4534 (fax)

Lead Counsel for
Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 17, 2015.

s/ Dennis J. Herman
DENNIS J. HERMAN
ROBBINS GELLER RUDMAN & DOWD LLP

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Mailing Information for a Case 2:15-cv-04194-DDP-JC Mark Stoyas v. Toshiba Corporation et al

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Danielle S Myers**
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- **Darren J Robbins**
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- **Laurence M Rosen**
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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Christopher M. Curran
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Owen C. Pell
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036-2787

EXHIBIT A

CERTIFICATION OF NAMED PLAINTIFF PURSUANT TO FEDERAL SECURITIES LAWS

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND ("Plaintiff") declares:

1. Plaintiff has reviewed a complaint and authorized its filing.

2. Plaintiff did not acquire the security that is the subj ect of this action at the direction of plaintiff's counsel or in order to participate in this private action or any other litigation under the federal securities laws.

3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.

4. Plaintiff has made the following transaction(s) during the Class Period in the securities that are the subject of this action:

Security Transaction Date Price Per Share

See attached Schedule A.

5. Plaintiff has not sought to serve or served as a representative party in a class action that was filed under the federal securities laws within the three-year period prior to the date of this Certification except as detailed below:

Wang, et al. v. Ariad Pharmaceuticals, Inc., et al., No. 1:13-cv-12544 (D. Mass.)

6. The Plaintiff will not accept any payment for serving as a representative party on

behalf of the class beyond the Plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating to the representation of the class as ordered or approved by the court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of December, 2015.

AUTOMOTIVE
INDUSTRIES PENSION
TRUST FUND

By: _____
Michael Schumacher,
Fund Manager

SCHEDULE A

SECURITIES TRANSACTIONS

Acquisitions

Date Acquired	Type/Amount of Securities Acquired	Price
03/23/2015	36,000	$25.57

EXHIBIT B

CERTIFICATION OF NAMED PLAINTIFF PURSUANT TO FEDERAL SECURITIES LAWS

NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND ("Plaintiff") declares:

1. Plaintiff has reviewed a complaint and authorized its filing.

2. Plaintiff did not acquire the security that is the subj ect of this action at the direction of plaintiffs counsel or in order to participate in this private action or any other litigation under the federal securities laws.

3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.

4. Plaintiff has made the following transaction(s) during the Class Period in the securities that are the subject of this action:

Security Transaction Date Price Per Share

See attached Schedule A.

5. Plaintiff has not sought to serve or served as a representative party in a class action that was filed under the federal securities laws within the three-year period prior to the date of this Certification except as detailed below:

6. The Plaintiff will not accept any payment for serving as a representative party on behalf of the class beyond the Plaintiffs pro rata share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating

to the representation of the class as ordered or approved by the court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of December, 2015.

NEW ENGLAND
TEAMSTERS &
TRUCKING INDUSTRY
PENSION FUND

By: _____
Edward F. Groden,
Executive Director

SCHEDULE A

SECURITIES TRANSACTIONS

Acquisitions

Date Acquired	Type/Amount of Securities Acquired	Price
04/01/2015	110,400	¥ 503.42
04/02/2015	66,600	¥ 512.26
09/04/2015	58,000	¥ 356.51
10/22/2015	57,600	¥ 340.53
10/23/2015	9,000	¥ 343.35
10/26/2015	23,400	¥ 356.66
10/27/2015	18,000	¥ 349.00

EXHIBIT 8

[Translation]
November 7, 2015

For Immediate Release

Company name: Toshiba Corporation
1-1-1 Shibaura, Minato-ku, Tokyo, Japan

Representative: Masashi Muromachi, President & CEO

Securities code: 6502 (TSE and NSE)

Contact: Naoto Hasegawa, General Manager, Public Relations & Investor Relations Office
Tel: +81-3-3457-2100

Notice on Receipt of Investigation Report from Executive Liability Investigation Committee, Filing of Action for Compensatory Damages Against Former Company Executives, an Action Filed in the U.S., and Other Matters

Toshiba Corporation (the "Company") today received an investigation report from the Executive Liability Investigation Committee. The Company hereby announces that, in response to the receipt of the investigation report and in accordance with a determination by the Audit Committee, the Company has filed an action for compensatory damages (an "action to enforce liability" as provided for in the Companies Act) with the Tokyo District Court against former executives as detailed below. The Company plans to make the investigation report

publicly available on November 9 *following examination of whether it is necessary to make partial redactions from perspectives such as impacts on the court proceedings, protection of trade secrets of the Company and its clients, and protection of personal privacy.

Also, in relation to a purported class action pertaining to the Company's inappropriate accounting issue that was filed in California in the U.S., the Company announces that today it officially received the Complaint in Japan.

The Company deeply apologizes to our shareholders, investors and other stakeholders for the considerable concern caused.

* The investigation report is (currently) only available in Japanese.

1. Action to enforce liability

(1) Background, and outline of recommendations

As stated in "Notice on Establishment of Executive Liability Investigation Committee" dated September 17, 2015, having received from certain shareholders on September 9 a demand to file an action to enforce the liability of executives under Article 847(1) of the Companies Act, the Company established an Executive Liability Investigation Committee comprising fair and impartial outside legal experts who do not have any interests in relation to the 98 individuals in total who were directors or executive officers of the Company between fiscal 2008 and the third quarter of fiscal 2014 (such directors and executive officers, the

"Investigated Executives"). The Executive Liability Investigation Committee has engaged in necessary investigations with the purpose of making a report and recommendations to the Audit Committee in order for the Company to determine fairly and appropriately, in relation to the Company's inappropriate accounting issue, whether any of the Investigated Executives are liable for being negligent in then duties and whether the Company should file an action against any of the Investigated Executives.

As a result of such investigation, the Company received a report and recommendations from the Executive Liability Investigation Committee to the effect that five of the Investigated Executives—Atsutoshi Nishida, Norio Sasaki, Hisao Tanaka, Fumio Muraoka, and Makoto Kubo—were found to have been negligent (such five individuals, the "Individuals Subject to Liability Enforcement") and that it would be reasonable to seek compensation for part of the damage incurred, within the scope in which reasonable and probable causation can be found in terms of the negligent acts of each individual and legal perspectives as an initial claim, taking into account factors such as recoverability. The Executive Liability Investigation Committee summarized as follows the respective liabilities of each Individual Subject to Liability Enforcement with respect to which the Company should enforce compensatory liability.

> Note: The project names are the same as those used in the investigation report by the Independent Investigation Committee.

Mr. Nishida

It is found that Mr. Nishida breached his duty of care as an executive officer and director in relation to the recording of profits in Buy-Sell transactions at the end of each fiscal period from the second quarter of fiscal 2008 to the first quarter of fiscal 2009 when he was in office as Director and Representative Executive Officer—President and Chief Executive Officer, and it is reasonable for Toshiba to enforce the foregoing liability by filing a civil action against Mr. Nishida in relation to damage for which reasonable and probable causation can be found in respect of such breach.

Mr. Sasaki

(i) In relation to the recording of provisions for contract losses in Project I, it is found that Mr. Sasaki breached his duty of care as an executive officer and director at the end of each fiscal period from the fourth quarter of fiscal 2011 to the first quarter of fiscal 2013 when he was in office as Director and Representative Executive Officer—President and Chief Executive Officer;

(ii) in relation to the recording of profits in Buy-Sell transactions, it is found that Mr. Sasaki breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2009 to the first quarter of fiscal 2013 when he was hi office as Director and Representative Executive

Officer—President and Chief Executive Officer; and

(iii) in relation to making inappropriate C/Os, it is found that Mr. Sasaki breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2011 to the first quarter of fiscal 2013 when he was in office as Director and Representative Executive Officer—President and Chief Executive Officer.

It is reasonable for Toshiba to enforce the foregoing liabilities by filing a civil action against Mr. Sasaki in relation to damage for which reasonable and probable causation can be found in respect of such breaches.

Mr. Tanaka

(i) In relation to the recording of provisions for contract losses in Project G, it is found that Mr. Tanaka breached his duty of care as an executive officer and director at the end of the second and third quarters of fiscal 2013 when he was in office as Director and Representative Executive Officer—President and Chief Executive Officer;

(ii) in relation to the recording of provisions for contract losses in Project K, it is found that Mr. Tanaka breached his duty of care as an executive officer and director at the end of each fiscal period from the first to the third quarters of

fiscal 2013 when he was in office as Director and Representative Executive Officer—President and Chief Executive Officer;

(iii) in relation to recording profits in Buy-Sell transactions,

(a) it is found that Mr. Tanaka breached his duty of care as an executive officer at the end of each fiscal period from the second quarter of fiscal 2008 to the first quarter of fiscal 2013 when he was in office as Executive Officer in charge of the Procurement Group; and

(b) it is found that Mr. Tanaka breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2013 to the third quarter of fiscal 2014 when he was in office as Director and Representative Executive Officer—President and Chief Executive Officer; and

(iv) in relation to making inappropriate C/Os, it is found that Mr. Tanaka breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2013 to the third quarter of fiscal 2014 when he was in office as Director

and Representative Executive Officer—President and Chief Executive Officer.

It is reasonable for Toshiba to enforce the foregoing liabilities by filing a civil action against Mr. Tanaka in relation to damage for which reasonable and probable causation can be found in respect of such breaches.

Mr. Muraoka

In relation to recording profits in Buy-Sell transactions,

(i) it is found that Mr. Muraoka breached his duty of care as an executive officer and director at the end of each fiscal period from the third quarter of fiscal 2008 to the first quarter of fiscal 2011 when he was in office as Director and Representative Executive Officer (hi charge of the Finance & Accounting Group); and

(ii) it is found that Mr. Muraoka breached his duty of care of monitoring and supervision as a director and member of the Audit Committee at the end of each fiscal period from the first quarter of fiscal 2011 to the first quarter of fiscal 2014 when he was in office as Director and Audit Committee Chairman.

It is reasonable for Toshiba to enforce the foregoing liabilities by filing a civil action against Mr. Muraoka in relation to damage for

which reasonable and probable causation can be found in respect of such breaches.

Mr. Kubo

(i) In relation to the recording of provisions for contract losses in Project G, it is found that Mr. Kubo breached his duty of care as an executive officer and director at the end of the second and third quarters of fiscal 2013 when he was in office as Director and Representative Executive Officer—Vice President (in charge of the Finance & Accounting Group);

(ii) in relation to the recording of provisions for contract losses in Project I, it is found that Mr. Kubo breached his duty of care as an executive officer and director at the end of each fiscal period from the fourth quarter of fiscal 2011 to the first quarter of fiscal 2014 when he was in office as Director and Representative Executive Officer (in charge of the Finance & Accounting Group);

(iii) in relation to the recording of provisions for contract losses in Project K, it is found that Mr. Kubo breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2013 to the third quarter of fiscal 2013 when he was in office as Director and Representative Executive Officer (in

charge of the Finance & Accounting Group);

(iv) in relation to the recording of profits in Buy-Sell transactions.

(a) it is found that Mr. Kubo breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2011 to the first quarter of fiscal 2014 when he was in office as Director and Representative Executive Officer (in charge of the Finance & Accounting Group);

(b) it is found that Mr. Kubo breached his duty of care of monitoring and supervision as a director and Audit Committee member at the end of each fiscal period from the first quarter of fiscal 2014 to the third quarter of fiscal 2014 when he was in office as Director and Audit Committee Chairman; and

(v) in relation to making inappropriate C/Os,

(a) it is found that Mr. Kubo breached his duty of care as an executive officer and director at the end of each fiscal period from the first quarter of fiscal 2011 to the first quarter of fiscal 2014

when he was in office as Director and Representative Executive Officer (in charge of the Finance & Accounting Group): and

(b) it is found that Mr. Kubo breached his duty of care of monitoring and supervision as a director and Audit Committee member at the end of each fiscal period from the first quarter of fiscal 2014 to the third quarter of fiscal 2014 when he was in office as Director and Audit Committee Chairman;

It is reasonable for Toshiba to enforce the foregoing liabilities by filing a civil action against Mr. Kubo in relation to damage for which reasonable and probable causation can be found in respect of such breaches.

Regarding the Investigated Executives other than the Individuals to Enforcement of Liability

The Executive Liability Investigation Committee examined the existence of liability on the part of each of the 98 Investigated Executives, dividing them into "Involved Individuals" (meaning the individuals mentioned in the Investigation Report by the Independent Investigation Committee as having been involved, as well as those found in the process of the investigation by the Independent Investigation Committee to have been possibly involved) and "Non-Involved Individuals" (those other than the Involved Individuals).

There was not found to be any liability on the part of the Non-Involved Individuals to compensate for damage, for reasons such as that they were not found to have been aware or had any particular opportunity to be aware about the necessity of recording provisions for contract losses, or that no particular circumstances or evidence was found that was sufficient to find that they had breached their duty to monitor and supervise or breached their duty to operate internal control systems.

Based on the results of interviews and relevant evidence, the Executive Liability Investigation Committee identified the facts pertaining to each of the projects and the actions of each Involved Individual to the extent ascertainable from the evidence, and determined the facts giving rise to liability and the existence of liability in respect of each Involved Individual, but there was not found to be any liability on the part of the Involved Individuals other than the Individuals Subject to Enforcement of Liability to compensate for damage, for reasons such as that there was no evidence to find that they played a leading or deciding role in not recording appropriate amounts of provisions for contract losses, that it would be difficult to go as far as saying that they had not fulfilled the duty of care that should be expected of them, or that it can be said that they basically fulfilled the duty of care that should be expected of them in the given circumstances.

Based on examinations made based on the facts etc., ascertainable from the evidence, it is not reasonable for Toshiba to enforce liability for compensatory damages against the Investigated

Executives other than the Individuals Subject to Enforcement of Liability as, for the reasons such as those stated above, they were not able to be found legally liable in respect of the inappropriate accounting.

Having received this report and recommendations and having examined whether to file an action seeking compensatory damages against the Individuals Subject to Enforcement of Liability and against the investigated Executives other than the Individuals Subject to Enforcement of Liability, the Company's Audit Committee decided to file an action seeking compensatory damages (an action to enforce liability) against the individuals Subject to Enforcement of Liability, and today submitted a Complaint to the Tokyo District Court as set out in (2) below.

Note that the question of whether to file an action seeking compensatory damages against Investigated Executives who are current members of the Company's Audit Committee was examined at the Company's Board of Directors by those Directors other than such Audit Committee members.

(2) Content of the action

A judgment is sought to the effect that five individuals—Atsutoshi Nishida, Norio Sasaki, Hisao Tanaka, Fumio Muraoka, and Makoto Kubo—jointly pay to the Company JPY 300,000,000 (see Note) and an amount of money equivalent to five percent per annum thereof from the date immediately following service of the Complaint until the date of payment in full.

Note: The amount of damage currently identified is expected to be in excess of a total of JPY 1,000,000,000 (such as compensation for certified public accountants and other accounting experts engaged by the Company to perform services for the restatement of past financial results, and the listing agreement violation penalty), and the amount claimed in this action is a portion (JPY 300,000,000) of such amount of damage, but the Company will examine increasing the amount claimed at an appropriate time if new damage is incurred in the future.

2. Action in the U.S.

As stated in "Notice on Action to be Taken by Toshiba in Response to the Results of the Investigation Report by the Independent Investigation Committee" dated July 29, 2015, the Company had been aware that a purported class action pertaining to the Company's inappropriate accounting issue had been filed in the State of California in the U.S. against the Company and multiple former directors of the Company (the "Class Action"), and today the Complaint for such Class Action was officially received by the Company in Japan. The Class Action has been filed by holders of American Depositary Receipts etc., but the Company has not been involved in the issuance of such American Depositary Receipts.

The Company plans to file a petition to the court by around the end of this year seeking that the Class Action be dismissed on grounds such as that the

Company is not subject to the application of U.S. securities laws and regulations.

3. Future outlook

It is currently difficult to calculate the financial impact from the above two actions, and the impact on the results of the Company is unclear. It will be disclosed promptly once it is determined.

4. Disciplinary measures against employees

In addition to the personnel measures taken against directors and executive officers that have already been announced, the Company will implement disciplinary measures against employees. As a result of having carefully examined taking measures against employees suspected of involvement, mainly the top managerial employees mentioned in the Investigation Report by the Independent Investigation Committee, the Company plans to implement disciplinary measures as of November 9, 2015 against a total of 26 employees with involvement and employees with management and supervisory responsibilities.

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APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Docket No. 2:15-cv-04194-DDP-JC

MARK STOYAS; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND; AND AUTOMOTIVE INDUSTRIES PENSION TRUST FUND, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TOSHIBA CORPORATION,

Defendant.

DECLARATION OF ANDREW M. PARDIECK

[EXCERPT]

* * *

C. Litigation Pending in Japan

53. I have reviewed the Complaint filed in Osaka alleging false and misleading disclosures by Toshiba Corporation, a related press summary, and Defendants' First Reply. I have also reviewed information posted to a website maintained by counsel for plaintiffs in the actions in Tokyo, Osaka, and Fukuoka.

54. Based on review of the above information, my understanding is that the named plaintiffs in the Osaka action include forty-five (45) individual investors, from areas including Osaka, Hyougo Prefecture, Kyoto, Hiroshima, and Nara. Plaintiffs in the Tokyo action include fifty (50) individuals, largely from the Tokyo area, but also including residents from the Kantou area, Niigata Prefecture, Aichi Prefecture, and Hokkaido. I have found no reference suggesting inclusion of any plaintiffs from the United States.

55. The named defendants in the Osaka action are Toshiba Corporation, and five (5) former officers of Toshiba Corporation, including Atsutoshi Nishida, Norio Sasaki, Hisao Tanaka, Tomio Muraoka, and Makoto Kubo.

56. Plaintiffs' claims in the Osaka Complaint against Toshiba Corporation are based on Civil Code Article 709, Japan's negligence statute, and FIEA Article 21-2(1). Plaintiffs' claims against the former officers of Toshiba Corporation are based on Civil Code Article 709 and FIEA Article 22(1), an article that extends the civil liability scheme set out in Article 21 to officers of

the company submitting the false or misleading statement.

* * *

APPENDIX F

U.S. Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)

(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in

contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u–1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

U.S. Securities Exchange Act of 1934 § 20(a), 15 U.S.C. § 78t(a) Liability of controlling persons and persons who aid and abet violations

(a) Joint and several liability; good faith defense

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

U.S. Securities Exchange Act of 1934 § 30(b), 15 U.S.C. § 78dd(b) Foreign securities exchanges

(b) Business without the jurisdiction of the United States

The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

17 C.F.R. § 240.12g3-2
Exemptions for American depositary receipts and certain foreign securities

(a) Securities of any class issued by any foreign private issuer shall be exempt from section 12(g) (15 U.S.C. 78*l*(g)) of the Act if the class has fewer than 300 holders resident in the United States. This exemption shall continue until the next fiscal year end at which the issuer has a class of equity securities held by 300 or more persons resident in the United States. For the purpose of determining whether a security is exempt pursuant to this paragraph:

(1) Securities held of record by persons resident in the United States shall be determined as provided in § 240.12g5-1 except that securities held of record by a broker, dealer, bank or nominee for any of them for the accounts of customers resident in the United States shall be counted as held in the United States by the number of separate accounts for which the securities are held. The issuer may rely in good faith on information as to the number of such separate accounts supplied by all owners of the class of its securities which are brokers, dealers, or banks or a nominee for any of them.

(2) Persons in the United States who hold the security only through a Canadian Retirement Account (as that term is defined in rule 237(a)(2) under the Securities Act of 1933 (§ 230.237(a)(2) of this chapter)), shall not be counted as holders resident in the United States.

(b)

(1) A foreign private issuer shall be exempt from the requirement to register a class of equity securities under section 12(g) of the Act (15 U.S.C. 78*l*(g)) if:

(i) The issuer is not required to file or furnish reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78o(d));

(ii) The issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities; and

(iii) The issuer has published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, since the first day of its most recently completed fiscal year, it:

(A) Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;

(B) Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and

(C) Has distributed or been required to distribute to its security holders.

(2)

(i) In order to maintain the exemption under paragraph (b) of this section, a foreign private issuer shall publish, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, the information specified in paragraph (b)(1)(iii) of this section.

(ii) An issuer must electronically publish the information required by paragraph (b)(2) of this section promptly after the information has been made public.

(3)

(i) The information required to be published electronically under paragraph (b) of this section is information that is material to an investment decision regarding the subject securities, such as information concerning:

(A) Results of operations or financial condition;

(B) Changes in business;

(C) Acquisitions or dispositions of assets;

(D) The issuance, redemption or acquisition of securities;

(E) Changes in management or control;

(F) The granting of options or the payment of other remuneration to directors or officers; and

(G) Transactions with directors, officers or principal security holders.

(ii) At a minimum, a foreign private issuer shall electronically publish English translations of the following documents required to be published under paragraph (b) of this section if in a foreign language:

(A) Its annual report, including or accompanied by annual financial statements;

(B) Interim reports that include financial statements;

(C) Press releases; and

(D) All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

(c) The exemption under paragraph (b) of this section shall remain in effect until:

(1) The issuer no longer satisfies the electronic publication condition of paragraph (b)(2) of this section;

(2) The issuer no longer maintains a listing of the subject class of securities on one or more exchanges in a primary trading market, as defined under paragraph (b)(1) of this section; or

(3) The issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

(d) Depositary shares registered on Form F-6 (§ 239.36 of this chapter), but not the underlying deposited securities, are exempt from section 12(g) of the Act under this paragraph.

* * *

Additional Form F-6 Eligibility Requirement Related to the Listed Status of Deposited Securities Underlying American Depositary Receipts, Securities Act Release No. 8287, Exchange Act Release No. 48,482, 68 Fed. Reg. 54,644-46 (Sept. 17, 2003)

[EXCERPT]

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is publishing for comment a proposed amendment to Form F–6 to make the form unavailable to register under the Securities Act of 1933 depositary shares evidenced by unsponsored American depositary receipts if the foreign issuer has separately listed the deposited securities on a registered national securities exchange or automated interdealer quotation system of a national securities association. The proposed amendment is intended to benefit U.S. investors by ensuring that investors in the equity securities of the same foreign issuer all enjoy a similar level of shareholder rights and by minimizing potential investor confusion. It also is intended to improve the ability of foreign companies to control the form in which their securities are traded in U.S. markets.

DATES: Please submit your comments on or before October 17, 2003.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by hard copy or e-mail, but not by both methods. Comments sent by hard copy should be submitted in

triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following electronic mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–16–03. This file number should be included in the subject line if electronic mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet website (*http://www.sec.gov*).[1]

FOR FURTHER INFORMATION CONTACT: Michael D. Coco, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at (202) 942–2990, U.S. Securities & Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0302.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment a proposed amendment to Form F–6,[2] the registration statement form under the Securities Act of 1933 ("Securities Act")[3] for depositary shares evidenced by American depositary receipts.

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[1] We do not edit personal, identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information that you wish to make publicly available.

[2] 17 CFR 239.36.

[3] 15 U.S.C. 77a *et seq.*

I. Background and Overview of the Proposal

American depositary receipts ("ADRs")[4] are certificates that represent an ownership interest in foreign securities on deposit with an intermediary. ADRs were developed as a means to facilitate U.S. trading in foreign securities when direct ownership would have been impractical. With the increasing globalization of securities markets and technological advancements in clearance procedures, an increasing number of foreign issuers[5] today choose to list their ordinary shares in the United States directly, rather than as ADRs. To better adapt the regulatory treatment of ADRs to the evolution of the market for foreign securities, the Commission is soliciting public comment on a proposed amendment to the eligibility requirements of Form F–6, the Securities Act registration form for ADRs. The Commission's

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[4] Since 1983, the Commission's regulations have made a distinction between ADRs and American depositary shares ("ADSs"). Under this distinction, an ADR is the physical certificate that evidences ADSs (in much the same way as a stock certificate evidences shares of stock), and an ADS is the security that represents an ownership interest in deposited securities (in much the same way as a share of stock represents an ownership interest in a corporation). Although conceptually accurate, it appears that ADR market participants largely do not differentiate between ADRs and ADSs. In this release, the term "ADS" is not used, and the term "ADR" may, depending on the context, refer to either the physical certificate or the security evidenced by the certificate.

[5] The term "foreign issuer" is defined in Securities Act Rule 405 [17 CFR 230.405]. A foreign issuer is any issuer that is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

proposed action has been prompted by proposals by market participants to issue unsponsored ADRs relating to the ordinary shares of a foreign issuer that are separately listed on a U.S. exchange.[6] The proposed amendment would not permit the use of Form F–6 to register ADRs that a foreign issuer has not sponsored if that issuer has listed its securities in ordinary share form on a national securities exchange or automated quotation system of a national securities association.

A. American Depositary Receipts

An American depositary receipt represents an ownership interest in a specified number or fraction of securities that have been deposited with a depositary ("deposited securities"). The deposited securities are typically equity securities[7] of a foreign issuer, and the depositary is usually a U.S. bank or trust company. ADRs were developed primarily to facilitate the transfer of ownership of foreign securities in the United States and the conversion of foreign currency dividends into U.S. dollars, as an alternative to purchasing ordinary shares on foreign markets.

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[6] This is not the first time the Commission has addressed questions relating to unsponsored ADRs. In 1991, the Commission published a concept release to seek comment on several questions relating to ADRs. (Release No. 33–6894, May 23, 1991). One of the main issues at that time related to unsponsored ADRs that would essentially duplicate and be fungible with sponsored ADRs for the same securities of the same foreign issuer. The Commission did not propose or adopt any rules as a result of the concept release.

[7] Debt securities may also underlie ADRs.

ADRs were developed in an era of physical securities and physical settlement as a means to facilitate the transfer of ownership of foreign securities in the United States. Because a foreign company's stock transfer books were generally maintained outside the United States, and because of differences in clearance and settlement practices, ADRs were a more convenient way to trade foreign securities. Even with vastly improved communications and clearance and settlement technology, ADRs remain the most common form in which foreign securities trade in the United States.

An ADR facility may be "sponsored" or "unsponsored." Although sponsored and unsponsored facilities are similar in many respects, for example each represents a fixed number or fraction of underlying securities on deposit with a depositary, there are a number of differences between them with regard to foreign issuer involvement, the rights and obligations of the ADR holders, and the practices of market participants.

1. Unsponsored ADRs

An unsponsored facility is established by the depositary acting on its own, usually in response to a perceived interest among U.S. investors in a particular foreign security that is not traded on a U.S. exchange or quotation system. An unsponsored ADR facility does not involve the formal participation, or even require the acquiescence of, the foreign company whose securities will be represented by the ADRs. If the foreign issuer is neither

reporting under the Securities Exchange Act of 1934 (the "Exchange Act")[8] nor exempt from reporting obligations under the "information supplying" exemption of Exchange Act Rule 12g3-2(b),[9] the depositary requests that the issuer establish the exemption. Once the foreign issuer is either reporting under the Exchange Act or exempt, the depositary files a Securities Act registration statement on Form F-6 for the ADRs.[10]

An unsponsored ADR arrangement is essentially a two-party contract between the depositary and the ADR holders. The holders pay any fees relating to unsponsored ADRs, such as currency conversion fees, dividend distribution fees, and charges for other distributions and services. Under the deposit agreement for most unsponsored facilities, the depositary has no obligation to exercise voting rights on behalf of ADR holders, or to notify ADR holders about shareholder meetings or to distribute proxy information, annual reports, or other materials it receives from the foreign company.

