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SN # 79

November 28, 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:

We are writing to you concerning the Commission's study of the effect of *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), on the ability of investors to obtain recoveries in the United States for securities violations. Our firm is counsel to the Miami Beach Employees' Retirement Plan, and we write particularly to give the Commission the Plan's perspective based on its experience as the lead institutional plaintiff in the class action *In re Vivendi, S.A. Securities Litigation* -- in which a large jury verdict was rendered in favor of class plaintiffs, only to be decimated when *Morrison* came down just months later[1] Our firm is also regular counsel to about 40 other municipal pension plans in Florida, and the comments in this letter apply generally to U.S.-based investors participating in our global securities markets. We respectfully submit that *Vivendi* demonstrates starkly how unwise and unfair *Morrison* and its progeny can be to such investors.

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[1]The plaintiffs in *Vivendi* are continuing to resist the post-verdict exclusions from the *Vivendi* class based on *Morrison*, and this submission is of course without prejudice to those arguments.

Vivendi was a French media company that made large acquisitions in the United States, including Seagrams, Universal Music and Universal Studios, in 2000 as part of a strategy of expansion into U.S. securities markets and U.S. business operations. Vivendi sponsored and listed ADRs for trading on the NYSE, and listed its ordinary shares for trading on the Paris Bourse and other European exchanges. Its chief executive officer and chief financial officer obtained residences in and moved many of their operations to New York; over half the company's assets were located in the United States; and the company's business was conducted from both hemispheres. Communications with investors and the media occurred from Paris and New York.

Our class action alleged that Vivendi concealed mounting liquidity problems during the class period, October 30, 2000 through August 14, 2002. The liquidity problems materialized publicly during the final months of the class period, causing Vivendi's share price to fall from a class-period high of over $75 per share to as low as $10 at the end; after concerted efforts to avoid insolvency, the company survived but its share price languished at under $20 for many months thereafter, and has never recovered.[2]

Our class action alleging violations of Section 10(b) and other claims was commenced in late 2002 in the Southern District of New York (the Honorable Richard J. Holwell). In 2007, the court certified a class of purchasers during the class period from the United States, France, England, and the Netherlands. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007). Claims of foreign investors were included based on the court's analysis of the conduct and effects test, and its determination that courts in France, England and the Netherlands would likely give preclusive effect to a class judgment rendered in the New York federal court proceedings.

After seven years of pretrial proceedings, the case went to trial in September 2009. The case was tried to a jury for three months; after the holidays and three weeks of deliberations, the jury returned a verdict finding Vivendi liable under Section 10(b) on all 57 of the alleged misrepresentations. The jury verdict included values of per-share inflation caused by the fraud for each day of the class period, rendered in both dollars and euros. Plaintiffs' damage expert calculated that, if every class member submitted a claim, the total recovery under the verdict would amount to approximately $9.3 billion.

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[2]The share prices are given in dollars; Vivendi's shares and ADRs traded at parallel dollar-euro prices in all markets.

About five months later, the decision in *Morrison* was issued. It was immediately apparent that the claims of the *Vivendi* class members from the three foreign countries were imperiled. As the lower courts proceeded to interpret *Morrison* expansively (*i.e.*, broadly to destroy investors' claims), even the claims of U.S. class members who purchased Vivendi shares on the Paris Bourse fell into doubt. On February 22, 2011, Judge Holwell, following the prior decisions interpreting *Morrison*, limited the class that could recover under the verdict only to persons who acquired Vivendi ADRs during the class period -- while at the same time forcefully confirming that the evidence presented at trial fully supported the jury's determination that Vivendi was liable for securities fraud and caused losses to investors, and rejecting the company's post-verdict challenges. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011).[3]

The main purpose of this letter is to point out that *Morrison* and its progeny therefore have relieved Vivendi, which had extensive business operations in the United States and which is an adjudicated perpetrator of securities fraud here, from compensating many thousands of investors whose losses were *adjudicated* as having been caused by Vivendi's fraud -- including U.S.-resident investors who purchased Vivendi shares on the Bourse on transactions initiated through their brokers in the United States.

Because members of the full *Vivendi* class never had to register or appear, there is no direct evidence quantifying the numbers or dollar/euro amounts of class members in the relevant categories (ADR purchasers, U.S. resident purchasers of ordinary shares, English-French-Dutch purchasers of ordinary shares). Based on comments by Vivendi in the press following issuance of the *Morrison* decision and other analysis, plaintiffs' experts roughly estimate that the class may break down into 10-20% ADR purchasers, 20-30% U.S. ordinary share purchasers, and the balance foreign purchasers. Putting aside the exclusion of English-French-Dutch class members, it is clear that *Morrison* has prevented large numbers of U.S. class members who purchased ordinary shares from collecting at least $2 billion in adjudicated losses.

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[3]It should be noted that Vivendi never made a statutory or jurisdictional argument that Section 10(b) applies only to purchasers of securities listed on a U.S. exchange or other U.S. transactions -- *i.e.*, it never made the argument pressed into law by *Morrison*, thereby clearly demonstrating that *Morrison's* legal reasoning was completely outside the mainstream of any accepted or predictable jurisprudence on the subject.

For the reasons articulated in the submissions made to you by other institutional investors seeking a legislative remedy to correct the error and injustice of *Morrison*, we urge the Commission to recommend that Congress restore liability under Section 10(b) to any investor -- and certainly any U.S.-resident investor -- harmed by violative conduct substantially occurring in the United States.

Sincerely,

CYPEN & CYPEN

Stephen H. Cypen
For the Firm

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