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February 17, 2011

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

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

Re: Request for Comments Regarding Section 929Y Transnational Reach of Anti-fraud Provisions of 1934 Act of the Dodd-Frank Wall Street Reform And Consumer Protection Act of 2010: File Number 4-617

Dear Ms. Murphy;

Our law firm represents numerous foreign and domestic persons and entities that invest in securities issued and traded transnationally. In the interests of our clients and investor welfare generally, we make this submission to respond to the Commission's solicitation of public comments respecting the extent to which private rights of action under the anti-fraud provisions of the Securities Exchange Act of 1934 ("Exchange Act") should be extended to transnational fraud.

For reasons set forth below, we strongly urge restoration of private rights of action under the anti-fraud provisions of the Exchange Act, in accordance with the position set forth in the United States *amicus curiae* submission in *Morrison v. National Australia Bank Ltd.*, No. 08-1191:[1] "A transnational securities fraud violates Section 10(b) if significant conduct material to its success occurs in the United States." [2]

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[1] Brief of the United States as Amicus Curiae Supporting Respondents, No. 08-1191, 2010 WL 719337 (Feb. 26, 2010) ("USA Br.").

[2] USA Br., 2010 WL 719337, at *13, *passim*.

Other statements in the United States brief in *Morrison* have contributed to the formation of our comments. **First**, "The increasing integration of the world's securities markets has expanded legitimate investment and capital-raising opportunities, but it has also created greater potential for transnational securities frauds."[3] **Second**, "[T]here is broad international consensus that regulation of securities fraud is necessary and important to the international economic system, and such regulation generally has not resulted in state-to-state conflict."[4] Our comments divide themselves essentially into the following parts.

1. Expansive securities markets are essential for capital development. Transnational listings at once provide exposure to global markets outside the issuer's home market and enhance the visibility of companies beyond their domestic base. Given both the "broad international consensus" that regulation is necessary for the international economic system and the fact that a loss of confidence in any economic system may lead to sharp and swift reversals of fortune, limiting an investor's anti-fraud protection to only domestic transactions in a financial world that has no borders ignores how a transnational world actually operates and risks erosion of important global capital formation functions.

2. The imposition of financially synthetic borders on private rights of action under the Exchange Act's anti-fraud provisions enhances the possibility of safe-harbor fraud, which will contribute to the dislocation of increasingly coordinated international capital markets. American companies can, for example, avoid exposure to the anti-fraud provisions of the Exchange Act simply by issuing securities – either via an exchange or by private placement – and assuring that the purchases and sales of those securities occur outside the United States. We are involved in matters presently in which American financial firms sold toxic securities through off-shore subsidiaries in offerings imited to non-US citizens – a maneuver no doubt designed to avoid the reach of Section 10(b). Besides enabling American created mischief to be perpetrated offshore, these activities also could artificially diminish employment of domestic markets.

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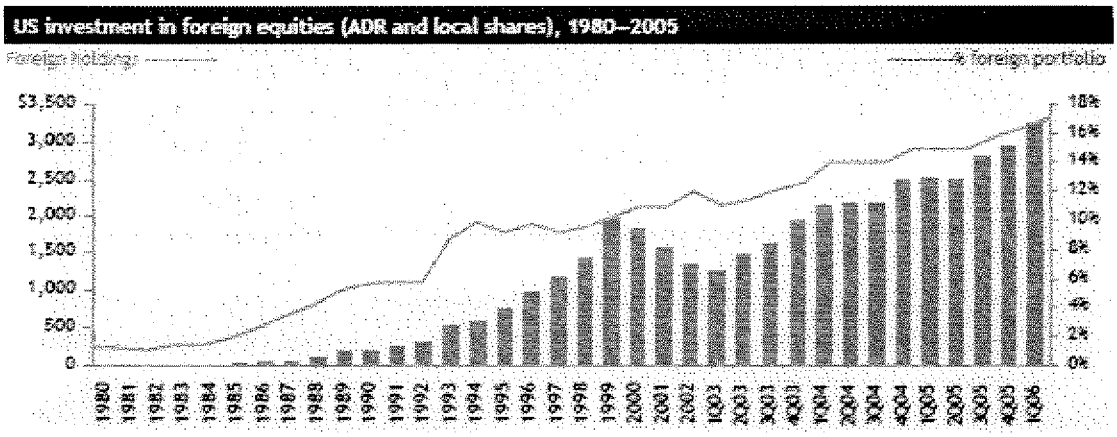
[3] *Id.* at *19.

