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U.S. Chamber of Commerce
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December 16, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act re Study to Determine the Extent to Which Private Rights of Action under the Antifraud Provisions of the Securities Exchange Act of 1934 Should be Extended to Cover Transnational Securities Fraud [Release No. 34-631374; File No. 4-617]**

Dear Ms. Murphy:

These comments are submitted by the U.S. Chamber of Commerce Center for Capital Markets Competitiveness ("CCMC") and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer and faster for all participants.

In our prior submission, we explained why the United States should not create a new, extraterritorial private cause of action for securities fraud to overturn the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010). As part of that explanation, we demonstrated that following *Morrison*, the lower courts have properly protected investors against fraud, while also respecting the decisions that foreign nations have made as to securities regulation.

This supplement provides a further review of the dozens of decisions that have applied *Morrison* over the past 18 months.[1] In *Morrison*, the Court found that Section 10(b) applies to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 130 S. Ct. at 2884.

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[1] We address decisions through December 15.

The post-*Morrison* decisions show that the courts are consistently and appropriately applying *Morrison*. When a transaction occurs in the United States, courts are steadfastly permitting claims under Section 10(b). Conversely, when a transaction occurs abroad, courts are deferring to the judgment of foreign nations as to the appropriate security enforcement mechanisms.

Moreover, there is no indication that the application of the principles set forth in *Morrison* is leaving unsophisticated U.S. investors without a remedy that they believed to have been available or leaving any U.S. investors without protection. To the contrary, the off-exchange transactions to which *Morrison* is being applied are highly-complex transactions entered into by extremely sophisticated investors well able to ascertain the governing remedial laws, which in virtually all cases are the well-developed laws of key U.S. allies and trading partners. For all of these reasons, there is no basis for the Commission to recommend congressional action to alter the Supreme Court's ruling.

Securities Purchased On Foreign Exchanges

1. Purchases by non-U.S. Individuals. Following *Morrison*, courts have concluded that the purchase of securities by foreigners on a foreign market cannot be the basis for a Section 10(b) claim. See *Terra Securities Asa Konkursbo v. Citigroup, Inc.*, 740 F. Supp. 2d 441, 447 (S.D.N.Y. 2010). These were largely the facts of *Morrison* – a so-called "f-cubed" case – so there can be little doubt on this point.

2. Purchases by U.S. Individuals. Courts have universally extended *Morrison*'s transactional test to reject also "f-squared" claims—where U.S. individuals purchase securities of a foreign issuer on a foreign exchange. As one court explained, "[t]hough the Supreme Court in *Morrison* did not explicitly define the phrase 'domestic transactions,' there can be little doubt that the phrase was intended to be a reference to the location of *the transaction*, not to the location of the purchaser and that the Supreme Court clearly sought to bar claims based on purchases and sales of foreign securities on foreign exchanges, even though the purchasers were American." *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 527, 532 (S.D.N.Y. 2011). See also *In re Merkin*, 2011 WL 4435873, at 9 n.2 (S.D.N.Y. 2011); *In re UBS Securities Litig.*, 2011 WL 4059356, at *7 (S.D.N.Y. 2011); *In re Royal Bank of Scotland Group PLC, Securities Litig.*, 765 F. Supp. 2d 327, 336-37 (S.D.N.Y. 2011); *Stackhouse v. Toyota Motor Co.*, 2010 WL 3377409, at *1 (C.D. Cal. 2010); *In re Banco Santander Securities-Optimal Litig.***,** 732 F. Supp. 2d 1305, 1317, 1318 (S.D. Fla. 2010); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 177-78 (S.D.N.Y. 2010); *In re Societe Generale Securities Litig.*, 2010 WL 3910286, at *5-6 (S.D.N.Y. 2010); *In* *re Alstom SA Securities Litig.*, 741 F. Supp. 2d 469, 471-72 (S.D.N.Y. 2010); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 627 (S.D.N.Y. 2010); *Sgalambo v. McKenzie*, 2010 WL 3119349, at *17 (S.D.N.Y. 2010).

In both of the situations described above, where the investor is purchasing shares on a non-U.S. exchange, there is little chance that the investor could mistakenly believe that U.S. laws apply. Furthermore, because the foreign exchanges are well-supervised by sophisticated regulators—principally those in developed countries that are key U.S. allies and trading partners—there is little chance that the investor will be left unprotected.

Securities Purchased On U.S. Exchanges

1. Purchases of Stock. Courts have correctly concluded that when a plaintiff purchases the securities issued by a defendant on a U.S. exchange, a Section 10(b) remedy is available against the issuer for fraudulent conduct. This principle applies even when the fraudulent conduct occurs abroad. In *Lapiner v. Camtek, Ltd.*, 2011 WL 445849, at *2 (N.D. Cal. 2011), a plaintiff purchased Camtek stock on the NASDAQ exchange. Defendants sought to invoke *Morrison*, arguing that the conduct forming the basis of the complaint occurred outside the United States and that the majority of its stock is held by foreign entities. *Id.* The court disagreed, finding that Section 10(b) attached to the sale of the securities on a U.S. exchange. *Id.* at *2-3. See also *SEC v. Credit Bancorp, Ltd.*, 738 F. Supp. 2d 376, 396-97 (S.D.N.Y. 2010); *Hufnagle v. Rino Int'l Corp.*, 2011 WL 710676, at *1 (C.D. Cal. 2011).

