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Government Oversight

The False Promise Of 'Reform'



Are measures to protect the primacy of U.S. markets the right remedy or could they be missing more significant problems?



C. Evan Stewart

BY C. EVAN STEWART

IN THE age-old Chicken Little fable, Chicken Little, while eating lunch one day, has an acorn hit her on the head and she concludes that “[t]he sky is falling.”¹ Her analysis and conclusion, as well as the hysteria that she then engenders, should be cautionary tales for those who have publicly been bemoaning the fast eroding primacy of the U.S. capital markets. Query whether these people are right either on the evidence or as to the remedies they propose to fix the problem they have identified. Query also whether by focusing on this issue we are missing the more significant problem(s) we face.

C. Evan Stewart is a partner at Zuckerman Spaeder and an adjunct professor at Fordham Law School and Brooklyn Law School.

What Is the Problem?

There seems to be a growing consensus among the cognoscenti that the primacy of the U.S. capital markets is under serious attack, the consequences of which are too dire to even contemplate. Treasury Secretary Henry M. Paulson Jr., Mayor Michael R. Bloomberg, Senator Charles E. Schumer, Governor Eliot Spitzer, the U.S. Chamber of Commerce, and many others, have all weighed in, with the principal “bad guys” identified as “the growth of U.S. regulatory compliance costs and liability risk.”²

More specifically, the critiques have pointed out (i) the costs and complexities of the Sarbanes-Oxley legislation—and §404, in particular (Section 404 requires public companies to demonstrate on an ongoing basis that they have sufficient internal controls to prevent fraud); (ii) the fact that many of the world’s largest IPOs have recently been taking place outside the United States; (iii) the premium investors pay for shares of foreign companies listed in the United States is markedly down;³

(iv) the civil litigation system in the United States places a litigation tax on doing business here;⁴ and (v) the regulatory/enforcement costs of doing business here are materially greater than under any other country’s regulatory scheme.⁵

Both the Chamber of Commerce and a privately funded group, the Committee on Capital Markets Regulation, have issued reports and suggested reforms to slow or reverse the disturbing trends.⁶ At the same time, the Securities and Exchange Commission itself has proposed a number of reforms along the same lines. And not to be outdone, New York’s governor has recently weighed in with a few reforms of his own.⁷ What are the essentials of all these reforms? They are:

- to modify §404 somewhat, imposing a “materiality standard” vis-à-vis the required internal controls, and what the auditors would be required to test for in that regard;
- to postpone §404’s application for “smaller” public companies;
- to make it easier for foreign companies

to delist from U.S. securities exchanges;

- to tone down prosecutorial “kill-the-corporation” tactics (e.g., alter the government’s “cooperation” policies, establish that a selective waiver of attorney-client privileged information to governmental entities does not constitute a waiver as to civil litigants, etc.);
- to make the prosecution of federal securities fraud cases more difficult;
- to reduce/consolidate the number of securities regulators;
- to scrap the United States’ complex regulatory scheme (with the harsh regulatory enforcement environment used to enforce our current system), and to adopt instead the “principles-based” regulatory scheme utilized by the Financial Services Authority (FSA) in London.

Will the Reforms Save the Markets?

The short answer to the question posed above is: no. Even a relatively quick and dirty look at each of the reforms reveals why that would be the case.

First of all, many of the attacks on §404 have had their desired effect. Both the SEC and the PCAOB (Public Company Accounting Oversight Board) have issued a new materiality standard in an attempt to make compliance easier and more cost-effective.⁸ The SEC has also announced that it will delay the application through the end of 2009 for companies with a public float of less than \$75 million.⁹ And the SEC has not only ruled that foreign companies do not have to adjust to American accounting standards, but has further proposed to make it easier for foreign companies to leave U.S. markets.¹⁰

What is the likely impact of these specific changes? Not to be unduly pessimistic, but it is highly unlikely to bring nirvana. Just to comply with the new standard of materiality will take some time for companies, and whether the associated costs will be greatly reduced is anyone’s guess. The whole costs issue seems to be a bit of a red herring in any event because the costs associated with §404 compliance have been going down significantly over time.¹¹ Extending the witching hour for small companies for another year seems unlikely to assist those companies in the “long run”—the SEC should fish or cut bait: either exempt small companies or mandate compliance. And as to the foreign

accounting and delisting “reforms,” they seem counterintuitive—we are going to be better off by having less transparent books and records and we are going to encourage companies to come to the United States by making it easier to leave?¹²

