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PARIS, LE 17 FEV 2011

CAB N°0273

Ms. Mary L. SCHAPIRO
Chairman
c/o
Ms. Elizabeth M. MURPHY
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act – Study on extraterritorial private rights of action [Release No. 34-63174; File No. 4-617].

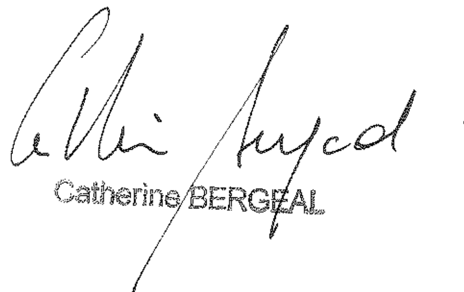
Dear Ms. Schapiro,

The Government of France welcomes the opportunity of the SEC's public consultation to express his view set forth below in relation to the study conducted by the U.S. Securities and Exchange Commission's (the "Commission") regarding Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[1].

Below, the Government of France elected to address certain key questions of the Commission's request for comments that are of particular interest to it.

Yours sincerely

La Directrice des Affaires Juridiques



[1] The Government of France was assisted by the law firm Shearman & Sterling LLP in the preparation of the Republic of France's commentaries.

<u>Question [1]:</u>

Propose the circumstances, if any, in which a private plaintiff should be allowed to pursue claims under the antifraud provisions of the Exchange Act with respect to a particular security where the plaintiff has purchased or sold the security outside the United States.

Does it make a difference whether the security was issued by a U.S. company or by a non-U.S. company?

Does it make a difference whether the security was purchased or sold on a foreign stock exchange or whether it was purchased or sold on a non-exchange trading platform or other alternative trading system outside of the United States? Does it make a difference whether the company's securities are traded exclusively outside of the United States?

Should there be an effects test, a conduct test, a combination of the two, or another test? Address whether any such test should be limited only to certain types of private plaintiffs, such as United States citizens or residents, or such as institutional investors. How would such investors be defined?

<u>Response:</u>

The well-settled principle of international comity requires foreign nations "to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citations omitted). The principle is "based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953). The relevant factors in determining whether the extraterritorial application of a foreign nation's law is reasonable include the citizenship or residence of the parties, the territory of the activity to be regulated, and the potential for conflict with foreign law. *See* Restatement (Third) of Foreign Relations Law of the United States §§ 403(2), 416(2) (1986).

U.S. courts apply similar principles with respect to domestic choice of law. For example, U.S. conflict of law principles provide that "[a] court may not apply the local law of its own state to determine a particular issue unless [that] would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved." Restatement (Second) of Conflict of Laws §§ 9, 145 (1971) [hereinafter Restatement (Second)]. The Restatement (Second) states that the governing law for tort actions should be that of the state which "has the most significant relationship to the occurrence and the parties." *Id.* § 145(1). The relevant factors for making that determination in a fraud or misrepresentation case include (a) the place where the plaintiff acted in reliance upon the defendant's representations; (b) the place where the plaintiff received the representations; (c) the place where the defendant made the representations; and (d) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *See id.* § 148(2).

The extraterritorial application of U.S. securities regulations to transactions that take place outside the United States is not consistent with the foregoing principles. Such application would conflict with the principle of international comity, because it would be unreasonable for the U.S. to exercise jurisdiction over securities transactions that take place on foreign markets between foreign parties. Foreign nations have a primary interest in protecting their citizens and residents, punishing their wrongdoers, and regulating their exchanges. Application of U.S. law to foreign securities transactions would undermine those interests and conflict with the regulatory policies and legal systems of other nations. Similarly, extraterritorial application of U.S. antifraud law would violate choice of law principles. Even if some conduct related to the securities fraud took part in the U.S., the country in which the securities transaction took place "has the most significant relationship to the

occurrence and the parties" and thus should supply the governing law. *See* Restatement (Second) § 145(1).

The government of France believes that the "transactional" test established by the Supreme Court in the *Morrison v. National Australia Bank* case is in accordance with the principles of comity and international law. The Dodd-Frank Act has to some extend endorsed an extra territorial application of the "effect and/or conduct test" regarding the public enforcement by the DOJ and the SEC. The parameters and application of such a test, to cases involving a private right of action, raise a completely different question. In such cases, restoring these tests would be amorphous and inherently unpredictable. It would be grossly unfair to allow plaintiffs to bring a global class action against foreign corporations based on these criteria.

