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January 12, 2012

Via Electronic Mail: chairmanoffice@sec.gov

Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SEC File Number 4-617
Comments on Study on Extraterritorial Private Rights of Action

Dear Chairman Schapiro:

The Maryland State Retirement and Pension System ("MSRPS" or the "System") strongly urges the Securities and Exchange Commission (the "Commission") to recommend that Congress restore private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act") for transnational securities fraud.

MSRPS is a $35 billion system which administers death, disability and retirement benefits on behalf of more than 367,000 members. These include active and former State of Maryland employees, teachers, State police, judges, law enforcement officers, correctional officers and legislators. MSRPS's global diversified investment portfolio contains several asset classes, with extensive investments in each class, including securities issued on domestic and foreign exchanges. The System views the protection of its funds as paramount and believes that undue limitations on the ability to pursue securities fraud actions would hamper its statutory and fiduciary duties to act in the best interests of its members.

To protect its assets, MSRPS continually monitors its portfolio and, where appropriate, proposed and pending securities litigation, evaluating the viability of potential causes of action under the Exchange Act and other securities laws. As authorized by its Board of Trustees, the System may actively take part in securities litigation. Within a few weeks of the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[1] ("*Morrison*"), the System was named lead plaintiff in a securities fraud class action in the Central District of California, *In re Toyota Motor Corporation Securities Litigation*[2] ("*Toyota*"). While

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[1] ---U.S.---,130 S.Ct. 2869 (2010).

[2] No. CV 10-922 DSF (AJWx) (C.D. Cal.). See also *Stackhouse v. Toyota Motor Co.*, Nos. 10-0922 DSF (AJWx), CV 10-1429 DSF (AJWx), CV 10-1452 DSF (AJWx), CV 10-1911 DSF (AJWx), CV 10-2196 DSF (AJWx), CV 10-2253 DSF (AJWx), CV 10-2578 DSF (AJWx), 2010 U.S. Dist. LEXIS 79837, 2010 WL 3377409 (C.D. Cal. July 16, 2010) (ruling on lead plaintiff).

MSRPS's participation in *Toyota* pre-dates *Morrison*, its application has already significantly affected the scope of that pending litigation, greatly limiting the amount of damages recoverable by the System, other institutional investors and members of the plaintiff class, and restricting these investors' opportunities to be compensated for their losses. Because of the impact that *Morrison* and subsequent judicial rulings have had on the System and other institutional investors, MSRPS urges that the Commission advocate to Congress that jurisdiction conferred by Section 929P of the Dodd-Frank Act as to actions brought by the Commission or the United States alleging a violation of the antifraud provisions of the Exchange Act for transnational cases be extended to U.S. investors.

Immediate Impact of *Morrison*

In its previous request for comments in connection with this issue, the Commission pointed out that *Morrison* restricts application of Section 10(b) of the Exchange Act to "the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." [3] As will be explained below, this "transactional" rule has been interpreted by several lower courts, with profound impacts upon the protection of investors through limitations on claims, available remedies and damages.

Significantly, in selecting MSRPS as lead plaintiff in *Toyota,* the court cited to the fact that MSRPS sustained the greatest losses among the applicant groups arising from its American Depository Receipts ("ADRs") of Toyota securities. These ADRs are listed and traded on the New York Stock Exchange. In light of this domestic connection, the *Toyota* court stated that *Morrison* "better support[s]" the view that "'domestic transactions' or 'purchase[s] or sale[s]. . . in the United States' means purchases and sales of securities explicitly solicited by the issuer within the United States rather than transactions in foreign-traded securities where the ultimate purchaser or seller has physically remained in the United States." [4]

The *Toyota* court has concluded that only ADR losses are at issue in that action. The immediate impact of this decision is that MSRPS is precluded from seeking compensation under the Exchange Act for more than $17 million in losses stemming from securities purchased on the Tokyo Stock Exchange. The System's compensable losses in the case under an ADR-only scenario would amount to approximately $258,000. Furthermore, the *Toyota* court's ruling tremendously reduced the potential damages at issue for the *Toyota* class by literally billions of dollars.

Post-*Morrison* Judicial Decisions

Like the ruling in *Toyota*, the most notable consequences of *Morrison* are limitations that several courts have placed on the extraterritorial reach of the Exchange Act. Post-*Morrison* federal district court decisions in which claims have been dismissed include:

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[3] 130 S.Ct. at 2888.
[4] *Stackhouse*, 2010 WL 3377409, at *1.

