No. 11-15

IN THE

Supreme Court of the United States

THE BLACKSTONE GROUP, L.P., *ET AL.*,

Petitioners,

v.

MARTIN LITWIN, *ET AL.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 30,000 direct members and indirectly represents the interests of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, and around the world. A central function of the Chamber is to represent the interests of its members in important matters before the state and federal courts, legislatures and executive branches. To that end, the Chamber files *amicus* briefs in cases that present issues of vital concern to the nation's business community.

One such vital concern is the potential for abuse of the federal securities laws. This concern is particularly acute in the wake of unprecedented market turmoil that has created opportunities for securities claims that seek to attribute market-driven losses to unfounded allegations of issuer misconduct. Early identification and dismissal of meritless suits depends critically on meaningful pleading standards under the Securities Act of 1933 and the Securities Exchange Act of 1934, including the standard for

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the Chamber and its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties received notice of the Chamber's intent to file this brief ten or more days before its filing, and all parties have consented to its filing.

pleading that an allegedly untrue or omitted fact was material.

The Chamber is concerned that the materiality pleading standard adopted by the Second Circuit in the decision below will dramatically increase securities issuers' exposure to unfounded class action lawsuits and, as a result, discourage capital raising in U.S. public capital markets, to the detriment of the Chamber's members and the national economy. The Chamber therefore submits this brief in support of the petition filed by the Blackstone Group and others ("Blackstone").

SUMMARY OF ARGUMENT

This case presents an issue of national importance regarding the pleading standards for private damages actions under the federal securities laws. In its decision below, a Second Circuit panel applied a standard for pleading materiality that is unduly permissive and dramatically departs from settled understandings that, in such cases, the materiality of an untrue or omitted fact depends on its significance to investors' expectations about an investment's value.

The case below is a purported class action asserting civil damages claims under Sections 11 and 12 of the Securities Act of 1933. The claims rest on allegations that the registration statement filed for a June 2007 offering of securities of Blackstone contained an untrue statement of material fact and omitted other material facts regarding certain investments made by funds advised by Blackstone. Blackstone's revenues are based on the performance of the funds that it advises and thus are affected by

the performance of the various investments held by the funds.

The District Court dismissed the claims on the ground that the alleged untrue and omitted facts were immaterial to Blackstone as a matter of law, because they pertained to investments that constituted only a small proportion of the assets managed by Blackstone, and because the revenues lost by Blackstone attributable to the investments' performance were small in relation to Blackstone's revenues. The Second Circuit reversed on the ground that the alleged misstatement and omissions were not "obviously unimportant" as they were "significant to an important business segment" of Blackstone. For that reason alone, the panel below declared, they were material to Blackstone itself.

The Second Circuit's standard is dramatically out of step with the purposes underlying the civil damages provisions of the federal securities laws and this Court's decisions in *Basic Incorporated v. Levinson*, 485 U.S. 224, 231-32 (1988), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011), both of which reflect the common-sense notion that an allegedly untrue or omitted fact is material to the purchaser of a security only if it would be substantially likely to affect expectations for the investment's value. An untrue or omitted fact about an "important segment" of an issuer's business may substantially bear on such expectations, but it also may not. Under the Second Circuit's materiality standard, however, any fact "significant" to an "important segment" qualifies as material to the issuer. The holding below excuses plaintiffs from having to plausibly plead that such facts would affect expectations about the perfor-

mance of the investment as a whole. Instead, it reverses the burden, requiring a defendant seeking dismissal to demonstrate based on the plaintiff's complaint that the fact is "obviously unimportant." Not only does this standard disassociate the pleading element of materiality from the basic disclosure concerns that animate the civil remedy provisions of the Securities Act, but it also relies on precisely the kind of excessively permissive approach to notice pleading that this Court rejected in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Review of the decision below is warranted. Absent correction, the Second Circuit's failure to require plaintiffs to plead facts plausibly showing materiality to the issuer will produce significant and detrimental real-world consequences. Materiality is the critical element that must be pled to state a claim under Sections 11 and 12 of the Securities Act, and meaningful strictures for pleading materiality are thus essential to the proper function of the statute's civil damages scheme. The decision below largely removes such strictures in the Second Circuit, a jurisdiction of special importance to the administration of the federal securities laws where a substantial share of lawsuits asserting claims under such laws are filed.