What about changing the government’s prosecutorial zeal? Well, maybe there is less kill-the-company rhetoric (with instead an increased number of deferred prosecution agreements), but there also seems to be no shortage of push-beyond-the-envelope prosecutions brought on by the government against white collar defendants.¹³ It is true that the Justice Department has “amended” its corporate “cooperation” policy—no longer will companies be deemed “uncooperative” if they do not waive the attorney-client privilege or if they live up to their corporate bylaws and advance legal fees to employees who are government targets.¹⁴ Because of the yawning gap that exists with this not-so-substantial shift (i.e., according to the “amended” policy, companies will be given affirmative credit for waiving the privilege and doing other things deemed cooperative), Congress has before it legislation to prevent the Justice Department from pressuring companies to waive the attorney-client privilege.¹⁵ But even if this were to become law, it would have no binding effect upon other semi-governmental organizations (e.g., FINRA, the Financial Industry Regulatory Authority) or the numerous state regulators (e.g., state attorney generals).

Legislation on a related front—to allow for the selective waiver of privileged information—was almost introduced in Congress.¹⁶ Selective waivers, however, are unnecessary, bad public policy, and counterproductive and counterintuitive to strengthening the privilege.¹⁷ As such, the concept “proved to be very controversial,” and it was pulled from proposed amendments to the Federal Rules of Evidence.¹⁸

With respect to altering the civil litigation landscape, much of the critics’ “wish list” has already been accomplished. Three recent U.S. Supreme Court rulings have made prosecuting complex civil litigation more difficult (if you are a plaintiff’s lawyer) or more properly rigorous (if you are a defense lawyer). In *Bell Atlantic Corp. v. Twombly*,¹⁹ for example, the Court held that the mere allegation of parallel antitrust

conduct was insufficient as a matter of pleading an antitrust conspiracy in order to survive a motion to dismiss under the Federal Rules of Civil Procedure. And in *Credit Suisse Securities (USA) LLC v. Billing*,²⁰ the Court upheld the doctrine of implied immunity, ruling that conduct actionable under the antitrust laws may not also be actionable under the securities laws if conflicting regulatory prerogatives of the Securities and Exchange Commission have been (are, or could be) put at issue.²¹

Most recently, in *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc.*,²² the Court rejected the plaintiffs’ bar’s attempted end-run around *Central Bank*²³ (via the concept of “scheme liability”) and reaffirmed that any 10b-5 claim must properly allege that the aggrieved plaintiff(s) relied upon some act or omission by a primary violator defendant(s).²⁴

The over-proliferation of securities regulators in the United States has been an issue for time immemorial. And there have been some recent steps to address this situation—most prominently, the merging of certain functions of the New York Stock Exchange and the National Association of Securities Dealers into the Financial Industry Regulatory Authority.²⁵ Other ways to “simplify” certain aspects of the regulatory oversight system have been proposed, but whether they will come to fruition is anyone’s guess.²⁶

But besides bureaucratic inertia and the difficulty inherent in unwinding the mind-boggling complexity of our current system, the notion that regulators (and prosecutors) are going to give up an incredibly powerful weapon that they currently employ in the manifestation of parallel proceedings is extremely naïve. The Kafkaesque whipsaw to which governmental targets can find themselves exposed when different regulators go after them is a (regrettably) common occurrence in the current regulatory system.²⁷ And while this practice recently took a hit in at least one prominent case,²⁸ government lawyers with whom I have spoken do not see a change in these tactics any time soon. So long as that is so, we should not expect a huge overhaul of the regulatory structure (at least for compliance and enforcement purposes).

Finally, what about changing the basic philosophy of securities regulation altogether and endorsing the FSA’s “principles-based”

system? This is clearly a “grass is greener” notion. Those who are directly familiar with the FSA’s system do not think it really works all that well in promoting and ensuring investor protection.²⁹ And its performance in the recent banking crisis led a committee of Parliament to conclude that the FSA had “systematically failed in its duty as a regulator,” and that the entire matter had been “damaging to the financial services industry in the United Kingdom.”³⁰ Do we really want to emulate that?

So what is the bottom line? Even the (more sage) promoters of these reforms think they will not make much of an impact (not even taking into account the limitations noted above). When the Committee on Capital Markets issued its first report in November 2006 (with its multitude of proposals), here is what the committee wrote:

The Committee concludes that four factors are responsible for loss of U.S. competitiveness to foreign and private markets: (i) an increase in the integrity of and trust in major foreign public markets resulting from more transparency and better disclosure; (ii) a relative increase in the liquidity of foreign and private markets, thus making it less necessary to go to the U.S. public equity capital markets for funding; (iii) improvements in technology, making it easier for U.S. investors to invest in foreign markets; and (iv) differences in the legal rules governing the U.S. public markets and the foreign and private alternatives.