2. Sponsored ADRs

A sponsored ADR arrangement is effectively a three party-contract: it is established jointly by a deposit agreement between the foreign company whose securities will be represented by the ADRs and the depositary, with ADR holders as third-party beneficiaries. The foreign company generally bears

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[8] 15 U.S.C. 78a *et seq.*

[9] 17 CFR 240.12g3-2(b).

[10] *See* Section II, *infra.*

some of the costs, such as dividend payment fees, but the ADR holders may pay other costs such as deposit and withdrawal fees. Under most sponsored ADRs, the depositary undertakes, at the foreign company's request (and at the company's expense), to arrange for the exercise of voting rights, the distribution of proxy materials, and the forwarding of shareholder communications to the ADR holders. Although the terms of the deposit agreement for a sponsored ADR are different from those of an unsponsored ADR, sponsorship does not lead to different reporting or registration requirements under either the Exchange Act or the Securities Act.

Foreign companies undertaking public offerings or listings of ADRs in the United States, and which then become reporting companies under the Exchange Act, virtually always establish sponsored arrangements.[11] The New York Stock Exchange (the "NYSE") and the American Stock Exchange ("AMEX") will list only sponsored ADRs.[12] In practice Nasdaq will also list

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[11] Sponsored ADR facilities are described by market participants in terms of three categories based on the extent to which the foreign company has sought to access the U.S. capital markets. A "Level I facility" is a sponsored facility traded in the over-the-counter markets. A "Level II facility" denotes ADRs quoted on the Nasdaq Stock Market ("Nasdaq") or listed on a national securities exchange when the ADRs have not been offered in a public offering in the United States (but are publicly traded in one or more markets outside the United States). A "Level III facility" refers to ADRs quoted on Nasdaq or listed on a national securities exchange following a U.S. public offering.

[12] *See* New York Stock Exchange (NYSE) Listed Company Manual, "Sponsored American Depositary Receipts or Shares," Section 103.04; American Stock Exchange (AMEX) Constitution

only sponsored ADRs, although its rules do not contain such a requirement.[13]

The majority of non-Canadian foreign companies whose securities are listed both in the United States and on a non-U.S. exchange use ADRs to list in the United States. ADRs have developed as a cost effective and relatively efficient means to provide for the clearance and settlement of foreign securities, and distribution of dollar-denominated dividends, in the United States.

B. Other Forms in Which Foreign Securities Are Listed on U.S. Trading Markets

Many foreign securities are listed in the United States in ordinary share form, without the use of ADRs. In this respect, these foreign securities are identical to securities of U.S. companies. For example, because the U.S. and Canadian securities markets and clearance and settlement systems developed along side one another over a long period of time, the markets have developed effective mechanisms that permit the same securities to list on a U.S. market and a Canadian market. As a result, Canadian companies list their securities in the United States without the use of ADRs. Some other foreign issuers, for example a number of Dutch issuers, issue a class of so-called "New York shares" rather than ADRs.

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and Rules, "Original Listing Applications of Foreign Issuers," Section 220.

[13] *See* The Nasdaq Stock Market, "Listing Requirements and Fees."

There are some foreign companies whose sole trading market is in the United States and therefore do not need to have securities transfer arrangements in more than one country. These companies have a single transfer agent located in the United States. These companies, which are generally incorporated in Bermuda, the Bahamas or Cayman Islands, are identical to U.S. companies in this respect.

Other foreign companies have created "global share" arrangements, in which the same security is traded in two markets without the use of ADRs.[14] The first such global share arrangement was created in connection with Daimler-Benz's acquisition of Chrysler in 1998. Since that time, three other foreign companies listed in the United States have established global share arrangements: Celanese AG, UBS AG and Deutsche Bank.

C. Unsponsored ADR Facilities Relating to Listed Ordinary Shares

Some market participants have proposed to establish unsponsored ADRs relating to shares of foreign issuers that are listed directly on a national securities exchange. These ADRs would bear a

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[14] Global shares allow foreign companies greater access to their shareholders, as they are no longer dependent on an ADR depositary bank for distribution of shareholder materials, tabulation of shareholder votes, distribution of dividends, and other shareholder services. They are also potentially attractive to investors wishing to trade foreign securities on a U.S. exchange, because investors who have purchased ordinary shares in a foreign market otherwise must first convert them into ADRs before being able to sell those securities on a U.S. exchange.

different CUSIP number from the underlying securities, each unsponsored ADR would represent a fraction or multiple of the underlying shares, and the unsponsored ADRs would trade in the over-the-counter market while the underlying shares would continue to trade on an exchange.

The Commission is concerned that having listed shares and unsponsored ADRs for the same issuer could cause investor confusion and disadvantage investors who, by purchasing unsponsored ADRs, would not benefit from the same voting rights, shareholder communications and market liquidity as ordinary shareholders. We also are concerned that unsponsored ADRs representing listed shares might disadvantage foreign issuers that have chosen to list their shares directly by reducing the degree of control those companies retain over the form in which their securities trade in the United States compared to domestic issuers. The proposed amendment to Form F-6 is intended to address these concerns.

II. Securities Act Registration and Eligibility Requirements for Form F-6

For purposes of Securities Act registration, ADRs and the deposited securities are separate securities, requiring separate registration or exemption from Securities Act registration. The regulatory structure relating to ADRs was developed in 1955,[15] and, other than a minor amendment in 1983, that structure

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[15] In 1955, the Commission considered the regulatory framework for ADRs and permitted their registration on Form S–12, which was specifically adopted for the registration of ADRs [Securities Act Release No. 3593 (November 17, 1955)].

remains in place today. The Commission has adopted Form F-6 specifically for the registration of ADRs,[16] and this form may be used to register both sponsored and unsponsored facilities. A Form F-6 registration statement, which the depositary files with the Commission, must become effective before the depositary begins to accept deposits of securities and to issue ADRs. A Form F-6 registration statement contains no substantive disclosure about the foreign company whose securities the ADRs represent, and does not indicate where those securities are traded. The disclosure relates solely to the contractual terms of deposit. Under the present eligibility requirements, ADRs may be registered under the Securities Act on Form F-6 if four conditions are satisfied:

- The deposited securities are those of a foreign issuer;[17]

- the holder of the ADR has the right to withdraw the deposited securities at any time, subject to temporary delays, payment of fees and compliance with legal requirements;[18]

- the deposited securities are exempt from Securities Act registration and freely tradable in the United States (for example, they are not restricted securities under Securities Act Rule 144) or are separately registered under the Securities Act;[19] and

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[16] Securities Act Release No. 6459 (March 24, 1983) [48 FR 12348]. The adoption of Form F-6 replaced Form S-12.

[17] *See* General Instruction I.A. to Form F-6.

[18] *See* General Instruction I.A.(1)(i)-(iii) to Form F-6.

[19] *See* General Instruction I.A.(2) to Form F-6.

- as of the filing date of the Form F-6, the foreign company is reporting under the periodic reporting requirements of Section 13(a)[20] or 15(d)[21] of the Exchange Act or exempt from registration under Exchange Act Rule 12g3-2(b).[22]

Form F-6 is signed and filed by the depositary bank and, for sponsored ADRs only, also by the foreign issuer and prescribed officers and directors. As a result, under the present eligibility requirements, a depositary bank could register and issue unsponsored ADRs relating to any foreign company that is registered under the Exchange Act and whose securities trade in the United States in ordinary share form.

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[20] 15 U.S.C. 78m(a).

[21] 15 U.S.C. 78o(d).

[22] *See* General Instruction I.A.(3) to Form F-6.

Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers,
Exchange Act Release No. 58,465,
73 Fed. Reg. 52,752-53, 52,755, 52,762, 52,767
(Sept. 10, 2008)

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the rule that exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") based on the submission to the Commission of certain information published by the issuer outside the United States. The exemption allows a foreign private issuer to have its equity securities traded in the U.S. over-the-counter market without registration under Section 12(g). The adopted rule amendments will eliminate the current written application and paper submission requirements under Rule 12g3–2(b) by automatically exempting from Exchange Act Section 12(g) a foreign private issuer that meets specified conditions. Those conditions will require an issuer to maintain a listing of its equity securities in its primary trading market located outside the United States, and require it to publish electronically in English specified non-United States disclosure documents. As a result, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-United States disclosure documents and thereby to make better informed decisions regarding whether to invest in that issuer's equity securities through the

over-the-counter market in the United States or otherwise. As is currently the case, issuers must continue to register their securities under the Exchange Act to have them listed on a national securities exchange or traded on the OTC Bulletin Board.

DATES: *Effective Date:* October 10, 2008.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: We are adopting amendments to Commission Rules 12g3–2 [1] and 15c2–11 [2] under the Exchange Act,[3] Forms 15F,[4] 40–F,[5] and 6–K[6] under the Exchange Act, and Form F–6[7] under the Securities Act of 1933 ("Securities Act").[8]

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[1] 17 CFR 240.12g3–2.

[2] 17 CFR 240.15c2–11.

[3] 15 U.S.C. 78a *et seq.*

[4] 17 CFR 249.324.

[5] 17 CFR 249.240f

[6] 17 CFR 249.306.

[7] 17 CFR 239.36.

[8] 15 U.S.C. 77a *et seq.*

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I. Executive Summary and Background

A. Introduction

Exchange Act Rule 12g3–2(b)[9] exempts a foreign private issuer[10] from Section 12(g) registration[11] if, among other requirements, the issuer furnishes to the Commission on an ongoing basis information it has made public or is required to make public under the laws of its jurisdiction of incorporation, organization or domicile, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders (collectively, its "non-U.S. disclosure documents").[12] The Commission adopted Rule 12g3–

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[9] 17 CFR 240.12g3–2(b).

[10] See the definition of foreign private issuer at Exchange Act Rule 3b–4(c) (17 CFR 240.3b–4(c)).

[11] When read in conjunction with Exchange Act Rules 12g–1 (17 CFR 240.12g–1) and 12g3–2(a) (17 CFR 240.12g3–2(a)), Exchange Act Section 12(g) requires an issuer to file an Exchange Act registration statement regarding a class of equity securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, the number of its U.S. resident holders is 300 or more, and the issuer's total assets exceed $10 million.

[12] Current Exchange Act Rule 12g3–2(b)(1)(iii) (17 CFR 240.12g3–2(b)(1)(iii)).

2(b) more than 40 years ago in order to exempt from Section 12(g) registration foreign companies that have not obtained a listing on a national securities exchange or otherwise sought a public market for their equity securities in the United States.[13]

Acquiring the Rule 12g3–2(b) exemption enables a foreign private issuer to have its equity securities traded on a limited basis in the over-the-counter market in the United States while avoiding registration under Exchange Act Section 12(g). Typically a foreign private issuer obtains the Rule 12g3–2(b) exemption in order to have established an unlisted, sponsored or unsponsored depositary facility for its American Depositary Receipts ("ADRs").[14] Establishing the Rule 12g3–2(b) exemption also permits registered broker-dealers to fulfill their current information obligations concerning foreign private issuers' securities for which they seek to

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[13] Release No. 34–8066 (April 28, 1967). For additional background on the initial adoption of Rule 12g3–2(b), see Part I.A of Release No. 34– 57350 (February 19, 2008), 73 FR 10102 (February 25, 2008) ("Proposing Release").

[14] An ADR is a negotiable instrument that represents an ownership interest in a specified number of securities, which the securities holder has deposited with a designated bank depositary. The filing of Securities Act Form F–6 (17 CFR 239.36) is required in order to establish an ADR facility. The eligibility criteria for the use of Form F–6 include the requirement that the issuer of the deposited securities have a reporting obligation under Exchange Act Section 13(a) or have established the exemption under Rule 12g3–2(b). See General Instruction I.A.3 of Form F–6. While required to be registered on Form F–6 under the Securities Act, ADRs are exempt from registration under Exchange Act Section 12(g) pursuant to current Exchange Act Rule 12g3–2(c) (17 CFR 240.12g3–2(c)).

publish quotations.[15] It further facilitates resales of an issuer's securities to qualified institutional buyers ("QIBs") under Rule 144A.[16]

1. Current Rule 12g3-2(b) Requirements

Currently, in order to establish the Exchange Act Rule 12g3-2(b) exemption, a foreign private issuer must initially submit to the Commission a list of its non-U.S. disclosure requirements as well as copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year.[17] An issuer must further submit its non-U.S. disclosure documents on an ongoing basis in order to maintain the exemption. The current Rule provides that an issuer need only submit copies of information that is material to an investment decision for the purpose of obtaining or maintaining the exemption.[18] At the time of the

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[15] Brokers currently can comply with their obligations under Exchange Act Rule 15c2-11 (17 CFR 240.15c2-11) when a foreign company has established and maintains the Rule 12g3-2(b) exemption by, in part, reviewing the information furnished to the Commission under the exemption. See Rule 15c2-11(a)(4) (17 CFR 240.15c2-11(a)(4)).

[16] See Securities Act Rule 144A(d)(4) (17 CFR 230.144A(d)(4)).

[17] Current Exchange Act Rule 12g3-2(b)(1)(i) (17 CFR 240.12g3-2(b)(1)(i)). Historically, an issuer has submitted its home jurisdiction materials as part of a letter application to the Commission, which has been processed through the Office of International Corporate Finance in the Division of Corporation Finance. The written application process does not apply to an issuer that receives the Rule 12g3-2(b) exemption upon the effectiveness of its Exchange Act deregistration pursuant to Exchange Act Rule 12h-6 (17 CFR 240.12h-6).

[18] Current Exchange Act Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)). As examples of material information, the Rule lists an issuer's financial condition or results of operations,

initial submission, an issuer must also provide the Commission with the number of U.S. holders of its equity securities and the percentage held by them, as well as a brief description of how its U.S. holders acquired those shares.[19]

Rule 12g3-2(b) currently requires that an applicant submit all of the necessary non-U.S. disclosure documents and other information before the date that a registration statement would otherwise become due under Section 12(g).[20] Once an issuer has timely submitted its application and obtained the exemption, the issuer may surpass any of the record holder, U.S. resident holder, or asset thresholds that would otherwise trigger an obligation to register a class of securities under Section 12(g) or the rules thereunder, as long as it maintains the exemption by submitting the required non-U.S. disclosure documents.

For most of its 40-year history, the Rule 12g3-2(b) disclosure regime has mandated paper submissions. Even after the adoption of EDGAR filing rules for foreign private issuers, the Commission has required a foreign private issuer to submit its initial Rule

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changes in its business, the acquisition or disposition of assets, the issuance, redemption or acquisition of securities, changes in management or control, the granting of options or other payment to directors or officers, and transactions with directors, officers or principal security holders.

[19] Current Exchange Act Rule 12g3-2(b)(1)(v) (17 CFR 240.12g3-2(b)(1)(v)). An issuer must also disclose the dates and circumstances of the most recent public distribution of securities by the issuer or an affiliate.

[20] Current Exchange Act Rule 12g3-2(b)(2) (17 CFR 240.12g3-2(b)(2)).

12g3-2(b) supporting materials in paper.[21] The Commission has based this treatment of Rule 12g3-2(b) materials on the analogous treatment of applications for an exemption from Exchange Act reporting obligations filed pursuant to Exchange Act Section 12(h).[22]

In March 2007, the Commission voted to adopt amendments to Rule 12g3-2, which enable a foreign private issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to contemporaneously adopted Exchange Act Rule 12h-6.[23] The March 2007 amendments require an issuer that has obtained the Rule 12g3-2(b) exemption, upon the effectiveness of its termination of registration and reporting pursuant to Rule 12h-6, to publish specified non-U.S. disclosure documents in English on an ongoing basis on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, rather than submit that information in paper to the Commission.[24] The amendments further permit, but do not require, a foreign private issuer that has obtained or will obtain the Rule 12g3-2(b) exemption, upon application to the Commission

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[21] See Release No. 33-8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

[22] 15 U.S.C. 78*l*(h). We require the filing of Section 12(h) exemptive applications in paper pursuant to Regulation S-T Rule 101(c)(16) (17 CFR 232.101(c)(16)).

[23] See Release No. 34-55540 (March 27, 2007), 72 FR 16934 (April 5, 2007).

[24] Current Exchange Act Rule 12g3-2(e) (17 CFR 240.12g3-2(e)).

and not pursuant to Rule 12h-6, to publish electronically in the same manner its non-U.S. disclosure documents required to maintain the exemption.[25]

The March 2007 amendments further clarified the English translation requirements under Rule 12g3-2(b).[26] The amendments provide that, when electronically publishing its non-U.S. disclosure documents required to maintain the Rule 12g3-2(b) exemption, at a minimum, a foreign private issuer must electronically publish English translations of the following documents if in a foreign language:

- Its annual report, including or accompanied by annual financial statements;
- Interim reports that include financial statements;
- Press releases; and
- All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.[27]

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[25] Current Exchange Act Rule 12g3-2(f) (17 CFR 240.12g3-2(f)).

[26] Current Exchange Act Rule 12g3-2(b)(4) (17 CFR 240.12g3-2(b)(4)) provides that copies furnished to the Commission of press releases and any materials distributed directly to security holders must be in English, and states that English summaries and versions may be used instead of English translations. However, the rule does not specify what other documents must be translated fully into English, and when summaries or versions may be used.

[27] Note 1 to Current Exchange Act Rule 12g3-2(e).

2. Proposed Rule 12g3-2 Amendments

In February 2008, we proposed amendments to Rule 12g3-2(b) in order to adapt that exemptive regime to the several significant developments occurring since its initial adoption four decades ago.[28] Those developments include the increased globalization of securities markets, advances in information technology, and the increased use of ADR facilities by foreign companies to trade their securities in the United States, which have multiplied the number of foreign companies engaged in cross-border activities, as well as increased the amount of U.S. investor interest in the securities of foreign companies. Just as those developments led us to reevaluate and revise the Commission rules governing when a foreign private issuer may terminate its Exchange Act registration and reporting obligations, so those same factors have led us to reconsider as well the Commission rules that determine when a foreign private issuer must enter the Section 12(g) registration regime.

We proposed to amend Exchange Act Rule 12g3-2 to permit a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit an application to, or otherwise notify, the Commission, as long as:

- The issuer is not required to file or furnish reports under Exchange Act Section 13(a)[29] or 15(d);

- The issuer currently maintains a listing of the subject class of securities on one or more exchanges

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[28] Release No. 34-57350.

[29] 15 U.S.C. 78m(a).

in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities;

- Either:

o The average daily trading volume ("ADTV") of the subject class of securities in the United States for the issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

o The issuer has terminated its registration of a class of securities under Exchange Act Section 12(g), or terminated its obligation to file or furnish reports under Exchange Act Section 15(d), pursuant to Exchange Act Rule 12h-6; and

- Unless claiming the exemption in connection with or following its recent Exchange Act deregistration, the issuer has published specified non-U.S. disclosure documents, required to be made public from the first day of its most recently completed fiscal year, in English on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market.

As proposed, a foreign private issuer that met the above requirements would be immediately exempt from Exchange Act registration under Rule 12g3-2(b) even if, on the last day of its most recently completed fiscal year, it exceeded the asset and shareholder thresholds for Section 12(g) registration, and although the 120-day window for filing a registration

statement under Section 12(g) had elapsed. Further, as proposed, an issuer could immediately claim the Rule 12g3-2(b) exemption upon the effectiveness of, or following its recent Exchange Act deregistration, whether pursuant to the older exit rules of Rule 12g-4 or 12h-3,[30] or Rule 12h6, or the suspension of its reporting obligations under Section 15(d),[31] if it met the above requirements other than the electronic publication condition for its most recently completed fiscal year.

The proposed rules would require any issuer, whether a prior registrant or not, to maintain the Rule 12g3-2(b) exemption by publishing its specified non-U.S. disclosure documents on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The proposed rules would require the electronic publication in English of the same types of information required under the March 2007 amendments.

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[30] 17 CFR 240.12g-4 or 240.12h-3. Both Rules 12g-4 and 12h-3 permit an issuer to exit the Exchange Act reporting regime following the filing of a Form 15 (17 CFR 249.323), which certifies that the issuer has fewer than 300 record holders or less than 500 record holders and total assets not exceeding $10 million on the last day of each of its most recent 3 fiscal years.

[31] An issuer may suspend its Section 15(d) reporting obligations under Rule 12h-3 or Section 15(d) itself. The statutory section provides that suspension occurs if, on the first day of the fiscal year, other than the year in which the issuer's registration statement went effective, the issuer's record holders number less than 300.

As proposed, the Rule 12g3-2(b) exemption would remain in effect until:

- The issuer no longer satisfies the electronic publication condition;

- The issuer no longer maintains a listing for the subject class of securities on one or more exchanges in its primary trading market;

- The ADTV of the subject class of securities in the United States exceeds 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the issuer's most recently completed fiscal year, other than the year in which the issuer first claims the exemption; or

- The issuer registers a class of securities under Exchange Act Section 12 or incurs reporting obligations under Exchange Act Section 15(d).

B. Principal Comments Regarding the Proposed Rule Amendments

We received letters from 32 commenters, including law firms, business, industry and legal trade associations, depositary banks, financial advisory firms, and an OTC market participant. Most commenters strongly supported the Commission's proposals to eliminate the written application process for the Exchange Act Rule 12g3-2(b) exemption and replace the paper submission process for an issuer's non-U.S. disclosure documents with mandated electronic publication as a condition to claiming and maintaining the exemption.

However, most commenters were critical of the proposal that, as a condition to claiming and

maintaining the Rule 12g3-2(b) exemption, a foreign private issuer's U.S. ADTV must be no greater than 20% of its worldwide ADTV for the issuer's most recently completed fiscal year. Those commenters urged us either to eliminate the trading volume condition in its entirety or else increase the U.S. ADTV threshold to a higher percentage, such as 35%, 40% or 50% of worldwide ADTV. Some commenters also requested that we impose a trading volume condition only as an initial requirement for claiming the exemption, and not as a condition for continued use in subsequent years.

Other areas receiving comment included whether:

- To adopt the foreign listing condition as a requirement for either initially claiming the exemption or maintaining it in subsequent years;

- To permit an issuer to publish English summaries, brief English descriptions, or English versions instead of English translations of its non-U.S. disclosure documents;

- To provide a period of time for an issuer to cure a deficiency in its compliance with one or more conditions before it would be required to register under the Exchange Act;

- To require an issuer to provide some form of public notice that it was claiming and intended to rely on the Rule 12g3-2(b) exemption;

- To modify Form F-6 in light of the rule amendments, including whether to adopt provisions regarding unsponsored ADR facilities; and

- To grandfather any issuer having the Rule 12g3-2(b) exemption before the effective date of the rule amendments.

C. Summary of the Adopted Rule Amendments

We have carefully considered commenters' concerns regarding the proposed amendments to Rule 12g3-2(b), and have addressed many of them in the rule amendments that we are adopting today. Most notably, we have determined to adopt a trading volume measure solely as part of the foreign listing/primary trading market condition, and not as a separate condition. As adopted, the rule amendments will enable a foreign private issuer to claim the Rule 12g3-2(b) exemption,[32] without having to submit a written application to the Commission, as long as the issuer:

- Currently maintains a listing of the subject class of securities on one or more exchanges in its primary trading market, which is defined to mean, as proposed, that:

o At least 55 percent of the trading in the subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year; and

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[32] By the use of the term "claim" in his release, we do not mean to imply that a foreign private issuer must apply for or provide notice of the Rule 12g3-2(b) exemption in order to qualify for that exemption. Rather, as amended, the Rule 12g3-2(b) exemptive regime is meant to be self-executing.

o If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions, the trading for the issuer's securities in at least one of the two foreign jurisdictions is greater than the trading in the United States for the same class of the issuer's securities;

- The issuer is not required to file or furnish reports under Exchange Act Section 13(a) or 15(d), as proposed; and

- Unless claiming the exemption upon or following its recent Exchange Act deregistration, the issuer has published in English specified non-U.S. disclosure documents, from the first day of its most recently completed fiscal year, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market.[33]

The adopted rule amendments will require an issuer to maintain the Rule 12g3-2(b) exemption by electronically publishing the specified non-U.S. disclosure documents for subsequent years. An issuer will lose the exemption if it:

- Fails to publish electronically the required non-U.S. disclosure documents;

- No longer meets the foreign listing/ primary trading market condition; or

- Incurs Exchange Act reporting obligations.

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[33] These rule amendments relate solely to the application of Exchange Act Section 12(g) and not to antifraud or other provisions of the U.S. federal securities laws.

We are adopting the rule amendments regarding English translation requirements, as proposed. While we decline to permit the use of "brief English descriptions" or "English versions," we have clarified that, generally, an issuer may provide an English summary for a non-U.S. disclosure document if such a summary would be permitted for a document submitted under cover of Form 6-K [34] or Exchange Act Rule 12b-12(d)(3).[35]

We are adopting conforming amendments to Form F-6 and Rule 15c2-11. Other adopted rule amendments include eliminating, as proposed:

- The current provision that generally prohibits the Rule 12g3-2(b) exemption to successor issuers;

- The rarely used ability of a Canadian issuer filing under the Multijurisdictional Disclosure System ("MJDS") to obtain the Rule 12g3-2(b) exemption for a class of equity securities while having Exchange Act reporting obligations regarding a class of debt securities;

- The current provision that prohibits an issuer from relying on the Rule 12g3-2(b) exemption if its securities are traded through an automated inter-dealer quotation system; and

- The related provision grandfathering Nasdaq-traded companies meeting specified conditions from Rule 12g3-2(b)'s automated interdealer quotation system prohibition.

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[34] 17 CFR 249.306.

[35] 17 CFR 240.12b-12(d)(3).

While the adopted rule amendments do not include a grandfathering provision, we are establishing, as proposed, a three-year transition period to provide sufficient time for any current Rule 12g3-2(b)-exempt issuer, which will no longer qualify for the exemption under the rule amendments, either to comply with all of the conditions of amended Rule 12g3-2(b) or register under the Exchange Act. We also are establishing, as proposed, a three-month transition period following the effectiveness of the rule amendments during which the Commission will accept and process any non-U.S. disclosure documents submitted in paper by Rule 12g3-2(b)-exempt issuers. Thereafter, the Commission will no longer process paper Rule 12g3-2(b) submissions.

By enabling a qualified foreign private issuer to claim the Rule 12g3-2(b) exemption automatically, and without regard to the number of its U.S. shareholders, the adopted rule amendments should encourage more foreign private issuers to claim the Rule 12g3-2(b) exemption. That would enable the establishment of additional ADR facilities, make it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2-11 with respect to the equity securities of a non-reporting foreign private issuer, and facilitate the resale of a foreign company's securities to QIBs in the United States under Securities Act Rule 144A. Consequently, the adopted rule amendments should foster the increased trading of a foreign private issuer's securities in the U.S. over-the-counter market.

By requiring the electronic publication in English of specified non-U.S. disclosure documents for an issuer claiming the Rule 12g3-2(b) exemption, the

adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents, and make better informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter market in the United States or otherwise. Thus, the adopted amendments should foster increased efficiency in the trading of the issuer's securities for U.S. investors.

