SECURITIES

DEFENSE COUNSEL BEWARE. THAT'S THE MESSAGE FROM ROBERT KHUZAMI, DIRECTOR OF the SEC's division of enforcement, who in the past year has pointedly criticized defense and in-house counsel for impeding agency investigations. He has repeatedly promised to wield the tools at his disposal—from withdrawing typical courtesies to possible suspension from the bar and investigation by the Department of Justice. Our panel of experts discusses this as well as trends in mergers and acquisition litigation, and Canada's potential as a forum for securities class actions. They are Matthew Larrabee of Dechert; Michael D. Celio of Keker & Van Nest; Kenneth Herzinger and Michael Torpey of Orrick, Herrington & Sutcliffe; Pete M. Stone of Paul Hastings; and Mary Blasy of Scott + Scott. The roundtable was moderated by *California Lawyer* and reported by Krishanna DeRita of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: How does the SEC and the Public Company Accounting Oversight Board's increased focus on attorney and witness misconduct in investigations affect your practice?

CELIO: The answer for me—and I hope for most lawyers—is "not at all." The SEC is a party to these cases, and it should not also be judge and jury. I've been surprised by the SEC's emphasis on attorney misconduct, and while I don't condone bad behavior, it is inappropriate for the SEC to attempt to police the conduct of its litigation adversaries. It can really chill zealous advocacy.

HERZINGER: Having been at the SEC, everyone knows that you are at a major disadvantage during an SEC deposition. You don't have all the normal protections of the Federal Rules of Civil Procedure. Rules of evidence don't apply, and often times there are two to three questioners asking questions interchangeably. They may ask your client to speculate and answer hypothetical questions, which frankly is improper. Oftentimes the staff encounters defense lawyers who are used to dealing with the Federal Rules of Civil Procedure and inserting objections where they think the questions are improper. They are not happy about that.

The SEC has said they don't want to create a chilling effect, but they are telling the defense lawyers that they may be censured and referred for DOJ prosecution for objecting during deposition testimony. We still intend to vigorously and zealously defend our clients within the framework of the rules and the ethical code.

CELIO: Has anyone seen the SEC move to disqualify someone? Other than *S.E.C. v. King Chuen Tang* (831 F. Supp. 2d 1130 (N.D. Cal. 2011))

LARRABEE: Being suspended or disbarred is probably not a realistic threat, but the broader point for our clients arises because the SEC serves as judge, jury, and executioner. To a large degree we are at their mercy, since they have significant discretion to do what they think is best. Our job is to zealously represent our clients, but ultimately that means persuading the SEC not to pursue a prosecution. That threat is very real and what's at stake is our credibility. If we lose that by being so strident that they disbelieve us—rightly or wrongly—that's a serious problem.

STONE: As an adversary, it seems improper for the SEC to complain about how its opponent does its job. But the message for the practitioner is a practical one about presentation of your clients to the SEC. There are three basic situations that lawyers defending clients in front of the SEC find themselves in.

First, when defending a wholly innocent person, you ought to cooperate with the SEC, showing you have nothing to hide and are honest because your client is honest and innocent. Second, where your client really is culpable, you shouldn't talk to the SEC at all. Most of the time you find yourself in the third situation—a gray area where mistakes were made and perhaps your client acted negligently, but not culpably wrong. In that case, impeding the SEC investigation is completely counterproductive because the SEC is trying to decide whether to proceed against your client.

The more they believe that you have something to hide, the

worse it gets for your client. So, while it's unfair for the SEC to say, "don't act this way," the message is also that to do so is ineffective.

HERZINGER: A government investigatory setting is like dealing with a state trooper when you get pulled over. You quickly get your license and registration, you answer their questions directly, and are as helpful as possible. We all understand that they have the power, so the cases they cite must be the rare exception because most defense lawyers I know take the completely opposite tack. Most of us would never cross those lines.

TORPEY: Let's assume a smart guy actually went to the *Wall Street Journal* and planned that article, what's his agenda? Possibly he has been frustrated by the way the SEC staff proceeds compared to the DOJ. The DOJ is very clipped and close to the vest. Khuzami has been signaling that he wants SEC enforcement proceedings to be more like a DOJ proceeding. For example, he wants individuals separately represented because he thinks he will get better deals and more cooperation that way.

