SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

FOUR TIMES SQUARE
NEW YORK 10036-6522

TEL: (212) 735-3000
FAX: (212) 735-2000
www.skadden.com

FIRM/AFFILIATE OFFICES
BOSTON
CHICAGO
HOUSTON
LOS ANGELES
PALO ALTO
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO
VIENNA

February 25, 2011

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

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

Dear Ms. Murphy:

We are pleased to submit this comment letter to the Securities and Exchange Commission (the "SEC" or the "Commission") in response to the SEC's request for comments regarding 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 cover transnational securities fraud and related questions.[1]

For the reasons discussed below, we believe the scope of private rights of action under the antifraud provisions of the Exchange Act in cases of alleged transnational securities fraud should not be expanded beyond their current scope, as articulated in the Supreme Court's recent decision in *Morrison v. National Australia Bank Ltd.*[2] Accordingly, the antifraud provisions of the Exchange Act should not be extended to permit private litigants to enforce the United States securities laws to the same extent that the Commission and the United States government can purportedly enforce those laws under Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3]

---

1 Study on Extraterritorial Private Rights of Action, Exchange Act Release No. 63,174, 75 Fed. Reg. 66,822 (Oct. 29, 2010).

2 130 S. Ct. 2869 (2010).

3 We understand that the Commission believes Section 929P(b) of the Dodd-Frank Act overruled *Morrison* and reinstated the "conduct" and "effects" tests in enforcement actions by the SEC and the United States. Under this view, issuers who do not engage in securities transactions in the United States, but who engage in conduct within the United States that constitutes a significant step in furtherance of a securities law violation, or conduct outside of the United States that has a foreseeable substantial effect within the United States, would potentially be subject to

The bright-line transactional test set forth in *Morrison* for private rights of action, together with the additional authority of the Commission and the United States to take appropriate actions, provides investors with the protections they should reasonably expect in transnational matters.

I. *Morrison*'s Transactional Test Benefits Investors and Issuers

A great virtue of *Morrison's* transactional test is clarity and predictability of application. Prior to *Morrison*, under the so-called "conduct" and "effects" tests (or an "admixture" of those tests), lower courts employed a fact-intensive analysis in deciding whether to apply the U.S. securities laws extraterritorially, focusing on whether significant conduct took place in the United States or had foreseeable effects in the United States.[4] The purpose of this inquiry was to determine "whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [foreign securities deals] rather than leave the problem to foreign countries."[5] Due to the fact-bound and case-specific nature of the inquiry, investors and companies had great difficulty knowing whether foreign transactions would ultimately be subject to litigation in the United States.[6] The *Morrison* test, in contrast, establishes a bright line: the federal securities laws only apply to "the purchase or sale of a security listed on an American stock exchange" or to "the purchase or sale of any other security in the United States."[7]

The predictability of *Morrison*'s transactional test provides significant protection and clarity for investors. Investors who purchase or sell securities on a domestic exchange or who purchase or sell any other security in the United States can logically and reliably expect the broad protection of the United States securities laws.[8] Investors who do not engage in such transactions, on the other hand, now

---

enforcement actions by the SEC and other U.S. governmental agencies. Some commentators, however, have advanced the view that Section 929P(b)—which amends the "jurisdiction" of the securities laws—did not overrule *Morrison*, even as it applies to SEC and United States enforcement actions, because the *Morrison* Court construed the substantive and not the jurisdictional reach of Section 10(b). While these different interpretations remain unresolved, for purposes of this comment letter we assume that the SEC and other government agencies were granted extended Section 10(b) enforcement rights by Section 929P(b).

4 *See, e.g.*, *SEC v. Berger*, 322 F.3d 187, 192-95 (2d Cir. 2003).

5 *Id.* at 192 (citations, quotations and alterations omitted).

6 *See, e.g.*, Eric S. Waxman and Peter B. Morrison, *US Supreme Court Restricts Extraterritorial Reach of the Federal Securities Laws*, FINANCIER WORLDWIDE, Dec. 2010, at 62 (discussing the difficulty of applying the conduct and effects tests).

7 *Morrison*, 130 S. Ct. at 2888.

8 This expectation will be met, of course, only to the extent that a Section 10(b) action arising out of such transactions would not be dismissed for lack of personal jurisdiction, *forum non conveniens*, failure to satisfy the requisite pleading standards, or other defenses. Investors should,

know with certainty that their securities transactions conducted outside the United States will not provide them with the right to bring private Section 10(b) actions. Equipped with this information, investors can make more informed decisions regarding whether and where to invest.