There is little public policy can do to reverse the impact of the first three factors....³¹

Beyond the committee’s correct conclusion as to our inability to stem some, most, or all of the market share we have lost, should we just throw in the towel and concede defeat? I would argue that if we stick to our knitting and remain committed to the U.S. markets being the best regulated, most transparent, most stable, and most devoted to investor protection, investors will continue to prize those criteria and want to keep well-invested in the United States, especially in times of great volatility and uncertainty.³²

What Are We Missing?

By focusing on events we cannot really control (and which may not be as catastrophic as some envision), are we missing more impor-

tant challenges to our economy? I can think of at least two. One very important challenge comes from the phenomenon titled Sovereign Wealth Funds. What are Sovereign Wealth Funds (SWFs)? They are state-owned investment entities which (to quote Carl Sagan) have billions and billions of financial assets, resources they are ready, willing, and able to invest.³³ There are some observers who fear SWFs because of the potential geopolitical influence they can wield, while others view investments by SWFs as just that and no more.³⁴

There can be no doubt that SWFs have been quite active in the United States recently, most visibly in providing huge capital infusions into some of the country’s largest financial institutions laid low by the subprime meltdown.³⁵ Who knows whether SWFs will ultimately be good, benign, or something else? What is clear is that this is a matter worthy of close study going forward.³⁶

Another very important challenge comes from the weakness of the dollar. Besides allowing foreigners to visit America and load up on “cheap” goodies (while also making trips to Europe for U.S. citizens obscenely expensive), the dollar’s precipitous decline against other key currencies needs to be addressed, and soon.³⁷ One consequence of this situation is that the oil-producing Gulf States (with oil being pegged to the dollar) are experiencing serious inflation. (Gulf currencies have fallen relative to other currencies—e.g., the euro—which has caused imports and the cost of living to jolt upward.)

At a time when foreign investors are already starting to move some of their money out of the United States, the Gulf States are making public noises about unhooking their currencies from the dollar (Iraq and Kuwait have already done so).³⁸ If this were to occur across the board—for example, if OPEC were to start pricing oil in euros—what would the Chinese and Japanese (with their immense energy needs) do with their vast U.S. Treasury holdings? If they were to cash most or all of those holdings and convert them into euros in order to pay OPEC, what might happen to the U.S. economy, our trade deficit, our standard of living, etc.?³⁹ This is not a pretty picture to contemplate.

Conclusion

We have come a long way since Frances Fukuyama proclaimed “The End of History.” While we have an amazingly resilient economy, our country faces truly significant economic challenges in the near and mid-term. Better we face them head-on and without wasting our energies on tinkering with our legal and regulatory systems in an attempt to deal with trends in how capital is raised—trends we can do little to stop or reverse.



1. The Chicken Little fable originates from the Jataka Tales of Buddhist Indian folklore. See J. Thornhill, “A Jataka Tale From India” (2002).

2. See G. Hubbard and J. Thornton, “Action Plan for Capital Markets,” *The Wall Street Journal* A16 (Nov. 30, 2006). See also R. McTague, “Citigroup General Counsel Blames SEC, in Part, for Loss of Global Edge in Markets,” *BNA Securities Regulation and Law Report* 1944 (Nov. 11, 2006); J. Gapper, “The Big Apple’s glory days have passed,” *Financial Times* 2 (Nov. 27, 2006); “Is Wall Street Losing Its Competitive Edge?” *The Wall Street Journal* A6 (Dec. 2, 2006); A. Lucchetti, “Identity Crisis for New York?” *The Wall Street Journal* C3 (Jan. 22, 2007); D. Solomon, “A Summit on U.S. Rules: ‘Too Gosh-Darn Complex,’” *The Wall Street Journal* C4 (March 14, 2007); S. Joyce, “New York Fed Says U.S. Capital Markets Challenged, ‘Eroded’ by Non-U.S. Markets,” *BNA Securities Regulation and Law Report* 1209 (Aug. 6, 2007); “NYSE Regulator Says Litigation, Regulation Deter Firms From Listing on U.S. Exchange,” *BNA Securities Regulation and Law Report* 1538 (Oct. 8, 2007); D. Gross, “The Capital of Capital No More?” *The New York Times Magazine* (Oct. 14, 2007).

