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February 18, 2011

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

Re: - Comments on the Commission's Study on Extraterritorial Private Rights of Action
File No. 4-617

Dear Ms. Murphy:

We are submitting this letter in response to the U.S. Securities and Exchange Commission's study on extraterritorial private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), published in Release No. 34-63174; File No. 4-617 (the "Release").[1]

The title of the Commission's study demonstrates the extraordinary nature of the question presented: should there be an "*extraterritorial*" private right of action under Section 10(b) of the Exchange Act? Expressed differently, should investors that purchase foreign securities in foreign markets be entitled to institute claims for alleged securities fraud in the United States courts?

We believe that investors that engage in transactions in non-U.S. markets have a legitimate expectation of protection under the securities laws of those markets, not under the laws of the United States. We strongly urge the Commission to respect the right of foreign sovereigns to decide how best to protect their own markets. The Commission should not propose to extend the scope of Section 10(b) to cover transactions that take place outside the United States.

[1] **EuropeanIssuers** represents the interests of publicly traded companies in Europe, which are subject to complex rules on issues such as shareholder rights, corporate governance and reporting and market regulations. Our members include both national associations and companies from all sectors in 14 European countries, where there are some 9,200 such companies with a combined market value of some € 5,000 billion. EuropeanIssuers' ultimate goal is to achieve well functioning European financial markets which serve the interests of their users, together with good corporate governance and responsible share ownership. More information can be found at www.europeanissuers.eu.

This fundamental point was at the heart of the *Morrison* decision, and we address it in the first part of this letter, demonstrating why foreign securities transactions should be subject to foreign antifraud rules, not those of the United States. We also show why a return to the "conduct" and "effects" tests in private actions would be problematic. Finally, we address the question of determining when a transaction occurs "in the United States" in the context of a global, technologically advanced securities market, an issue that is intellectually difficult but that is likely to have practical consequences in only a small minority of cases (and which therefore should not drive the Commission's overall position).

1. Private Rights of Action in the Context of the Facts of the *Morrison* Case

The facts involved in the *Morrison*[2] case are clear and simple. Foreign plaintiffs who purchased securities of a foreign company on a foreign stock exchange sought to recover damages for alleged fraud in a United States court. They claimed the right to do this because the fraud allegedly occurred in one of the issuer's United States subsidiaries.

The two lower court decisions[3] in the *Morrison* case found that there was not a sufficient nexus between the alleged conduct in the United States and the damages allegedly suffered by the plaintiffs to uphold a claim in a United States court. The concurring opinion of Justice Stevens in the Supreme Court followed similar reasoning.[4]

The Supreme Court's majority decision took a different approach and adopted a bright line test: Section 10(b) applies only to securities transactions that take place in the United States or that involve securities that are listed on a United States exchange. While the opinion eloquently discussed broader principles of legal extraterritoriality, the basic holding in the securities law context was this simple, bright line test.

We believe that the majority's bright line test is the right one, for the following reasons:

- *Investor expectations*. When an investor purchases securities of a foreign company on a foreign exchange, the investor should legitimately expect to be protected by the securities laws of the foreign market.[5] The investor can (and should) assess the risks and benefits of the foreign securities law regime when it makes an investment decision. The investor cannot assume, at the time it makes its investment decision, that some future conduct by the issuer or one of its affiliates will be determined after-the-fact to have had a relationship to the United States sufficient to justify the application of the U.S. securities laws. Even under the pre-*Morrison* tests, the investor must assume that the United States securities laws will not apply.

[2] Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010) ("*Morrison*"). -
[3] Morrison v. National Australia Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008). ("*Morrison Second Circuit*"); In re Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at *3 (S.D.N.Y. Oct. 25, 2006). -
[4] *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring). -
[5] See, e.g., SEC Release No. 33-6863; 34-27942 (Apr. 24, 1990), Part II ("As investors choose their markets, they choose the laws and regulations applicable in such markets."). -

- *Investor Protection*. Extending Section 10(b) to foreign securities transactions would not protect United States investors. To the contrary, it could have an adverse impact on those investors and on the U.S. securities markets more generally.