Issuers also benefit from the predictability inherent in *Morrison*'s transactional test. They, too, can make better informed decisions when determining whether to list their securities on United States exchanges or to sell securities in the United States, knowing that doing so will potentially subject them to litigation under the U.S. securities laws by private plaintiffs, as well as the SEC and other federal law enforcement agencies. Conversely, issuers who choose not to take advantage of listing in the United States, or issuers who choose not to sell securities in the United States, know that they will not be subject to private actions under the U.S. securities laws. Issuers, therefore, will have greater certainty when planning and executing transactions, which is consistent with achieving fair, orderly, and efficient markets—a key part of the Commission's mission. Foreign companies can also invest in the United States—for example, through subsidiaries or joint ventures in the United States—without worrying that such investment, without more, will leave them exposed to potentially extensive litigation under the U.S. securities laws.

To date, application of the *Morrison* decision by the lower courts has been straightforward. Several district courts have applied *Morrison*'s bright-line rule to preclude transactions in securities on foreign exchanges from giving rise to a Section 10(b) action.[9] Likewise, at least one court has applied *Morrison*'s bright-line rule to find that trades on a domestic exchange were subject to a private Section 10(b) action.[10] Indeed, plaintiffs in Section 10(b) actions brought prior to *Morrison*

---

however, remain confident that their action will not be subject to the unpredictable vagaries of the "conduct" and "effects" tests.

[9] *See In re Royal Bank of Scotland Group PLC Sec. Litig.*, No. 09 Civ. 300(DAB), 2011 WL 167749, at *6-8 (S.D.N.Y. Jan. 11, 2011) (hereinafter, "*In re RBS*"); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 627 (S.D.N.Y. 2010); *In re Celestica Inc. Sec. Litig.*, No. 07 CV 312(GBD), 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010); *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495(RMB), 2010 WL 3910286, at *5-6 (S.D.N.Y. Sept. 29, 2010); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, --- F. Supp. 2d ---, No. 08 Civ. 1958 (JGK), 2010 WL 3860397, at *8-10 (S.D.N.Y. Oct. 4, 2010); *In re Alstom SA Sec. Litig.*, --- F. Supp. 2d ---, No. 03 Civ. 6595 (VM), 2010 WL 3718863, at *2-3 (S.D.N.Y. Sept. 14, 2010); *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, --- F. Supp. 2d ---, No. 09 Civ. 7058 (VM), 2010 WL 3291579, at *4-5 (S.D.N.Y. Aug. 16, 2010); *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH)(HBP), 2011 WL 590915, at *10-11 (S.D.N.Y. Feb. 17, 2011); *see also Elliott Assocs. v. Porsche Automobil Holding SE*, --- F. Supp. 2d ---, No. 10 Civ. 0532(HB), 2010 WL 5463846, at *6-7 (S.D.N.Y. Dec. 30, 2010) (transactions in swap agreements referencing securities traded on foreign exchange are not covered by § 10(b)).

[10] *See Lapiner v. Camtek, Ltd.*, No. C 08-01327 MMC, 2011 WL 445849, at *2 (N.D. Cal. Feb. 2, 2011) (allegations that "Camtek stock was traded on the NASDAQ exchange and that [plaintiff] purchased his stock on the NASDAQ exchange . . . are sufficient at the pleading stage to establish the applicability of the Exchange Act"). We note that such a conclusion would have taken considerably more than a single paragraph under the former "conduct" and "effects" tests.

have even stipulated to dismissal or amended their complaints to reflect *Morrison*'s bright-line rule.[11]

Judicial application of the second prong of *Morrison* concerning "the purchase or sale of any other security in the United States" to off-exchange transactions has also been more straightforward than any "conduct" or "effects" analyses that would have otherwise occurred.[12] This is a testament to the clarity and predictability of *Morrison*, which was sorely lacking under the previous conduct and effects tests. While some commentators have suggested that the off-exchange securities transactions present a "more complex" application of *Morrison*'s transaction test,[13] any analysis under the second prong of *Morrison* is still far less

---

[11] *See, e.g.*, *Elliott Assocs.*, 2010 WL 5463846, at *1 (complaints amended after *Morrison*); *Sgalambo v. McKenzie*, --- F. Supp. 2d ---, No. 09 Civ. 10087(SAS), 2010 WL 3119349, at *17 (S.D.N.Y. Aug. 6, 2010) ("The parties concede that the Supreme Court's recent decision in *Morrison* [] forecloses any potential class members who purchased Canadian Superior common stock on a foreign exchange . . . ."); *Terra Sec. ASA Konkursbo*, 2010 WL 3291579, at *5 (court granted motion to dismiss where parties agreed *Morrison* was controlling and did not dispute that the shares were purchased on European stock exchanges); *In re IMAX Sec. Litig.*, --- F.R.D. ---, No. 06 Civ. 6128(NRB), 2010 WL 5185076, at *1 n.1 (S.D.N.Y. Dec. 22, 2010) (proposed class amended post-*Morrison* to include only those who purchased shares on the NASDAQ and exclude those who purchased securities on the Toronto Stock Exchange). Defendants, too, have conceded Section 10(b) coverage in certain situations based on *Morrison*'s bright-line rule. *See, e.g.*, *In re RBS*, 2011 WL 167749, at *8 ("Defendants admit that under *Morrison*, trades on the NYSE fall within the territorial ambit of the Exchange Act.").