II. Discussion

A. Foreign Listing Condition

We are adopting, as proposed, the condition that, in order to be eligible to claim the Rule 12g3-2(b) exemption, an issuer must currently maintain a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities.[36] This condition is substantially similar to the foreign listing condition adopted as part of the March 2007 amendments.[37]

The purpose of the foreign listing condition is to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the trading of the issuer's securities and the issuer's disclosure obligations to investors. This foreign listing condition increases the likelihood that the principal pricing determinants for a foreign private issuer's securities

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[36] Exchange Act Rule 12g3-2(b)(1)(ii) (17 CFR 240.12g3-2(b)(1)(ii)).

[37] Exchange Act Rule 12h-6(a)(3) (17 CFR 240.12h-6(a)(3)).

are located outside the United States, and makes more likely the availability of a set of non-U.S. securities disclosure documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities in the U.S. over-the-counter market.

Several commenters supported the proposed foreign listing condition substantially as proposed or at least in principle.[38] Some commenters supported a condition that would require an issuer to be subject to a recognized foreign regulatory authority and a set of public disclosure obligations, but would not require a foreign listing.[39] We decline to adopt such a provision because, among other factors, we believe it could be difficult for market participants to determine whether an issuer is in fact subject to a complying foreign regulatory regime. In addition, a listing on a securities market generally involves the affirmative action of an issuer to be traded on that market and to be subject to the listing requirements of that market, including applicable ongoing disclosure requirements. The foreign listing requirement therefore supports one of the underlying purposes of the Rule 12g3-2(b) exemption—to make material information available to investors.

A few commenters opposed the foreign listing condition on the grounds that it would impose costs on those issuers that have not yet obtained a foreign

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[38] See, for example, the letter of the Bank of New York ("BNY"), dated April 25, 2008. This letter, along with other comment letters, is available at *http://www.sec.gov/comments/s7-04-08/s70408.shtml.*

[39] See, for example, the letter of Sullivan & Cromwell, dated April 25, 2008.

listing, and which are likely to be smaller companies.[40] As we noted when proposing the rule amendments, the foreign listing condition is consistent with the Commission staff's past and current practice of administering the Rule 12g3-2(b) exemption. Any issuer, regardless of size, has had to obtain a foreign listing before it could receive the exemption. Accordingly, the adopted rule should impose no new burdens in this regard.[41]

1. The Primary Trading Market Definition

The adopted rule amendments define primary trading market, as proposed, to mean that at least 55 percent of the worldwide trading in the issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently

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[40] See, for example, the letter of the American Bar Association, Business Law Section ("ABA"), dated April 30, 2008.

[41] As is currently the case, an issuer that, on the last day of its most recently completed fiscal year, has not exceeded the 500 worldwide holder threshold under Exchange Act Section 12(g), the 300 U.S. holder threshold under Rule 12g3-2(a), or the $10 million annual asset threshold under Rule 12g-1, could claim an exemption from Section 12(g) registration for a class of equity securities based upon one or more of those provisions, and would not have to comply with Rule 12g3-2(b)'s foreign listing or other conditions, if it chose not to rely on that rule for its exemption from Section 12(g) registration. However, such an issuer would have to claim the Rule 12g3-2(b) exemption, and satisfy all of its conditions, if it sought to have established an ADR facility for its equity securities. ADRs must be registered on a Form F-6, which requires an issuer of the deposited securities to be either an Exchange Act reporting company or have the Rule 12g3-2(b) exemption.

completed fiscal year. The rule amendments further instruct that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for that purpose, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.[42]

As proposed, we have based the adopted definition on the definition of primary trading market under the March 2007 amendments. Like the earlier amendments, the amendments we are adopting today will permit an issuer to aggregate its securities over multiple markets in one or two foreign jurisdictions in recognition that many foreign private issuers have listings on more than one exchange in one or more non-U.S. markets.[43]

Some commenters urged the Commission to adopt a primary trading market definition that would

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[42] Note 1 to Rule 12g3-2(b)(1) (17 CFR 240.12g3-2(b)(1)).

[43] As under the earlier amendments, measurement for the primary trading market determination will be by reference to ADTV as reported by the relevant market. An issuer would measure the ADTV of on-exchange transactions in its securities aggregated over one or two foreign jurisdictions against its worldwide trading volume. The issuer could include in this measure off-exchange transactions in those jurisdictions comprising the numerator only if it includes those off-exchange transactions when calculating worldwide trading volume in the denominator. This denominator would consist of U.S. ADTV, which must include both on-exchange and off-exchange transactions, and non-U.S. ADTV, which must include on-exchange transactions, but could also include off-exchange transactions. See Note 1 to Rule 12g3-2(b)(1) and Release No. 34-55540 at 72 FR 16934, 16939.

permit an issuer to aggregate its trading over an unlimited number of foreign jurisdictions or permit an issuer's trading in its primary foreign markets to comprise less than 55 percent of its worldwide trading.[44] We decline to adopt these suggestions because, by defining an issuer's primary trading market to comprise no more than two foreign jurisdictions, it becomes more likely that an eligible issuer will be subject to an overseas regulator with principal authority for regulating the issuance and trading of the issuer's securities and the issuer's disclosure to investors. Similarly, requiring an issuer's primary non-U.S. trading to constitute no less than 55 percent of its worldwide trading helps assure that a clear majority of an issuer's securities trading occurs outside the United States. If the United States was the sole or principal market for a foreign private issuer's securities, then the Commission would have a greater regulatory interest in subjecting the foreign company to the Exchange Act reporting regime.

The adopted rule amendments will not require an issuer establishing the exemption, but not deregistering, to have maintained a foreign listing for the previous twelve months, or for some other specified period of time, as was required under the March 2007 amendments. As noted in the Proposing Release, we see no reason to exclude newly listed foreign companies from eligibility. Many foreign exchanges require substantial initial disclosure before a listing is accepted. Moreover, there is

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[44] See, for example, the letters of JPMorgan Chase Bank ("JPMorganChase"), dated April 18, 2008, and the Organization for International Investment ("OFII"), dated April 23, 2008.

currently no similar requirement for a non-reporting company applying for the Rule 12g3-2(b) exemption.

Under Rule 12h-6, an issuer must certify that, at the time it files its Form 15F,[45] it meets that rule's foreign listing requirement. That issuer will also have to meet Rule 12g3-2(b)'s foreign listing requirement upon the effectiveness of its Exchange Act termination of registration and reporting under Rule 12h-6 in order to be able to claim the Rule 12g3-2(b) exemption. Since typically that effectiveness occurs 90 days from the date of filing of the Form 15F, we expect most Form 15F filers will satisfy the adopted foreign listing requirement under Rule 12g3-2(b).[46]

2. Elimination of the Proposed 20 Percent Trading Volume Condition

In addition to the trading volume standard under the primary trading market definition, we proposed that an issuer's U.S. ADTV must be no greater than 20 percent of its worldwide ADTV for its most recently completed fiscal year. We have determined not to adopt this separate trading volume condition.

Most commenters opposed the 20 percent trading volume condition. Several commenters maintained that a foreign private issuer cannot control the level

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[45] 17 CFR 249.324. Similar to a Form 15, Form 15F is the form that a foreign private issuer must file to certify that it meets the conditions for terminating its Exchange Act registration and reporting obligations under Rule 12h-6.

[46] Unless the Commission objects, termination of an issuer's reporting and registration under Rule 12h-6 is effective 90 days after the filing of its Form 15F. Exchange Act Rule 12h-6(g)(1) (17 CFR 240.12h-6(g)(1)).

of U.S. trading of its equity securities because U.S. investors are able to purchase a foreign private issuer's securities in the issuer's home market and subsequently trade them in the United States, or purchase the issuer's securities through unsponsored ADR facilities in the United States. According to these commenters, those factors could cause an issuer's U.S. trading volume to exceed the proposed trading volume threshold and thereby require the issuer to register its securities in the United States although it has not voluntarily sought a public market there.[47]

Some commenters further stated that the proposed trading volume condition would likely discourage foreign private issuers from establishing or maintaining sponsored ADR facilities or engaging in exempted offerings in the U.S., such as private placements and Rule 144A resales, to the detriment of U.S. investors.[48] In addition, commenters noted that the proposed trading volume condition would be unnecessary should the Commission adopt the proposed foreign listing condition and accompanying definition of primary trading market.[49]

After consideration of the comments, we have determined that adopting these amendments without the 20 percent trading volume condition is consistent

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[47] See, for example, the letters of Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"), dated April 25, 2008, and EuropeanIssuers, dated April 25, 2008.

[48] See, for example, the letters of the International Bar Association, dated April 25, 2008, and Linklaters, dated April 24, 2008.

[49] See, for example, the letters of BNY and O'Melveny & Myers LLP, dated April 25, 2008.

with the protection of U.S. investors. Most of the foreign private issuers that currently claim the Rule 12g3-2(b) exemption have U.S. trading volumes that fall below the proposed 20 percent threshold although there is no mandatory trading volume condition.[50] We expect that the primary trading market provision will serve to protect U.S. investors by making it more likely that foreign companies claiming the exemption will be subject to disclosure requirements where they are listed.

3. Treatment of Compensatory Stock Options

Currently, the scope of the exemption afforded to a class of equity securities under Rule 12g3-2(b) may include compensatory stock options that relate to that class of equity securities.[51] Some commenters expressed their concern that, as proposed, the scope of the amended rule would not include compensatory stock options since the exemption extends to a class of equity securities, the compensatory stock options would likely be deemed a separate class, and the compensatory stock options would typically not be listed in the issuer's primary trading market.[52]

It is not our intention to change the scope of Rule 12g3-2(b) in this regard. Accordingly, we have added a note to the amended rule to clarify that

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[50] See the Memo by Jennifer Marietta-Westberg, Office of Economic Analysis, dated March 10, 2008, which is available at *http://www.sec.gov/comments/s7-04-08/s70408-2.pdf.*

[51] See current Exchange Act Rule 12g3-2(b)(1), which states that "securities" of a foreign private issuer shall be exempt from Section 12(g) if the rule's conditions are met.

[52] See the letter of Gloria W. Nusbacher and 24 other attorneys.

compensatory stock options for which the underlying securities are in a class exempt under Rule 12g3-2(b) are also exempt under that rule.[53]

B. Non-Exchange Act Reporting Condition

We are adopting the condition, as proposed, that in order to be eligible for the Rule 12g3-2(b) exemption, an issuer must not have any reporting obligations under Exchange Act Section 13(a) or 15(d).[54] Like the current non-Exchange Act reporting condition of Rule 12g3-2(b),[55] the purpose of this provision is to prevent an issuer from claiming the Rule 12g3-2(b) exemption when it already has incurred active Exchange Act reporting obligations.

1. Non-Reporting Issuers

A foreign private issuer will satisfy the proposed non-reporting condition if it does not already have reporting obligations under either Exchange Act Section 13(a) or 15(d). Since Section 13(a) imposes reporting obligations on an issuer that has registered a class of securities under Section 12, a foreign private issuer that has an effective registration statement filed with the Commission under Section 12(b),[56] for example, covering a class of debt securities, or Section 12(g), covering a particular class of equity securities, would be ineligible to claim the exemption. This treatment is consistent with the

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[53] Note 3 to Exchange Act Rule 12g3-2(b)(1).

[54] Exchange Act Rule 12g3-2(b)(1)(i) (17 CFR 240.12g3-2(b)(1)(i)).

[55] Current Exchange Act Rule 12g3-2(d)(1) (17 CFR 240.12g3-2(d)(1)).

[56] 15 U.S.C. 78l(b).

current Exchange Act reporting prohibition under Rule 12g3-2(b).[57]

We received relatively few comments on the proposed non-reporting condition. While some commenters supported the proposed condition,[58] others requested that, in the interest of increasing the flexibility of capital raising in the United States for foreign private issuers, we permit an issuer to claim the Rule 12g3-2(b) exemption with respect to a particular class of equity securities although it has Exchange Act reporting obligations regarding a class of debt securities or a different class of equity securities.[59] We decline to adopt this suggested modification because we believe that it could cause confusion for investors and other market participants regarding the scope of an issuer's Exchange Act reporting obligations and the protections available under the Exchange Act.

Currently an issuer may apply for the Rule 12g3-2(b) exemption, although it may have exceeded the Section 12(g) shareholder thresholds on the last day of its most recently completed fiscal year, as long as the statutory 120-day period for filing a Section 12(g) registration statement has not lapsed.[60] We proposed to eliminate this 120-day submission requirement because, under the revised Rule 12g3-2(b) exemptive scheme, we did not believe that this requirement would be necessary to protect investors.

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[57] Current Exchange Act Rule 12g3-2(d)(1).

[58] See, for example, the letter of Sullivan & Cromwell.

[59] See, for example, the letter of OFII.

[60] Current Exchange Act Rule 12g3-2(b)(2) (17 CFR 240.12g3-2(b)(2)).

The revised exemption does not depend on an issuer's determination of the number of its worldwide or U.S. shareholders, and does not require that it submit a written application disclosing that information. Instead, it affirmatively requires a foreign private issuer to meet a foreign listing requirement and electronically publish specified material non-U.S. disclosure documents in English. If we also required an issuer to claim the exemption within the 120-day period, we believe some issuers, particularly smaller ones, would be unable to meet that deadline.[61] Those issuers would have to wait until the end of their current fiscal year and the start of a new 120-day period before they could claim the exemption. We see little benefit in requiring issuers to wait several months before being able to claim the exemption. On the other hand, providing the exemption and encouraging these issuers to publish their material non-U.S. disclosure documents in English should benefit U.S. investors. Commenters uniformly agreed with our assessment on this issue. Therefore, we are eliminating the 120-day requirement for issuers under Rule 12g3-2(b), as proposed.

2. Deregistered Issuers

Under the adopted, revised exemptive scheme, a foreign private issuer that has suspended its Exchange Act reporting obligations upon the filing of Form 15, pursuant to Rule 12g-4 or 12h-3, or Form 15F, pursuant to Rule 12h-6, will satisfy the non-

[61] Under current Rule 12g3-2(b), several issuers have applied for the exemption although the 120-day period has lapsed.

reporting requirement upon the effectiveness of its deregistration, assuming that it has not otherwise incurred additional Exchange Act reporting obligations. Similarly, a foreign private issuer that has suspended its reporting obligations pursuant to the statutory terms of Section 15(d) will satisfy the non-reporting condition immediately upon its determination that it had less than 300 shareholders as of the beginning of its most recent fiscal year.

Thus, unlike the current rule, the adopted rule amendments will not require an issuer to look back over the previous eighteen months and determine whether it had Exchange Act reporting obligations during that period.[62] We eliminated the eighteen month requirement when adopting the March 2007 rule amendments that granted the Rule 12g3-2(b) exemption automatically to a foreign private issuer upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to Rule 12h-6. We see no reason to treat differently foreign private issuers that have terminated their Section 12(g) registration under the older Rule 12g-4 or suspended their Section 15(d) reporting obligations pursuant to that statutory section or under Rule 12h-3 and following the filing of Form 15. Elimination of a lengthy waiting period will hasten the electronic publication of a foreign private issuer's non-U.S. disclosure documents required under the exemption and, thus, help improve the ability of U.S. investors

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[62] Current Exchange Act Rule 12g3-2(d)(1) provides that the Rule 12g3-2(b) exemption is generally not available to a foreign private issuer that, during the preceding 18 months, has registered a class of securities under Exchange Act Section 12 or had an active or suspended Section 15(d) reporting obligation.

to make informed decisions regarding that issuer's securities. Commenters uniformly supported this revision, which we are adopting as proposed.

C. Electronic Publishing of Non-U.S. Disclosure Documents

1. Electronic Publishing Requirement To Claim Exemption

We are adopting, as proposed, the requirement that, unless in connection with or following a recent Exchange Act deregistration, in order to claim the Rule 12g3-2(b) exemption, an issuer must have published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, from the first day of its most recently completed fiscal year, it:

- Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;

- Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and

- Has distributed or been required to distribute to its security holders.[63]

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[63] Exchange Act Rule 12g3-2(b)(1)(iii) (17 CFR 240.12g3-2(b)(1)(iii)) and Note 2 to Exchange Act Rule 12g3-2(b)(1). As proposed, the adopted amendments do not require a deregistered issuer to satisfy the non-U.S. publication requirement in order to claim the Rule 12g3-2(b) exemption

These are the same categories of information that the Commission has historically required a non-reporting company to submit in paper when applying for the exemption under Rule 12g3-2(b).[64] They also are the same non-U.S. disclosure documents that, more recently, the Commission has required an issuer to publish electronically in order to maintain its Rule 12g3-2(b) exemption claimed upon the effectiveness of its deregistration under Rule 12h-6.[65] Commenters strongly supported this electronic publication requirement.[66]

The purpose of this non-U.S. electronic publication condition is to provide U.S. investors with ready access to material information when trading in the issuer's equity securities in the over-the-counter market.[67] This condition also will assist U.S. investors who are interested in trading the issuer's securities in its primary securities market.

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since that issuer will have filed Exchange Act reports for the prior fiscal year upon which investors may rely.

[64] Current Exchange Act Rule 12g3-2(b)(1)(i).

[65] Current Exchange Act Rule 12g3-2(e)(2).

[66] While commenters uniformly supported the electronic publication condition, some questioned the proposed requirement to provide English translations of specified non-U.S. disclosure documents. See Part II.C.3 of this release.

[67] Any trading of a foreign private issuer's Rule 12g3-2(b)-exempt securities in the United States would have to occur through an over-the-counter market such as that maintained by the Pink Sheets, LLC since, as of April, 1998, the NASD has required a foreign private issuer to register a class of securities under Exchange Act Section 12 before its securities could be traded through the electronic over-the-counter bulletin board administered by Nasdaq. See, for example, NASD Notice to Members (January 1998).

Moreover, having a foreign private issuer's key non-U.S. disclosure documents electronically published in English will assist broker-dealers in meeting their Rule 15c2-11 obligations and facilitate resales of that issuer's securities to QIBs under Rule 144A.

As under the current rule, the adopted amendments will require an issuer only to publish electronically information that is material to an investment decision regarding the subject securities,[68] such as:

- Results of operations or financial condition;
- Changes in business;
- Acquisitions or dispositions of assets;
- The issuance, redemption or acquisition of securities;
- Changes in management or control;
- The granting of options or the payment of other remuneration to directors or officers; and
- Transactions with directors, officers or principal security holders.[69]

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[68] Exchange Act Rule 12g3-2(b)(3)(i) (17 CFR 240.12g3-2(b)(3)(i)). Although the substantive requirements are the same, we have made conforming changes to General Instruction E and Part II, Item 9 of Form 15F to reflect the renumbering of the non-U.S. publication requirements of Rule 12g3-2(b).

[69] These are the same types of information specified in current Exchange Act Rule 12g3-2(b)(3) (17 CFR 240.12g3-2(b)(3)).

2. Electronic Publishing Requirement to Maintain Exemption

In order to maintain the Rule 12g3-2(b) exemption, the adopted amendments will require an issuer to publish the same information specified in the prior fiscal year provision, on an ongoing basis and for subsequent fiscal years, on its Internet Web site or through an electronic information delivery system in its primary trading market.[70] This requirement will apply to any issuer claiming the exemption, whether or not a former Exchange Act registrant. Like the prior fiscal year publication condition, this ongoing publication condition will help assure that investors and other market participants have access to an issuer's specified non-U.S. disclosure documents, in English, which are material to an investment decision. Most commenters strongly supported this ongoing non-U.S. electronic publication condition.

Similar to the current rule,[71] the adopted rule amendments will require an issuer to publish electronically its non-U.S. disclosure documents promptly after the information has been made public, pursuant to its home jurisdiction laws, non-U.S. stock exchange rules, or shareholder meeting rules and practices.[72] As under current Commission staff practice, what constitutes "promptly" will depend on the type of document and the amount of time

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[70] Exchange Act Rule 12g3-2(b)(2)(i) (17 CFR 240.12g3-2(b)(2)(i)).

[71] Current Exchange Act Rule 12g3-2(b)(1)(iii).

[72] Exchange Act Rule 12g3-2(b)(2)(ii) (17 CFR 240.12g3-2(b)(2)(ii)). Form 6-K imposes a similar requirement.

required to prepare an English translation. Currently an issuer typically must electronically publish or submit in paper a copy of a material press release on or around the same business day of its original publication.

The adopted amendments will permit an issuer to meet Rule 12g3-2(b)'s electronic publication requirement concurrently with the publishing in English of a non-U.S. disclosure document through an electronic information delivery system generally available to the public in its primary trading market. Thus, if an issuer's non-U.S. stock exchange or securities regulatory authority permits the issuer to publish electronically a required report on its electronic delivery system, and the public has ready access to the report and other documents maintained on the system,[73] that electronic publication solely will satisfy the proposed Rule 12g3-2(b)'s electronic publishing requirements.

3. English Translation Requirement

We are adopting, as proposed, the condition that, in order to claim or maintain the Rule 12g3-2(b) exemption, an issuer must publish electronically, at a minimum, English translations of the following documents if in a foreign language:

- Its annual report, including or accompanied by annual financial statements;

[73] An example of such a system is the System for Electronic Document Analysis and Retrieval ("SEDAR") maintained by the Canadian Securities Administrators.

- Interim reports that include financial statements;

- Press releases; and

- All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.[74]

These are the same documents for which an issuer that has deregistered under Rule 12h-6 must currently provide English translations.[75]

Some commenters requested that we permit an issuer to provide brief English descriptions or English versions of specified non-U.S. disclosure documents instead of English translations.[76] We decline to adopt this suggestion because, as we stated in the Proposing Release, the specified non-U.S. disclosure documents are the same documents for which the Commission staff has historically required English translations because of their importance to investors.[77]

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[74] Exchange Act Rule 12g3-2(b)(3)(ii) (17 CFR 240.12g3-2(b)(3)(ii)).

[75] Note 1 to Current Exchange Act Rule 12g3-2(e) (17 CFR 240.12g3-2(e)).

[76] See, for example, the letters of Sullivan & Cromwell and Simpson Thacher & Bartlett ("Simpson Thacher"), dated April 18, 2008.

[77] See Part II.D.1 of the Proposing Release. We similarly eliminated the ability of foreign registrants to provide English versions or brief English descriptions of specified non-U.S. documents submitted under cover of Form 6-K because of the vagueness and lack of utility of such versions and descriptions submitted to the Commission. *See* Release No. 33-8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

Some commenters also requested that we provide guidance regarding when an issuer may provide an English summary instead of an English translation.[78] Generally, if, as a registrant, an issuer could submit an English summary for a non-U.S. disclosure document under cover of Form 6-K or pursuant to Exchange Act Rule 12b-12(d)(3), it can do so when claiming or maintaining the Rule 12g3-2(b) exemption.

D. Elimination of the Written Application Requirement

The adopted rule amendments eliminate the current requirement that, in order to obtain the Rule 12g3-2(b) exemption, if not proceeding under Rule 12h-6, a foreign private issuer must submit written materials, typically in the form of a letter application, to the Commission. These materials currently include a list of the issuer's non-U.S. disclosure requirements, the number of U.S. holders of its subject securities and the percentage of outstanding shares held by them, the circumstances in which its U.S. holders acquired those securities, and the date and circumstances of the most recent public distribution of the securities of the issuer or its affiliate.[79] As long as an issuer satisfies the adopted rule's conditions, it no longer has to submit these materials to the Commission. Commenters strongly

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[78] See, for example, the letters of Shearman & Sterling, dated April 25, 2008, and Sullivan & Cromwell.

[79] Current Exchange Act Rules 12g3-2(b)(1), (2) and (5). As part of the written application process, an issuer must also submit paper copies of its non-U.S. disclosure documents published since the first day of its most recently completed fiscal year.

supported eliminating the written application process.

Elimination of Rule 12g3-2(b)'s written application process for all foreign private issuers is consistent with our adoption of an automatic application of the Rule 12g3-2(b) exemption upon the effectiveness of an issuer's deregistration under Rule 12h-6. Moreover, since the adopted rule amendments permit an issuer to claim the Rule 12g3-2(b) exemption based on a foreign listing/primary trading market condition, regardless of the number of its U.S. shareholders, the current shareholder information requirement would be of marginal use. Further, since, as adopted, as a condition to claiming and maintaining the Rule 12g3-2(b) exemption, an issuer will have to publish electronically its non-U.S. disclosure documents, investors should be able to ascertain many of the issuer's non-U.S. disclosure requirements from a review of those publicly available documents.

From time to time, the Commission has published a list of issuers claiming the Rule 12g3-2(b) exemption that have submitted relatively current information pursuant to that rule.[80] Commission staff has compiled this list based on a review of submitted paper documents. As we stated in the Proposing Release, as part of the streamlining of the Rule 12g3-2(b) process that the adopted rule amendments are intended to effect, the Commission anticipates it will

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[80] See, for example, Release No. 34-51893 (June 21, 2005), 70 FR 37128 (June 28, 2005).

no longer publish these lists subsequent to the effective date of the new rules.[81]

Some commenters suggested that, as a substitute for these lists, we adopt a requirement that an issuer must notify the Commission and other market participants that it is claiming and intends to rely on the Rule 12g3-2(b) exemption.[82] We decline to adopt such a notice requirement because we believe that, as other commenters have noted, a notice requirement could run contrary to the goal of encouraging an issuer to claim the Rule 12g3-2(b) exemption and electronically disseminate its non-U.S. disclosure documents in English.[83] Nevertheless, an issuer that wants to provide notice to investors, broker-dealers and other market participants may do so by, for example, stating on its Internet Web site that it has electronically published specified non-U.S. disclosure documents in order to claim or maintain the Rule 12g3-2(b) exemption.

E. Duration of the Amended Rule 12g3– 2(b) Exemption

As adopted, the amended Rule 12g3-2(b) exemption will remain in effect until an issuer:

- No longer electronically publishes the specified non-U.S. disclosure documents required to maintain the exemption;

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[81] See the Proposing Release at n. 86.

[82] See, for example, the letters of Simpson Thacher and Sullivan & Cromwell.

[83] See the letters of Ziegler, Ziegler & Associates, dated April 28, 2008, and BNY.

- No longer maintains a listing for the subject class of securities on one or more exchanges in a primary trading market, as defined by the rule; or

- Registers a class of securities under Section 12 of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act.[84]

The duration of the amended Rule 12g3-2(b) exemption is similar to the duration of the current exemption. Both depend on an issuer's continued compliance with the requirement to publish its non-U.S. disclosure documents. Under both provisions, Section 12 registration or the incurrence of Section 15(d) reporting obligations terminates the exemption.[85] Moreover, currently, if an issuer can no longer claim the Rule 12g3-2(b) exemption because it has not complied with the rule's publication requirements, it must determine on the last day of the fiscal year whether, because of its record holder count, it would be required to register a class of securities under Section 12(g). The same would hold true under the rule amendments for a noncompliant issuer.

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[84] Exchange Act Rule 12g3-2(c) (17 CFR 240.12g3-2(c)).

[85] See, for example, current Exchange Act Rule 12g3-2(e)(3). A Rule 12g3-2(b)-exempt issuer that acquires an Exchange Act reporting company following an exchange of shares, and thereby succeeds to the target company's Exchange Act reporting obligations under Exchange Act Rule 12g3 (17 CFR 240.12g-3) or Exchange Act Rule 15d5 (17 CFR 240.15d-5), would lose the Rule 12g3-2(b) exemption upon succession. If such successor issuer qualified for deregistration under Exchange Act Rule 12h-6, it could claim the Rule 12g3-2(b) exemption upon deregistration.

