

Leandro Perucchi
Ph.D. in Law, LL.M.
Attorney at Law
Admitted in Zurich, Switzerland and NY State
Counsel with Rüd Winkler Partner Ltd., Zurich, Switzerland

February 18, 2011

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

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

Re: File Number 4-617

Dear Ms. Murphy,

I am pleased to submit this letter in response to a request of the Securities and Exchange Commission (SEC) for comments on its Study on Extraterritorial Private Rights of Action (Release No. 34-63174; File No. 4-617).

For the following reasons, in my view the 34 Act and the corresponding SEC Rules *should cover transnational private rights of action (claims of foreign investors)*:

- **A) Conflict of laws considerations demonstrate that the 34 Act should cover transnational private rights of action**
 - 1) The notion of *extraterritoriality* or *extraterritorial application* of the securities laws¹ is *per se* questionable, especially with regard to damages provisions. The concept is flawed, because it obviates the well established doctrinal separation between *substantive rules* and *rules of conflict of laws*.
 - Normally, *conflict of laws* rules determine whether a substantive law applies in the transnational context (or within the US, in a multi-state context). Once the applicable set of *substantive* rules is determined in the process, that's it. Never is there a subsequent inquiry, as to whether Congress or the State lawmakers intended the applicable substantive law to have "extraterritorial effect".
 - If such a question, like it was done in in *Morrison v. NAB*, were routinely asked, we would never be able to solve transnational or multi-state cases, because most substantive laws were enacted without considerations as to their transnational or multi-state application. Nevertheless, these laws are always applied in transnational or multi-state settings, if warranted by the relevant conflict of laws-provisions.
 - There is no reason to obviate the well established doctrinal separation between *substantive rules* and *rules of conflict of laws* in the private rights of action-context under the securities laws.

¹ Cf. *Morrison v. National Australia Bank Ltd.*, 561 U.S.__(2010), p. 12 ss.

- Therefore, if conflict of laws rules determine that, substantively, the anti-fraud provisions of the 34 Act are applicable to a case, these provisions also apply to transnational private rights of action.
- 2) *Morrison v. NAB* is the result of misguided efforts by the defense bar:
- For years, the defense bar desperately tried to prevent foreign plaintiffs from filing securities lawsuits in US courts by misshaping the superiority-requirement in transnational 23(b)(3)-class actions:
 - They invented the *recognition prognosis* at class certification stage.
 - Their argument was, because foreign courts would allegedly not recognize US class judgments, US district courts should not certify classes containing foreign plaintiffs in the first place.
 - However, no court outside the American continent ever seems to have actually opined on the question. The recognition prognosis therefore is a matter of pure *futurology*, *bare of any empiric value*.
 - On the contrary, as published scholarly writings on the subject suggest, most civil law jurisdictions, like e.g. Switzerland, would in fact largely recognize US class action-judgments and -settlements and thereby extend a class judgment's or -settlement's effect of *res judicata* to foreign jurisdictions.²
 - Little did the recognition prognosis help in *Vivendi*³ – unimpressed by defendants' meandering with the recognition prognosis, the court granted certification and the jury returned a \$ 9.3 Billion judgment for plaintiffs. Consequently, the defense bar had to come up with something new.
 - The test ultimately adopted in *Morrison v. NAB*, however, is rooted in the *impermissible question*, whether Congress wanted a substantive law provision to have "extraterritorial effect,"⁴
 - (1) which, as a matter of logic, it cannot have;⁵
 - (2) and which question obviates the well established doctrinal separation between *substantive rules* and *rules of conflict of laws*.
 - As outlined above, normally conflict of laws rules determine the applicable laws in transnational settings.

