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Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Attn: Ms. Elizabeth M. Murphy, Secretary

Re: Study on Extraterritorial Private Rights of Action
Release No. 34-63174; File No. 4-617

Ladies and Gentlemen:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "Committee" or "we") of the Business Law Section (the "Section") of the American Bar Association (the "ABA"), in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in its November 3, 2010 release referenced above (the "Release"). Pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the Commission is required to solicit public comments and thereafter 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 extended to cases of transnational securities fraud. We are pleased to present to the Commission our views on this matter.

The comments expressed in this letter (the "Comment Letter") represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

Background

As the Commission notes in the Release, there have been a number of significant developments recently regarding the extraterritorial enforcement of the antifraud provisions of the Exchange Act. For many years, most federal courts took the position that the antifraud provisions were entitled to extraterritorial application, and applied some variation or combination of an "effects" test and a "conduct" test to determine the extraterritorial reach of Section 10(b) of the Exchange Act. These decisions focused generally not on whether these tests were appropriate, but instead on how these tests were best articulated. As a result, different federal circuits applied a number of variations of these tests. In most cases, the question of the extraterritorial reach of Section 10(b) was viewed as a question of subject matter jurisdiction. All this has changed dramatically with the U.S. Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[1] In *Morrison*, the Supreme Court stated that the lower courts had misconstrued the nature of the issue before them. In the Supreme Court's view, the question was not one of subject matter jurisdiction, which refers to a tribunal's power to hear a case, but instead was a merits question, going to whether Congress intended Section 10(b) to have extraterritorial reach.[2] Citing the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" the Supreme Court concluded that Section 10(b) applied only within the United States, and did not apply on an extraterritorial basis. The Court also concluded that the conduct within the United States, which allegedly served as the basis for the Section 10(b) claim in *Morrison*, did not bring the claim within the scope of Section 10(b). Instead, the Court held that "the Exchange Act's focus is not on the place where the deception originated, but on purchases and sales of securities in the United States. Section 10(b) applies only to transactions in securities listed on domestic exchanges and domestic transactions in other securities….The probability of incompatibility with other countries' laws is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.' 499 U.S. at 256 Neither the Government nor petitioners provide any textual support for their proposed alternative test, which would find a violation where the fraud involves significant and material conduct in the United States."

Shortly after the *Morrison* decision, Congress enacted the Dodd-Frank Act. Section 929P of the Dodd-Frank Act amended the Exchange Act by providing that United States District Courts shall have jurisdiction over an action brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of the Exchange Act involving:

[1] 130 S. Ct. 2869 (2010).

[2] Our references to the Supreme Court's decision in *Morrison* are to the majority opinion delivered by Justice Scalia.

(i) 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 foreign investors; or

(ii) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Pursuant to Section 929Y of the Dodd-Frank Act, the Commission is required to conduct a study to determine whether private rights of action should be similarly extended[3] in cases of transnational securities fraud. Our comments are submitted in connection with this study.

Summary of Our Views

In undertaking its study, we believe that the Commission should be guided by two fundamental principles: first, the Commission should preserve the ability of an investor to bring a Section 10(b) cause of action under circumstances where the investor would reasonably expect the protections of Section 10(b) to be available; and second, the Commission should be sensitive to the concerns expressed by foreign governments regarding the implications of extending the extraterritorial application of Section 10(b) to private causes of action.

In this letter, we suggest that the Commission consider, as part of its study, the benefits of applying a territorial approach focusing on the location of the investor at the time the investor is induced to purchase or sell securities in reliance on a materially false or misleading statement or pursuant to a manipulative act.[4] This territorial presence standard would generally, but not always, result in the application of the law of the jurisdiction where the investor is resident at the time of the fraudulently induced purchase or sale. Importantly, it would result in the application of the law that we believe best reflects the investor's reasonable expectations; investors would expect to be protected by the laws of the place they are present at the time they are subjected to false or misleading statements or manipulative conduct. One of the goals of the Commission's study should be to avoid creating illogical distinctions between the rights of various classes of investors to pursue U.S. securities laws claims. We believe the standard we propose accomplishes this, because it would give all investors physically present in the United States the same rights to bring Section 10(b) claims, whether or not the investors are United States citizens or residents, and regardless of where the issuers whose securities they trade may be incorporated or headquartered, or where the subject purchase or sale of securities is effected. Under the standard we propose, the right of action should be available to all classes of private

[3] "Similarly extended" is the term the Commission uses in its release. As set forth in this letter, we do not support an extension of private rights of action on the basis of the tests set forth in Section 929P.

