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VIA E-MAIL: rule-comments@sec.gov

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number 4-617

Dear Ms. Murphy:

We are pleased to submit this letter in response to a request of the Securities and Exchange Commission (the "Commission") for comments on its Study on Extraterritorial Private Rights of Action (Release No. 34-63174; File No. 4-617) (the "Release").

Pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the Commission is soliciting public comments on whether and to what extent the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act") should be extended to private rights of action in cases of transnational securities fraud involving (1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States. The Commission is also soliciting comments on related questions.

We believe the Commission should not extend private rights of action under the antifraud provisions of the Exchange Act to cases of securities fraud where the securities were purchased or sold outside of the United States. This should be the case regardless of whether the security was issued by a U.S. company or foreign private issuer[1]; purchased by a U.S. or non-U.S. person; or purchased or sold on a foreign stock exchange or foreign alternative trading platform. Instead, we propose that the Commission adopt the bright-line "transactional" test enunciated by the Supreme Court in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), where private rights of action are only allowed in connection with the purchase or sale of a security listed on a U.S. stock exchange, and the purchase or sale of any other security in the United States.

Our position is based on a number of considerations and factors, including:

[1] As defined in Rule 405 of the Securities Act of 1933.

- **Extending private rights of action to non-U.S. markets will undermine the development of remedial structures for securities fraud in those markets; and**

- **International relations between the United States and foreign countries would suffer, and this in turn would impede cooperation in developing class action remedial structures in foreign jurisdictions.**

I. We Oppose the Extension of Private Rights of Action to Transnational Securities Fraud

We advise foreign and U.S. corporations and financial institutions on a wide range of public and private securities offerings in the United States and globally. Some of our foreign private issuer clients do not list their shares or ADRs on a U.S. stock exchange or otherwise sell their securities in the United States, but nonetheless conduct business in the United States. Our clients are understandably concerned that they will be exposed to a greater risk of litigation in the United States if private rights of action are allowed under the Exchange Act for cases of alleged securities fraud involving or on behalf of investors who have not traded on any U.S. exchange or in the U.S. market.

They are concerned for good reason. The frequency of securities class action filings against foreign private issuers has increased from 6.8 percent of total filings during the period 1997 through 2003, to 13.3 percent of filings during the period 2004 through 2008.[2] In 2008, there were 31 filings associated with foreign private issuers, the highest number up to that date, and the upward trend continued in the first half of 2009 with 18 filings against foreign private issuers, or 20.7 percent of the total.[3] This is all the more noteworthy since the share of foreign private issuers listed on the NYSE and NASDAQ has actually decreased from 13.3 percent to 10.7 percent between 2002 and 2008.[4]

Settlements of such claims also have increased in cost. Between 2008 and 2009, both the value and the number of securities class action settlements increased. The total value of settlements in 2009 came to $3.8 billion, representing an increase of 35 percent from 2008.[5]

These trends adversely affect the competitiveness of the U.S. capital markets and the U.S. economy by discouraging companies from having any U.S. securities connections. They also put a strain on international relations between the United States and foreign countries and stifle the development of remedial structures in foreign countries, points which are discussed in more detail in Part II below.

Rather than adopt a new "conduct and effects" test, which would make room for private rights of action, we suggest the Commission adopt the bright-line "transactional" test outlined in *Morrison*, where, barring actions brought by the Commission and the United States, Section 10(b) of the Exchange Act permits claims only "in connection with the

[2] Securities Class Action Filings – 2009 Mid-Year Assessment, Cornerstone Research, p.7.
[3] *Id.*, p.7.
[4] *Id.*, p.7, citing NYSE facts and figures from 2002 through 2008 and NASDAQ foreign listing information from 2002 through June 2008.
[5] Securities Class Action Settlements - 2009 Review and Analysis, Cornerstone Research, p.1.

purchase or sale of a security listed on a U.S. stock exchange, and the purchase or sale of any other security in the United States."[6] It is a straightforward test that would be easy to administer and would relieve the concerns of foreign companies that do not sell their securities in the United States. As noted by the Supreme Court in *Morrison*, the conduct and effects tests were widely criticized and yielded unpredictable and inconsistent results. *See Morrison,* 130 S. Ct. at 2880-81. There will be no way for a "new" conduct and effects test to avoid the same pitfalls, which would be a step backward to the era of uncertainty as to what conduct would constitute a violation.