[12] *See, e.g.*, *Elliott Assocs.*, 2010 WL 5463846, at *7 (domestic transactions in other securities means "purchases and sales of securities explicitly solicited by the issuer in the U.S.") (citations omitted); *Stackhouse v. Toyota Motor Co.*, No. CV 10-0922 DSF (AJWx), 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010) (second prong means purchases and sales "explicitly solicited by the issuer within the United States"); *Quail Cruises Ship Mgmt. Ltd. v. Agencia De Viagens CVC Tur Limitada*, 732 F. Supp. 2d 1345, 1349-50 (S.D. Fla. 2010) (holding that the second prong of *Morrison* was not satisfied, even though the share purchase agreement designated Miami as the location of the deal closing, where the defendants were not signatories of the share purchase agreement, the actual signatories apparently signed the agreement in Spain and Uruguay, and all correspondence under the agreement was to be sent to the signatories' foreign offices); *SEC v. Credit Bancorp, Ltd.*, 738 F. Supp. 2d 376, 2010 WL 3582906, at *19-20 (S.D.N.Y. Sept. 13, 2010) (prior ruling denying motion for declaratory judgment and granting motion for summary judgment in an SEC enforcement action unaffected by *Morrison* because, *inter alia*, defendants marketed and sold an "Insured Credit Facility" to American investors while based in New Jersey, and held out to domestic investors that their assets would be held in U.S. banks and brokerage firms); *Gannon Int'l, Ltd. v. Blocker*, No. 4:10CV0835 JCH, 2011 WL 111885, at *15 (E.D. Mo. Jan. 13, 2011) ("By Plaintiffs' own admission, their 10(b)(5) claim relates to the sale of Plaintiffs' purported interest in Gannon Brewery in Vietnam. . . . Accordingly, Plaintiffs' 10(b)(5) claim, which purports to relate to an extraterritorial stock sale, fails as a matter of law."); *Absolute Activist Value Master Fund Ltd. v. Homm*, No. 09 CV 08862(GBD), 2010 WL 5415885, at *5 (S.D.N.Y. Dec. 22, 2010) (dismissing securities fraud claims in connection with private placement transactions between foreign issuers and Cayman Islands-based funds that were managed in Europe).

[13] *See, e.g.*, Dorothy Heyl, *Federal Courts Apply 'Morrison' Expansively*, N.Y. L.J., Nov. 19, 2010, at 4 (citing *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010), in which

complex than the analysis required by the abandoned conduct and effects tests. Moreover, such commentary does not counsel in favor of the SEC advising Congress in its report to revert to the unwieldy pre-*Morrison* tests. Rather, to the extent necessary, the Commission should consider providing guidance or adopting rules to provide still further predictability and clarity in the application of the *Morrison* test. For instance, the SEC could adopt safe harbor provisions that would provide an exemption from Section 10(b) liability for certain categories of transnational deals. The principles inherent in Rule 903 of Regulation S under the Securities Act of 1933, including the concepts of "offshore transaction" and "directed selling efforts," would be helpful when determining whether the primary sale of a security by an issuer or one of its affiliates occurred "in the United States." Similarly, Rule 904 of Regulation S under the Securities Act uses concepts that may be useful in the formulation of a safe harbor for determining whether the secondary market trades of a particular security occurred offshore.

We also believe that it is important for the Commission to consider that *Morrison*'s bright-line test conserves scarce judicial resources. Unclear rules of law lead to substantial expenditures of judicial resources. As *Morrison* itself described in detail, the conduct and effects tests were no exception to this general rule.[14] District courts applying *Morrison* have independently commented favorably on the relative ease of analysis introduced by *Morrison*'s test.[15] In this way, *Morrison*'s transactional test improves upon the previous conduct and effects tests, which wasted considerable judicial time and energy.

The transactional test adopted in *Morrison* also strikes an appropriate balance by limiting private securities fraud actions to those cases with a clear transactional nexus to the United States. Foreign companies will have a greater incentive to raise capital in the U.S. markets with the knowledge that, upon doing so,

---

the court denied the defendants' motion to dismiss in order to permit further development of the factual record to determine whether the plaintiffs' purchases of shares of certain offshore funds occurred in the United States).

[14] *Morrison*, 130 S. Ct. at 2878-81 (criticizing pre-*Morrison* tests as "complex in formulation and unpredictable in application").