France fully supports the holding of *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), that the private right of action under the antifraud provision of the Securities Exchange Act of 1934 (the "Exchange Act") applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 2884 (footnote omitted). Specifically, France agrees with the Court's holding that Section 10(b) applies "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States". *Id.* at 2888.

France believes that the *Morrison* test should apply regardless of whether the security was purchased or sold on a stock exchange or whether it was purchased or sold on a non-exchange trading platform or other alternative trading system outside of the United States. As the Supreme Court explained in *Morrison*, if the security was sold or purchased outside the United States, foreign law should apply.

At most, an exception might be made for actions brought by U.S. plaintiffs against U.S. corporations. In cases where both the plaintiff and the defendant are U.S. nationals, the interests at stake are mainly, if not exclusively, those of the United States. Accordingly, the application of U.S. securities fraud law to such disputes is consistent with the principles of international comity discussed above.

In any event, as set forth in our amicus brief in the *Morrison* case (See Brief for the Republic of France as *Amicus Curiae* in support of Respondent at pp-17-22), regardless of the alleged conduct or effects in the U.S., *under no circumstances* should Section 10(b) of the Exchange Act be applied to "foreign-cubed" securities actions – i.e., cases in which private foreign claimants file actions in U.S. courts that arise out of foreign defendants' securities offerings on foreign exchanges.

Question [6]:

What would be the implications on international comity and international relations of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational securities fraud?

Response:

The Republic of France and other foreign nations have a paramount interest in regulating securities transactions that take place on their own soil and in protecting investors who trade within their borders. The broad application of U.S. antifraud law to foreign securities transactions would threaten international relations and principles of international comity by substantially interfering with the sovereign interests, policies, and laws of other nations.

In particular, allowing private plaintiffs to sue for securities fraud that takes place outside the United States would interfere with the ability of foreign nations to regulate their own securities markets and manage their economies. While most foreign countries proscribe securities fraud, "not all nations agree on how securities markets should be designed or regulated. While there may be widespread agreement on certain forms of fraud, perhaps the classic forms of deceit or manipulation, nations have often widely divergent views on what constitutes the entire panoply of actionable securities fraud." Kellye Y. Testy, *Comity & Cooperation: Security Regulation in a Global Marketplace*, 45 Ala. L. Rev. 927, 957 (1994). Foreign nations like France have their own reticulated regime of securities regulation and enforcement that rests on legal traditions and policy judgments that are of fundamental importance to those countries and differ in important respects from those of the United States.

For example, many foreign legal regimes contemplate a greater role for government as opposed to private regulation and enforcement, as reflected in the reliance on public actions (*l'action publique*) rather than private actions. *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy*, 10 Tul. J. Int'l & Comp. L. 5, 9 n.18 (2002) (European nations generally prefer "state actions, not private ones" for the enforcement of law).

Class actions are also disfavored by many foreign nations. *See* Hannah L. Buxbaum, Multinational Class Actions Under Federal Securities Law, 46 Colum. J. Transnat'l L. 14, 32 (2007) ("[m]ost foreign legal systems do not permit group litigation"); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 484 (2009) ("only a few other countries have adopted class-action mechanisms for securities violations"). In particular, many countries (like France) have a concern with the procedural fairness of certain forms of class action that purport to bind persons who have taken no affirmative steps to participate in the collective lawsuit (the opt-out class action). France's concern with the opt-out class action is discussed more fully is our response to Question 9 below.

Foreign nations also have different standards governing the substantive elements of securities fraud, different measures of damages, different rules governing contribution and indemnity, and different limitations periods. Additionally, foreign jurisdictions have different rules governing procedural elements of litigation, including attorney's fees, contingency fees, jury trials, and pre-trial discovery. The U.S. approach to policing securities fraud – by privately initiated class actions instituted by plaintiffs' attorneys working on a contingency-fee basis - is not one that has commended itself to most foreign nations.

Applying the conduct and effects tests set forth in Section 929P of the Dodd-Frank Act to private causes of action would have an adverse impact on international relations by requiring foreign parties to litigate in the U.S. courts foreign securities transactions that are more properly the domain of the laws, regulations, and public policies of other nations.

