



Via Email

February 17, 2011

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

*Re: File Number 4-617, Study on Extraterritorial Private Rights of Action*<sup>1</sup>

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors (Council), a nonprofit association of public, union and corporate pension funds with combined assets that exceed \$3 trillion dollars. Member funds are major shareowners with a duty to protect the retirement savings of millions of American workers.<sup>2</sup> The purpose of this letter is to respond to your request for comments in connection with the Securities and Exchange Commission's (Commission or SEC) *Study on Extraterritorial Private Rights of Action*.<sup>3</sup>

The United States (US) Congress has long recognized that institutional investors are America's largest shareowners and, therefore, "have the most to gain from meritorious [securities] litigation."<sup>4</sup> Congress also recognized that institutional investors have the most to lose from meritless securities litigation that depletes shareowner wealth.<sup>5</sup> The Council agrees with those sentiments and accordingly has taken a strong interest in ensuring that the antifraud provisions of the Securities Exchange Act of 1934 (Exchange Act) continue to honor the longstanding aims of those provisions—deterring fraud in the securities markets and compensating those actually injured by such fraud.<sup>6</sup>

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<sup>1</sup> Study on Extraterritorial Private Rights of Action, Exchange Act Release No. 63,174 (Oct. 25, 2010), <http://www.sec.gov/rules/other/2010/34-63174.pdf> [Hereinafter Study].

<sup>2</sup> For more information about the Council of Institutional Investors (Council) and its members, please visit the Council's website at <http://www.cii.org>.

<sup>3</sup> Study, *supra* note 1, at 1.

<sup>4</sup> See, e.g., H.R. Conf. Rep. No. 104-369, 34 (1995) (quoting testimony of Maryellen Andersen, then treasurer of the Council).

<sup>5</sup> See, e.g., S. Rep. No. 104-98, at 9 (1995) ("We are . . . hurt if a system allows someone to force us to spend huge sums of money in legal costs by merely paying ten dollars and filing a meritless cookie cutter complaint against a company or its accountants." (quoting testimony of Maryellen Andersen)).

<sup>6</sup> See, e.g., *Amicus Curie* Brief of the Council of Institutional Investors in Support of Respondent at 2, *Janus Capital Group, Inc. and Janus Capital Management LLC v. First Derivative Traders*, 130 S.Ct. 1117 (2010) (No. 09-525), <http://www.cii.org/UserFiles/file/resource%20center/key%20governance%20issues/legal%20issues/09-525bsacCouncilOfInstitutionalInvestors.pdf>.

More specifically, the Council believes that private rights of action under the antifraud provisions of the Exchange Act, whether in the case of purely domestic or transnational securities fraud, are clearly beneficial to the protection of investors.<sup>7</sup> We further believe the Commission should carefully scrutinize recent judicial restrictions on private rights of action in transnational cases.

Pension funds, as long-term shareowners, sometimes choose to pursue private rights of action under the federal securities laws as a tool to recover fund assets lost through corporate malfeasance.<sup>8</sup> Recoupment of losses in those circumstances is an important consideration because of pension funds' obligation to protect the assets of its beneficiaries.<sup>9</sup> In some cases, private securities litigation may be the *only* means available to recover those losses.<sup>10</sup>

Moreover, the Commission's continuing ability to prosecute securities fraud cases, including certain transnational securities fraud,<sup>11</sup> is not, in our view, an adequate substitute for private rights of action brought by institutional investors for at least two reasons.<sup>12</sup> First, the evidence indicates that SEC action alone is frequently insufficient to adequately compensate long-term shareowners that have been the victims of securities fraud.<sup>13</sup>

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<sup>7</sup> See, e.g., Council of Institutional Investors, *Everything You Always Wanted to Know About . . . Securities Litigation . . . But Were Afraid to Ask 2* (2008), [http://www.cii.org/UserFiles/file/resource%20center/publications/Cii%20Securities%20Litigation%20Brochure\\_final.pdf](http://www.cii.org/UserFiles/file/resource%20center/publications/Cii%20Securities%20Litigation%20Brochure_final.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Cf. Clifford Chance, Client Memorandum, Cross-Border Litigation Series, Lower Courts Extend *Morrison* But SEC Asserts Dodd-Frank Act Overrides *Morrison* for Enforcement Actions 4 (Feb. 3, 2011), [http://www.cliffordchance.com/publicationviews/publications/2011/02/cross-border\\_litigationserieslowercourt.html](http://www.cliffordchance.com/publicationviews/publications/2011/02/cross-border_litigationserieslowercourt.html) (Noting that the "SEC has interpreted Section 929P of the Dodd-Frank Act to allow it to prosecute transnational securities fraud that satisfies a reformulated version of the conduct and effects test").

