February 18, 2011

Via Electronic Delivery

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

Attention: Comments

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

Dear Ms. Murphy:

The Clearing House Association L.L.C. ("*The Clearing House*"),[1] the Institute of International Bankers ("*IIB*"),[2] and the ABA Securities Association ("*ABASA*")[3] appreciate the

[1] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing – through regulatory comment letters, amicus briefs and white papers – the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer and check-image payments made in the U.S. *See* The Clearing House's web page at www.theclearinghouse.org for additional information.

[2] The IIB's mission is to help resolve the many special legislative, regulatory, tax and compliance issues confronting internationally headquartered banks operating branches and agencies and bank and broker-dealer subsidiaries in the United States. Collectively, the U.S. operations of internationally headquartered banks contribute significantly to the U.S. economy and to the depth, liquidity and vitality of the U.S. financial markets.

[3] The American Bankers Association (the "ABA") represents banks of all sizes and charters and is the voice of the nation's $13 trillion banking industry and its 2 million employees. ABASA is a separately chartered affiliate of the ABA that represents those holding company members of the ABA that are actively engaged in capital markets, investment banking, and broker-dealer activities.

opportunity to provide comments to the Securities and Exchange Commission (the "*Commission*") in response to the Commission's Request for Comments in connection with its study, pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("*Dodd-Frank*"), regarding whether private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "*Exchange Act*") should be extended to cover alleged fraud in connection with overseas securities transactions.

Executive Summary

In *Morrison* v. *National Australia Bank*, the United States Supreme Court held that the antifraud provisions of Section 10(b) of the Exchange Act do not apply to purchases of securities of foreign issuers by foreign plaintiffs made outside the United States ("foreign-cubed" claims).[4] In so holding, the Court discarded the multi-factored "conduct" and "effects" tests that had previously been used by lower courts to assess whether U.S. courts should exercise subject matter jurisdiction over extraterritorial securities transactions. In its place, the Supreme Court announced a new "transactional" test that limits Section 10(b) actions to claims based on purchases or sales of securities that occur in the United States.[5]

Morrison did not address the authority of the Commission to bring enforcement actions.[6] Section 929P of Dodd-Frank, however, subsequently provided that U.S. courts have subject matter jurisdiction over enforcement actions brought by the Commission and/or the Department of Justice against (i) persons taking "significant steps [in the United States] in furtherance of the [securities law] violation, even if the securities transaction occurs outside the United States" and (ii) persons engaging in "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[7] In doing so, Section 929P followed the language used by the lower courts when formulating the "conduct" and "effects" tests that were discarded by *Morrison*.[8] Dodd-Frank also directed the Commission to conduct a study to determine whether the standards governing enforcement actions brought by the

---

4 130 S. Ct. 2869 (2010).

5 Although *Morrison* addressed only claims brought under the Exchange Act, its logic extends to private actions brought under the Securities Act of 1933 as well. *See*, *e.g.*, *Axelrod & Co.* v. *Kordich & Neufeld*, 451 F.2d 838, 842 (2d Cir. 1971) ("[T]he two Acts are considered *in pari materia* and should be construed together as one body of law."); *In re Royal Bank of Scotland Group PLC Sec. Litig.*, No. 09 Civ. 300, slip op. at 24-26 (S.D.N.Y. Jan. 11, 2011) (applying *Morrison* to dismiss claims brought under the Securities Act).

6 *Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring in the judgment).

7 Pub. L. 111-203, § 929P, 124 Stat. 1376, 1864-65 (2010).

8 *See*, *e.g.*, *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983).

Commission should also govern private rights of action, and then report the findings and recommendations of that study back to Congress.[9]

We believe that the Commission should recommend to Congress that it not expand the Exchange Act's private right of action to purchases and sales of securities that occur outside the United States, because such an expansion would, (i) threaten to superimpose U.S. law on securities markets governed by legal and regulatory systems that have substantive and procedural rules that differ from those of the United States, (ii) discourage foreign issuers from listing their shares in the United States, and (iii) recreate the same fundamental uncertainties that existed under the "conduct" and "effects" tests. (*See infra* Section I.) To the extent that U.S. laws should be imposed on purchases and sales of securities outside the United States, we believe that the Commission and the Department of Justice are better suited than private plaintiffs to consider the impact and appropriateness in a particular case of such imposition on international comity and the U.S. capital markets.