  Expanding the coverage of U.S. securities actions (particularly class actions) will cause companies to limit strictly their contacts with the U.S. market. As the Commission is aware, more than 40% of the European companies that were reporting companies when the deregistration regime was modified in 2007 have chosen to terminate their U.S. registration. Many have done so in order to limit their potential exposure to disruptive (and often abusive) class actions. Expanding the potential scope of class actions will cause companies to reduce their U.S. contacts further, such as by terminating (or declining to establish) sponsored ADR programs, or limiting their investor communications programs in the United States.[6]

  In addition, if the "conduct" test is restored, non-U.S. companies will review the organizational structures of their businesses. They will choose to conduct business through non-U.S. subsidiaries where possible, in order to reduce the risk that an alleged fraudulent action occurring in the United States might "trip the wire" and result in a long and costly U.S. securities litigation procedure. In addition to the adverse impact that this would have on the U.S. economy, it would effectively mean that companies will choose where to do business based on considerations that have nothing to do with the needs of the business, potentially harming investors.

- *International Comity and Respect for Foreign Sovereignty*. Structuring an effective securities law regime requires legislatures and regulators to make difficult choices. Many nations have made choices that are different from those in the United States.[7] For example, most nations that have enacted collective action regimes require plaintiffs to affirmatively opt-in to a case, declining to adopt the U.S. "opt-out" mechanism, which they view as contrary to public policy.[8] Additionally, most civil legal regimes forbid or limit the use of

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[6] We recognize that the issue being considered by the Commission is whether to expand Section 10(b) on an extraterritorial basis, an issue that in theory should not be affected by the extent of contacts between a non-U.S. company and the United States market. In practice, however, the more contacts a company has with the United States, the more likely it is to come within the "radar" of the class action plaintiff's bar. If the potential size of a class is expanded through the inclusion of investors that engage in transactions on foreign markets, companies will be more cautious and restrict their contacts with the United States.

[7] We cite a limited number of examples in this letter. For a more detailed review of the choices made by various nations in designing their securities law regimes, please see the *amicus curiae* brief filed in the Supreme Court Morrison case by one of our member associations, the Association Française des Entreprises Privées, together with a number of other organizations. Brief for the Securities Industry and Financial Markets Association et. al. as *Amici Curiae*, *Morrison*, No. 08-1191.

[8] Hannah L. Buxbaum, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat'l L. 14, 63 (2007); countries that have adopted "opt-in" procedures for representative proceedings (in the securities fraud context or otherwise) include: England, Estonia, Finland, France, Germany, Italy, Spain, and Taiwan. See Civil Procedure Rule (U.K.) 19.10-.12 (2008); Global Legal Group, The International Comparative Legal Guide to: Class & Group Actions 2010 ("C&G 2010"), at 66, 74

contingency fees,[9] and utilize the "loser pays" rule where the losing party is normally responsible for the other party's costs and fees.[10] Applying Section 10(b) and United States litigation procedures to claims based on securities transactions in foreign markets would inappropriately undermine the legitimate policy choices made by other sovereign nations.[11]

- *Use of U.S. Judicial Resources*. One of the justifications for the class action system is that it fosters the efficient utilization of U.S. judicial resources by avoiding multiple claims relating to the same issues. Expanding Section 10(b) to cover non-U.S. transactions would do precisely the opposite. Investors that purchase securities outside the United States can pursue remedies in the courts of the markets where they engage in transactions. Allowing those investors to bring claims in the United States – in addition to foreign courts[12] – would consume scarce resources of the U.S. courts that should be focused on the protection of the U.S. markets, rather than foreign markets.