CELIO: The article emphasized both deposition conduct and internal investigations. In an internal investigation, the SEC will allow you to run the investigation as you see fit. They may or may not agree with your findings, but typically they will wait for you to do your job. The DOJ, on the other hand, shows no such willingness to wait—they will have FBI agents talking to witnesses as well. The SEC is on record that it feels some of the investigations it is seeing are of poor quality. One way to deal with this concern is to reject the SEC's historical willingness to let internal investigations run their course in favor of the DOJ's approach. If that came to pass, it would have huge implications for the defense bar.

If the comments from the SEC are taken at value, there is a real risk that we will see securities practice become more and more like white-collar defense, and that would be dangerous. SEC enforcement is not the same thing as criminal prosecution. There's an overlap, but the two fields are supposed to be different.

LARRABEE: That's a very dangerous model if you are in a regulated industry where the SEC is conducting regular examinations. If they present themselves as the FBI every time they come in to do an examination of a registered issuer, imagine what kinds

MARY BLASY is an attorney in the San Diego office of Scott + Scott. Her clients range from individual investors to some of the nation's largest public pension funds. Ms. Blasy has recovered hundreds of millions of dollars for investors in class actions, including Sprint, Coca-Cola, Reliance Acceptance, and Martha Stewart Omnimedia. Through shareholder derivative litigation, she has obtained corporate governance enhancements valued by the market at billions of dollars. **mblasy@scott-scott.com** **scott-scott.com**

MICHAEL CELIO, a partner at Keker & Van Nest in San Francisco, defends white-collar criminal cases and enforcement actions brought by the Securities and Exchange Commission. He has tried numerous cases in state and federal courts, primarily involving securities fraud. He received his J.D., cum laude from Harvard Law School, his M.Sc. from the London School of Economics, and his A.B., with honors and distinction from Stanford University.
mcelio@kvn.comk **kvn.com**

KENNETH P. HERZINGER is a partner in Orrick's San Francisco office and a member of the Securities Litigation and Regulatory Enforcement Group. His practice focuses on SEC investigations, accountants' liability, and securities class actions. He has represented corporations, directors and officers, auditors, hedge funds, mutual funds and broker-dealers involved in investigations by the SEC, FINRA, and the New York Attorney General's Office. He was formerly a staff attorney in the SEC's Enforcement Division in New York.
kherzinger@orrick.com **orrick.com**

MATTHEW LARRABEE, a partner in the San Francisco office of Dechert LLP, has more than 25 years of trial and appellate experience specializing in financial institution, securities class action, consumer class action, antitrust and other complex commercial litigation for major corporate clients in the financial services, mutual fund, technology, and health care industries. He's been recognized in the *San Francisco Business Times* "Best Lawyers in the Bay Area" (2009, 2010) and the *San Francisco Chronicle*'s "San Francisco's Top Attorneys" (2012). **matthew.larrabee@dechert.com** **dechert.com**

PETE STONE, a partner in litigation practice of Paul Hastings, is the chair of the Palo Alto office's Litigation Department and the vice-chair of the firm's International Securities Litigation and Enforcement Practice Group. He also serves on the firm's International Steering Committee for Litigation. Mr. Stone has significant experience in complex business litigation and securities enforcement, in both federal and state jurisdictions, with an emphasis on securities, shareholder, professional negligence, health care and other class action matters. **peterstone@paulhastings.com** **paulhastings.com**

MICHAEL TORPEY chairs Orrick's Securities Litigation and Regulatory Enforcement Group. A partner in the San Francisco office, Mr. Torpey specializes in litigation involving the Securities Act of 1933, the Securities and Exchange Act of 1934, the Private Securities Litigation Reform Act of 1995, the Uniform Standards Act, and proceedings initiated by the SEC. Mr. Torpey has extensive experience in litigation involving breaches of fiduciary duty and has conducted various types of corporate investigations.
mtorpey@orrick.com **orrick.com**

of cooperation they are going to get? There has to be some balance for their overall system to work and in some industries routine examinations are the primary source of the prosecution. It's really dangerous for them to go as far as the DOJ. It's not like the FBI walks around public companies to do routine examinations looking for crimes.

