Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
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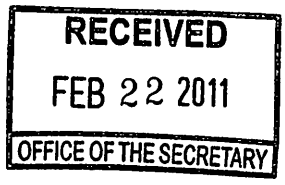
Embassy of Switzerland in the United States of America



The Honorable
Elizabeth Murphy
Secretary of Securities and Exchange
Commission
100 F Street, N.E.
Washington, D.C. 20549

Your reference: File No. 4-617: Study on Extraterritorial Private Rights of Action
Our reference: 521.50-4
Washington, D.C., 17.02.2011

Dear Secretary Murphy:

This letter sets forth the comments of the Government of Switzerland on certain of the questions posed by the SEC in its notice published in 75 Fed. Reg. 27357 (Oct. 29, 2010), relating to the SEC's study regarding whether the United States should provide for a private right of action for alleged securities fraud based on securities transactions that take place in non-U.S. exchanges. Specifically, the Government of Switzerland is providing comments on the SEC's questions regarding "what implications such a private right of action would have on international comity."

Switzerland has previously commented on the issues raised in the case *Morrison v. National Australia Bank*, through a diplomatic note (No.17 / 2010) submitted to the Department of State. A copy of that note is enclosed. The position of Switzerland described in this note has not lost any of its validity or importance. Switzerland re-affirms its view that the United States should not authorize extraterritorial private rights of action.

Below we describe Switzerland's protections for investors in Switzerland and explain why it is important to respect international comity.

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1. Swiss Legal Protections for Investors

Switzerland has comprehensive legislation prohibiting securities offenses. Swiss law provides for criminal sanctions for such offenses as insider trading (Penal Code Art. 161), price manipulation (Art. 161bis), and false statements regarding commercial businesses (Art. 152). Both the federal government and the Swiss cantons can prosecute such offenses. The Swiss Government recently decided to tighten the provisions on securities fraud and market abuse. The revision introduces a comprehensive definition of market manipulation, widens the scope of supervision in this area by the Swiss Financial Market Supervisory Authority (FINMA) and streamlines investigation procedures (http://www.efd.admin.ch/dokumentation/zahlen/00579/00607/01167 /index.html?lang=de).

FINMA has broad authority to supervise, *inter alia,* stock exchanges, securities dealers and collective investment schemes. Among other responsibilities, FINMA enforces through administrative measures the Federal Act on Stock Exchanges and Securities Trading (SESTA) and prosecutes cases of insider trading, price manipulation and other violations of the Act (SESTA Art. 6). FINMA conducts investigations and has the authority to order injunctive relief, suspend or revoke licenses and – based on Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) Art. 35 – confiscate illegal gains from supervised entities and distribute them to victims. Such orders can be enforced in the Swiss federal courts. When there are grounds for suspecting criminal activity, FINMA is required to refer cases for prosecution (FINMASA Art. 38 III). FINMA has done so in several cases which led to convictions by Swiss criminal courts.

Swiss law also provides for private rights of action for financial loss resulting from violations of the duties of corporate managers (Code of Obligations Art. 754). There are specific provisions establishing liability for misleading prospectuses for initial offerings (Art. 752) and misconduct by auditors (Art. 755). Private actions may also be brought as general tort claims based on Code of Obligations Art. 41.

These legal protections extend to non-Swiss persons, as the Swiss authorities accept complaints from non-Swiss persons investing in Swiss markets. The Swiss regime has a proven track record of deterring and punishing securities fraud. It will be even more effective under the new regime mentioned above.

2. International Comity

The extraterritorial assertion of jurisdiction is inconsistent with established principles of international law and contrary to the principle of comity. These principles require respect for the sovereignty of other Nations, which includes that no State may exercise its own jurisdiction over persons, property and acts abroad without a reasonable minimum level of contact. Under international law, territorial jurisdiction is primary, and extraterritorial jurisdiction should be restrained in deference to the

policies of the State in which the legal violation occurs. The United States should maintain limits on the extraterritorial application of its law and not purport to provide civil remedies for alleged securities law violations committed by non-U.S. corporations with respect to shares transacted on non-U.S. securities exchanges. Allowing U.S. courts to assert such extraterritorial jurisdiction would interfere with the sovereignty of foreign nations, which have the right to regulate securities-related activities within their own territory without the interference from U.S. civil lawsuits.

Not every country has the same procedural mechanisms as the U.S. regime. National solutions to combat securities fraud are tailored to national legal environments and individual jurisdictions. Switzerland is convinced that the jurisdiction of the securities market in which a transaction took place will be the best equipped to address questions of unfair trading. Moreover, it can reasonably be assumed that persons who decide to invest in markets outside their own countries are aware that their transactions are governed by the law of the jurisdiction of those markets. Therefore, in cases of securities traded on publicly traded markets, if the market is not Swiss, Switzerland defers to the jurisdiction in which the market is located and would expect that other States defer to Swiss jurisdiction for securities traded in Switzerland.

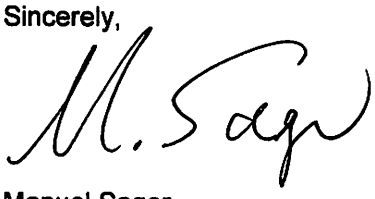
As explained above, there is no need to overlap the Swiss system with the extraterritorial application of civil remedies under U.S. law. At the same time, such an extraterritorial assertion of U.S. jurisdiction would interfere with the rules of comity and the sovereignty of foreign nations. Just as important, providing investors in Swiss markets with a private right of action for securities fraud in U.S. courts may result in conflicting judicial decisions, as U.S. and Swiss law may differ. It is not in the interest of Nations – including the United States – to have different regulations apply to the same dispute and thus invite plaintiffs to forum shop. In Switzerland's view, deviations from the *Morrison* rule would give rise to these problems. Indeed, in a world in which every country followed the same approach as the one now being considered by the SEC, a company traded on a U.S. public exchange could be sued by different shareholders in many countries simultaneously for the exact same conduct.

There is a long history of mutually beneficial cooperation between the Swiss and United States governments in criminal and administrative investigations and prosecutions of securities law violations. That cooperation has been achieved in a manner that respects the sovereignty and enforcement priorities of both countries. Switzerland reaffirms its view that international mutual assistance is the most effective mechanism for combating instances of genuinely transnational securities fraud schemes.

In conclusion, expanding the U.S. private right of action to apply extraterritorially would be inconsistent with international law and is unnecessary because other States, such as Switzerland, have their own effective judicial mechanisms. Encouraging a proliferation of extraterritorial civil

actions may result in inconsistent rulings and legal requirements for the same conduct, which would be counterproductive to the interests of both the United States and other nations.

Sincerely,



Manuel Sager
The Ambassador of Switzerland

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Embassy of Switzerland in the United States of America

Note No. 17 / 2010

The Embassy of Switzerland presents its compliments to the U.S. Department of State and has the honor of communicating that Switzerland wishes to draw to the attention of the United States the case *Morrison v. National Australia Bank* (No. 08-1191), which is currently pending before the U.S. Supreme Court. The *Morrison* case is a class action lawsuit initiated on behalf of non-U.S. investors in an Australian corporation whose shares trade on an Australian stock exchange. The plaintiffs assert that allegedly fraudulent information was reported by a U.S. subsidiary to its Australian parent, that the Australian parent used the information in preparing its financial reports, and that those reports ultimately misled investors participating in securities transactions in Australia. The plaintiffs argue that the reporting of false data by the subsidiary from the United States to its parent would provide a sufficient basis for a private claim against the Australian parent under Section 10(b) of the U.S. Securities Act of 1934. Both the U.S. District Court and the Court of Appeals for the Second Circuit ruled that the connection between the activities that occurred in the United States and the allegedly fraudulent statements by the Australian parent was too remote to allow a private right of action to proceed under Section 10(b).

Switzerland wishes to highlight two points relating to this case, concerning (i) maintaining judicial limits on the extraterritorial application of U.S. law and (ii) Switzerland's own protections for Swiss investors and investors in Swiss companies.

The extraterritorial assertion of jurisdiction requested by the plaintiffs in this case would be inconsistent with established principles of international law. The United States should not purport to provide civil remedies for alleged securities law violations committed by non-U.S. corporations against non-U.S. persons on non-U.S. securities exchanges. Allowing U.S. courts to assert such extraterritorial jurisdiction under the circumstances of the *Morrison* case would interfere with the sovereignty of foreign nations, which have the right to regulate securities-related activities within their own territory without interference from U.S. civil lawsuits.

As many other nations, Switzerland asserts its own jurisdiction over securities fraud, namely through comprehensive legislation prohibiting securities offenses. Swiss law provides for criminal sanctions for such offenses as insider trading (Penal Code Art. 161), price manipulation (Art. 161bis), and false statements regarding commercial businesses (Art. 152). Both the federal government and the Swiss cantons can prosecute such offenses.

The Swiss Financial Market Supervisory Authority (FINMA) has broad authority to supervise, *inter alia*, stock exchanges, securities dealers and collective investment schemes. Among other responsibilities, FINMA enforces through administrative measures the Federal Act on Stock Exchanges and Securities Trading (SESTA) and prosecutes cases of insider trading, price manipulation and other violations of the Act (SESTA Art. 6). FINMA conducts investigations and has the authority to order injunctive relief, suspend or revoke licenses and confiscate illegal gains from supervised entities. Such orders can be enforced in the federal courts. When there are grounds for suspecting criminal activity, FINMA is required to refer cases for prosecution (SESTA Art. 35 VI).

Swiss law also provides for private rights of action for financial loss resulting from violations of the duties of corporate managers (Code of Obligations Art. 754). There are specific provisions establishing liability for misleading prospectuses for initial offerings (Art. 752) and misconduct by auditors (Art. 755). Private actions potentially may also be brought as general tort claims based on Code of Obligations Art. 41.

Thus, there is no need to augment the Swiss system through the extraterritorial application of civil remedies under U.S. law. Even more important, providing non-U.S. investors in Swiss companies with a private right of action for securities fraud in U.S. courts may result in conflicting judicial decisions, as U.S. and Swiss law may differ. It is not in the interest of Nations to have different regulations apply to the same case and thus invite plaintiffs to forum shop.

Switzerland notes that there is a long history of mutually beneficial cooperation between the Swiss and United States governments in criminal and administrative investigations and prosecutions of securities law violations. That cooperation has been achieved in a manner that respects the sovereignty and enforcement priorities of both countries. Switzerland reaffirms its view that international mutual assistance is the most effective mechanism for combating instances of genuinely transnational securities fraud schemes.

Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take the necessary steps to encourage the Supreme Court to affirm the results of the decisions of the lower courts in this matter.

The Embassy of Switzerland avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

Washington, D.C., 23 February 2010

EMBASSY OF SWITZERLAND
WASHINGTON D.C.

United States Department of State
Washington, D.C.