TO: U.S. SECURITIES AND EXCHANGE COMMISSION
FROM: MARY K. BLASY, ESQ.
SCOTT + SCOTT, LLP
DATE: MARCH 18, 2011
RE: FILE NUMBER 4-617
COMMISSION'S STUDY ON EXTRATERRITORIAL PRIVATE RIGHTS OF ACTION

Pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act's directive to the Securities and Exchange Commission to conduct a 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 modified in light the U.S. Supreme Court's recent decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the Commission issued Release No. 34-63174 seeking comment by February 18, 2011. I only recently became aware of the Commission's Release but this issue is very important and as such I request that this brief comment be considered.

As an investor advocate, I represent individual and institutional investors in securities class actions throughout the United States. My firm, Scott+Scott LLP, is lead counsel in several such actions pending against foreign issuers in U.S. courts and so the impact of *Morrison* is significant to our practice. These comments are mine alone however, and do not necessarily represent the views of Scott+Scott LLP or its clients.

Simply stated, the *Morrison* decision is being applied in far broader proportions than the relatively simple issue presented to the U.S. Supreme Court warrants. In *Morrison*, the plaintiff was a foreign investor of a foreign issuer who purchased stock on a foreign exchange – a classic "F-Cubed" situation in securities class action parlance. Significantly, none of the plaintiffs involved in that appeal were American citizens – which would have presented a so-called "F-Squared" situation instead. And though it appears National Australia Bank had ***unsupported*** American Depository Shares ("ADR" or "ADS") trading on over-the-counter in the U.S., none of the plaintiffs in *Morrison* purchased or had standing to represent ADR purchasers. Presented with this narrow F-Cubed situation ***only***, the Court held that it was "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.* at 2884. Unfortunately, what "domestic transactions in other securities" are was never defined. *Id.*

And yet, *Morrison* is now being applied by courts around the country to preclude F-Squared claims – and defendants in certain cases have even urged that ADR purchaser claims are somehow precluded under *Morrison*.[1] ***As this issue was never briefed or***

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[1] *See eg. Stackhouse v. Toyota Motor Co.,* Civ. No-0922, 2010 WL 3377409 (C.D. Cal.) (appointing the shareholder with the largest ADR loss as lead plaintiff to the exclusion of U.S. purchasers on foreign exchanges); *In re Societe Generale Sec. Litig.*, Civ. No. 08-2495, 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) (dismissing the claims of ADR purchasers as foreign transactions); *In re Vivendi Universal, S.A. Sec. Litig.*, Civ. No. 02-5571, 2011 WL 590915, *7 (S.D. N. Y. Feb. 17 2011) (noting that "[t]he parties agree that *Morrison* has no impact on the claims of ADR purchasers since Vivendi's ADRs were listed and traded on the NYSE" in a post-verdict motion to limit the allowable damage class to U.S. purchasers of ADRs);

argued before the U.S. Supreme Court, there are several reasons the Commission should exercise its rule-making authority to ensure that American's civil claims once guaranteed under the anti-fraud provisions of the U.S. federal securities laws are preserved, regardless of which exchange these investors actually transact on.

First, the 1933 Securities Act, the 1934 Securities and Exchange Act and the 1940 Investment Advisors Act were all enacted in the wake of the 1929 stock market crash to protect American investors from fraud and other chicanery. Even though the markets had less of a global convergence in the 1930's, even then Americans were transacting in foreign securities on foreign exchanges and Congress could have but did not expressly limit the application of the new investor protections it enacted to transactions on U.S. exchanges. Instead, those protections were put in place to protect American investors without regard to where they transacted. Especially in our modern global era, American investors are solicited by issuers from all around the globe. Many of these issuers have significant U.S. operations – and are even headquartered literally or figuratively in U.S. cities – regardless of which nation's laws they are technically organized under. For instance, global oil conglomerates BP plc and Royal Dutch Shell plc conduct significant portions of their operations here and derive substantial proportions of their profits here. They have ADRs registered with the Commission and listed on U.S. exchanges. The percentage of U.S. ownership is massive. To preclude American investors' claims simply because he/she chose to purchase ordinary shares on the London exchange instead of ADRs on the NYSE arbitrarily abrogates the protections Congress promised.

Second, though some say American investors can limit their stock purchases to U.S. exchanges to guarantee the protections of this country's securities laws, this is a short sighted approach. Why should American investors – including American pension funds – be relegated to waiting five or six hours for New York-based exchanges to open to transact in the securities of companies like BP and Shell – when the stock is trading on then-current information throughout the trading day in different time zones in London and across Europe and Asia. Simply stated, the U.S. markets open later in the trading day and thus American investors are being put to the Hobson's choice of transacting on foreign exchanges without the protections of the antifraud provisions of the U.S. securities laws, or waiting to trade until the U.S. markets open, potentially under adverse financial conditions where information disclosed during the overseas trading day has already been impacted into the price.

Moreover, as demonstrated by the recent consolidation of certain exchanges, it is not going to be entirely clear very much longer to American investors if they are transacting on a foreign or domestic exchanges. When one purchases on the new *Borse-NYSE* or the *NYSE-Borse* – whatever that ***electronic*** exchange is ultimately named – where will that transaction take place? Where the buyer is located? Where the seller is located? In the country where the exchange itself determines to plant its network servers? In the country where the exchange is headquartered? While it is not clear where the transactions will "physically" take place under these scenarios, even a conservative reading of *Morrison* should allow American citizens' claims as "domestic transactions in

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Cornwell v. Credit Suisse Group, *et al*, Civ. No. 08-3758 (S.D.N.Y., July 19, 2010) (J. Marrero) (limiting class to ADR purchasers on motion to dismiss); *Johnson v. Siemens AG*, Civ. No. 09-5310 (E.D.N.Y., July 23, 2010) (J. Gleeson) (on motion to dismiss class limited to ADR purchasers); and *In re Alstom Sec. Litig.*, Civ. No. 03-6596 (S.D.N.Y., July 28, 2010) (J. Marrero) (on motion to dismiss class limited to ADR purchasers).

other securities, to which § 10(b) applies." *Id.* at 2884. But based on what has happened so far with the courts' application of *Morrison*, it is far from clear that will happen.

Again, because the Supreme Court only received briefing and oral argument on the F-Cubed issue – and did not have the F-Squared issue before it, much less the application of *Morrison* to ADR purchasers – it's important that the Commission consider these important issues. To be sure the overly broad application of *Morrison* currently being applied does not comport with the fact that American investors have been transacting on foreign exchanges for decades now believing all the while those transactions were protected by the antifraud provisions of the U.S. securities laws. Limiting those protections *ex ante* just isn't fair.

Thank you. I remain available to provide further detail or answer questions the Commission may have.

Mary K. Blasy
Scott + Scott, LLP
707 Broadway, Suite 1000
San Diego, California 92101
(P) 619/233-4565
mblasy@scott-scott.com
www.scott-scott.com