[15] *See, e.g.*, *In re RBS*, 2011 WL 167749, at *8 ("The *Morrison* Court did not reject the conduct and effects tests formerly employed by the various Circuits to replace it with another difficult-to-employ, fact intensive test."); *Cornwell*, 729 F. Supp. 2d at 622-23 ("The standard the *Morrison* Court promulgated to govern the application of § 10(b) in transnational securities purchases and sales does not leave open any of the back doors, loopholes or wiggle room to accommodate the distinctions Plaintiffs urge to overcome the decisive force of that ruling . . . ."); *id.* at 624 (returning to pre-*Morrison* tests would "invite extensive analysis required to parse foreign securities trades so as to assess quantitatively how many and which parts or events of the transactions occurred within United States territory, and then to apply value judgments to determine whether the cluster of those activities sufficed to cross over the threshold of enough domestic contacts to justify extraterritorial application of § 10(b)"); *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1317-18 (S.D. Fla. 2010) ("Adopting the unpredictable and subjective criterion suggested by the Plaintiffs . . . would eliminate the doctrinal clarity that the Supreme Court provided in *Morrison*.").

their potential liability will be limited to and commensurate with their U.S. capital raising activities, and will not threaten their broader international capital base. Combined with the authority of the SEC and other federal law enforcement agencies to bring enforcement actions in appropriate cases where transnational fraud has been alleged, we believe these private rights properly protect investors.[16]

II. Congress was Correct to Limit Extraterritorial Rights of Action Post-*Morrison* to the Securities and Exchange Commission and the United States

A key question that the SEC has been asked to consider and address in its study and eventual report is whether Congress was correct to limit rights of action for transnational matters after the decision in *Morrison* to the SEC and the United States. Following the *Morrison* Court's decision that Congress did not intend for Section 10(b) of the Exchange Act to provide rights of action for transnational matters, Congress specifically decided to adopt Section 929P of the Dodd-Frank Act to address the extraterritorial jurisdiction of the antifraud provisions of the federal securities laws for actions or proceedings "brought or instituted by the Commission or the United States." We believe that Congress was correct in establishing this key limitation and that further changes to the current balance in rights are unnecessary and potentially harmful.

The ability of the SEC or the U.S. government to commence actions and proceedings in accordance with Section 929P will ensure that investors have additional antifraud protections when they are necessary and appropriate. Delegating responsibility for these additional antifraud protections to federal law enforcement agencies recognizes the important role they play in both investor protection and the broader U.S. economy. The mission of the SEC, as noted above, includes not only investor protection, but also "maintain[ing] fair, orderly, and efficient markets, and facilitat[ing] capital formation." In carrying out its mission, the SEC has the authority and capability to weigh the impact of its actions against equally legitimate but potentially competing interests (*e.g.*, use of judicial resources and encouraging foreign investment in the United States). By contrast, we believe that private litigants have neither the benefit of this broader U.S. marketplace outlook nor any meaningful incentive to consider these potentially competing interests.[17] We

---

[16] *See* Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 38-39, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723009, at *38-39. This more restrained approach also seems more likely to encourage less developed financial regulatory regimes to adopt clear and enforceable rules of their own to encourage investment, rather than relying on unpredictable private suits in the United States to provide adequate levels of enforcement. *See id.* at 28.

[17] *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (recognizing that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general" because even meritless cases can have substantial settlement value, and that abusive litigation can injure the U.S. economy, which

respectfully submit that the SEC should focus on this important difference when conducting its study and preparing its report.

Federal law enforcement agencies share another important difference from private litigants: they have both bilateral and multilateral relationships with foreign governments and foreign regulators. These relationships allow for cooperative dialogue with foreign counterparties that can limit conflict with foreign regulation and duplicative litigation.[18] The SEC, for example, is a member of the International Organization of Securities Commissions (IOSCO) and has cooperated with that organization on the adoption of certain rules and standards.[19] The Commission also has investigation-assistance and other agreements with many securities regulators around the world. We believe that these relationships and agreements benefit investors and the U.S. marketplace because they facilitate the SEC's ability to consider nuanced and delicate issues relating to international regulatory cooperation and comity both in establishing regulations and in determining whether or not to bring a particular enforcement action.

We do not believe that respect for foreign regulatory regimes needs to come at the expense of investor protection. Investors who choose to access foreign capital markets are hardly without recourse when foreign issuers engage in misconduct. Most major non-United States jurisdictions provide investors with ample opportunity to redress injuries suffered as a result of securities fraud. For example, Australian law provides a considerable range of civil remedies.[20] As in the United States, Australian securities plaintiffs can maintain class actions.[21] Similarly, British law provides multiple common law and statutory causes of action for persons

---

justifies judicial and legislative limitations on the private right of action under Section 10(b)) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-40 (1975), and H.R. Conf. Rep. No. 104-369, at 31-32, *reprinted in* 1995 U.S.C.C.A.N. 730, 730-31 (1995)).

[18] Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae, *supra* note 16, at 39.