[4] For purposes of this letter, we do not consider "sale" or "purchase" to include the technical processing or consummation of the securities transaction. Consequently, we draw no distinction on the basis of whether the security is traded over a regulated exchange, trading platform or other alternative trading system outside the United States.

actors, regardless of whether they are institutions or individuals. We believe that a standard based on investors' reasonable expectations should serve as the starting point for the analysis to be undertaken in the Commission's study.

Moreover, we believe this standard would be consistent with the concerns raised by foreign governments regarding the extraterritorial application of Section 10(b). If investors are induced to purchase or sell securities on the basis of false or misleading information while they are physically present in the United States, providing them a Section 10(b) cause of action would not appear to us to violate principles of international comity.

We view the standard applicable to private actions to be only one of a number of components that together would provide appropriate remedies for securities fraud. Investors who are present in the United States at the time they receive fraudulent inducements to purchase or sell securities would be entitled to bring private actions under Section 10(b). Assuming that Section 929P of the Dodd-Frank Act is effective to provide a basis for the such authority, the Commission and the United States would be able to pursue broader actions, based on the conduct and effects tests specified in Section 929P. Investors who are subject to fraudulent inducements while outside the United States would be entitled to pursue whatever remedies the non-United States jurisdictions might provide to them.

We acknowledge that the standard we propose would require further development. Any system based on this standard would need to grapple with questions such as whether an investor's presence in a jurisdiction should refer to only to physical presence, or would extend to presence by electronic or other means, and how emails or web postings should be treated. An ideal standard would preserve the reasonable expectations of investors, while not being either too amorphous or subject to abuse or misapplication.

Discussion

The study that the Commission is required to undertake pursuant to Section 929Y may have broad and far-reaching implications to investors and to public and private companies worldwide, and merits review from a number of perspectives. The U.S. securities markets constitute just one part of an increasingly sophisticated global network of markets in which securities transactions take place, and it is important that whatever remedies may be available to investors under the U.S. securities laws be sensitive to the regulatory and enforcement mechanisms in place outside the United States to protect investors. United States courts, as well as the Congress, have clearly recognized the need for a balanced approach to providing foreign litigants access to U.S. courts for securities fraud actions under the U.S. securities laws. The courts, through their adoption of the judicially-based conduct and effects tests (prior, of course, to *Morrison*), and Congress, through the adoption of Section 929P of the Dodd-Frank Act, have sought to distinguish those actions that should give rise to a U.S. cause of action from those that should not.

Although Section 929P of the Dodd-Frank Act sets forth what may be an appropriate standard for enforcement actions by the Commission and the United States, this standard may

not be appropriate in the context of private litigation. Among other things, enforcement actions by the Commission and by the United States which involve international considerations are often conducted in cooperation with other interested regulators, and are sensitive to the particular regulatory and enforcement systems in non-U.S. jurisdictions. The same considerations do not necessarily apply in the context of private litigations. For this reason, as well as the other matters addressed in this letter, we believe that the Commission should consider recommending to Congress a standard other than that referred to in Section 929P.

As a matter of process, we encourage the Commission, in performing its study, to consult with the securities regulators and enforcement personnel in a broad number of foreign jurisdictions, as well as with foreign private issuers and their counsel and members of the U.S. and foreign plaintiffs' bars, to assess the impact the potential extension of private rights of action may have to their systems and their business activities. Only against the backdrop of this research will the Commission be in a position to present to Congress the fully informed assessment contemplated by Section 929Y.

1. Private Rights of Action under the Antifraud Provisions of the Exchange Act Should Be Premised on the Reasonable Expectations of Investors.

In our view, the standard adopted by the U.S. Supreme Court in *Morrison* is not consistent with the reasonable expectations of investors. In *Morrison*, the Supreme Court reviewed the existing statutory basis for the extraterritorial application of Section 10(b), and concluded that the determinative factor as to whether a matter was within the scope of Section 10(b) was whether the securities at issue were purchased or sold in the United States. Under the *Morrison* standard as we read it, no investor, foreign or domestic, would be entitled to commence a cause of action under Section 10(b) if securities that were purchased or sold on the basis of materially false or misleading disclosures were purchased or sold outside the United States, even if statements were made directly to those investors within the United States. We believe this to be too restrictive a standard.