We are also adopting the provision, as proposed, that an issuer will lose the Rule 12g3-2(b) exemption if it no longer meets the foreign listing condition. An issuer will no longer satisfy the foreign listing condition either because it is no longer listed in its primary trading market, or because the one or two foreign jurisdictions in which it trades no longer qualifies as its primary trading market, as defined by the rule. Since the definition of primary trading market uses a trading volume standard for the issuer's most recently completed fiscal year, an issuer will have to redetermine its relative U.S. and foreign trading volumes on an annual basis.

Some commenters opposed basing the duration of the Rule 12g3-2(b) exemption on whether an issuer remains listed in its primary trading market.[86] We believe this provision is necessary in order to help ensure the continued availability of a set of non-U.S. disclosure documents to which investors may turn when making decisions regarding an issuer's securities. It is also necessary to help make sure that an issuer's principal trading market has not become the U.S. market, which would require the issuer to register and report under the Exchange Act.

Some commenters requested that we at least establish a "cure" period, such as six or twelve months, during which an issuer would either have to correct any deficiency or else register under the Exchange Act.[87] We decline to adopt a specific cure

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[86] See the letters of the ABA and Sullivan & Cromwell. The primary objection was that adherence to the electronic publication condition should be a sufficient basis for maintaining the exemption as it is under the current rule.

[87] See, for example, the letter of the OFII.

period. We believe that in order to best protect investors, an issuer that finds itself not in compliance with any of the conditions required to maintain the Rule 12g3-2(b) exemption must either re-establish compliance with the rule in a reasonably prompt manner or else register under the Exchange Act.

There is no cure period for domestic issuers that find they are subject to registration under Section 12(g). Thus, foreign private issuers are treated in a similar manner as domestic issuers in this respect. As noted, foreign private issuers may be able to avoid registration by re-establishing compliance with Rule 12g3-2(b), for example, by relisting its securities in its primary trading market.

F. Elimination of the Successor Issuer Prohibition

The adopted rule amendments will eliminate the provision that precludes an issuer from obtaining the Rule 12g3-2(b) exemption if, following the issuance of shares to acquire by merger, consolidation, exchange of securities or acquisition of assets, it has succeeded to the Exchange Act reporting obligations of another issuer.[88] Until recently, the sole exception to this successor issuer prohibition was for Canadian companies that registered the securities to be issued in the transaction on specified MJDS registration statements under the Securities Act.[89]

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[88] Current Exchange Act Rule 12g3-2(d)(2). An issuer succeeds to the Exchange Act reporting obligations of another either under Exchange Act Rule 12g-3 (17 CFR 240.12g-3) or 15d-5 (17 CFR 240.15d-5).

[89] The specified MJDS registration statements are Forms F-8, F-9, F-10 and F-80 (17 CFR 239.38, 239.39, 239.40, and 239.41).

As part of the March 2007 rule amendments, we adopted a provision that permits a successor issuer to terminate its newly acquired Exchange Act reporting obligations as long as it meets Rule 12h-6's substantive requirements for equity or debt securities issuers.[90] We also amended Exchange Act Rule 12g3-2 to permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its termination of Exchange Act registration and reporting under Rule 12h-6. We see no reason to treat differently a successor issuer that qualifies for deregistration under one of the older exit rules, Rule 12g-4 or 12h3, or under Section 15(d).

Elimination of the successor issuer prohibition will help encourage a successor issuer to claim the Rule 12g3-2(b) exemption and electronically publish its specified non-U.S. disclosure documents in English. No commenter opposed the proposed elimination of the successor issuer prohibition. Accordingly, we are removing the successor issuer prohibition under Rule 12g3-2(b), as proposed.

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[90] 17 CFR 240.12h-6(d). Under that rule, a non-Exchange Act reporting foreign private issuer that has acquired a reporting foreign private issuer in a transaction exempt under the Securities Act, for example, under Rule 802 (17 CFR 230.802), or Securities Act Section 3(a)(10) (15 U.S.C. 77c(a)(10)), may qualify immediately for termination of its Exchange Act reporting obligations under Rule 12h-6, without having to file an Exchange Act annual report, as long as the acquired company's reporting history fulfills Rule 12h-6's prior reporting condition and the successor issuer meets the rule's other conditions.

G. Elimination of the Rule 12g3–2(b) Exception for MJDS Filers

The adopted rule amendments will eliminate the Rule 12g3-2 provisions that make the Rule 12g3-2(b) exemption available to Canadian issuers that have only filed with the Commission specified registration statements under the MJDS,[91] although they may have filed those registration statements within the previous 18 months or to effect transactions in which they would succeed to Exchange Act reporting obligations.[92] Because the adopted amendments will eliminate the 18 month and successor issuer prohibitions under Rule 12g3-2(b), they will remove as unnecessary the MJDS filer exceptions to those prohibitions.

The adopted rule amendments will also eliminate the current ability of a Canadian issuer that already has the Rule 12g3-2(b) exemption, but that subsequently acquires Exchange Act reporting obligations as a MJDS filer, for example, with regard to a class of debt securities, to retain the Rule 12g3-2(b) exemption for its equity securities. Such a MJDS filer currently may submit its non-U.S. disclosure documents simultaneously to fulfill its Exchange Act

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[91] The Commission adopted the Rule 12g3-2 provisions when adopting the MJDS in order to encourage Canadian issuers to use the MJDS. See Release No. 33-6879 (October 22, 1990), 55 FR 462881 (November 2, 1990), as adopted in Release No. 33-6902 (June 21, 1991), 56 FR 30036 (July 1, 1991). The MJDS generally permits a qualified Canadian issuer to file with the Commission its Canadian registration statements and reports under cover of the MJDS forms.

[92] Current Exchange Act Rules 12g3-2(d)(1) and (2).

reporting obligations under the MJDS and its non-U.S. publication obligations under Rule 12g3-2(b).[93]

We proposed to eliminate this ability of a MJDS filer simultaneously to maintain the Rule 12g3-2(b) exemption both because few issuers have ever used that ability and because it no longer is the case that a MJDS filer must file the same documents to fulfill its obligations under the Exchange Act and Rule 12g3-2(b). Since the enactment of the Sarbanes-Oxley Act,[94] and Commission rules adopted under that Act, Canadian issuers must respond to several U.S. disclosure requirements when preparing their Form 40-F annual reports.[95]

Only one commenter opposed eliminating this rarely used ability to be a MJDS filer while simultaneously claiming the Rule 12g3-2(b) exemption.[96] The primary ground for objection was that some issuers may already be relying on the ability to use MJDS reports for this dual purpose. We continue to believe that this ability is rarely used if at all. Moreover, as explained below, we are adopting a three-year transition period following

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[93] Under the current rules, a Canadian issuer that checks the appropriate box on the cover of each filed Form 40-F and submitted Form 6-K is able to use those Exchange Act reports to maintain its Rule 12g3-2(b) exemption as well.

[94] Public Law 107-204, 116 Stat. 745 (2002).

[95] See, for example, Form 40-F's certifications required concerning an issuer's disclosure controls and procedures and its internal controls over financial reporting, and the disclosure required concerning its audit committee financial expert, its code of ethics, and its off-balance sheet arrangements.

[96] See the letter of Osler, Hoskins & Harcourt, dated April 28, 2008.

effectiveness of the adopted rule amendments, that will provide ample time for a MJDS registrant of debt securities, which has simultaneously claimed the Rule 12g3-2(b) exemption for a class of equity securities, to register that class of securities under the Exchange Act.[97]

Accordingly, we are adopting the elimination of this MJDS provision, as proposed.[98] Under the adopted rule amendments, a MJDS registrant will be eligible to claim the Rule 12g3-2(b) exemption on the same grounds as other foreign registrants. If it has recently exited the Exchange Act reporting regime under Rule 12h-6, 12g-4 or12h-3 or Section 15(d), it can claim the exemption, assuming it satisfies the rule amendments' other conditions. Otherwise, the filing of a MJDS registration statement under the Securities Act or Exchange Act will trigger Exchange Act reporting obligations and preclude that issuer from claiming the exemption.

H. Elimination of the "Automated Inter-Dealer Quotation System" Prohibition and Related Grandfathering Provision

The adopted amendments will also eliminate the provision generally prohibiting a foreign private issuer from claiming the Rule 12g3-2(b) exemption if it has securities or ADRs quoted in the United States

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[97] See Part II.K.1 below.

[98] The adopted rule amendments remove the instruction on the cover page of Form 40-F and Form 6-K requiring a registrant to indicate whether it also is furnishing the materials pursuant to Rule 12g3-2(b).

on an automated interdealer quotation system,[99] which, until recently, referred to the inter-dealer quotation system administered by the National Association of Securities Dealers Inc., and known as Nasdaq. The Commission initially adopted this prohibition in 1983 because of its belief that, since its establishment in 1971, Nasdaq had so matured into a trading system with substantial similarities to a national securities exchange that Nasdaq-traded foreign private issuers should be required to meet the same disclosure standards as exchange-traded foreign private issuers.[100] We are eliminating this prohibition, as proposed, because Nasdaq has since become a national securities exchange.[101]

When the Commission adopted the automatic inter-dealer quotation system prohibition, it recognized that the general prohibition could cause some Nasdaq-quoted foreign companies that already had obtained the Rule 12g3-2(b) exemption to withdraw from Nasdaq. Therefore, the Commission excepted from that prohibition securities that:

- Were quoted on Nasdaq on October 5, 1983 and have been continuously traded since;

- Were exempt under Rule 12g3-2(b) on October 5, 1983 and have remained so since; and

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[99] Current Exchange Act Rule 12g3-2(d)(3) (17 CFR 12g3-2(d)(3)).

[100] Release No. 34-20264 (October 6, 1983), 48 FR 46736 (October 14, 1983).

[101] Nasdaq ceased operations as an automated inter-dealer quotation system and became a national securities exchange effective August 1, 2006. See Release No. 34-53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

- After January 2, 1986, were issued by a non-Canadian company.[102]

The adopted rule amendments will eliminate this grandfathering provision because, as we stated in the Proposing Release, due to developments occurring since its adoption, we no longer believe the grandfathering provision is necessary. Only nine of the grandfathered issuers remain listed on Nasdaq.[103] Pursuant to Commission order, Nasdaq is now a national securities exchange, and those issuers must register their securities under Exchange Act Section 12(b) by August 1, 2009 if they wish to remain listed on Nasdaq.[104] Pursuant to the terms of the Commission order, as long as the nine grandfathered issuers continue to comply with the conditions of Rule 12g3-2(b), brokers and dealers may trade their securities in reliance on the Rule 12g3-2(b) exemption until the above deadline for Exchange Act registration. Those few commenters that addressed the issue supported the proposed

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[102] Current Exchange Act Rule 12g3-2(d)(3). The Commission based the more limited grandfathering of Canadian securities on the more active U.S. market for those securities, which had led to abuses under Rule 12g3-2(b). Release No. 34-20264.

[103] Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006), attached to Release No. 3454240 (July 31, 2006), 71 FR 45246 (August 8, 2006).

[104] Release No. 34-54241 (July 31, 2006), 71 FR 45359 (August 8, 2006). The Commission granted the grandfathered issuers an additional three years to register their securities under Section 12(b) in order to avoid disruptions in the trading of their securities caused by their delisting from Nasdaq and to provide them with time to meet U.S. disclosure requirements.

elimination of the grandfathering provision.[105] Accordingly, we are adopting the elimination, as proposed.

I. Revisions to Form F–6

Currently, a registrant of ADRs must state on Form F-6, the registration statement used to register ADRs under the Securities Act, that the issuer of the deposited securities against which the ADRs will be issued is either an Exchange Act reporting company or furnishes public reports and other documents to the Commission pursuant to Rule 12g3-2(b).[106] We proposed to require a Form F-6 registrant to state that, if the issuer of deposited securities is not an Exchange Act reporting company, such issuer publishes information in English required to maintain the Rule 12g3-2(b) exemption on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The registrant would also have to disclose the issuer's address of its Internet Web site or the electronic information delivery system in its primary trading market.[107]

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[105] See the ABA letter and the letter of the Pink OTC Markets Inc. ("Pink OTC"), dated April 10, 2008.

[106] Part I, Item 2 of Form F-6. Form F-6 states that the registrant is the legal entity created by the deposit agreement for the issuance of ADRs for the deposited securities.

[107] A registrant that has effected a Form F-6 registration statement before the effective date of these final rules would not have to amend the Form F-6 to provide the issuer's Internet Web site address until the registrant's first substantive amendment of the Form F-6. However, once a registrant has disclosed the issuer's Internet address on the Form F-6, it

Some commenters stated that, if the Commission elects not to publish an annual list of Rule 12g3-2(b)-exempt issuers, it will be difficult for a depositary of an unsponsored ADR facility [108] to determine that the issuer of the subject securities has complied with the electronic publication condition of Rule 12g3-2(b). Those commenters requested that, for unsponsored facilities, we either eliminate the Form F-6 condition that an issuer must be subject to Exchange Act reporting or must furnish reports required under Rule 12g3-2(b),[109] or revise the proposed Form F-6 amendment to permit the depositary to base its representation concerning an issuer's Rule 12g3-2(b) electronic publication upon the depositary's reasonable, good faith belief.[110]

We are not revising the requirement under Form F-6 that the issuer of the deposited securities be either an Exchange Act reporting company or be exempt from registration under Rule 12g3-2(b) because such revision would eliminate any ongoing disclosure obligations as a condition of Form F-6 registration, which would not be in the best interest of investors. However, we are amending Form F-6 to state that, in the case of an unsponsored ADR

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should promptly amend the Form F-6 to disclose a subsequent change in that address.

[108] Currently an ADR facility may be either sponsored or unsponsored. With a sponsored facility, the issuer of the deposited securities is a party to the deposit agreement along with the depositary and is able to exercise some control regarding the terms and operations of the facility. With an unsponsored facility, the depositary solely controls the terms and operations of the facility.

[109] See the letter of JPMorganChase.

[110] See the letters of Ziegler, Ziegler & Associates and BNY.

facility, a Form F-6 filer may base its representation that the issuer publishes information in English required to maintain the exemption from registration under Exchange Act Rule 12g3-2(b) upon the filer's reasonable, good faith belief after exercising reasonable diligence.[111] Except for this one change, we are adopting the Form F-6 amendment, as proposed.

Currently an issuer that does not seek to have its securities traded in the United States in the form of ADRs is able, by not formally establishing the Rule 12g3-2(b) exemption and submitting documents to the Commission, to restrict the ability of ADR depositary banks to establish unsponsored ADR facilities. Because the adopted rule amendments will expand the availability of the Rule 12g3-2(b) exemption by making it available to all otherwise eligible foreign private issuers that post materials to their Web sites or publish them through an electronic information delivery system in their primary trading market, ADR depositaries will be able to establish unsponsored ADRs on this expanded group of foreign private issuers based upon their reasonable, good faith belief, after exercising reasonable diligence, that those issuers comply with Rule 12g3-2(b).[112]

We solicited comment on whether, because of the expanded availability of the Rule 12g3-2(b) exemption under the proposed rule amendments, we should require, as a condition to the registration of

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[111] See the Note to Form F-6, Part I, Item 2.

[112] ADR depositaries will also be able to establish sponsored ADR facilities with foreign private issuers that choose to have their shares represented by ADRs in the United States.

ADRs on Form F-6, that the issuer give its consent to the depositary, or at least that the depositary must have notified the issuer of its intention to register ADRs and must not have received an affirmative statement of objection from the issuer. Those few commenters that addressed this matter disagreed on whether imposing such additional conditions on the creation of unsponsored ADR facilities was necessary or advisable.[113] Given this disagreement, and because we concur with those commenters who stated that imposing such additional conditions could run counter to the goal of streamlining the Rule 12g3-2(b) regime for the benefit of investors and issuers,[114] we are not adopting at this time any additional conditions regarding the formation of unsponsored ADR facilities.

J. Amendment of Exchange Act Rule 15c2–11

Exchange Act Rule 15c2-11[115] contains requirements that are intended to deter broker-dealers from initiating or resuming quotations for

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[113] See the letters of Cleary Gottlieb and EuropeanIssuers, both of which favored requiring a depositary to notify an issuer before establishing an unsponsored ADR facility, and requiring it to terminate an unsponsored facility created without the consent of an issuer if the issuer decides to create a sponsored facility. But see the letters of BNY and Pink OTC, both of which opposed the adoption of a condition requiring a depositary to obtain the consent of an issuer before establishing an unsponsored ADR facility, and the letter of Deutsche Bank, dated April 21, 2008, which stated that, because, in practice, depositary banks typically obtain the issuer's consent before establishing an unsponsored ADR facility, a rule requiring such consent was not necessary.

[114] See the letters of BNY and Pink OTC.

[115] 17 CFR 240.15c2-11.

covered over-the-counter securities that may facilitate a fraudulent or manipulative scheme. The Rule currently prohibits a broker-dealer from publishing (or submitting for publication) a quotation for a covered over-the-counter security in a quotation medium unless it has obtained and reviewed current information about the issuer.[116] One of the specified types of information satisfying this Rule 15c2-11 obligation is information furnished to the Commission pursuant to Rule 12g3-2(b). A broker-dealer must make this information reasonably available upon request to any person expressing an interest in a proposed transaction involving the security with the broker-dealer.[117]

We proposed to amend Rule 15c2-11 to conform to the proposed rule amendments so that a broker-dealer must have available the information that, since the beginning of its last fiscal year, the issuer has published pursuant to the Rule 12g3-2(b) exemption. We further proposed to permit a broker-dealer to fulfill its Rule 15c2-11 obligation to make reasonably available upon request the information published pursuant to Rule 12g3-2(b) by providing the requesting person with appropriate instructions regarding how to obtain the information electronically. This reflects our view that most investors will have ready access to the electronically

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[116] Rule 15c2-11(a) (17 CFR 240.15c2-11(a)). The broker-dealer must also have a reasonable basis for believing that the issuer information, when considered along with any supplemental information, is accurate and is from a reliable source.

[117] Rule 15c2-11(a)(4) (17 CFR 240.15c2-11(a)(4)).

published documents of Rule 12g3-2(b)-exempt issuers.

The proposed amendment of Rule 15c2-11 received little comment. Because this proposal will make it easier for broker-dealers to fulfill their Rule 15c2-11 obligations for the benefit of investors, we are adopting it, as proposed. Because some issuers currently still make paper submissions to maintain their Rule 12g3-2(b) exemption, we expect that, during the first year of the amended rules' effectiveness, a broker-dealer may have to resort to both paper submissions and electronically published materials in order to fulfill its Rule 15c2-11 obligations regarding a particular issuer.

Eventually, however, a broker-dealer will only have to look to an issuer's electronically published materials for the purpose of Rule 15c2-11.

K. Transition Periods

1. Regarding Section 12 Registration

While we believe most issuers that currently have the Rule 12g3-2(b) exemption will continue to be able to claim the exemption upon the effectiveness of the adopted rule amendments, some may not be able to do so because, for example, they no longer maintain a foreign listing or their principal foreign trading market comprises less than 55 percent of their worldwide trading and, therefore, does not meet the definition of primary trading market under the amended rule. Those issuers will have to file a Section 12 registration statement if they are unable to meet all of the amended rule's conditions or fail to qualify under another exemption from Section 12(g).

In order to provide those issuers with sufficient time to prepare for and complete the Section 12 registration process, including obtaining required audited financial statements, we are adopting a three-year transition period, as proposed. Those issuers must become Exchange Act registrants no later than three years from the effective date of the adopted rule amendments if they are unable to comply fully with all of the amended rule's conditions.[118]

We believe this three-year transition period is necessary for the benefit not just of issuers, but of broker-dealers and investors as well. If a currently exempt issuer is unable to claim the Rule 12g3-2(b) exemption upon the effectiveness of the rule amendments because it no longer has a foreign listing or cannot meet the primary trading market definition, but continues to comply with the electronic publishing condition, a broker-dealer will be able to rely on that issuer's electronic postings to meet its Rule 15c2-11 obligations to investors and to facilitate resales of that issuer's securities in Rule 144A transactions during the transition period.

Several commenters urged the Commission to grandfather indefinitely current Rule 12g3-2(b)-exempt companies.[119] Most of those issuers also stated their support for a three-year transition period

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[118] We adopted a similar three-year transition period to enable those grandfathered Nasdaq-traded foreign companies that were Rule 12g3-2(b)-exempt to register under Section 12(b) after Nasdaq became an exchange. *See* Release No. 34-54241 (July 31, 2006), 71 FR 45359 (August 8, 2006).

[119] See the letters of the ABA, BNY, JPMorganChase, Pink OTC, and Shearman & Sterling.

as an alternative to a grandfathering provision.[120] We decline to adopt a grandfathering provision because, in the interest of protecting investors, we believe that any issuer that claims the Rule 12g3-2(b) exemption must comply fully with the foreign listing condition and definition of primary trading market. Adoption of a three-year transition period will enable issuers to achieve full compliance with Rule 12g3-2(b) or Exchange Act registration without unduly burdening them.

2. Regarding Processing of Paper Submissions

We expect that, following the effectiveness of the adopted rule amendments, some Rule 12g3-2(b)-exempt companies will continue to submit their non-U.S. disclosure documents in paper to the Commission either because they are unaware of the amendments or lack electronic publishing capabilities. In order to assist those companies in complying with the new amendments, and because there may also be some investors who currently do not have ready access to the Internet, we are adopting a three-month transition period, as proposed. During this period, the Commission will continue to process paper Rule 12g3-2(b) submissions and make them publicly available in the Public Reference Room for three months following the effectiveness of the rule amendments. Thereafter, the Commission will no longer process paper Rule 12g3-2(b) submissions. An issuer that continues to make Rule 12g3-2(b) submissions in paper after this three-month period, and does not publish the submitted documents electronically as required, will

[120] The ABA suggested a five-year transition period.

no longer be able to claim the Rule 12g3-2(b) exemption.

Those commenters that addressed the matter supported such a transition period,[121] although one commenter suggested a one-year period instead of a three-month period.[122] Because of recent advances in information technology, we continue to believe that three months will be sufficient time for all Rule 12g3-2(b)-exempt issuers to develop the capabilities to publish electronically their non-U.S. disclosure documents, and for investors and other interested persons to determine how and where to access those electronically published documents.

III. Paperwork Reduction Act

The final rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[123] The title of the affected collections of information are submissions under Exchange Act Rule 12g3-2 (OMB Control No. 3235-0119) and Securities Act Form F-6 (OMB Control No. 3235-0292). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the amendments to Rule 12g3-2 and Form F-6 is mandatory.

Exchange Act Rule 12g3-2 is an exemptive rule that, under paragraph (b) of that rule, provides an exemption from Exchange Act Section 12(g)

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[121] See the letters of the ABA, BNY and Pink OTC.

[122] See the BNY letter.

[123] 44 U.S.C. 3501 *et seq.*

registration for a foreign private issuer that, on an ongoing basis, either submits copies of its material non-U.S. disclosure documents to the Commission in paper or publishes those documents on its Internet Web site or through an electronic information delivery system in its primary trading market. We adopted paragraph (b) of Rule 12g3-2 in order to provide information for U.S. investors concerning foreign private issuers with limited securities trading in U.S. capital markets.

Securities Act Form F-6 is the form used to register ADRs, which are a special type of security issued by a U.S. bank, representing a specified amount of securities issued by a foreign company that are deposited with the bank. We adopted Form F-6 in order to provide investors with information concerning a foreign company's ADRs, as disclosed in the deposit agreement, which must be attached as an exhibit to the Form F-6.

The hours and costs associated with making submissions under Exchange Act Rule 12g3-2(b) and preparing and filing Form F-6 constitute reporting and cost burdens imposed by those collections of information. We based our estimates of the effects that the final rule amendments will have on those collections of information primarily on our review of the most recently completed PRA submissions for Rule 12g3-2(b) documents and Form F-6, on the particular requirements for those submissions and form, and on other information, for example, concerning relative U.S. and foreign trading volume for foreign private issuers whose equity securities trade in the U.S. over-the-counter market.

The final rule amendments to Exchange Act Rule 12g3-2 will permit a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit paper copies of written materials to the Commission, if, among other requirements, it maintains a listing of the subject class of securities on one or more exchanges in its primary trading market. The final rule amendments define primary trading market to mean that at least 55 percent of the trading in the issuer's subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. The final rule amendments also provide that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of meeting the primary trading market definition, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.

The final rule amendments further require that, as a condition to claiming the Rule 12g3-2(b) exemption, a non-Exchange Act reporting issuer must publish in English specified non-U.S. disclosure documents required by Rule 12g3-2(b) for its most recently completed fiscal year on its Internet Web site or through an electronic information delivery system in its primary trading market, instead of requiring their submission in paper as part of a written application to the Commission. The final rule amendments also require an issuer similarly to publish electronically specified non-U.S. disclosure

documents in English on an ongoing basis for subsequent fiscal years as a condition to maintaining the Rule 12g3-2(b) exemption, rather than permitting their submission in paper to the Commission.

The final amendments to Form F-6 will require a registrant to state that the issuer of the deposited securities, which is not an Exchange Act reporting company, publishes information in English required to maintain the Rule 12g3-2(b) exemption on the issuer's Internet Web site or through its primary trading market's electronic information delivery system.[124] The final amendments will also require the registrant to disclose the address of the issuer's Internet Web site or electronic information delivery system. A registrant that already has an effective Form F-6 will have to disclose the address of where the issuer electronically publishes its non-U.S. disclosure documents under Rule 12g3-2(b) when the registrant first amends its Form F-6 following the effective date of the final rule amendments.

We have prepared the annual burden and cost estimates of the final rule amendments on Rule 12g3-2(b) submissions or publications and Form F-6 based on the following current estimates and assumptions:

- A foreign private issuer incurs 75% of the burden required to produce each Rule 12g3-2(b) submission or publication, excluding the initial application for the Rule 12g3-2(b) exemption and English translation work, and 25% of the burden

[124] The final amendments provide that the registrant of an unsponsored ADR facility may make the required representation based upon its reasonable good faith belief after exercising reasonable diligence.

required to perform work for the initial application and English translation for the Rule 12g3-2(b) submissions or publications;

- Outside firms, including legal counsel, accountants and other advisors incur 25% of the burden required to produce each Rule 12g3-2(b) submission or publication, not including the initial application for the Rule 12g3-2(b) exemption and English translation work, at an average cost of $400 per hour, and 75% of the burden required to produce the initial application at an average cost of $400 per hour, and 75% of the burden resulting from English translation work at an average cost of $125 per hour;

- English translation work constitutes on average 25% of the total work required for the Rule 12g3-2(b) submissions;

- A registrant satisfies 25% of the burden required to produce each Form F-6; and

- Outside firms, including legal counsel, accountants and other advisors, satisfy 75% of the burden required to produce each Form F-6 at an average cost of $400 per hour.

We published a notice requesting comment on the collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[125] We received several comment letters regarding the proposed rule amendments, although none addressed their estimated effects on the collection of information

[125] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

requirements. We have revised the proposed rule amendments in response to those comments. As a result, we have revised the estimated reporting and cost burdens of the rule amendments, as discussed below.