[19] For instance, when adopting disclosure standards for foreign private issuers, the Commission noted that its new standards "conform[ed] to the international standards endorsed by the International Organization of Securities Commissions." *See* International Disclosure Standards, Exchange Act Release No. 41,936, 64 Fed. Reg. 53,900, 53,900-53,901 (Oct. 5, 1999) ("We believe IOSCO's disclosure standards represent a strong international consensus on fundamental disclosure topics . . . . Today we are revising our existing foreign issuer integrated disclosure system to incorporate fully the international disclosure standards.").

[20] *See* Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendant-Appellees at 15-16, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723006, at *15-16.

[21] *See id.* at 17-20.

who suffer injuries as a result of securities fraud, and the U.K. legal system also includes a mechanism for group litigation.[22]

Certain differences between United States law and foreign law—for example, the "English" rule of cost allocation in certain common law jurisdictions (*i.e.*, the "loser pays")—represent deliberate policy choices that should not be undermined by permitting litigation of foreign disputes in United States courts.[23] The Supreme Court has noted with caution the risk of permitting litigants to "bypass . . . less generous remedial schemes" in the appropriate forum, "thereby upsetting a balance of competing considerations" embodied by that forum's laws.[24]

We encourage the SEC to consider carefully the importance of these relationships and the legitimate approaches to regulation taken by other countries, and would suggest that the SEC and the United States are the appropriate parties to make judgments regarding the trade-offs among these considerations in individual cases.

Even if investors are injured by a transnational fraud and, in the context of a particular case, may lack adequate remedies in an appropriate foreign venue, it is not necessary to rely on private enforcement of the U.S. securities laws to compensate these investors. If appropriate, the SEC can act in such cases on the basis of its powers under Section 929P of the Dodd-Frank Act and effectively compensate injured investors. In both civil and administrative enforcement actions, the SEC can require violators to disgorge ill-gotten gains.[25] Indeed, the SEC is not limited to suing just the persons who violate the securities laws. It can also obtain disgorgement from relief defendants to whom unlawful proceeds are transferred.[26] And those disgorgement amounts received by the SEC can generally be distributed to

---

[22] *See* Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae, *supra* note 16, at 8-13. Like the U.K., several additional European nations also provide a mechanism for group litigation. *See* Brief of Amicus Curiae NYSE Euronext in Support of Respondents at 18, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723008, at *18 (discussing development of mass litigation mechanisms in Sweden, the Netherlands, the U.K., Canada, and Italy).

[23] *See* Brief of the Government of the Commonwealth of Australia as Amicus Curiae, *supra* note 20, at 22-23.

[24] *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004) (analyzing the Sherman Antitrust Act in the context of conduct that caused independent foreign harm that was the sole basis for plaintiffs' claims).

[25] 15 U.S.C. § 78u-3(e) (2010) ("In any [administrative] cease-and-desist proceeding under subsection (a) of this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest."); *SEC v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1047 (9th Cir. 2005) (explaining that "[d]isgorgement plays a central role in the enforcement of the securities laws" and noting that the Commission may use disgorged proceeds to compensate injured victims) (citing *SEC. v. Rind*, 991 F. 2d 1486, 1491-92 (9th Cir. 1993)).

[26] *See, e.g.*, *SEC v. George*, 426 F.3d 786, 798-99 (6th Cir. 2005); *SEC v. Cavanagh*, 155 F.3d 129, 136-37 (2d Cir. 1998).

injured parties.[27] Additionally, since 2002, the SEC has also been able to use "Fair Funds" to direct payment of the proceeds of penalties collected from securities law violators to the victims of their wrongdoing.[28] Thus, even in cases where the amount of ill-gotten gain is not commensurate to injuries suffered by investors, the Commission still has the ability to make investors whole.

Allowing the SEC and the United States to bring enforcement actions in transnational securities fraud cases without creating a private right of action is also not a novel or unusual approach. For example, in multiple contexts, the SEC has the power to enforce particular provisions of the securities laws that are not subject to private enforcement. The SEC, but not private litigants, can bring enforcement actions against persons who aid and abet violations of the securities laws;[29] chief executive officers and chief financial officers when a restatement is required due to an issuer's noncompliance with financial reporting requirements;[30] and issuers for the selective disclosure of non-public material information.[31] Likewise, the Foreign Corrupt Practices Act—another statute with international implications—does not provide a mechanism for private enforcement.[32]

---

[27] *See, e.g.*, U.S. SEC. & EXCH. COMM'N, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2010) ("An integral part of the [SEC Enforcement] program's function is to seek penalties and the disgorgement of ill-gotten gains in order to return funds to harmed investors.").

[28] Sarbanes-Oxley Act of 2002 § 308(a), 15 U.S.C. § 7246(a) (2002). Pursuant to the Dodd-Frank Act, the Commission is no longer required to obtain disgorgement in order to place penalty amounts into a Fair Fund for the benefit of injured investors. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 929B, 15 U.S.C. § 7246(a) (2010).

