CALSTRS
HOW WILL YOU SPEND YOUR FUTURE?

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November 10, 2011

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

Re: Release No. 34-63174; File No. 4-617; Study on Extraterritorial Private Rights of Action

Dear Ms. Murphy:

I am writing to you on behalf of the California Teachers' Retirement System ("CalSTRS") to discuss in detail the troubling expansion of the *Morrison* decision and the resulting risks to the precious pension dollars of California's teachers.

CalSTRS administers a hybrid retirement system, consisting of a traditional defined benefit, cash balance and defined contribution plan, as well as disability and survivor benefits for the benefit of California's 852,000 public school educators and their families.

CalSTRS oversees the Teachers' Retirement Fund and invests the moneys in the Fund according to modern portfolio theory, diversifying the investments for the greatest return at the most responsible level of risk. In this global economy, responsible diversification necessarily includes investment in foreign companies through purchases on foreign markets.

The risk profile of foreign investments was dramatically altered by the U.S. Supreme Court's June 2010 ruling in *Morrison v. National Australia Bank* (2010) 130 S.Ct. 2869, which reversed over 40 years of precedent and significantly altered the legal landscape for investors seeking redress for securities fraud against foreign actors. Subsequent lower court decisions have broadly applied *Morrison* to further limit a private plaintiff's ability to avail himself/herself of U.S. securities laws as a means to recover losses in securities transactions.

The majority of transnational securities fraud cases that find their way into U.S. courts are premised on the anti-fraud provisions contained in Section 10(b) of the Securities Exchange Act of 1934. Section 10(b) is not explicitly restricted to fraud in connection with sales or transactions on U.S. markets, but rather applies to the use of manipulative or deceptive devices in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered. (15 U.S.C. §78j(b).) In interpreting the language and legislative history of Section 10(b), early on courts determined that "Congress thus meant §10(b) to protect against fraud in the sale or purchase of securities whether or not these were traded on organized United States markets." (*Leasco Data Processing Equip. Corp. v. Maxwell* (2d Cir. 1972) 468 F.2d 1326, 1336.) Consequently, Section 10(b) had a broad application and provided a venue for both domestic and foreign investors seeking redress against foreign companies for securities fraud.

However, the previously expansive application of Section 10(b) has been dramatically curtailed as a result of the Supreme Court's holding in *Morrison v. National Australia Bank*, and subsequent lower court interpretations of *Morrison*. In *Morrison*, the Supreme Court held that Section 10(b) does not apply extraterritorially and instead applies only to domestic securities transactions. In so holding, the Supreme Court established a "transactional test" to determine whether an action could be subject to a Section 10(b) suit. Specifically, an action is not subject to a 10(b) suit unless (1) the purchase or sale is made in the U.S. or (2) the purchase or sale involves a security listed on a domestic exchange.

Following *Morrison*, each successive lower court application of the holding in *Morrison* represents further proof of the decision's sweeping reach. Within one year of the *Morrison* decision, the lower courts have resolutely rejected the argument that a foreign company's listings on U.S. stock exchanges subject *all* transactions in the company's shares to suit in the U.S, instead holding that unless the point of irrevocable liability in connection with the purchase or sell occurs in the U.S., a 10(b) action cannot stand. The lower courts have also held that *Morrison* precludes a domestic plaintiff from bringing a Section 10(b) claim against a foreign company over swap agreements entered into in the U.S. or American Depository Receipts ("ADRs") traded over-the-counter in the US, although the issue remains unresolved with respect to ADRs listed on a formal domestic exchange. Finally, the lower courts have affirmatively held that *Morrison* applies equally to claims under the anti-fraud provisions of the 1933 Securities Act and that *Morrison* applies to claims brought by the SEC.

As a result of *Morrison*, plaintiffs have sought alternatives to federal securities litigation claims, including bringing state law claims for fraud as well as claims for fraud based on foreign law. Unfortunately, to date, there has been little success in that arena. For instance, in *In re Toyota Motor Corporation Securities Litigation* (C.D.Cal. July 7, 2011, Case No. CV 10-922 DSF (AJWX) 2011 U.S. Dist LEXIS 75732, the Central District of California declined to exercise its jurisdiction to adjudicate Japanese law claims (*Id.* at pp. 19-20).[1]

[1]Another troubling development occurred recently in *In re BP Shareholder Derivative Litigation* (S.D. Tex. September 15, 2011 Civ. A. No. 4:10-cv-3447, MDL No. 10-md-2185) 2011 U.S. Dist. LEXIS 104817. There, on September 15, 2011, the U.S. District Court for the Southern District of Texas held that England is the appropriate forum for a shareholder derivative suit filed against current and former officers and directors of BP based on the Deepwater Horizon oil rig explosion. In reaching this holding, the court found that because the

Currently, CalSTRS trades in approximately 62 foreign markets, with a total volume of $33,097,269,451.00 traded in these foreign markets. The vast majority of these trades occurred on foreign exchanges. Therefore, *Morrison* will have a staggering impact on the System's ability to recover damages in the event of fraud or manipulation by any one of these foreign companies. This decreased ability to pursue fraud claims in U.S. federal court undeniably alters the risk assessment of the portfolio.

