

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63174; File No. 4-617]

Study on Extraterritorial Private Rights of Action

AGENCY: Securities and Exchange Commission.

ACTION: Request for Comments.

SUMMARY: Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) directs the Securities and Exchange Commission (the “Commission”) to solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the “Exchange Act”) should be extended to cover transnational securities fraud. The Commission is soliciting comment on this question and on related questions.

DATES: The Commission will accept comments regarding issues related to the study on or before February 18, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/other.shtml>);
- or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-617 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-617. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John W. Avery, Office of the General Counsel, at (202) 551-5107, or Robert Peterson, Office of International Affairs, at (202) 551-6696, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a recent decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the Supreme Court significantly limited the extraterritorial scope of Section 10(b) of the Exchange Act. In the Dodd-Frank Act, Congress restored the ability of the Commission and the United States to bring actions under Section 10(b) in cases involving transnational securities fraud. Congress further directed the Commission to conduct a study to determine whether, and to what extent, private plaintiffs should also be able to bring such actions. Consideration of the *Morrison* decision and of extending the extraterritorial scope of the antifraud provisions of the Exchange Act to private actions raises important questions touching on the Commission's mandate to protect investors, to maintain fair, orderly and efficient markets, and to facilitate capital formation. It also raises issues regarding international comity and the respect that governments

afford each other regarding their decisions on regulation of their home markets. Exploration of these issues will also help inform how the Commission can best protect investors and the integrity of U.S. markets in an environment in which a significant volume of securities transactions are conducted across borders.

II. Background

In *Morrison*, the Supreme Court considered “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.” The text of the Exchange Act had been silent as to the transnational reach of Section 10(b). In a decision issued on June 24, 2010, the Supreme Court said: “When a statute gives no clear indication of an extraterritorial application, it has none.” *Morrison*, 130 S. Ct. at 2878. “[T]here is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially,” the Court found, “and we therefore conclude that it does not.” *Id.* at 2883. Thus, the Court concluded, “it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.” *Id.* at 2884 (footnote omitted). The Court summarized the test as follows:

Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with 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.

Id. at 2888.

The *Morrison* decision rejected long-standing precedents in most federal courts of appeals that applied some variation or combination of an “effects” test and a “conduct” test to

determine the extraterritorial reach of Section 10(b) of the Exchange Act. See, e.g., *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991); *Itoba Ltd v. LEP Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995). The effects test centered its inquiry on whether domestic investors or markets were affected as a result of actions occurring outside the United States. *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998). See also *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983). By contrast, the conduct test focused “on the nature of [the] conduct within the United States as it relates to carrying out the alleged fraudulent scheme.” *Psimenos*, 722 F.2d at 1045.

On July 21, 2010, less than a month after the decision in *Morrison*, President Obama signed the Dodd-Frank Act. Section 929P of the Dodd-Frank Act amended the Exchange Act to provide that the United States district courts shall have jurisdiction over an action brought or instituted by the Commission or the United States alleging a violation 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.¹

Under section 929Y of the Dodd-Frank Act, the Commission is required to conduct a study to determine whether *private* rights of action should be similarly extended. The report of the study

¹ With respect to U.S. Government and Commission actions, the Dodd-Frank Act largely codified the long-standing appellate court interpretation of the law that had existed prior to the Supreme Court's decision in *Morrison* by setting forth an expansive conducts and effects test, and providing that the inquiry is one of subject matter jurisdiction. The Dodd-Frank Act made similar changes to the Securities Act of 1933 and the Investment Advisers Act of 1940.

must be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House not later than January 21, 2012.

III. Request for Comments

Section 929Y(a) of the Dodd-Frank Act directs the Commission to solicit public comment on whether the scope of the antifraud provisions of the Exchange Act in cases of transnational securities fraud should be extended to private rights of action to the same extent as that provided to the Commission by Section 929P, or to some other extent.² Section 929Y(b) directs that the study shall consider and analyze, among other things—

- (1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;
- (2) what implications such a private right of action would have on international comity;
- (3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and
- (4) whether a narrower extraterritorial standard should be adopted.

Accordingly, we request comment on these issues and questions. We also encourage commenters to:

² Section 929Y(a) of the Dodd-Frank Act provides that the Commission “shall solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (15 U.S.C. 78u-4) should be extended to cover: conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”

- Propose the circumstances, if any, in which a private plaintiff should be allowed to pursue claims under the antifraud provisions of the Exchange Act with respect to a particular security where the plaintiff has purchased or sold the security outside the United States. Does it make a difference whether the security was issued by a U.S. company or by a non-U.S. company? Does it make a difference whether the security was purchased or sold on a foreign stock exchange or whether it was purchased or sold on a non-exchange trading platform or other alternative trading system outside of the United States? Does it make a difference whether the company's securities are traded exclusively outside of the United States?
 - If you disagree with extending the test set forth in Section 929P to private plaintiffs, what other test would you propose?
 - Should there be an effects test, a conduct test, a combination of the two, or another test?
 - Address whether any such test should be limited only to certain types of private plaintiffs, such as United States citizens or residents, or such as institutional investors. How would such investors be defined?
- Identify any cases that have been dismissed as a result of *Morrison* or pending cases in which a challenge based on *Morrison* has been filed. Describe the facts of the case.
- Identify any cases brought prior to *Morrison* that likely could not have been brought or maintained after *Morrison*. Describe the facts of the case.
- In *Morrison*, the Supreme Court held that in the case of securities that are not listed on an American stock exchange, Section 10(b) only reaches the use of a manipulative or deceptive device or contrivance in connection with the purchase or sale of a security *in the United States*.

Address the criteria for determining where a purchase or sale can be said to take place in various transnational securities transactions. Discuss the degree to which investors know, when they place a securities purchase or sale order, whether the order will take place on a foreign stock exchange or on a non-exchange trading platform or other alternative trading system outside of the United States.

- What would be the implications on international comity and international relations of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational securities fraud? Identify any studies that purport to show the effect that the extraterritorial application of domestic laws have on international comity or international relations.
- Discuss the cost and benefits of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational securities fraud, including the costs and benefits to domestic and international financial systems and securities markets. Identify any studies that have been conducted that purport to show the positive or negative implications that such a private right of action would have.
- What remedies outside of the United States would be available to U.S. investors who purchase or sell shares on a foreign stock exchange, or on a non-exchange trading platform or other alternative trading system outside of the United States, if their securities fraud claims cannot be brought in U.S. courts?
- What impact would the extraterritorial application of the private right of action have on the protection of investors? On the maintenance of fair, orderly and efficient markets in the United States? On the facilitation of capital formation?
- Address any other considerations commenters would like to comment on to assist the

Commission in determining whether to recommend changes to the extraterritorial scope of the antifraud private rights of action under the Exchange Act.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: October 25, 2010