Rather than conducting its study from the standpoint of tests the courts have previously articulated, we believe the Commission should commence its study by ascertaining the reasonable expectations of investors, that is, whether an investor would reasonably believe that Section 10(b) remedies should be available in a particular situation. We suggest that most investors would reasonably expect to be entitled to the protections of the Exchange Act's antifraud provisions if they are physically in the United States at the time they were induced to purchase or sell a security on the basis of false or misleading information.[5] We believe that, in

[5] One of the aspects of the test described above is direct communication with the investor. In our view, in order to be actionable under Section 10(b) based on the territorial presence test (at least insofar as the extraterritorial application is concerned), the communication containing the fraudulent or misleading information must be made directly to the investor. Under this standard, merely preparatory or ancillary actions (such as the preparation of false financial information provided to National Australia Bank by its U.S. subsidiary) which do not constitute direct communications to an investor should not give rise to a U.S. securities law claim. In our view,

most cases, investors physically present outside the U.S. would likely expect to be entitled to whatever remedies are available in that other jurisdiction, and not to Section 10(b) remedies. If the Commission's study supports this view, it can serve as the starting point for the Commission's further consideration of the standard it would recommend to Congress.

We believe there are a number of factors that support an objective territorial presence standard: by this standard, investors subject to securities fraud while physically present in the U.S. would be treated similarly, whether or not they are U.S. citizens or residents, and whether or not they are individuals or institutions.[6] Under this standard, certain other elements become irrelevant, including the jurisdiction or jurisdictions where the issuer is organized, where its headquarters are located, where it conducts business, or where its securities are traded; whether or not the issuer has securities registered pursuant to Section 12 of the Exchange Act or a reporting obligation under Section 15(d); or whether or not the issuer's securities are subject to a sponsored or unsponsored American depositary receipt program.

Were the Commission to start with a standard based on physical presence in the United States, it will likely need to drill down further to refine the parameters of this approach. Many of the considerations applicable to this standard derive from the manner in which information is communicated. For example, investors at a road show presentation in the U.S. at which materially misleading information is communicated should clearly have a U.S. cause of action under Section 10(b). However, we leave to the Commission to address whether an investor who telephones in to the road show presentation from another country, and therefore is not physically present in the U.S., should have these same rights, and how communications that are not directed to a specific investor or investor group, such as emails, investor conference calls, or website postings, should be dealt with, where a sender may not know the physical location of the investor at the time the communication is read. Also, the Commission would need to address how disclosures to a corporation or other entity should be treated. We understand that these are complicated issues but believe a territorial presence test would be consistent with reasonable investor expectations, and would provide a good starting point for the Commission's study.

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the purely internal conduct of persons and entities within National Australia Bank group should have no bearing on the right to commence a claim, because such conduct does not involve direct communication to the investor .

[6] It would, of course, be necessary for the investor to be able to confirm his or her presence in the United States at the time the fraudulent statement was made to him or her, as a condition to making a claim under Section 10(b).

2. An Overly Broad Extraterritorial Application of the Antifraud Provisions Could Be Inconsistent With, and Injurious to, the Legitimate Interests of Foreign Jurisdictions to Implement Their Own Systems to Regulate Securities Fraud and to Provide Rights to Litigants

We understand that concerns about the extraterritorial application of the U.S. antifraud provisions strike a sensitive nerve in foreign jurisdictions.[7] The amicus briefs submitted on behalf of the United Kingdom, France and Australia in *Morrison* emphasize the importance of international comity in connection with the enforcement of securities laws, and express the concern that providing private litigants too broad an extraterritorial private right of action under the U.S. securities laws would be disruptive to their own enforcement systems and public policies.[8] As the Commission is certainly aware, the rights of litigants in the United States differ significantly from the rights of litigants elsewhere. Such differences are evident, among other things, in rights to discovery, as well as the ability of litigants to seek and recover punitive or exemplary damages and certain other forms of relief. In addition, U.S. litigants are generally able to commence class actions more easily than litigants elsewhere.[9]

In addition to the differences in the procedural aspects of litigation, we note that the substantive elements of what constitutes securities fraud may differ between the U.S. and a

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[7] As *Le Monde* reported in response to the mandated Section 929Y study by the Commission, the potential for the United States to become a global "financial policeman…scares a…number of foreign capitals." Le Monde, Aug. 5, 2010.