MODERATOR: What is the impact of the Second Circuit court decision in denying class certification in the *New Jersey Carpenters* case (*New Jersey Carpenters Health Fund v. Rali Series 2006-QO1 Trust, 2012 WL 1481519 (2nd Cir.)*)?

LARRABEE: There aren't many cases where class certification is denied under Section 11 of the 1933 Act, but this is one. Until now the idea that a defendant could present evidence showing that large numbers of class members may have had individual knowledge of the fraud has been more theoretical than real. It's a significant case and being affirmed by the Second Circuit as an important precedent. But I'm already litigating the importance or unimportance of this precedent. The plaintiffs bar is doing its best to paint this case as unusual and to limit it to the facts.

BLASY: Hopefully it has no impact whatsoever in the Ninth Circuit, but even in the Second Circuit this decision merely demonstrates the importance of vetting class representatives. Several district courts, including this one, have since certified mortgage-backed securities classes, distinguishing the problems here, and even Judge Baer wouldn't have done this based just on class composition. The real issue is that institutional investors' outside money managers don't get vetted at the lead plaintiff stage, so now they're going to start being vetted at the class certification stage.

LARRABEE: The vetting is already happening. We represent clients with in-house lawyers who spend a significant amount of time fending off third-party subpoenas seeking evidence about the knowledge in the marketplace in order to prove what the plaintiffs must have known.

Just one of our clients is facing dozens of subpoenas and is trying to figure out how to stop this. I'm in multi-district litigation right now where we issued 40 third-party subpoenas and the principal driving force was an effort to gather third-party evidence of knowledge in the industry and either direct or indirect knowledge of class members about alleged misrepresentations.

TORPEY: This was very mortgage-backed focused. What are your views of its application beyond the mortgage-backed area? These are often really sophisticated buyers, and it seems to be a different phenomenon than an open market 10(b)5 case with an issuer.

HERZINGER: The one instance where the case may apply is where you have an issuer whose stock is predominantly held by large institutional investors. Those institutions have their own financial analysts and perform their own valuations and frankly know more about the company than some people at the company. However, I agree that except for the few cases such as this, the Second Circuit's decision will have little impact.

BLASY: What about the new Facebook IPO actions? The company puts out some additional risk disclosures, privately tells analysts to downgrade their earnings models, and the analysts talk to some people. How many people got that information? Unfortunately, I could see this coming up outside the mortgage-backed security arena.

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>
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CELIO: In the Second Circuit opinion you can see a significant emphasis on the standard of review. It seems this is as far as the court is willing to go. The opinion is not hinting at the endorsement of a theory of the law that would be extended to cover a Rule 10(b)5 case. The structure of Section 11 is different than the structure of a traditional fraud case—the availability of an affirmative defense based on the plaintiffs' unique knowledge make a big different. *New Jersey Carpenters* could be a big deal in the Section 11 context, but I don't see it expanding beyond that.

LARRABEE: The lesson of that analysis—if you are a defense lawyer trying to defeat class cert—is to focus on the evidentiary record you put before the district court. You might persuade a district court judge that class cert shouldn't be granted, but that will depend significantly on the evidentiary record, which in turn leads to the kind of discovery I was talking about. For our clients, most of this activity is related to mortgage-backed securities. But my recent cases are more analogous to the fact situation with Facebook, where there's an issue about what the market knows through a lot of sophisticated purchasers. In cases involving the disclosure or nondisclosure of investment risks it's not that hard to take this idea and put it in a different fact pattern if you can get the evidence.

TORPEY: Two things will come out of it. One is an evidentiary

battle pre-class certification. There's no question it's already started and will continue. Second, the idea behind these cases is directly inconsistent with the idea in the Private Securities Litigation Reform Act—that the person with the largest loss will proceed as the lead plaintiff because he or she will have the most sophisticated analysis and individualized approach to the purchase and the sale of the stock. Your mom and pops are not going to have any of that and they are more likely to rely on the evaluations that are inherent in stock price and less likely to do a separate analysis. The statute forces the plaintiffs lawyers to the people most vulnerable to this argument.

BLASY: It is a PSLRA lead plaintiff provision defect. The issue came up during congressional debate. Investors with the largest share losses typically have bigger interests in the debt of these same companies, but Congress kind of dismissed the issue.