A. Rule 12g3–2(b) Submissions or Publications

We estimate that, currently under Rule 12g3-2(b), on an annual basis:

- 1,036 foreign private issuers claim the Rule 12g3-2(b) exemption;
- Each issuer makes on average 12 submissions or publications, for a total of 12,432 submissions or publications under Rule 12g3-2(b);
- Production of those Rule 12g3-2(b) submissions or publications requires a total of 49,728 burden hours, or an average of 4 burden hours per submission or publication (for all work performed by foreign private issuers and outside firms);
- Of those total burden hours, 13,700 hours result from work incurred by 685 issuers to produce their initial Rule 12g3-2(b) applications;[126]

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[126] We previously estimated that 685 issuers obtained the Rule 12g3-2(b) exemption before the adoption of Rule 12h-6, which eliminated the application process for issuers that deregister pursuant to that new rule. See Release No. 3455540. All of the 685 issuers obtained the Rule 12g3-2(b) exemption after having submitted a letter application to the Commission. Based on a review of several Rule 12g3-2(b) applications, and an assessment of Rule 12g3-2(b)'s requirements and current practice, we estimated then, and continue to estimate, that it takes approximately 20 hours on average to complete a Rule 12g3-2(b) letter application. 685 × 20 hrs. = 13,700 hrs.

- Foreign private issuers incur a total of 25,943 burden hours [127] to produce the Rule 12g3-2(b) submissions or publications, or an average of 2.1 burden hours per submission or publication;[128] and

- Outside firms perform service at a total cost of $7,656,375[129] to produce the Rule 12g3-2(b) submissions or publications.[130]

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[127] 49,728 hrs. - 13,700 hrs. = 36,028 hrs. for work excluding application work. 36,028 hrs. × .25 = 9,007 hrs. for English translation work. 36,028 hrs. - 9,007 hrs. = 27,021 hrs. × .75 = 20,266 hrs. for non-English translation work. 9,007 hrs. × .25 = 2,252 hrs. for English translation work. 13,700 hrs. × .25 = 3,425 hrs. for application work. 20,266 hrs. + 2,252 hrs. + 3,425 hrs. = 25,943 hrs. for total work performed by foreign private issuers. 25,943 hrs./12,432 = 2.1 hrs per submission or publication.

[128] The last OMB-approved submission for Rule 12g3-2(b) reported 31,080 burden hours for foreign private issuers. Our current estimate of 25,943 burden hours is due to our assessment of the average annual burden hours required to produce written applications under Rule 12g3-2(b), most of which are incurred by outside firms. The decrease in hours represents an adjustment to the previous OMB-approved burden estimate for Rule 12g3-2(b), which we noted when submitting the PRA estimate for the Proposing Release.

[129] 27,021 hrs. × .25 = 6,755 hrs. × $400/hr. = $2,702,000 for non-English translation work. 9,007 hrs. × .75 = 6,755 hrs. × $125/hr. = $844,375 for English translation work. 13,700 hrs. × .75 = 10,275 hrs. × $400/hr. = $4,110,000 for application work. $2,702,000 + $844,375 + $4,110,000 = $7,656,375 for total work performed by outside firms.

[130] The last OMB-approved submission for Rule 12g3-2(b) reported $4,895,100 in total costs for outside firms. Our current estimate of $7,656,375 is due to the previously noted assessment of the average annual burden hours required to produce written applications under Rule 12g3-2(b). This increase in costs represents an adjustment to the previous OMB-approved cost

We estimate that, on an annual basis, up to 350 additional foreign private issuers could claim the Rule 12g3-2(b) exemption as a result of the amendments to Rule 12g3-2 we are adopting today.[131] This increase in the number of Rule 12g3-2(b)-exempt issuers would cause:

- The number of issuers claiming the Rule 12g3-2(b) exemption to total 1,386;
- The number of Rule 12g3-2(b) publications to total 16,632;[132]
- The number of burden hours required to produce these Rule 12g3-2(b) publications to total 59,528 hours (for all work performed by issuers and outside firms);[133]

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estimate for Rule 12g3-2(b), which we noted when submitting the PRA estimate for the Proposing Release.

[131] We previously estimated that the proposed rule amendments would cause an additional 150 issuers to claim the Rule 12g3-2(b) exemption. We have increased the estimated number of issuers affected by the final rule amendments in part due to the elimination of the proposed condition that would have required an issuer to have its U.S. trading volume no greater than 20 percent of its worldwide trading volume for its last fiscal year. Under the final rule amendments, an issuer must still meet the foreign listing/primary trading market condition, which effectively limits the issuer's U.S. trading volume to no greater than 45%. The increase in the estimated number of issuers affected by the final rule amendments is also due to a reconsideration of the number of unsponsored ADR facilities that could result from the amended rules.

[132] 1,386 × 12 = 16,632 publications.

[133] 16,632 × 4 hrs. = 66,528 hrs. 350 × 20 hrs. = 7,000 hrs. of work saved by the elimination of the written application requirement. 66,528 hrs. - 7,000 hrs. = 59,528 hrs.

- The number of burden hours incurred by foreign private issuers to produce the Rule 12g3-2(b) publications to total 37,206 hours, or 2.2 burden hours per publication;[134] and

- Outside firms perform services at a total cost of $5,860,050[135] to produce the Rule 12g3-2(b) publications.[136]

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[134] 59,528 hrs. × .25 = 14,882 hrs. for English translation work. 59,528 hrs. - 14,882 hrs. = 44,646 hrs.; 44,646 hrs. × .75 = 33,485 hrs. for non-English translation work; 14,882 hrs. × .25 = 3,721 hrs. for English translation work; 33,485 hrs. + 3,721 hrs. = 37,206 total hrs. incurred by foreign private issuers. 37,206 hrs./16,632 = 2.2 hrs. per publication. This represents an increase of 6,126 hrs. from the most recent OMB-approved burden estimate for Rule 12g3-2(b) submissions or publications. Using a rate of $175/hr. for in-house work, the adopted amendments could result in $6,511,050 of in-house costs incurred by foreign private issuers compared to $5,439,000 of in-house costs based on the previous OMB-approved burden estimate for Rule 12g3-2(b) submissions or publications. 37,206 hrs. × $175/hr. = $6,511,050. 31,080 hrs. × $175/hr. = $5,439,000.

[135] 44,646 hrs. × .25 = 11,162 hrs. × $400/hr. = $4,464,800 for non-English translation work; 14,882 hrs. × .75 = 11,162 hrs. × $125/hr. = $1,395,250 for English translation work; $4,464,800 + $1,395,250 = $5,860,050 for total costs incurred by outside firms. This represents an increase of $964,950 from the most recent OMB-approved cost estimate for Rule 12g3-2(b) submissions or publications.

[136] Based on the above estimates, the amendments could result in a $2,037,000 increase in Rule 12g3-2(b) costs. $6,511,050 + $5,860,050 = $12,371,100 in total post-amendment Rule 12g3-2(b) costs. $5,439,000 + $4,895,100 = $10,334,100 in total pre-amendment Rule 12g3-2(b) costs. $12,371,100 - $10,334,100 = $2,037,000 increase in Rule 12g3-2(b) costs.

B. Form F–6

We currently estimate that, on an annual basis:

- 150 registrants file Form F-6;
- Each registrant files one Form F-6, for a total of 150 Form F-6s;
- Production of these Form F-6s requires 150 burden hours, or one burden hour per Form F-6 (for all work performed by registrants and outside firms);
- Of those total hours, registrants incur 38 hours to produce the Form F-6s, or an average of .25 hours per Form F-6; [137]and
- Outside firms perform services at a total cost of $45,000 to produce the Form F-6s.[138]

We estimate that, on an annual basis, approximately 350 additional registrants could file Form F-6 as a result of the final rule amendments. We further estimate that, as a result of the final rule amendments, the burden required to produce each Form F-6 would increase by .5 hours. This increase in the number of Form F-6s and burden hours would cause:

- The number of Form F-6s filed to increase by 350 for a total of 500;
- The total hours required to produce the Form F-6s to increase by 525 hours for a total of 675 hours, or 1.35 hours per Form F-6; [139]

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[137] 150 hrs. × .25 = 38 hrs.

[138] 150 hrs. × .75 × $400/hr. = $45,000.

- The number of burden hours incurred by registrants to produce the Form F-6s to increase by 131 hours to 169 hours, or.34 hours per Form F-6; [140] and

- Outside firms to perform services at a total cost of $202,400 (an increase of $157,400)[141] to produce the Form F-6s.[142]

IV. Cost-Benefit Analysis

A. Expected Benefits

The adopted rule amendments are designed to encourage more foreign companies, which have not listed or otherwise publicly sold their securities in the United States, to claim the Rule 12g3-2(b) exemption, and thereby require them to publish on the Internet

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[139] For the additional 350 filers: 350 × 1.5 hrs. = 525 hrs., 525 hrs. + 150 hrs. = 675 hrs., 675 hrs./ 500 = 1.35 hrs. per Form F-6.

[140] 675 hrs. × .25 = 169 hrs., 169 hrs. - 38 hrs. = 131 hrs., 169 hrs./500 = .34 hr. per Form F-6. Using a rate of $175/hr. for in-house work, the adopted amendments could result in $29,575 of in-house costs incurred by foreign private issuers compared to $6,650 of pre-amendment in-house costs. 169 hrs. × $175/hr. = $29,575. 38 hrs. × $175/ hr. = $6,650.

[141] 141 675 hrs. × .75 = 506 hrs. × $400/hr. = $202,400. $202,400 - $45,000 = $157,400.

[142] Based on the above estimates, the amendments could result in a $180,325 increase in Form F-6 costs. $29,575 + $202,400 = $231,975 in total post-amendment Form F-6 costs. $6,650 + $45,000 = $51,650 in total pre-amendment Form F-6 costs. $231,975 - $51,650 = $180,325 increase in Form F-6 costs. Thus, considering the estimated effects on both Rule 12g3-2(b) submissions and publications and Form F-6, the amendments could result in a $2,217,325 increase in total costs. $2,037,000 + $180,325 = $2,217,325.

material disclosure documents in English, enhancing the ability of U.S. investors to trade equity securities of such companies in the U.S. over-the-counter market. The Rule 12g3-2(b) exemption permits a foreign company to have established an unlisted ADR facility under which its equity securities are traded as ADRs in the U.S. over-the-counter market for the convenience of U.S. investors, even if its U.S. investors exceed the Section 12(g) shareholder thresholds.[143] The Rule 12g3-2(b) exemption also permits a foreign company to have its equity securities traded in the form of ordinary shares through the U.S. over-the-counter market, makes it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2-11, and facilitates the resale of a foreign company's securities to qualified institutional buyers in the United States under Securities Act Rule 144A.

The adopted rule amendments should result in new investment opportunities in foreign securities for U.S. investors by encouraging more foreign companies to claim the Rule 12g3-2(b) exemption and thereby have their securities traded in the United States over-the-counter market. The new investment opportunities in foreign securities may also lead to improved diversification in the portfolios of U.S. investors.

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[143] Use of an ADR facility makes it easier for a U.S. investor to receive dividends in U.S. dollars. Moreover, because the clearance and settlement process for ADRs generally is the same for securities of domestic companies that are traded in U.S. markets, a U.S. holder of an ADR is able to hold securities of a foreign company that trades, clears and settles within automated U.S. systems and within U.S. time periods.

The adopted rule amendments will encourage more foreign companies to claim the Rule 12g3-2(b) exemption by reducing the costs of obtaining that exemption for foreign private issuers in two ways. First, the rule amendments will enable an otherwise eligible issuer to claim the Rule 12g3-2(b) exemption, regardless of the number of its U.S. security holders, as long as it maintains a listing of the subject class of equity securities on one or more exchanges in no more than two foreign jurisdictions constituting its primary trading market. The rule amendments define "primary trading market" to mean that at least 55 percent of the worldwide trading volume of the issuer's subject class of securities occurs in no more than two foreign jurisdictions, and the trading volume in one of the foreign jurisdictions must be larger than the U.S. trading volume for the same class of securities. Currently Rule 12g3-2(b) requires an issuer to disclose the number of its U.S. security holders and the percentage of its outstanding securities held by them when applying for the Rule's exemption from Exchange Act registration.[144] Since it is typically more difficult for a foreign company to calculate the number of its U.S. holders than to determine its U.S. or foreign trading volume, the adopted rule amendments should make it easier for more foreign companies to claim the exemption and thereby have their securities traded in the U.S. over-the-counter market for the benefit of U.S. investors.

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[144] An issuer must also currently recalculate the number of its U.S. security holders when applying for reinstatement of the Rule 12g3-2(b) exemption should it lose that exemption due to noncompliance with the Rule's ongoing requirements.

Second, the adopted rule amendments will eliminate the current written application process that requires an issuer to submit in paper specified information concerning, for example, its non-U.S. disclosure requirements, along with paper copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year. Since outside law firms typically perform most of the work required for the application, the rule amendments should reduce Rule 12g3-2(b) costs for foreign companies and encourage more of them to have their securities traded in the U.S. over-the-counter market pursuant to the Rule 12g3-2(b) exemption for the benefit of U.S. investors.

The adopted rule amendments will further benefit U.S. investors by requiring any foreign company that claims the Rule 12g3-2(b) exemption to publish in English specified non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. Currently an issuer that has obtained the Rule 12g3-2(b) exemption upon application may submit its non-U.S. documents on an ongoing basis in paper to the Commission. By requiring the electronic publication in English of specified non-U.S. documents for any issuer claiming the Rule 12g3-2(b) exemption, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities.

B. Expected Costs

Investors will incur costs from the adopted rule amendments to the extent that the amendments encourage more foreign companies, which otherwise would be required to register their equity securities under the Exchange Act, to claim the Rule 12g3-2(b) exemption, where the information, enforcement remedies, and other effects of registration are valuable to investors. We estimate that, on an annual basis, approximately 350 additional foreign private issuers could claim the Rule 12g3-2(b) exemption as a result of the adopted amendments to Rule 12g3-2. Some less technologically capable investors may also incur costs resulting from the search and retrieval of a foreign company's electronically published documents. However, we expect those costs to be less than the costs that investors currently must incur to obtain written copies of a foreign company's non-U.S. disclosure documents submitted in paper to the Commission.

A foreign company will incur costs resulting from the amended rule's requirement to publish electronically specified non-U.S. disclosure documents in English to the extent that it is not already required to, or does not already, do so pursuant to any applicable law or rule. A foreign private issuer will also incur costs resulting from its required annual determination regarding whether it is still in compliance with the amended rule's primary trading market provision. However, those costs will likely be less than the costs that an issuer currently must incur when calculating the number of its U.S. holders pursuant to Rule 12g3-2(b).

If, because of those costs, the foreign company does not claim or maintain the Rule 12g3-2(b) exemption, U.S. investors interested in trading in the securities of that company would have to resort to trading in the company's non-U.S. primary trading market. Those U.S. investors could incur costs associated with finding and contracting with a broker-dealer who is able to trade in the foreign reporting company's primary trading market. U.S. investors could also face additional costs resulting from currency conversion and higher transaction costs trading the securities in a foreign market. U.S. investors would also incur costs from lost investment opportunities and possibly lost diversification benefits to the extent that they choose not to trade in a foreign company's securities that are not available in the U.S. over-the-counter market.

V. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation Analysis

When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act [145] requires us to consider the impact that any new rule will have on competition. Section 23(a)(2) also prohibits us from adopting any rule that will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, Section 2(b)[146] of the Securities Act and

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[145] 15 U.S.C. 78w(a)(2).

[146] 15 U.S.C. 77b(b).

Section 3(f) of the Exchange Act [147] require the Commission to consider whether the action will promote efficiency, competition and capital formation.

In the Proposing Release, we considered the proposed rule amendments in light of the standards set forth in the above statutory sections. We solicited comment on whether, if adopted, the proposed rule amendments would result in any anti-competitive effects or promote efficiency, competition and capital formation. We further encouraged commenters to provide empirical data or other facts to support their views on any anticompetitive effects or any burdens on efficiency, competition or capital formation that might result from adoption of the proposed amendments.

We did not receive any comments or any empirical data in this regard concerning the proposed amendments. Accordingly, since the adopted rule amendments are similar to the proposed rule amendments, we continue to believe the amended rules will contribute to efficiency, competition and capital formation.

The adopted amendments revise the rules that determine when a foreign private issuer may claim the exemption from Exchange Act Section 12(g) registration under Exchange Act Rule 12g3-2(b). That exemption permits limited trading of an issuer's exempted equity securities in the over-the-counter market in the United States as long as the issuer submits its non-U.S. disclosure documents to the Commission, notwithstanding that the issuer exceeds

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[147] 15 U.S.C. 78c(f).

the Section 12(g) registration thresholds. Many foreign private issuers rely on the Rule 12g3-2(b) exemption to have established ADR facilities, which make it easier for U.S. investors to trade in those issuers' equity securities. The Rule 12g3-2(b) exemption also makes it easier for broker-dealers to meet their Exchange Act Rule 15c2-11 obligations, and effect the resale of a foreign private issuer's securities to QIBs under Securities Act Rule 144A.

The adopted rule amendments will permit a foreign private issuer to claim the Rule 12g3-2(b) exemption without having to submit a paper application to the Commission, as is currently required, if, among other conditions, the issuer maintains a listing on one or more exchanges in no more than two foreign jurisdictions that constitute its primary trading market. The adopted rule amendments will also require an issuer to publish in English specified non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. Currently an issuer that has obtained the Rule 12g3-2(b) exemption by application may submit its non-U.S. disclosure documents in paper to the Commission.

By enabling a qualified foreign private issuer to claim the Rule 12g3-2(b) exemption automatically, and without regard to the number of its U.S. shareholders, as is currently the case, the adopted rule amendments should encourage more foreign private issuers to claim the Rule 12g3-2(b) exemption by lowering the costs of obtaining that exemption. Consequently, the adopted rule amendments should

increase the efficiency of foreign private issuers' claiming the exemption and foster the trading of foreign companies' equity securities in the U.S. over-the-counter market, for example, by enabling the establishment of additional ADR facilities and making it easier for broker-dealers to meet their Rule 15c2-11 obligations with respect to foreign securities. The enhanced ability of investors to trade foreign securities in the United States should help encourage competition between domestic and foreign firms for investors in the U.S. over-the-counter market.

Moreover, by requiring the electronic publication in English of specified non-U.S. disclosure documents for any issuer claiming the Rule 12g3-2(b) exemption, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities. Thus, the proposed amendments should foster increased efficiency in the trading of the issuer's securities.

VI. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,[148] we certified that, when adopted, the proposed rule amendments would not have a significant economic impact on a substantial number of small entities. We included this certification in Part VI of the Proposing Release. While we encouraged written comments regarding this certification, no commenters responded to this request.

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[148] 5 U.S.C. 605(b).

VII. Statutory Basis and Text of Rule Amendments

We are adopting the amendments to Securities Act Form F-6, Exchange Act Rules 12g3-2 and 15c2-11, and Exchange Act Forms 40-F, 6-K, and 15F under the authority in Sections 6, 7, 10 and 19 of the Securities Act[149] and Sections 3(b), 12, 13, 23 and 36 of the Exchange Act.[150]

Text of Rule Amendments

List of Subjects in 17 CFR Parts 239, 240 and 249

Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 1. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u-5, 78w(a), 78*ll*, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

■ 2. Amend Form F-6 (referenced in § 239.36) by revising Item 2 of Part I to read as follows:

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[149] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s.

[150] 15 U.S.C. 78c, 78*l*, 78m, 78w, and 78mm.

Note: The text of Form F-6 does not and this amendment will not appear in the Code of Federal Regulations.

FORM F–6

Registration Statement Under the Securities Act of 1933 for Depositary Shares Evidenced by American Depositary Receipts

* * * * *

Part I—Information Required In Prospectus

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Item 2. Available Information

Provide the information in either (a) or (b) below, whichever is applicable.

(a) State that the foreign issuer publishes information in English required to maintain the exemption from registration under Rule 12g3-2(b) under the Securities Exchange of 1934 on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. Then disclose the address of the foreign issuer's Internet Web site or the electronic information delivery system in its primary trading market.

(b) State that the foreign issuer is subject to the periodic reporting requirements of the Securities Exchange Act of 1934 and accordingly files reports with the Commission. Then disclose that these reports are available for inspection and copying through the Commission's EDGAR system or at

public reference facilities maintained by the Commission in Washington, DC.

Note to Item 2: In the case of an unsponsored ADR facility, you may base your representation that the issuer publishes information in English required to maintain the exemption from registration under Exchange Act Rule 12g3-2(b) upon your reasonable, good faith belief after exercising reasonable diligence.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 4. Amend § 240.12g3–2 by revising paragraphs (b), (c), and (d), and removing paragraphs (e) and (f), to read as follows:

§ 240.12g3–2 Exemptions for American depositary receipts and certain foreign securities.

* * * * *

(b)(1) A foreign private issuer shall be exempt from the requirement to register a class of equity securities under section 12(g) of the Act (15 U.S.C. 78l(g)) if:

(i) The issuer is not required to file or furnish reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78o(d));

(ii) The issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities; and

(iii) The issuer has published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, since the first day of its most recently completed fiscal year, it:

(A) Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;

(B) Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and

(C) Has distributed or been required to distribute to its security holders.

Note 1 to Paragraph (b)(1): For the purpose of paragraph (b) of this section, *primary trading market* means that at least 55 percent of the trading in the

subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of this paragraph, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities. When determining an issuer's primary trading market under this paragraph, calculate average daily trading volume in the United States and on a worldwide basis as under Rule 12h–6 under the Act (§ 240.12h–6).

Note 2 to Paragraph (b)(1): Paragraph (b)(1)(iii) of this section does not apply to an issuer when claiming the exemption under paragraph (b) of this section upon the effectiveness of the termination of its registration of a class of securities under section 12(g) of the Act, or the termination of its obligation to file or furnish reports under section 15(d) of the Act.

Note 3 to Paragraph (b)(1): Compensatory stock options for which the underlying securities are in a class exempt under paragraph (b) of this section are also exempt under that paragraph.

(2)(i) In order to maintain the exemption under paragraph (b) of this section, a foreign private issuer shall publish, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in

its primary trading market, the information specified in paragraph (b)(1)(iii) of this section.

(ii) An issuer must electronically publish the information required by paragraph (b)(2) of this section promptly after the information has been made public.

(3)(i) The information required to be published electronically under paragraph (b) of this section is information that is material to an investment decision regarding the subject securities, such as information concerning:

(A) Results of operations or financial condition;

(B) Changes in business;

(C) Acquisitions or dispositions of assets;

(D) The issuance, redemption or acquisition of securities;

(E) Changes in management or control;

(F) The granting of options or the payment of other remuneration to directors or officers; and

(G) Transactions with directors, officers or principal security holders.

(ii) At a minimum, a foreign private issuer shall electronically publish English translations of the following documents required to be published under paragraph (b) of this section if in a foreign language:

(A) Its annual report, including or accompanied by annual financial statements;

(B) Interim reports that include financial statements;

(C) Press releases; and

(D) All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

(c) The exemption under paragraph (b) of this section shall remain in effect until:

(1) The issuer no longer satisfies the electronic publication condition of paragraph (b)(2) of this section;

(2) The issuer no longer maintains a listing of the subject class of securities on one or more exchanges in a primary trading market, as defined under paragraph (b)(1) of this section; or

(3) The issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

(d) Depositary shares registered on Form F–6 (§ 239.36 of this chapter), but not the underlying deposited securities, are exempt from section 12(g) of the Act under this paragraph.

■ 5. Amend § 240.15c2–11 by revising paragraph (a)(4) to read as follows:

§ 240.15c2–11 Initiation or resumption of quotations without specific information.

* * * * *

(a) * * *

(4) The information that, since the beginning of its last fiscal year, the issuer has published pursuant to § 240.12g3–2(b), and which the broker or dealer shall make reasonably available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with the broker or dealer, such as by providing the requesting person with appropriate instructions regarding how to obtain the information electronically; or

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 6. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 7. Amend Form 40–F (referenced in § 249.240f), the cover page, by removing the second to last paragraph, which pertains to information furnished pursuant to Rule 12g3–2(b), including the check boxes.

Note: The text of Form 40–F does not and this amendment will not appear in the Code of Federal Regulations.

■ 8. Amend Form 6–K (referenced in § 249.306), the cover page, by removing the two paragraphs, which pertain to information furnished pursuant to Rule 12g3–2(b), following the second Note, including the check boxes.

Note: The text of Form 6-K does not and this amendment will not appear in the Code of Federal Regulations.

■ 9. Amend Form 15F (referenced in § 249.324) by revising General Instruction E and Item 9 of Part II to read as follows:

Note: The text of Form 15F does not and this amendment will not appear in the Code of Federal Regulations.

FORM 15F

Certification of a Foreign Private Issuer's Termination of Registration of a Class of Securities Under Section 12(G) of the Securities Exchange Act of 1934 or Its Termination of the Duty To File Reports Under Section 13(A) or Section 15(D) of the Securities Exchange Act of 1934

* * * * *

General Instructions

* * * * *

E. Rule 12g3-2(b) Exemption

Regardless of the particular Rule 12h6 provision under which it is proceeding, a foreign private issuer that has filed a Form 15F regarding a class of equity securities shall receive the exemption under Rule 12g3-2(b) (17 CFR 240.12g3-2(b)) for the subject class of equity securities immediately upon the effective date of its termination of registration and reporting under Rule 12h-6. Refer to Rules 12g3-2(b)(2) and (b)(3) (17 CFR 240.12g3-2(b)(2) and (b)(3)) and Rule 12g3-2(c) (17 CFR 240.12g3-2(c)) for the conditions

that a foreign private issuer must meet in order to maintain the Rule 12g3-2(b) exemption following its termination of Exchange Act registration and reporting.

* * * * *

Part II

Item 9. Rule 12g3-2(b) Exemption

Disclose the address of your Internet Web site or of the electronic information delivery system in your primary trading market on which you will publish the information required to maintain the exemption under Rule 12g3-2(b).

Instruction to Item 9

Refer to Rule 12g3-2(b)(3)(ii) (17 CFR 240.12g3-2(b)(3)(ii)) for instructions regarding providing English translations of documents required to maintain the Rule 12g3-2(b) exemption.

* * * * *

By the Commission.

Dated: September 5, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8-20995 Filed 9-9-08; 8:45 am]

BILLING CODE 8010–01–P

APPENDIX G

Deutsche Bank: Depositary Receipt Services
Depositary Receipt Directory

1. 3i Group PLC
2. 3SBIO Inc.
3. A.P. Moller - Maersk A/S
4. A2A S.p.A.
5. AAC Technologies Holdings Inc.
6. Aalberts Industries N.V.
7. Aareal Bank AG
8. Abcam PLC
9. Abengoa
10. Abertis Infraestructuras, S.A.
11. ABN AMRO Group N.V.
12. Aboitiz Equity Ventures Inc.
13. Aboitiz Power Corp.
14. Acacia Mining PLC
15. Acerinox S.A.
16. Ackermans & Van Haaren
17. Acs, Actividades De Construccion Y Servicios, S.A.
18. Adaro Energy Tbk, PT
19. Adecco Group AG
20. Adelaide Brighton Ltd.
21. Admiral Group PLC
22. AECI Ltd.
23. Aegean Airlines S.A.
24. Aena SME, S.A.
25. AEON Co. Ltd.
26. Aeroports De Paris
27. AGC Inc.
28. Agfa-Gevaert

29. Aggreko PLC
30. Agile Group Holdings Ltd.
31. Agricultural Bank Of China
32. AIB Group
33. Aida Engineering Ltd.
34. Aiful Corp.
35. Airbus SE
36. Airports Of Thailand Public Company Ltd.
37. Aisin Seiki Co. Ltd
38. Aixtron SE
39. Ajinomoto Co. Inc.
40. Ajisen (China) Holdings Ltd.
41. Akastor ASA
42. Aker Solutions ASA
43. AKR Corporindo Tbk
44. Alfa Laval AB
45. Alfresa Holdings Corp.
46. Alibaba Health
47. Alior Bank S.A
48. Alliance Global Group Inc.
49. Allied Group Ltd.
50. Alps Electric Co. Ltd.
51. ALS Ltd.
52. Alstom S.A.
53. Altice Europe N.V.
54. Altri SGPS S.A.
55. Amada Co. Ltd.
56. Amadeus IT Group S.A.
57. Ambu A/S
58. Amplifon
59. Ams AG
60. Anadolu Hayat Emeklilik A.S.
61. andritz AG
62. Anhui Conch Cement Company Ltd.