3. See G. Ip, “Is a U.S. Listing Worth the Effort?” *The Wall Street Journal* C1 (Nov. 28, 2006) (the investment premium dropped 20 percent between 2002 and 2005).

4. While securities class actions had generally been trending downward, the money damages assessed/paid out in settlements had skyrocketed. See “Is Wall Street Losing Its Competitive Edge?” *The Wall Street Journal* A6 (Dec. 2, 2006). With the current subprime mess, the trend lines for securities class actions may be reversing themselves. See V. Bajaj, “If Everyone’s Finger-Pointing, Who’s to Blame?” *The New York Times* C1 (Jan. 22, 2008).

5. See supra note 4 (*The Wall Street Journal*) (SEC’s monetary penalties in 2005 were \$1.9 billion; London’s FSA’s monetary penalties in 2005 were \$33 million).

6. The U.S. Chamber of Commerce’s report can be accessed at www.uschamber.com/publications/reports/0703capmarketscomm.htm. The first report of the Committee on Capital Markets Regulation (Nov. 30, 2006) can be accessed at <http://www.capmktreg.org>. A more recent report of that same group (Dec. 4, 2007) can be accessed at <http://www.capmktreg.org/research.html>.

7. See M. Mercel, “New York Panel Offers Changes to Securities Oversight,” *The New York Times* C3 (Jan. 19, 2008).

8. See R. McTague, “SEC Adopts Management Guidance for Evaluating Internal Controls Under SOX,” *BNA Securities Regulation and Law Report* 853 (May 28, 2007).

9. See J. Burns, “SEC Grants Small Firms Reprieve From Audit Rule,” *The Wall Street Journal* B4 (Feb. 2, 2008).

10. See F. Norris, “S.E.C. Says Foreign Companies Do Not Have to Adjust to U.S. Accounting,” *The New York Times* C8 (Nov. 16, 2007); S. Labaton, “S.E.C. Eases Regulations in Business,” *The New York Times* C1 (Dec. 14, 2006). SEC Chairman Christopher Cox described the former listing/de-listing protocol as akin to the 1976 Eagles song, “Hotel California” (where “you can check in anytime you

like, but you can never leave"). In the chairman's words, "'Hotel California' is a great song, but it is a lousy business model." See F. Norris, "S.E.C. Changes Its Tune on Letting Foreign Securities Leave," *The New York Times* C6 (Dec. 7, 2006).

11. See "\$404 Costs Continued to Fall in 2006, FEI Study Concludes," *BNA Securities Regulation and Law Report* 857 (May 28, 2007) (compliance costs fell by approximately 23 percent in 2006). A drop in the number of companies that are non-compliant has also been reported. See S. Webster, "Number of Companies Reporting Ineffective Internal Controls Falls," *BNA Securities Regulation and Law Report* 1088 (July 9, 2007).

12. In fact, there are some academic studies that indicate there would be increased risk exposure to U.S. investors as a result of the latter "reform." See F. Norris, "S.E.C. to Firms: Keep Money, Forget Rules," *The New York Times* C1 (Dec. 15, 2006). Moreover, the notion that no major IPOs by foreign companies are taking place in the United States is belied by the facts. See L. Cowan, "Latest China IPO in U.S. Soars 85%," *The Wall Street Journal* C3 (Oct. 25, 2007).

13. See C.E. Stewart, "Corporate Criminal Liability Runs Amok," *New York Law Journal* (Nov. 15, 2007) (threatened prosecution of Chiquita executives and directors who brought corporate wrongdoing to the Justice Department); J. Cooper and W. Vodra, "New Questions About Guilty Pleas in Purdue OxyContin Case," *BNA Pharmaceutical Law and Industry Report* (Sept. 7, 2007) (company executives plead guilty to violating federal misbranding law, based upon the corporation's misconduct, notwithstanding that each individual officer specifically denied knowledge of the facts giving rise to corporate liability); See also *U.S. v. Stringer*, 408 F.Supp.2d 1083 (D. Or. 2006).

14. See C.E. Stewart, "'Carnacking' the Future," *New York Law Journal* (Feb. 15, 2007).

15. The operative language is "demand, request or condition treatment on the disclosure...." H.R. 3013 recently was approved by a voice vote in the House of Representatives. Whether its companion bill in the Senate (S. 186) will receive similar treatment remains to be seen. See R. Lindeman, "House Overwhelmingly Approves Bill to Limit DOJ Policy on Corporate Privilege Waivers," *ABA/BNA Lawyers' Manual on Professional Conduct* 604 (Nov. 28, 2007).