LARRABEE: Having the PSLRA push forward more knowledgeable plaintiffs is both a class cert and a trial issue. It might even promote the truth. Deposing a bunch of class plaintiffs who don't know anything, doesn't seem focused on justice. Talking to people who understand the company and can differentiate between what was and was not known in the marketplace could get to the truth a lot sooner, and limit cases to more credible claims more quickly.

TORPEY: It hasn't worked out that way. In 1990, one could take ten cases into a conference room in San Diego and sit down with a plaintiffs lawyer and settle five of them. You can't do that anymore because the dynamic has changed on the plaintiffs' side. Getting past a motion to dismiss is everything. Now the case is worth way more if you do. Plaintiffs need to do that to justify their economic model. But the record in the defense bar for winning motions to dismiss is very high, and as a consequence, as a plaintiff, the economic model had to change. I'm not complaining. It's a fact of life. You file ten. The two you are going to settle are going to be higher priced than if you got eight through.

CELIO: To be fair, it's not just the economics that have altered the settlement dynamics. Given the tools that the Reform Act has given the defense bar, the cases that get by a motion to dismiss tend to be the ones that have issues. There are exceptions, but on the whole the Reform Act does a reasonably good job sifting out the unmeritorious cases.

STONE: Turning back to the decision, the only way that the knowledge of the plaintiff comes up in a typical 1933 Act IPO case is where the plaintiffs allege a leak of information over time so that you have a disclosure on day one, day five, and day ten, and you are arguing which class members knew what when. This decision seems to indicate that if you have factual questions about whether the class members present on day six knew more than the members present on day two, there won't be the ability to certify a class. That's how it could come up in everyday practice, otherwise it's a fairly unusual case and one that probably won't be that important unless there's this kind of leakage of disclosure.

HERZINGER: The Second Circuit seemed to say either pick the more cohesive class or suggest sub-classes, and that's exactly right. That was the hint from the Second Circuit for the plaintiffs bar to more narrowly define your class and avoid some of these conflicts.

BLASY: We don't do sub-classes if it's not necessary, because it marginalizes part of the class or requires additional class representatives, but sometimes it's necessary. Some lawyers like to certify the biggest class possible and it sounds like that happened here. They didn't want to leave anyone out. But your duty is to the entire class, not to getting every single person in it.

STONE: You get into manageability issues. How are you going to try a case with all these sub-classes? But it can be effective in some cases.

MODERATOR: What developments are you seeing in M&A litigation, particularly in handling multi-jurisdictional deals?

STONE: In the last decade we've seen a lot of changes in the way M&A deal litigation proceeds. A number of years ago it was typical that when a deal was announced you might have lawsuits in one jurisdiction, typically in Delaware, and you would fight one case. Statistics of recent deal cases show that 95 percent or more of all deals involving public companies are drawing litigation. And, a very large percentage of those cases are multi-jurisdictional; typically you are proceeding in both the state of incorporation, which is almost always Delaware, and the state of headquarters. On the West Coast that is often California.

How do you deal with lawsuits in two or more jurisdictions? All of us might answer that question a little differently.

LARRABEE: There is a growing trend involving one-forum motions in Delaware. Sixteen were filed in Delaware Chancery Court in 2011, and in 15 circumstances the result was one forum. Those motions are pretty novel in their structure—it requires two judges to get on the phone. The purpose is for the Chancellor in Delaware talk to the judge in the Northern District of California, or wherever the other cases are filed, and they decide the forum.

STONE: Are those motions really a good idea from a defense perspective? You are ceding control of the case's venue. You may end up dealing with folks with whom you don't want to deal. A better approach is to try to herd the plaintiffs, if you will, in the direction you want them to go under threat that you could always file this motion and it will be up to the judges to decide which sets of plaintiffs lawyers get to run the case.

BLASY: This wasn't a problem until Delaware stopped deferring to the first-filed rule. Chancellor Laster came to San Diego a

couple of months ago and said corporate law is like Delaware's entire gross domestic product and so they want to keep the cases there. The Delaware judges began ignoring case law that they had applied for years. For instance, in *Paul N. Gardner Defined Plan Trust v. Draper* (1993 WL 125517 (Del.Ch.,1993)), Vice Chancellor Harnett said that California judges are just as competent to apply Delaware law as Delaware judges. But the newer chancellors get the cases to Delaware by ignoring which court first assumed jurisdiction.