[29] *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78t(e) (2010) (providing the SEC with statutory authority to bring enforcement actions against persons who aid and abet violations of the Exchange Act); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 929M & 929N, 124 Stat. 1376, 1861-62 (2010) (codified in scattered sections of 15 U.S.C.) (providing the SEC with statutory authority to bring enforcement actions against persons who aid and abet violations of the Securities Act, the Advisers Act, and the Investment Company Act); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177-78, 191 (1994) (holding that a private plaintiff could not maintain an aiding and abetting action under § 10(b)); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2006) ("The § 10(b) implied private right of action does not extend to aiders and abettors. The conduct of a secondary actor must satisfy each of the elements or preconditions for liability . . . .").

[30] There is no private right of action under Section 304 of the Sarbanes-Oxley Act of 2002. *Cohen v. Viray*, 622 F.3d 188, 193-94 (2d Cir. 2010); *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1229-33 (9th Cir. 2008).

[31] Regulation FD does not create a private right of action. *See* Selective Disclosure and Insider Trading, Exchange Act Release No. 43,154, 65 Fed. Reg. 51,716, 51,726 (Aug. 24, 2000) (codified at 17 C.F.R. § 243.100 (2010); 17 C.F.R. § 243.101 (2000); 17 C.F.R. § 243.102 (2000) & 17 C.F.R. § 243.103 (2000)).

[32] *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027-30 (6th Cir. 1990).

III. Expanding the Implied Private Right of Action to Cover Transnational Securities Fraud Would be Problematic

Even if the Commission is concerned that existing standards regarding extraterritoriality—as buttressed by the possibility of U.S. government enforcement actions in appropriate cases—may not be sufficient to protect investors, returning to the pre-*Morrison* status quo presents many problems. First, if the Commission concludes that private rights of action for transnational securities fraud should be extended, what test should Congress adopt? Will the Commission simply ask Congress to reanimate pre-*Morrison* doctrinal uncertainty, which was finally settled by the Supreme Court in *Morrison*? Ambiguity and uncertainty are unavoidable elements of the conduct and effects tests. For example, with respect to the conduct test, commentators have observed that the distinction between "preparatory" conduct in the United States (which is insufficient to establish jurisdiction) and "substantial" conduct in the United States (which is sufficient to establish jurisdiction) is confusing and ultimately meaningless.[33] Other commentators have made similar observations about the inherent unpredictability of the effects test.[34]

Perhaps the Commission could recommend that Congress legislate some other test with sufficient precision that confusion and uncertainty would not re-emerge. We respectfully submit, however, that if federal courts of appeal were unable to create a consistent and satisfactory standard for extraterritorial application of the securities laws during decades of considering these issues, the Commission and Congress are unlikely to succeed where the courts failed. The history of the conduct and effects tests counsels against crafting new, unwieldy tests for extraterritorial private securities actions.

Second, federal courts before the *Morrison* decision were not in agreement regarding the extraterritorial application of the inferred private right of action under Section 10(b). Prior to *Morrison*, the outcome in any given case could turn on securities plaintiffs' choice of forum. As the U.S. Court of Appeals for the Seventh Circuit observed in a pre-*Morrison* opinion, while federal courts "that have confronted the matter seem to agree that there are some transnational situations to which the antifraud provisions of the securities laws are applicable, agreement

---

[33] *See* Stephen J. Choi and Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 491-92 (2009); *accord Morrison*, 130 S. Ct. at 2879.

[34] *See* EDWARD F. GREENE, *ET AL.*, U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 15.10[2], 15-133 (9th ed. 2009) (noting apparent difficulty of reconciling the holding in *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968), which found subject matter jurisdiction where Canadian defendants engaged in fraud with respect to a Canadian company that listed shares on the American Stock Exchange with the holding in *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), which found no subject matter jurisdiction where foreign defendants defrauded a foreign investment trust with American investors).

appears to end at that point."[35] According to that Court, the "predominant difference among the circuits" was:

> [T]he degree to which the American-based conduct must be related causally to the fraud and the resultant harm to justify the application of American securities law. At one end of the spectrum, the District of Columbia Circuit . . . require[d] that the domestic conduct at issue must itself constitute a securities violation. . . . At the other end of the spectrum, the Third, Eighth and Ninth Circuits, although also focusing on whether the United States-based conduct caused the plaintiffs' loss . . . generally require some lesser quantum of conduct.[36]

Thus, over the years, competing articulations of the standard for extraterritorial application of the federal securities laws in private actions contributed to undesirable complexity and lack of predictability.[37] Returning to the pre-*Morrison* test or adopting a new test could resurrect these forum issues.

Third, in addition to doctrinal considerations, extraterritorial application of the federal securities laws in suits by private litigants directly implicates international comity. In *F. Hoffmann-La Roche Ltd. v. Empagran*, the Supreme Court stated that application of American law where foreign conduct gives rise to foreign injury creates "a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," and the Court refused to assume that Congress would intend such "an act of legal imperialism."[38] Only in rare circumstances should the United States seek to impose its policy choices on other nations. In the field of securities law, the decision whether to do so is best left with the Commission or the U.S. government, as opposed to private litigants.

