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VIA EMAIL
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SECURITIES AND EXCHANGE COMMISSION
Elizabeth M. Murphy, Secretary
100 F Street, NE
Washington, DC 20549-1090

Re: *File Number 4-617*

Commissioners:

We submit this Comment Letter pursuant to the Commission's Request for Comments regarding Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Release Number 34-63174, File Number 4-617.

I. EXECUTIVE SUMMARY

We, the undersigned, are institutional investors who collectively manage over \$134 billion in assets for the benefit of our constituent retirees and pension funds – and thus have a significant interest in ensuring that the American securities laws continue to prevent securities frauds whenever possible, and provide remedies for injured investors when fraud does occur.

In light of the Commission's recent invitation to submit comments concerning the decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), that rejected the "conduct and effects test" for the extraterritorial application of Section 10(b) and SEC Rule 10b-5, and in recognition of the fact that *Morrison's* holding dramatically weakens overall investor protections and invites additional securities fraud, we urge the Commission to recommend that Congress reinstate the time-tested "conduct and effects test" for private litigants.

That "conduct and effects test" advances Section 10(b)'s twin goals of promoting high ethical standards in the American securities industry and protecting investors because it does not provide an easy escape for foreign fraudsters. By focusing on where the wrongful conduct occurred and whether that wrongful conduct had a substantial effect in the United States or on United States citizens, it utilizes American judicial resources to properly address conduct that presents substantial domestic concerns.

In contrast, the more-restrictive, "transactional" standard for Section 10(b) announced by the *Morrison* Court heightens the risk that the United States will be used as a base from which to orchestrate securities frauds and the risk that United States investors will be targeted by securities fraudsters - all because of a narrow and hyper-technical reading of the existing federal securities

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laws. If left unresolved, that restrictive approach will erode ethical standards in the American securities industry and undermine investor confidence, while providing an easy escape for foreign fraudsters.

No one disputes that the limited resources available to the Commission renders the private enforcement of the federal securities laws a necessary tool to combat the scourge of securities fraud. Allowing only the Commission to bring actions in instances where the “conduct and effects test” is satisfied but the new restrictive “transactional” standard is not will cause, perversely, a disproportionate amount of Commission funds being diverted to address one of the most expensive species of securities fraud to investigate and prosecute – those cases that involve multiple nations with wide-flung witnesses and highly complex facts and issues.

II. RATIONALE

In passing the landmark Private Securities Litigation Reform Act of 1995, Congress reaffirmed that “[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.” Securities Litigation Reform Act, *Conference Report*, H.R. 104-369, 104th Cong., 1st Sess. (Nov. 28, 1995).

The Supreme Court has repeatedly echoed that sentiment, most recently in the *Tellabs* decision. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 n.4 (2007) (reiterating “the conclusion ‘that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses’ – a matter crucial to the integrity of domestic capital markets” (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006))). And the Commission itself has noted that “meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions.” (*Amicus Curiae*, Submitted by the Commission and the Solicitor General in *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525, at 24, quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007))

Plainly, then, private enforcement of the federal securities laws remains incredibly important to investors, for many reasons. Primary among those reasons is the simple fact that recoveries from government enforcement often may not adequately compensate investors victimized by fraud. During the eight-year period spanning 2002 to 2009, government enforcement of securities laws resulted in total recoveries of \$17.76 billion on behalf of swindled investors. While laudable, that recovery nonetheless is lower than the amount recovered by private securities fraud class actions in just one year – 2006 – when private cases helped defrauded investors recover some \$18.3 billion. In fact, during that eight-year period spanning 2002 to 2009, private

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enforcement recovered over \$51 billion for investors victimized by fraud – nearly three times the amount recovered by government enforcement.

These facts are not set forth to compare the relative values of private versus government enforcement, as the two mechanisms have different goals and functions. Rather, they confirm why Congress, the Supreme Court, and the Commission are all in agreement that private securities litigation is an indispensable tool and an essential complement to the government's prosecutorial and enforcement actions.