PRIOR TO *MORRISON*, IT WAS INDISPUTABLE THAT U.S. INVESTORS WERE PROTECTED BY THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS, REGARDLESS OF THE NATIONALITIES OF THE COMPANIES IN WHICH THEY INVESTED OR THE <u>LOCATIONS</u> WHERE THE SECURITIES WERE PURCHASED.

By way of background, beginning in the 1960s, courts began to extend Section 10(b)'s reach beyond domestic securities transactions. In doing so, courts developed two tests to determine whether Section 10(b) should be given extraterritorial application. These two tests became known as the "conduct" and "effects" tests.

Under the "conduct" test, extraterritorial application of the federal securities laws was appropriate if the wrongful conduct associated with a particular transaction occurred in the United States. (*Cornwell v Credit Suisse Group* (S.D.N.Y. 2010) 729 F.Supp.2d 620, 623 [discussing the Second Circuit's extraterritoriality doctrine before *Morrison*].) Under the "effects" test, extraterritorial application of the securities laws was appropriate if the wrongful conduct had a substantial effect on United States markets or upon American citizens. (*Id.*) The tests were applied jointly, when possible, however, a case often proceeded when just one of the tests was satisfied.

As an example, for most claims brought by domestic shareholders who purchased shares of foreign corporations on foreign exchanges (known as "f-squared" cases), the mere fact that the putative class members are domestic has traditionally been all that is required to demonstrate a substantial effect upon U.S. citizens. Historically, that was sufficient to satisfy the effects test and domestic plaintiffs were allowed to bring antifraud claims against foreign defendants for the purchase or sale of securities not registered on a domestic exchange.

On the other hand, jurisdiction over foreign shareholders who purchased shares of a foreign corporation on a foreign exchange (known as "f-cubed") hinged on the extent of the defendants' conduct in the U.S. In order for a court to exercise jurisdiction over an f-cubed

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purported breaches of fiduciary duty at issue involved the Board of Directors of an English corporation that is headquartered in London, the case belonged in an English courtroom. The court further found that because most of the evidence was likely to be located in London, England had the greatest interest in this action.

plaintiff where there was little or no effect on U.S. citizens or markets, the fraudulent conduct occurring in the U.S. had to be akin to a substantial act in furtherance of the fraud. (*Psimenos v. E.F. Hutton & Co.* (2d Cir. 1983) 722 F.2d 1041, 1045.)

THE DECISION IN *MORRISON* HAS STRIPPED U.S INVESTORS OF PROTECTIONS OF THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS.

In *Morrison*, a group of Australian plaintiffs brought a Section 10(b) action against defendant National Australia Bank ("NAB"), which was an Australian entity with its common shares traded in Australia, but which also had American Depository Receipts ("ADRs") listed on the NYSE. (*Morrison, supra,* 130 S.Ct. at p. 2876.) The plaintiffs' allegations of fraud stemmed from NAB's 1998 acquisition of an American mortgage company headquartered in Florida. (*Id.* at p. 2875.) In 2001, NAB was forced to begin a series of write-downs due to the subsidiary mortgage company's false accounting. (*Id.* at pp.2875-76.) The mortgage company had allegedly manipulated its books and sent the falsely inflated numbers to NAB's headquarters, which then published the information in press releases and public findings. (*Id.*)

The plaintiffs filed suit in the district court in Manhattan. The court there dismissed the case for lack of subject-matter jurisdiction (*In re National Australia Bank Securities Litigation* (S.D.N.Y. October 25, 2006, 03 Civ. 6537 (BSJ)), 2006 U.S. Dist. Lexis 94162), and upon review the Second Circuit affirmed, applying its long-standing "conduct" and "effects" tests to determine that the federal courts in this country could not properly hear this case involving foreign purchasers who had purchased stock in a foreign company on a foreign exchange. (*Morrison v. National Australia Bank* (2d Cir. 2008) 547 F.3d 167.) The Supreme Court, however, decided the case on entirely different grounds.

The issue addressed and decided by the Supreme Court was "whether §10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." (*Morrison, supra,* 130 S.Ct. at p. 2875.)