2. The "Conduct" and "Effects" Test

(2009); French C. Com. arts. 225-120, 225-252 (2010), available at http://www.legifrance.gouv.fr/affichCode.do;jsessionid=6E3121AB386F2B0FA14F42ADCB6AAEFF.tpdjo03v_3?cidTexte=LEGITEXT000005634379&dateTexte=20100221 and C&G 2010, at 80-81; Bundesministerium der Justiz, The German 'Capital Markets Model Case Act,' at 2, available at http://www.bmj.bund.de/files/-/1056/EnglishInfo KapMuG.pdf; Brief for German & Italian Legal Scholars as Amici Curiae at 27-30, Infineon Technologies AG. v. Dolan, No. 09-15857 (9th Cir. Sept. 9, 2009); Spanish Law of Civil Judgment 1/2000; Lawrence S. Liu, Simulating Securities Class Actions: The Case in Taiwan, at 4 (2000), available at http://ssrn.com/abstract=251224.

[9] Countries that limit or prohibit the use of contingency fees include: Australia, England, France, Japan, and Switzerland. See Michael Duffy, 'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosures in the United States, Canada and Australia, 29 Melb. U. L.Rev. 621, at 652 (2005) & *C&G 2010*, at 30; Winand Emons & Nuno Garoupa, The Economics of US-style Contingent Fees and UK-style Conditional Fees, at 2 (Bern University Discussion Paper Series 04-07, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=546742; Veronique Magnier, Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters, at 24 (2007), available at http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf (prohibiting arrangements that include only contingency fees or a symbolic noncontingency fee); Harold S. Bloomenthal & Samuel Wolff, International Capital Markets and Securities Regulation, § 54:59 (2010); C&G 2010, at 150; see generally Buxbaum, at 63.

[10] "[T]he general rule in Europe is 'the loser pays[.]'" Laurel J. Harbour & Marc E. Shelley, The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World, at 11 (ABA Annual Meeting, Section of Litigation, August 2006); see also C&G 2010, at 22, 46, 69, 77, 94, 122, 128, 138, 142, 149; Peta Spender, Securities Class Actions: A View from the Land of the Great White Shareholder, 31 Comm. L. World Rev. 123, 144 (2002); Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 31; C&G 2010, at 53; Civil Procedure Rule 44.3(2) (U.K.) (2008).

[11] As the Supreme Court noted in *Morrison*, these issues would need to be dealt with in determining whether a U.S. court could properly exercise jurisdiction over a claim relating to a foreign securities transaction. *Morrison*, 130 S. Ct. at 2887. The Supreme Court did not make this determination in *Morrison*, as it found that Section 10(b) did not apply to the foreign transaction at issue, making it unnecessary to address the difficult question of international comity and jurisdiction. Id., at 2877.

[12] The institution of a U.S. class-action lawsuit would not necessarily bar a plaintiff from bringing a duplicative lawsuit in a foreign court over the same matter. As a result, plaintiffs seeking "two bites at the apple" would effectively occupy the resources of the courts in both the United States and the foreign market. The result would be one case in the United States (with a class including all who have not affirmatively opted out), and another abroad (including foreign plaintiffs that consider they are not bound by a U.S. judgment or settlement).

Despite their storied history, the "conduct" and "effects" tests are highly unsatisfactory methods of determining whether Section 10(b) should apply to an action for alleged securities fraud in today's global securities market. As the Supreme Court recognized in its *Morrison* decision, these tests are complex in formulation and unpredictable in application, with the actual tests varying based on multiple factors and among the different U.S. circuits.[13]

The problem with the "conduct" and "effects" tests lies in their fact-specific nature. The "effects" test is based on "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." The "conduct" test requires a court to determine "whether the wrongful conduct occurred in the United States." Sometimes each test is applied individually, and sometimes courts mix the two tests. Neither test takes into account the expectations of investors when they purchase securities, or the substantial interests of foreign jurisdictions in the protection of their own markets.

The result of these tests is years of lengthy and costly, fact-specific legal procedures simply to determine whether or not the U.S. securities laws apply (before any consideration is given to the merits of a case). Because of the tremendous costs and resources involved in this procedure, including utilization of significant management time, and given the unpredictable application of the test, companies often decide to settle cases without merit to which the U.S. securities laws should not even apply.