The chaos that can result from different courts applying different rules for certain investors is illustrated in two conflicting decisions in the U.S. District Court for the Southern District of New York: *In re Vivendi Universal, S.A.*,[39] and *In re Alstom SA Sec. Litig.*[40] The *Vivendi* court, after conducting a lengthy and thorough analysis of French law, held that French investors could be part of a class of plaintiffs in a Section 10(b) action because, among other reasons, French courts would grant preclusive effect to a United States judgment or settlement covering

---

35 *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998).

36 *Id.* at 665-66 (citations and quotations omitted).

37 *See Morrison*, 130 S. Ct. at 2879-81.

38 542 U.S. at 165, 169.

39 242 F.R.D. 76 (S.D.N.Y. 2007).

40 253 F.R.D. 266 (S.D.N.Y. 2008).

French investor class members.[41] The *Alstom* court held precisely the opposite after conducting an equally rigorous analysis of French law, holding that French courts would not be likely to recognize and give preclusive effect with respect to French investor class members.[42] Under this pair of decisions, French investors have no way of knowing whether or not they must guard against the possibility that they could be unwittingly bound by an unsatisfactory judgment or settlement in the United States or, conversely, whether they can expect to take advantage of the class action device in the United States. Bright-line rules cure these types of inconsistencies.[43]

In light of the very real threat of conflict, reintroducing extraterritorial private actions under the federal securities laws could easily weaken international support for, and cooperation with, U.S. financial regulation and litigation. The Commission has often recognized the importance of international cooperation among financial regulators.[44] Accordingly, the Commission should keenly focus its study on any changes to the existing regulatory landscape that are likely to reduce international regulatory cooperation.

Finally, reintroducing extraterritorial private securities actions would also have significant economic implications. A recent study by Cornerstone Research shows that private securities class actions as a percentage of total securities class actions have increased markedly over the last 15 years. In 1996, about 6% of

---

41 *See Vivendi*, 242 F.R.D. at 95-102.

42 *See Alstom*, 253 F.R.D. at 282-87.

43 Competing litigation in U.S. and French courts in the *Vivendi* case further underscored the threat to international comity posed by transnational securities litigation in the U.S. During the pendency of the U.S. action, Vivendi initiated a lawsuit in France to enjoin certain French persons from serving as class representatives in the U.S. action. *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH)(HBP), 2009 WL 3859066, at *1 (S.D.N.Y. Nov. 19, 2009). Plaintiffs in the U.S. action responded by seeking an anti-suit injunction requiring Vivendi to withdraw the French action—*i.e.*, there were dueling anti-suit injunction actions pending in French and American courts. *See id.* Ultimately, the litigation did not result in international judicial conflict, because the U.S. court relieved the French plaintiffs of their responsibilities as class representatives after Vivendi conceded that French shareholders could remain in the class without French named plaintiffs, *see id.* at *7, and the French court held that the French plaintiffs could remain parties to the action, *see* Matthew Campbell and Heather Smith, *Vivendi Can't Block French Investors From Joining U.S. Class-Action Suit*, BLOOMBERG.COM, Apr. 28, 2010. Nevertheless, it is not difficult to envision a case in which the outcome would differ.

44 *See, e.g., International Cooperation to Modernize Financial Regulation: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs Subcomm. on Sec. and Int'l Trade and Fin.*, 111th Cong. (2009) (statement of Kathleen Casey, Comm'r, U.S. Sec. and Exch. Comm'n) ("International cooperation is critical for the effectiveness of financial regulatory reform efforts. . . . [D]ue to the mobility of capital in today's world of interconnected financial markets, activity can easily shift from one market to another. Only collective regulatory action can be effective in fully addressing cross-border activity in our global financial system.").

all securities class actions were filed against foreign issuers.[45] In 2010, that number was 15.9%, up from 11.9% in 2009.[46]

Private securities litigation against foreign issuers poses a genuine threat to the global competitiveness of the American capital markets. As the Supreme Court recognized in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, whenever the scope of the implied right of action under Section 10(b) of the Exchange Act is broadened, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here," and "[t]his, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets."[47] The Court's observation is consistent with the findings of New York City Mayor Michael Bloomberg and New York Senator Charles Schumer. In a 2006 study, Mayor Bloomberg and Senator Schumer concluded that "the increasing extraterritorial reach of [United States] law and the unpredictable nature of the legal system were . . . significant factors that caused New York to be viewed negatively" in relation to other global financial centers.[48]

These conclusions are well founded. The number of foreign companies listing on United States exchanges has declined dramatically in recent years. To give a few examples, between the end of 2006 and the end of 2009, the number of French firms registered and reporting with the SEC fell from 27 to 10, the number of U.K. firms fell from 63 to 42, the number of German firms fell from 20 to 10, the number of Italian firms fell from 11 to 5, the number of Australian firms fell from 24 to 13, and the number of Canadian firms fell from 491 to 377.[49] Taken together with statements by foreign companies that fear of liability under the federal securities laws (among other concerns) has driven them from the U.S. capital markets,[50] and the ready availability of overseas capital,[51] these statistics are very

---

45 CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS—2010 YEAR IN REVIEW 13 (2011).

46 *Id.*

47 *Stoneridge Inv. Partners*, 552 U.S. at 164.

