*Strathclyde Pension Fund Office*
*Managing the Local Government Pension Scheme in West Central Scotland*

**Administering Authority Glasgow City Council**

February 15, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File No. 4-617, Study on Extraterritorial Private Rights of Action**

Dear Secretary Murphy:

We are writing on behalf of the Strathclyde Pension Fund, a public pension administered under the authority of Glasgow City Council in Scotland, which invests in securities publicly traded throughout the world. We submit these comments in response to your October 25, 2010, release pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Our principal overarching comment is that any study to determine the extent to which private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act") should be extended to cover transnational securities fraud must be based upon scientific, technical or other specialized knowledge that will be helpful to Congress in soundly restoring meritorious Exchange Act claims where the alleged violation involves-

(1) Conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only non-U.S. investors; or

(2) Conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

*See* Dodd-Frank Act, Section 929P(b) (codifying the traditional "conduct" and "effects" test for claims brought by the Commission and the United States). The Commission should recommend that Congress extend extraterritorial jurisdiction for private litigants to assert the antifraud provisions of the federal securities laws.

While our comments are structured to address the issues and questions set forth in Section 929Y of the Dodd Frank Act, we also provide suggestions for conducting a study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud. The suggestions are largely framed by specific points identified in Release No. 34-63174 at 6-7. Any study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud will serve to corroborate for Congress that the traditional legal rationale for transnational securities fraud claims, when evaluated for federal subject matter jurisdiction under the conduct and effects requirements above, are sound, practical and just. By these comments we respectfully request that the

Commission recommend that Congress extend the extraterritorial scope of the antifraud private right of action under the Exchange Act to all investors who sufficiently state transnational securities
fraud claims and satisfy the conduct and effects requirements codified by Section 929P(b) of the Dodd-Frank Act.

## I. PRIVATE RIGHT OF ACTION FOR TRANSNATIONAL SECURITIES FRAUD SHOULD EXTEND TO ALL PRIVATE ACTORS WHO STATE A VALID CLAIM UNDER THE CONDUCT OR EFFECTS TEST

A study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud will provide adequate bases for the Commission to recommend that Congress extend the extraterritorial scope of the antifraud private right of action under the Exchange Act to investors who sufficiently state claims involving conduct or effects as codified in Section 929P(b) of the Dodd-Frank Act. An extraterritorial private right of action for securities fraud should extend to all private actors who sufficiently state the elements of the claim.

Transnational securities frauds became more common in the latter half of the 20th century. The federal courts were increasingly called upon to wrestle with the question of whether and under what circumstances such claims fall within the text and history of Section 10(b) of the Exchange Act. The Court of Appeals for the Second Circuit grappled with the question over an extended series of cases to "discern" under what circumstances "Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to [transnational] transactions." *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167, 170 (2008) (internal quotation marks omitted). Relying on opinions by Judge Henry Friendly, beginning in earnest with *Schoenbaum v. Firstbrook*, 405 F.2d 200, *rev'd on rehearing on other grounds*, 405 F.2d 215 (1968) (en banc), the Second Circuit settled on what is now well-known as the "conduct-and-effects" test. The U.S. Supreme Court overruled the test in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (adopting a transaction test). *See also Morrison*, 130 S. Ct. at 2889-90 (Stevens, J., concurring) (discussing history of conduct and effects test jurisprudence).

The effects test centered its inquiry on whether domestic investors or markets were affected as a result of actions occurring outside the United States. *See Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London,* 147 F.3d 118, 125 (2d Cir. 1998); *see also Psimenos v. E.F. Hutton & Co.,* 722 F.2d 1041, 1045 (2d Cir. 1983). The conduct test focused "on the nature of [the] conduct within the United States as it relates to carrying out the alleged fraudulent scheme." *Psimenos*, 722 F.2d at 1045.

Traditionally, the extraterritorial extension of the antifraud provisions of the Exchange Act required satisfaction of the conduct and effects test to affirmatively establish subject matter jurisdiction. This test asks "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Morrison*, 130 S. Ct. at 2889 (Stevens, J., concurring). *See, e.g., Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 10 (2d Cir. 1979).