- *In re Banco Santander Sec.-Optimal Litig.*, 732 F.Supp.2d 1305 (S.D. Fla. 2010) (rejecting Section 10(b) claims brought against Bahamian investment fund when all activity related to purchases of securities occurred abroad even though plaintiffs alleged that their purpose was ultimately to invest in a fund purportedly holding securities listed on U.S. exchanges);
- *Gannon Int'l, Ltd. v. Blocker*, No. 4:10CV0835 JCH, 2011 U.S. Dist. LEXIS 3348, 2011 WL 111885 (E.D. Mo. Jan. 13, 2011) (claim related to extraterritorial stock sale fails as a matter of law);
- *In re Royal Bank of Scotland Group PLC Sec. Litig.*, 765 F.Supp.2d 327, 336 (S.D.N.Y. 2011) (holding that registration of ADRs on a U.S. stock exchange is insufficient to prevent dismissal of claims arising from ordinary shares purchased on a foreign exchange and stating that, in *Morrison*, "the Court makes clear its concern is on the true territorial location where the purchase or sale was executed and the particular securities exchange laws that governed the transaction. . .");
- *Elliott Assocs. v. Porsche Automobil Holding SE*, 759 F.Supp.2d 469, 476 (S.D.N.Y. 2010) (holding that confirmations signed in United States for swap agreements referencing German securities are not "domestic transactions in other securities" and thus do not meet the *Morrison* standard);
- *Absolute Activist Value Master Fund Ltd. v. Homm*, No. 09 Civ. 8862 (GBD), 2010 U.S. Dist. LEXIS 137150, at *19, 2010 WL 5415885, at *5 (S.D.N.Y. Dec. 22, 2010) ("Permitting this case to move forward on the theory that any trade routed through the United States meets the *Morrison* standard would be the functional antithesis of *Morrison's* directive.");
- *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F.Supp.2d 166, 178 (S.D.N.Y. 2010) (holding that electronically transmitting a purchase order from within the United States "is insufficient to subject the purchase to the coverage of section 10(b) of the Exchange Act");
- *In re Société Générale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 U.S. Dist. LEXIS 107719, 2010 WL 3910286 (S.D. N.Y. Sept. 29, 2010) (location where buy order was placed and site of wrongful conduct determined to be insufficient under *Morrison*);
- *In re Alstom SA Sec. Litig.*, 741 F.Supp.2d 469 (S.D. N.Y. 2010) (dismissing Exchange Act claims stemming from shares purchased on a European exchange even though those shares also could be purchased as ADRs on the New York Stock Exchange);
- *Sgalambo v. McKenzie*, 739 F.Supp.2d 453 (S.D.N.Y. 2010) (dismissal of claims concerning shares issued in Canada and purchased on Toronto Stock Exchange, although Canadian issuer also traded shares on a U.S. stock exchange and registered with the Commission); and
- *Cornwell v. Credit Suisse Group*, 729 F.Supp.2d 620 (S.D.N.Y. 2010) (no Section 10(b) claim exists for sales of securities listed on a foreign exchange, even where purchase is initiated from the United States by U.S. resident, stock is taken into U.S. account and economic risk is incurred in the United States).

Additional Implications of *Morrison*

Aside from the limitations on available remedies and damages for victims of securities fraud, the transactional standard in *Morrison* has resulted and may result in other consequences for U.S. investors and capital markets.

Limiting the scope of damages undoubtedly has reduced the size of classes in class action litigation, again diminishing investors' remedies. The effect of this change has been especially felt among large institutional investors such as MSRPS, which, given the multitude of investments in its widespread global portfolio, faces the daunting prospect of initiating individual litigation in foreign judicial systems, even in cases where significant fraudulent activity occurred in the United States. To date, such foreign lawsuits have been rare and no track record exists as to whether U.S. investors would be adequately protected by such claims.

More broadly, many actionable securities fraud lawsuits are not being filed simply because investors lack the resources to pursue those claims. Class action and contingent fee litigation generally are not common under many foreign judicial systems, requiring the retention of overseas attorneys and substantial court fees on an on-going basis. The difficulty in pursuing such actions abroad therefore curtails the ability of a public pension fund investor such as MSRPS to protect its participants.

Aside from the substantial expenses they would face, U.S. investors forced to seek remedies in foreign courts are presented with other logistical and practical problems. Foreign laws are not uniform, with substantial differences in their reach, levels of discovery (if any), applicable standards, burdens of proof, and available remedies. Once again, the effects on investors in the United States are substantial.

The diversion of securities fraud actions to overseas forums seems especially incongruous in this global economic age. Multi-national corporations such as Toyota, for example, engage in business throughout the world. Securities transactions and exchanges have grown increasingly interdependent. In instances where substantial fraud occurs in the United States, the issuing company maintains a substantial presence here, and buying and selling decisions are made in this country by U.S. investors, it makes little sense to focus narrowly on the location of a particular stock exchange or transaction as the venue for all securities fraud litigation.