The application of the U.S. securities laws should depend on where the securities transaction takes place. The location of alleged fraudulent conduct is not relevant to an investment decision in securities.[14] Similarly, the question of whether there is an effect in the United States is either an imperfect proxy for a test based on the location of a transaction, or an overly broad fact-based test that bears no relation to investor expectations.

The difficulties inherent in the "conduct" test can be seen in the decisions of the lower courts in *Morrison*. In the Second Circuit decision, the court determined that the alleged fraud in the United States did not have a sufficiently close relation to the alleged damages of the plaintiffs to warrant the application of the U.S. securities laws.[15] While the original financial information at issue was produced in Florida, it was integrated into National Australia Bank's financial statements outside the United States. This intermediate, non-U.S. step caused the "conduct" test to be failed.

This analysis has nothing to do with the protection of investors. What if the Florida numbers had been integrated directly into the financial statements by NAB's information technology system, avoiding an intervening manual step in Australia? What if NAB had an accounting processing center in the United States that was responsible for U.S. accounting segment data? These issues, which involve the analysis of minute factual

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[13] *Morrison*, 130 S. Ct. at 2878 - 2881. -

[14] Indeed, the decisions that developed the conduct test reflect a policy rationale not of protecting U.S. - investors and markets, but of preventing the United States from becoming a "launching pad" for fraudulent - behavior directed elsewhere. As discussed below, we believe there is no material risk of this occurring. In any - event, it has nothing to do with investment decisions. -

[15] *Morrison Second Circuit*, 547 F.3d at 176. -

distinctions years after the occurrence of the alleged fraud, clearly have no relation to the degree of Section 10(b) protection (if any) that investors should have expected when they purchased NAB's shares in Australia.

One traditional rationale for the "conduct" test has been that it prevents companies from using their U.S. operations to develop fraudulent schemes that have their impact outside the United States. While this might have been an important consideration when the "conduct" test was originally conceived, the substantial development of enforcement regimes outside the United States makes it unlikely that foreign companies will view the United States as a haven in which they can devise schemes to deceive home country investors. Moreover, applying the United States class action regime where home countries have chosen other systems is not the right way to deal with this issue. Restoring the jurisdiction of the Commission and the Department of Justice should be more than adequate for this purpose.

The "effects" test suffers from similar uncertainty. In order for the test to be satisfied, there must be a "foreseeable, substantial effect" on the United States market. Determining whether an effect is sufficiently "foreseeable" and "substantial" to warrant U.S. court jurisdiction requires the same fact intensive, after-the-fact analysis as the "conduct" test.

There is a potentially more fundamental problem with the "effects" test. Rather than simply permitting the investors that suffer the adverse "effects" to bring a claim under Section 10(b), the "effects" test could open the U.S. courts to all investors in the subject company's securities, regardless of whether they were "affected" in the United States.

While most courts have not taken this approach, the mere fact that the question has been litigated is indicative of a problem.[16] Moreover, some courts have allowed the expansive use of what is in substance the effects test, allowing (or considering) claims on the basis of a combined conduct and effects test where the only allegedly fraudulent "conduct" in the United States is the dissemination of information documents.[17]

It makes no sense for the rights of investors that purchase securities outside the United States to be determined by whether the volume of U.S. transactions – entered into by other investors – exceeds some undefined threshold. Only the investors that engage in those U.S. transactions, and that suffer an "effect" in the United States, should be entitled to bring their claims in United States courts.

We recognize that Congress has to some extent endorsed the "conduct" and "effects" test by restoring their use for jurisdictional purposes in proceedings brought by the Commission and the United States. We believe that restoring these tests for actions by

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[16] See, e.g., In re Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024 (S.D.N.Y. Oct. 25, 2006), where the Court determined that it lacked subject matter jurisdiction with respect to the foreign plaintiffs over two years after the plaintiffs' class action filing with respect to purchases on the Russian stock exchange .