Yet, against this background *Morrison v. National Australia Bank* has dramatically undermined that necessary complement, making it harder for defrauded investors to seek a private recovery for injuries stemming from securities fraud. With the Supreme Court believing its hands were tied by the securities laws' existing text, *Morrison* tossed aside 40 years of time-tested jurisprudence relating to the "conduct and effects test" in favor of a "transactional" standard that looks solely at the locus of the transaction in question. Alarmingly, under *Morrison* it matters not whether the fraud committed is domestic or what the fraud's domestic impact is, but instead depends upon a hyper-technical inquiry that elevates – above all else – the sole fact of where the transaction took place. By ignoring the fraud's genesis or effect and focusing instead on the technical transaction, *Morrison* creates not just an easy escape for foreign fraudsters, but an open invitation: Come to the United States to commit securities fraud and feel free to negatively impact the United States with that fraud – so long as you don't list your securities on an American exchange, you may never have to repay any of the investors you victimized. Through *Morrison*, the Supreme Court has strayed from the securities laws' underpinnings of investor protection and largely denied investors – both domestic and foreign – the protections of the federal securities laws.

The extreme threat posed by *Morrison's* invitation to foreign fraudsters was presciently noted by the Commission's former Chairman, Christopher Cox, in a speech the then-Chairman delivered to the 34th Annual Securities Regulation Institute, entitled "Re-Thinking Regulation in the Era of Global Securities Markets." (*Re-Thinking Regulation in the Era of Global Securities Markets*, speech by Chairman Christopher Cox, U.S. Securities and Exchange Commission, 34th Annual Securities Regulation Institute, Coronado, California, January 24, 2007; transcript located at: <http://www.sec.gov/news/speech/2007/spch012407cc.htm>) First, the Chairman acknowledged the fact that "our capital markets and our trading markets have always been global." The Chairman then discussed the benefits accruing from a global securities marketplace and naturally turned to the threats a globalized marketplace posed to investors: "**the threat comes from the increasing opportunities for fraud, unethical trading practices, and market manipulation that globalization brings with it.**" Chairman Cox then rightly observed, "Fraudsters and criminals are becoming increasingly sophisticated in the use of technology to help them find the weak spots in our financial infrastructure, and **to exploit the seams in the regulatory defenses between nations....** This newfound ease with which fraudsters can take advantage of our borderless capital markets **threatens to turn our national systems of regulation into a shield for theft,**

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rather than so many swords for detection and prosecution. ... **[S]ecurities swindlers intend to exploit the fact that regulators can't always engage in hot pursuit beyond their borders.**" Finally, Chairman Cox clearly stated the need to aggressively pursue fraudsters with every weapon available: "We really have no choice: after all, there's no global regulator who can do the job for us." (All emphasis added.)

We believe that Chairman Cox had it right. The American securities laws must prevent securities fraud whenever possible, and provide remedies for injured investors when fraud does occur. Further, we believe the Commission is uniquely situated to promote the vitality of the American securities laws, and can do so without becoming a global regulator. As the federal agency charged with enforcing and interpreting the federal securities laws, its views warrant great deference on Capitol Hill. We respectfully suggest to the Commission that urging Congress to reinstate the "conduct and effects test" for private enforcement of the securities laws will restore investor protection and assist in the maintenance of fair markets by giving teeth to this necessary complement to government enforcement.

III. CONCLUSION

For all of the foregoing reasons, we believe that the full protections of the federal securities laws should be restored, and urge the Commission to recommend that Congress reinstate the time-tested standard (*i.e.*, the "conduct and effects test") for the extraterritorial application of Section 10(b) and Rule 10b-5, restoring the full panoply of private enforcement for victimized investors.

Respectfully submitted by:
ROBBINS GELLER RUDMAN & DOWD LLP

For and on behalf of:

- The London Pensions Fund Authority;
- Wirral MBC On Behalf Of The Merseyside Pension Fund;
- Mn Services Vermogensbeheer B.V.;
- The Council Of The Borough Of South Tyneside Acting In Its Capacity As The Administering Authority Of The Tyne And Wear Pension Fund;
- City Of Bradford Metropolitan District Council As The Administering Authority For The West Yorkshire Pension Fund;
- Wolverhampton City Council, Administering Authority For The West Midlands Metropolitan Authorities Pension Fund

PWD/NWB:maa