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January 10, 2012

Mary L. Schapiro
Chairman
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 Chairman Schapiro:

The undersigned are United States public pension funds managing assets of approximately $950 billion for the benefit of millions of public servants at the state and local level. Each of us invests in securities publicly traded throughout the world and we are most grateful for the opportunity to express our concerns and perspectives on important issues affecting our members and beneficiaries. Many of us have previously addressed you, both in person and via letter, but we are writing again to emphasize our request that the Commission recommend Congress restore the private litigant's right to assert the antifraud provisions of the federal securities laws against foreign issuers as such right existed before the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). Specifically, we respectfully request the Commission recommend Congress extend the extraterritorial scope of the antifraud private right of action under the Exchange Act to all investors who sufficiently state transnational securities fraud claims and satisfy the conduct and effects requirements codified by Section 929P(b) of the Dodd-Frank Act. Such a recommendation is an imperative foundational step for efforts by investors seeking congressional action.

Private actions overseen by sophisticated institutional investors have been a valuable complement to the enforcement efforts of the Commission since the passage of the Private Securities Litigation Reform Act of 1995. The role of investors becomes increasingly vital during times of reduced resources and increased burdens on the Commission. Unfortunately, the Supreme Court's decision in *Morrison*, and the lower courts' expansive interpretation of *Morrison* (*See* the list of cases in the attachment to this letter), leaves the investor community unable to fulfill its complementary role to the SEC in pursuing financial fraud committed within the borders of the United States. Stated plainly, *Morrison* and its progeny have stripped U.S. investors of nearly all of the private rights and protections against fraud by foreign issuers previously afforded by federal securities laws.

It cannot be overstated that, under *Morrison*, companies listed on a foreign exchange can commit financial fraud within United States borders but investors have virtually no private recourse in United States courts. This simply is unacceptable from the perspective of investors.

Looking back at the major financial frauds that have occurred over the past decade provides an instructive framework to assess the impact of *Morrison*. If *Morrison,* as it is currently being interpreted, had been issued in 2000 and remained in effect, more than $6 billion in recoveries would have been barred. Cases such as *Nortel Networks Corporation* (U.S. District Court for the Southern District of New York) and *Royal Ahold* (United States District Court, District of Maryland) in large part would not have survived. In both cases, the foreign corporations were alleged to have engaged in fraudulent accounting practices, which in turn allowed the individual defendants to reap enormous profits at the shareholders' expense. Without the ability to seek redress in the United States Courts for these high profile, blatant frauds, the public confidence in the integrity in the markets – already shaken by the scandals that precipitated the enactment of Sarbanes-Oxley - would have been substantially undermined.

The holding in *Morrison* has quickly taken an expansive turn. The current trend in the lower courts is to deem as insufficient greater and greater contacts by foreign companies with the U.S. As a result, foreign companies are in a position to take advantage of the U.S. markets without fear of incurring civil liability for their actions, even if those actions involve fraud. For example, in *In re Vivendi Universal S.A. Securities Litigation, 765 F.Supp. 2d 512 (S.D.N.Y. 2011)*, the jury found Vivendi liable for securities fraud based largely upon conduct committed within the United States and awarded an estimated $9 billion in damages to a multi-national class. Explicitly as a result of *Morrison* and its progeny, the district court has excluded both U.S. and foreign plaintiffs who purchased Vivendi's common stock on the Paris Bourse, leaving only purchasers of Vivendi's ADRs. Because of the district court's application of *Morrison*, U.S. shareholders who were defrauded by Vivendi's fraudulent conduct in the U.S. were precluded from seeking redress in U.S. courts.

Just as fines levied by the Commission serve as an important deterrent to individuals in a position to commit fraud, as evidenced above, so do private rights of actions. The inability of investors to hold those responsible for committing fraud within the U.S. accountable for their actions erodes investor confidence, impairs capital formation and increases costs for U.S. investors. An affirmative recommendation in the SEC report required by Section 929Y of the Dodd-Frank Act is essential to future efforts by the investor community at restoring such accountability, and a report that fails to recommend and support Congressional action will undermine the interests of investors.