Ultimately, the Supreme Court held section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with (1) the purchase or sale of a security listed on an American Stock exchange or (2) the purchase or sale of any other security in the United States. (*Id.* at p. 2888.) In reaching its conclusion, the Supreme Court determined that the Securities Exchange Act could not be applied extraterritorially because Congress had not specifically included language to that effect in the Act. (*Id.* at p. 2877-83.) On that basis, the Supreme Court extirpated more than 40 years of jurisprudence and unequivocally repudiated the conduct and effects tests, finding the tests inconsistent with the presumption against extraterritorial application of statutes. (*Id.*) Rather, the Supreme Court noted that the U.S. securities laws focus strictly on domestic transactions and, as such, a "transactional test" is the appropriate measure to determine when a cause of action exists under section 10(b) of the Exchange Act. (*Id.* at p. 2884.) Consequently, the Australian shareholders' complaint was dismissed.

It is interesting to note that when the case was initially filed, there was a second class of plaintiffs representing American shareholders who had purchased NAB's ADRs on the NYSE, making that an "f-squared" case. However, those claims were dismissed by the district court for failure to allege damages. And, because those plaintiffs did not appeal, the Supreme Court did not address its holding in the context of an "f-squared" plaintiff. (*See Id.* at p. 2876, fn. 1.) Instead, this issue was left open for lower courts to determine.

Since the *Morrison* decision, lower courts have applied the Supreme Court's "transactional test" in a broad manner. Below is a chronological summary of key cases that have expanded the reach of *Morrison*.

On July 27, 2010, the U.S. District Court of the Southern District of New York, in its opinion in *Cornwell v Credit Suisse Group*, ruled that *Morrison* is not limited to the so-called "f-cubed" plaintiffs in a Section 10(b) action. (*Cornwell, supra,* 729 F.Supp.2d 620.)

In *Cornwell*, plaintiffs filed a class action against Credit Suisse Group ("CSG"), asserting claims under Section 10(b) of the Securities Exchange Act. (*Id.* at p. 621.) Plaintiffs were divided into two categories: (1) those such as Cornwell who had purchased ADRs on the NYSE; and (2) those such as LAMPERS (Louisiana Municipal Police Employees Retirement System) who had purchased common shares of CSG on the Swiss Stock Exchange. (*Id.*)

Following the Supreme Court's decision in *Morrison*, CSG moved to dismiss LAMPERS because it had not purchased CSG shares on a domestic market. (*Id.*) In response, plaintiff LAMPERS argued that because it made its investment decision to purchase CSG shares in the U.S. and because it actually initiated its purchase of CSG from the U.S., the fact that the purchase order was settled overseas on the Swiss Stock Exchange did not prevent Section 10(b) from applying. (*Id.* at p. 622.) The district court was not persuaded, stating that LAMPERS's argument was no more than an attempt to revive the conduct and effects test, which had clearly been overruled by the Supreme Court in *Morrison*. (*Id.* at p. 622.) As such, the district court granted SCG's Motion to Dismiss defendant LAMPERS. (*Id.* at p. 627.)

The defendants did not move to dismiss the first class of plaintiffs who purchased ADRs on the NYSE nor did the court raise the dismissal of those plaintiffs on its own. Therefore, the court did not discuss the *Morrison* holding with respect to domestic plaintiffs who purchased foreign ADRs on a domestic exchange.

On September 14, 2010, the U.S. District Court of the Southern District of New York, in its opinion in *In re Alstom SA Securities Litigation*, ruled that the listing of shares on a domestic exchange is, in and of itself, insufficient under *Morrison* to maintain a Section 10(b) action. (*In re Alstom SA Securities Litigation* (S.D.N.Y. 2010) 741 F. Supp. 2d 469.) Rather, according to this court, *Morrison* mandates that the shares must actually be purchased on a domestic exchange in order for the plaintiffs to avail themselves of the U.S. securities laws. (*Id.* at pp. 472-473.)

In *In Re Alstom*, the plaintiffs filed a class action alleging that Alstom and its subsidiaries violated Section 10(b) of the Securities Exchange Act. The class of plaintiffs was comprised of three groups of investors: (1) those who purchased Alstom securities in the form of ADRs on the NYSE; (2) those who purchased ADRs directly from Alstom; and (3) those who purchased ADRs on the Paris Stock Exchange ("Euronext"). (*Id.* at p. 471.) The defendant moved to dismiss the second and third class of plaintiffs who purchased ADRs on a foreign market. (*Id.*)

In response, the plaintiffs argued that because the shares were registered and listed on the NYSE, the transactions fulfilled the letter of *Morrison's* rule that federal securities laws apply to transactions in securities "listed on a domestic exchange." (*Id.* at p. 472.) The court rejected the plaintiffs' argument, finding it relied on a selective and overly-technical reading of *Morrison.* (*Id.*) The court noted that, "[t]hough isolated clauses of the opinion may be read as requiring only that a security be 'listed' on a domestic exchange for its purchase anywhere in the world to be cognizable under the federal securities law, those excerpts read in total context compel the opposite result." (*Id.*) Specifically, the court noted that *Morrison*, as a whole, is concerned with the territorial location of where the purchase or sale was executed. (*Id.*) Therefore, because the purchase of Alstom ADRs actually occurred on the Euronext or directly from Alstom, plaintiffs could not bring a claim under Section 10(b). (*Id.* at pp. 472-473.)