<u>Question [7]</u>:

Discuss the cost and benefits of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational securities fraud, including the costs and benefits to domestic and international financial systems and securities markets.

<u>Response:</u>

In cases where securities fraud takes place outside the U.S., the application of U.S. law is unnecessary because the foreign country in which the securities were traded can provide a remedy for such fraud in accordance with its own laws and policies. Foreign countries like France have enacted

strong prohibitions against securities fraud and actively enforce those laws. The enforcement securities' regulations in France are discussed more fully in Question 8 bellow.

To the extent related fraudulent conduct occurred in the U.S., that separate fraud can be addressed by U.S. criminal and public enforcement authorities against the specific U.S. perpetrators. The U.S. Securities and Exchange Commission ("SEC") has broad investigative powers and can bring civil enforcement actions seeking monetary penalties, injunctions, bars against serving as a director or officer of a public company, and other civil remedies. The SEC's civil enforcement is supplemented by the activities of self-regulatory organizations such as the major stock exchanges, state securities regulators, and private litigants. Under the statutory provisions that govern SEC enforcement actions, "[w]henever it shall appear to the Commission that any person has violated any provision of [the Exchange Act], ... the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation." 15 U.S.C. 78u(d)(3)(A). The SEC has similarly broad and unqualified authority to bring an action for injunctive relief "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of [the Act]." 15 U.S.C. 78u(d)(1).

Criminal violations of the federal securities laws are prosecuted by the Department of Justice and the ninety three United States Attorneys offices throughout the country (collectively the "DOJ"). The DOJ may seek indictments for criminal violations of the securities laws on their own initiative or through formal or informal referrals from the SEC.

Section 929P of the Dodd-Frank Act amended the Exchange Act to provide that the United States district courts shall have jurisdiction over an action brought or instituted by the SEC or the Unites States alleging a violation of the antifraud provisions of the Exchange Act involving (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States. Thus, when a transnational securities fraud involves significant and material conduct or has a substantial foreseeable effect in the U.S., that fraud can be redressed by either an SEC enforcement action or U.S. criminal action. Thus, there is no need for the U.S. to allow private plaintiffs to sue for securities fraud that takes place abroad.

Another unnecessary and costly implication of the extraterritorial application of U.S. securities fraud law is the significant risk that foreign courts will refuse to enforce a U.S. class action settlement or judgment. A full explanation of that risk is set forth in response to Question 9 below.

The broad extraterritorial application of U.S. law is also likely to interfere with the ability of foreign regulatory authorities and courts to resolve disputes by giving plaintiffs the option of suing in the U.S. and thereby bypassing a foreign regulatory system altogether. If private plaintiffs were permitted to sue in cases where the securities transaction takes place abroad, U.S. courts would become a magnet for foreign plaintiffs who believe they can obtain a better result in the U.S. than they can under their nation's laws. That sort of international forum shopping would undermine the laws of other nations while imposing an unnecessary burden on U.S. courts.

Finally, a categorical rule against application of U.S. antifraud rules to securities transactions that takes place outside U.S. borders is necessary to provide a clear standard to foreign courts, foreign nations, foreign companies, and investors. A case-by-case application of the "effect and/or conduct" test set forth in Section 929P of the Dodd-Frank Act to private actions would be inherently unpredictable and difficult to apply. What is more, a case-by-case application would be likely to cause foreign companies to bear the immense burden, expense, and uncertainty of U.S. discovery, dispositive motions, and perhaps trial before a court even rules on the extraterritoriality issue.

In sum, allowing private plaintiffs to sue for securities transactions that take place abroad would impose substantial costs on foreign corporations and foreign financial markets with very little upside for the United States. *See* John C. Coffee, Jr., "Reforming the Securities Class Action", 106 COLUM. L. REV. 1534, 1534 (2006); A. GUZMAN,"Choice of Law: News Foundations", Geo. L.J. 90, 333 (2002).

. Foreign countries – including France – have struck their own legal and political balance in regulating securities fraud that occurs within their borders in accordance with their own values, legal traditions, and public policy objectives.