If allowed to stand, the Second Circuit's decision will negatively affect issuers of securities in the U.S. public capital markets. Issuers will be less able to dismiss unfounded claims based on allegedly untrue or omitted facts of fanciful and unsubstantiated materiality, exposing them to increased risk of costly and uncertain class action litigation. The expected costs of raising funds in the U.S. public capital mar-

kets will rise, to the detriment of businesses and the economy generally, and will encourage issuers to avoid the U.S. capital markets – a demonstrably increasing trend with important negative consequences for the nation's economy.

ARGUMENT

I. THE SECOND CIRCUIT'S "SIGNIFICANCE TO AN IMPORTANT BUSINESS SEGMENT" TEST FAILS TO TIE MATERIALITY TO THE ESSENTIAL CONCERN OF IMPACT ON INVESTMENT VALUE

The Second Circuit's holding that a fact is material so long as it is "significant" to an "important business segment" of an issuer – without any requirement that the plaintiff plausibly plead its materiality to expectations about the performance of the investment overall – unmoors the standard for pleading materiality from the basic disclosure concerns underlying the private remedy provisions of the Securities Act: that information given to investors in offering a security does not mislead about its likely performance and value. Instead, the court below presumed that any fact "significant" to an "important segment" of an issuer's business is material to the investment as a whole.

This unduly permissive standard is inconsistent with the statute's purposes and marks a departure from this Court's precedents. Properly understood, those precedents require that plaintiffs plead materiality by alleging a plausible basis to think that the untrue or omitted fact would affect expectations about the investment's value.

A. To Plead that a Fact Is Material, a Plaintiff Must Plausibly Allege that It Would Reasonably Affect Overall Investment Value

Securities holders invest to obtain a return. This common-sense notion animates the private remedies provisions of the Securities Act, which seek to ensure that offers to sell securities do not mislead investors about a security's likely performance and value.[2]

As the SEC explained in 1975:

> "[T]he principal, if not the only, reason why people invest their money in securities is to obtain a return. A variety of other motives is probably present in the investment decisions of numerous investors but the only common thread is the hope for a satisfactory return, and it is to this that a disclosure scheme intended to be useful to all must be primarily addressed." *Conclusions Regarding Disclosure of Environmental and Other Socially Significant Matters*, Securities Act Release No. 5627, Exchange Act Release No. 11,733, 1975 SEC LEXIS 624, at *56 (Oct. 14, 1975).

Given that investors purchase securities in pursuit of a "satisfactory return," it follows that whether

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[2] Indeed, the very definition of a "security" under the securities laws depends on whether investors are "'attracted solely by the prospects of a return' on [their] investment." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975) (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946)).

a fact is "material" to investors depends on whether it would significantly affect expectations about such returns. This understanding is, not surprisingly, evident in this Court's decisions that have addressed materiality in the context of claims to recover investment losses.

In *Basic Incorporated v. Levinson*, 485 U.S. 224 (1988) this Court held that a fact is material if there is:

> "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 485 U.S. at 231-32 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).[3]

Basic expressly linked the concept of materiality with investment value in accepting that investors could plead reliance in fraud suits by alleging a "fraud on the market." As described in *Basic*:

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[3] In *TSC Industries* the Court addressed the related but distinct question of whether a false or misleading proxy statement was material to a shareholder's voting decision. *Basic* and *Matrixx* both addressed claims under Section 10(b) of the Securities Exchange Act of 1934, but the *TSC* and *Basic* formulation of materiality has been accepted in a variety of contexts across the securities laws, including for purposes of Section 11 and Section 12 of the Securities Act. *See* IV Louis Loss *et al.*, SECURITIES REGULATION 617 & n.419 (4th ed. 2009) (noting application of the *TSC* and *Basic* standard in various securities law contexts.)

> "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . ." 485 U.S. at 241 (quotation omitted)).

The "fraud on the market" theory holds that, because the price of a security in a well-functioning market generally reflects all available material information regarding its value, investors "rely" on price in making investments. *See, e.g., id.* at 244 ("The market . . . inform[s] [investors] that given all the information available to it, the value of the stock is worth the market price.") (quotation omitted). An untrue or omitted fact is material if it renders stock prices unreliable – i.e., if it leads to a discrepancy between price (which is perceived value) and actual value. *See id.* at 245-47. Since price reflects the "total mix" of publicly available material information, it follows that information is material only to the extent it has a significant bearing on value and price.