[4] *Id.* at *20, citing Restatement (Third) of the Foreign Relations Law of the United States §416 (1987) (quotation marks omitted).

3. The Commission is underbudgeted, understaffed, and overburdened. Private suitors may help to enforce the Exchange Act's anti-fraud provisions.

1. The Growing Importance of Transnational Markets

This is a tale that can be told by numbers. For example, according to J.P. Morgan Chase & Co., more than 2,100 entities have issued depository receipts, the level of United States investment in foreign equities now exceeds $2.0 trillion – a 100-fold growth in 30 years – and the growth of Global Depository Receipts ("GDR's") instruments offered to investors in two or more markets – has increased at a ferocious pace.[5] In 2000, they accounted for less than 1% of the capital raising market; by 2005, 45%. Consider the following data generated by the Federal Reserve Bank, BNY Mellon, and J.P. Morgan Chase & Co.



Source: Federal Reserve, Flow of Funds Report., Dec. 2006

Id. at p. 4.

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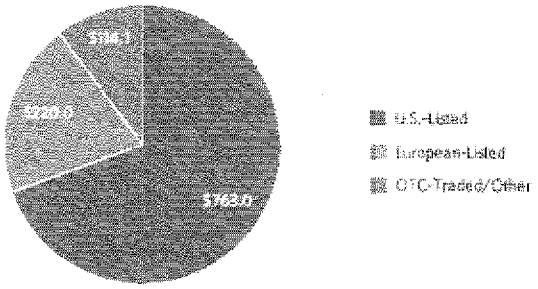
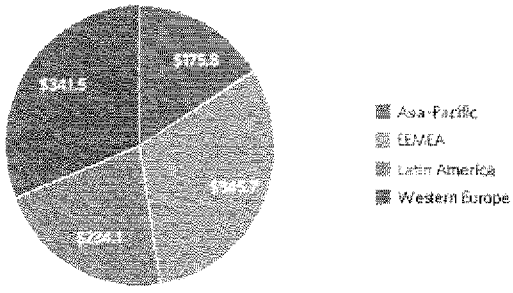
[5] J.P. Morgan Chase & Co., *Depository Receipts Reference Guide*, at pp. 3-5 (2005), http://www.scribd.com/doc/19606730/JP-Morgan-Depositary-Receipts-Reference-Guide.

Value of Outstanding Depositary Receipts
By Market, 1H '10 ($bb)

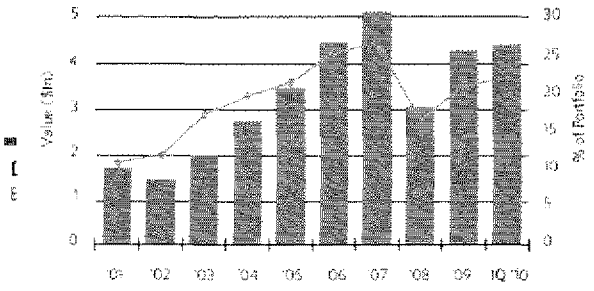


Value of Outstanding Depositary Receipts
By Region, 1H '10 ($bb)

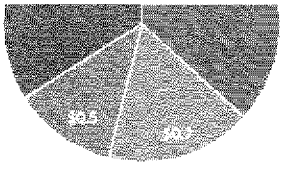


Source: BNY Mellon Corp., *The Depositary Receipt Markets 2010 Mid-Year Market Review*, at pp. 6, 8, http://www.adrbnymellon.com/files/MS30327.pdf. All figures as of June 30, 2010.