Because it captures the substance of the conduct and effects test traditionally applied by federal courts considering the extraterritorial application of the securities fraud statutes, the conduct and effects language codified by Congress in Section 929P(b) of the Dodd-Frank Act presents practical language for any legislation proposed to extend the extraterritorial right of action to private litigants. Section 929P(b) of the Dodd-Frank Act captures within its provisions the tried and true jurisprudence of United States courts. The conduct and effects test inquiry focuses on whether the alleged wrongful conduct occurred in the U.S. or affects the U.S., not on who asserts the claim. The conduct and effects language is thereby consistent with the public policy that the law should be equally applied to all and, as such, extending the extraterritorial cause of action to all investors comports with traditional notions of fairness. Because federal courts have for decades been applying the same conduct and effects principles codified in Section 929P(b) of the Dodd-Frank Act, extending the extraterritorial cause of action to private litigants would not be difficult for federal courts to handle.

The conduct and effects provisions contained in Section 929P(b) of the Dodd-Frank Act, if extended to private litigants, would find useful application in circumstances presented on numerous occasions in federal courts before the *Morrison* decision, including circumstances where a private plaintiff asserts claims under the antifraud provisions of the Exchange Act with respect to a particular security that had been purchased or sold outside the United States. An example of this circumstance arose in the pre-*Morrison* case, *In re Bridgestone Sec. Litig.*, 430 F. Supp 2d 728 (M.D. Tenn. 2006); *see also*, *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005), in which a state pension system, the Iowa Public Employees Retirement System (IPERS), based in Des Moines, Iowa, was appointed to lead the case. Bridgestone, a Japanese corporation whose common stock traded on the Tokyo exchange, had unsponsored American Depository Receipts (ADRs) that traded "over the counter" through a telephone and computer network regulated by the National Association of Securities Dealers ("NASD"). Bridgestone's Firestone subsidiary, which was itself, along with its officers, a primary actor in the alleged fraud, operated in the U.S. Bridgestone filed with the Commission its annual report in English on Form 20-F. IPERS executed purchases of Bridgestone common stock on the Tokyo stock exchange through a United Kingdom-based investment manager. IPERS's investment guidelines governing its investment decisions were formulated in Iowa. While IPERS's Bridgestone purchases were executed in the Tokyo exchange. IPERS was permitted to proceed with the class claims alleged, because the alleged fraudulent conduct substantially occurred in the United States. The case settled for $30 million.

Similarly, in *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 356 (D.Md. 2004), non-U.S. investors who purchased Royal Ahold stock on a non-U.S. exchange were permitted to pursue their Exchange Act claims because the alleged fraudulent conduct substantially occurred in the United States. This case settled for over $1 billion. These cases demonstrate that the conduct test may fairly and efficiently be applied to cases involving a fraud that occurred in the U.S., regardless of whom the purchaser is or where she purchased her securities. Under *Morrison*, the meritorious fraud claims of common stock purchasers in both of these cases would have been dismissed merely because neither Bridgestone nor Royal Ahold common stock traded on a U.S.

exchange, leaving investors harmed by these two frauds without a remedy for over $1 billion in damages.

It should not make a difference whether the security was issued by a U.S. company or by a non-U.S. company, because the conduct and effects test looks to where the fraud occurred and to whether there were consequences of the fraud on the U.S. For the same reasons, it should not make a difference whether the security was purchased or sold on a non-U.S. stock exchange or whether it was purchased or sold on a non-exchange trading platform or other alternative trading system outside the United States. A private litigant should be entitled to assert a transnational securities fraud claim as long as she may establish a prima facie claim and that (1) conduct within the United States constitutes significant steps in furtherance of the violation, or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States. As Justice Stevens explained in his concurring opinion in *Morrison*, Section 10(b) "extends to transnational frauds only when substantial acts in furtherance of the fraud were committed within the United States, or when the fraud was intended to produce and did produce detrimental effects within the United States." 130 S. Ct. at 2893 (internal citations and quotation marks omitted); *accord Basic v. Levinson*, 485 U.S. 224, 230 (1988) ("The 1934 Act was designed to protect investors against manipulation of stock prices."). A private right of action for transnational securities fraud should extend to all private actors who state a valid claim under the conduct or effects test.