But when a foreign issuer lists securities on both foreign and domestic exchanges, Section 10(b) extends only to parties to transactions that occur on a U.S. exchange. *In re UBS Securities Litig.*, 2011 WL 4059356, at *5 ("[F]oreign-cubed claims asserted against issuers whose securities are crosslisted on an American exchange are outside of the scope of § 10(b)."); *In re Royal Bank of Scotland Group PLC*, 765 F. Supp. 2d at 335-36 ("The idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*."). The mere listing of a stock on a U.S. exchange does not mean that Section 10(b) applies to sale of the stock on a foreign exchange.

2. Purchases of American Depositary Receipts. An American Depositary Receipt ("ADR") is a security traded in the United States that represents the stock of a non-U.S. company. ADRs provide a foreign company with a method of listing securities in U.S. markets without directly registering its stock to trade on a domestic exchange. Courts have broadly concluded ADRs are "securities" to which Section 10(b) applies. Following *Morrison*, Section 10(b) is available to those who purchase ADRs in the United States. See *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 527, 529 (S.D.N.Y. 2011) ("The ADRs were both listed and traded on the NYSE, and thereby fall within any reading of *Morrison*."); *In re Elan Corp. Securities Litig.*, 2011 WL 1442328, at *1 (S.D.N.Y. 2011). This ensures that purchasers of securities sold on U.S. markets or over-the-counter in the United States fall within Section 10(b).[2]

Although ADRs themselves are subject to U.S. law, courts have properly rejected efforts to bootstrap the fact of ADR registrations into claims by plaintiffs that purchased securities on foreign exchanges. In *Vivendi Universal*, for example, the defendant had registered with the SEC as a Tier 3 ADR, in order to permit it to raise capital through a U.S. public offering. 765 F. Supp. 2d at 527-28. Vivendi deposited shares with a French bank to underlie its ADR offering, and registered those shares with the SEC and the NYSE. *Id.* at 528. Because of the registration of these shares for ADR purposes, plaintiffs argued that *any* purchase of Vivendi stock *abroad* was susceptible to Section 10(b) liability. Plaintiffs focused on the fact that several of the ADR shares had migrated back to the European markets via redemption, and thus more Vivendi stock was registered with the New York Stock Exchange than was outstanding in the form of an ADR. *Id.* at 528-30. In this sense, they claimed, Vivendi shares were "listed" on the NYSE. *Morrison*, 130 S. Ct. at 2888. The district court nonetheless rejected claims brought by purchasers on foreign markets, finding that "where the purchase and sale does not arise from the domestic listing, particularly where (as here) the domestic listing is not even for trading purposes," the mere fact of a domestic listing cannot establish liability for foreign purchases. 765 F. Supp. 2d at 531. The court explained that *Morrison* "really meant to say a security 'listed *and traded*' on a domestic exchange" was a prerequisite for Section 10(b). *Id.* at 530 (emphasis added).

Off-Exchange Transactions

1. Transactions Outside the United States. When parties engage in off-market transactions that are completed outside the United States, those transactions do not fall within the purview of Section 10(b), as they are not "domestic transactions in other securities." *Morrison*, 130 S. Ct. at 2884. To determine whether an off-exchange transaction is "domestic," courts focus on the physical location where the transaction became irrevocable. In *Quail Cruises Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307 (11th Cir. 2011), for example, the plaintiff alleged that it was fraudulently induced to purchase securities of a company

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2 One district court appears to have held to the contrary and dismissed claims of ADR purchasers. See *In re Societe Generale Securities Litig.*, 2010 WL 3910286, at *6-7. But the ruling in *Societe Generale*—which was not appealed to the Second Circuit—is an outlier that has not been followed by other courts.

in a private offering. The Eleventh Circuit concluded that because the plaintiff had "alleged that the closing *actually* occurred in the United States, and it was here that 'the transaction [wa]s consummated,'" a Section 10(b) claim could be maintained if those facts were proven true. *Id.* at 1310. See also *In re Optimal U.S. Litig.*, 2011 WL 1676067, at *11-12 (S.D.N.Y. 2011) (denying motion to dismiss where complaint alleged transaction was completed in the United States). Conversely, in *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 2011 WL 3044149, *4 (S.D.N.Y. 2011), claims respecting a transaction in the Cayman Islands were dismissed because plaintiffs had failed to "allege that the parties incurred irrevocable liability to purchase or sell the security in the United States." See also *SEC v. Goldman Sachs & Co.*, 2011 WL 2305988, at *9-11 (S.D.N.Y. 2011); *Absolute Activist Value Master Fund Ltd. v. Homm*, 2010 WL 5415885, at *5 (S.D.N.Y. 2010).