Basic also framed materiality in terms of whether a fact "is significant to the reasonable investor's *trading decision*." *Id.* at 235 (emphasis added). As noted above, the "reasonable investor" makes such decisions based on expectations about an investment's return. *See also id.* at 246 n.23 (noting that investors' incentive to monitor disclosures "comes from their motivation to make a profit"). Thus, under *Basic*, information that does not significantly alter such expectations is not significant to the "reasonable investor's" trading decision and thus is not material.

This Court reaffirmed *Basic*'s "total mix" of information standard last Term in *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011). In *Matrixx*, the Court considered whether adverse event reports regarding the issuer's leading product, a cold remedy, were immaterial as a matter of law because they lacked statistical significance. The Court rejected the argument in terms that plainly evaluated the materiality of the information in light of its likely affect on the issuer's performance:

> "Consumers likely would have viewed the risk associated with Zicam (possible loss of smell) as substantially outweighing the benefit of using the product (alleviating cold symptoms), particularly in light of the existence of many alternative products on the market. Importantly, Zicam Cold Remedy allegedly accounted for *70 percent of Matrixx's sales*. Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a *significant risk to the commercial viability of Matrixx's leading product*." 131 S. Ct. at 1323 (emphasis added).

The Court did not merely characterize the reports as "significant" to an "important" product and end the inquiry there. Rather, it rested its holding on allegations which plausibly pled that the reports cast doubt on the viability of the issuer's leading product, with obviously significant ramifications for its performance and the value of its stock.

Not surprisingly, decisions in the courts of appeals commonly focus on the alleged impact of

purportedly material information on the issuer's expected performance and the value of its securities.[4]

B. The Holding Below Improperly Permits Allegations of "Significance" to an "Important Segment" as Sufficient to Plead a Material Omission

Charting a course at odds with the principles discussed above, the Second Circuit reversed the dismissal of the complaint in this case because the allegedly untrue and omitted facts were not "obviously unimportant" as they were "significant" to an

[4] *See, e.g., Hill v. Gozani*, 638 F.3d 40, 47, 49-51, 56-57 (1st Cir. 2011) (risk that insurance carriers would not reimburse purchasers of medical device responsible for the "bulk of the [company's] profit" was "of critical importance to the profitability of the device and of [the corporation] itself"); *ECA & Local 134 IBEW Joint Pension Trust v. J.P. Morgan Chase Co.*, 553 F.3d 187, 193-94, 203-05 (2d Cir. 2009) (mischaracterization of loans was immaterial because they represented only 0.3% of assets and 0.1% of revenues, and mischaracterization would not be expected to result in a "significant market reaction"); *United States v. Nacchio*, 519 F.3d 1140, 1164 (10th Cir. 2008), *rev'd on reh'g on other grounds*, 555 F.3d 1234, 1236 (10th Cir. 2009) ($900 million shortfall in projected earnings was not immaterial where defendant had stated that "even a $50 million shortfall could create a 15-20% drop in stock price"); *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 886-87, 890-91 (9th Cir. 2008) (alleged misstatements that company would list on NASDAQ were material because "NASDAQ listing carries objective benefits that directly and positively affect corporate earnings, investor returns, and a stock's pool of potential shareholders"); *Oran v. Stafford*, 226 F.3d 275, 279-83 (3d Cir. 2000) (data suggesting link between drug and heart-valve disorders was not material where disclosure of the data "had no appreciable negative effect on the company's stock price").

"important business segment." Pet. App. 25a. Under that standard, it sustained the complaint based on essentially conclusory assertions about the significance of particular investments to "important segments" of Blackstone's business, without requiring any plausible showing that the allegedly untrue or omitted information would have significantly affected expectations about the value of Blackstone's securities.

The Second Circuit stated that dismissal for failure to plead materiality is permissible only where the allegedly untrue and omitted facts are "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." Pet. App. 25a (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161-62 (2d Cir. 2000)). The panel characterized the pleading burden under Sections 11 and 12 of the Securities Act as "relatively minimal" and observed that because materiality is "inherently fact-specific," in pleading that element, "the burden on plaintiffs to state a claim is even lower." Pet. App. 25a.