## II. PRIVATE RIGHT OF ACTION FOR TRANSNATIONAL SECURITIES FRAUD HAS YIELDED ROBUST DIPLOMATIC GROWTH IN INTERNATIONAL COMITY

While some may contend that extension of a private right of action under the Exchange Act to transnational securities frauds would harm international relations based on comity, such an argument fails to credit substantive jurisprudential history and data and that counsels otherwise. For example, in the *Bridgestone* securities fraud case litigated in the Middle District of Tennessee, the defendants argued that permitting the non-U.S. investors in the alleged class to participate would offend Japanese principles of comity. *E.g.*, *Bridgestone Sec. Litig.*, Master File No. 3:01-0017, Docket Entry 454 (Final Judgment); *Royal Ahold Sec. Litig.*, Civil No. 1:03-MD-01539, Docket Entry 695 (Order Certifying Class and Approving Settlement). The defendants argued that permitting non-U.S. investors who purchased the common stock of the Japanese company on the Tokyo stock exchange to proceed with their claim in a U.S. federal court would interfere with Japan's ability to independently regulate its own securities market. Neither we nor our counsel has uncovered a single instance where private securities fraud litigation on behalf of non-U.S. purchasers of non-U.S. securities on non-U.S. exchanges have ever been found to interfere with a non-U.S. sovereign's ability to independently regulate its own securities markets. *See, e.g.,* Makoto Ikeya and Satoru Kishitani, *Trends in Securities Litigation in Japan: 1998-2008*, NERA Economic Consulting Report (July 15, 2009). Indeed, the policy of the Exchange act -- to protect investors, the integrity of capital markets, and the ability to raise capital in public markets -- is identical with and parallel to the policies of market regulators worldwide, including Japan.

Many commentators on international comity confuse “judicial” sovereignty with the government’s “administrative” or “regulatory” sovereignty. But neither a government’s “administrative” nor “regulatory” sovereignty is implicated by private U.S. federal securities fraud cases. Under the laws of most non-U.S. sovereigns, the right of the sovereign to regulate corporations in connection with alleged wrongful course of conduct is not affected by private actions under the Exchange Act.

In addition, given that non-U.S. statutes of limitations for securities fraud claims tend to be shorter than the statute of limitations under U.S. law, private enforcement in the U.S. is often the only means by which investors purchasing stock on foreign exchanges may obtain a remedy for the harm caused by a wrongful course of conduct in the U.S. or affecting the U.S., even where a non-U.S. regulatory or administrative sovereign entity proceeds with its own action(s). In the *Parmalat* securities litigation, private claims were so adjudicated while regulatory or administrative proceedings were ongoing in both the U.S. and Italy; similarly private claims were adjudicated while regulatory or administrative proceedings were ongoing in the Netherlands in connection with the *Royal Ahold* securities litigation. Often there is simply no adequate alternative remedy available to make private investors whole for the economic harm they suffered as a result of a securities fraud emanating from the U.S. These factors have led to a robust respect for international relations based upon comity among judicial sovereigns, and non-U.S. investors have eagerly sought out the protections provided to them by the federal securities laws.

In nearly every jurisdiction of a non-U.S. sovereign, a judgment rendered in the United States will be *res judicata* and binding upon those non-U.S. class members who submit proof of their claim of the settlement proceeds in a U.S. class action, or who otherwise affirmatively participate in the U.S. securities fraud action. Where a non-U.S. court is convinced that the filling of a proof of claim may be deemed as the appearance of the non-U.S. class member in the U.S. class action, then the non-U.S. court will not consider it as contrary to the public policy of its judicial sovereignty. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007); *In re Vivendi Universal, S.A. Sec. Litig.*, 2009 WL 855799 (S.D.N.Y. March 21, 2009) (comparing and contrasting European jurisdictions). Furthermore, the submission of a proof of claim by a non-U.S. citizen or resident releasing the non-U.S. corporate defendant from future claims arising out of the conduct at issue in a case would be an effective release or waiver under the laws of the non-U.S. judicial sovereign. Transnational law experts from jurisdictions such as Japan, Germany, France, the United Kingdom, Italy, the Netherlands, and elsewhere have submitted sworn statements to this effect in cases before the federal courts prior to the *Morrison* decision. A non-U.S. court would simply not interfere with an investor’s right to choose to obtain a remedy in a private U.S. securities fraud case. We have not been able to identify any non-U.S. court decision involving a securities fraud that requires otherwise.