The suggestions of some that *Morrison* will reduce litigation and litigation costs, thereby benefiting investors, are, we respectfully submit, inaccurate and short-sighted. In reality, responsible fiduciaries for the assets necessary to fund the retirements of millions of individuals will be forced to pursue redress for fraud committed within the United States in foreign courts. Foreign investments are essential and growing components of our funds' asset allocation plans, are used to hedge geographic risks in our portfolios and increasingly incorporated into our benchmarks. In many cases, the magnitude of investment losses associated with a financial fraud will not allow us to simply ignore them. Rather we will be, and, in fact, already have been, forced to retain counsel to litigate in forums that lack the efficiencies of class action suits while presenting additional, significant other barriers to recovery. The costs of such actions will substantially increase and will likely cause a corresponding reduction in any eventual recovery by investors. In fact, some of us are already experiencing substantially increased costs of litigation in other countries as well as a reduction in our ability to effectively oversee foreign actions.

The United States has long provided a marketplace that fosters investor confidence through principles of transparency, consistency in reporting, and accountability. *Morrison* and its progeny, if not reversed legislatively, threaten to destroy investor confidence. The deterrent effect of civil liability, investors' ability to continue partnering with the SEC in prosecuting financial fraud in the U.S., and the availability of important economic recoveries by victims of fraud all cease to exist unless action is taken to restore the conduct and effects tests for private litigants. Accordingly, we respectfully urge the Commission recommend that Congress extend the extraterritorial scope of the antifraud private right of action under the Exchange Act to all investors who sufficiently state transnational securities fraud claims and satisfy the conduct and effects requirements codified by Section 929P(b) of the Dodd-Frank Act.

Thank you for your time and commitment to protecting our markets and the interests of U.S. investors.

Respectfully,

Gregory Smith, General Counsel/COO
Colorado Public Employees' Retirement System

/s/
Jay Wills, General Counsel
Arkansas Public Employees' Retirement Board
Arkansas State Police Retirement System

Peter Mixon, General Counsel
California Public Employees' Retirement System

Brian Bartow, General Counsel
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/s/
Robert Jones, Executive Director
Oklahoma Firefighters Pension & Retirement System

/s/
Mary Beth Foley, General Counsel
Ohio Police and Fire Pension Fund

/s/
Maureen M. Hazen, General Counsel
State Board of Administration of Florida

Theresa Whitmarsh, Executive Director
Washington State Investment Board

/s/
Craig Slaughter
Executive Director
West Virginia Investment Management Board

Cc:
Elisse B. Walter, Commissioner
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
Daniel M. Gallagher, Commissioner

Attachment

SAMPLING OF POST-*MORRISON* DECISIONS

1. *Cornwell v. Credit Suisse Group* 729 F.Supp.2d 620 (2010 S.D.N.Y.)

On July 27, 2010, the U.S. District Court of the Southern District of New York, in its opinion in *Corwnell v Credit Suisse Group*, ruled that *Morrison* is not limited to the so-called "f-cubed" plaintiffs in a Section 10(b) action. (*Corwnell, 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 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 SWX does not prevent Section 10(b) from applying. (*Id.* at 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 622.) As such, the district court granted SCG's Motion to Dismiss defendant LAMPERS. (*Id.* at 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.

2. *In re Alstom SA Securities Litigation*, 741 F.Supp.2d 469 (2010 S.D.N.Y.)

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*, 741 F. Supp. 2d 469 (2010 SD NY).) Rather, *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 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"). The defendant moved to dismiss the second and third class of plaintiffs who purchased ADRs on a foreign market. (*Id.* at 471.)