² Cf. for Switzerland FAVALLI, DANIELE/MATTHEWS, JOSEPH M., *Recognition and Enforcement of U.S. class action judgments and settlements in Switzerland*, Schweizerische Zeitschrift für internationales und europäisches Recht (4/2007), p. 625, concerning mandatory class actions, implicitly including 23(b)3 class actions; *id.*, p. 612, 628; skeptical whether lack of notice by a class member would operate as an obstacle to recognition abroad, pp. 628, 629, 635, 636; DÖRIG, ADRIAN, *Anerkennung und Vollstreckung US-amerikanischer Entscheidungen in der Schweiz* (1998), p. 446, 447; ROMY, ISABELLE, *Class actions américaines et droit international privé suisse*, AJP/PJA (1999), p. 795 ss.; PERUCCHI, LEANDRO, *Anerkennung und Vollstreckung von US class action-Urteilen und –Vergleichen in der Schweiz* (2008), p. 44 ss., with a summary of the different issues on p. 192 ss and a summary of conclusions in English on p. 199.; cf. specifically on the unproblematic recognition of class action-settlements BAUMGARTNER, SAMUEL, *Die Anerkennung und Vollstreckung ausländischer Zivilurteile in der Schweiz: Neuere Entwicklungen*, in: LEUENBERGER, CHRISTOPH/GUY, JACQUES-ANDRÉ, *Rechtshilfe und Vollstreckung* (2004), p. 116 s.; PERUCCHI, *id.*, p. 141.

³ Cf. *In re Vivendi Universal, S.A. Securities Litigation*, No. 02 Civ. 5571.

⁴ Cf. *Morrison v. National Australia Bank Ltd.*, 561 U.S. __ (2010), p. 12 ss.

⁵ Like a court can not exert jurisdiction beyond the territorial limits over which it has jurisdiction (e.g. for the US Supreme Court, the territory of the US), Congress has no power to enact laws that have an effect outside US territory.

- The 2nd Circuit's pre-Morrison *conduct-and-effects test* was at the core an elaborate conflict of laws provision, which for nearly 40 years helped the courts discern under what circumstances US courts and law enforcement agencies should be devoted to transnational transactions. The test asked (1) whether the wrongful conduct occurred in the US, and (2) whether the wrongful conduct had a substantial effect in the US or upon US citizens.⁶
 - With regard to transnational tort or contract damages claims, nobody would normally start an "extraterritorial application"- discussion of the applicable substantive rules as it was done in *Morrison v. NAB*.
 - *There is no reason to adopt a different standard* with regard to private rights of action flowing from Section 10b of the 34 Act and Rule 10b-5, because, after all, these rules similarly regulate damages provisions.
- Therefore, *because it is rooted in an impermissible question*, the transactional test established in *Morrison v. NAB* should be abolished with regard to private rights of action under the 34 Act.
- 3) Under the so called *effects-doctrine*, "extraterritorial application" is a concept used in both US⁷ and European⁸ antitrust laws and governs *transnational or cross-border* application of antitrust rules.
 - In the US for example, under the FTAIA, the Sherman Act is applicable, where the foreign conduct (1) has a "direct, substantial and reasonably foreseeable effect" on domestic commerce, and (2) such effect gives rise to a Sherman Act claim.⁹ Insofar, extraterritorial application is recognized in US antitrust law.
 - To some extent, antitrust rules are a valid example for comparison with the provisions under the 34 Act, because like the securities laws, they rely on the bifurcated framework of public enforcement and private rights of actions to doubly deter wrongdoers *ex ante*.
 - However, the effects-doctrine in antitrust law was first and foremost created to facilitate *public agency enforcement* of antitrust law, while *conflict of laws* provisions apply to private rights of action flowing from antitrust-violations.¹⁰
- Nevertheless, even if we were to use the misleading term "extraterritorial application", *comparative analysis* with domestic and foreign antitrust laws therefore supports the conclusion that the 34 Act *should cover transnational private rights of action*.

⁶ Cf. STEVENS, J., GINSBURG, J., concurring in judgment, *Morrison v. National Australia Bank Ltd.*, 561 U.S. (2010), p. 2 ss.

⁷ Cf. *F. Hoffmann-La Roche Ltd., et al. v. Empagran S.A. et al.*, 542 U.S. 155 (2004) (note: Isn't F. Hoffmann-La Roche Ltd. a Swiss Corp. or at least part of a Swiss group of companies?)

⁸ Cf. for Germany: §130 GWB; for Switzerland: Article 2, Section 2 KG; for the European Union: Article 81 of the EU treaty.