Under the conduct and effects test, the federal securities laws protect non-U.S. investors harmed by a securities fraud exported from the United States, even where the issuer is a non-U.S. issuer and the stock transactions are executed on a non-U.S. exchange. As such the conduct and effects test is designed to prevent the United States from being used as a manufacturing base for the export of fraud and deceit. The overarching policies of the United States and non-U.S. securities regulatory schemes in protecting investors and the integrity of capital markets counsel in favor of extending the conduct and effects test to private litigants. It is entirely appropriate for the federal securities laws to have extraterritorial application in situations demonstrating the export of fraud or deceit from the U.S. in the global securities markets, where there is substantial fraudulent conduct by top directors or executives in or throughout the United States, the direct effect of which caused harm to investors both in the U.S. and abroad.

That said, recent reforms proposed and enacted in non-U.S. jurisdictions have led some non-U.S. investors to consider pursuing their securities fraud claims outside the U.S., even before *Morrison*. But European and other international investors considering legal procedures outside the United States, including those in European, Canadian, Australian and Japanese jurisdictions, face significant hurdles not present in the pre-*Morrison* securities fraud jurisprudence in the U.S., particularly with regard to the burdensome "loser pays" rule in many non-U.S. jurisdictions, and the limitations on pretrial discovery. Criticisms of the U.S. class action procedures -- particularly those involving the "opt out" as contrasted with an "opt in" class mechanism -- has prevented other nations from embracing the U.S.-style class action securities fraud model in all respects. We submit that substantial hurdles to effective group adjudication of transnational securities fraud claims in forums outside the U.S., in light of the efficiently adjudication of such claims in the U.S. before the *Morrison* decision, counsels in favor of the extraterritorial extension of U.S. subject matter jurisdiction over securities fraud claims to private litigants.

For instance, the Netherlands in 2005 amended its Civil Code with the Dutch Act on the Collective Settlement of Mass Claims. While originally envisioned as a method for resolving large-scale torts, the Dutch Act does not provide for any pre-trial discovery. Thus, by itself this Act would not aid non-U.S. investors since the *Morrison* decision.

The amended Dutch law arguably worked to the advantage of Royal Dutch/Shell, which was facing a securities fraud class action pending in the United States District Court for the District of New Jersey when it negotiated the settlement with a Dutch shareholder association and other European investors, each of whom opted out of the U.S. class action in order to participate in the process under Dutch law. It is likely that there would have been a very different result in the Royal Dutch/Shell case before the Netherlands court if there was no threat posed by the then-pending U.S. class action asserting claims on behalf of all investors. Only if Congress were to restore extraterritorial subject matter jurisdiction to private litigants asserting transnational securities fraud claims could the progress in international comity continue to grow, because European and other international investors can use the pending threat of a United States class action to gain bargaining leverage with European defendants in non-U.S. jurisdictions like the Netherlands. Without that additional threat of suit, there simply is no opportunity for comity to be enhanced through securities litigation. The results of the *Royal Dutch/Shell* litigation demonstrate the increased mutual respect and comity between the U.S. federal court handling the claims brought by U.S. investors, on the one hand, and the Netherlands court handling claims settled by over 150 institutional investors in 17 European countries, Canada and Australia, on the other.

U.S. capital market competitiveness can significantly benefit from extension of the private right of action for securities fraud where the conduct and effects test may be satisfied. By doing so, Congress can offer competitive advantages to litigants seeking the most appropriate forum in which to have their transnational securities fraud claim addressed. The *Morrison* decision, which overruled the conduct and effects test that provided the basis for such bargaining power, closed the door on these investors from seeking relief in U.S. courts. After *Morrison*, the characteristics of litigation in other forums, such as the "loser pays" rule, which disenfranchises investors from pursuing their meritorious fraud claims in the United Kingdom and elsewhere, leave investors to bear the economic burdens of securities fraud on their own. Where a transnational securities fraud results from conduct in the United States, fairness strongly counsels in favor of extending extraterritorial jurisdiction for Exchange Act claims to all private litigants who can sufficiently state a claim.