We also would like to take this opportunity to express our view that, under the Supreme Court's decision in *Morrison*, the Exchange Act's private right of action does not cover any purchase or sale of a security conducted outside the United States, regardless of whether (i) the issuer also lists that class of securities on a U.S. exchange, or (ii) the purchaser is a citizen or resident of the United States. Post-*Morrison* courts have unanimously interpreted Section 10(b) in this way. (*See infra* Section II.)

Discussion

I. Important Policy Considerations Favor Limiting the Exchange Act's Private Right of Action to Securities Purchased in the United States.

Three policy considerations undergird our view that private rights of action under the antifraud provisions of Section 10(b) should not be available for purchases of securities outside the United States.

First, permitting private rights of action under the antifraud provisions of Section 10(b) for purchases of securities outside the United States risks substantial interference with foreign securities regulation. As the Supreme Court noted, securities regulation differs from country to country, both substantively and procedurally: "regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters."[10] For example, under U.S. securities law, plaintiffs can rely on the "fraud on the market" theory, instead of showing direct reliance, in order to bring claims based on alleged material misstatements or

---

[9] Pub. L. 111-203, § 929Y, 124 Stat. 1376, 1871 (2010).

[10] *Morrison*, 130 S. Ct. at 2885.

omissions in a company's financial statements.[11] In the United Kingdom, by contrast, plaintiffs must show direct reliance on such statements or omissions, a rule that is designed to reduce the risk of (i) "unmeritorious claims for large sums" and (ii) "defensive and bland reporting."[12] In addition, few countries permit U.S.-style opt-out class actions as a means of private enforcement of the securities laws,[13] and many nations follow the "English rule" requiring the losing party to pay the other's attorney's fees[14]—both reflecting important procedural differences among regimes.

Recognizing these differences, the Supreme Court rested its decision in *Morrison*, in part, on the "complain[ts]" of "interference . . . that application of § 10(b) abroad would produce" expressed by numerous *amici* foreign governments—the United Kingdom, Australia, France, and Switzerland—and trade organizations.[15] In light of these important considerations of international comity, the decision whether and how to proceed in an enforcement action would be best left to the discretion of the Commission, as opposed to private plaintiffs, who are "often . . . unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government."[16]

Second, like the Supreme Court, we are concerned that applying U.S. securities law and U.S. class action procedures to foreign issuers would bolster the United States'

---

[11] *See Basic* v. *Levinson*, 485 U.S. 224, 241-47 (1988).

[12] Brief of the U.K. of Gr. Brit. and N. Ire. as *Amicus Curiae* in Support of Respondents, *Morrison* v. *Nat'l Austl. Bank Ltd*., 130 S. Ct. 1869 (2010) (No. 08-1191), 2010 WL 723009, at *17 ("UK *Amicus*"); *see also* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 61 (2007) (noting that "the United States is unusual in recognizing presumed reliance based on the fraud on the market theory, rather than requiring investors to prove actual reliance on misleading information").

[13] *See*, *e.g.*, Stephen J. Choi & Linda J. Silberman, *Transnational Securities Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 484 (2009) (noting that "only a few other countries have adopted class-action mechanisms for securities violations").

[14] *See*, *e.g.*, Stefano M. Grace, *Strengthening Investor Confidence in Europe*, 15 J. Transnat'l L. & Pol'y 281, 289 (2005) ("The 'English rule' is the predominant rule in Europe, and only one EU member state, Luxembourg, has rejected the rule requiring each party to pay their own litigation costs similar to the American approach.").

[15] *See Morrison*, 130 S. Ct. at 2885-86; *see also* UK *Amicus*; Brief of the Gov't of the Commonwealth of Austl. as *Amici Curiae* in Support of Defendants-Appellees, 2010 WL 723006; Brief for the Republic of Fr. as *Amicus Curiae* in Support of Respondents, 2010 WL 723010; Brief of the Int'l Chamber of Commerce et al. as *Amicus Curiae* in Support of Respondents at App'x A (Swiss Diplomatic Note No. 17/2010), 2010 WL 719334, at *3a.

[16] *Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J., concurring in the judgment) (internal quotation marks omitted).

