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December 13, 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 write in connection with Release No. 34-63174 of the Securities and Exchange Commission ("SEC" or "Commission"), which requests comments on whether private rights of action under the Securities and Exchange Act of 1934 ("Exchange Act") should be extended to transnational securities fraud given the United States Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) ("*Morrison*"). We understand that SEC Commissioner Mary Schapiro seeks further input on this issue following her meeting with Gregory Smith of the Colorado Public Employees' Retirement Association ("Colorado PERA") and Brian Bartow of the California State Teachers' Retirement System ("CALSTRS") on November 15, 2011.

For the reasons discussed below, we urge the Commission to recommend to Congress that Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[1] be extended to private rights of action brought under the antifraud provisions of the Exchange Act. Such an extension would simply restore the legal framework that existed prior to *Morrison*, which served to protect our firm's institutional investor clients from transnational securities fraud regardless of whether the subject securities were purchased in the United States or abroad. One such client representation clearly illustrates why the approach set forth in *Morrison* should be rejected in favor of an extension of Section 929P to private litigants.

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[1] Section 929P of the Dodd-Frank Act provides U.S. courts with jurisdiction to adjudicate actions brought by the Commission or the U.S. alleging violations of the antifraud provisions of the Exchange Act 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." 15 U.S.C. § 78aa (2010).

Our firm represented Colorado PERA as the court-appointed lead plaintiff in the case captioned *In re Royal Ahold N.V. Securities & ERISA Litigation*, MDL No. 03-1539 (D. Md.) brought on behalf of investors in Royal Ahold common stock and American Depository Receipts ("ADRs"). The *Ahold* case involved a widely reported financial fraud at the Dutch holding company and its U.S. subsidiaries which resulted in billions of dollars in revenue and earnings restatements by the companies. Colorado PERA brought a claim under Section 10(b) of the Exchange Act for investors who purchased Ahold's ADRs on the New York Stock Exchange ("NYSE"), and investors who purchased the company's shares on foreign exchanges. The ability to pursue this claim in a U.S. court ultimately resulted in a $1.1 billion recovery for a global class of defrauded Ahold investors. This currently represents the largest recovery under Section 10(b) of the Exchange Act obtained against a European-based securities issuer. Notably, a substantial percentage of the Ahold investor class would have had no remedy for defendants' fraudulent conduct under *Morrison* and its progeny.

We respectfully submit that the analysis employed in the *Ahold* case by U.S. District Court Judge Catherine Blake provides the correct framework for assessing the application of U.S. securities laws to instances of transnational fraud. The court in *Ahold* applied the long-standing "conduct" and "effects" tests to determine whether it had subject matter jurisdiction over the Section 10(b) claims of foreign class members who purchased Ahold securities on foreign securities exchanges. *See In re Royal Ahold N.V. Securities & ERISA Litigation*, 351 F. Supp.2d 334, 358 (D. Md. 2004). Under these tests, a U.S. court can exercise subject matter jurisdiction over such claims if the defendants' conduct contributing to the alleged securities violation either occurred within the U.S., or its overseas conduct caused a substantially adverse effect in U.S. markets. *Id.* at 356.

Specifically, the *Ahold* court found that U.S. jurisdiction over foreign securities transactions is appropriate under the "conduct" test when "'the conduct occurring in the United States *directly causes* the plaintiff's alleged loss in that the conduct forms a *substantial part* of the alleged fraud and is *material* to its success.'" *Id.* at 361 (emphasis added). Under the "effects" test, the court found it had subject matter jurisdiction over foreign securities transactions if the transactions resulted in "direct, adverse injury to specific American investors and parties within the United States." *Id.* at 360.

The "conduct" test was satisfied in *Ahold* given Royal Ahold's business activities within the U.S. which fundamentally advanced the overall fraud to the detriment of *all* investors. The following factors were deemed to be dispositive by the court:

- Royal Ahold admitted in its Form 20-F filed with the SEC that its U.S.-based subsidiaries had engaged in improper accounting practices that violated Generally Accepted Accounting Principles in both the U.S. and Holland;

- Approximately $885 million of Royal Ahold's overall $1.1 billion earnings restatement resulted from the improper accounting practices at its U.S. subsidiaries;

- Royal Ahold's internal investigation concluded that certain senior officers and employees at its main U.S. subsidiary were involved in the accounting fraud;
- Royal Ahold's fraudulently reported growth rate was primarily based on the improper accounting practices of its U.S. subsidiaries;
- The accounting, financial, and administrative services for Royal Ahold's U.S. operations were all conducted in the U.S.; and
- Most of defendants' alleged false and misleading statements were made in the U.S. through Royal Ahold's SEC filings.

See id. at 361-62. In weighing these factors, the court appropriately focused its jurisdictional analysis on where the fraudulent activity originated rather than where the securities transactions took place.