The defendants did not move to dismiss the first class of plaintiffs who purchased ADRs on the NYSE nor did the court raise the dismissal of these plaintiffs on its own. Therefore, the court did not discuss the *Morrison* holding with respect to those plaintiffs.

On September 29, 2010, the U.S. District Court of the Southern District of New York, in its opinion in *In Re Societe Generale Securities Litigation*, diverged from its implied findings in *Cornwell* and *Alstom*, and held that Section 10(b) claims do not apply to a domestic plaintiff's purchase of foreign ADRs even when the ADRs are purchased on a domestic market. (*In Re Societe Generale Securities Litigation* (S.D.N.Y. September 29, 2010, 08 Civ. 2495 (RMB)) 2010 U.S. Dist LEXIS 107719.)

In *In Re Societe Generale*, the plaintiffs filed a class action against Societe Generale ("SocGen"), a French company whose stock is traded on the Euronext, alleging that SocGen violated Section 10(b) of the U.S. securities laws. Plaintiffs consisted of: (1) Vermont Pension Investment Committee and Boilermaker-Blacksmith National Pension Fund, which both purchased SocGen ordinary shares on the Euronext; and (2) United Food and Commercial Workers Union ("UFCW") Joint Pension Fund, which purchased SocGen ADRs on an over-the-counter market in New York. (*Id.* at pp. 4-5.)

Following issuance of the *Morrison* opinion, defendants moved to dismiss the claims brought by Vermont and Boilermaker because the shares were purchased on a foreign market. (*Id.* at p. 6.) However, defendants did not move to dismiss the claims of UFCW because the ADRs were purchased on a domestic market. (*Id.* at p. 7, fn 2.) Despite this, the court, on its own motion, ruled that the *Morrison* decision compelled the dismissal of all three plaintiffs, including UFCW. (*Id.* at p. 15.)

Even though defendants did not argue that UFCW's claims should be dismissed under *Morrison*, the court concluded, without much analysis, that the Exchange Act is inapplicable to UFCW's ADR transactions because "[t]rade in ADRs is considered to be a 'predominantly foreign securities transaction'" thereby making section 10(b) inapplicable under *Morrison.* (*Id.* at p. 14.) In reaching this holding, the court found it to be relevant that "SocGen's ADRs 'were not traded on an official American securities exchange; instead, ADRs were traded in a less formal market with lower exposure to U.S.-resident buyers.'" (*Id.* at p. 20.)

This opinion is in sharp contrast to the implied findings in *Cornwell* and *Alstom*, where both plaintiffs who had purchased ADRs on a domestic market were allowed to proceed with their claims after the *Morrison* analysis. The only distinction is that in *Cornwell* and *Alstom*, the ADRS were listed on the NYSE and not sold through an over-the-counter market.

On December 30, 2010, the U.S. District Court of the Southern District of New York, in its opinion in *Elliott Associates v. Porsche Automobil Holding SE*, ruled that a securities-based swap agreement of a foreign corporation was effectively a transaction "on a foreign exchange" even when the swap agreement was entered into in the U.S. and contained a choice of law provision applying U.S. law. (*Elliott Associates v. Porsche Automobil Holding SE* (S.D.N.Y. 2010) 759 F. Supp. 2d 469.)

In *Porsche*, plaintiffs consisted of a group of global hedge funds, approximately half of which were organized under domestic laws, but all of which were domestically managed. (*Id.* at p. 471.) Porsche is a German corporation and is publicly traded in Germany, although it has ADRs traded over the counter in the United States. (*Id.* at pp. 471-472.)

All of the hedge-fund plaintiffs entered into security-based swap agreements with Porsche that referenced the share price of another German car company, Volkswagen. (*Id.* at p. 471.) The plaintiffs thereafter brought suit under Section 10(b) alleging that Porsche caused a dramatic rise in VW stock prices by buying nearly all of the freely-traded voting shares of VW as part of a secret plan to take over VW. (*Id.* at p. 470.) Following the *Morrison* decision, Porsche moved for a dismissal of all of the plaintiffs. (*Id.*)

The swap agreements at issue here all included express choice of law provisions stating that New York law governs and forum selection clauses designating New York federal and state courts as the appropriate venue. (*Id.* at p. 471.) Further, all of the steps necessary to transact in the swap agreements were carried out in U.S. and the final swap confirmations were signed by the investment managers in their various offices in New York. (*Id.*)

The court nevertheless concluded that *Morrison* had swept away all Section 10(b) claims for foreign acquired securities and, according to this court, swap agreements are equivalent to trade in foreign securities. (*Id.* at p. 476.) Specifically, the court found that swap agreements are equivalent to a "buy order" in the U.S. for securities traded abroad. (*Id.*) Therefore, the court concluded that "swap agreements are essentially 'transactions conducted upon foreign exchanges and markets,' and not 'domestic transactions' that merit the protection of §10(b)." (*Id.*)