Question [8]:

What remedies outside of the United States would be available to U.S. investors who purchase or sell shares on a foreign stock exchange, or on a non-exchange trading platform or other alternative trading system outside of the United States, if their securities fraud claims cannot be brought in U.S. courts?

Response:

Multiple remedies are available outside the United States to U.S. investors who purchase or sell shares in foreign stock markets.

With respect to conflicts of jurisdiction[2], article 2 of European Union Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("EU Regulation 44/2001) allows U.S. investors buying securities from a corporation traded abroad (outside the U.S.) to bring suit in a court of a Member State of the European Union ("Member State") in order to be compensated for the loss suffered as a result of the securities fraud when the "defendant" corporation is domiciled on the territory of a Member State ("the EU"). Pursuant to Article 60 § 1 of the aforementioned Regulation, a company is domiciled at the place where it has either: (i) its statutory seat, (ii) central administration or (iii) principal place of business. Significantly, a corporation will be considered to be domiciled in any country where any one of these criteria is met.

U.S. investors therefore have the option of bringing suit before the court of any jurisdiction where the corporation is domiciled. Provided that the "defendant" corporation is domiciled in one of the member States, the investor also has the option, in accordance with Article 5 § 3 of EU Regulation 44/2001, to sue for damages before the courts of the place where the "harmful event occurred or may occur", i.e., the courts of the Member State where the securities have been bought or exchanged.

As for the law applicable, a private investor has the option to initiate a civil suit allowing him to seek full compensation for the damage personally suffered due to the securities fraud. What is more, as for procedural rules, French law provides that securities fraud claims may be brought on a collective basis by organizations that represent investors who opt-in to said procedure.

Pursuant to Article L. 452-1 of the French Monetary and Financial Code, organizations, which have been approved by decree, pursuant to the consultation of the Public Prosecutor and the Financial Markets Authority, are vested with broad powers. Among other things, they may apply for injunctive relief, on behalf of the investors' pool, to enjoin cessation of violations of the securities' laws (See http://195.83.177.9/code/liste.phtml?lang=uk&c=25&r=899#art1471).

[2] Under European Regulations, conflicts of jurisdiction specify which court has jurisdiction without interfering with the rules governing the law applicable.

Furthermore, in accordance with Article L. 452-2 of the French Monetary and Financial Code, any such approved organization may – when it has been mandated to do so – bring suit on behalf of two or more individuals (security holders) who have suffered damages as a result of the actions of the same defendant in order to obtain compensation for loss that they have personally suffered.

Accordingly, there are substantial remedies outside of the United States available to U.S. investors who purchase or sell shares outside the United States.

Question [9]:

What impact would the extraterritorial application of the private right of action have on the protection of investors?

Response:

The extraterritorial application of the private right of action would adversely affect investors because foreign courts are unlikely to enforce a class action judgment or settlement entered in such cases. Most foreign nations do not permit the "opt out" method of binding individuals to the outcome of litigation in class actions. Indeed, French courts would almost certainly refuse to enforce a court judgment in a U.S. "opt out" class action because such a judgment violates French constitutional principles and public policy.

For example, the *Cour de cassation* (the highest court in the French judiciary) held that a French judge should recognize and enforce a foreign judgment only if three conditions are met: (1) there is a sufficient link between the dispute and the chosen forum; (2) the decision does not violate French public policy; and (3) the party seeking enforcement did not evade French law in obtaining the foreign judgment. *Cornelissen v. Société Avianca Inc., et autres*, Appeal No. 05-14.082, *Cour de cassation*, First Civil Chamber (Feb. 20, 2007).

French courts would almost certainly refuse to enforce a court judgment in a U.S. "opt out" class action because it violates the second prong of that test - specifically, the "opt out" mechanism violates French constitutional principles and public policy. The *Conseil Constitutionnel* (the sole French high Court authorized to declare the constitutionality of French legislation) has held that any "individual associated with a collective action must be offered the opportunity to give an informed consent and remain at liberty to personally conduct the defense of his interests and to terminate the action." Decision No. 89-257 DC (July 25, 1989). That decision reflects the French constitutional principle that the choice to initiate and terminate a legal action is an important individual right. AJDA, L'Actualité juridique - Droit administratif, at 796 (Dec. 20, 1989). French legal scholars and official commentators agree that the *Conseil Constitutionnel*'s reasoning precludes the "opt out" method of binding class members. See, e.g., Les cahiers du Conseil Constitutionnel, No. 23/2007, at 22 ("In case of a failure to respect this individualized consent, which does not, for example, exist in the Anglo-Saxon opt-out mechanism in class actions, the individual would, in violation of the Constitution, be improperly deprived of a right."); S. Guinchard, "Une class action à la française?" Recueil Dalloz, at 2180 (32/2005) (noting that the *Conseil Constitutionnel*'s decision requires "pro[of] at the outset of the proceedings that the [party] has had actual notice (personal knowledge) of the action" and concluding that it "amounts to a rejection of the opt-out mechanism").