⁹ The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. However, an exception applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a "direct, substantial and reasonably foreseeable effect" on domestic commerce, and (2) such effect gives rise to a [Sherman Act] claim, cf. *F. Hoffmann-La Roche Ltd., et al. v. Empagran S.A. et al.*, 542 U.S. 155 (2004) (note: Isn't F. Hoffmann-La Roche Ltd. a Swiss Corp. or at least part of a Swiss group of companies?)

¹⁰ Cf. for Switzerland, DASSER, FELIX, *Basel Commentary on Conflicts of Laws (2007)*, Article 137 Swiss Private International Law Act, N 12.

- **B) Investor equality considerations in global corporations (multinational enterprises, MNEs), with securities listed or registered on multiple exchanges in the US and abroad, support the conclusion that the 34 Act should cover transnational private rights of action**
 - 1) Only global or transnational class actions offer *global investor protection*:
 - Because only global class actions - by operation of the procedural rules on recognition and enforcement of judgments and settlements abroad - produce *global res judicata* and therefore global peace for defendants and plaintiffs alike.
 - In a globalized world, where investors buy securities issued by the same corporation in different markets all over the world, *only global res judicata* warrants a fair, equal and just resolution of investor disputes.

 - 2) The recent merger between *NYSE Euronext and Deutsche Boerse* evidences the globalization of the stock markets.
 - In addition, the merger evidences the *unparalleled importance and worldwide dominance of the US stock markets*, as the majority of relevant positions after the merger appear to be held by US specialists.¹¹
 - Also because of global *stock price parallelism*, where stock prices on foreign exchanges largely follow and reflect the changes on the US stock markets, all investors in the same corporation should be offered an uniform protection
 - regardless of their nationality or domicile,
 - regardless of the nationality or domicile of the issuer,
 - and regardless of the place of transaction
 - provided the substantive US securities laws apply according to the relevant conflict of laws provisions.

 - 3) The *UBS-case* demonstrates the need for the 34 Act to apply in a transnational context, or there will be *no justice* for UBS-investors who did not transact over the US exchanges:
 - UBS, the largest Swiss bank, received USD 74 Billion CPFF-money¹² from the Federal Reserve (on top of the CHF 65 Billion the Swiss Federal Government had to kick in in Fall 2008).
 - The size of the combined government support required to keep UBS going, roughly USD 140 Billion at present value, demonstrates the magnitude of UBS-management's failure and the reprehensibility of its violations of duties.
 - Nevertheless, in the Fall of 2008, only roughly 2 weeks before the Swiss Federal Government had to kick in its CHF 65 Billion, and before UBS' massive subprime crisis losses and transnational tax evasion scheme-related wrongdoings became public, UBS's then president of the board publicly announced at a special shareholders

¹¹ Cf. Swiss Newspaper TAGESANZEIGER, February 16, 2011, available at www.tagesanzeiger.ch.

¹² "Commercial Paper Fund Facility", cf. Bloomberg-Article of December 2, 2010: "Federal Reserve May Be 'Central Bank of the World' After UBS, Barclays Aid", available at www.bloomberg.com. The \$74.5 billion received by UBS through the CPFF, which bought short-term debt, represents total borrowings by UBS over the life of the program. The total outstanding at any point in time never exceeded about half that sum, said Karina Byrne, a UBS spokeswoman.