reputation as "the Shangri-La of class action litigation."[17] Hundreds of foreign issuers currently list their ordinary shares or American Depositary Receipts on U.S. exchanges, but even prior to *Morrison*, these issuers were rapidly leaving U.S. capital markets, in large part because of fear of private antifraud litigation. For example, between June 2007, when the Commission amended its rules to remove barriers to delisting, and June 2009, 15 out of 27 French companies registered in the United States at the end of 2005 had delisted, as had 19 of 44 United Kingdom companies, 7 of 20 German companies, 6 of 11 Italian companies, and 15 of 24 Australian companies.[18] In addition to losing these foreign issuers, the U.S. capital markets are also failing to attract new foreign issuers: the U.S. percentage of global IPOs, which is widely viewed as an indicator of capital markets competitiveness, has rapidly decreased in the last ten years, with the United States capturing a meager 2.7% of global IPO activity in the first quarter of 2010.[19] As Professor John Coffee has noted, "while the press and others attribute the growing disenchantment of foreign issuers with the U.S. market to the Sarbanes-Oxley Act, closer analysis and interview data suggests that fear of U.S. private antifraud litigation may be the better explanation [for the flight of foreign private issuers from U.S. markets]."[20] Professor Coffee's views are shared by Senator Charles Schumer and Mayor Michael Bloomberg, who have likewise concluded that "the increasing extraterritorial reach of U.S. law and the unpredictable nature of the legal system were . . . significant factors that caused New York to be viewed negatively" by business leaders.[21]

Expanding the Exchange Act private right of action risks aggravating the trend of foreign issuers avoiding U.S. capital markets. Such a trend threatens to harm U.S. economic growth and the vibrancy of U.S. capital markets during a time of economic uncertainty.

Third, the test enunciated in Section 929Y of Dodd-Frank suffers from the same conceptual flaws as the discredited "conduct" and "effects" tests. Courts found these tests difficult to administer because they turned on "very fine distinctions,"[22] and, indeed, "the presence or absence of any single factor which was considered significant in other cases . . .

---

17 *Id.* at 2886 (Scalia, J., opinion of the Court).

18 *See SEC*, International Registered and Reporting Companies (June 11, 2009), *available at* http://www.sec.gov/divisions/corpfin/internatl/companies.shtml (Dec. 31, 2009).

19 Stephen M. Bainbridge, *Corporate Governance and U.S. Capital Market Competitiveness* 5 (UCLA School of Law, Law-Econ Research Paper No. 10-13, 2010).

20 John C. Coffee, Jr., *Securities Policeman to the World? The Cost of Global Class Actions*, N.Y.L.J., Sept. 18, 2008.

21 Mayor Michael Bloomberg & Sen. Charles Schumer, *Sustaining New York's and the US's Global Financial Services Leadership*, at 73, *available at* http://www.nyc.gov/html/om/pdf/ny_report_final .pdf.

22 *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537, 2006 WL 3844465, at *4 (S.D.N.Y. Oct. 25, 2006).

[was] not necessarily dispositive in future cases."[23] Consequently, resurrecting them would resurrect "unpredictable and inconsistent application of § 10(b) to transnational cases" that the Supreme Court criticized in *Morrison*.[24] To the extent that these tests are resurrected, we believe that the decision to bring such suits should be left in the hands of government officials, who are better suited than private plaintiffs to make balanced decisions taking into account the full array of relevant policy concerns.

II. The Commission Should Confirm That, After *Morrison*, the Exchange Act's Private Right of Action Does Not Extend to Any Transactions Conducted Outside the United States.

In response to the Commission's request for comments on the circumstances under which "a private plaintiff should be allowed to pursue claims under the antifraud provisions of the Exchange Act with respect to a particular security where the plaintiff has purchased or sold the security outside the United States,"[25] we would like to take this opportunity to express our agreement with the unanimous body of post-*Morrison* caselaw that has addressed two issues concerning the extent of the securities laws' coverage: the "listing" theory and "foreign-squared" claims (both described below).

The "Listing" Theory. In *Morrison*, the Supreme Court held that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[26] Shortly after *Morrison* was decided, certain private plaintiffs began arguing that the Supreme Court, by using the term "listed," meant to hold that the Exchange Act also provides a private right of action based on any purchase or sale of a security made outside the United States as long as the issuer also "listed" the class of that security on a U.S. exchange (the "listing" theory). In other words, a Canadian citizen who purchased shares of a Canadian issuer on a Canadian exchange and who alleged that the issuer issued false and misleading statements in Canada about actions occurring wholly in that country could bring suit in a U.S. court under the U.S. securities laws if the issuer had also listed those shares on a U.S. exchange. Thus, under the listing theory, if a foreign issuer lists any of its shares for trading on a U.S. exchange, then Section 10(b) reaches all worldwide purchases of the company's shares regardless of the size of the U.S. percentage of the worldwide trading volume in that issuer's shares.

---

[23] *IIT* v. *Cornfeld*, 619 F.2d 909, 918 (1980) (internal quotation marks omitted).

[24] *Morrison*, 130 S. Ct. at 2880.

[25] Study on Extraterritorial Private Rights of Action, Exchange Act Release No. 63174, 2010 WL 4196006, at *3 (Oct. 25, 2010).