<sup>12</sup> See, e.g., *Amicus Curie* Brief of the Council of Institutional Investors in Support of Respondent at 21, *Stoneridge Investment Partners, LLC, v. Scientific-Atlantic, Inc.*, 552 U.S.148 (2008) (No. 06-43), <http://www.cii.org/UserFiles/file/resource%20center/key%20governance%20issues/legal%20issues/CIIbrief%20-%20Stoneridge%20v%20Scientific%20Atlanta.pdf> ("[A]s both Congress and the SEC have repeatedly recognized, SEC enforcement is not sufficient to deter wrongdoers and to compensate investors").

<sup>13</sup> *Id.* at 22.

As detailed in our *amicus* brief to the US Supreme Court in *Stoneridge Investment Partners, LLC v. Scientific-Atlantic, Inc.*:

Even when the SEC brings an enforcement action, it often recovers only a small fraction of what private lawsuits yield for investors. . . . For example, in the WorldCom litigation, the SEC obtained \$750 million for investors, while the related class action obtained \$6.2 billion [and] . . . in the Cendant litigation, the SEC failed to recover any significant amount for investors, while private suits recovered \$3.2 billion . . . .<sup>14</sup>

Second, the Commission has not been provided adequate funding necessary to effectively prosecute securities fraud, particularly fraud involving complex transnational securities transactions.<sup>15</sup> The seriousness of the SEC's funding shortage and its impact on their enforcement activities was recently described by Commissioner Aguilar in the following stark terms:

Clearly, the current funding freeze at the SEC has to be resolved quickly. This situation is causing real harm with a devastating impact that could be avoided. . . . [I]t has been well documented that the SEC has had to introduce draconian cut-backs on the staff's ability to examine and investigate regulated entities and entities suspected of violating the securities laws.

As just a few examples, the lack of funding has already led the agency to institute a hiring freeze and to cut back on travel for examiners - trips involving enough distance to require an overnight stay are not possible. *Moreover, the SEC has also limited the ability to hire expert witnesses in certain trials, such as in complex securities cases, or the taking of depositions in other cases. It should not be acceptable that the budget chill will further delay the day that harmed investors can get restitution through a Commission enforcement action.*

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<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> Cf. Andrew Ross Sorkin, *Wall St. Joins S.E.C. in Plea for Bigger Budget*, N.Y. Times, Feb. 7, 2011 (Deal Book), at 4, <http://dealbook.nytimes.com/2011/02/07/wall-st-joins-s-e-c-in-plea-for-bigger-budget/?src=dlbksb> ("Without the extra money to help police the markets and make long-term investments in the department, the S.E.C. faces the increased probability of weak enforcement and lax oversight").

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. . . At a time when the SEC should be expanding its expertise to appropriately oversee the markets, it is operating with a serious handicap. These budget constraints are negatively affecting the SEC's ability to carry out its core mission.<sup>16</sup>

The perpetual budget constraints faced by the SEC require strengthening of private rights of action as an additional deterrent to securities fraud. In light of the funding challenges faced by many of our member funds, we urge the Commission to evaluate carefully potential costs to investors that result from diminished enforcement and impairments to private rights of action.

The Council appreciates the opportunity to provide our views on this important matter. Please feel free to contact me at (202) 261-7081 or [jeff@cii.org](mailto:jeff@cii.org) if you should have any questions or require any additional information.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney  
General Counsel

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<sup>16</sup> Commissioner Luis A. Aguilar, Setting Forth Aspirations for 2011, Address to the Practising Law Institute's SEC Speaks in 2011 Program 3-4 (Feb. 4, 2011) (emphasis added and footnotes omitted), <http://www.sec.gov/news/speech/2011/spch020411laa.htm>.