II. Extending the Scope of the Antifraud Provisions to Private Rights of Action Treads on the Principle of International Comity

Extending the scope of the antifraud provisions to private rights of action treads on the principle of international comity and leads to a deterioration of bilateral relations between the United States and foreign countries regarding securities regulation. Such private rights of action are seen as inappropriate and intrusive and undermine bilateral cooperation between the United States and foreign countries. As argued in the *Amicus Curiae* brief of the United Kingdom of Great Britain and Northern Ireland in *Morrison*, "nations have a strong interest in regulating their own capital markets, developing disclosure rules to govern their own issuers, deciding how and when class action shareholder litigation should occur and determining the penalties for violations of such laws."[7] This view is echoed in the related *Amicus* briefs of the Government of The Commonwealth of Australia and of the Republic of France, which also voice concern over the extraterritorial reach of United States jurisdiction.[8]

Rather than extend the scope of the antifraud provisions, and run the risk of making the United States "the Shangri-La of class-action litigation" (*Morrison*, 130 S. Ct. at 2886), the Commission should be looking at ways to help other nations expand investigative powers and develop their own remedial structures so as to better cooperate with U.S. efforts to improve the operation of the global securities markets. European class action litigation, for example, is currently in the early stages of evolution and the Commission should be focusing its efforts on working with European governments to help them develop class actions and other remedial structures so that aggrieved shareholders there may be afforded the same remedies as those available in the United States.[9]

Indeed, the Commission has a strong record of success in international cooperation with foreign securities regulators and foreign governments, and this success can be repeated

[6] *Morrison*, 2010 WL 2518523, at *14

[7] Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents, p. 22, *Morrison v. National Australia Bank*, S. Ct. 2869 (2010).

[8] See Briefs of the Government of The Commonwealth of Australia and the Republic of France as *Amici Curiae* in Support of the Defendants-Appellees and Respondents, respectively, in *Morrison v. National Australia Bank*, S. Ct. 2869 (2010).

[9] *In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571, as an indication of the various stages of development of class action litigation in Europe, the United States District Court for the Southern District of New York held on March 22, 2007 that foreign investors from France, England and the Netherlands, but not from Germany and Austria were eligible to participate in and be bound by the securities class action brought in the U.S. courts. One important factor in deciding which investors from which countries were allowed to join the class was whether the courts of that foreign country would likely enforce a U.S. judgment.

with assisting foreign governments develop class action litigation in their own countries.[10] The international agreements reached have resulted in a movement towards worldwide convergence of securities regulation at least among industrialized countries, where a degree of harmonization and best practice has been adopted.

If the Commission were to now recommend extending the scope of the antifraud provisions to private rights of action, it would (i) alienate foreign governments and cause them to build up walls against the extraterritorial nature of U.S. jurisdictional reach, just at a time when greater international cooperation is needed to respond to the globalization of the international capital markets, (ii) continue to encourage transnational securities litigation to migrate to the United States, where the environment is friendlier to litigation, and (iii) thwart the development of class action litigation in foreign jurisdictions, in particular in Europe.

III. Purchases or sales of securities "in the United States" in the context of Rule 144A securities

The Commission has asked for comments on the criteria for determining where a purchase or sale can be said to take place in various transnational securities transactions. In this regard we believe the complexity and globalization of the capital markets makes this question hard to answer in plain terms.

A large part of our practice outside of the United States centers on advising issuers and underwriters in the very active European and Asian Rule 144A/Regulation S debt markets. In a typical European high-yield bond transaction, for example, the issuance of the bond is conceptually split into two parts by U.S. securities practitioners: the first "sale" is made as a private placement to the underwriters under Section 4(2) of the Securities Act, and then the bonds are immediately resold by the underwriters to investors pursuant to Rule 144A or Regulation S of the Securities Act, depending on whether the institutional investors are U.S. persons or located in the United States, or are not.

As you know, investors are often solicited by way of any number of physical "road show" meetings, which can take place all over the world, but are typically centered in locations with large numbers of institutional investors (New York, Boston, Edinburgh, London and Frankfurt, for example). "Net roadshow" recordings are also increasingly commonplace, whereby a roadshow presentation is recorded and a screened set of investors are given access to the presentation. Other investors known to the underwriters may simply invest without either attending a physical roadshow presentation or accessing the net roadshow presentation online.