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.* 472.) The court rejected the plaintiffs argument, finding it relied on a selective and overly-technical reading of *Morrison*. (*Id.*) The court noted that, "though 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 when 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 Paris Exchange or directly from Alstom, plaintiffs could not bring a claim under Section 10(b).

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.

3. *In Re Societe General Securities Litigation*, 2010 U.S. Dist LEXIS 107719 (2010 S.D.NY.)

On September 29, 2010, the U.S. District Court of the Southern District of New York, in its opinion in *In Re Societe General 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 General Securities Litigation* 2010 U.S. Dist LEXIS 107719 (2010 SD NY).)

In *In Re Societe General*, the plaintiffs filed a class action against Societe General ("SocGen"), a French company whose stock is traded on the Euronext, alleging that SocGen violated Section 10(b) of the federal securities law. 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 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 6.) However, defendants did not move to dismiss the claims of UFCW because the ADRs were purchased on a domestic market. (*Id.* at 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 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 "trade in ADRs is considered to be a 'predominantly foreign securities transaction,'" thereby making section 10(b) inapplicable under *Morrison*. (*Id.*) 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 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.

4. *Elliott Associates v. Porsche Automobil Holding SE*, 759 F. Supp. 2d 469 (2010 S.D.N.Y.)

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*, 759 F. Supp. 2d 469 (2010 SD NY).)

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 417.) Porsche is a German corporation and is publicly traded in Germany, although it has ADRs traded over the counter in the United States. (*Id.*)

All of the hedge-fund plaintiffs entered into security-based swap agreements with Porsche that referenced the share price of another German car company, Volkswagon. (*Id.*) 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 470.) Following the *Morrison* decision, Porsche moved for a dismissal of all of the plaintiffs. (*Id.*)

Swap agreements are privately negotiated contracts that are not traded on any exchange. 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 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 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.*)

5. *In Re Royal Bank of Scotland Group PLC Securities Litigation*, 765 F. Supp. 2d 327 (2011 S.D.N.Y.)

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 1933 Exchange Act 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*, 765 F. Supp. 2d 327 (2011 SD NY).) Section 12(a)(2) of the 1934 Securities Act imposes civil liabilities against anyone who offers or sales any security by means of a prospectus or oral communication, which includes any false or misleading statement.

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"). (*Id.*) 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 330.) Plaintiffs alleged claims under Section 10(b) of the 1934 Exchange Act and Section 12(a)(2) of the 1933 Securities Act.

RBS is a British company whose common shares are listed on several foreign exchanges. (*Id.* at 329.) In late 2007, RBS purchased the Dutch banking giant, ABN AMRO. (*Id.* at 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 338-339.) On that same date, RBS announced a multi-billion dollar Rights Issue to increase the company's capital base. (*Id.* at 332.) 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 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 purchases 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. 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.

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 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.*)

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 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 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.

6. ***Securities and Exchange Commission v. Goldman Sachs & Co.*, 2011 U.S. Dist. LEXIS 62487 (2011 S.D.N.Y.)**

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 as follows: (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.*, 2011 U.S. Dist. LEXIS 62487 (2011 SD NY).)

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 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 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 4-5.) Goldman Sachs allegedly marketed the CDOs without disclosing Paulson's position. (*Id.* at 5.)

IKB, a German commercial bank, purchased $150 million worth of Abacus notes from Goldman Sachs. (*Id.* at 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 30.)

ACA Capital Holdings, a U.S.-based entity purchased $42 million worth of Abacus notes. (*Id.* at 14.) Additionally, through a series of credit default swaps between ABN AMCO (a European bank) and Goldman Sachs International, which swap 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 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 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). The court thereafter found that neither IKB nor ABN AMCO incurred irrevocable liability in the U.S. As such, those claims were dismissed. 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 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 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 46.) Therefore, because the offer of the securities was made in the U.S., the SEC's Section 17(a) claims survived. (*Id.* at 47-50.)

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, 124 Stat. 1376 (2010).) 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.