- meeting of October 2, 2008 that UBS had allegedly “*weathered the difficult times well and was one of the best capitalized banks.*”¹³
- Instead of sanctioning this public misstatement, FINMA¹⁴ unexplicably protected it as being “appropriate”, thereby demonstrating its ineffectiveness, bias and even conflict of interest.¹⁵
 - After the news of UBS’ true financial situation had leaked, UBS’ stock plummeted and until now has recovered only marginally.
 - How did the Swiss legal system respond to UBS’ unprecedented wrongdoings?
 - UBS’ current management decided *not to file* derivative actions against former UBS-management for violation of their duties and for disregarding even the most basic corporate governance principles.
 - One of the key argument for the current board’s decision not to file derivative actions against former management, was that UBS did not want to provide support for the plaintiffs in the US class actions¹⁶ pending against UBS.¹⁷
 - Due to excessive procedural cost-burdens, some of the most wealthy institutional UBS-investors, Swiss Public Pension Fund *AHV* and the Federal Public Employee Retirement System *Publica* apparently could not afford to file derivative actions.¹⁸
 - By consequence, in the Swiss legal system, UBS investors get punished twice:
 - *No derivative actions* could be filed (because of excessive procedural cost-burdens to bring them).
 - Their UBS-investment therefore can not even indirectly profit from payments made to UBS.
 - *No direct or class actions* could be filed (because they don’t exist yet under Swiss law).
 - Because of this *procedural deficit*, after UBS published its transparency report, the Swiss Federal Counsel (the executive body of Swiss the government) on October 14, 2010 publicly announced that it will reconsider the introduction of the class action device in the Swiss Rules of Civil Procedure.¹⁹ However, this will likely take several years, if not decades.
 - It must therefore be concluded that although
 - UBS’ wrongdoings led the US and Swiss governments to kick in a combined USD 140 Billion to keep it going,

¹³ Cf. Swiss Newspaper TAGESANZEIGER, November 7, 2009, p. 49.

¹⁴ Swiss Financial Markets Authority, FINMA, is the Swiss equivalent of the SEC, cf. www.finma.ch.

¹⁵ Consequently, FINMA was widely criticized by legal scholars; cf. TAGESANZEIGER, *id.*, p. 49; Swiss Newspaper NEUE ZÜRCHER ZEITUNG/NZZ ONLINE, November 7, 2009, available at www.nzzonline.ch. So far, the Swiss Stock Exchange SIX has not sanctioned UBS in this matter.

¹⁶ Most likely the case *In re UBS AG Securities Litigation* pending in the SDNY, Docket No. 1:07-CV-11225-RJS.

¹⁷ Cf. FORSTMOSER, PETER, *Statement of Opinion on the UBS AG Transparency Report of October 2010 and the Resolution by the UBS AG Board of Directors' [sic] to Refrain from the Initiation of Liability Litigation*, October 1, 2010, p. 24, available for public download at <http://www.ubs.com/1/e/transparencyreport.html>.

¹⁸ Cf. Swiss Newspaper NEUE ZÜRCHER ZEITUNG, October 14, 2010, available at www.nzzonline.ch.

¹⁹ Cf. Swiss Newspaper NEUE ZÜRCHER ZEITUNG, *id.*

- there were violations of the ad hoc-publicity rules of the Swiss exchange SIX,
- under applicable Swiss law, UBS-investors will likely *not receive any compensation* for their gigantic losses on their stock.
- Therefore, the Swiss legal system does not adequately compensate harmed investors.
 - Given that result, it goes without saying, that it does not deter UBS from future wrongdoing at all.
- Harmed Swiss institutional investors, like e.g. Actares,²⁰ seem to have *no other choice* but to rely on the private rights of action under the 34 Act to protect them:
 - Because of the inexistence of effective procedural tools and because of the extremely high costs of litigation, under Swiss law investors practically *cannot file derivative actions*.²¹
 - In addition, they *cannot effectively bring direct actions*: In Switzerland, like in most European countries, there are no well established and proven class or other collective/representative action tools yet,²² to effectively and economically compensate large numbers of defrauded or otherwise harmed victims.
- This proves that, under the Swiss legal system, investors in Swiss public corporations are virtually *without any effective legal protection at all with regard to damages suffered from securities fraud*, even when it comes to suing a *Swiss issuer domiciled in Switzerland*.
- The problem is huge:
 - In the present Swiss legal system, even extremely wealthy shareholders, like the largest pension funds, cannot even only derivatively sue directors of public corporations for violations of their duties, let alone directly sue the corporation for violation of the securities laws.
 - In addition, the Swiss Federal Financial Markets Authority FINMA was substantially conflicted in the UBS case and therefore systematically underenforced securities and banking law provisions vis-a-vis UBS.
- As demonstrated above, the present Swiss legal system therefore operates to doubly underenforce the Swiss securities laws (*no agency enforcement, no private enforcement*) and thereby severely *underdeters* UBS from future wrongdoing.
- The UBS-case is *representative* for all cases, in which a globally operating Swiss corporation, whose stock is registered and listed on multiple exchanges in the US and Europe, violates the securities laws and thereby harms investors on a global level.²³

²⁰ Cf. TSCHOPP, ROBY, *Verantwortung für das UBS-Debakel: Zurück zum Start?*, in: Private, Das Geld Magazin, Issue of January/February 2011 (2011), p. 34, publicly available at www.private.ag.