On January 11, 2011, the U.S. District Court of the Southern District of New York, in its opinion in *In re Royal Bank of Scotland Group PLC Securities Litigation*, ruled that *Morrison* precludes not only a Section 10(b) claim, but also a claim under Section 12(a)(2) of the 1934 Securities Act. (*In re Royal Bank of Scotland Group PLC Securities Litigation* (S.D.N.Y. 2011) 765 F. Supp. 2d 327.) Section 12(a)(2) of the 1933 Securities Act imposes civil liabilities against anyone who offers for sale any security by means of a prospectus or oral communication, which includes any false or misleading statement. (15 U.S.C. §77l.)

In *In Re Royal Bank of Scotland*, the named plaintiffs consisted of two domestic pension funds (MassPRIM and MissPERS), which owned common shares of the Royal Bank of Scotland ("RBS"). (*In re Royal Bank of Scotland*, *supra*, 765 F. Supp. 2d at p. 329.) Plaintiffs brought an action alleging that they suffered massive losses in shareholder value as a direct result of a series of write-downs that occurred at RBS due to RBS's substantial holdings in subprime mortgages. (*Id.* at p. 330.) Plaintiffs alleged claims under Section 10(b) of the 1934 Exchange Act and Section 12(a)(2) of the 1933 Securities Act. (*Id.* at p. 334.)

RBS is a British company whose common shares are listed on several foreign exchanges. (*Id.* at pp. 329-330.) In late 2007, RBS purchased the Dutch banking giant, ABN AMRO. (*Id.* at p. 332.) Shortly thereafter, due to RBS's and ABN AMRO's holdings in subprime mortgages, RBS announced a multi-billion dollar write down. (*Id.*) Neither MassPRIM nor MissPERS had shares of ABN AMRO that were "exchanged" to RBS shares via this purchase. (*Id.* at p. 338-339.) On that same date, RBS announced a multi-billion dollar Rights Issue to increase the company's capital base. (*Id.* at p. 333.) U.S. shareholders were generally excluded from participation in the Rights Issue, and to the extent they did participate, it was not through a public offering, but through narrow exceptions such as that for Qualified Institutional Buyers under section 144A of the Securities Act. (*Id.* at p. 339, fn. 13.) MassPRIM and MissPERS had QIB status, but did not participate in the Rights Issue. (*Id.*)

Plaintiffs brought suit for the following 4 categories of claims: (1) claims under Section 10(b) of the Exchange Act on behalf of purchasers of RBS common shares; (2) claims under the Securities Act of 1933 on behalf of purchasers of RBS preferred shares; (3) claims under the Securities Act of 1933 on behalf of those who tendered ABN AMRO shares in exchange for ordinary RBS shares; and (4) claims under the Securities Act of 1933 on behalf of those who purchased RBS ordinary shares in the Rights Issue. (*Id.* at p. 334.) Following *Morrison*, RBS moved to dismiss claims 1, 3 and 4 because those plaintiffs purchased RBS common shares, which were only traded on foreign markets. (*Id.* at p. 335.)

The court easily dismissed the 1934 Act's Section 10(b) claims based on *Morrison* and the line of cases cited above because the plaintiffs did not purchase shares of RBS on a domestic market. (*Id.* at p. 335-336.) In so holding, however, it is important to note that both the defendants and the court conceded that the Exchange Act might reach RBS ADRs trading on the NYSE, but because MassPRIM and MissPERS had not purchased ADRs, the court held that they did not have standing to bring those claims. (*Id.* at pp. 337-338.)

The court also dismissed the 1933 Securities Act claims, basing this decision on *Morrison* dicta that both Acts had the "same focus on domestic transactions." (*Id.* at p. 338-340.) Specifically, with the Exchange Offer, the court held that because RBS's ordinary shares are not traded on a domestic market, and because the complaint was "void of any allegations that the purchase of RBS ordinary shares pursuant to the Exchange Offer actually took place in the United States," the claims were precluded by *Morrison.* (*Id.* at p. 339.)

With respect to the Rights Issue claim, the court held *Morrison* was dispositive as to the issue because "no U.S. public offering is present and the Rights Issue did not involve a domestic securities transaction." (*Id.*) Like the shares issued pursuant to the Exchange Offer, the shares issued pursuant to the Rights Issue were RBS ordinary shares, which were not traded on a domestic market; therefore, the court found the claims to be deficient because of *Morrison*'s holding. (*Id.*)

On June 10, 2011, U.S. District Court of the Southern District of New York, in its opinion in *Securities and Exchange Commission v. Goldman Sachs & Co.*, ruled : (1) The *Morrison* holding is applicable to claims by the SEC; (2) a "purchase" or "sale" within the meaning of *Morrison* occurs at the point of irrevocable liability; and (3) *Morrison* applies to claims made under Section 17(a) of the 1933 Securities Act. (*Securities and Exchange Commission v. Goldman Sachs & Co.* (S.D.N.Y. 2011, June 10, 2011, 10 Civ. 3229(BSJ)(MHD)) 2011 U.S. Dist. LEXIS 62487.)