48 MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 73 (Dec. 2006); *see also* John C. Coffee Jr., *Global Class Actions*, 6/11/2007 NAT'L L.J. 12 (arguing that "fear that listing on a U.S. exchange exposes [a] foreign issuer to potentially bankrupting securities liabilities if its stock price were to decline sharply" causes foreign firms to avoid U.S. capital markets).

49 *See* U.S. SEC. & EXCH. COMM'N, DIV. OF CORP. FIN., INTERNATIONAL REGISTERED AND REPORTING COMPANIES (last modified June 4, 2010), http://www.sec.gov/divisions/corpfin/internatl/companies.shtml.

50 *See* Brief of Infineon Techs. AG as Amicus Curiae Supporting Respondents at 22-24, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723007, at *22-24.

troubling. We believe that tailoring the scope of the U.S. securities laws to fit within the international regulatory and enforcement framework is a necessary part of maintaining the global competitiveness of the American capital markets.

We note that, in addition to investor protection, the Commission's mandate includes facilitating capital formation. As one Commissioner recently remarked, "[a]n overarching objective engrained into and animating the federal securities laws is to encourage investment so that businesses can raise the capital they need to drive economic growth," which "advances core investor goals."[52] We agree with this assessment, and, as the Commission conducts its study, we respectfully urge it to be mindful of these important, but at times competing, policy goals.

Extraterritorial private securities litigation also threatens foreign direct investment in the United States. In 2008, the U.S. Department of Commerce cautioned that "[t]he United States is increasingly seen from abroad as a nation where lawsuits are too commonplace."[53] The Department of Commerce further noted that the U.S. litigation environment is seen by many critics as an "implicit international competitive disadvantage," and "[a]ny issue that erodes competitiveness has the potential to affect foreign direct investment," which "plays a major role in the U.S. economy as a key driver of the economy and as an important source of innovation, exports, and jobs."[54] If the Commission recommends to Congress that it reinstate an extraterritorial private right of action, it should be aware that this may further dissuade foreign companies from investing in the United States for liability reasons. In these times of economic crisis and high unemployment, this country should encourage foreign firms to invest and expand their activities in the United States. Reinstatement of an extraterritorial private right of action under the securities laws would be a profound step in the wrong direction.

* * * * *

---

[51] *See* Peter Stein, *Hong Kong Seeking IPO 3-Peat in 2011*, WALL ST. J., Jan. 2, 2011 ("For a second year running, the Stock Exchange of Hong Kong topped the list of global venues for new share offerings by raising $57.16 billion, according to data provider Dealogic. That put it well ahead of New York, at No. 2 with $34.9 billion.").

[52] *See* Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at "The SEC Speaks in 2011" (Feb. 4, 2011).

[53] *See* U.S. DEP'T OF COMMERCE, THE U.S. LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT: SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY 1 (Oct. 2008) (citation omitted).

[54] *Id.* at 1-2 ("Foreign firms employ more than 5.3 million U.S. workers through their U.S. affiliates and have indirectly created millions of additional jobs. More than 30 percent of the jobs directly created through [foreign direct investment in the United States] are in manufacturing, and these jobs account for 12 percent of all manufacturing jobs in the United States.") (citations omitted).

We appreciate the opportunity to comment on the Commission's extraterritoriality study. In our view, the transactional test articulated in *Morrison* provides adequate and expected protection to investors and badly needed clarity for issuers and other market participants. We also believe it protects judicial resources and encourages capital raising and foreign investment in the United States. By authorizing government enforcement actions in circumstances where *Morrison* would preclude private litigation, Congress has already struck an appropriate balance between protection for investors and respect for international comity. We respectfully urge the Commission to consider these points in its study and to cover them in its report to Congress.

We would be pleased to discuss our comments with the Commission or its staff. You may contact Hilary Foulkes in our Frankfurt office at 011-49-69-74220-0, Richard Ely in our London Office at 011-44-20-7519-7171, or Peter Morrison in our Los Angeles office at 1-213-687-5304 with any questions relating to this comment letter.

Very truly yours,

Skadden, Arps, Slate, Meagher & Flom LLP

Skadden, Arps, Slate, Meagher & Flom LLP

cc: Hon. Mary L. Schapiro, Chairman
Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner