

February 18, 2011

VIA EMAIL: rule-comments@sec.gov

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

Re: File No. 4-617

Dear Ms. Murphy:

The undersigned global public pension and institutional investment funds respectfully submit the following comments in response to Release No. 63174 of the Securities and Exchange Commission (“SEC” or “the “Commission”). This comment is submitted on behalf of a group of institutional investors from outside of the United States, including a number of pension funds that invest for the long-term security of their millions of active and retired members. Collectively, the undersigned have over 2 trillion U.S. dollars in assets under management.¹ The undersigned include some of the largest institutional investors in the world and have a strong interest in restoring private litigants’ right to assert federal securities fraud claims in cases where a transnational fraudulent scheme includes a significant American component.² For the reasons set forth herein, we urge the SEC (i) to find that the antifraud provisions (“Section 10(b)”) of the Securities Exchange Act of 1934 (“Exchange Act”) should allow a private right of action in cases involving transnational securities fraud within the limits provided for SEC actions under Section 929P(b) (“Section 929P”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or the “Act”), and (ii) to recommend to the U.S. Congress that the Exchange Act be amended accordingly.

Less than one month after the United States Supreme Court’s decision in *Morrison v. National Australia Bank* (“*Morrison*”)³ significantly limited the SEC’s and private litigants’ ability to pursue transnational securities fraud claims under Section 10(b), Congress, through Section 929P, restored the scope of the SEC’s transnational enforcement power, effectively to pre-*Morrison* levels. As to the SEC, Section 929P “largely codified” the pre-*Morrison* test applied by courts for decades to assess whether transnational Section 10(b) suits could be

¹ The undersigned also have significant investments in U.S. companies that trade on foreign exchanges, as well as in foreign companies that have a significant presence in the United States.

² As used herein, “transnational securities fraud” or “transnational fraud” (and similar variations) refer to a securities transaction that would facially violate Section 10(b) of the Exchange Act and that is consummated through purchases or sales of securities outside of the United States, including on non-U.S. exchanges or trading platforms. “Foreign-cubed” or “F-cubed” refers to non-U.S. investors purchasing shares of a non-U.S. company on a foreign exchange.

³ 130 S. Ct. 2869 (2010).

brought in the United States (the “conduct and effects test”).⁴ With the SEC’s power restored, similarly expanding Section 10(b) to allow private claims of transnational fraud would recognize investors’ legitimate interest in pursuing claims properly heard in the U.S. while avoiding the application of U.S. law to essentially foreign frauds. For this reason, and because this proposed restoration of private litigants’ rights is consistent in scope with the SEC’s restored authority under the Act, no unique international comity or economic cost-benefit concerns apply that Congress would not already have weighed when passing Section 929P.

1. A Private Right Of Action For Transnational Securities Fraud Should Be Available To All Private Actors Under Limited Circumstances

The threshold question here is whether a private right of action addressing transnational securities fraud, supplemental to the public right of action for transnational securities fraud restored in Section 929P, should be available. As explained in detail in Section 2 below, the answer is “yes.”

The standard made applicable to the SEC through Section 929P should govern the availability of private actions under Section 10(b). This would allow for uniform enforcement of Section 10(b) in transnational fraud actions and permit the further development of a well-established body of case law. As the Commission has noted, “[Section 929P] largely codified the long-standing appellate court interpretation of the law that had existed prior to ... *Morrison* by setting forth a narrow conduct and effects test.”⁵ This “long-standing appellate” jurisprudence applied the conduct and effects test as a limit on both private and public transnational fraud actions. *See, e.g., SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003) (noting that the conduct and effects test applied identically to public and private actions under Section

⁴ SEC Release No. 63174, n.1. Specifically, Section 929P authorizes SEC actions under Section 10(b) for alleged transnational frauds 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.”

⁵ SEC Release No. 63174, n.1. As the Commission further noted, Congress in Section 929P not only codified the conduct and effects test, but also provided that the “inquiry is one of subject matter jurisdiction.” *Id.* It is immaterial for present purposes that, in restoring the SEC’s authority to police transnational fraud, Congress spoke in terms of “jurisdiction” while *Morrison* described the question as merits-based, and not jurisdictional. 130 S. Ct. at 2877. The Act itself is unequivocal as to Section 10(b)’s extraterritorial application with respect to SEC actions: Section 929P expressly provides “extraterritorial jurisdiction” for Commission actions “alleging a violation of” Section 10(b) that satisfy the conduct and effects test. Moreover, Section 929P’s amendment of the Exchange Act to include this language negates the central premise of the Supreme Court’s analysis in *Morrison*. Specifically, the basis for the Court’s determination that Section 10(b) does not apply extraterritorially was the Exchange Act’s (then-) silence as to its transnational reach, *see id.* at 2883 (“there is no affirmative indication in the Exchange Act that [Section] 10(b) applies extraterritorially, and we therefore conclude that it does not”) – a silence which Section 929P eliminates.

10(b)).⁶ Congress reaffirmed the appropriateness of this standard in Section 929P. Given all of these considerations, there is no basis for abandoning decades of law placing the same scope limitations on public and private transnational fraud actions under Section 10(b).

The undersigned propose that the conduct and effects inquiry applicable to determining whether Section 929P is satisfied properly considers all aspects of an alleged fraud, from commission to injury, in assessing the fraud's connection to the U.S. As a consequence, the particular factors specified in Release 63174 ("whether the security was issued by a U.S. company or by a non-U.S. company;" "whether the security was purchased or sold on a foreign stock exchange, a non-exchange trading platform or other alternative trading system outside the [U.S.];" "whether the issuer's securities are traded exclusively outside the [U.S.]") would all be relevant to the inquiry, along with many other factors, including the citizenship of the purchaser and the *situs* of substantial fraudulent conduct. Each would be gauged for what it indicated about the significance of the alleged fraud's connection to the U.S. Typically, however, no single factor would be determinative.⁷ This approach is consistent with pre-*Morrison* case law which held that the conduct and effects test was satisfied only if a substantial part of the wrongful conduct occurred in the U.S., the wrongful conduct substantially affected the U.S., or if some substantial admixture of the two appeared.⁸

As detailed below, arguments suggesting that a return to a pre-*Morrison* standard would transform the United States into the world's court are baseless speculation unsupported by history. The familiar standard in Section 929P includes limits that preclude the prosecution of Section 10(b) claims unless the case has a significant United States nexus. To this end, in order to support an SEC enforcement action for transnational fraud, a defendant's U.S. conduct must "constitute[] significant steps in furtherance of the violation," while a fraud's effects must be "foreseeable [and] substantial." Thus, cases without sufficient ties to the U.S. will not be prosecuted in its courts. Moreover, because of budgetary and other constraints, it is unrealistic to expect government regulators to uncover and prosecute all frauds. Restoring private litigants' rights to pre-*Morrison* levels simply provides investors the opportunity to assert claims on their own behalf, and to not rely entirely on government enforcement to remedy injuries. Of course, with respect to private litigants, and especially those seeking to bring class actions, limitations already in place to filter out weaker actions would be unaffected by any of the proposed changes

⁶ To the extent pre-*Morrison* authority from the circuit courts could be read as being inconsistent, the undersigned respectfully suggest that pre-*Morrison* rulings from the Second Circuit should provide the contours of private litigants' right to pursue transnational frauds. See *Morrison*, 130 S. Ct. at 2894 ("in my view, the Second Circuit has done the best job of discerning what sorts of transnational frauds Congress meant in 1934-and still means today-to regulate") (Stevens, J., concurring).

⁷ Whenever U.S. resident investors suffer direct injuries from fraudulent conduct, however, claims should be allowed to proceed under Section 10(b) because in such cases the "effects" test would always be satisfied.

⁸ *Berger*, 322 F.3d at 192-93.

to the scope of Section 10(b). *See* 15 U.S.C. §78u-4(b) (setting forth, *inter alia*, heightened pleading requirements for private actions and establishing automatic stay of discovery).⁹

2. Restoring Private Litigants' Rights To Pursue Claims For Transnational Securities Fraud Furthers The SEC's Mission, Is Consistent With Current Securities Law Jurisprudence, And Enhances Capital Formation¹⁰

Allowing investors the opportunity to assert claims to recover losses caused by fraud does not undermine the efficiency of capital markets. The primary purpose of the Exchange Act is protecting "the interests of investors."¹¹ To this end, the SEC specifically recognizes the paramount aspect of its mandate, stating on its website that its mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." This tripartite mission is complementary, *i.e.*, it is recognized that increased investor protection necessarily enhances efficient markets and capital formation. *See* Mary Schapiro, Testimony before the House Financial Services Subcommittee (March 11, 2009) ("we must have a renewed commitment to protecting investors, as it is investors who provide the capital used to fund the productive enterprises that create jobs and wealth. While we have a tripartite mission at the SEC, investor protection is an essential piece from which our other responsibilities flow.").

Chairman Schapiro's comments echo the long-standing core belief that capital markets cannot function if investors do not have confidence in the truth of financial disclosures. As the SEC acknowledges on its website:

*The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires public companies to disclose meaningful financial and other information to the public. This provides a common pool of knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a particular security. **Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.***

⁹ Given such limiting rules, the undersigned perceive no principled reason for the imposition of additional filters that would limit the types of plaintiff who could bring transnational fraud claims.

¹⁰ This section addresses the Commission's request that commenters -- "consider and analyze . . . (3) the economic costs and benefits of extending a private right of action for transnational securities frauds."

¹¹ *See Morrison*, 130 S. Ct. at 2894 ("it is the 'public interest' and 'the interests of investors' that are the objects of the statute's solicitude") (Stevens, J., concurring).

The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation's economy.¹²

The link between strong investor protection and enhanced capital market efficiency is now beyond dispute. For example, David Ruder, former SEC chairman from 1987 to 1989 authored a paper in 2005 discussing the interplay of investor protection and capital formation:

The federal securities statutes emphasize the need for corporate and market honesty and integrity as a means of protecting investors. They mandate adequate disclosure of information, prohibit dishonesty and fraud in the sale and purchase of securities, and require brokers, dealers, investment advisers and other market professionals to act in the best interests of investors.

Although the primary objective of requiring honesty is to protect investors, honesty also improves market efficiency. Honest markets will be more liquid, since investors will be more likely to risk their resources in an honest market. Additionally, since in a dishonest market investors will seek higher prices for securities as compensation for the risks of loss due to dishonesty, an honest market will facilitate the transfer of assets at lower prices, thereby lowering the cost of capital.

David Ruder, "Balancing Investor Protection With Capital Formation Needs After the SEC Chamber of Commerce Case," *Pace Law Review* 39, pp. 41-42 (2005).

Empirical evidence strongly supports the Commission's position that properly functioning financial markets require the protection of investors' rights. In a study for the World Bank in 2002, former White House economic advisor Glenn Hubbard, among others, empirically established a strong positive correlation between investor protection and capital formation. The results of the study imply that policies aimed at strengthening investor protection laws and their enforcement will improve capital formation and result in higher economic growth. This link was found precisely because higher rates of insider equity ownership are strongly correlated with market inefficiencies. As investor protection is strengthened, firms can increasingly turn to outside investors to meet their capital needs. Conversely, if investor confidence is low due to weak investor protection, firms have a more difficult time raising capital from outsiders, and must increasingly resort to insiders to meet their capital needs, which is highly inefficient. The study concluded:

The weaker is investor protection, the higher is the concentration of inside equity ownership. And second, the higher is the concentration of inside ownership, the higher is the implied cost of capital.

¹² Unless otherwise noted, all emphases herein are added.

Charles P. Himmelberg, R. Glenn Hubbard and Inessa Love, “Investor Protection, Ownership, and the Cost of Capital,” The World Bank Development Research Group, p. 38 (2002).

Thus, there should be no dispute that protecting investors is critical to the proper and efficient functioning of capital markets and must form an essential component of the securities regulatory regime in the United States.

a. Private Litigation Is Essential To The Protection Of Investors’ Rights

Given the explicit mandate in Dodd-Frank to apply the U.S. securities laws to transnational frauds with strong connections to the United States, the purpose of the Exchange Act and the SEC’s core mission to protect investors, it is clear that investors must have a private right of action co-extensive with the SEC’s under Section 10(b).¹³ It is unrealistic to expect that the SEC has the resources to police all securities frauds on its own. If the SEC is authorized under Dodd-Frank to police transnational frauds, it is *essential* that investors be given a private right of action to supplement the SEC’s efforts. According to comments made in 2004 by Giovanni P. Prezioso, General Counsel of the SEC, to the American Bar Association:

*[P]rivate securities litigation has always formed a major - and essential - component of the enforcement of the federal securities laws. The Commission has long advocated private rights of action precisely because they supplement its own enforcement program in deterring misconduct.*¹⁴

Consistent with the concept that private litigation complements SEC enforcement actions, the Supreme Court “has long recognized that meritorious private actions to enforce federal antifraud securities laws are an *essential supplement* to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.”¹⁵ The Supreme Court has stated that this is especially true when it comes to

¹³ This section of the submission addresses the Commission request that commenters discuss “What impact would the extraterritorial application of the private right of action have on the protection of investors? On the maintenance of fair, orderly and efficient markets in the United States? On the facilitation of capital formation?”

¹⁴ Moreover, former SEC Chairs Arthur Levitt, Jr., Harvey Goldschmid, and Richard C. Breeden, have each expressly noted their belief of the important— and complementary—role that private enforcement plays in the regulation of our markets. Likewise, Lynn Turner, the former Chief Accountant of the SEC, recently testified before Congress that “laws are not just enforced by the law enforcement agencies, but also through private rights of action of investors and consumers. This is critically important as law enforcement agencies have lacked the adequate resources to get the job done alone.”

¹⁵ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (private rights of action under the securities laws are a “*necessary* supplement to Commission action”).

actions under Section 10(b): “a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure.” *Herman & McLean v. Huddleston*, 459 U.S. 375, 380 (1983).

Recent research provides significant support for courts’ longstanding recognition of a private right of action as an essential component of protecting investors and fostering the proper functioning of capital markets.¹⁶ A recent study by academics in Europe provides evidence that individual firms that are the target of enforcement actions can also become more efficient as a result of the action, particularly when the violations are the result of violations of the duty of loyalty by management, such as accounting fraud or insider trading. This result recently was reported by Professor Rob Bauer at the Maastricht University School of Business and Economics in the Netherlands. Rob Bauer and Robin Braun, “Misdeeds Matter: Long-Term Stock Price Performance after the Filing of Class-Action Lawsuits,” *Financial Analysts Journal*, Vol. 66, No. 6, (Nov./Dec. 2010).

Professors Bauer and Braun examined the longstanding assumption that companies facing securities enforcement action, especially private litigation, would experience long-term share price declines, as the truth of past false statements are disclosed, and the public loses confidence in management (and perhaps also in the core business model of the firm). They found, however, that, at least when the action relates to violations of the duty of loyalty, especially claims concerning insider trading or accounting fraud, that share prices actually can benefit from an enforcement action:

In the case of insider trading, the filing of the lawsuit and reputational costs discipline the existing managers, or a more efficient and ethical management replaces them. In the latter case, new managers are aware of the lawsuit that their predecessors faced, and this information deters them from any self-dealing actions. . . .

We further documented shareholder wealth effects for companies that face accounting fraud allegations. . . . [S]ubsequent to the disclosure of fraud (implicitly, the filing of the lawsuit in our case and, eventually, the final verdict), companies typically shed labor and capital to become more productive. . . . Therefore, institutional investors initiating or joining a class action lawsuit can, to some degree, expect substantial reorganizations in the sued company, which can result in medium- to long-term outperformance.

¹⁶ This addresses the Commission’s request that commenters -- “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. Identify any studies that have been conducted that purport to show the positive or negative implications that such a private right of action would have.”

Id. at 90.

Given the complementary role to government enforcement private litigation has historically played in the Section 10(b) context, to preclude private litigation where government actions are permitted would lead to a material deficiency in the enforcement of Section 10(b). If one aspect of 10(b) enforcement (transnational securities fraud) is reserved to the SEC, and private actions remain prohibited, this creates an artificial and indefensible inconsistency in the securities laws -- despite the SEC's and the Supreme Court's recognition of the necessary assistance provided by private litigation. Such a result is contrary to the mission of the SEC and the established record of the benefits of private actions.

3. The Transactional Test For Extraterritorial Application Of The Private Right Of Action Established In *Morrison* Creates A Number Of Issues That Would Lead To Results That Are At Odds With The Purpose Of The Federal Securities Laws¹⁷

As noted above, under *Morrison*, the private Section 10(b) right of action only reaches the purchase or sale of a security *listed* on an American stock exchange, or other *domestic* transactions. 130 S. Ct. at 2888 (“Section 10(b) reaches the use of a manipulative or deceptive device or contrivance 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.”). However, determining whether a transaction occurred domestically can prove difficult and potentially can result in entirely anomalous results for investors worldwide.

First, the *Morrison* test fails to recognize the realities of today's modern trading environment, and is punitive to investors who often do not know whether their respective securities transaction was ultimately executed on a U.S or foreign exchange. More specifically, just because a security is *listed* on an exchange does not mean the security is actually *traded* on that exchange. For example, the security might be listed and regularly trade in the U.S., but a particular investor's purchase was made in a private transaction that did not occur on the exchange. Even securities listed and regularly traded on a U.S. exchange are frequently sold or purchased by brokers (who may be residing outside of the U.S.) on behalf of their clients, bypassing the exchange. Moreover, institutions increasingly trade large blocks of securities off-exchange in private markets known as “dark pools.” Such private markets (dark pools and other off-exchange strategies) now account for fully *one-third* of all stock trades in the United States. See, e.g., Jacob Bunge, “Dark Pools Pick Up Stock-Trading Share,” *The Wall Street Journal* (Jan. 4,

¹⁷ This addresses the Commission request that commenters -- “Address the criteria for determining where a purchase or sale can be said to take place in various transnational securities transactions. Discuss the degree to which investors know, when they place a securities purchase or sale order, whether the order will take place on a foreign stock exchange or a non-exchange trading platform or other alternative trading system outside of the United States.”

2011).¹⁸ Finally, some securities are listed on two stock exchanges and investors typically do not know which exchange their order is directed through, assuming it even occurs on an exchange. Both the European Union¹⁹ and the United States²⁰ have adopted legislation requiring brokers to establish a best execution policy to ensure that orders for securities are executed to the best benefit of the client. In order to achieve “best execution,” in the case of a dually-listed security, the broker will execute the transaction on the exchange that provides the greatest advantage to the client, which could be a U.S. or a foreign exchange, depending on circumstances. For example, Merrill Lynch, in its policy relating to the execution of securities transactions, states that “if the securities are listed on more than one financial instruments exchange (‘Multiple Listing’), we will place the order on the exchange which is selected by Quick Corporation as the primary exchange at the time of the execution. (The details of this determination are available upon request from our offices).”²¹

Second, as Justice Stevens’ concurrence in *Morrison* points out, the transactional test is also at odds with the primary purpose of the Exchange Act: to protect the interests of investors.

Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under § 10(b). ***The oddity of that result should give pause.***

¹⁸ Indeed, the lower courts already have shown discomfort with the *Morrison* analysis, and have functionally read the word “listed” out of the test entirely for securities that do not trade on US exchanges. *In re RBS Sec. Litig.*, No. 09 Civ. 300 (DAB) (S.D.N.Y. Jan. 11, 2011), slip op. at 17-18 (“The idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has ‘listed’ some securities in the United States is simply contrary to the spirit of *Morrison*.”).

¹⁹ Markets in Financial Instruments Directive (MiFID), “Directive 2004/39/EC”. Official Journal of the European Union. 2004. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:02004L0039-20060428:EN:NOT>.

²⁰ FINRA Rule 2320 (“(a)(1) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.”).

²¹ Bank of Merrill Lynch in Japan – Best Execution policy 5.2; Information on J.P. Morgan’s Execution Policy for Professional Clients March 2010 (“In the absence of express instructions from you JPMorgan will exercise its own discretion, having regard for the terms of your order in determining the factors that it needs to take into account for the purpose of providing you with Best Execution.”).

Morrison, 130 S. Ct. at 2895 (Stevens, J., concurring). Surely, this result is not what Congress intended when drafting the Exchange Act.

In sum, the *Morrison* test leaves investors at a loss as to their legal rights, and is at odds with the very purpose of the securities laws. At its core, Section 10(b) is not about whether the SEC or private investors can sue errant foreign issuers for securities fraud but about truthful disclosure. The ability of investors and the SEC to bring actions deters issuers from making false statements to the public, and creates additional incentives for issuers to comply with the disclosure laws.

4. Restoring Investors' Right To Assert Private Claims Under Section 10(b) To The Extent The Commission Is Permitted Will Not Undermine International Comity Or Upset International Relations

As all nations have a common interest in deterring fraud in today's global economy, restoring private litigants' ability to bring a transnational fraud claim within the parameters of the conduct and effects test would not offend international comity or undermine international relations. If anything, permitting investors to bring such claims in the appropriate context (*i.e.*, where a material component of the transnational fraud occurred in and/or substantially affected the U.S.) will be beneficial to such relationships and the overall standing of the United States as a leader in the global community in combating fraud.

a. The U.S. And Foreign Countries Share A Common National Interest Of Preventing Securities Fraud And Punishing Wrongdoers

The doctrine of international comity is implicated when there is a true conflict between American law and the law of a foreign jurisdiction. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). The Supreme Court has found that there is no conflict for purposes of comity "where a person subject to regulation by two states can comply with the laws of both." *Id.* (citing Restatement (Third) Foreign Relations Law, § 403). The showing of a true conflict is a threshold issue; unless a true conflict exists, no further consideration of comity principles is permitted and dismissal of an action inappropriate. *Id.* at 799; *Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180 (2d Cir. 2002) (dismissal inappropriate where record did not indicate that compliance with laws of both countries was impossible). In determining whether comity is implicated, courts will look to whether the respective laws or policies *contradict* one another, not whether one set is stronger or more effective in achieving similar objectives.²²

²² The doctrine of comity "is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882, 2005 WL 2082846, at *8 (S.D.N.Y. Aug. 30, 2005) (international comity principles did not require deferring to Canadian interests because the public's interest in vindicating human rights outweighed the nexus between the lawsuit and Canadian foreign policy considerations).

In the context of securities fraud, it is axiomatic that nations around the world *share* a significant interest in deterring such conduct and protecting the rights of investors.²³ As a result of securities frauds seen over the past decade that failed to recognize any national boundaries (e.g., Enron, WorldCom, Royal Dutch/Shell, Vivendi, Royal Ahold), and the global financial crisis that caused significant damage to financial markets and investors worldwide, these interests have become even more closely aligned. Accordingly, even if the U.S. federal securities laws are stronger than the laws of other nations in deterring securities fraud, these regimes are not in “conflict” with one another in light of their respective overlapping interests. *See IIT, Int’l Inv. Trust v. Cornfield*, 619 F.2d 909, 921 (2d Cir. 1980) (the “primary interest of a foreign state is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than those of a foreign state’s, that country will surely not be offended by their application.”); *see also United Int’l Holdings, Inc. v. Wharf Ltd.*, 210 F.3d 1207, 1223 (10th Cir. 2000) (“A true conflict would exist here only if Hong Kong law compelled securities fraud rather than just permitted it.”).²⁴

In light of the similar set of values in the international community in deterring securities fraud, we respectfully submit that a private right of action for transnational securities fraud should be available to all private litigants when the conduct and effects test is satisfied.²⁵

²³ *See Morrison*, 130 S. Ct. at 2894 (“it is the ‘public interest’ and ‘the interests of investors’ that are the objects of the statute’s solicitude”) (Stevens, J., concurring); Aiman Nariman Mohd-Sulaiman, Australian Journal of Corporate Law, Financial Misreporting and Securities Fraud: Public and Private Enforcement (discussion of private cause of action for securities fraud as a tool to prevent securities fraud and protect Australian investors); *Amicus Mem. of Republic of France, Morrison v. National Australia Bank*, No. 08-1191, 2010 WL 723010, at *4 (Feb. 26, 2010) (noting that “no nation [] condones securities fraud”).

²⁴ In light of the increasingly intertwined and globalized economy, fraud in one nation’s markets eventually will infiltrate the market integrity of other nations due to the nearly instant worldwide availability of information disseminated or statements made by the corporate issuer or others. Indeed, Congress recognized that because well-developed markets absorb information on a global scale, transactions even in foreign countries can affect American interests. Section 2 of the Exchange Act provides that trading in such markets establishes prices “disseminated and quoted throughout the United States *and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold...” 15 U.S.C. § 78b(2). Congress found that regulation was necessary because “the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities” *Id.* § 78b(3). The legislative history confirms that Congress intended the Exchange Act to “provide for the regulation of securities exchanges and over-the-counter markets operating in interstate and *foreign commerce* and through the mails, to prevent inequitable and unfair practices on such exchanges and markets....” H.R. Rep. No. 78-1838, (Conf. Rep.), 1934 WL 1291 (May 31, 1934).

²⁵ In addition, in furtherance of their common objective, securities commissions from more than 90 nations are members of the International Organization of Securities Commissions (the “IOSCO”). One of the IOSCO’s main objective is to “enhance investor protection and promote investor confidence in the integrity of securities markets.”

b. A Private Litigant's Securities Fraud Claims Would Only Apply To A Transnational Securities Fraud If It Had A Material Domestic Component

As amended by Section 929P, the anti-fraud provisions of the Exchange Act prohibit fraud in the sale of securities when significant conduct occurs in the United States or conduct has substantial effects on investors in the United States. Restoring private litigants' rights to assert claims to the extent permitted by Section 929P would allow claims under Section 10(b) *only* if the alleged fraud included *a material domestic component*. As such, restoring private litigants' ability to seek legal redress in transnational fraud would not offend notions of international comity.

It is well-established that application of a (U.S.) statute to *domestic* conduct does not raise concerns about extraterritoriality. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 371 (2005) ("Petitioners used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States."); *Small v. United States*, 544 U.S. 385, 389 (2005) (in the context of gun possession law, an "extraterritorial" application is one that would "prohibit[] unlawful gun possession abroad as well as domestically"); *id.* at 400 (Thomas, J., dissenting) (describing the presumption against extraterritorial application as "restricting federal statutes from reaching conduct *beyond U.S. borders*," and having no role to play in a case involving "conduct *within U.S. borders*"); *cf. Rasul v. Bush*, 542 U.S. 466, 480 (2004) ("Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States."). Where a material component of the fraud occurred in the U.S., it hardly makes sense to characterize the fraud as "extraterritorial" and refuse to apply the plain terms of Section 10(b).

The *Restatement (Third) of Foreign Relations Law of the United States* (1987), which the Supreme Court relied upon in *Hartford Fire*, 509 U.S. at 764, also supports the application of American law to a fraud that contains a material domestic component. Section 416 applies specifically to securities actions, and provides that federal securities laws apply to "conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States." Even more broadly, § 403 makes it clear that regulation is reasonable when there is a "link" to the regulating state, based on, among other things, conduct within the territory. *Id.* § 403(2)(a). Regulation is also reasonable when there is universal agreement among states that the activity should be regulated, when regulation is important to the international "economic system," and when there is little likelihood of international conflict. *Id.* § 403(2) (c, e, h). A single, transnational fraudulent scheme where substantial portions occur within the U.S. has an important "link" to the U.S. as a regulating

territory; moreover, as discussed above, nations universally agree on the desirability of regulation and enforcement.

In addition, as noted above, because the proposed restoration of private litigants' rights is consistent in scope with the SEC's restored authority, no unique international comity concerns apply that Congress would not already have weighed when passing Section 929. Indeed, there is no reason why the nature of the plaintiff (*i.e.*, the SEC or a private litigant) would raise any unique comity concerns when the securities fraud claim, place of misconduct, and defendants are nevertheless the same. In addition, we note that Section 308 of Sarbanes Oxley permits the SEC to establish a Fair Fund, the proceeds of which may be distributed to *all investors* who have incurred losses as a result of the wrongdoing.²⁶ Accordingly, in conjunction with the SEC's restored ability to bring a transnational fraud claim, defrauded investors could potentially recoup losses incurred on the purchase of securities under 10(b) even though they purchased the subject securities on a *foreign exchange*.²⁷ Accordingly, it is clear that permitting litigants to bring a private right of action addressing transnational securities fraud would, in reality, have no further impact upon comity.

Accordingly, we submit that when a material component of the fraud occurred in and/or had a substantial affect on the United States it would not further the purpose of the Exchange Act -- or be fair -- to deny investors (whether private individuals or large institutional investors with billions at stake) the opportunity to plead claims simply because they bought their shares on a foreign stock exchange. We also respectfully submit that it would make little sense for a fraud to be subdivided into pieces and tried in different locations or under different laws. In short, the entire scheme (under Section 10(b)) should be considered as a whole. *See* Hannah L. Buxbaum, *Multinat'l Class Actions Under Fed. Sec. Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 58-59 (2007) (recognizing the interest that all nations have in trying claims arising out of a single transnational scheme in a single forum).

c. Restoring Private Litigants' Ability To Bring Transnational Fraud Claims Would Not Result In A Flood of Litigation In U.S. Courts

Any contention that a return to a pre-*Morrison* standard for private rights of action would transform the United States into the world's court are belied by history. U.S. courts have often

²⁶ *See also* SEC "Report Pursuant to Section 308(c) of Sarbanes Oxley" (noting that the "principle on which the Fair Fund provision is based – [] all monies recovered in Commission actions be made available first to compensate the victims of securities fraud.").

²⁷ The procedures for the distribution of proceeds presumably will be similar distributions to the distribution of proceeds from Fair Funds prior to *Morrison*. *See, e.g.*, <http://www.sec.gov/news/press/2010/2010-67.htm> (SEC press release, dated April 30, 2010, announcing start of distribution of proceeds from \$113.5 million Fair Fund for Royal Dutch Shell that will "ultimately return money to more than 84,000 investors in the U.S. and **56 other countries.**").

sustained defense motions for dismissal for lack of subject matter jurisdiction over foreign investors under Fed. R. Civ. P. 12(b)(1) and, in class actions, at the class certification stage. In addition to these grounds, where a defendant has successfully shown that an adequate forum is available elsewhere, and that the private and public interests implicated in the case weigh strongly in favor of dismissal or removal to another forum courts have also dismissed actions under *forum non conveniens*. Of course, as also discussed herein, Section 929P itself includes limits that preclude the prosecution of Section 10(b) claims that have an insignificant connection to the U.S. Accordingly, cases without significant ties to the U.S. will not be prosecuted in its courts.

Indeed, the number of securities class actions against foreign issuers is a small fraction of the number of securities fraud cases litigated under the U.S. federal securities laws. *See* Advisen Quarterly Report – Q3 2010, at 11-12 (Eleven percent of the securities actions filed through the third quarter of 2010 (*i.e.*, prior and subsequent to the *Morrison* decision in June 2010) were against companies domiciled in a foreign country); *see also* Risk Metrics Blog, “*Morrison v. National Australia Bank – the Dawn of a New Age*” (June 25, 2010) (“[O]f the 530+ suits that settled in 2009, approximately 50 of them were against defendants domiciled in a country outside the U.S.[]”).²⁸

5. Cases Dismissed Or Impacted By *Morrison*

Since June, 2010, several cases alleging violations of the federal securities law have been dismissed, and several more currently face challenges, based on *Morrison*. Pursuant to the Commission’s request, we summarize some of the more notable cases below:

- *Cornwell v. Credit Suisse Group*, 2010 U.S. Dist. LEXIS 76543, 2010 WL 2069597 (S.D.N.Y. July 27, 2010), addressed Section 10(b) claims brought on behalf of all investors who had purchased Credit Suisse Group (“CSG”) securities traded on the Swiss Stock

²⁸ In contrast to the shared objectives and interests in preventing securities fraud, there are contexts in which the extraterritorial application of one nation’s laws governing certain conduct could potentially conflict with the interest and regulations of another country. For example, in light of national protectionist implications, conflicts may arise in the extraterritorial application of U.S. antitrust laws to conduct in a foreign jurisdiction. *See* White, “Protecting Foreign Investors from International Securities Fraud,” 32-34; Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & Pol’y Int’l Bus. 1, 47 (1993). Specifically, in certain instances, the extraterritorial application of the U.S. antitrust laws (*i.e.*, the Sherman Act) arguably could interfere with another nation’s ability to independently regulate its own commerce where the underlying conduct “*independently*” affected foreign consumers and the U.S. consumer market. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (unreasonable to apply U.S. antitrust laws to foreign conduct where the resulting foreign injury was independent of any domestic injury). Indeed, a foreign nation’s lack of regulation in the antitrust arena may itself constitute an economic policy to permit certain forms of conduct. While, as discussed above, in the securities fraud context, the lack of regulation or penalty of course in no way means that a country condones such wrongful conduct.

Exchange (“SWX”) or CSG American Depositary Shares (“ADS”) traded on the New York Stock Exchange (“NYSE”). Defendants moved to dismiss claims concerning the purchases of shares on the SWX as barred by *Morrison*. The lead plaintiff contended that its claims were not barred because it “made an investment decision and initiated a purchase of CSG from the U.S.” and “took the CSG stock into its own account in the U.S. and incurred an economic risk in the U.S.” 2010 U.S. Dist. LEXIS 76543, at *6. The court dismissed plaintiffs’ claims and stated that the *Morrison* Court established a “new bright-line transactional rule” and “was entirely aware that its new test would preclude extraterritorial application of § 10(b) to foreign securities transactions involving alleged wrongful conduct that could cause harm to American investors in the United States, or that entail occurrence of some acts in the United States in furtherance of [a] purchase or sale.” *Id.* at **11, 18.²⁹

- *In re Alstom SA Sec. Litig.*, 2010 U.S. Dist. LEXIS 98242, 2010 WL 3718863 (S.D.N.Y. Sept. 14, 2010), involved claims brought on behalf of all investors who had purchased Alstom SA (“Alstom”) shares traded on non-U.S. exchanges and Alstom American Depositary Receipts (“ADRs”) traded on the NYSE. The court considered *Morrison* after certifying a class consisting of U.S. and non-U.S. investors purchasing ADRs and common shares on certain non-U.S. exchanges. Plaintiffs argued that *Morrison*’s “listed on a domestic exchange” requirement was satisfied by the listing of the ADRs on the NYSE, and that this listing allowed claims concerning stock on foreign exchanges. The court did not agree, and dismissed the claims based on the purchase of Alstom common shares. 2010 U.S. Dist. LEXIS 98242, at *17.
- *In re Societe Generale Sec. Litig.*, 2010 U.S. Dist. LEXIS 107719, 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) plaintiffs brought claims on behalf of all investors who had purchased Societe Generale shares traded on the EuroNext or Societe Generale ADRs traded on the over-the-counter market in the United States. Defendants argued that *Morrison* barred claims based on the EuroNext stock, while plaintiffs argued that these purchases were “domestic purchases” because the transactions involved “United States investors purchas[ing] foreign securities in the United States, even if the securities happen to be listed on a foreign exchange.” 2010 U.S. Dist. LEXIS 107719, at **15-16. The court was unconvinced by plaintiffs’ argument and dismissed the EuroNext claims. Going beyond

²⁹ See also *Sgalambo v. McKenzie*, 2010 U.S. Dist. LEXIS 79688, at *69, 2010 WL 3119349 (S.D.N.Y. Aug. 6, 2010), (dismissing claims brought on behalf of all investors who had purchased Canadian Superior Energy common stock, traded on the Toronto Stock Exchange (“TSX”), because the parties conceded that *Morrison* “forecloses any potential class members who purchased [securities] on a foreign exchange”); *In re Celestica Inc. Sec. Litig.*, 2010 U.S. Dist. LEXIS 110630, 2010 WL 4159587 (S.D.N.Y. Oct. 14, 2010) (dismissing, without significant discussion, claims brought by Canadian and American pension fund lead plaintiffs on behalf of all investors who had purchased Celestica stock on the TSX); *Plumbers’ Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 2010 U.S. Dist. LEXIS 105720, at *23, 2010 WL 3860397 (S.D.N.Y. Oct. 4, 2010) (dismissing a U.S. pension fund’s fraud claims with prejudice and ruling, “as a general matter, a purchase order in the United States for a security that is sold on a foreign exchange is insufficient to subject the purchase to the coverage of section 10(b) of the Exchange Act.”).

previous cases, however, the court also *sua sponte* dismissed an American pension fund's claims concerning ADR purchases on the grounds that trades in Societe Generale's ADRs, which were traded over-the-counter in the United States, are "predominantly foreign" transactions. *Id.* at *20.³⁰

- In *Elliott Associates LP v. Porsche Automobil Holding SE*, No. 1:10-cv-00532 (S.D.N.Y. Dec. 30, 2010), American and foreign hedge funds brought claims alleging that Porsche misrepresented its intention to take over Volkswagen ("VW") and concealed its acquisition of VW stock. Plaintiffs had entered into swap agreements which referenced VW stock that was traded on German stock exchanges. When Porsche eventually revealed that it intended to take over VW and disclosed its acquisitions, plaintiffs suffered over \$2 billion in losses as the price of VW stock rose substantially. Despite the fact that the swap agreements were entered into in New York, the court found that plaintiffs' claims were barred by *Morrison*. Specifically, the court concluded that the "swaps were the functional equivalent of trading the underlying VW shares on a German exchange" and "are essentially 'transactions conducted upon foreign exchanges and markets.'" *Id.* at 12. Moreover, the court concluded that *Morrison*'s definition of a "domestic transaction" did not apply to swap agreements, like those in this case, "where only the purchaser is located in the United States." *Id.* at 13.³¹

³⁰ Relying on *Cornwell* and its progeny and *In re Societe Generale*, Defendants in *In re Elan Corp. Sec. Litig.*, Case No. 08-cv-08761 (S.D.N.Y. Oct. 14, 2010) are currently challenging claims concerning purchases of Elan Corp. ("Elan") common stock traded on the Irish Stock Exchange and purchases of ADRs and call-options traded on the NYSE. Elan, an Irish company, also moved to disqualify the lead plaintiff, Tyne & Wear Pension Fund ("Tyne & Wear"), on the grounds that Tyne & Wear was a "foreign-cubed" plaintiff and therefore, was barred under *Morrison*. The court agreed and removed Tyne & Wear as lead plaintiff. The court has not ruled on the other challenges.

³¹ A number of cases have dismissed the claims of foreign investors who have unsuccessfully attempted to characterize their securities purchases as transactions occurring in the United States. For example, in *In re Banco Santander Securities-Optimal Litig.*, 2010 U.S. Dist. LEXIS 87580, 2010 WL 3036990 (S.D. Fla. Jul. 30, 2010), foreign plaintiffs argued that their investments in Bahamian investment funds—one fund was exclusively designed to invest in Bernard Madoff funds while the other substantially invested in Madoff funds—occurred in the United States. Plaintiffs argued that because their intent was to invest in Madoff's funds, which purported to purchase securities traded on domestic exchanges, these investments were domestic transactions. The court rejected this argument and indicated that analyzing an investor's intent "would eliminate the doctrinal clarity" of *Morrison*'s transactional test. 2010 U.S. Dist. LEXIS 87580, at *27. See also *Quail Cruises Ship Mgmt. v. Agencia De Viagens CVC Limitada*, 2010 U.S. Dist. LEXIS 79445, 2010 WL 3119908 (S.D. Fla. Aug. 6, 2010) (dismissing foreign purchaser's claims against foreign defendants where the securities purchase agreement at issue was signed in Spain and Uruguay and there was "no evidence that any of the Defendants intended the closing to occur in the United States" despite plaintiffs' assertions); *Terra Securities ASA Lonkursbo v. Citigroup, Inc.*, 2010 U.S. Dist. LEXIS 84881, 2010 WL 3291579 (S.D.N.Y. Aug. 16, 2010) (dismissing foreign investors' claims where the parties agreed that the securities involved consisted of fund-linked notes listed on European stock exchanges and a total-return swap sold directly to plaintiffs in Europe); *Absolute Activist Value Master Fund Limited v. Homm*, 2010 U.S. Dist. LEXIS 137150 (S.D.N.Y. Dec. 22, 2010) (dismissing foreign investors' claims based on the purchase of shares of U.S. "Penny Stock Companies" because the shares

- *In re RBS Sec. Litig.*, No. 09 Civ. 300, slip op. (DAB) (S.D.N.Y. Jan. 11, 2011) dismissed Exchange Act claims of U.S. investors purchasing shares on a foreign exchange and expanded *Morrison*'s holding to claims under the Securities Act of 1933. In dismissing the Exchange Act claims the court rejected plaintiffs' argument that *Morrison* did not preclude the application of Section 10(b) to claims by investors purchasing shares outside of the United States because some of RBS' securities were listed in the United States. According to the court, "[t]he idea that a foreign company is subject to a U.S. securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*." *Id.* at p. 17-16.

Although the following cases have not been dismissed, we believe *Morrison* will be central in defendants' effort to limit the scope of the actions:

- *Stackhouse v. Toyota Motor Co.*, 2010 U.S. Dist. LEXIS 79837, 2010 WL 3377409 (C.D. Cal. July 16, 2010) considered *Morrison* in the context of lead plaintiff appointment in a case alleging claims on behalf of investors in Toyota common stock traded on the Tokyo Stock Exchange ("TSE") and ADSs traded on the NYSE. The claims were based on allegations that Toyota failed to disclose the existence of significant defects and safety issues with accelerator pedals in automobiles sold in the U.S. and in other countries. According to investors, the Company misled American regulators at the National Highway Traffic Safety Administration and issued false statements in American media outlets and in documents filed with the SEC. These safety issues eventually forced Toyota to recall several million automobiles in the United States resulting in substantial losses for its investors. Notwithstanding the case's connections to the United States and the common facts underlying all investors' claims, the court appointed the plaintiff with the largest ADS loss rather than appointing the plaintiff with the largest overall loss (ADS and common stock). The court also doubted whether purchases of common stock on the TSE, even if by U.S. investors, are domestic transactions as contemplated by *Morrison* and subject to Section 10(b). Lead plaintiff subsequently filed a consolidated complaint that included purchasers of Toyota common stock. The claims are premised under Japanese law. We suspect a challenge under *Morrison* is likely.
- *In re BP, PLC Sec. Litig.*, No. 10-md-2185, 2010 U.S. Dist. LEXIS 136871 (S.D. Tex. Dec. 28, 2010) was filed in the midst of the largest oil spill in the history of the United States. The only substantive decision in this case to date concerns the appointment of a lead plaintiff. "Among other things, the plaintiffs allege that BP and its executives made fraudulent statements about the company's safety measures and about the extent of the Gulf of Mexico spill. The proposed classes consist of purchasers of American Depositary Receipts ('ADRs') [traded on the NYSE] and ordinary shares of BP [traded on the London Stock Exchange] during various time periods between 2005 and 2010." *Id.* at *13-*14. Although the court did

were not traded on a U.S. stock exchange, were sold directly to the foreign investors, and, as such, were not domestic transaction).

not rely on *Morrison* in appointing lead plaintiff, it noted *Morrison*-based arguments made by certain plaintiffs vying to be lead plaintiff questioned whether losses from ordinary shares could be included in the court's assessment of movants' financial interest. *Id.* at *25 n.7. In a consolidated complaint filed on February 14, 2011, the lead plaintiff asserted claims under New York and United Kingdom law on behalf of investors who purchased common shares. We suspect some type of *Morrison*-based attack on these claims by BP will be forthcoming.

- In *In re Vivendi Universal, SA Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007), both U.S. and foreign investors brought claims alleging securities claims based upon the purchase of securities traded on foreign exchanges. The court allowed plaintiffs to assert claims on behalf of all American, French, English, and Dutch purchasers of Vivendi ordinary shares traded on the Paris Bourse or Vivendi ADSs traded on the NYSE. On January 29, 2010, a jury returned a verdict finding Vivendi liable for securities fraud on 57 statements alleged to have been false or misleading. Subsequently, defendants moved to challenge the scope of the jury's verdict under *Morrison*. The challenge is pending.³²

Finally, the following cases provide examples of actions – falling into Justice Stevens' hypotheticals that he noted in his concurrence in *Morrison* (as discussed above) – which may not have survived under *Morrison*:

- *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118 (2d Cir. 1995) is typical of the “F-Cubed” cases that would likely be barred by *Morrison*. In *Itoba*, a foreign holding company brought claims against a foreign corporation that traded its common shares on the London Exchange and its ADSs on the NASDAQ. The foreign plaintiff sought to acquire a controlling stake in the defendant by purchasing a significant number of its common shares. The foreign plaintiff alleged that it had relied upon statements made in documents filed with the SEC by the defendant pursuant to its listing of ADSs on the NASDAQ. When the defendant revealed that these statements were false, the price of defendant's stock declined 97% and the plaintiff suffered a nearly \$111 million loss. Finding that there was some evidence that there was a material connection to the United States, the Second Circuit remanded the case to the district court for a trial on its merits to determine whether the facts were sufficient to support jurisdiction. Even though the plaintiff's injury was predicated directly upon statements issued in the United States pursuant to federal securities laws, under *Morrison*, this case would likely be barred outright as it did not involve securities listed on a domestic exchange or a domestic transaction.

³² *Anwar v. Fairfield Greenwich Ltd.*, 2010 U.S. Dist. LEXIS 86716, 2010 WL 3341636 (S.D.N.Y. Aug. 18, 2010), a case brought by investors defrauded by Bernard Madoff, deferred ruling on a *Morrison* challenge. The court determined that the unique nature of the investments required the development of the factual record to assess whether plaintiffs' transactions occurred in the United States.

- *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005) (“*Royal Dutch I*”) involved both U.S. and foreign investors alleging securities claims based upon the purchase of securities traded on foreign exchanges. In *Royal Dutch I*, two American pension funds brought claims on behalf of all purchasers, including foreign investors, who had purchased the foreign defendants’ ordinary shares traded on overseas markets and the NYSE, and the defendants’ ADRs traded on the NYSE. While the court initially allowed both the American and foreign class members’ claims to proceed in *Royal Dutch I*, the claims of the foreign class members were ultimately dismissed. See *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712 (D.N.J. 2007) (“*Royal Dutch II*”) (“Plaintiffs have not shown sufficient conduct within the United States on the part of Shell such that the Court may exercise subject matter jurisdiction over the federal securities claims of the Non-U.S. Purchasers.”). The American purchasers—including purchasers on both domestic and foreign exchanges—eventually settled their claims for in excess of \$130 million. Under the interpretation of *Morrison* by *Cornwell* and its progeny, however, it is possible that the American purchasers of defendants’ foreign traded stock would not have been able to recover their losses.
- *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004) involved claims brought on behalf of a class of persons, including both U.S. and European investors, who purchased Royal Ahold common shares trading on foreign exchanges or ADRs trading on the NYSE. The claims against Royal Ahold followed the disclosure of accounting discrepancies at one of its U.S. subsidiaries. The court held that this was sufficient to have subject matter jurisdiction over the foreign purchasers. As such, claims of both U.S. and foreign purchasers of securities traded on foreign exchanges were allowed to continue. Ultimately, the case resulted in a \$1.1 billion settlement for investors. *Morrison* and its subsequent interpretations would likely have deprived both U.S. and foreign purchasers of foreign exchanges from recovering the substantial losses that resulted from fraud that took place at a U.S. subsidiary of a foreign corporation.³³

³³ Other high-profile fraud cases that collectively returned millions of dollars to investors but which may not survive in whole or in part under *Morrison* include:

- *In re Nortel Networks Corp. Sec. Litig.*, Case No. 01-cv-1855 (S.D.N.Y.) (“*Nortel I*”) (settling claims of American and foreign purchasers of Nortel common stock traded on both the NYSE and the TSX);
- *In re Nortel Networks Corp. Sec. Litig.*, Case No. 04-cv-2115 (S.D.N.Y.) (“*Nortel II*”) (same);
- *In re DaimlerChrysler AG Sec. Litig.*, Case No. 00-993 (D. Del.) (settling claims of all persons who exchanged Chrysler shares for DaimlerChrysler shares or otherwise purchases or acquired DaimlerChrysler shares on the open market—excluding foreign residents who purchased shares on non-U.S. exchanges); and
- *In re SCOR Holding (Switzerland) AG Sec. Litig.*, Case No. 04-cv-7897 (S.D.N.Y.) (settling claims of a class that included all purchasers of Converium shares on the SWX and Converium ADSs on the NYSE, as well as foreign purchasers of ADSs on the NYSE).

Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
February 18, 2011
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We appreciate the opportunity to provide the Commission our views on this critical issue. We have designated Darren J. Check, Esq. (610-822-2235), Beata Gocyk-Farber, Esq. (212-554-1421), and Geoffrey C. Jarvis, Esq. (302-622-7040) as our representatives in this matter. Please feel free to contact any of these designees with any questions about our comments.

Respectfully,

AGEST Superannuation Fund;
Alecta pensionsförsäkring, ömsesidigt;
AMF Fonder AB;
AMF Pensionsförsäkring AB;
APG Algemene Pensioen Groep N.V.;
ASSETSuper Superannuation Fund;
ATP - Arbejdsmarkedets Tillægspension;
AUST (Q) Superannuation Fund;
Australian Catholic Superannuation & Retirement Fund;
Australian Institute of Superannuation Trustees;
Australian Reward Investment Alliance;
Australian Superannuation Fund;
Australia's Unclaimed Super Fund;
AustSafe Superannuation Fund;
AVSuper Superannuation Fund;
Catholic Superannuation Fund;
Construction & Building Industry Superannuation Fund;
Danica Pension;
Danske Invest Management A/S;
Electricity Supply Industry Superannuation Fund;
Emergency Services & State Superannuation Fund;
Energy Industries Superannuation Scheme;
FIL Investments International;
FirstSuper Superannuation Fund;
Folksam;
Forsta AP-Founden;
GMB Trade Union;
Health Employees Superannuation Trust Australia;
Health Superannuation Fund;
HOSTPLUS Superannuation Fund;
Industriens Pension;
KLP Kapitalforvaltning;
Labour Union Co-operative Retirement Fund;
Legalsuper Superannuation Fund;
Local Government Superannuation Scheme;

Local Super (SA-NT) Superannuation Fund;
Maritime Superannuation Fund;
Media Superannuation Fund;
Merseyside Pension Fund;
Motor Trades Association of Australia Superannuation Fund;
Non-Government Schools Superannuation Fund;
Nordea Fondbolag Finland AB;
Nordea Fondene Norge AS;
Nordea Fonder AB;
Nordea Investment Funds Company I S.A.;
OMERS Administration Corporation;
PFA Pension;
PGGM Vermogensbeheer B.V. (PGGM Investments);
Raiffiesien Capital Management;
Retail Employees Superannuation Trust;
Royal Mail Pension Plan;
Sampension KP Livsforsikring A/S;
SKAGEN A/S;
Skandinaviska Enskilda Banken AB;
SPEC Superannuation Fund;
State Superannuation Scheme // SAS Trustee Corporation;
Statewide Superannuation Fund;
Sunsuper Superannuation Fund;
Swedbank Robur Fonder AB;
Syntrus Achmea;
Tasplan Superannuation Fund;
Telstra Superannuation Fund;
The Australian Council of Superannuation Investors;
TWUSUPER Superannuation Fund;
UniSuper Superannuation Fund;
Universities Superannuation Scheme;
Varma Mutual Pension Insurance Company;
VicSuper Superannuation Fund;
VisionSuper Superannuation Fund