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February 15, 2010

VIA E-mail: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Securities & Exchange Commission ("SEC") Request For Comments on Extraterritorial Private Right of Action Pursuant to Release No. 34-63174; File No. 4-617

Dear Ms. Murray:

We write to you as legal advisor of leading institutional investors around the world, with collective assets under management of over $4 billion, and including the leading German, Swiss, and Italian investors as well as major investors from the Middle East and the United States.

With this letter, we would like to express our thoughts and comments regarding the implementation of an extraterritorial private right of action in addition to the SEC's right of action under the Dodd-Frank Act of 2010 ("DFA"). We strongly believe such a private right of action to be a matter of utmost importance for effective global investor protection.

The questions presented for which comments are sought, and our answers following each such question in the order presented, are:

(1) Scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise

a. A private right of action should be available for ALL private and institutional investors alike, as there is no difference among public investors who all have access to the same information and rely on the same public information. Moreover, there is no justification for discriminating between the various groups of investors, as all are potentially damaged in the same fashion.
b. Such private right of action, together with the SEC's enforcement actions, will ensure that unlawful conduct is pursued in a court of law to the maximum extent, with the government focusing on public interest aspects and the private claimants focusing on compensation. The combination of both serves as effective deterrence and re-establishes a balance of power and a fair re-distribution of wealth/assets. It also supports and encourages consumer savings and investments, which might relieve the government from the potential social consequences of at times feared pension underfunding or devaluation.
c. Given the public as well as private interests in protecting investor interests and enforcing securities laws in the United States, an extensive use of jurisdictional powers of U.S. courts to actions/inactions of companies with some U.S. nexus is required.
d. Moreover, given the efficiency and predominance of the U.S. legal and procedural system in connection with producing tangible results for investors (of billions of U.S. Dollars per year), a liberal application of jurisdictional rules to provide effective investor protection makes sense.
e. For this, the "conduct and effects test"[1] should be reinstated in its previous form, or modified as necessary, to establish US jurisdiction for collective redress in the situation where there is a connection to the US.
f. The Supreme Court in *Morrison v. National Australia Bank*[2] erred in its decision to abolish the "conduct and effects test," by declaring it as a misinterpretation of the law. Until the *NAB* decision, the "conduct and effects test" had been applied by U.S. courts in over 40 years of case law and should now be codified by Congress to fit (global) investor protection needs and provide a predictable, uniform test, similar to the interpretation by the courts over the 40 years of precedent.
g. Reversing the Supreme Court decision in *NAB*, the reinstatement of the "conduct and effects test", respectively its codification should be done in the same form as previously used, requiring either "conduct" by an issuer of securities, or an "effect" on any investors in the U.S. to establish jurisdiction, should be chosen. Therefore, it should be irrelevant whether securities were traded on a foreign or U.S. exchange, whether they were issued by a U.S. or a non-U.S. company, or where the securities were purchased or sold, as long as there is sufficient U.S. conduct or an effect in the U.S. Hence, as long as there is sufficient U.S. interest in having a dispute over the behavior of an issuer resolved in the U.S., in order to police the behavior of public issuers

[1] The Second Circuit Court of Appeals first applied the We first applied the effects test in *Schoenbaum v. Firstbrook,* 405 F.2d 200, 206 (2d Cir. 1968), and the conduct test in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).
[2] *Morrison v. National Australia Bank*, 561 U.S. __, 130 S. Ct. 2869 (June 24, 2010).

who take advantage of the U.S. market and pool of investors, there is no reason to distinguish between foreign or U.S. investors and to create a dual class of investors as well as a dual class of protection of investor interests.

(2) What implications such a private right of action would have on international comity

a. A private right of action is extremely important for the comprehensive enforcement of securities laws. Given the limitations of the SEC in manpower and funding, only a fraction of cases involving fraud are actually prosecuted by the SEC. Moreover, only a fraction of the damages are recovered by the SEC while contemporaneous or subsequent civil enforcement actions return much bigger financial compensation to investors.
b. Today, class actions are a vehicle for effective investor protection mostly in the U.S. and – with exceptions – in Canada or Australia. While other countries, such as the Netherlands, have significantly improved their collective claims systems or are in the process of doing so, the U.S. class action system remains the best available system for the protection of the small (and large) investor.
c. In today's world of real-time publication of information and real-time electronic trading platforms, investments are not related to any specific national exchange but are carried out on a global platform. Thus, a system providing global investor protection on a collective level has to be in place. As of today, the only effective and relevant (due to the size of the U.S. capital market) system is the U.S. class action system. If foreign companies access U.S. capital markets or U.S. (institutional) investors by having some presence, presentations or representation in the U.S., then they should also be subject to enforcement of U.S. securities laws. There should then also not be any distinction as to the origination of the investors as everybody (at least on an institutional level) is investing on the same informational platform and basis throughout the world.
d. In U.S. class actions, there is always the discussion about a potential infringement of sovereign rights of other countries who do not know or strongly oppose class actions under Rule 23 of the Federal Rules of Civil Procedure due to their opt out nature, because passive, foreign investors get rolled into U.S. class actions and are bound by the results (if they do not opt out). However, it is exactly, this opt out feature that provides sufficient protection of the rights of passive investors, as they can always opt out if they don't want to be bound by a positive (settlement or verdict) or negative (dismissal or verdict) outcome of the case. Hence, they can always pursue their individual rights, as long as the respective statute of limitations in their home country has not expired.
e. International comity is based upon respect for other countries and jurisdictions and requires that this principle be applied in the absence of international conventions. Normally, comity is applied to refrain from asserting jurisdiction where foreign lawsuits are pending and no explicit *lis pendens* rule is in place, or where foreign judgments should be recognized