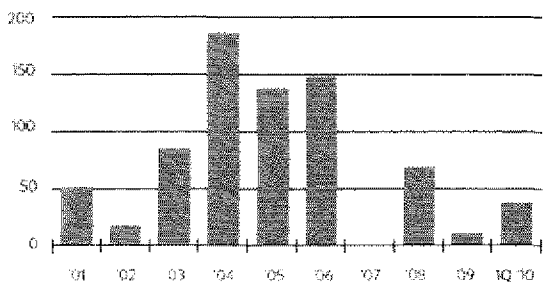
U.S. Holdings of Foreign Equities

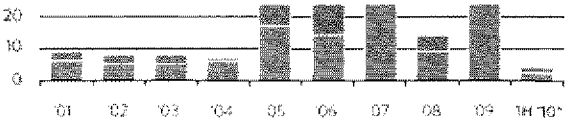


Source: U.S. Federal Reserve as of June 30, 2010. Historical figures revised by U.S. Federal Reserve as of June 30, 2010.



U.S. Investment in Foreign Equities
Net Purchases, ($bb)





*Note: 2010 represents first half figures.

Id. at p. 7.

It cannot be gainsaid, therefore, that transnational markets are growing, that American and foreign persons invest heavily in those markets, markets implicate dual-listings, which, when one requires filings with the Commission, has USA data influencing foreign values, and that American issuers use those markets for capital formation. American issuers cross list also in order to trade in a variety of currencies, and because increased liquidity carries the potential to lower cost of capital, as well as to lower bid-ask spreads.[6] American issuers' presence on global markets also "[e]nhances visibility and global presence among investors, consumers and customers."[7]

2. An Effective Anti-Fraud Provision Is Needed To Allow Transnational Markets to Thrive

It is settled beyond controversy that capital markets require public confidence to function properly, and confidence depends in significant part on effective regulation. Writing of the 1929 Crash and Depression, the Commission recognized that, "[t]here was a consensus that for the economy to recover, the public's faith in the capital markets needed to be restored" and went on to say that the SEC, the Securities Act of 1933, and the Exchange Act, were "designed to restore investor confidence in our capital markets . . . ."[8] The Commission's *Morrison* brief filed in 2010 makes the same point in the context of transnational economics. "[T]here is a broad international consensus that regulation of securities fraud is necessary and important to the international economic system . . ."[9]

A legal regime whose anti-fraud provisions are artificially inhibited fails the call of that consensus. A regime fails the call when it increases the prospects of a safe harbor for

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[6] Julius Melnitzer, *Euronext Cross-Listing Offers Benefits to U.S. Companies* (May , 2010), *available at* http://www.insidecounsel.com/Issues/2010/May-2010/Pages/Euronext-CrossListing-Offers-Benefits-to-US-Companies.aspx.

[7] J.P. Morgan Chase & Co., *Depository Receipts Reference Guide*, at p.7.

[8] About the SEC, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, *available at* http://www.sec.gov/about/whatwedo.shtml.

[9] USA Br., 2010 WL 719337, at *20.

fraud in connection with securities that are issued or traded outside the United States notwithstanding that issuers and investors may be American, that non-US issuers may trade securities on American exchanges, that market values of dual-traded instruments certainly are influenced by filings with the Commission or public statements fed into the stream of international commerce. A regime determined by the strictures imposed by the *Morrison* decision[10] also opens itself to further debilitating judicial dangers. As discussed more fully immediately below, some district courts have precluded private securities fraud actions arising from the plaintiffs' acquisition of ADRs traded on United States markets.[11] In sum, a regime limiting private rights to enforce the Exchange Act's anti-fraud provisions, as the decision in *Morrison* has done, will not reinforce the necessary public confidence in transnational markets, and, by decreasing accountability, increases the possibility of massive frauds that roil markets to destructive degrees.

3. Courts Are Expanding *Morrison* Into Domestic Transactions

Misusing *Morrison* as lever, United States courts have promiscuously enlarged the scope of that decision.