The *Ahold* court's assessment was consistent with the prevailing case law addressing the extraterritorial application of Section 10(b) prior to *Morrison*. Indeed, the "conduct" and "effects" tests have long been applied by federal courts throughout the country to provide Exchange Act protection to U.S. investors purchasing foreign securities on foreign securities exchanges ("f-squared" cases), and foreign investors purchasing foreign securities on foreign exchanges ("f-cubed" cases). *See, e.g., Itoba v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995) (combining "conduct" and "effects" tests to find sufficient U.S. involvement for Exchange Act claims by Channel Islands purchaser against British issuer); *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (allowing Exchange Act claim for Canadian fund purchasing foreign traded securities given fraudulent activity within the U.S.); *Robinson v. TCI/US West Commc'ns. Inc.*, 117 F.3d 900, 905-07 (5th Cir. 1997) (jurisdiction over Exchange Act claims of British shareholder for sale of shares in British corporation given "key event" in the U.S.); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665-67 (7th Cir. 1998) (jurisdiction over Exchange Act claims by Malaysian corporation for investment in foreign company given U.S.-based conduct "material to the successful completion of the alleged scheme"); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 524 (8th Cir. 1973) (U.S. investors could assert Exchange Act claim against Canadian corporation for foreign traded securities where significant elements of fraud occurred in U.S.); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983) (jurisdiction over Exchange Act claim by German purchaser of securities issued by Mexican company given "material" U.S.-based conduct in furtherance of fraud). This substantial body of law assured that fraudulent activity within the U.S. was effectively policed regardless of where the securities were issued or sold.[2]

[2] These rulings were also consistent with the long-arm statutes of U.S. states which govern the exercise of personal jurisdiction over foreign individuals and companies. In general, such statutes provide for personal jurisdiction over those parties who have a general presence in the state, or have purposely directed their activities toward the state and those activities give rise to the tort claim at issue. *See, e.g.*, N.Y. C.P.L.R. § 302(a) (providing for personal jurisdiction over non-NY domiciliaries who "transact[] any business within the state" or "commit[] a tortious act

Judge Blake's fact-sensitive inquiry provided broad redress for all Ahold investors who were harmed by the *same* fraudulent conduct in the U.S. Had the "transactional" test of *Morrison* been applied, the majority of defrauded Ahold investors would have had no recourse in U.S. courts despite the fact that the alleged fraud originated and was perpetrated in this country. In the post-*Morrison* era, no investor who purchased Ahold securities on a foreign securities exchange would have any remedy under U.S. securities laws for a U.S.-based fraud. Such class members accounted for more than 90% (over $1 billion) of the total recovery obtained for defendants' admitted wrongdoing because Ahold's common stock was predominantly traded on the Euronext exchange.

Perhaps more disturbing is the possibility that even U.S.-based investors who purchased Ahold's ADRs on the NYSE would now be denied relief under the recent extension of *Morrison* by some lower courts. *See, e.g., In re Societe Generale Securities Litigation*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *6-7 (S.D.N.Y. Sept. 29, 2010) (Exchange Act inapplicable to transactions in foreign company ADRs executed on domestic over-the-counter market); *Elliot Associates v. Porsche Automobil Holding SE*, 759 F. Supp.2d 469, 476 (S.D.N.Y. 2010) (*Morrison* bars Exchange Act claims on foreign securities-based swap agreements executed in the U.S.); *see also Copeland v. Fortis*, 685 F. Supp.2d 498, 506 (S.D.N.Y. 2010) ("Trade in ADRs is considered to be a 'predominantly foreign securities transaction.'"). In the *Ahold* case, such a limitation would have effectively foreclosed *any* investor recovery under the U.S. securities laws for an admitted fraud which occurred almost exclusively in the U.S.

Congress cannot have intended to preclude any redress for securities fraud committed within U.S. borders simply because the defrauded investors purchased their shares on a foreign exchange. To do so can only encourage both domestic and foreign corporations to flee the U.S. capital markets in order to insulate themselves from any wrongdoing within this country. Indeed, it is conceivable that after *Morisson* certain corporations may affirmatively choose to list their securities on foreign exchanges exclusively (while still maintaining significant business operations in the U.S.) to evade potential liability under the Exchange Act. No company should be permitted to act with such impunity when it defrauds investors through its business activities in the U.S.

The regime established by *Morrison* and its progeny also undermines the importance of private securities litigation in helping to enforce the SEC's mission of protecting investors. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (recognizing that "meritorious private actions to enforce federal antifraud securities laws are an essential supplement to . . . civil enforcement actions . . ."); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the

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within the state"); 10 Del. C. § 3104 (same); Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (same); *see also* Restatement (Second) of Conflict of Laws § 145 (1971) (rights and liabilities in tort action are determined by the "law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . ."). Long-arm statutes demonstrate that the states have an interest in policing fraudulent activity committed within their respective borders. The U.S. should have no less of an interest in doing so when the federal securities laws are violated.

marketplace. . . .in part, through the availability of private securities fraud actions."). By limiting the ability of private litigants to pursue Exchange Act claims only for securities listed on U.S. exchanges or domestic transactions in other securities, the *Morrison* decision restricts the scope of these important supplemental enforcement efforts.

For the foregoing reasons, we respectfully request that the SEC make a recommendation to Congress to extend the provisions of Section 929P of the Dodd-Frank Act to private litigants asserting claims under the antifraud provisions of the Exchange Act. This would restore the well tested legal framework in place prior to *Morrison* which correctly centered on the factual circumstances surrounding the fraud itself, rather than the exchange upon which the subject securities traded.

We appreciate the opportunity to comment on the SEC's study regarding the extraterritorial application of the Exchange Act to private rights of action. Please feel free to contact us should the Commission or its staff wish to discuss our comment letter further.

Respectfully submitted,

Andrew J. Entwistle
For Entwistle & Cappucci LLP