[17] See, e.g., Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 123 (2d Cir. 1995); In re Cable & Wireless Securities, PLC, Sec. Litig., 321 F. Supp. 2d 749 (E.D. Va. 2004); In re Royal Ahold N.V. Securities & ERISA Litigation, 351 F. Supp. 2d 334 (D. Md. 2004).

private plaintiffs would be a completely different matter. The Commission and the Department of Justice are professional agencies that act in the public interest. They have enforcement MOUs and other relations with foreign regulators, and they typically act in coordination with those regulators in cross-border cases. In contrast, class-action lawsuits are brought by plaintiffs (and their lawyers) to further their own private financial interests, creating significant risk of abuse.

We note also that the expansion of U.S. court jurisdiction for actions brought by the Commission and the United States, coupled with the enhanced enforcement powers of the Commission under the Dodd-Frank Act, should provide an effective mechanism to combat transnational securities fraud, without subjecting companies to the risks and costs of abusive private procedures that undermine the choices made by foreign governments regarding the protection of their own markets.

3. Defining a "United States Transaction"

As discussed above, the *Morrison* decision has produced a "bright line" test – U.S. securities laws apply to transactions in the United States, not to transactions outside the United States. Nonetheless, we recognize that it may be difficult in a small number of cases to determine whether a particular transaction takes place in the United States.

In his concurring opinion in *Morrison*, Justice Stevens cited this difficulty as an argument in favor of retaining the "conduct" and "effects" tests.[18] We respectfully disagree. Instead, the solution is to address this issue directly by adopting appropriate definitions and guidelines to provide more certainty as to what does and does not constitute a U.S. securities transaction. Applying Section 10(b) to non-U.S. transactions would be an overbroad reaction to a limited (albeit intellectually difficult) problem.

We believe, based on the collective experience of our member organizations and companies, that it will be obvious in the vast majority of cases whether a transaction takes place in the United States. The issue arises primarily as a result of technology, as investors who are physically located in the United States can today trade securities on a global basis by pushing a button on their computers. We believe that trades originated in the United States and executed on non-U.S. exchanges generally represent only a small minority of the trading in the securities of non-U.S. companies.

Despite their relatively limited importance, trades by U.S. investors on foreign exchanges have been at issue in most of the lower court decisions since *Morrison*.[19]

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[18] *Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring).

[19] See Cornwell v. Credit Suisse Group, No. 08 Civ. 3758 (VM), 2010 WL 3069597 (S.D.N.Y. July 27, 2010); Stackhouse v. Toyota Motor Co., Nos. CV 10-0922 DSF (AJWx), CV 10-1429 DSF (AJWx), CV 10-1452 DSF (AJWx), CV 10-1911 DSF (AJWx), CV 10-2196 DSF (AJWx), CV 10-2253 DSF (AJWx), CV 10-2578 DSF (AJWx), 2010 WL 3377409 (C.D. Cal. July 16, 2010); In re Alstom SA Sec. Litig., No. 03 Civ. 6595 (VM), 2010 WL 3718863 (S.D.N.Y. Sept. 14, 2010); Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., No. 08 Civ. 1958 (JGK), 2010 WL 3860397 (S.D.N.Y. Oct. 4, 2010); Sgalambo v. McKenzie, No. 09 Civ. 10087 (SAS), 2010 WL 3119349 (S.D.N.Y. Aug. 6, 2010); Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, No. 09-23248-Civ., 2010 WL 3119908 (S.D. Fla. Aug. 6, 2010); In re Societe Generale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010); In re Royal Bank of Scotland Group PLC Sec. Litig., No. 09 Civ. 300(DAB) (S.D.N.Y. Jan. 11, 2011); see also Elliott Associates v. Porsche Automobil Holding SE, Nos. 10 Civ. 0532(HB), 10

These courts have uniformly found (sensibly in our view) that trades by U.S. investors on foreign exchanges are non-U.S. trades, even if the orders are given from computers located in the United States.