In *Goldman Sachs*, the SEC alleged that in 2007, the NY branch of Goldman Sachs structured and marketed a synthetic collateralized debt obligation ("CDO") called Abacus 2007-ACI ("Abacus") that was based on the performance of subprime residential mortgage backed securities ("RMBSs"). (*Id.* at pp. 3-4.) The complaint also alleged that Goldman Sachs was assisted by a large hedge fund, Paulson & Co., in selecting the RMBSs that would collateralize the CDO. (*Id.* at p. 4.) The SEC further alleged that, at the same time, Paulson took a short position in the CDO by entering into Credit Default Swaps ("CDS") that bet the RMBSs would perform poorly. (*Id.* at pp. 4-5.) Goldman Sachs allegedly marketed the CDOs without disclosing Paulson's position. (*Id.* at p. 5.)

IKB, a German commercial bank, purchased $150 million worth of Abacus notes from Goldman Sachs. (*Id.* at p. 12.) According to the offering memorandum, the notes would be "'ready for delivery in book-entry form only in New York'." (*Id.*) However, trade confirmations for the IKB note purchases list Goldman Sachs International (located in London) as the seller and IKB's affiliate, Loreley Financing based on the Island of Jersey (a British Crown Dependency), as the purchaser. (*Id.* at p. 30.)

ACA Capital Holdings, a U.S.-based entity purchased $42 million worth of Abacus notes. (*Id.* at p. 14.) Additionally, through a series of credit default swaps between ABN AMCO (a European bank) and Goldman Sachs International, which were was governed by British law, and between ABN AMCO and ACA, ACA Capital assumed the credit risk associated with the $909 million super senior portion of Abacus' capital structure. (*Id.* at pp. 14-15, 33.)

The defendants moved for judgment on the pleadings on the basis that the complaint failed to state a claim because it did not allege a securities transaction took place in the U.S. (*Id.* at p. 2.) In ruling on this motion, because the Abacus notes were not traded on an exchange, the issue was whether the transactions amounted to a purchase or sale made in the U.S, the second prong of *Morrison*. The court determined that a purchase or sale occurs at the point of "irrevocable liability" to take and pay for a security (purchase) or to deliver a security (sale). (*Id.* at pp. 25-26.) The court thereafter found that neither IKB nor ABN AMCO incurred irrevocable liability in the U.S., and therefore, those claims were dismissed. (*Id.* at pp. 26-36.) However, the court did not dismiss the claims related to the ACA swap and note purchase, though the court provided no discussion as to why this decision was reached. (*Id.* at pp. 38-40.)

The court then analyzed the sufficiency of the SEC's claim under section 17(a) of the Securities Act and whether *Morrison* applied to that section. The court held that *Morrison* does apply to Section 17(a) claims and therefore, to the extent that Section 17(a) applies to sales, it does not apply to sales that occur outside the United States. (*Id.* at p. 45.) However, the court continued its analysis of Section 17(a), noting that unlike Section 10(b), Section 17(a) applies not only to sales, but also applies to offers. (*Id.* at p. 46.) Therefore, because the offer of the securities was made in the U.S., the SEC's Section 17(a) claims survived. (*Id.* at pp. 47-50.)

What is interesting about this case is that it was decided after Dodd-Frank was signed into law on July 21, 2010. Dodd-Frank officially modified the Exchange Act and adopted the conduct and effects tests as the measure to determine whether federal courts had extraterritorial jurisdiction to hear causes of action brought by the SEC for violations of U.S. securities laws. (*See* Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010) 124 Stat. 1376.) Despite this, there was no mention of Dodd-Frank in this court's opinion and the court applied the *Morrison* transaction test to support its ruling that the SEC could not bring a Section 10(b) claim against the defendants.

Clearly, following <u>*Morrison*, U.S. investors have been stripped of much of the protections previously afforded by federal securities laws, which will have a dramatic impact on the ability of U.S. investors to recover for fraudulent conduct. As an example,</u> attached to this letter is a sampling of pre-*Morrison* settlements that would have never have been effectuated if the *Morrison* rules were in place at the time. Notable among these settlements is the 2007 $3.2 billion settlement that was reached in *In re Tyco International, Ltd.* (*In re Tyco Int'l Ltd.* (D.N.H. 2007) 535 F.Supp 2d 249.) In that case, plaintiffs alleged that Tyco International, a Bermuda company, misrepresented the value of several companies that Tyco acquired and misreported Tyco's own financial condition in ways that artificially inflated the value of Tyco stock. (*Id.* at p. 252.) These fraudulent accounting practices, plaintiffs alleged, enabled the individual defendants to reap enormous profits by looting the company through a combination of unreported bonuses, forgiven loans, excessive fees, and insider trading. (*Id.*) The looting, in turn, allegedly fostered a coverup by means of continued accounting fraud, materially false and misleading statements, and the omission of material information in various registration statements to cover up the misconduct, all of which further violated the federal securities laws. (*Id.* at pp. 252-253.) Under *Morrison*, the U.S. investors would have had no recourse in U.S. courts for the billions of dollars lost due to Tyco's egregious conduct.