One consequence of the transfer of judicial oversight abroad may be to cause corporations to cease listing their stock on U.S. exchanges. Rather than face the rigors of Section 10(b), multi-national companies seemingly would find it more advantageous to remove themselves from the reach of U.S. courts' jurisdiction. In encouraging companies to delist their stock here, *Morrison* could result in higher levels of activities on foreign exchanges and less in the United States. Correspondingly, the delisting of a company could result in decreased investor confidence in such companies as investors recognize that opportunities to enforce claims against such corporations would be greatly diminished.

The unavailability of private enforcement mechanisms enhances the opportunities for securities fraud. Foreign-listed companies now may recognize that fraudulent activities initiated in the

United States on securities listed abroad could be accomplished without the fear of reprisals in the form of significant civil judgments in U.S. courts. Although maintaining the enforcement powers conferred by Section 929P of the Dodd-Frank Act, the Commission itself operates with finite resources and cannot be expected to enforce the full range of case remedies which have heretofore been available through private rights of action. Without change in the transactional securities fraud standard, heavier reliance will be placed on government in the enforcement of securities laws. At a time of record federal deficits and rising calls for fiscal austerity, private enforcement of securities laws should be encouraged rather than largely precluded under these circumstances.

Federal courts already have seen another effect of the *Morrison* decision—the pleading of foreign law claims under the courts' supplemental jurisdiction authority.[5] But even this avenue offers little promise of protection for institutional investors. The portion of MSRPS's claims against Toyota alleging violations of Japan's Financial Instruments and Exchange Act were dismissed.[6]

Accordingly, given the demonstrated effects to date and likelihood of further fundamental changes on private securities fraud enforcement and on securities markets, compelling reasons exist for expansion of the antifraud provisions of the Exchange Act.

Recommendations for Change

MSRPS strongly believes that private rights of action under the antifraud provisions of the Exchange Act should be extended to cover transnational securities fraud that impacts U.S citizens, including business and institutional investors. Section 929P(b) of the Dodd-Frank Act gives federal courts extraterritorial jurisdiction over actions brought by the Commission or the United States where "conduct within the United States . . . constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or "conduct occurring outside the United States . . . has a foreseeable substantial effect within the United States." With the U.S. government already maintaining enforcement powers over transnational claims, no reasonable rationale exists to prohibit the application of similar standards to private litigants who are U.S. citizens. Those who commit securities fraud should not be shielded from the financial consequences of their conduct based only on the location of a stock exchange, where substantial fraud has occurred in this country or that fraud has significant impact here. In this regard, both public and private rights of action would ensure maximum protection for U.S. investors.

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[5] *See, e.g., Banco Santander*, 732 F.Supp.2d at 1318 ("While the Court concludes that in light of *Morrison* United States securities law does not govern this case, it does not rule out the possibility that the securities laws and regulations of foreign countries may apply."); *Plumbers' Union*, 753 F.Supp.2d at 179 n. 5 (noting plaintiffs' belief that they may have a claim under Swiss law but that they did not pursue it); *Alstom*, 741 F.Supp.2d at 473 (declining to exercise supplemental jurisdiction under French law claims because to do so "would essentially restart substantial portions of this seven-year old litigation").

[6] *Toyota*, 2011 U.S. Dist. LEXIS 75732 (C.D. Cal. July 7, 2011).

The proposed requirement limiting party plaintiffs to U.S. citizens, businesses and institutions recognizes the interests of international comity and foreign governments in enforcing their own securities laws and regulations. The acknowledgment of these interests, however, must be measured against the reality of international business and global markets. Companies which benefit from doing business in the United States and with U.S. investors cannot expect to be shielded from its laws. Given the interdependence of stock exchanges, foreign issuers should be aware that fraudulent securities activities with ramifications in the United States will not be ignored solely because shares were issued on a non-U.S. exchange. Where significant fraud occurs in the United States and overseas enforcement is difficult (or perhaps even inadequate), the full panoply of private rights of action should be available for the protection of investors.

The "conduct and effects" test set forth in Section 929P represents a fair and equitable approach for private enforcement of securities fraud violations. MSRPS believes that the standard would be met by conduct in the United States that constitutes substantial acts in furtherance of the fraud that are material to its success.[7] The test should be applied where the issuing company maintains a substantial presence in the United States and buying and selling decisions are made in this country by U.S. investors.

In conclusion, the balanced approach recommended by MSRPS would provide necessary and appropriate protections for U.S. institutional investors against fraud that may arise in connection with their international investments. The judicial doors open to the Commission and U.S. government should not be closed to public pension funds obligated to protect and maintain the assets of their members and retirees.

MSRPS therefore vigorously urges the Commission to recommend that Congress extend private rights of action under the antifraud provisions of the Exchange Act to cover transnational securities fraud. Should you have questions regarding these comments or need further information, please do not hesitate to contact us.

Very truly yours,

Nancy K. Kopp

Nancy K. Kopp
State Treasurer and
Chairman, Board of Trustees

R. Dean Kenderdine
Executive Director

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[7] See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972); *Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905-06 (5th Cir. 1997); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).