The court below then evaluated the materiality of the allegedly untrue and omitted facts – essentially, that funds managed by Blackstone held investments in businesses and markets that Blackstone purportedly expected at the time of the offering would be facing challenging economic conditions. The panel conceded that the two specific investments at issue – FGIC Corp. ("FGIC") and Freescale Semiconductor Inc. ("Freescale") – fell "below the presumptive 5% threshold of materiality" when viewed in relation to

Blackstone's total assets under management. Pet. App. 27a.[5] The court determined, however, that the investments were "significant" to the "Corporate Private Equity" segment of Blackstone, which accounted for approximately 37% of the assets Blackstone managed. Because the investments were allegedly "significant" to this "important business segment," the panel deemed the alleged omissions to be material to Blackstone itself. Pet. App. 29a-30a. The panel rejected Blackstone's arguments that plaintiffs were required to plead that the omissions would reasonably be expected to have a significant affect on Blackstone as a whole. Pet. App. 30a-31a.

The court similarly concluded that allegedly misleading statements about the real estate market were material because up to 15% of the assets managed by Blackstone's Real Estate segment may have been invested in residential real estate and the Real Estate segment accounted for 22.6% of the assets Blackstone managed. Pet. App. 34a-35a. Here again, the Second Circuit considered alleged misstatements regarding a small proportion of the segment's investments material because the segment as a whole was significant to Blackstone. Pet. App. 34a-35a. It never evaluated whether plaintiffs' allegations plausibly stated a claim that the alleged misstatements were significant to expectations for

[5] At the time of the IPO, the funds' investments in these businesses expressed as a percentage of the total assets managed by Blackstone were approximately 0.4% in the case of FGIC and 3.6% in the case of Freescale. Pet. App. 14a-15a.

Blackstone's performance and investment returns on its stock.[6]

The Second Circuit's test for materiality is out of step with the common-sense understanding that what matters to investors is information that would substantially affect expectations for returns on an investment. The purpose of the civil remedy provisions of the securities laws is to protect investors from being misled about such matters, not to require information that has not been plausibly alleged to have any bearing on them. This Court's decisions in *Basic* and *Matrixx* reflect precisely such an understanding of the function of the pleading element of materiality in actions by purchasers of securities.

The holding below departs from that understanding by holding that facts "significant" to an "important segment" qualify as material unless the defendant succeeds in somehow demonstrating that they are "obviously unimportant." The Second Circuit's standard effectively excuses plaintiffs from the basic obligation, recognized by this Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to make out a plaus-

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[6] The panel explained that disclosures about business trends affecting significant segments may be required under Item 303 of SEC Regulation S-K and SEC guidance explaining that information may be qualitatively material if relevant to an important business segment. *See* Pet. App. 21a, 29a (citing Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii) and Securities and Exchange Commission Staff Accounting Bulletin ("SAB") No. 99, 64 Fed. Reg. 45,152 (1999)). But importance to a segment does not *necessarily* render information material, much less satisfy the requirements under *Basic* for pleading materiality for purposes of stating a claim under the private remedy provisions of the securities laws.

ible claim for relief. That obligation includes the obligation to plead a plausible basis to conclude that an untrue or omitted fact is material. Merely pleading that a fact was "significant" to an "important segment" of the issuer, without *also* pleading a plausible basis to think that it would affect a reasonable investor's assessment of the value of the issuer's security, cannot satisfy that burden.[7]

[7] The Second Circuit's "so obviously unimportant" standard for evaluating the sufficiency of materiality allegations is essentially a variant of the *Conley v. Gibson* "no set of facts" standard, 355 U.S. 41, 45-46 (1957), that this Court rejected in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The formulation appears to have been adapted from this Court's holding in *TSC Industries* regarding the standard for a summary judgment ruling that a fact *is* material as a matter of law. *See TSC Indus., Inc.*, 426 U.S. at 450 ("Only if the established omissions are 'so obviously important to an investor, that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment.") (quotation omitted). In 1985, the Second Circuit adapted this language in articulating the standard for evaluating the sufficiency of materiality allegations, changing "so obviously important" to "so obviously *un*important," *see Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985), and it has since been in common use in the Second Circuit and other jurisdictions.

II. THE SECOND CIRCUIT'S UNDULY PERMISSIVE MATERIALITY STANDARD INCREASES ISSUERS' RISK OF BEING SUED FOR MARKET-DRIVEN LOSSES AND WILL FURTHER UNDERMINE CONFIDENCE IN THE U.S. PUBLIC CAPITAL MARKETS

A. A Meaningful Materiality Standard is Critical to the Private Civil Damages Scheme of Sections 11 and 12

It is critically important that federal district courts evaluating motions to dismiss claims under Sections 11 and 12 of the Securities Act give meaningful content to the plaintiff's obligation to plead materiality. As the Second Circuit noted below, apart from alleging that a statement or omission in a registration statement or prospectus was material, a purchaser of securities faces few obstacles to pleading a claim under those provisions. There is no element of intent (and no assertion here that defendants engaged in any fraud or purposeful misconduct), nor is there any requirement to plead reliance or that the alleged misstatement or omission was the cause of the purchaser's loss. And since such claims do not sound in fraud, notice pleading suffices.