In a remarkable demonstration of comity between a non-U.S. court and a U.S. court, a U.S. securities fraud case in which Vivendi lost the liability phase of the securities jury trial and subsequently lost an attempt to obtain an order from a French court to bar French investors from the U.S. class action, Judge Jean-Claude Magendie of the Court of Appeals of Paris ruled on April 28, 2010 that Vivendi may not block French investors from participating in the U.S. class action lawsuit. The *Morrison* decision has disenfranchised the French investors from doing what had been diplomatically authorized in mutual comity by the U.S. and the French courts presiding over the litigation. Additionally, coordination between the U.S. federal court and the Italian courts handling the fraud claims associated with the Parmalat bankruptcy demonstrates how the global ramifications of a transnational securities fraud may be handled by U.S. and non-U.S. courts with the highest degree of comity and mutual respect.

Any study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud will serve to corroborate for Congress that a private right of action for transnational securities fraud has demonstrably yielded robust diplomatic growth and progress in international judicial comity. The extraterritorial extension of subject matter jurisdiction to private litigants asserting meritorious transnational securities fraud claims that satisfy the conduct and effects test codified in Section 929P(b) of the Dodd-Frank Act assures those interested in international comity that the U.S. will protect them from economic harm for transnational frauds that emanate from the U.S.

## III. ECONOMIC BENEFITS OUTWEIGH COSTS OF EXTENDING A PRIVATE RIGHT OF ACTION FOR TRANSNATIONAL SECURITIES FRAUDS

From former President George W. Bush's call for "truthful books, honest people and well enforced laws against fraud and corruption," to former Senator Paul Sarbanes' admonition that "unless we come to grips with the crisis in accounting and corporate governance, we run the risk of seriously undermining our long-term world economic leadership," corporate governance and antifraud reforms in the U.S. provide stronger deterrence to corporate corruption and malfeasance. To hold violators accountable for harm they cause investors is increasingly necessary. The U.S. federal securities laws have always promoted transparency and reliability in corporate reporting, the *sine qua non* of value for long term investors and others who depend on information publicly reported by public corporations and their agents.

Any study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud will serve to corroborate for Congress that a private right of action for transnational securities fraud has demonstrably yielded more valuable economic benefits than costs. This conclusion provides multiple bases for expanding extraterritorial jurisdiction to private litigants asserting meritorious transnational securities fraud claims where they can establish the conduct and effects test codified in Section 929P(b) of the Dodd-Frank Act.

Throughout the modern history of capital markets there has been a debate about the scope of regulation and its impact on U.S. capital market competitiveness in a global economy. Duke Law School professor James D. Cox has described the debate in recent years as indicating an “escalation of the culture war on regulation.” But there is data that can be used to distinguish factors increasing costs from those increasing economic benefits. This data demonstrate that the economic stability and certainty that flow from the regulatory scheme that has been in place for decades under U.S. law yields both increased U.S. market competitiveness as well as increased benefits to the U.S. economy. The data also show that non-U.S. investors are willing to pay the court costs associated with protections afforded by the federal securities laws and their traditional extraterritorial extension to private litigants through a conduct and effects test for subject matter jurisdiction. The ability of those investors to retain competent counsel to advocate their fraud claims in federal courts on a contingent fee basis -- a uniquely U.S. practice -- is largely to credit for this valuable phenomenon.

A Governmental Accounting Office (GAO) report concerning financial restatements is illustrative. The GAO identified over 1,750 financial restatement announcements during a four year period from 2002 to 2006. It found that the number of public companies announcing financial statement restatements rose by about 67 percent since passage of the Sarbanes-Oxley Act. The GAO concluded that a variety of factors contributed to the increased trend in restatements, including “increased accountability requirements on the part of company executives; increased focus on ensuring internal controls for financial reporting; increased auditor and regulatory scrutiny (including clarifying guidance); and a general unwillingness on the part of public companies to risk failing to restate." The primary reasons for restatements were to correct errors in accounting and reporting revenue, costs or expenses.

Commenting on the GAO report, Charles D. Niemeier, a member of the Public Company Accounting Oversight Board, explained:

> Many of these restatements are attributed to errors identified in companies’ and auditors’ examination of the effectiveness of internal controls.... Indeed, the number of restatements in 2005 reached a record level. While troubling, it is, at the same time, a positive sign that, working with their auditors, companies are getting their accounting on the right path.