One district court has decided that purchases of ADRs via an over-the-counter transaction does not qualify for 10(b) protection. Its rationales were that the OTC does not qualify as "an official American securities exchange" and that trade "in ADR's is considered a predominantly foreign securities transaction."[12]

In another,[13] the court supposed that *Morrison* equally addressed the Securities Act of 1933 and that even if "listed" on an American stock exchange, ADR trades are "predominantly foreign".

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[10] *Morrison v. National Australia Bank Ltd*, 130 S. Ct. 2869 (2010).

[11] *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286. (S.D.N.Y. Sept. 29, 2010).

[12] *Copeland v. Fortis*, 685 F. Supp. 2d 498, 506 (S.D.N.Y. 2010).

[13] *In re Royal Bank of Scotland Group PLC Sec. Litig.*, No. 09 Civ. 300(DAB), 2011 WL 167749, at *6-7 (S.D.N.Y. Jan. 11, 2011).

In another,[14] the court held that entirely domestic swap transactions - agreements between New York venued investment managers that were executed in New York and that had choice of law and forum selection clauses designating New York courts – were equivalent to buy order in the United States for securities traded abroad, and dismissed the case on *Morrison* grounds.

In yet another,[15] the court dismissed the claim on the determination that a purchase order placed electronically in the United States that happened to result in a foreign market execution failed *Morrison*.

Restoration of the private rights under consideration is needed to prevent their further erosion.

4. Underfunded, Understaffed, Overburdened, the Commission May Welcome Private Sector Assistance

It is widely known that "[b]udget shortfalls will hurt the Securities and Exchange Commission even as it desperately needs funds to bolster equity markets and adopt new rules required by the Dodd-Frank financial overhaul."[16] Recent shortfalls are but another episode in an extended period of financial starvation of the Commission, and, according to Chairman Schapiro, will oblige the Commission "to take some more steps to cut back . . . [a]t this stage it will impact our work."[17] Pairing the "broad international consensus that regulation of securities fraud is necessary and important to the international economic

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[14] *Elliott Assocs. V. Porsche Automobil Holding, SE*, No. 10 Civ. 0532 (HB), – F. Supp. 2d –, 2010 WL 5463846, at *7 (S.D.N.Y. Dec. 30, 2010).

[15] *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, No. 08 Civ. 1958 (JGK), –F. Supp. 2d –, 2010 WL 3860397, at *9 (S.D.N.Y. Oct,. 14, 2010).

[16] Rachelle Younglai, *Lack of funds to restrict SEC plans: Schapiro*, Reuters, December 21, 2010, available at http://www.reuters.com/article/idUSTRE6BK63I20101221, purporting to paraphrase SEC Chairman Mary Schapiro, speaking with reference to Commission duties imposed or implied by Dodd-Frank.

[17] *Ibid.*

system"[18] to the reality that the Commission has been deprived of ability effectively to enforce regulation makes private rights of action essential. Nor is this problem mitigated by the possibility of government actions against transnational frauds.

Private rights to enforce the anti-fraud provisions of the federal securities laws have long been recognized as proper and necessary adjunct to the SEC. "[T]he passage of time [has] removed any doubt that a private cause of action...constitutes an essential tool for enforcement of the 1934 Act's requirements."[19] That truth is in no way diminished where significant conduct material to the success of a transnational fraud occurs in the United States. If anything, the overwhelming burdens that have been placed on the Commission have fortified the need to have private enforcement of the anti-fraud provisions in instances of transnational wrongdoing. These rights must be restored.

We greatly appreciate your consideration of the views set forth in this letter, and we would be pleased to have the opportunity to discuss these matters further with the Commission and its Staff. If you have any comments or questions, please feel free to contact Ira M. Press at (212) 371 - 6600, ext. 213 or ipress@kmllp.com.

Sincerely,

Ira M. Press, Partner

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[18] USA Br., 2010 WL 719337, at *20.

[19] *Basic Inc. v. Levinson*, 485 U.S. 224, 230-231 (1988).