This same approach is used where a foreign party solicited U.S. investment through contacts in the United States. *See, e.g.*, *Horvath v. Banco Comercial Portugues, S.A.*, 2011 WL 666410, at *2-3 (S.D.N.Y. 2011) ("The Court created no exception for those transactions involving foreign securities but with significant U.S. contacts; in fact, the Court rejected out of hand such an analytical framework."); *Cascade Fund, LLP v. Absolute Capital Management Holdings, Ltd.*, 2011 WL 1211511 (D. Colo. 2011) ("*Morrison* is explicit that the reach of § 10(b) is determined by the location of the 'transaction,' not events preparatory to that transaction.").

Following *Morrison*, investors in off-market exchanges can have precisely the sort of predictability necessary to a well functioning securities enforcement regime. If parties wish for their conduct to be controlled by Section 10(b), they may enter into an off-market transaction in the United States. If they wish for foreign securities law to control, they may close a transaction abroad. In these cases, there is no suggestion that foreign counter parties defrauded U.S. investors into wrongly believing that a transaction occurred in the United States. Now, investors may have certainty as to the applicable law at the time an investment is made.

Significantly, all of these decisions involved sophisticated purchasers capable of understanding both the terms of the transaction and the applicable law regarding remedies. There is no indication that the *Morrison* standard is leaving without a domestic remedy individual investors who believed they were purchasing securities in the United States. And if that were true, the Commission's enforcement power—which is broader that the implied private cause of action—could be invoked to protect those investors. In addition, those investors likely would have remedies under the law of the country in which the transaction was consummated.

2. Securities-Based Swap Agreements. Through swap agreements (certain forms of derivatives), parties can replicate other securities transactions, such as purchasing or shorting company stock. These transactions are synthetic in the sense that gains and losses are the product of contracts and the parties need not actually own the underlying security instrument at issue. In *Elliott Assocs. v. Porsche Automobil Holding SE*, 759 F. Supp. 2d 469, 475-76 (S.D.N.Y. 2010), the Southern District of New York concluded that the economic reality of such swap agreements determined whether it is foreign or domestic for purposes of *Morrison*. Thus, when a swap agreement is functionally indistinguishable from purchasing or shorting stock on a foreign market, it must be treated as a foreign transaction and thus outside the scope of Section 10(b). *Id.* at 476. This properly ensures that U.S. entities cannot create an end run around *Morrison* by entering into synthetic transactions relating to securities traded abroad. Again, given the high level of sophistication of the parties that enter into these transactions, there is little risk of misunderstanding regarding the applicable remedies.

3. Foreign Contracts for Difference. Contracts for difference ("CFDs") are another type of synthetic security pegged to an underlying referent. CFDs are essentially a derivative instrument that permits a trader to take a long or short position on an underlying financial instrument without actually owning it. CFDs are often purchased from specialized providers. In the context of a CFD relating to company stock, for example, a CFD provider offers to sell an instrument with characteristics identical to the stock, including pricing and dividends. Immediately before executing a CFD with a purchaser, a provider may purchase (or short) the security on the open market so as to not carry risk with respect to price fluctuation. CFD purchases may therefore directly alter market pricing for the underlying securities as the CFD agreement may cause open market purchases of the referent security. CFDs—typically disallowed in the United States by SEC restrictions—are often purchased on margin at substantial leverage. See *Freudenberg v. E*Trade Fin. Corp.*, 2008 WL 28767373 (S.D.N.Y. 2008).

A district court recently concluded that foreign purchases of CFDs nonetheless fall within Section 10(b) when the underlying referent is a stock traded on a U.S. exchange. In *SEC v. Compania Internacional Financiera S.A.*, 2011 WL 3251813 (S.D.N.Y. 2011), the SEC brought an insider trading action against foreign entities that made transactions immediately prior to the announcement of the acquisition of Arch Chemicals. Defendant Chartwell sought to avoid Section 10(b) liability with respect to its purchase of CFDs in the United Kingdom, contending that those transactions fell outside the scope of *Morrison*. Judge Cote disagreed: "Even though Chartwell may have engaged in this insider trading by trading CFDs in London that were tied to transactions on the NYSE in Arch's domestic securities, this does not negate the fact that its alleged deceptive conduct involved securities listed on a domestic exchange." *Id.* at *6.

As with swap-based agreements, the court looked to the economic reality of the transaction. As the transaction was indistinguishable from the purchase of a U.S. security—and indeed likely caused the provider to purchase U.S. securities—it properly falls within the scope of U.S. regulation. And as with swap-based agreements, the parties to these transactions are highly-sophisticated investors.

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In sum, the courts have applied *Morrison* with consistency. Section 10(b) extends to transactions that occur on U.S. exchanges or otherwise occur within the United States. If a transaction occurs abroad, U.S. courts are deferring to the securities enforcement mechanisms established for foreign nations. This system is working correctly, and no legislation altering the principle adopted by the Supreme Court *Morrison* is appropriate at this time.

We thank you for your consideration of these comments and would be happy to discuss these issues further with you and your staff.

Sincerely,

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