The conclusion that the "opt out" mechanism is inconsistent with French constitutional law and public policy was reaffirmed in a May 2006 interview by Guy Canivet, the chief justice of France's highest civil court at the time. In that interview, Justice Canivet explained that "[t]he exclusion option ('opt out') is too far removed from [France's] own legal reflexes, and even dangerous" in that "[i]t seems ... very difficult to hold someone bound to a legal decision in which he

did not willingly participate." La Tribune, at 30 (May 16, 2006); see also J. Lemontey & N. Michon, "Les 'class actions' américaines et leur éventuelle reconnaissance en France," JDI 2/2009 at 535 (noting that "US class actions entail a loss of control on the dispute for the members of the class which is incompatible with fundamental principles of French law").

Even apart from the opt-out problem, a foreign country such as France might well decline to enforce a U.S. judgment on the ground that the dispute had only an attenuated link to the U.S. or on the ground that the judgment was a product of the evasion of the foreign country's securities regulations. Foreign-cubed lawsuits by their nature involve, at best, an attenuated link between the dispute and the U.S. and thus plaintiffs would have an uphill battle in satisfying the first prong of the test set forth above by the *Cour de cassation* for enforcing foreign judgments. Moreover, plaintiffs would have difficulty satisfying the third prong of the test because a French court faced with a French citizen seeking to enforce a U.S. judgment against a French company based on losses incurred on securities sold on a French exchange could easily conclude that such a judgment was the product of an evasion of French securities regulations.

In sum, the likelihood that courts in France (and other nations) will refuse to enforce judgments in opt-out class actions counsels strongly against the extraterritorial application of the U.S. securities fraud laws in private actions. If a foreign country does refuse to enforce a U.S. settlement or judgment, there is a significant risk that investors will be required to engage in duplicative litigation abroad, thereby imposing unnecessary and substantial costs on plaintiff investors and defendant corporations (and their investors).

<u>Question [10]</u>:

Address any other consideration commentators would like to comment on to assist the Commission in determining whether to recommend changes to the extraterritorial scope of the antifraud rights of action under the Exchange Act.

<u>Response:</u>

Extraterritorial application of U.S. securities fraud law is further unnecessary in light of the various methods of cooperation between European nations such as France and the United States. For example, the SEC and the *Autorité des Marchés* ("AMF") – formerly the *Commission des Opérations de bourse* ("COB") – have a longstanding history of cooperation. In 1989, the COB and the SEC entered into an agreement establishing a framework for cooperation and consultation between the two regulatory authorities in the enforcement and administration of the securities laws of their respective nations. Specifically, the agreement was intended "to strengthen the ability of the SEC and the COB to sanction persons and entities engaging in fraudulent practices and therefore to protect investors in the markets of each nation." (See www.sec.gov/about/offices/oia/oia_bilateral/france.pdf -.)

Furthermore, as part of their regulatory duties, the SEC and the AMF actively cooperate through organizations such as the International Organization of Securities Commissions, the Federation of Small Businesses ("FSB"), and the Joint Forum, to improve regulation of international securities' markets.

In an effort to actively cooperate with regulatory authorities of other countries, the AMF has also entered into 44 agreements and memoranda with various regulatory authorities of countries other than the U.S. to facilitate the enforcement and investigation of cross-boarder securities' fraud. Such close cooperation is essential given the strong integration of today's financial markets.

Additionally, since 2001, the Committee of European Securities Regulators ("CESR") – which became the European Markets and Securities Authority ("ESMA") as of January 2011 – has granted responsibility to the various domestic regulatory authorities to make regulatory proposals to the European Commission to further the uniform application of securities' related European directives.