Presented with one-forum motions, Delaware chancellors easily talk other state court judges into ceding the cases. All cases going to Delaware isn't a good idea. If you are a California corporation, it's going to cost you a lot more money to try a case in Delaware. It's also just a bad idea to have a few judges and a few plaintiffs lawyers running all corporate M&A litigation. Monopoly is never good.

CELIO: I share Mary [Blasy]'s unease with domination of any one court. Delaware has immense influence. On the whole, that's been a good development. But it can go too far. I look at what our IP colleagues faced in the Eastern District of Texas. I don't think that anybody on either side of the bar views the outsized importance of that court as an unmitigated good. There are important differences between Delaware Chancery Court and the Eastern District of Texas, but it shows that when any small group of judges becomes very powerful, the impacts can be unpredictable.

TORPEY: This is going to get decided by those cases where the companies put an exclusive venue provision in their bylaws. A number of companies have done that and it is being actively litigated in Delaware. If the exclusive venue provision survives, every company will do it because they will view Delaware as the place most advantageous to them.

STONE: There are variations on whether the bylaws are adopted by shareholders or the board. Delaware has hinted that an exclusive venue is enforceable. But what about a company headquartered in California if our courts say they are not enforceable? Then you have an irresolvable conflict of law.

LARRABEE: Typically the defendant has a lot of practical say in the outcome. If the defendant wants to go to Delaware, and plaintiffs have filed there already, there's a good chance that will happen. The venue provisions may matter, but the practicalities do too. In these cases, the whole game is usually a preliminary injunction.

If you don't enjoin the transaction, the resolution of these cases 99.5 percent of the time is a modest settlement or dismissal. In considering venue, a defendant therefore tries to assess whether they can get an injunction and in Delaware there are only a few chancellors and you know exactly how each chancellor thinks about these issues because they have many injunction decisions. Recently, that body of law has been almost uniformly anti-injunction.

TORPEY: The defense always wants to be in Delaware. It's the plaintiffs bar that should be fighting to get out. In Delaware you lose your jury. You have chancellors who are following a developed set of precedents that favor the defendant. But the plaintiffs bar is split on this. Practioners in Delaware want those venue provisions to stand up and plaintiffs lawyers elsewhere do not. I predict the Delaware courts are going to approve them, and unless the U.S. Supreme Court steps in, there will be constitutional implications that many states will have a hard time swallowing.

HERZINGER: In the *Galaviz* case here in the Northern District of California, the district ruled on and rejected the forum selection bylaw provision, but there were unique facts because it wasn't approved by shareholders. (See *Galaviz v. Berg*, 763 F.Supp.2d 1170 (N.D. Cal. 2011).) This case may have serious repercussions for corporations because these provisions are a lot of work to enact and it's a major issue and it's unclear whether it's going to hold up in court, so they are questioning whether it's worth it.

TORPEY: Returning to the preliminary injunction. That was true ten years ago. My concern now is the plaintiffs bar handling them as back-end cases and I have seen lightweight moves toward preliminary injunction. It's almost as if some plaintiffs firms are doing things to ensure they keep the case, but they are more interested in the back-end cases.

STONE: We've seen this practice in the past few years. Plaintiffs threaten to keep seeking damages post-closing of the deal. It's because as other securities litigation has gone down, this gives them a group of cases to keep active. The results in some cases have been good for plaintiffs.

There's insurance that covers the damages case, at least to the point where you have judgment issues. As long as the insurers are paying defense costs, they have to worry about the case. Of course, in an M&A case, there's a big distinction between defending the target and the acquirer. If I'm the target lawyer, I don't care much if the damages case goes forward so long as I had sufficient insurance. As the acquirer, the last thing you want is litigation that hangs over the close.

TORPEY: The shift is dramatic. You can pay six-figure attorneys fees, fix the disclosure, get rid of the case, and close the deal. The cases representing eight-figure numbers are the back-end cases that last a long time. Those are impacted by whether you name the acquirer as a defendant. Because of the non-indemnifiable nature of a '33 and '34 Act judgment, if you don't have enough insurance, there's tension between the target, boards, and the acquirer as to whether there is an obligation to indemnify. You have to advise them that if you go to trial and lose, it won't be filed from the acquirer. And if the insurance is enough, you are fine, but if not, there are a lot of problems.