[26] *Morrison*, 130 S. Ct. at 2888.

We agree with the uniform position of the courts rejecting the listing theory as a "selective and overly-technical reading of *Morrison* that ignores the larger point of the decision," namely the Supreme Court's "focus on where the securities transaction actually occurs."[27] The listing theory is inconsistent with the Supreme Court's statement in *Morrison* that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[28] It is also "utterly inconsistent" with *Morrison*'s concern with avoiding the conflicts with foreign sovereigns that are part and parcel of applying U.S. law to transactions on foreign exchanges.[29] Moreover, allowing worldwide class actions to proceed against an issuer solely because that issuer lists its securities on a U.S. exchange is a compelling incentive for those remaining foreign issuers still listed on U.S. exchanges to delist.

"Foreign-Squared" Claims. Because *Morrison* was a "foreign-cubed" case, the Supreme Court did not directly address the question whether U.S. investors who purchase foreign securities outside the United States may bring claims under the Exchange Act ("foreign-squared" claims).[30] Certain private plaintiffs have argued that foreign-squared claims can survive the decision, but we agree with the unanimous line of cases rejecting this argument, because, after *Morrison*, the "focus" must be on "purchases and sales of securities in the United States"—not on the residence of the purchaser.[31] As with the listing theory, allowing foreign-squared private rights of action under the Exchange Act would put U.S. laws into conflict with those of the foreign sovereigns on whose exchanges the transactions at issue took place.

---

[27] *In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595, 2010 WL 3718863, at *2 (S.D.N.Y. Sept. 14, 2010) (rejecting the listing theory); *accord In re Société Générale Sec. Litig.*, No. 08 Civ. 2495, 2010 WL 3910286, at *5-6 (S.D.N.Y. Sept. 29, 2010); *Royal Bank of Scotland*, slip op. at 17-19; *Absolute Activity Value Master Fund Ltd.* v. *Homm*, No. 09 CV 08662, 2010 WL 5415885, at *4-5 (S.D.N.Y. Dec. 22, 2010); *see also Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758, 2010 WL 3069597, at *1-3 (S.D.N.Y. July 27, 2010) (dismissing foreign-cubed claims, without considering the listing theory); *Sgalambo* v. *McKenzie*, No. 09 Civ. 10087, 2010 WL 3119349, at *17 (S.D.N.Y. Aug. 6, 2010) (same); *In re Celestica Inc. Sec. Litig.*, No. 07 CV 312, 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010) (same).

[28] *Morrison*, 130 S. Ct. at 2884.

[29] *Royal Bank of Scotland*, slip op. at 18.

[30] Although foreign-squared claims concern the purchase outside the United States of securities issued by foreign companies, the same logic should apply to purchases outside the United States of securities issued by U.S. companies.

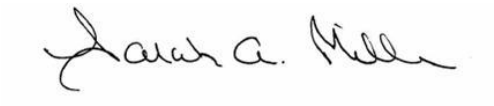
[31] *Elliot Assocs.* v. *Porsche Automobil Holding SE*, Nos. 10 Civ. 532, 10 Civ. 4155, 2010 WL 5463846, at *5-6 (S.D.N.Y. Dec. 30, 2010); *Royal Bank of Scotland*, slip op. at 19-20; *Société Générale*, 2010 WL 3910286, at *5; *Plumbers' Union Local No. 12 Pension Fund* v. *Swiss Reinsurance Co.*, No. 08 Civ. 1958, 2010 WL 3860397, at *8-9 (S.D.N.Y. Oct. 4, 2010); *Credit Suisse*, 2010 WL 3069597, at *5; *Stackhouse* v. *Toyota Motor Co.*, No. CV 10-0922, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010).

Conclusion

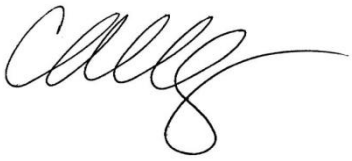
Thank you for considering the views expressed in this letter. We appreciate the opportunity to share our views and would be pleased to discuss any of them further at your convenience. If you have any questions, please contact Eli Peterson, Vice President and Regulatory Counsel of The Clearing House, at (202) 649-4602 (e-mail: eli.peterson@theclearinghouse.org).

Sincerely,

Eli K. Peterson
Vice President and Regulatory Counsel
The Clearing House Association L.L.C.



Sarah A. Miller
Chief Executive Officer
Institute of International Bankers



Cecelia A. Calaby
Executive Director and General Counsel
ABA Securities Association