even though there is no recognition treaty in place. In order to respect international comity, a U.S. court could decide to decline jurisdiction over class actions or class members, who are already covered in foreign class actions. Hence, once other countries' jurisdictions and procedural systems mature into providing collective relief as well, then there can be such comity-based *lis pendens* abstention from jurisdiction over foreign class members. Until that time, comity arguments do not provide any benefit except for the political defendants or violators who use it to escape liability for their wrongdoings.

f. It is the statute of limitations issue in the absence of international conventions or treaties on global *lis pendens* and the tolling of foreign statute of limitations, which creates the biggest need for extending U.S. court jurisdiction to foreign cases and foreign investors. Otherwise, a case will be litigated in the U.S. for eight years, such as the *Vivendi* case,[3] only to find out at the end that certain foreign investors might get excluded and cannot pursue any rights in their home country any more.

(3) <u>The economic costs and benefits of extending a private right of action for transnational securities frauds</u>

a. Not only do the U.S. stock exchanges assume a leading position in the world, the United States is the only jurisdiction to provide effective and relevant worldwide relief for damaged investors via its class action system.[4] Without a private right of action via U.S. class actions on the basis of a "conduct and effects" test, lawsuits would have to be filed in the U.S. and in other jurisdictions to obtain loss recovery on a larger scale. This would increase the number of lawsuits around the world and, thus, increase the time expended and costs accrued, for both the plaintiffs and the defendants. It would also result in different outcomes and different levels of protection, so that various classes of investors would be created depending on the level of protection and recovery in the various countries of origin. Moreover, it might lead to an effective denial of access to justice in countries that do not allow class actions.

b. It would also not be in the interest of the U.S. exchanges in transparency and integrity of the market if foreign ADR investors or the like would not be protected, or if foreign companies decide not to list on the U.S. exchanges anymore, but seek investments from U.S. investors abroad, if they can avoid litigation by doing so. Hence, extending the reach of U.S. courts would also discourage companies from delisting or not listing on the U.S. exchanges, but continuing to do business in the U.S. and with U.S. investors.

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[3] *In re Vivendi Universal S.A. Sec. Litig.*, 02-cv-05571 (S.D.N.Y.).

[4] The Canadian system has also grown in significance, but is limited due to the amount and size of market capitalization of companies on the Canadian exchanges compared to the U.S. exchanges. Similarly, Australian class actions have grown in size but still do not mean anything from a total return of capital to investors perspective, due to the small market capitalization of Australian companies.

c. Furthermore, securities fraud class actions have a long history in the United States, resulting in substantial relevant case law and experience in the courts. Thus, the U.S. courts are likely to assess cases better than the courts of other jurisdictions and cases are likely to conclude more quickly or more justly. Particularly, as there is no class action system or history in countries such as in Europe, so that passing or changing laws and then developing a functioning system of private enforcement would take a long time.
d. A private right of action in addition to the SEC's right of action is the only way to maintain fair, orderly and efficient markets and to prohibit forum shopping by companies to avoid liabilities for illegal behavior with a U.S. nexus. Such a private right of action will add other resources to go after those who commit securities fraud and will also put the weight of institutional investors behind these cases. Moreover, the SEC is pursuing different (public interest) goals than private claimants would (compensation).

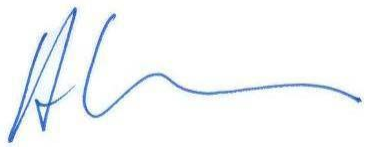
(4) Whether a narrower extraterritorial standard should be adopted

A narrower extraterritorial standard than the previous standard of the "conduct and effects" test or the *NAB* "transactional" test should not be adopted, since it would make it even more difficult for foreign investors, as well as U.S. investors, to enforce their rights to transparent and correct information from publicly listed companies.

The "transactional" test after *NAB* is too narrow and does not protect the interest of U.S. investors properly. The "conduct and effects" test could be codified to give better guidelines for what is a "sufficient nexus" with the U.S. in order to justify the interest of U.S. courts in resolving issues for all investors on a global basis. However, the case law as developed over the last 40 years before *NAB* does give a lot of good guidance.

We are happy to engage in further discussions on the issue in person or by written communication and appreciate the opportunity to provide some input.

Sincerely,



Alexander Reus
Managing Partner