We believe that there is no need for Commission action to address this issue. Instead, it would be appropriate to allow parties to present their cases to the courts, which can decide cases on the basis of specific factual circumstances, hopefully establishing a sensible and practical line of precedents.[20] The Commission should consider action (rulemaking or proposed legislation) only if future judicial decisions produce unclear or impractical results.

If the Commission nonetheless decides to consider action in relation to this issue, we believe that it should be guided by the following principles:

- If any cross-border transactions are deemed to take place in the United States, only the affected investors should be entitled to bring Section 10(b) claims on this basis. A determination that a few borderline cases should be placed on one side or the other of the "bright line" should not have any impact on the treatment of the vast majority of investors whose status is unambiguous. This would be a marked contrast (and improvement) compared to the potential for all investors to be included in a Section 10(b) action under the "conduct" and "effects" tests.

- The Commission may consider taking into account whether companies take affirmative steps to establish trading markets in the United States. For example, it might be more appropriate to treat transactions in certain sponsored ADRs, depending on the nature of the programs, as taking place in the United States, than to treat computer trades of foreign listed ordinary shares or swaps relating to foreign shares as U.S. transactions. We also believe that transactions in unsponsored ADRs should not be considered to be in the United States, as companies have had no control over the establishment of unsponsored programs since the Commission modified Rule 12g3-2(b) in 2008.[21]

- The Commission should carefully consider whether the extent of contacts between a company and U.S. investors should have an impact on this issue. We believe that it would be a mistake to impose a higher degree of potential liability on companies that make the effort to provide information directly to U.S.

Civ. 4155(HB), 2010 WL 5463846 (S.D.N.Y. Dec. 30, 2010) (holding that swap agreements were the functional equivalent of trading the underlying shares on a German exchange and therefore that Section 10(b) did not apply).

[20] See Anwar v. Fairfield Greenwich Ltd., No. 09 Civ. 0118(VM), 2010 WL 3341636 (S.D.N.Y. Aug. 18, 2010) (stating that a more developed factual record was necessary to determine whether plaintiffs' purchases of shares occurred in the United States). See also In re Banco Santander Sec.-Optimal Litig., Nos. 09-MD-02073-CIV, 09-CV-20215-CIV, 2010 WL 3036990 (S.D. Fla. July 30, 2010) (where the Court determined that a private securities transaction was not a transaction in the United States).

[21] Exemption From Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-58465, 73 FR 52752 (Sept. 10, 2008).

investors through regular investor relations activities.[22] If the Commission were to take a contrary view, some companies would undoubtedly limit their U.S. investor relations activities, with the result that less information would be made available to U.S. investors. Even if the Commission decides that U.S. investors trading abroad should have Section 10(b) claims based on information provided to them in the United States, such claims should only be available to the directly affected investors, and there should not be "all-or-nothing" liability toward investors that trade abroad of the type that could formerly be imposed under the "conduct" and "effects" tests.

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As the Commission stated in the Release, consideration of extending the extraterritorial scope of the antifraud provisions of the Exchange Act to private rights of action raises important questions touching on investor protection, the fairness and efficiency of markets, and international comity and respect that governments afford to one another.[23] The implication was that these interests may be in conflict with one another, and that the Commission must undertake a balancing exercise in order to reach an appropriate decision.

We believe that there is no such conflict. A simple, "bright-line" rule that U.S. antifraud rules apply to U.S. securities transactions, but not to foreign transactions, is consistent with all of the objectives cited by the Commission, as well as being fair, clear and practical.

We would like to thank the Commission for the opportunity to comment on this important issue. Please do not hesitate to contact us if you have any questions.

Yours sincerely,

Susannah Haan

Susannah Haan
Secretary General

[22] Of course, investor communications in connection with offerings of securities by an issuer could give rise to liability to U.S. investors under the U.S. securities laws in case of material errors or omissions in the offering materials that meet the general standards for issuer liability. In this letter, we are only addressing investor relations activities designed to inform investors outside the context of a securities offering.

[23] Release at 2 – 3.