In a speech in Sao Paolo, Brazil, Mr. Niemeier explained that by the late 1990s, audits were perceived to be “compliance obligations as opposed to the linchpin of reliable financial reporting.” He explained that weaknesses in controls over corporate accounting and financial reporting allowed managers "free reign [sic] to manipulate results as reported to investors." Mr. Niemeier explained that the regulatory regime for U.S. capital markets was designed to restore the transparency and reliability of financial statements and disclosures as a basis on which investors could make informed decisions, thereby restoring investor confidence in the integrity of financial and accounting information available in the capital markets.

Commenting on the contention that increased regulation has discouraged companies from tapping U.S. capital markets, Mr. Niemeier pointed out that the "greatest costs companies listing in the U.S. face are not compliance costs but rather are underwriting fees. The facts appear to confirm the continued attraction of U.S. markets to companies, because of the significant valuation premium for companies that can meet the requirements of U.S. listings.” Niemeier says that New York Stock Exchange estimates peg the valuation premium at 30 percent. Similarly, a University of Pennsylvania Wharton School of Business study found that companies from countries with more extensive disclosure requirements, stronger securities regulation, and stricter enforcement mechanisms have a significantly lower cost of capital. Christianna Wood, a senior investment officer at the California Public Employees’ Retirement System, told Reuters that the cost of capital for companies listing their stock in the U.S. is 7 percent less than abroad, and valuations are at a 13 percent premium. As a result, “the U.S. share of worldwide IPOs actually has increased since 2001,” former SEC Commissioner Annette L. Nazareth told *Newsweek*, adding that regulation, including Sarbanes-Oxely, “has not harmed our ability to compete but rather is viewed by other countries as providing valuable investor protections.” We agree with this conclusion, and extension of the conduct and effects test codified in Section 929P(b) of the Dodd-Frank Act will restore those “valuable investor protections” that *Morrison* overruled.

While the short-term view may seem like a swinging pendulum of public policy, investor confidence and corporate initiative, the transparency and reliability of U.S. corporate governance systems, accounting and financial reporting standards, and related requirements for internal control structures, over time, lead to the kind of growth in value that is desired by long-term investors, who depend on clear and reliable financial reporting. That transparency and reliability is precisely what has enabled the U.S. to enjoy its long term economic leadership in the global markets. A philosophy of transparency through accurate disclosure -- which is embedded in the federal securities laws -- is the key driver towards ensuring that U.S. capital markets continue that leadership for years to come.

As Kevin LaCroix reported in the *D&O Diary*: "Securities suits against non-U.S. companies have in recent years been a significant part of overall securities lawsuit filings in recent years. For example, 24 (or 12.7%) of the 2009 securities lawsuit filings involved companies that are domiciled outside the United States. In 2008, there were 34 non-U.S. domiciled companies sued in securities class action lawsuit, or about 15% of all filings that year." LaCroix continued: "Given what a significant percentage of total U.S.-based securities class action filings these actions against non-U.S. companies have become in recent years, the reduction in these filings could mean a material reduction in the overall level of securities class action filings. … The fact that investors who bought shares on non-U.S. exchanges can no longer access U.S. courts [since *Morrison*] clearly creates a problem for these investors. As the filing levels … demonstrate, these investors increasingly had come to rely on the U.S processes and remedies as a way to seek redress when they felt they had been misled, at least where the alleged fraud involved U.S.-based conduct." Numerous non-U.S. institutional investors had filed *amicus curia* briefs in the *Morrison* case, arguing that both non-U.S. and domestic investors alike rely on American law to ensure that corporations doing business in America are not tainted by fraud.

Importantly, United States federal courts as a preferred forum for aggrieved investors to pursue securities fraud claims over European and other non-U.S. jurisdictions bring substantial economic benefits into the United States. *See, e.g.,* Kathleen R. McNamara, *Does Money Make the State? Political Development, the Greenback, and the Euro* (November 2003) (U.S. federal courts "crucially aided" establishment of U.S. capital markets and play "key role" in growth of trade) (citing Freyer, Tony Allan, *Forums of Order: The Federal Courts and Business in American History* (1979) (Greenwich, CT: JAI Press)). LaCroix explained that pre-*Morrison*, "the clear advantages to proceeding in U.S. courts under the U.S. securities laws, [made] aggrieved non-U.S. investors ... likely to continue to attempt to pursue their claims in U.S. courts, as long as and to the extent that U.S. relief and remedies are available to them." U.S. courts offer claimants, including those located outside the U.S., with advantages. For example, LaCroix explained: "the U.S. lacks a loser pays rule; it allows contingency fees; it uses a jury system for civil cases; and it has a well recognized and understood class action mechanism. It also has a highly motivated, entrepreneurial plaintiffs bar. Its courts recognize the fraud on the market theory, which spares claimants from having to prove that they relied on alleged misrepresentations." Extending the conduct and effects test codified in the Section 929P(b) of the Dodd-Frank Act would re-open the doors of U.S. courts to continue that good business of adjudicating justice.