16. See R. Lindeman, "Leahy, Specter Introduce Bill to Create New Court Rule to Prevent Privilege Waiver," *BNA Securities Regulation and Law Report* 1943 (Dec. 17, 2007) (S. 2450); "New Rules Adopted in Arkansas Limit Waiver of Privilege Claims," *ABA/BNA Lawyers' Manual on Professional Conduct* 41 (Jan. 23, 2008).

17. See C.E. Stewart, "Will Waiving the Privilege Save It?" *N.Y. Business Law Journal* (Spring 2007); C.E. Stewart, "Can the U.S. Capital Markets Be Saved by Tinkering With the Legal Profession?" *The Metropolitan Corporate Counsel* 12 (June 2007).

18. See http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf. (letter of the U.S. Judicial Conference's Committee on Rules of Practice and Procedure to Congress).

19. 127 S. Ct. 1955, 2007-1 CCH Trade Cases ¶75,709 (2007).

20. 2007 WL 1730141, at *4 (June 18, 2007). See C.E. Stewart, "The Policies and Politics of Antitrust," *New York Law Journal* (Aug. 16, 2007).

21. One SEC commissioner, writing before the Court handed down its decision, predicted that a contrary result would lead to "widespread...reverberations," in-

cluding the dismantling of the process of "getting IPOs efficiently and effectively to market." See P. Atkins, "A Serious Threat to Our Capital Markets," *The Wall Street Journal* A16 (June 10, 2006).

22. 552 U.S. ___, 2008 WL 123801 (Jan. 15, 2008).

23. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 169 (1994).

24. Prior to the resolution of *Stoneridge*, the partisan rhetoric about the possible consequences to the future of Western Civilization (especially if the Court were to adopt "scheme liability") ran pretty high. One SEC commissioner has been prolific on the consequences of this one case, both before and after. See P. Atkins, "Just Say 'No' to the Trial Lawyers," *The Wall Street Journal* A17 (Oct. 9, 2007) (a victory for the plaintiff "would be a hidden tax on the American economy and would affect our global competitiveness; "investors and consumers will bear the costs as their investments fall in value and the prices of their purchases rise."); P. Atkins, "Stoneridge and the Rule of Law," *The Wall Street Journal* A14 (Jan. 25, 2008) (lauding the Court for "insist[ing] on predictability and the rule of law—principles that are fundamental to the protection of investors and success of their investments."). It is true that not all of the critics' "wish list" has been accomplished. See J. Wallison, "Capital Complaints," *The Wall Street Journal* A19 (March 20, 2007) ("Killing class actions would be the best 'Sarbox' reform.").

25. Even the merging of said functions has left some overlap issues behind. For example, the NYSE continues to have an enforcement division devoted to the specifics of the trading protocols of the NYSE trading system.

26. See M. Merceal, "New York Panel Offers Changes to Securities Oversight," *The New York Times* C3 (Jan. 19, 2008) (proposal to have one New York state regulator, instead of four). Whether this specific proposal is likely to go anywhere hinges on how the Martin Act (which currently gives unfettered power to New York's Attorney General to regulate securities matters) is modified or dealt with. See C.E. Stewart, "When the Government Comes Knocking," *GC New York, New York Law Journal* (March 14, 2005).

27. See e.g., *In re Application of Justin F. Ficken*, SEC Admin. Proc. File No. 3-12143, Release No. 34-54699 (Nov. 3, 2005); *In re Application of Frank P. Quattrone*, SEC Admin. Proc. File No. 3-11786, Release No. 39-53547 (March 24, 2006). See also *D.L. Cromwell Investments Inc. v. NASDR*, 132 F.Supp.2d 248 (SDNY 2001). For a recent bar overview of this scary business, see Richard Hall, "Strategy for Parallel Proceeding Begins With Decision on Testimony, Lawyers Say," *BNA Sec. Reg. & L. Rep.* 170 (Nov. 5, 2007).

28. *U.S. v. Stringer*, 408 F.Supp.2d 1083 (D. Or. 2006) (currently on appeal in the Ninth Circuit).