²¹ Cf. FORSTMOSER, *id.*, p. 12, FN 5, stating that over the past 35 years, apparently *less than 5 derivative actions* were filed by shareholders against directors and officers of publicly-held Swiss corporations.

²² Cf. HODGES, CHRISTOPHER, *The Reform of Class and Representative Actions in European Legal Systems, A New Framework for Collective Redress in Europe* (2008), p. 246; DROESE, LORENZ, *Die Sammelklage in den USA und in Europa und die Auswirkungen auf die Rechtslage in der Schweiz*, in: *Haftpflichtprozess 2010* (2010), p. 133.

²³ Because of the undisputed systemic underdevelopment of efficient and economic class or representative action models in Europe, most likely it is also representative for all cases, where *any European corporation*, whose

- In globalized stock markets, where investors buy stock issued by the same corporation in different markets all over the world, *only global res judicata* warrants a fair, equal and just resolution of investor disputes.
 - Therefore, *investor equality* considerations support the conclusion that the 34 Act should cover transnational private rights of action.
- **C) International comity and public policy doctrine require the US courts to apply the 34 Act in transnational settings**
 - As the UBS-case shows, investors in foreign jurisdictions rely heavily on the US legal system to enforce the provisions of 34 Act and the according rules and regulations in the transnational context, even with regard to wrongdoings of foreign issuers, for at least two reasons:
 - Because in their homecountries, as the UBS-case demonstrates, investors most likely are without effective redress.
 - Because globally listed corporations would be underdeterred otherwise.
 - Since non-US based companies that register with the SEC only do so if they have significant US operation/presence, also from a *jurisdictional standpoint*, it seems logic to subject them to the 34 Act.
 - It would be *fundamentally unfair* to exclude international victims from compensation for global securities fraud paid by defendants simply based on the victims' geographical location and place of transaction.
 - Outside the securities-context, US courts usually are not reluctant to apply US damages provisions in transnational settings, e.g. in torts, contracts or antitrust-cases.
 - The 2nd Circuit's pre-Morrison *conduct-and-effects test* is an elaborate conflict of laws provision, which for nearly 40 years helped the courts discern under what circumstances US courts and law enforcement agencies should be devoted to transnational transactions. The conduct-and-effects test should be *reinstated* since it is a fair test to determine, under what circumstances foreign fraud victims are entitled to receive the protection of the 34 Act.
 - As demonstrated above, global investors rely on the protection of the 34 Act, because in their homecountries, most likely there are no procedural instruments allowing for effective investor protection. For example in Europe, the implementation of effective instruments like class actions will take years, if not decades from now. In the case of Switzerland, the discussion on an eventual introduction of a class action tool has started only as recently as four months ago.
 - There is no risk of interference with foreign enforcement of securities laws, because, as the UBS-case demonstrates, in most cases there is likely *no foreign enforcement*: neither on a private rights of action level, nor on the level of public agency enforcement.
 - There is no reason to assume that greater costs will be imposed on US issuers:
 - If there is fraud, suits by US-based investors will undoubtedly ensue.
 - Therefore, suits by or including foreign investors will add little if anything to the defendants' costs of defending such suits.
 - The likelihood that foreign investors who purchased on foreign exchanges would be the only ones to sue is very remote.