[8] See Brief of the Government of the Commonwealth of Australia http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.Government-of-the-Commonwealth-of-Australia-in-Support-of-REsp.pdf ; Brief for the Republic of France http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.Republic-of-France-in-Support-of-REsp.pdf and Brief for the United Kingdom and the Republic of Ireland http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1191_RespondentAmCuUnitedKingdom.pdf. See also the diplomatic note from Switzerland to the U.S. Department of State vigorously protesting foreign-cubed lawsuits in the United States as violations of international law, set forth as Appendix A to the Brief of the International Chamber of Commerce, et al. http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.International-Chamber-of-Commerce-Swiss-Bankers-Association-Economiesuisse-the-Federation-of-German-Industries-and-the-French-Business-Confederation-in-Support-of-REsp..pdf

[9] In addition to the foregoing, differences in litigation between the U.S. and many foreign jurisdictions include the elements a plaintiff is required to prove in connection with a securities fraud claim, the potential liability of third parties, contingency fees, opt-out class actions, and the ability to demonstrate fraud-on-the-market as a substitute for proving actual reliance. Many of the foreign rules relating to litigation are steeped in local cultural and policy considerations that are distinct from those in the United States and should, in our view, be respected and supported.

foreign jurisdiction. It is therefore possible that conduct that would not be actionable outside the U.S. would be deemed to be fraudulent under U.S. law. These differences highlight the concerns associated with "exporting" U.S. securities law standards abroad.

The differences referred to above arose as a result of the balances and choices various jurisdictions have made regarding their civil procedures and substantive antifraud rules. We are concerned that providing broad-based extraterritorial jurisdiction under Section 10(b), even in the context of the conduct and effects tests referred to by Congress, may significantly interfere with the ability of foreign jurisdictions to enforce their own securities laws in accordance with their established procedures.[10] We believe suitable channels exist under many home country laws and regulations for deterring international securities fraud, which may counteract the need for private litigants to rely upon the U.S. courts for a remedy.[11]

We therefore believe that the Commission should, in its study, review the implications the extraterritorial application of Section 10(b) to private rights of action may have to foreign

[10] For purposes of comparison, we believe that U.S. companies would be similarly offended were a foreign investor who purchased securities of a U.S. issuer while in the U.S. to have the a right to bring an antifraud claim against the U.S. issuer in a foreign court based on foreign antifraud standards.

[11] The U.S. District Court for the Southern District of New York, in dismissing a "foreign-squared" case in 2010, stated that, even if Section 10(b) of the Exchange Act did apply, it would have dismissed the case since adequate alternatives were available through the European courts. *In re European Aeronautic Defence & Space Company Securities Litigation*, No. 08 Civ 5389 (S.D.N.Y. March 26, 2010) Many jurisdictions put the onus on the state to serve as the primary enforcer of securities laws and provide only limited, if any, private rights of action. Some significant markets, including Canada, Australia and Japan, do permit class actions and have seen substantial increases in class action litigation in recent years. In other jurisdictions, such as The Netherlands, specific laws have been adopted to facilitate settlement of cross-border claims involving multiple claimants. The Dutch Act on Collective Settlement enables a group of claimants from multiple jurisdictions to seek approval of a collective settlement and has proven effective in recent years in combating transnational securities fraud. Although the Dutch statute does not provide for class action litigation, it serves to bind putative class members who do not opt out of the settlement. This procedure provides a forum for defendants who seek to settle class claims without incurring significant expense managing lawsuits in multiple jurisdictions and has been used successfully in two recent cases of transnational securities fraud. In addition, we understand that the European Union, through the newly-formed European Securities and Markets Authority, is undertaking a study to review securities fraud laws and regulations across Europe in consideration of the appropriateness of a harmonized regime to protect investors and create greater consistency in the application of EU Directives. Efforts at international coordination and cooperation among regulators, through IOSCO as well as bilateral agreements, also serve to promote enforcement of common goals in deterring not only securities fraud but also abuse of available legal remedies.