For all these reasons, Section 11 and 12 suits have been called the "weapon of choice for class action plaintiffs' lawyers."[8] Section 11 and 12 suits are

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[8] *See* Joel G. Chefitz & Andrew B. Kratenstein, *A Winning Strategy for Beating IPO Class Actions*, Law360 (Apr. 4, 2011), *available at* http://www.law360.com/articles/233852/a-winning-strategy-for-beating-ipo-class-actions.

capable of being brought following market-driven declines, with only the obligation to plead a material false statement or omission to prevent unfounded claims from proceeding past a motion to dismiss. And as such claims are commonly asserted as class actions, even claims with little or no merit may have significant settlement value if they survive a motion to dismiss.

In the related context of actions for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, a plaintiff must satisfy an array of pleading hurdles in addition to pleading materiality when asserting a false statement or misleading omission as the basis for the claim. In recent years, this Court has explained and given content to these additional pleading requirements, such as, for example, the obligation to plead a "strong inference" that the defendant acted with the required state of mind, *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), and the obligation to plead that the defendant's action caused the plaintiff economic loss, *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005). Given these additional requirements, in fraud cases, the element of materiality may play a less important role in weeding out unmeritorious claims. Indeed, the element of loss causation in fraud cases may in some circumstances perform a function similar to that of materiality, because loss causation requires the plaintiff to plead that the defendant's fraud affected the price of the security. *See id.* at 345-46; *see, e.g., Oran v. Stafford*, 226 F.3d 275, 282 (3rd Cir. 2000) ("[T]he materiality of disclosed information may be measured post hoc by looking at the movement, in the period immediately following disclosure, of the

price of the firm's stock."). That is not a reason, however, to lose sight of the critical role of the materiality requirement in fraud suits or actions under Sections 11 and 12.

The Second Circuit's holding below, by refusing to require plaintiffs to plead that allegedly untrue or omitted facts were plausibly significant to investors' expectations about the value of Blackstone's stock, leaves little substance to plaintiffs' pleading burden under Sections 11 and 12. This Court's review is accordingly important to ensure that the district courts apply a meaningful materiality standard in evaluating such claims at the dismissal stage.[9]

B. The Second Circuit's Unduly Permissive Pleading Standard Will Exacerbate Issuers' Avoidance of U.S. Public Capital Markets

The Second Circuit's new materiality standard can only exacerbate avoidance of U.S. public capital markets, a well-documented trend traceable in significant part to litigation risk and detrimental to the U.S. economy. Indicators of this trend include:

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[9] Absent review at this time, it is quite possible that the Second Circuit's standard will evade this Court's review. Defendants will be unable to appeal district court decisions that sustain claims on the basis of the Second Circuit's holding, as such rulings are not final judgments. Nor would an appeal from a decision granting or denying summary judgment or after trial provide a foreseeable opportunity for this Court to review a denial of a motion to dismiss at an earlier stage of the case.

Fewer U.S. publicly traded companies. The number of companies listed on the major domestic exchanges has fallen to about 4,000 from a peak of more than 7,000 listings in 1997.[10]

Fewer U.S. IPOs. In the 1990s, U.S. markets averaged 503 IPOs per year.[11] Last year, there were only 115 IPOs in the United States.[12]

More U.S. issuers listed abroad. During the period 1996-2006, 0.3% of listed companies based in the United States were exclusively listed abroad. As of 2010, this percentage had increased to 5.2%.[13]

Loss of global IPO share. U.S. markets accounted for only 14.2% of global IPO activity in 2010, compared to an average of 28.7% for the period of 1996-2006.[14]

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[10] Felix Salmon, Op-Ed, *Wall Street's Dead End*, N.Y. Times, Feb. 13, 2011.

[11] *See* Jean Eaglesham, *U.S. Eyes New Stock Rules: Regulators Move Toward Relaxing Limits on Shareholders in Private Companies*, Wall St. J., Apr. 8, 2011.