- Through persistent misinterpretation of the law, the defense bar tried to overturn an otherwise crystal-clear result: *Global securities fraud calls for fraud victims' global and uniform compensation by the wrongdoer.*
 - Therefore, *international comity and public policy doctrine* support a finding that the 34 Act should cover transnational private rights of action.
- **D) Transnational application of the 34 Act maintains the US capital market's unique attractiveness in an ever stronger global competition for investor money**
 - In order to attract foreign investors in US corporations, the US must maintain the most investor-friendly capital market in the world, because global investor money will flow to those markets that offer the greatest investor protection from fraud.
 - Antifraud provisions that apply in transnational settings thereby directly operate to allocate *maximum foreign capital* in the US capital market.
 - Markets with effective enforcement of the securities provisions will attract the most investors on a global level.
 - Allowing foreign investor access to US courts to pursue fraud claims against US-based or SEC-registered companies, even when the securities are purchased on a foreign exchange, will further the goals of *deterrence* and *investor confidence* long prized by US securities laws.
 - It is in America's interest to be and appear to be the *most investor-friendly capital system* in the world. Extending the protections of the US securities laws to non-US buyers on non-US exchanges furthers that goal.
 - As to purchases made by non-US buyers on US exchanges – which some courts have now barred – the argument is *even more compelling*.
 - This is not about encouraging litigation, it is about making investing in US based or SEC registered companies appear to be *safer and thus boost investor confidence* and *encouraging capital flows towards such issuers*.
 - Extensive application of the transactional test in *Morrison* will *not encourage foreign investors* to buy on US exchanges in order to gain protection of the US securities laws; instead they will still buy on foreign exchanges, but less likely securities from US issuers.
 - By consequence, *Morrison* does *not help* US issuers to attract worldwide capital.
 - Instead, the proper result should be that US-based corporations have greater access to capital in increasingly global financial markets:
 - Thus, US corporations should be encouraged to also list their securities on foreign exchanges to attract capital worldwide,²⁴ profiting from the competitive advantage of offering protection of the US securities laws to foreign purchasers.
 - Protection of the US securities laws for purchasers on foreign exchanges helps US corporations *raise capital* and ultimately *helps US economy grow*.
 - Therefore, *the necessity to attract foreign investors in US corporations and to enable US corporations to attract capital worldwide, also on foreign exchanges*, supports the conclusion that the 34 Act should cover transnational private rights of action.

²⁴ The merger of NYSE Euronext and Deutsche Boerse will likely foster such steps.

- Only transnational application of the private rights of action under the 34 Act will enable the US to maintain the *richest, deepest and largest capital market in the world*.²⁵

- **E) Conclusion**

- I believe the SEC should reinstate transnational private rights of action under the antifraud provisions of the 34 Act, as it was the case for nearly 40 years under the 2nd Circuit's pre-Morrison *conduct-and-effects test*. My opinion is based on the following findings:
 - *Conflict of laws considerations* demonstrate that the 34 Act should cover transnational private rights of action (cf. supra, A);
 - *Investor equality* considerations in global corporations (multinational enterprises, MNEs), with securities listed or registered on multiple exchanges in the US and abroad, support the conclusion that the 34 Act should cover transnational private rights of action (cf. supra, B);
 - International *comity and public policy* doctrine require the US courts to apply the 34 Act in transnational settings (cf. supra, C);
 - Transnational application of the 34 Act maintains the *US capital market's unique attractiveness* in an ever stronger global competition for investor money (cf. supra, D).

I appreciate the opportunity to comment on the issue above and would be pleased to discuss any question the SEC or its staff may have about this letter.

Please do not hesitate to call me on 011-41-43-501-07-00 or send me an e-mail on leandro.perucchi@ruedwinkler.ch.

Very truly yours,



Leandro Perucchi

²⁵ Cf. WORLD FEDERATION OF EXCHANGES, *Largest Domestic Equity Market Capitalization Year-End 2010*: NYSE Euronext (US) + NASDAQ OMX (US): USD 17'283 Billion; Tokyo Stock Exchange Group: USD 3'828 Billion; London Stock Exchange Group (including Borsa Italiana): USD 3'613 Billion; NYSE Euronext (Europe): USD 2'930 Billion; Shanghai Stock Exchange: USD 2'716 Billion; Hong Kong Exchanges: USD 2'711 Billion, all data can be downloaded from the website www.world-exchanges.org.