CONCLUSION

CalSTRS routinely purchases securities on foreign markets. Undeniably, *Morrison* will have a significant impact on the ability of CalSTRS to participate in securities fraud class action lawsuits. Specifically, *Morrison* will force CalSTRS to either become involved in foreign litigation to effectuate loss recovery or to forego its claims, potentially raising fiduciary concerns.

CalSTRS currently holds $33,097,269,451.00 in shares, purchased on a total of 62 different foreign markets. As a result of *Morrison* and its progeny, CalSTRS could be forced to litigate in these foreign jurisdictions. Each jurisdiction has different legal, procedural and economic considerations so that there is no uniform approach to proceeding as a damaged investor. More importantly, the foreign procedures are far different from the established, proven U.S. class action system that was previously available to shareholders.

For example, the United Kingdom, Germany and the Netherlands prohibit contingent fee arrangements. Moreover, each of these countries also has adverse party costs, meaning if the shareholder does not prevail, it would be liable for the defendant company's costs as well as court costs and fees. Additionally, Germany, as well as other countries, utilizes an opt-in system as opposed to the U.S. opt-out system. This means that unless a shareholder affirmatively elects to participate in the class action, its claims would be barred.

Forcing U.S. investors to navigate the vagaries of foreign securities laws cannot serve any public purpose. On the contrary, given the importance of public pension funds and their need to diversify, it is crucial that they not be denied the right to recover for losses caused by fraud on securities purchased on a foreign exchange.

Foreign issuers who sell their securities to Americans and/or do business in this country should be subject to civil liability under the Exchange Act regardless of where they choose to list those securities.

Very truly yours,

Brian J. Bartow
General Counsel

Encl.

Sampling of Pre-*Morrison* Cases & Settlements That Would Have Been Dismissed under *Morrison*

Approx Year Filed	Case Name	Foreign Company Headquarters	Were any of the plaintiffs domestic shareholders?	Did any domestic shareholders purchase shares on a foreign exchange?	Did any domestic shareholders purchase shares on a domestic exchange?	Settlement or Verdict Amount	Allegations of Fraud
2000	*In re Deutsche Telekom AG Sec Litig* 2002 U.S. Dist. LEXIS 2627 (SD NY) SD-NY 00-9475	Germany	Yes.	No.	Yes; Plaintiffs purchased ADRs on domestic OTC markets	$120 million	The prospectus and registration statement issued in connection with Deutsche Telekom's IPO were alleged to be materially false and misleading on the grounds that the documents (1) failed to disclose that Deutsche Telecom was at that time engaged in advanced merger talks with VoiceStream Wireless Corp., and (2) overstated Deutsche Telekom's real estate portfolio by at least 2 billion Euro (approximately $ 1.8 billion).
2000	*In re Tyco International, Ltd.* 236 F.R.D. 62 (2006 Dist NH) 2000 U.S. Dist. LEXIS 5551 535 F. Supp. 2d 249	Bermuda	Yes; Lead plaintiffs were several domestic pension funds.	Yes; some plaintiffs purchased shares on the Bermuda exchange.	Yes; some plaintiffs purchased shares on the NYSE.	$3.2 billion	Tyco International misrepresented the value of several different companies Tyco acquired during the class period and misreported Tyco's own financial condition. Plaintiff's also allege that the individual defendants looted the company by misappropriating corporate funds in the form of undisclosed cash bonuses and forgiven loans. The looted proceeds were then used to reward the individual defendants for their participation in the accounting fraud scheme. Plaintiffs contend that this looting and accounting fraud scheme defrauded the investing public in violation of the federal securities laws. They claim that defendants made materially false and misleading statements and omitted material information in various registration statements and publications, which concealed the corporate misconduct and mismanagement.