securities regimes. The Commission's study should review both the substantive and the procedural aspects of the extraterritorial application. Although actions by the Commission and United States are regularly coordinated with the efforts of foreign regulators, this is not the case in private actions.[12]

We believe that the proposal we make in this letter would be consistent with the concerns expressed by the above-referenced amici with respect to international comity. Companies that make or direct fraudulent statements to investors in the United States, in order to induce the investors to purchase or sell their securities, should not, in our view, be beyond the reach of U.S. antifraud provisions. Moreover, providing investors a remedy for fraudulent statements made to them while they are in the U.S. should not affect the ability of foreign regulators to enforce their securities laws relating to fraudulent statements made to investors outside the United States.

3. Were the Commission study to support the application of the conduct or effects tests to private litigants, we recommend that the Commission include an additional condition to the tests, based on the relative involvement of the United States in the matter, as compared with the involvement of other jurisdictions.

Were the Commission to determine to recommend the extension of the extraterritorial provisions of the Exchange Act to private litigants based on the conduct and effects tests, we urge the Commission not to recommend the adoption of the conduct and effects tests provided for in Section 929P and referred to in Section 929Y of the Dodd-Frank Act. For the reasons expressed above, we consider these standards, by themselves, to be too broad. Instead, we recommend that the Commission adopt the standard articulated by the Second Circuit Court of Appeals in *Morrison*, which, among other things, would weigh the relative involvement of the United States against the involvement of other jurisdictions in connection with the matter.[13]

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[12] In this respect, we refer to the testimony of Robert J. Giuffra, Jr., Testimony before the U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, "Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009," Sept. 17, 2009, available at http://judiciary.senate.gov/pdf/09-09-17%20Giuffra%20Testimony.pdf. Mr. Giuffra is a former Chief Counsel to the Senate Banking Committee. Although Mr. Giuffra's testimony related to legislation dealing with aiding and abetting liability, we believe it is relevant to the Commission's study, because of its emphasis on balancing enforcement remedies to "stop real abuses, but not prevent the bringing of meritorious securities cases." As he states in that context, "I believe that Congress acted wisely in entrusting the responsibility for deciding when to prosecute alleged aiders and abettors of securities fraud to the expert judgment of the SEC and the Department of Justice. Obviously, those agencies don't have the same incentives as the plaintiffs' bar to bring strike suits against deep-pocket defendants."

[13] In *Morrison*, the Second Circuit wrote as follows:

"The actions taken and the actions not taken by NAB in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida. HomeSide, as a wholly owned, primarily operational

Conclusion

We believe that the limitation on causes of action expressed by the Supreme Court in *Morrison* may operate to the detriment of investors in the United States. We are also concerned, though, that the application of the conduct and effects test described in Section 929Y of the Dodd-Frank Act would extend the reach of Section 10(b) well beyond the reasonable expectations of investors and would violate important principles of international comity. In order to appropriately balance these considerations, we suggest that the Commission consider, as a starting point for its study, the territorially-based standard we have set forth in this letter.

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Once again, the Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin
Chair, Federal Regulation of Securities Committee

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subsidiary of NAB, reported to NAB in Australia. HomeSide's mandate was to run its business well and make money. The responsibilities of NAB's Australian corporate headquarters, on the other hand, included overseeing operations, including those of the subsidiaries, and reporting to shareholders and the financial community. NAB, not HomeSide, is the publicly traded company and its executives — assisted by lawyers, accountants, and bankers — take primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world. Appellants' claims arise under Rule 10b-5(b), which focuses on the accuracy of *statements* to the public and to potential investors. Ensuring the accuracy of such statements is much more central to the responsibilities of NAC's corporate headquarters, which issued the statements, than those of HomeSide, which did not. Liability under Rule 10b-5(b) requires a false or misleading statement. 'Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).' *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998) (citation and internal quotation marks omitted). NAB's executives possess the responsibility to present accurate information to the investing public and to the holders of its ordinary shares in accordance with a host of accounting, legal and regulatory standards. When a statement or public filing fails to meet these standards, the responsibility, as a practical matter, lies in Australia, not Florida." See http://law.du.edu/documents/corporate-governance/international-corporate-governance/morrison-v-natl-austl-bank-opinion.pdf

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