[10] In 2002, the International Organization of Securities Commissions (IOSCO) created a Multilateral Memorandum of Understanding (MMOU), the first global multilateral information-sharing arrangement among securities regulators. Then there are the Commission's bilateral Memoranda of Understanding (MOUs) with the securities authorities of 20 different countries, including the United Kingdom, France, Germany, Hong Kong and Japan. In 2008, the Commission signed a Mutual Recognition Agreement with Australia, which "provides a framework for the SEC, the Australian government, and ASIC [the Australian securities regulator] to consider regulatory exemptions that would permit U.S. and eligible Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need for these entities (in certain aspects) to be separately regulated in both countries." (Commission press release, SEC, Australian Authorities Sign Mutual Recognition Agreement, August 25, 2008).

What is consistent about all of the approaches described above is that, regardless of where these meetings (or lack thereof) take place, investors do not become committed to purchase the bonds at this time. Rather, the "time of sale" for Securities Act liability purposes takes place at the so-called "pricing" of the bonds, at which their price is set and trades and allocations are confirmed with investors. The investors could be anywhere in the world at this point, with the relevant underwriters confirming the trades sitting at their desks in a major financial center (New York or London).

As for secondary trades, high yield bonds in particular are nearly always listed, but these listings are typically made on securities exchanges where the bonds do not actually trade (largely, the so-called "exchange-regulated" markets of the Luxembourg Stock Exchange and the Irish Stock Exchange, and, in the case of Asian issues, the Singapore Stock Exchange). Secondary trades thus occur over-the-counter and are typically confirmed by phone by way of inter-broker dealers—they do not take place via the facilities of a stock exchange in any traditional sense.

Applying *Morrison,* it is fair to say that none of these activities should be deemed to occur in the United States because none involves the purchase or sale of a security "*in the United States*":

- No U.S. exchange is required to process the transaction; and
- With respect to the initial sale of a Rule 144A debt security to investors, it is easy to determine whether a roadshow meeting took place in the United States or not. However, the relevance of a roadshow meeting to the *Morrison* analysis is not clear, since the "time of sale" (the time of the actual transaction for liability purposes) occurs after the roadshow meeting.

The question is thus really whether the location of the buyer or the seller should be the relevant criteria for determining whether a plaintiff has a private right of action under Section 10(b)—when (particularly in the case of a seller in an initial sale of a Rule 144A debt security) that location could be manipulated (one can easily imagine a scenario in which underwriters simply confirmed all such trades using sales desks in London or other locations outside of the United States, thus limiting their exposure to liability). It is also worth noting that U.S. courts generally have held that initial sales are not into an efficient market such that the so-called fraud-on-the-market exception should apply to allow plaintiffs to presume reliance by the class on some set of information. Accordingly, and given the problems associated with attempting to assign a "location" to modern securities transactions, we would suggest that the Commission eschew anything other than a bright line rule regarding where Rule 144A offerings are deemed to occur.

IV. Conclusion

We believe the Commission should not extend private rights of action under the antifraud provisions of the Exchange Act to cases of securities fraud where the securities were purchased or sold outside of the United States because of the likely negative outcomes. New conduct and effects tests will take us back to an era of unpredictable and inconsistent court decisions, whereas the bright-line "transactional" test in *Morrison* that we recommend is preferable for its simplicity and consistency.

In addition, allowing private rights of action in cases of securities fraud in non-U.S. markets will undermine the development of remedial structures for securities fraud in those markets and cause litigation to migrate to the United States. International relations between the United States and foreign countries would suffer, and this in turn would impede cooperation in developing class action remedial structures in foreign jurisdictions.

Lastly, with regard to where a purchase or sale can be said to take place, we note that in the context of Rule 144A securities, location can be easily manipulated and we would suggest that the Commission eschew anything other than a bright line rule regarding where Rule 144A offerings are deemed to occur.

* * *

We appreciate the opportunity to comment on the Release and would be pleased to discuss any questions the Commission or its staff may have about this letter. Please do not hesitate to contact Owen Pell in our New York office at +1 212 819 8891 or opell@ny.whitecase.com.

Very truly yours,

White & Case LLP

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