2001	*In re Nortel Networks Sec. Litig.* 238 F.Supp.2d 613, (2003 SD NY); 2006 U.S. Dist. LEXIS 93390	Canada	Yes	Yes; some plaintiffs purchased shares on the Toronto exchange.	Yes; some plaintiffs purchased shares on the NYSE.	$1.14 billion	Nortel issued false and misleading press releases about it's financial strength and projected growth; violated SEC reporting rules and GAAP
2002	*In re Asia Pulp Paper Sec. Litig.* 293 F.Supp 2d 391 (2003 SD NY)	China	Yes	Unknown; but highly likely based on the class definition.	Yes; Plaintiffs were purchasers of ADSs on the NYSE and on pink sheets	$46 million	Asia Pulp and Papery (APP) made false and misleading statements are based on APP's failure to disclose information with respect to the following transactions: (1) currency swaps which were required to be disclosed pursuant to a written policy; (2) certain receivables owed to APP on transactions between APP and several British Virgin Islands companies; (3) certain transactions with allegedly related parties; and (4) certain deposits APP made at private banks allegedly controlled by APP's majority shareholders. Plaintiffs' also alleged that APP overvalued its property, plant and equipment in its registration statements.
2003	*In re Parmalat Sec. Litig.* 375 F. Supp. 2d 278 (2004 SD NY) 2008 U.S. Dist. LEXIS 64296	Italy	Yes; 100 US QIB plaintiffs and a negligible amount of non-QIB US purchasers	Yes; QIB plaintiffs purchased shares on the Milan exchange	Yes; some shares purchased domestically on OTC markets	$86.8 million	Parmalat engaged in a massive fraud that involved allegedly under-reporting its debt by nearly $10 billion and over-reporting its net assets by $16.4 billion. Specifically, the complaint alleged insiders at Parmalat concocted a scheme involving misleading transactions and off-shore entities that created the appearance of financial health. One such transaction, for example, involved a fictitious sale of 300,000 tons of powdered milk to Cuba for $260 million. Loans obtained on the basis of this transaction were used to service debt and obtain more loans. In short, the complaint alleged that Parmalat was operating something akin to a Ponzi scheme.

2004	*In re Royal Dutch/Shell Sec. Litig.* 380 F.Supp.2d 509 (2005 NJ); 2006 U.S. Dist. LEXIS 56778	Netherlands	Yes; Lead Plaintiffs were Pennsylvania State Employee Retirement System and Pennsylvania Public School Retirement System	Yes, domestic plaintiffs purchased shares on the Amsterdam and London exchanges	Yes, domestic plaintiffs purchased shares on the NYSE	$130 million	RDS disseminated materially false and misleading statements concerning RDS's reported proved oil and natural gas reserves - over-stating reserves by 20%; issued materially false, misleading and unqualified audit opinions that were included in the Class Period financial statements filed with the SEC
2004	*In re Biovail Corp Sec. Litig.* 247 F.R.D. 72 (2007 SD NY)	Canada	Yes; Lead Plaintiffs are US and Canadian Pensions	Unknown; but highly likely based on the class definition.	Unknown	$138 million	Biovail issued false and misleading statements, which artificially caused a false increase in Biovail's share price. Once the false and misleading statements were exposed, Biovail's share price plummeted.
2003	*In re Royal Ahold N.V. Sec. Litig* 351 F. Supp. 2d 334 (2004 Dist MD) 437 F. Supp. 2d 467 (2006 Dist MD) 2007 U.S. Dist. LEXIS 45935	Netherlands	Yes; Lead Plaintiff is the Public Employees' Retirement Association of Colorado (COPERA)	Yes; COPERA represents one class of plaintiffs who purchased shares on a foreign exchange. COPERA lost more than $16 million as a result of RA's fraud.	A second class of plaintiffs purchased Royal Ahold ADRs on the NYSE.	$1.1 billion	In 2003, accounting irregularities and discrepancies were discoverd, which stemmed mainly from two company practices: (1) inflated reporting of income from vendor rebates or promotional allowances by its subsidiary USF; and (2) improper attribution of revenue by Royal Ahold from joint ventures in which Royal Ahold did not have a controlling stake. Royal Ahold determined that USF prematurely recognized promotional allowance income in violation of U.S. and Dutch GAAP. The forensic investigation conducted by the company also revealed that certain individuals had colluded with outside vendors to falsely inflate vendor rebate amounts. On May 8, 2003 Royal Ahold announced that the total income restatement attributable to USF would be $ 885 million for the period from April 2000 to December 28, 2002. In addition, on May 26, 2003 Royal Ahold announced that its investigation had uncovered $ 29 million in intentional accounting irregularities at its Tops subsidiary.

2004	*In re CP Ships Sec. Litig.* 578 F.3d 1306 (2009 11th Cir)	Canada	Yes; Canadian citizens who purchased shares on Toronto exchange were excluded from the class.	Unknown; but highly likely based on the class definition and the fact that 80% of shares are traded on Toronto Exchange.	Unknown; however 20% of shares are traded on NYSE.	$1.3 million	The Single Accounting Practice" conversion project occurred in the Company's Tampa, Florida, accounting offices, where personnel--including key executives--knowingly caused costs to be understated. The Tampa offices then transmitted this false data to the Company's foreign offices, where it was incorporated into allegedly false and misleading financial statements that were disseminated from abroad.