With commentators like LaCroix noting that "the movement toward the development of collective remedies in jurisdictions outside the U.S. is now well-established and the Dutch Court's approval of the Shell settlement undeniably represents another step in support of that movement," extending the conduct and effects test of Section 929P(b) of the Dodd-Frank Act to private investors would protect the business of U.S. courts and ensure that the services long available to all investors harmed by a fraud manufactured in the U.S. or effecting the U.S. continue to be made available in an increasingly competitive global market. The economic benefits far outweigh any costs of extending a private right of action for transnational securities frauds as requested herein.

## IV. THE CONDUCT AND EFFECTS STANDARD FOR EXTRATERRITORIAL JURISDICTION SET FORTH IN SECTION 929P(B) OF THE DODD-FRANK ACT SHOULD BE EXTENDED TO PRIVATE LITIGANTS

In a September 15, 2010, preliminary study entitled *Fraud-On-The Market Class Actions Against Non-U.S. Issuers*, Columbia Law School professor Merritt B. Fox demonstrated that the transnational reach of the private antifraud cause of action under the Exchange Act, traditionally implemented through application of subject matter jurisdiction jurisprudence in the federal courts, reflected by the conduct and effects test substantially codified in Section 929P(b) of the Dodd Frank Act, has focused on a fact-bound evidentiary inquiry into whether the cause of action "reaches any particular transnational situation where there is some kind of conduct in the United States or some kind of effect." The circumstances considered under the conduct and effects test traditionally depended on a number of factors, according to Professor Fox, including "whether the issuer registered its securities under the Exchange Act, whether, in an effects case, there was some U.S. conduct or whether, in a conduct case, there were some U.S. effects, whether documents containing the alleged misstatements were sent from abroad to the plaintiffs in the U.S. in a case focusing on effects or vice versa on a case focusing on conduct, and where the transaction was effected." Professor Fox's stated that "the conduct and effects test approach has been reasonably workable for traditional fraud cases." Professor Fox concluded that extraterritorial extension of the private right of action under the Exchange Act using the conduct and effects test has been "reasonably workable in terms of the interaction with other legal systems in the world." A study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud will serve to corroborate the historical jurisprudence demonstrating that U.S. courts are capable of fairly handling the issues relating to transnational fraud without great difficulty.

Since *Morrison* was decided, a number of cases have been dismissed on the grounds articulated in the Supreme Court's opinion; pending claims have also been challenged based on the *Morrison* decision. *See* Exhibit A annexed hereto. Numerous cases commenced before *Morrison* would likely not have been brought or maintained in light of *Morrison*. *See* Exhibit B annexed hereto. These cases resolved hundreds of millions, if not billions, of dollars of damages claims, disbursed under the authority of the U.S. courts to investors around the globe. There are many citizens of nations around the world who, but for the *Morrison* decision, would otherwise seek the reliable and open system of justice offered in the U.S. federal courts. A study to determine the extent to which private rights of action under the Exchange Act should be extended to cover transnational securities fraud must be based upon verifiable, objective evidence and scientific data. The conduct and effects test for subject matter jurisdiction has traditionally provided a rationale, consistent with the philosophy of transparency through disclosure at the heart of the U.S. securities laws, by which federal courts have justly and efficiently determined transnational securities fraud claims.

To be sure, the federal antifraud provisions of the Exchange Act have played an important role in protecting the integrity of the capital markets in the U.S. and around the world. The conduct and effects standard for extraterritorial jurisdiction set forth in Section 929P(b) of the Dodd-Frank act should be extended to private litigants.

Very truly yours,

Richard Keery
Investment Manager
Strathclyde Pension Fund
PO Box 27001
Glasgow
G2 9EW