29. See A. MacDonald, "Judging a U.K. Watchdog," *The Wall Street Journal* C1 (July 23, 2007).

30. See J. Perry and G. Ip, "Bank of England Chief Changes Tack in Crisis," *The Wall Street Journal* A1 (Jan. 28, 2008); L. Norman & N. Brereton, "Report Finds U.K. Regulator Failed in Northern Rock Case," *The Wall Street Journal* B5 (Jan. 26, 2008). Beyond that, do we also want to emulate the FSA's lower standards for IPOs? See G. Chazan, "Gazprom Drills Deeper Into Europe," *The Wall Street Journal* A16 (Jan. 28, 2008).

31. See supra note 6 (Committee's Nov. 30, 2006 report at pp. 4-5).

32. See "Is Wall Street Losing Its Competitive Edge?" *The Wall Street Journal* A6 (Dec. 2, 2006) (comments of

former Treasury Secretary Lawrence Summers, arguing for a balance between ensuring competitiveness of markets and investor protection). See also "New Academic Study Finds SOX Effects Didn't Hurt Foreign Listings in United States," *BNA Securities Regulation and Law Report* 737 (May 7, 2007) (investors willing to pay significant premium for U.S. listings, based upon assurance that companies met U.S. regulatory standards). And, of course, we have weathered challenges to our capital markets before (e.g., in the late 1980s and early 1990s, it appeared that the center of the world's markets was shifting to Tokyo).

33. The SWF entities include those run by Abu Dhabi (\$875 billion), China (\$200 billion), Qatar (\$60 billion), Venezuela (\$17.5 billion), and Oman (\$6 billion). SWF assets are estimated to grow to \$13.4 trillion by 2017. See V. Galani and S. Nixon, "Don't Fear the Sovereigns," *The Wall Street Journal* B18 (Jan. 26, 2008).

34. See N. Timiraos, "Will Overseas Funds Be a Juggernaut?" *The Wall Street Journal* A11 (Dec. 1, 2007); D. Wesel, "The Risks of Sovereign Funding," *The Wall Street Journal* A2 (Dec. 13, 2007); H. Jenkins, "Living With 'Sovereign Wealth'," *The Wall Street Journal* A10 (Dec. 26, 2007); A. Sorkin, "What Money Can Buy: Influence," *The New York Times* C1 (Jan. 22, 2008); R. Kimmitt, "Public Footprints in Private Markets," *Foreign Affairs* 119 (January/February 2008).

35. See R. Carew, L. Santini and J. Dreddy, "Great Wall Street of China," *The Wall Street Journal* C1 (Dec. 20, 2007); D. Enrich, R. Smith and D. Paletta, "Citigroup, Merrill Seek More Foreign Capital," *The Wall Street Journal* A1 (Jan. 10, 2008); S. Joyce, "Paulson Defends Mortgage Plan, Welcomes Sovereign Wealth Fund Investment in Banks," *BNA Securities Regulation and Law Report* 41 (Jan. 14, 2008).

36. While the United States has traditionally been receptive to foreign investment, a number of our historic trading partners are more wary of SWFs. See S. Joyce, "To Ease Concerns, IMF May Develop Best Practices for Sovereign Wealth Funds," *BNA Securities Regulation and Law Report* 1886 (Dec. 10, 2007); J. Kirwin, "EC Holds Off Regulating Sovereign Funds, but Will Consider Guidelines, Transparency," *BNA Securities Regulation and Law Report* 1886 (Dec. 16, 2007); P. Goodman & L. Story, "Overseas Investors Buying U.S. Holdings at Record Pace," *The New York Times* A1 (Jan. 20, 2008).

37. See "Adam Smith Grows," *The Wall Street Journal* A18 (Nov. 8, 2007); F. Guerra, A. van Duyn and P. Pimlott, "U.S.'s triple-A credit rating 'under threat'," *Financial Times* 1 (Jan. 11, 2008); D. Malpass, "Markets and the Dollar," *The Wall Street Journal* A13 (Jan. 14, 2008); B. Wilby, "The Dollar and the Market Mess," *The Wall Street Journal* A25 (Jan. 23, 2008).

38. See M. Fackler, "Japanese Shift Cash Out of U.S. Investments," *The New York Times* C1 (Nov. 23, 2007); J. Slater and C. Cummins, "Wealthy Nations in Gulf Rethink Peg to Dollar," *The Wall Street Journal* A1 (Nov. 20, 2007). Kuwait has switched to a basket of currencies; Iraq has switched to euros.

39. See T. McCormick, "What Would William Appleman Williams Say Now?" *Passport* 16 (August 2007); P. Khanna, "Waving Goodbye to Hegemony," *The New York Times Magazine* 34 (Jan. 27, 2008).

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