63. Anritsu Corp.
64. Ansaldo STS
65. Ansell Ltd.
66. Anta Sports Products Ltd.
67. Anton Oilfield Services
68. AO World PLC
69. Aozora Bank Ltd.
70. Arcam AB
71. Arcelik A.S.
72. Arnoldo Mondadori Editore S.p.A.
73. Arrium Ltd.
74. Aryzta AG
75. Asahi Group Holdings
76. Asahi Kasei Corp.
77. Ascom Holding AG
78. Ashtead Group PLC
79. Asia Cement China Holdings Corp.
80. ASICS Corp.
81. ASM Pacific Technology
82. ASOS PLC
83. Aspen Pharmacare Holdings Ltd.
84. ASR Nederland N.V.
85. Assa Abloy AB
86. Asseco Poland SA
87. Assicurazioni Generali S.p.A.
88. Associated British Foods
89. Astellas Pharma Inc.
90. Astra Agro Lestari
91. Astral Foods Ltd.
92. ASX Ltd.
93. Atlantia S.p.A.
94. Atlas Consolidated Mining & Development Corp.
95. Atlas Iron Ltd.

96. Atos Origin SA
97. Atresmedia Corporacion De Medios De Comunicacion SA
98. Aurubis AG
99. Australian Agricultural Co Ltd.
100. Auto Trader Group PLC
101. Autogrill S.p.A.
102. Avast
103. Aveng Ltd.
104. Aveva Group PLC
105. AVI Ltd.
106. AvtoVAZ JSC
107. Axel Springer SE
108. Axfood AB
109. Axis AB
110. Ayala Corp.
111. Ayala Land Inc.
112. Aygaz A.S.
113. Azimut Holding S.p.A
114. Azrieli Group Ltd.
115. B&M European Value Retail S.A.
116. Babcock International Group PLC
117. BAIC Motor Corporation Ltd.
118. Baloise Holding AG
119. Banca Mediolanum S.p.A..
120. Banca Monte Dei Paschi Di Siena S.p.A.
121. Banco BPI S.A.
122. Banco BPM
123. Banco Comercial Portugues, S.A.
124. Banco De Sabadell, S.A.
125. Banco Espirito Santo, S.A.
126. Bandai Namco Holdings Inc.
127. Bang & Olufsen A/S
128. Bangkok Bank Public Company Ltd.

129. Bangkok Dusit Medical Services
130. Bank Danamon Tbk
131. Bank Leumi Israel Ltd.
132. Bank Negara
133. Bank Of Ayudhya Public Co Ltd.
134. Bank Of China Ltd.
135. Bank Of Communications Co. Ltd.
136. Bank Of Ireland Group
137. Bank Of Jinzhou Co Ltd.
138. Bank Of Queensland
139. Bank Of The Philippine Islands
140. Bankia, S.A
141. Banpu Public Co. Ltd.
142. Barconew N.V.
143. Barloworld Ltd.
144. Barratt Developments PLC
145. Barry Callebaut
146. BBA Aviation PLC
147. BBMG Corp.
148. Beach Energy Ltd.
149. Beazley PLC
150. BEC World Public Company Ltd.
151. Bega Cheese Ltd.
152. Beiersdorf AG
153. Beijing Capital International Airport Co Ltd.
154. Beijing Enterprises Water Group Ltd.
155. Bekaert
156. Bellamy's
157. Bellway PLC
158. Benesse Holdings Inc.
159. Berkeley Group Holdings
160. Berli Jucker Public Company Ltd.
161. Beter Bed Holding N.V.
162. Betsson AB

163. Bezeq The Israeli Telecomunication Corp. Ltd.
164. Bilfinger SE
165. BillerudKorsnas AB
166. Biogaia AG
167. Biomerieux
168. Bionor Pharma ASA
169. Biotest AG
170. Bluescope Steel Ltd.
171. Boart Longyear Ltd.
172. BOC Aviation
173. Bodycote PLC
174. Boliden AB
175. Bolsas y Mercados Espanoles
176. Boohoo.Com PLC
177. Boozt AB
178. Borregaard ASA
179. Bosideng International Holdings Ltd.
180. Boustead Holdings Bhd.
181. Bouygues S.A.
182. Bovis Homes Group
183. BPER Banca S.P.A
184. Bpost S.A. / N.V
185. Brenntag AG
186. Breville Group Ltd.
187. Bridgestone Corporation
188. Brilliance China Automotive Holdings Ltd.
189. Brother Industries Ltd
190. Brunello Cucinelli S.P.A.
191. BTS Group Holdings Public Company Ltd.
192. Budimex S.A.
193. Bumi Serpong Damai
194. Bumrungrad Hospital Public Co. Ltd
195. Bureau Veritas SA
196. Burford Capital

197. Buzzi Unicem S.p.A.
198. BW LPG Ltd.
199. BYD Co.
200. BYD Electronic (International) Co Ltd
201. C C Land Holdings Ltd.
202. Cabcharge Australia Ltd.
203. Cafe De Coral Holdings Ltd.
204. Cairn Energy PLC
205. Cairn Homes PLC
206. Caixabank, S.A
207. Calbee Inc.
208. Caltex Australia Ltd.
209. Capcom Co. Ltd.
210. Capgemini SE
211. Capita PLC
212. Capitec Bank Holdings
213. CAR Inc.
214. Cargotec Corporation
215. Carillion PLC
216. Carl Zeiss Meditec AG
217. Carsales.com Ltd.
218. Casio Computer Co. Ltd.
219. Castellum AB
220. Cebu Air Inc.
221. Ceconomy AG
222. Cellnex Telecom
223. Central Japan Railway Company
224. Central Pattana Public Co. Ltd.
225. Cerved Information Solutions
226. CEZ A.S. (CEZZY)
227. CEZ A.S. (CEZYY)
228. CGN Power Co Ltd.
229. Challenger Ltd.
230. Chaoda Modern Agriculture (Holdings) Ltd.

231. Charoen Pokphan Indonesia Tbk, PT
232. Chemring Group PLC
233. Chiba Bank Ltd.
234. China Agri-Industries Holdings Ltd.
235. China Bluechemical Ltd.
236. China Citic Bank Corp. Ltd.
237. China Coal Energy Co. Ltd.
238. China Communications Construction Co Ltd.
239. China Communications Services Corp Ltd.
240. China Construction Bank Corp.
241. China Dongxiang (Group) Co Ltd.
242. China Everbright International Ltd.
243. China Everbright Ltd.
244. China Evergrande Group
245. China Fishery Group Ltd.
246. China Foods Ltd.
247. China Galaxy Securities Co Ltd.
248. China Gas Holdings Ltd.
249. China High Speed Trans. Equip. Group Co. Ltd.
250. China Hongqiao Group Ltd.
251. China Huiyuan Juice Group Ltd.
252. China International Marine Containers (Group) Co. Ltd.
253. China Jinmao Holdings Group Ltd.
254. China Literature Ltd.
255. China Longyuan Power Group Corporation Ltd.
256. China Machinery Engineering
257. China Medical System Holdings Ltd.
258. China Mengniu Dairy Co Ltd.
259. China Merchants Bank Co Ltd.
260. China Merchants Holdings International
261. China Merchants Securities Co., Ltd

262. China Minsheng Banking Corporation Ltd.
263. China Molybdenum Co Ltd.
264. China National Building Material Co.
265. China Oriental Group Company Ltd.
266. China Overseas Grand Oceans Group Ltd.
267. China Overseas Land & Investment Ltd.
268. China Pacific Insurance (Group) Co Ltd.
269. China Power International Development
270. China Railway Construction Corp.
271. China Railway Group Ltd.
272. China Railway Signal & Communication Corp. Ltd.
273. China Reinsurance Group Corp.
274. China Resources Cement Holdings Ltd.
275. China Resources Gas Group Ltd.
276. China Resources Land Ltd.
277. China Resources Power Holdings
278. China Shanshui Cement Group Ltd.
279. China Shenhua Energy Company Ltd.
280. China Shineway Pharmaceutical Group Ltd.
281. China State Construction International Holdings Ltd.
282. China Tower Corp Ltd.
283. China Taiping Insurance Holdings Co Ltd.
284. China Vanke Co. Ltd.
285. China Vanke Co. Ltd.
286. China Zhengtong Auto Services Holdings Ltd.
287. China Zhongwang Holdings Ltd.
288. Chinese Estates Holdings Ltd.
289. Chiyoda Corporation
290. Chongqing Rural Commercial Bank
291. Chow Tai Fook Jewellery Group Ltd.
292. Christian Dior SE
293. Chugai Pharmaceutical Co. Ltd.

294. Chugoku Electric Power Co. Inc.
295. Cifi Holdings (Group) Co. Ltd.
296. Cimic Group Ltd.
297. Cineworld Group
298. CIR Compagnie Industrial Riunite S.p.A.
299. Citic Resources Holdings Ltd.
300. Citic Securities Co.
301. Citizen Watch Co. Ltd.
302. Ck Assets Holdings Ltd.
303. Ck Hutchison Holdings Ltd.
304. Ck Infrastructure Holdings Ltd.
305. Clariant AG
306. Clear Media Ltd.
307. Clinigen Group
308. Close Brothers Group PLC
309. CNP Assurances
310. Coats Group PLC
311. Cobham PLC
312. Coca Cola HBC AG
313. Coca-Cola Bottlers Japan Holdings Inc.
314. Cochlear Ltd.
315. Coloplast A/S
316. Colruyt
317. Com Hem Holding AB
318. Comfortdelgro Corp. Ltd.
319. Compagnie De Saint-Gobain S.A.
320. Compagnie Financiere Richemont S.A.
321. Compugroup Medical SE
322. Concordia Financial Group Ltd.
323. Connect Group
324. Contact Energy
325. Convatec Group PLC
326. Cookpad Inc.
327. Corbion N.V.

328. Cosco Shipping Development Co., Ltd.
329. Cosco Shipping Holding Co., Ltd.
330. Cosco Shipping Ports Ltd.
331. Cosmo Energy Holdings Co., Ltd.
332. Costain Group PLC
333. Country Garden Holdings Ltd.
334. Countryside Properties
335. Countrywide PLC
336. Covivio
337. CP All Public Company Ltd.
338. CPP Group PLC
339. Cranswick PLC
340. Creative Technology Ltd.
341. Credit Agricole S.A.
342. Crest Nicholson Holdings PLC
343. Crimean Soda Plant
344. Croda International PLC
345. Crown Resorts Ltd.
346. CRRC Corporation Ltd.
347. CSE Global Ltd.
348. CSPC Pharmaceutical Group Ltd.
349. CSR Ltd.
350. CTT Correios De Portugal S.A.
351. Cyberagent Inc.
352. Cyfrowy Polsat S.A.
353. D&L Industries Inc.
354. D'Ieteren N.V.
355. Dah Chong Hong Holdings Ltd.
356. Dah Sing Financial Holdings Ltd.
357. Dai-Ichi Life Holdings Inc.
358. Daibiru Corporation
359. Daikin Industries Ltd.
360. Daimler AG
361. Dainippon Sumitomo Pharma Co., Ltd.

362. Dairy Crest Group PLC
363. Dairy Farm International Holdings Ltd.
364. Daiwa House Industry Co.
365. Danieli & C - Officine Meccaniche S.p.A.
366. Danieli & C - Officine Meccaniche S.p.A.
367. Daphne International Holdings
368. Datatec Ltd.
369. Datwyler Holding AG
370. Davide Campari
371. DCC PLC
372. De La Rue PLC
373. Dechra Pharmaceuticals PLC
374. Delong Holdings Ltd.
375. Denso Corporation
376. Dentsu Inc.
377. Deutsche Boerse AG
378. Deutsche Boerse AG
379. Deutsche Euroshop AG
380. Deutsche Wohnen SE
381. Devro PLC
382. Dexia
383. Dexus Property Group
384. Digital China Holdings Ltd.
385. Dignity
386. Diploma PLC
387. Direct Energie
388. Direct Line Insurance Group PLC
389. Disco Corporation
390. Discovery Ltd.
391. Distribuidora Internacional De Alimentacion S.A.
392. DKSH Holding AG
393. DMCI Holdings Inc.
394. DNO ASA

395. Dogan Sirketler Grubu Holding A.S.
396. Domino's Pizza Enterprises Ltd.
397. Domino's Pizza Group PLC
398. Don Quijote Co., Ltd.
399. Dongfeng Motor Group Company Ltd.
400. Dormakaba
401. Downer Edi Ltd.
402. Drax Group
403. DSV A/S
404. Duerr AG
405. Dufry AG
406. Dunelm Group PLC
407. Duni AB
408. East Japan Railway Company
409. Ebara Corporation
410. EBOS Group
411. Ebro Foods S.A
412. Echo Entertainment Group Ltd.
413. Edenred
414. EDP Renovaveis S.A.
415. Edreams Odigeo S.A.
416. EFG Eurobank Ergasias S.A.
417. EFG International AG
418. Ei Group PLC
419. Ei Towers S.P.A.
420. Eiffage
421. El Al Israel Airlines Ltd.
422. Elders Ltd.
423. Electric Power Development Co Ltd.
424. Electricite De France S.A.
425. Electricity Generating Public Company Ltd.
426. Electrocomponents PLC
427. Elekta AB
428. Elementis

429. Elior Group
430. Elisa Oyj
431. Ellaktor S.A.
432. Elringklinger
433. Empiric Student Property PLC
434. Ems-Chemie Holding AG
435. Enagas S.A.
436. ENAV S.p.A.
437. Endesa S.A.
438. Enea S.A.
439. Enel Societa Per Azioni
440. Energi Mega Persada Tbk
441. Energy Development Corporation
442. Energy Resources Of Australia Ltd.
443. ENKA Insaat ve Sanayi A.S.
444. ENN Energy Holdings Ltd.
445. Epiroc Aktiebolag
446. Eramet
447. Eregli Demir Celik Fabrikalari A.S.
448. Essentra PLC
449. Essilorluxottica
450. Eurocash S.A.
451. Eurofins Scientific SE
452. Europris A.S.A.
453. Evolution Gaming Group AB
454. Evolution Mining Ltd.
455. Evonik Industries AG
456. EVS Broadcast Equipment
457. Ezra Holdings
458. Fabege AB
459. Fairfax Media Ltd.
460. Familymart UNY Holdings Co., Ltd.
461. Famous Brands Ltd.
462. Fanuc Corporation

463. Far East Horizon Ltd.
464. Fast Retailing Co. Ltd.
465. FBD Holdings PLC
466. Ferrexpo PLC
467. Ferrovial S.A.
468. FF Group
469. Fidessa Group PLC
470. Fields Corp.
471. Fielmann AG
472. FIH Mobile Ltd.
473. Fineco Bank
474. First Gen Corporation
475. First Resources Ltd.
476. First Tractor Company Ltd.
477. Firstgroup PLC
478. Firstrand Ltd.
479. Fisher & Paykel Healthcare Corporation Ltd.
480. Flight Centre Travel Group Ltd.
481. Flsmidth & Co. A.S.
482. Flughafen Zurich Ag.
483. Fomento De Construcciones Y Contratas, S.A.
484. Forbo Holding AG
485. Ford Otomotiv Sanayi A.S.
486. Forgame Holdings Ltd.
487. Fortum Oyj
488. Fosun International Ltd.
489. Fourlis Holdings S.A.
490. Foxtons Group PLC
491. Fraport AG
492. Fraser & Neave Ltd.
493. Fred Olsen Energy
494. Freenet AG
495. Freightways Ltd.
496. Fuchs Petrolub SE

497. Fuchs Petrolub SE
498. Fuji Electric Holdings
499. Fuji Film Holdings Corporation
500. Fuji Media Holdings Inc.
501. Fujitec Company Ltd.
502. Fujitsu Ltd.
503. Fukuoka Financial Group, Inc.
504. Funai Electric Co Ltd.
505. Furukawa Electric Co. Ltd.
506. Futuren S.A.
507. Fuyao Glass Industry Group Co. Ltd
508. G.U.D. Holdings
509. G4S PLC
510. Galaxy Entertainment Group Ltd.
511. Galenica AG
512. Galliford Try PLC
513. Galp Energia SGPS S.A.
514. GAM Holding Ltd.
515. Gaztransport Et Technigaz
516. Gcl-Poly Energy Holdings Ltd.
517. Geberit AG
518. Geely Automobile Holdings Ltd.
519. Gem Diamonds Ltd.
520. Genel Energy PLC
521. Genting Singapore Ltd.
522. Genus PLC
523. Genworth Mortgage Insurance Australia Ltd.
524. Geox S.p.A.
525. Gerresheimer AG
526. Gerry Weber International AG
527. Getin Holding Spolka Akcyjna
528. Getinge AB
529. Getlink SE
530. Givaudan S.A.

531. Gjensidige Forsikring Ba
532. GL Ltd.
533. Glencore PLC
534. Global Bio-Chem Technology
535. Global Brands Group Holdings
536. Global PVQ SE
537. Globe Telecom Inc.
538. Globe Trade Centre S.A.
539. Glorious Property Holdings Ltd.
540. Glory Ltd.
541. Glow Energy Public Co. Ltd.
542. GMO Internet Inc.
543. GN Store Nord A/S
544. Go-Ahead Group PLC
545. Golden Agri Resources
546. Golden Eagle Retail Group Ltd.
547. Golden Meditech Holdings Ltd.
548. GOME Retail Holdings Ltd.
549. Grafton Group
550. Graincorp Ltd.
551. Grand Baoxin Auto Group Ltd.
552. Grand City Properties
553. Great Eastern Holdings Ltd.
554. Great Wall Motor Co., Ltd.
555. Greek Organisation Of Football Prognostics S.A.
556. Greenvale Energy Ltd.
557. Greggs PLC
558. Grindrod Ltd.
559. Groupe Bruxelles Lambert (New)
560. Gruma S.A.B. de C.V.
561. Grupa Kety SA
562. Gruppo Editoriale L'Espresso S.p.A.
563. GT Capital Holdings Inc.

564. Guangdong Investment Ltd.
565. Guangzhou Automobile Group
566. Guangzhou R&F Properties Co Ltd
567. Gudang Garam Tbk
568. Guoco Group Ltd.
569. Guocoland Ltd.
570. Guotai Junan Securities
571. GWA Group Ltd.
572. Hachijuni Bank Ltd.
573. Haier Electronics Group Co., Ltd.
574. Haitong Securities Co., Ltd.
575. Hakuhodo DY Holdings Inc.
576. Halfords Group PLC
577. Halma PLC
578. Hamamatsu Photonics K.K.
579. Hamburger Hafen und Logistik AG
580. Haoma Mining
581. Hapag-Lloyd Ag
582. Hargreaves Lansdown PLC
583. Harvey Norman
584. Haseko Corporation
585. Havas SA
586. Haw Par Corporation Ltd.
587. Hays PLC
588. Healthscope Ltd.
589. Heidelbergcement AG
590. Heidelberger Druckmaschinen AG
591. Hella Gmbh & Co. Kgaa
592. Hellenic Exchanges - Athens Stock Exchange S.A.
593. Helvetia Holdings AG
594. Hengan International Group Co. Ltd.
595. Hengdeli Holdings Ltd.
596. Hennes & Mauritz AB

597. Hera S.p.A.
598. Hermes International
599. Hexagon AB
600. Hexpol AB
601. Hidili Industry International Development Ltd.
602. Hindusthan Engineering & Indus
603. Hino Motors Ltd.
604. Hiscox Ltd.
605. Hisense Kelon
606. Hitachi Capital Corporation
607. Hitachi Chemical Co., Ltd.
608. Hitachi Construction Machinery Co., Ltd.
609. Hitachi High-Technologies Corp.
610. Hitachi Metals Ltd.
611. HKBN Ltd.
612. HKT Trust and HKT Ltd.
613. Hochiki Corporation
614. Hochschild Mining PLC
615. Hochtief AG
616. Hokuhoku
617. Holcim Indonesia Tbk
618. Holcim(Philippines) Inc.
619. Holmen AB
620. Holmen AB
621. Homeserve
622. Hong Kong & Shanghai Hotels Ltd.
623. Hong Kong Exchanges and Clearing Ltd.
624. Hongkong Land Holdings Ltd.
625. Howden Joinery Group PLC
626. Hua Hong Semiconductor Ltd.
627. Huabao Holdings International Ltd.
628. Huadian Fuxin Energy

629. Huadian Power International Corporation Ltd.
630. Huaneng Renewables Corporation Ltd.
631. Hunting PLC
632. Hurriyet Gazetecilik Ve Matbaacilik A.S.
633. Hutchison Port Holdings Trust
634. Hyflux Ltd.
635. Idemitsu Kosan Co Ltd.
636. Ihi Corp.
637. Iliad S.A.
638. Illich Iron & Steel Works
639. Iluka Resources Ltd.
640. Imaginatik PLC
641. IMAX China Holding, Inc.
642. IMCD N.V.
643. Imerys
644. Indo Tambangraya Megah Tbk, Pt
645. Indocement Tunggal
646. Indofood Agri Resources Ltd.
647. Indofood Cbp Sukses Makmur
648. Indofood Sukses Makmur Tbk
649. Indorama Ventures Public Company Ltd.
650. Indra Sistemas
651. Industria De Diseno Textil S.A.
652. Industrial & Commercial Bank Of China
653. ING Bank Slaski S.A.
654. Ingenico S.A.
655. Inmarsat
656. Innate Pharma
657. Innogy SE
658. Inpex Corporation
659. Insurance Australia Group Ltd.
660. International Container Terminal Services Inc.

661. International Personal Finance PLC
662. Interpump Group S.p.A.
663. Interserve PLC
664. Intertek Group PLC
665. Intralot S.A. - Integrated Lottery Systems & Services
666. Intrum AB
667. Investec Ltd.
668. Investec PLC
669. Investor AB
670. IQE PLC
671. Iren S.p.A.
672. IRESS Ltd.
673. IRPC Public Company Ltd.
674. Isetan Mitsukoshi Holdings Ltd.
675. Israel Discount Bank Ltd.
676. Isuzu Motors Ltd.
677. ITE Group
678. Itochu Corporation
679. Itochu Techno-Solutions Corporation
680. ITV PLC
681. JAFCO Co., Ltd.
682. Japan Airlines Company Ltd.
683. Japan Airport Terminal Co. Ltd.
684. Japan Display Inc.
685. Japan Exchange Group Inc.
686. Japan Petroleum Exploration Co., Ltd.
687. Japan Post Bank Co Ltd.
688. Japan Post Holdings Co Ltd.
689. Japan Post Insurance Co Ltd.
690. Japan Steel Works Ltd.
691. Japan Tobacco Inc.
692. Japara Healthcare Ltd.
693. Jardine Cycle & Carriage Ltd.

694. Jardine Matheson Holdings Ltd.
695. Jardine Strategic Holdings Ltd.
696. Jasa Marga (Persero) Tbk, PT
697. JB Hi-Fi
698. JCDecaux S.A.
699. JD Sports Fashion PLC.
700. Jeronimo Martins - S.G.P.S., S.A.
701. JG Summit Holdings Inc.
702. JGC Corp.
703. JNBY Design Ltd.
704. Johnson Electric Holdings Ltd.
705. Jollibee Foods Corporation
706. JSR Corporation
707. JTEKT Corp.
708. Juki Corporation
709. Julius Baer Group Ltd
710. Jumbo S.A.
711. Jungheinrich AG
712. Just Eat PLC
713. Jutal Offshore Oil Services
714. JVC Kenwood Corporation
715. JXTG Holdings, Inc.
716. Jyske Bank A/S
717. Kabel Deutscheland Holding AG
718. Kajima Corporation
719. Kakaku.com, Inc.
720. Kalbe Farma Tbk
721. Kansai Electric Power Co. Inc.
722. Kao Corporation
723. Karoon Gas Australia
724. Kasikornbank Public Co. Ltd
725. Kaspi Bank
726. Kawasaki Kisen Kaisha Ltd.
727. KAZ Minerals PLC

728. KBC Group SA N.V.
729. KCE Electronics
730. KDDI Corp.
731. Kenedix Inc.
732. Keppel Telecommunications & Transportation Ltd.
733. Kering
734. Kerry Logistics Network Ltd.
735. Kerry Properties Ltd.
736. Kesko Oyj
737. Kier Group PLC
738. Kikkoman Corp.
739. Kingboard Holdings Ltd.
740. Kingboard Laminates Holdings Ltd
741. Kingdee International Software Group Company Ltd.
742. Kingspan Group PLC
743. Kintetsu World Express Inc.
744. KION Group AG
745. Kloekner & Co.
746. Koc Holding A.S.
747. Koito Manufacturing Co. Ltd
748. Komercni Banka
749. KONE Corp.
750. Konecranes PLC
751. Konica Minolta Inc.
752. Koninklijke Vopak N.V.
753. Kose Corporation
754. Kowloon Development Co. Ltd.
755. Koza Altin Isletmeleri
756. Krakatau Steel (Persero)
757. Krones AG
758. Krung Thai Bank Public Co. Ltd.
759. Kuala Lumpur Kepong Berhad

760. Kuehne & Nagel International AG
761. KUKA AG
762. Kungsleden AB
763. Kunlun Energy Company Ltd.
764. Kuraray Co. Ltd.
765. Kyushu Electric Power Co. Inc.
766. Kyushu Railway
767. L'Air Liquide S.A.
768. L'Occitane International S.A.
769. L'Oreal
770. Lafargeholcim Ltd.
771. Land Securities Group
772. Landis+Gyr Group AG
773. Lanxess AG
774. Lastminute.com N.V.
775. Lawson Inc.
776. LEG Immobilien AG
777. Legend Holdings Corporation
778. Legrand S.A.
779. Leonardo S.p.A.
780. Leoni AG
781. Leroy Seafood Group
782. Li & Fung Ltd.
783. Li Ning Co Ltd
784. Lianhua Supermarket Holdings Co Ltd.
785. Life Healthcare Group Holdings Ltd.
786. Lifestyle International Holdings Ltd.
787. Link Administration Holdings Ltd.
788. Lion Corporation
789. Lixil Group Corporation
790. London Stock Exchange Group
791. Longfor Properties Co. Ltd.
792. Lonking Holdings Ltd.
793. Lonza Group AG

794. Loomis AB
795. Lotus Bakeries
796. LPP S.A.
797. Luks Group (Vietnam Holdings) Co., Ltd.
798. Lvmh Moet Hennessy Louis Vuitton SA
799. M1 Ltd.
800. Mabuchi Motor Co Ltd.
801. Mainfreight
802. Malayan United Industries Bhd.
803. Man Group PLC
804. Man SE
805. Man SE
806. Man Wah Holdings Ltd.
807. Mandarin Oriental International Ltd.
808. Manila Electric Company
809. Manila Water Co. Inc.
810. Mapfre Sociedad Anonima
811. Marfin Investment Group
812. Marston's PLC
813. Marubeni Corporation
814. Marui Group Co. Ltd.
815. Massmart Holdings Ltd.
816. Matahari Department Store Tbk.
817. Matsui Securities Co.
818. Maurel et Prom
819. Mayne Pharma Group Ltd.
820. Mazda Motor Corp.
821. Mbank S.A.
822. McKesson Europe AG
823. McMillan Shakespeare Ltd.
824. Medco Energi
825. Media Nusantara Citra Tbk, PT
826. Mediaset Espana Communicacion, S.A.
827. Medibank Private Ltd.