[12] Ernst & Young, *Global IPO Trends 2011*, at 4, *available at* http://www.ey.com/Publication/vwLUAssets/Global-IPO-trends_2011/$FILE/Global%20IPO%20trends% 202011.pdf.

[13] Press Release, *Latest CCMR Study Shows Deterioration in Competitiveness of U.S. Public Equity Markets in 2010 Compared to 2009*, Committee on Capital Markets Regulation (Mar. 22, 2011).

[14] *Id.* ("[I]n 2010 the competitiveness of U.S. public equity markets in global markets continued to deteriorate."). Exchanges in China, Hong Kong and Taiwan collectively accounted for 46.3% of global IPO revenues in 2010, while the (…continued)

These statistics indicate that companies are seeking alternatives to the U.S. public capital markets. This trend has negative implications for the U.S. economy, including decreases in domestic company expansion, job creation, development and application of new technologies and diversity of investment opportunities for average investors, all of which threaten loss of global competitive advantage and overall economic decline.[15]

Although some of this transition is undoubtedly due to the maturation of financial markets in other parts of the world, it is significantly promoted by the costs and uncertainties associated with the threat of unfounded class action litigation under the U.S. securities laws. The U.S. litigation environment is

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(continued…)

United States accounted for approximately 13-14%. *See* Ernst & Young, *supra* note 12, at 4.

[15] *See* Committee on Capital Markets Regulation, *Interim Report*, at 1 (Nov. 30, 2006) (health of U.S. financial markets closely tied to health of overall U.S. economy); David Weild & Edward Kim, Grant Thornton, *Market Structure is Causing the IPO Crisis – and More*, at 4 (June 2010) (diminished public capital market access inhibits company expansion and job creation); *id.* at 15 (entrepreneurs increasingly seeking out foreign markets to develop and apply new technologies); Tim Kane, *The Importance of Startups in Job Creation and Job Destruction*, Kauffman Foundation, at 6 (July 2010) (new firms create an average of three million new jobs annually, many using funds raised in the public markets); Felix Salmon, *Wall Street's Dead End*, N.Y. Times, Feb. 13, 2011 (decreased investment opportunities for average investors); Jeffrey A. Brill, *"Testing the Waters" – The SEC's Feet Go From Wet to Cold*, 83 Cornell L. Rev. 464, 480-81 (1998).

widely seen as discouraging participation in U.S. public capital markets, is consistently cited as a significant deterrent by companies considering U.S. public offerings and is cited as a reason why companies de-list from U.S. exchanges.[16]

These views are unsurprising given the substantial expense that litigation imposes on U.S. publicly traded companies and their shareholders. According to one estimate, securities class action lawsuits reduced shareholder wealth by nearly $25 billion from 1995-2005.[17] Plaintiffs' recoveries in securities class actions are typically obtained through settlement, with the average exceeding $36 million in 2010.[18] Settlements of Section 11 and 12 suits represent an increasing percentage of class action securities settlements (22% in 2009 and 34% in 2010).[19] The

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[16] *See* James Angel, Center for the Study of Financial Regulation, *What Happened to Our Public Equity Markets?*, at 1 (Issue 5 2011), *available at* http://business.nd.edu/uploaded Files/Academic_Centers/Study_of_Financial_Regulation/pdf_ and_documents/Angel.pdf (identifying shareholder litigation as a "major contributor" to decline in U.S. public capital markets); Financial Services Forum, *2007 Global Capital Markets Survey*, at 8, *available at* http://www.crapo.senate.gov/docments/ FINAL2007ForumIPOStudy.pdf*; see also* Committee on Capital Markets Regulation, *Interim Report*, *supra* note 15, at 71.

[17] U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation: The Problem, its Impact, and the Path To Reform*, at 14 (July 2008).

[18] Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2010 Review and Analysis*, at 2, *available at* http://www.cornerstone.com/pubs /xprPubResultsCornerstone.aspx?xpST=PubRecent.

[19] *Id.* at 9.

Second Circuit features prominently in these trends, with approximately 25% of U.S. securities class action settlements in 2010 arising from lawsuits brought in the Second Circuit.[20]

Well-functioning capital markets require predictability and protection from threats of significant liability from unfounded claims. Requiring that plaintiffs plausibly plead the element of materiality that is required to state a claim under the civil remedy provisions of the federal securities laws plays a critical role in achieving those goals. The petition accordingly presents a significant question of national importance that should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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[20] *Id.* at 15.