MODERATOR: Securities class actions hit an all-time high in Canada last year. In March, the Ontario Court of Appeals allowed a global class

to proceed in which the company Canadian Solar, which was incorporated in Canada, only traded on NASDAQ and does its business in China. So will Canada become an alternate forum post-*Morrison v. National Australia Bank Ltd.* (130 S.Ct. 2869 (2010))?

LARRABEE: The Court of Appeals ruling was very limited, because the jurisdictional test under the Ontario statute was whether the company had a substantial connection to Ontario, and no one was disputing that. The only argument the Court of Appeal addressed was whether they had to be traded on the Canadian exchange and the court said no. Since the basic test was not in dispute on appeal, the class was approved. There's a pretty narrow ruling, well short of Canada taking over the world's securities litigation.

TORPEY: The news here is that this is the first time that the Ontario courts have certified a class that is not a company traded on a Canadian exchange.

BLASY: Some cases may go up there. But unless you can show knowing misstatements in Canada, you have unfavorable damage caps—roughly a million dollars for the issuer and $25,000 for officers. Some big settlements are coming out of there in the right cases, but the loser still pays in much of Canada, including Ontario.

TORPEY: I'm hearing that *Morrison* is a big problem for the plaintiffs bar and they don't see any way around this. Plaintiffs firms have offices in Toronto and now one defense firm does too. It's going to be a panacea if there's a case that certifies a class in Canada without the company headquarters there. We are going to see a flight of global classes in Canada.

BLASY: They are getting past motions to dismiss and the cases do well. But there has to be a tie to Canada, which is going to rein in the number. There is also growing cross-border litigation, and what will be interesting is where you have different claims in different regimes. I don't see why you can't get recovery for the same people in Canada that you get in the U.S. It's a different claim. It's almost like a section 10 versus a section 11 recovery.

TORPEY: One possibility is a European company that has a problem, and the U.S. shareholders sue in the U.S., but because of *Morrison*, the class gets limited to U.S. shareholders. Everybody else needs to go somewhere and the two global forums are Toronto and Amsterdam. Those are the courts that have shown some interest in litigating global classes.

As long as *Morrison* isn't changed legislatively, it is going to have some collateral consequence. If you're in Singapore and buy U.S. Steel on the Tokyo exchange, and U.S. Steel gets sued with a possibility of a big settlement, under *Morrison* you are excluded from that settlement. So where are those people going to go? If it can't be the U.S., where is it?

STONE: I don't think Canada will become the place where *Morrison*-prevented cases go to rest. And it's not necessarily the case that the world will have some court to go to when their claims are excluded from the U.S. because of *Morrison*. That court could spring up in Venezuela, but nonetheless people who get their judgment there will have to enforce it in the jurisdictions where they reside.

This case illustrates a trend for decades to come. There will be a rise of class cases, securities cases, and class securities cases in lots of jurisdictions worldwide with an increasingly global economy. A few years ago I spoke in Seoul about Korea's class action statute. It has not generated tons of cases, but in the right circumstance someone could sue a Korean company for a class action.

In Japan if you have been wronged because you bought on the Tokyo exchange, Nikko, then you have to follow Tokyo's rules or Japan's rules to validate the claim. It doesn't mean you have more remedy, but that you have to follow the rules where you live. Canada is developing their jurisprudence in this area just as I expect many countries will.

HERZINGER: Europe has been talking about class action systems for years, and none of that has taken a foothold. It's probably many years before the legislation is passed in any of those countries.

TORPEY: Mary [Blasy], what's the plaintiffs bar thinking about *Morrison* and what will they do about it?

BLASY: It was a huge deal when it came down. It hurt a lot of cases and left a lot of wreckage, but people have moved on. You take *Morrison* into consideration now when you bring cases. What can we do about it? Legislation is really the only way to go. This really threatens U.S. retirement savings. If you are CalPERS, can you really keep purchasing stock overseas? You have no protection under the U.S. securities laws now unless you purchase on a U.S. exchange.

HERZINGER: There's almost a premium in investing on U.S. markets because you have a remedy, depending on the market.

TORPEY: The reality is you don't always have a choice. There are some securities that you can buy only in the U.S., some only in Tokyo, and some you have a choice. ■

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