828. Mediclinic International PLC
829. Mediobanca - Banca Di Credito Finanziario S.p.A.
830. Mediolanum S.p.A.
831. Medipal Holdings Corporation
832. Megaworld Corporation
833. Meggitt PLC
834. Meiji Holdings Co. Ltd.
835. Meitu Inc.
836. Melbourne IT Ltd.
837. Melrose Industries PLC
838. Menzies (John) PLC
839. Mercari Inc.
840. Mersen
841. Metallurgical Corporation Of China Ltd.
842. Metro AG
843. Metro Holdings Ltd.
844. Metropole Television S.A.
845. Metropolitan Bank & Trust Company
846. Mexichem S.A.B. de C.V.
847. Meyer Burger Technology AG
848. MGM China Holdings Ltd.
849. Michelin (CGDE)-B
850. Millicom International Cellular S.A.
851. Minera IRL Ltd.
852. Mineral Resources Ltd.
853. Minor International Pcl
854. MINTH Group Ltd.
855. Misumi Group Inc.
856. Mitchells and Butlers PLC
857. Mitie Group PLC
858. Mitsubishi Chemical Holdings Corp.
859. Mitsubishi Electric Corporation
860. Mitsubishi Estate Co. Ltd.

861. Mitsubishi Tanabe Pharma Corporation
862. Mitsubishi UFJ Lease & Finance Co., Ltd
863. Mitsui Chemicals Inc.
864. Mitsui Engineering & Shipbuilding Co. Ltd.
865. Mitsui Fudosan Co Ltd
866. Mitsui Mining and Smelting Company Ltd.
867. Mitsui O.S.K. Lines Ltd.
868. Modern Times
869. Monadelphous Group
870. Moncler S.p.A.
871. Mondi Ltd.
872. Mondi PLC
873. Monex Group Inc.
874. Moneysupermarket.Com Group PLC
875. Mongolia Energy Corporation Ltd.
876. Monotaro Co. Ltd.
877. Mota-Engil S.G.P.S., S.A.
878. Motor Oil (Hellas) Corinth Refineries S.A.
879. Mount Gibson Iron Ltd.
880. MS&AD Insurance Group Holdings Inc.
881. MTR Corporation Ltd.
882. MTU Aero Engines AG
883. Muenchener Rueckversicherungs-Gesellschaft AG
884. Murata Manufacturing Company Ltd.
885. Mytilineos Holdings S.A.
886. Nabtesco Corp.
887. Nagacorp Ltd.
888. Nan Hai Corp.
889. National Express Group PLC
890. Natixis S.A.
891. Naturgy Energy Group, S.A.
892. Navitas Ltd.
893. NEL ASA

894. Neopost S.A.
895. NEPI Rockcastle PLC
896. Neste Oyj
897. Net One Systems Co. Ltd.
898. Netcare Ltd.
899. Netdragon Websoft Inc.
900. NetEnt AB
901. Nets
902. New China Life Insurance Company Ltd.
903. New World Department Store China Ltd.
904. New Zealand Oil & Gas
905. Newton Resources Ltd.
906. Nexans S.A.
907. Nexity
908. Nexon Co. Ltd.
909. Next PLC
910. NGK Sparks Plug Co. Ltd.
911. NH Foods Ltd.
912. Nichirei Corporation
913. Nifco Inc.
914. Nihon Kohden Corporation
915. Nikon Corporation
916. Nine Dragons Paper (Holdings) Ltd.
917. Nintendo Co. Ltd.
918. Nippon Electric Glass Co. Ltd.
919. Nippon Express Co. Ltd.
920. Nippon Kayaku Co. Ltd.
921. Nippon Sheet Glass Co. Ltd.
922. Nippon Shinyaku Co. Ltd.
923. Nippon Suisan Kaisha Ltd.
924. Nissan Chemical Industries Ltd.
925. Nisshinbo Holdings Inc.
926. Nitto Denko Corporation
927. NMC Health PLC

928. NN Group N.V.
929. Nobia AB
930. Noble Group Ltd.
931. Nokian Tyres PLC
932. Nomura Research Institute Ltd.
933. Nordex SE
934. Northern Star Resources Ltd.
935. Nostrum Oil & Gas PLC
936. Novozymes A/S
937. NSK Ltd.
938. NTT Data Corp.
939. Nyrstar N.V.
940. NZ Refining
941. NZX Ltd.
942. O-Net Technologies (Group) Ltd.
943. Obrascon Huarte Lain
944. OC Oerlikon Corporation AG, Pfaffikon
945. Odakyu Electric Railway Co Ltd
946. OFX Group Ltd.
947. Oji Holdings Corporation
948. Oki Electric Industry Co. Ltd.
949. Olam International
950. Old Mutual
951. ONO Pharmaceutical Co. Ltd
952. Ontex Group N.V.
953. Onward Holdings Co., Ltd.
954. Ophir Energy PLC
955. Orange Belgium
956. Organizacion Soriana S.A.
957. Orica Ltd.
958. Orient Overseas (International) Ltd.
959. Oriental Land Co., Ltd.
960. Origin Energy Ltd.
961. Orion Corporation

962. Orora Ltd.
963. Orpea
964. Orsted A.S.
965. Osaka Gas Co. Ltd.
966. Osram Licht AG
967. Otsuka Holdings Co. Ltd.
968. Outokumpu Oyj
969. Outotec Oyj
970. Oversea-Chinese Banking Corporation Ltd.
971. Oxford Instruments PLC
972. Pacific Basin Shipping Ltd.
973. Pact Group Holdings Ltd.
974. Paddy Power Betfair PLC
975. Pagegroup PLC
976. Paladin Energy Ltd.
977. Panalpina Welttransport (Holding) AG
978. Parkson Retail Group Ltd.
979. Paysafe Group PLC
980. Pegasus Hava Tasimaciligi A.S.
981. Pennon Group
982. People's Insurance Company (Group) of China Ltd.
983. Permanent TSB Group Holdings PLC
984. Pernod Ricard S.A.
985. Persimmon PLC
986. Perusahaan Gas Negara (PGN)
987. Petrofac Ltd.
988. Petron Corporation
989. Pets At Home Group PLC
990. Peugeot S.A.
991. PGE Polska Grupa Energetyczna S.A.
992. Phoenix Group Holdings
993. Piaggio S.p.A.
994. PICC Property and Casualty Company Ltd.

995. Pick N Pay Stores Ltd.
996. Pigeon Corporation
997. Ping An Healthcare and Technology
998. Pioneer Corporation
999. Piraeus Bank S.A.
1000. Pirelli & C S.p.A.
1001. Pko Bank Polski S.A.
1002. Playtech PLC
1003. Polish Oil & Gas
1004. Porsche Automobil Holding SE
1005. Port Of Tauranga
1006. Postal Savings Bank Of China
1007. Postnl N.V.
1008. Pou Sheng International Holdings Ltd.
1009. Powszechny Zaklad Ubezpieczen SA
1010. PP London Sumatera
1011. Prada S.p.A.
1012. Premier Farnell PLC
1013. Premier Foods
1014. Premium Leisure
1015. Prosafe SE
1016. Prosiebensati Media SE
1017. Proximus
1018. Prysmian S.p.A.
1019. PSP Swiss Property
1020. PT Aneka Tambang Tbk
1021. PT Astra International Tbk
1022. PT Bank Central Asia Tbk
1023. PT Bank Mandiri (Persero) Tbk
1024. PT Bank Rakyat Indonesia
1025. PT Bukit Asam Tbk
1026. PT Bumi Resources Tbk.
1027. PT Chandra Asri Petrochemical Tbk
1028. PT Mitra Adiperkasa Tbk

1029. PT Semen Indonesia (Persero) Tbk
1030. PT Unilever Indonesia Tbk
1031. PT United Tractors Tbk
1032. PTT Global Chemical Public Company Ltd.
1033. PTT Public Company Ltd.
1034. Puma SE
1035. Puregold Price Club Inc.
1036. Pushpay Holdings
1037. PZ Cussons PLC
1038. Qinetiq Group PLC
1039. Qube Holdings Ltd.
1040. Raffles Education Corporation Ltd.
1041. Raiffeisen Bank International AG
1042. Rallye
1043. Ramsay Health Care
1044. Randstad N.V.
1045. Rational AG
1046. Razer
1047. REA Group Ltd.
1048. REC Silicon ASA
1049. Recruit Holdings Co. Ltd.
1050. Red Electrica Corporacion S.A.
1051. Redes Energeticas Nacionais SGPS S.A.
1052. Refresco Group N.V.
1053. Regis Resources Ltd.
1054. Remy Cointreau S.A.
1055. Renault S.A.
1056. Renesas Electronics Corporation
1057. Renewi PLC
1058. Renishaw PLC
1059. Resolute Mining Ltd.
1060. Reunert Ltd.
1061. Rexel S.A.
1062. Rheinmetall AG

1063. RHI AG
1064. RHI Magnesita N.V.
1065. Rhoen-Klinikum AG
1066. Rhythmone PLC
1067. Rib Software SE
1068. Ridley Corporation
1069. Rieter Holding AG
1070. Rightmove PLC
1071. Rinnai Corporation
1072. Rizal Commercial Banking Corporation
1073. RMB Holdings Ltd.
1074. Road King Infrastructure Ltd.
1075. Robinson Department Store Public Company Ltd.
1076. Robinson's Land Corporation
1077. Robinsons Retail Holdings Inc.
1078. ROHM Co. Ltd.
1079. Rotork PLC
1080. Rottneros AB
1081. Rovio Entertainment
1082. Royal Boskalis Westminster N.V.
1083. Royal Mail PLC
1084. RPC Group PLC
1085. RTL Group S.A.
1086. Rubis
1087. Ryman Healthcare Ltd.
1088. Ryohin Keikaku Co. Ltd.
1089. Sa Sa International Holdings Ltd.
1090. Sacyr S.A.
1091. Safilo Group
1092. Safran S.A.
1093. Sage Group PLC
1094. SAI Global Ltd.
1095. Saipem S.p.A.

1096. Salini Impregilo S.p.A.
1097. Salvatore Ferragamo S.p.A.
1098. Salzgitter AG
1099. Sampo
1100. Samsonite International S.A.
1101. Sanbio Co. Ltd.
1102. Sandfire Resources
1103. Sands China Ltd.
1104. Sanford
1105. Sanoma Corporation
1106. Santander Bank Polska S.A.
1107. Santen Pharmaceutical Co. Ltd.
1108. Sany Heavy Equipment International Holdings Co. Ltd.
1109. Saras Raffinerie Sarde S.p.A.
1110. Sartorius AG
1111. SAS AB
1112. SATS Ltd.
1113. Savills PLC
1114. SBM Offshore N.V.
1115. Schaeffler AG
1116. Schibsted
1117. Schneider Electric SE
1118. Schoeller-Bleckmann Oilfield Equipment AG
1119. Scout24 AG
1120. SEB Group
1121. Seche Environment
1122. Secom Co. Ltd.
1123. Securitas AB
1124. SEEK Ltd.
1125. Seiko Epson Corp.
1126. Sekisui Chemical Co. Ltd.
1127. Selangor Properties Bhd.
1128. Sembcorp Industries Ltd.

1129. Sembcorp Marine Ltd.
1130. Semperit AG Holding
1131. Senior PLC
1132. Septeni Holdings Co. Ltd.
1133. Sevan Marine ASA
1134. Seven & I Holdings Co. Ltd.
1135. Seven Bank Ltd.
1136. Seven West Media Ltd.
1137. SG Holdings Co. Ltd.
1138. SGS S.A.
1139. Shandong Molong Petroleum Machinery Co.
1140. Shandong Weigao Group Medical Polymer Company Ltd.
1141. Shandong Xinhua Pharmaceutical Co.
1142. Shanghai Electric Group Co.
1143. Shanghai Fudan Microelectronics Group Company Ltd.
1144. Shanghai Jin Jiang Intl Group
1145. Shanghai Pharmaceuticals Holding Co. Ltd.
1146. Sharp Corporation
1147. Shenguan Holdings (Group) Ltd.
1148. Shenzhen Expressway Co. Ltd.
1149. Shenzhen Investment Ltd.
1150. Shenzhou International Group Holdings
1151. Shimano Inc.
1152. Shimao Property Holdings Ltd.
1153. Shimizu Corporation
1154. Shin-Estu Chemical Co., Ltd.
1155. Shinkin Central Bank
1156. Shionogi & Co. Ltd.
1157. Shizuoka Bank Ltd.
1158. Shougang Concord International Enterprises
1159. Shougang Fushan Resources Group Ltd.
1160. Showa Denko K.K.

1161. Showa Shell Sekiyu K.K.
1162. Shui On Land Ltd.
1163. SIA Engineering Company Ltd.
1164. Siam Commercial Bank Public Co. Ltd.
1165. Siam Makro Public Company Ltd.
1166. Siemens Gamesa Renewable Energy
1167. Siemens Healthineers AG
1168. Signify N.V.
1169. Sihuan Pharmaceutical Holdings Group Ltd.
1170. Sika AG
1171. Singapore Airlines Ltd.
1172. Singapore Exchange
1173. Singapore Post Ltd.
1174. Singapore Press Holdings Ltd.
1175. Singapore Technologies Engineering Ltd.
1176. Singulus Technologies Ag
1177. Sino Biopharmaceutical Ltd.
1178. Sino-Ocean Group Holdings Ltd.
1179. Sinofert Holdings Ltd.
1180. Sinopec Engineering (Group) Co. Ltd.
1181. Sinopec Kantons Holdings Ltd.
1182. Sinopharm Group Co. Ltd.
1183. Sinotrans Shipping Ltd.
1184. Sinotruk (Hong Kong) Ltd.
1185. Sirtex Medical Ltd.
1186. Sisecam
1187. SITC International
1188. SJM Holdings Ltd.
1189. Skandinavisk Tobokshkompagni A/S
1190. Skellerup Holdings Ltd.
1191. Sky Perfect Jsat Holdings Inc.
1192. Skyworth Digital Holdings Ltd.
1193. SMA Solar Technology
1194. Smith (David S) Holdings PLC
1195. Smurfit Kappa Group PLC

1196. SNAM S.p.A.
1197. Societe Bic S.A.
1198. Soda Sanayii
1199. Softbank Group Corp.
1200. Sohgo Securities Co.
1201. Soitec
1202. Sojitz Corp.
1203. Solar World AG
1204. Solidere
1205. Solocal Groupe
1206. Sompo Holdings Inc.
1207. Sonae S.G.P.S. S.A.
1208. Sonaecom, S.G.P.S. S.A.
1209. Sonova Holding AG
1210. Sony Financial Holdings Inc.
1211. Sophos
1212. Sopra Steria Group S.A.
1213. Sound Global Ltd.
1214. Spar Group Ltd.
1215. Spectris
1216. Spicers Ltd.
1217. Spirax-Sarco Engineering PLC
1218. Sports Direct International PLC
1219. Springland International Holdings Ltd.
1220. Spt Energy Group Inc.
1221. Square Enix Holdings Co. Ltd.
1222. Srisawad Corporation
1223. Ssab Corporation
1224. Stada Arzneimittel AG
1225. Standard Life Aberdeen PLC
1226. Starhub Limited
1227. Start Today Co., Ltd.
1228. Steinhoff International Holdings Ltd.
1229. Stella International Holdings Ltd.
1230. Storebrand

1231. Strabag SE
1232. Straits Trading Co. Ltd.
1233. Straumann Holding AG
1234. Strauss Group Ltd.
1235. Studsvik AB
1236. Subaru Corporation
1237. Suedzucker AG
1238. Suez
1239. Sulzer AG
1240. Sumco Corp.
1241. Sumitomo Chemical Co., Ltd.
1242. Sumitomo Electric Industries Ltd.
1243. Sumitomo Heavy Industries, Ltd.
1244. Sumitomo Metal Mining Co. Ltd.
1245. Sumitomo Realty & Development Co. Ltd.
1246. Sumitomo Rubber Industries Ltd.
1247. Summit Ascent Holdings Ltd.
1248. Summit Resources Ltd. NL
1249. Sun Art Retail Group Ltd.
1250. Sun Hung Kai & Co. Ltd.
1251. Sunac China Holdings Ltd.
1252. Sunny Optical Technology (Group) Co., Ltd.
1253. Sunrise Communications Group AG
1254. Suntory Beverage & Food Ltd.
1255. Super Retail Group Ltd.
1256. Superdry PLC
1257. Suruga Bank Ltd.
1258. Suzuki Motor Corp.
1259. Svenska Handelsbanken AB
1260. Swatch Group AG
1261. Swedish Match
1262. Swiss Life Holding
1263. Sydbank
1264. Symrise AG
1265. Synthomer PLC

1266. Sysmex Corporation
1267. T&D Holdings Inc.
1268. Tabcorp Holdings Ltd.
1269. Taiheiyo Cement Corporation
1270. Taisei Corporation
1271. Taisho Pharmaceutical
1272. Taiyo Yuden Co. Ltd.
1273. Talanx AG
1274. Talk Talk Telecom Group PLC
1275. Tao Heung Holdings Ltd.
1276. Tateru
1277. Tauron Polska Energia SA
1278. Tav Havalimanlari Holding A.S.
1279. Taylor Wimpey PLC
1280. Tdc AS
1281. Tecan Group AG
1282. Technopro Holdings
1283. Tecnicas Reunidas
1284. Teijin Ltd.
1285. Tekfen Holding A.S.
1286. Tele2 AB
1287. Telenet Group Hldgs N.V.
1288. Teleperformance S.A.
1289. Telia Company AB
1290. Tencent Holdings Ltd.
1291. Terna - Rete Elettrica Nazionale Societa Per Azioni
1292. Terna Energy S.A.
1293. Terumo Corp
1294. Texwinca Holdings Ltd.
1295. Thai Beverage Public Company Ltd.
1296. Thai Oil Public Co. Ltd.
1297. Thai Union Group Public Company Ltd.
1298. Thales S.A.
1299. Thanachart Capital Public Co. Ltd.

1300. The Siam Cement Public Company Ltd.
1301. Thk Co. Ltd.
1302. Thomas Cook Group PLC
1303. Tianjin Port Development Holdings Ltd.
1304. Tieto Oyj
1305. Tisco Financial Group Public Company Limited
1306. Titan Cement Company S.A.
1307. Tmb Bank Public Co. Ltd.
1308. Tod's S.p.A.
1309. Toho Gas Co. Ltd.
1310. Tohoku Electric Power Co. Inc.
1311. Tokai Carbon Co. Ltd.
1312. Tokuyama Corporation
1313. Tokyo Electric Power Company Inc.
1314. Tokyo Electron Ltd.
1315. Tokyo Gas Co. Ltd.
1316. Tokyo Tatemono Co. Ltd.
1317. Tokyu Corp
1318. Tokyu Fudosan Holdings Corporation
1319. Tomtom N.V.
1320. Tonengeneral Sekiyu Kabushiki Kaisha
1321. Topdanmark A/S
1322. Topps Tiles
1323. Toray Industries Inc.
1324. Toshiba Corp.
1325. Toshiba Machine Co. Ltd.
1326. Toshiba Tec Corporation
1327. Tosoh Corporation
1328. Total Access Communication Public Company Ltd.
1329. Toto Ltd.
1330. Tower Bersama Infrastructure
1331. Towngas China Co. Ltd.
1332. Toyo Ink SC Holdings Co. Ltd.

1333. Toyo Suisan Kaisha Ltd.
1334. Toyo Tire & Rubber Co. Ltd.
1335. Toyobo Co. Ltd.
1336. Toyoda Gosei Co., Ltd.
1337. Toyota Boshoku Corp.
1338. Toyota Industries Corp.
1339. Tpg Telecom Ltd.
1340. Tpv Technology Ltd.
1341. Trade Me
1342. Trakya Cam Sanayii A.S.
1343. Trustpower
1344. Tryg A.S.
1345. Tsim Sha Tsui Properties Ltd.
1346. Tsugami Corporation
1347. Ttw Public Company Limited
1348. Tui AG
1349. Tullow Oil PLC
1350. Turk Hava Yollari A.O.
1351. Turk Telekomunikasyon A.S.
1352. Turkiye Halk Bankasi A.S.
1353. Turkiye Sinai Kalkinma Bankasi A.S.
1354. Turkiye Vakiflar Bankasi T.A.O.
1355. Tv Asahi Holdings Corporation
1356. Ube Industries Ltd.
1357. Ubisoft Entertainment
1358. Ucb S.A.
1359. Udg Healthcare PLC
1360. Ukr Telecom JSC
1361. Ulker Biskuvi Sanayi A.S.
1362. Ultra Electronics Holdings PLC
1363. Umicore
1364. Uni-President China Holdings Ltd.
1365. Unibail-Rodamco
1366. Unicredit
1367. Unione Di Banche Italiane

1368. Uniper SE
1369. Unipetrol, A.S.
1370. Unipol Gruppo S.p.A.
1371. Unipolsai Assicurazioni S.p.A.
1372. United Arrows
1373. United Industrial Corporation Ltd.
1374. United Internet AG
1375. United Laboratories Intl. Ltd.
1376. Universal Robina Corporation
1377. Uponor Oyj.
1378. Uss Co., Ltd.
1379. Valle Indonesia
1380. Vapiano
1381. Vat Group
1382. Venture Corporation Ltd.
1383. Vestas Wind Systems
1384. Vesuvius PLC
1385. Vib Vermoegen AG
1386. Vicat
1387. Victrex PLC
1388. Vifor Pharma AG
1389. Vilmorin & Cie
1390. Vinci
1391. Vinda International Holdings Limited
1392. Virtus Health Limited
1393. Vitro S.A.B. De C.V.
1394. Vitrolife AB
1395. Vivendi S.A.
1396. Voestalpine AG
1397. Volkswagen AG (VWAGY)
1398. Volkswagen AG (VWAPY)
1399. Volvo AB
1400. Vonovia SE
1401. Vossloh AG
1402. Vtech Holdings Ltd.

1403. Wacker Chemie AG
1404. Wacom Co. Ltd.
1405. Wallenius Wilhelmsen Logistics ASA
1406. Want Want China Holdings Ltd.
1407. Wartsila Oyj Abp.
1408. Weichai Power Co. Ltd.
1409. Weiqiao Textile Co
1410. Wesfarmers Limited
1411. Wessanen N.V.
1412. West Japan Railway Company
1413. Wharf (Holdings) Ltd.
1414. Wheelock and Company Ltd.
1415. Wheelock Properties (Singapore) Ltd.
1416. Whitehaven Coal Ltd.
1417. Wihlborgs Fastigheter AB
1418. William Demant Holding AS
1419. William Hill PLC
1420. Wilmar International Ltd.
1421. Wincanton PLC
1422. Wincor Nixdorf
1423. Wirecard AG
1424. Wizz Air Holdings
1425. Wm Morrison Supermartkets PLC
1426. Wood Group (John) PLC
1427. Worldline
1428. Worleyparsons Limited
1429. Wumart Stores, Inc.
1430. Wuxi Biologics Cayman Inc.
1431. Wynn Macau Ltd.
1432. Xiaomi Corporation
1433. Xinyi Glass Holdings Limited
1434. Xl Axiata Tbk.
1435. Xtep International Holdings Ltd.
1436. XXL ASA
1437. Yahoo Japan Corp

1438. Yakult Honsha Co. Ltd.
1439. Yamaha Motor Co. Ltd.
1440. Yamato Holdings Co. Ltd.
1441. Yamazaki Baking Co. Ltd.
1442. Yanlord Land Group Ltd.
1443. Yaskawa Electric Corporation
1444. Yit Oyj
1445. Yokogawa Electric Corporation
1446. Yokohama Rubber Co. Ltd.
1447. Yue Yuen Industrial Holdings Limited
1448. Zakhidenergo
1449. Zalando SE
1450. ZCI Limited
1451. Zenkoku Hosho
1452. Zhaojin Mining Industry Co., Ltd.
1453. Zhejiang Shibao
1454. Zhongan Online P & C Insurance Co. Ltd.
1455. Zhongsheng Group Holdings Limited
1456. Zhongyuan Bank Co. Ltd.
1457. Zhuzhou Crrc Times Electric Co. Ltd.
1458. Zijin Mining Group Company Limited
1459. Zoomlion Heavy Industry Science and Technology Co., Ltd.
1460. Zooplus AG
1461. Zte Corp.
1462. Zumtobel Group AG

Deutsche Bank: Global Transaction Banking Unsponsored ADRs: 2017 Market Review

[EXCERPT]

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Unsponsored ADR market

Executive Summary

The unsponsored ADR (UADR) market continues to grow. At the end of the third quarter of 2017, there were 1,642 UADR programmes in existence, a slight increase from 1,605 at the same time in 2016. More notably, reported investment in UADRs grew to USD 11.9 billion at the end of September 2017, a 51% increase on the prior year's reported investment figure of USD 7.9 billion at the end of the third quarter.

What is an Unsponsored American Depositary Receipt (UADR)?[1]

An Unsponsored ADR (UADR) is one in which no deposit agreement and no legal relationship is entered into between a depositary bank and the issuer. An unlimited number of depositary banks may issue the depositary receipts evidencing ownership of the underlying ordinary shares held in custody in the issuer's home market. It is not uncommon for all four of the Depositary Banks to administer an

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[1] 'Unsponsored ADRs: Evolution and opportunities' (Deutsche Bank Depositary Receipts, November 2012) and 'Recent Amendments to Rule 12g3-2(b) and the practical implications for ADR issuers' (Deutsche Bank Depositary Receipts, September 2008).

Unsponsored ADR programme for a particular issuer company. The UADRs trade in the United States on the over-the-counter (OTC) market.

The establishment of a UADR is initiated by the depositary bank, mainly in response to investor demand and requires no action on the company's part in the form of legal documentation or otherwise. There are no costs involved to the issuer, no incremental reporting obligations on the part of the issuer, no requirements to comply with Sarbanes-Oxley and no US GAAP reconciliation (local financial statements suffice). Though there are key differences between a UADR and a sponsored Level 1 ADR programme (Level I), from an investor perspective – both instruments provide an opportunity to access foreign securities more easily within the framework of the US securities infrastructure.

Background

On October 10th, 2008, certain amendments to the exemption from US registration under Rule 12g3-2(b) became effective, making the exemption available to many more issuers than under the previous rules. The Rule 12g3-2(b) exemption is the key precondition to establishing a sponsored Level I or an unsponsored American Depositary Receipt programme.

For the purposes of establishing a UADR, a depositary bank can independently make the determination that a foreign issuer meets the exemption. The depositary bank must represent that it has a "reasonable, good faith belief after exercising reasonable diligence" that the issuer electronically publishes the information required by Rule 12g3-2(b)

including regular financial statements, annual reports and press releases in English, for example.

The US SEC rule change to the claiming of the Rule 12g3-2(b) exemption has been designed to encourage the establishment of ADR facilities for more foreign private issuers. Prior to October 10th 2008, issuers had to apply for exemption under Rule 12g3-2(b). Under the new rules the exemption became automatic, conditional on the electronic publication of the information described in the previous paragraph. These changes have encouraged the formation of many new UADR programmes.

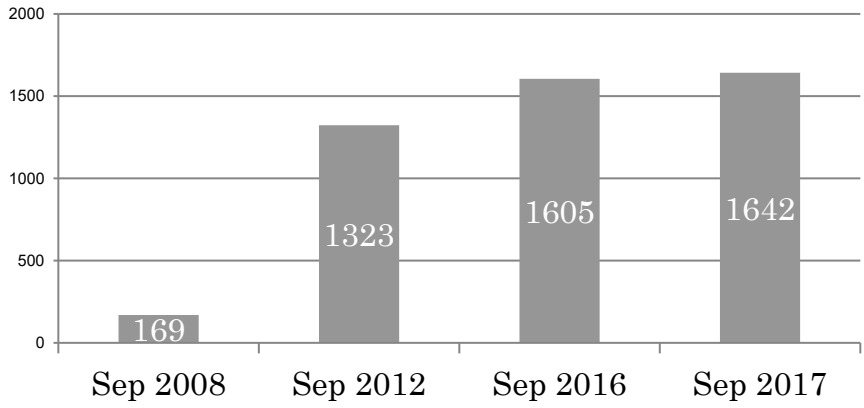
UADR Market

Growth and Current Size

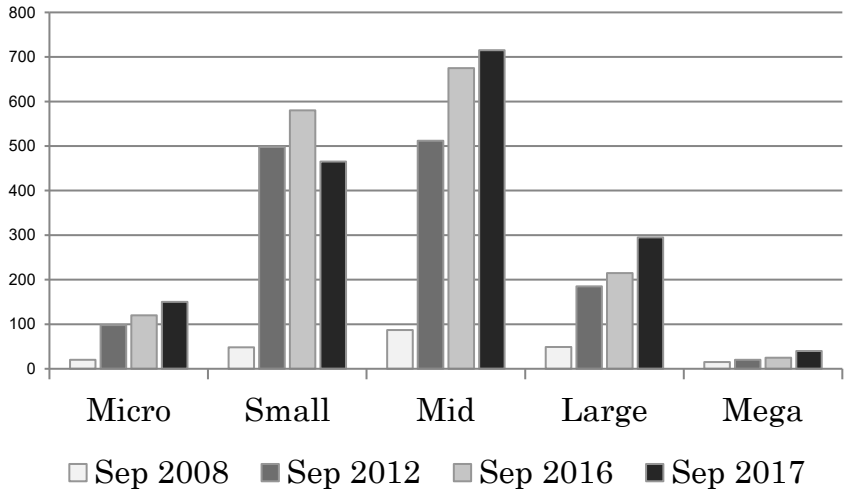
Prior to the SEC rule change in 2008, the UADR market was relatively under-developed, with just 169 unsponsored programmes in existence. Since the rule change, the number of new UADR programmes has increased, rising to 1,642 programmes at the end of September 2017. As Figure 1 shows, the number of UADR programmes continues to grow, with 37 new unsponsored depositary receipt programmes created in the last twelve months, an increase of 2.3%.

Figure 2 shows that companies with a small and mid-market capitalisation constitute the majority of UADR programmes. This general trend has changed little since 2008, with nearly 71% of UADRs represented by small and mid-cap companies at the end of September 2017. However, this proportion has decreased over the year, with a marked reduction in the number of UADR programmes for companies with a small market capitalisation.

Number of UADR programmes in existence
Figure 1



Number of UADR programmes by market capitalisation
Figure 2



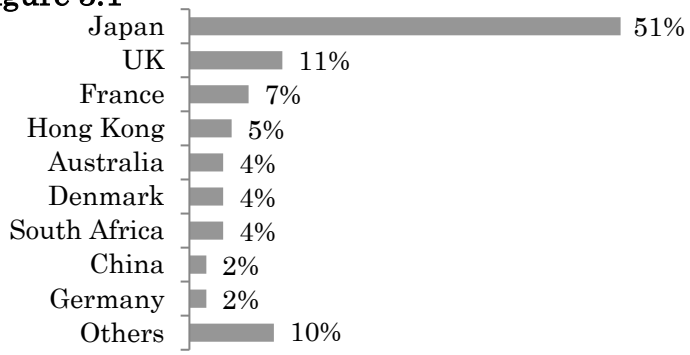
Source: Deutsche Bank (www.adr.db.com), BNY Mellon (www.adrbnymellon.com), J.P.Morgan (www.adr.com) and Citibank (www.citi.com/dr) (October 2017)

Figures 3.1 and 3.2 compare the geographical distribution of the UADR market prior to the rule change with the current distribution. In September 2008, UADR programmes were available for companies from 18 countries with Japan, the UK, France, Hong Kong, Australia, Denmark, South Africa, China and Germany accounting for 90% of the UADR universe. Japan accounted for the largest market share with 51% of all UADR programmes.

The geographical distribution in the UADR market has become much broader. Figure 3.2 shows the top 25 countries by number of UADR programmes. UADR programmes are currently available from 40 countries, with Japan, the UK, China, Hong Kong, Australia, Germany and France retaining their positions towards the top of the list. However, UADR programmes have now been set up for companies from Indonesia, Thailand, the Philippines, Spain, Poland and Turkey to name a few. Notably, Japan's market share has decreased to 16% but it still remains the country with the highest number of UADR programmes.

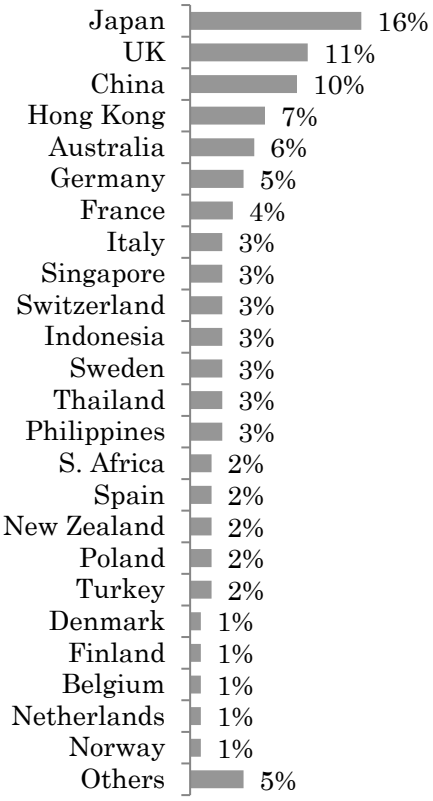
Country segmentation: pre-rule change

Figure 3.1



Country segmentation: current

Figure 3.2



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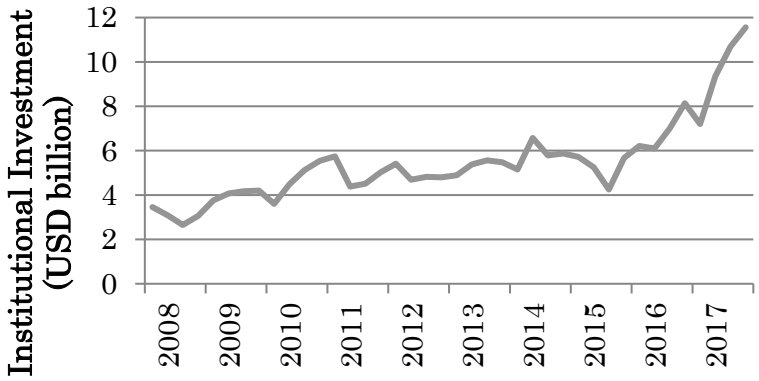
UADR Institutional Ownership

With the rise in the level of UADR trading over the last ten years, institutional ownership has in turn become more widespread. It is worth noting that publicly filed data for UADRs is not as readily available compared to listed ADR programmes, and that actual UADR investment is likely to be significantly higher than the amount reported. Public data shows that 162 institutional investors held UADRs worth USD 3.6 billion in September 2008. The figure has since risen to 390 institutional investors holding UADRs worth USD 11.9 billion at the end of September 2017. It is also worth highlighting the USD 4.0 billion growth in reported institutional ownership over the last four quarters (Figure 10).

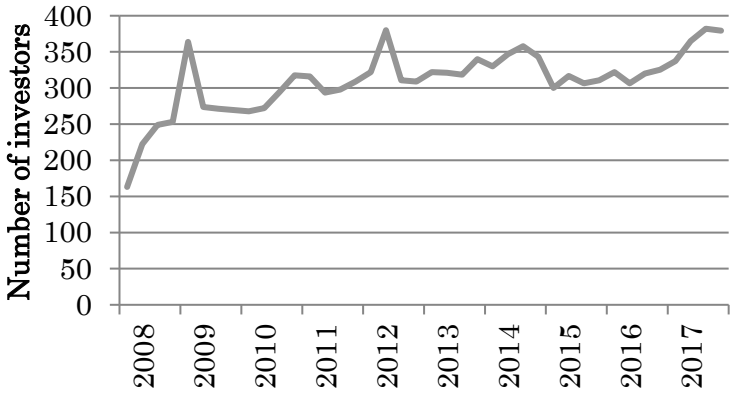
Figure 11 shows how the reported number of institutional investors has increased since 2008. This figure peaked at 397 in September 2012, before declining slightly. However, the numbers may be returning to these levels, with 390 institutional investors in UADRs reported in September 2017.

Institutional investment in UADRs
Figure 10



Source: Factset (October 2017)

Number of institutional investors in UADRs
Figure 11



Source: Factset (October 2017)

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The Rise of Global Securities Litigation

Robbins Geller Rudman & Dowd LLP
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Each year, billions of dollars are recovered in legal proceedings brought by investors who have been the victims of securities fraud. These cases secure compensation for investment losses suffered as a result of misrepresentations made by issuers, their agents and third parties in connection with the issuers' publicly traded securities. The recoveries result from the fact that hundreds of millions – if not billions – of dollars are lost by investors each time a publicly traded company materially misleads financial markets about its true condition or performance, only for the truth to ultimately emerge.

Cases to recover such losses are pursued in just a small number of jurisdictions – predominantly in the United States, which also happens to be the world's deepest capital market. Cases are increasingly being brought in other jurisdictions as well, and recoveries won are divided in varying degrees amongst the participating investors. In some jurisdictions, so long as some proactive investors are willing to initiate lawsuits to recover their losses, other similarly situated investors can sit back passively and, if there is a recovery, claim a pro-rata share. In other jurisdictions, rather than rely upon the initiative of others, it may be necessary for any investor who wants compensation to actively bring proceedings and, in some cases, to present evidence of reliance upon the misrepresentations in issue.

Investors who suffer losses due to securities fraud possess valuable rights. When they buy publicly traded securities at fraudulently inflated prices and then either sell them at a loss or continue to hold the devalued assets after the truth has emerged, investors often have both statutory and non-statutory rights to recover compensation for their damage. In some circumstances, even those who purchased and sold before the truth emerged may have viable claims on the basis that defrauded investors should be allowed to recover the amounts of artificial inflation they were tricked into paying. Many investors whose portfolios are managed externally are entirely unaware of these rights.

This article provides an overview of the various opportunities available to investors to pursue legal claims against publicly traded companies acting in breach of anti-fraud laws. It briefly explores the class action opportunities available in the United States as well as the mechanisms available to seek recoveries in other jurisdictions, specifically Canada, Australia, the Netherlands, the United Kingdom, Germany, and Japan.

I. The Road to Multiple Jurisdictions

Securities fraud class actions – actions that can include the claims of all investors similarly damaged by the same misconduct – yield the vast majority of aggregate returns that are the product of securities litigation. The United States remains the most significant forum in the world for securities class actions, recovering an average of $4 billion annually.

But interest in remedies that can be achieved outside of the United States has increased in the past few years. That upswing in interest is largely attributable to the U.S. Supreme Court's 2010 decision in *Morrison v National Australia Bank*. The *Morrison* decision limited federal securities law protection to investors who engage in domestic U.S. transactions, prompting investors who engaged in non-U.S. transactions to look to the laws of the jurisdiction where the transactions occurred for their remedies.

At the same time *Morrison* limited the jurisdiction of U.S. federal courts to domestic U.S. transactions, the securities class action regimes enacted in Canada and Australia have matured to the point where litigation is generating significant recoveries in those jurisdictions. Consequently, Canada and Australia are becoming increasingly attractive venues for securities class actions after *Morrison*. Simultaneously, there is an ongoing debate within the European Union as to the merits of extending the scope for collective redress. While in the field of competition law the appetite for such redress appears high, there generally remains a lack of coordination or urgency that leaves collective redress efforts for securities fraud in their infancy.

II. Primary Jurisdictions

United States: Regardless of their nationality or domicile, investors who purchase securities on U.S. exchanges or in U.S. transactions are entitled to the protection of the U.S. anti-fraud provisions. That is the law of the land after *Morrison*. It is for those investors (or their trustees or other fiduciaries) to choose

whether to initiate or participate in litigation to enforce U.S. anti-fraud provisions.

From a cost perspective, investors typically incur no out-of-pocket expenses to litigate securities class actions in the United States because most U.S. securities firms offer representation on a contingent fee (*i.e.*, no-win/no-fee) basis, and will also advance all expenses associated with the litigation. Nor, as is the case in most jurisdictions, do litigants assume the risk of paying their opponents' legal fees should their claims not be successful. Under the "American Rule," each party bears its own legal fees, win or lose.

Given the permissibility of contingent fee arrangements and the absence of fee-shifting risk, pension funds, with little appetite to spend large sums in legal fees to bring difficult cases, are able to regularly serve as lead plaintiffs in U.S. securities litigation. As global investors vital to the sustainability of the world and national economies, the participation of such investors in securities cases is highly valued and respected. Consequently, recoveries in U.S. securities fraud class actions are significantly higher when pension funds or institutional investors lead the charge.

Canada: Securities litigation in Canadian provinces has increased significantly over the last decade. There were 11 securities class actions filed in Canada in 2014, 11 in 2013, and 10 in 2012. Most of the cases were filed in Ontario, pursuant to Ontario's 2005 Bill 198, widely seen as a "pro-investor" piece of legislation.

By the end of 2014, there were 60 active securities cases pending in Canada – more than double the number in 2007 and more than four times the number in 2000. These active cases represent more than CAD$35 billion in total claims. The adoption of opt-out procedures, the jettisoning of reliance, and the fact that the courts are showing some willingness to certify worldwide classes (so long as the defendant has a sufficient connection to the jurisdiction) have helped spur interest in Canadian venues for securities class actions.

However, Canada's potential for securities fraud recoveries is limited. First, some Canadian provinces have caps on damages, which are determined by the level of misconduct a plaintiff is able to prove. In Ontario, for example, if the plaintiff is unable to prove intentional wrongdoing, damages are capped at the greater of 5 percent of the company's market capitalization (before the fraud was revealed) or CAD$1 million. Also, most Canadian provinces, like the United Kingdom, operate a "loser-pays" system, with fee-shifting. In such systems, the party that loses the case, or even a particular argument in the case, faces the risk of paying the winning side's legal fees. Accordingly, litigation has been difficult to fund because, given the size and complexity of securities class actions, those shifted fees may be enormous, posing an unacceptable risk to investors. After-the-event ("ATE") insurance and/or third-party litigation funding may help mitigate the downside risk, but will not always eliminate or sufficiently reduce it.

Australia: Securities class actions arrived in Australia in 1999. Although the number of class actions has been

increasing, the overall numbers are dwarfed by those in the United States. In Australia, there were six securities class actions in 2014, five in 2013, two in 2012, and two in 2011.

Settlement amounts in Australian cases tend to be significant. In 2014, aggregate settlements in Australian securities class actions exceeded AUS$1 billion. Like Canada, Australia has adopted opt-out procedures for class actions. Also similar to Canada (and the United Kingdom), the Australian legal system operates as a "loser-pays" system. However, unlike most provinces in Canada, Australia has yet to affirm a fraud-on-the-market approach to proving reliance for misrepresentations or omissions. Additionally, contingency fees are limited to "conditional fees," with a permitted "uplift" upon success of no more than 25 percent.

Given the limits on the "conditional fee" that Australian lawyers can charge, litigation funding by professionals has become the norm. In fact, even though Australia is an opt-out jurisdiction, the legal uncertainties still present and the limitations on lawyers' fees have encouraged litigation funders to develop an opt-in process. Accordingly, in most Australian securities class actions, the funding of the litigation is only available to select investors who opt in by reaching a funding agreement with the entity funding the case. As a practical matter, therefore, many class action securities recoveries in Australia ironically may be limited to a small number of institutional investors.

The Netherlands: Although the Netherlands lacks a class action procedure, it may well become a destination of choice for parties simply wishing to obtain court approval and European-wide recognition of securities settlements reached outside the United States. The Netherlands owes this preferred status to its procedures for settling mass claims contained in the 2005 Wet Collectieve Afwikkeling Massaschade (the Collective Settlement Act, or "WCAM"). The WCAM was originally created to resolve mass claims around pharmaceuticals, but was also utilized to adjudicate the European settlement reached in the *Royal Dutch Shell* matter. The WCAM allows a settling defendant to negotiate a European-wide binding contract with a Dutch Stichting (*i.e.*, a foundation) formed of damaged investors, to provide the defendant "peace" regarding European claims.

Upon court approval of the settlement, investors who have chosen not to join the Stichting, or file their own case, are bound by the settlement and barred thereafter by the Netherlands court from filing their own case. While the procedure was first employed in a securities context in 2009 for the *Royal Dutch Shell* matter (where a significant party was Dutch), it was unclear whether the procedure would be available where there was not a significant Dutch party/presence. The 2012 decision in a case against Converium Holdings AG confirmed that the WCAM does not require significant Dutch participation to be viable.

The *Converium* case, a U.S. class action against the Swiss company Converium Holdings AG, yielded an $85 million settlement for investors who purchased

Converium Holding securities on a U.S. exchange. Investors who purchased their shares on the Swiss exchange were excluded from the U.S. action. However, because Converium sought a comprehensive resolution, Converium cooperated with a Stichting of Converium investors and sought court approval in the Netherlands of a settlement amounting to $58 million.

The Netherlands Court of Appeal approved the settlement. Notably, however, the $58 million paid to the investors who participated amounted to just a quarter of the compensation per share that investors in the U.S. settlement enjoyed, reflecting the relatively weaker investor protection laws in European jurisdictions. It should be noted that anyone can create a Stichting, and they are often formed by litigation promoters – not lawyers. Indeed, the Dutch landscape is littered with empty Stichtings, abandoned because their promoters could not make economic sense of their litigation plans: the overwhelming majority of Stichtings have never brought legal action, nor have they obtained any recovery for investors. Accordingly, each opportunity presented to join and commit to such a vehicle should be approached with great caution.

United Kingdom: In the wake of *Morrison*, investors who purchase their shares on the U.K. exchanges in circumstances where the same misconduct is the subject of litigation in the United States may sometimes persuade the U.S. courts to also hear their claims. In such circumstances, the U.S. court is likely to apply U.K. law to the claims based on the U.K. transactions. In other cases, where there is no jurisdictional hook, such investors can expect to be

forced to pursue their statutory and common law claims in the High Court in London. However, for multiple reasons, including the lack of a class action mechanism, the presence of a "loser-pays" rule, the inability to utilize the "fraud on the market" theory of reliance, and the absence of juries in civil cases, the number of investor-led actions in the United Kingdom will continue to grow only slowly.

As a weak alternative to a class action procedure, the United Kingdom permits "group" actions, which require participants effectively to affirmatively opt in to the proceedings. The opt-in requirement, which necessitates not just adding your name to a list but being prepared to affirmatively prove your losses and other elements of the cause of action, rather than an opt-out mechanism, where you are included and must simply demonstrate your loss to a settlement or judgment claims administrator unless you choose to exclude yourself, severely limits the ability of investors to aggregate losses and generate sufficient leverage over defendants.

The opt-in approach also means that defendants are unable to settle all claims in one action, thereby precluding defendants from being able to obtain complete peace. Additionally, the "loser-pays" model typically means that plaintiffs must purchase ATE insurance coverage in order to mitigate the risk of having to pay the huge defense fees of both solicitors and barristers typically incurred during complex securities litigation cases.

While the recent advent of contingency fees in the United Kingdom may eventually encourage more

securities fraud actions, the procedural impediments and consequent financial risks facing litigants in the United Kingdom remain daunting. That being said, there are large cases pending or threatened against the Royal Bank of Scotland, Lloyds and Tesco, which offer examples of scenarios where securities fraud litigation may arise in the United Kingdom. Because of *Morrison*, investors who purchased shares of these companies in the United Kingdom are no longer able to invoke the protection of U.S. anti-fraud provisions. Thus, they must either explore a remedy in the United Kingdom despite the impediments discussed above, or accept the losses and do nothing.

Germany: The massive fraud recently revealed at Volkswagen, regarding the dirty performance of its allegedly clean diesels, has generated significant interest in litigating securities fraud claims in Germany. While there is no general collective redress mechanism in the German legal system, there is legislation allowing capital market claims, where identical issues of law or fact exist, to utilize a model case proceeding. The legislation is the Kapitalanleger-Musterverfahrensgesetz (the Capital Market Model Claims Act, or "KapMuG").

Under the KapMuG, a minimum of 10 claimants who invoke the KapMuG is required to initiate the model case proceedings. Thereafter, the findings of the model case proceeding are binding on the other claimants, but the individual cases are each kept separate. Similar to proceedings under the WCAM in the Netherlands, proceedings under the KapMuG, although ultimately aimed at compensation of damages, are limited to a declaratory judgment on

certain preliminary questions – for example, relating to the potential liability of the issuer of a financial product. The amount of damages is then determined in each individual case, once the test case has been successfully heard.

As to evidence, generally there is no pre-trial discovery in the German legal system. Yet, in some cases, findings of authorities are used as a basis for a trial. For example, liability may be established in antitrust law via a finding of cartel activity by the European Commission. Some public authorities, such as the Bundesanstalt für Finanzdienstleistungsaufsicht (the German Federal Financial Supervisory Authority, or "BaFin"), have a duty of disclosure of information within certain limits. As to costs, Germany follows the "loser-pays" system. However, there are specific rules that allow for splitting costs of the KapMuG model proceedings among all claimants. Lastly, contingency fees for lawyers are no longer generally excluded in Germany. The former prohibition was struck down as unconstitutional, thus contingency fees are now permissible, though only under exceptional circumstances.

Japan: Historically, the concept of securities litigation arising from misstatements as defined by Japan's Financial Instruments and Exchange Act ("FIEA") has been unfamiliar to investors. However, after amendments in 2004, reducing the burden of proof for plaintiffs and introducing the presumptive rule for damages related to continuous disclosure (*i.e.*, estimated damages are the difference in the one-month average of a stock price before and after the disclosure in question), the volume of litigation

increased dramatically — and this increase occurred despite the fact that Japan's legal system does not provide for class-action lawsuits. Indeed, the FIEA may lead to more favorable outcomes for plaintiffs in Japan than they could realize under the U.S. securities laws. Not only has the presumptive rule significantly reduced the plaintiff's burden of proof, but also the FIEA stipulates no-fault liability on the part of corporations for their misstatements, thereby making it easier to file a lawsuit and claim damages under the FIEA.

Although the number of Japanese court decisions on filings related to misstatements decreased to 7 in 2012 from 11 in 2011, 2012 will perhaps be remembered as the year when Japanese securities litigation was "discovered" by foreign investors. In prior years, plaintiffs had been mostly domestic — typically groups of individuals or institutional investors such as pension funds. The *Olympus* action became the first major litigation in Japan to be initiated by foreign institutional investors. Following lawsuits filed by domestic investors, 48 institutions and overseas pension funds filed a lawsuit on June 28, 2012. Later, 68 foreign institutions filed a collective lawsuit against the company. As a result, those investors have recovered $92 million in aggregate from Olympus. It remains to be seen whether recent allegations of securities fraud against Toshiba and Takata will lead to similar litigation in Japan by non-Japanese institutional investors.

III. Informed Decision Making

Owing to the fact that there are multiple jurisdictions that may be utilized by investors seeking to recover losses caused by financial misconduct, it is now more desirable than ever for institutional investors to be properly informed of the extent to which the fund assets may be diminished because of financial misconduct. In pursuit of that objective, nearly 1000 institutional investors worldwide ensure they are properly informed by retaining Robbins Geller to monitor their securities portfolios for such financial misconduct, at no cost. Through the Firm's Portfolio Monitoring Program[SM], investors can promptly understand the amount of losses sustained – and available litigation options – when an investment is damaged by misconduct, no matter where the underlying transaction took place. By providing this information and the means to pursue recoveries, in the last decade alone, Robbins Geller has been able to help its clients obtain recoveries in multiple jurisdictions.

Stanford Law School
Securities Class Action Clearinghouse
a collaboration with Cornerstone Research
Filings Database

Heat Maps & Related Filings: Circuits

max: 1475	min: 23
2nd	1475
9th	1187
3rd	487
11th	355
5th	321
1st	248
4th	228
6th	221
7th	212
10th	167
8th	164
D.C.	23

5088 Total Filings

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Methodology

We have concentrated our resources on the data gathering methodologies.

Our researchers gather filings from the Public Access to Court Electronic Records (PACER) database and extract and analyze thousands of complaints, briefs, and other litigation-related material. We also extract information from documents filed with the U.S. Securities and Exchange Commission (SEC), press releases and news articles, and academic sources. We are constantly fine-tuning our data gathering methodologies to ensure that we are capturing and publishing the best available data. We also welcome feedback concerning our methodology and the content of our site. Please send comments to scac@law.stanford.edu.

SCAC Database Sample Data

We track securities class actions filed in Federal Court after the Private Securities Litigation Reform Act of 1995 came into effect. Therefore, our population of records consist of securities class action lawsuits filed in federal court on or after January 1, 1996.

We do not track lawsuits filed in state court where there is no parallel federal civil class action. Nor we [sic] track SEC enforcement proceedings, but we track parallel federal civil class actions filed in federal court.

Definition of a Single Filing or Record in the SCAC Database

Often when there is a violation of the federal securities laws, issuers, underwriters, investment banks, broker firms, mutual funds, or a combination of these, will be sued in multiple class action complaints, filed by different named plaintiffs represented by different plaintiff law firms. While these filings often contain substantially similar allegations, there may be variations between the allegations or defendants in separate complaints. In the early stages of the litigation, one court will typically consolidate all of the related securities class actions into a single proceeding that can be jointly managed.

We undertake the challenge of compiling into a single "record" or "filing" all of the related lawsuits long before the courts consolidate those lawsuits into a single proceeding. A unique "record" or "filing" in our database thus consists of one or more securities class action complaints with the same underlying allegations filed against the same defendant or set of defendants. Later-filed complaints that arise out of the same subject matter become part of that record or filing.

Although a record or filing may consist of several related class action complaints, case summaries generally rely on information gleaned from the first identified complaint, which is used as a proxy for all of the related complaints. If multiple complaints are filed at one time, we rely on the complaint that appears to contain the most detailed allegations. If we locate an amended and/or consolidated complaint,

we update the case summary and other information as needed.

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