



Legal Office

P.O. Box 942707

Sacramento, CA 94229-2707

TTY for Speech and Hearing Impaired: (916) 795-3240

(916) 795-3675 FAX (916) 795-3659

February 18, 2011

VIA EMAIL

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:

The California Public Employees' Retirement System ("CalPERS") manages retirement benefits for more than 1.6 million California public employees, retirees and their families. As of February 14, 2011, CalPERS managed an investment portfolio with a market value of approximately \$229.5 billion.

CalPERS submits the following comments in response to Release No. 34-63174 of the Securities and Exchange Commission ("Commission") concerning the implications of the United States Supreme Court decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) ("*Morrison*"). For the reasons set forth below, CalPERS requests that the Commission make a finding that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78j(b), and its implementing regulations, should apply to all purchases and sales of securities by United States residents and by any legal entity located in the United States. CalPERS also requests a similar finding with respect to the purchase and sale of securities where significant and material conduct occurred in the United States that led to an alleged loss caused by securities fraud.

Private Securities Litigants Play A Critical Role In Remediating Securities Fraud

"Though the text of the Securities Exchange Act does not provide for a private cause of action for §10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation." (*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008) (citing *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971)).)

Indeed, the Supreme Court has long recognized the importance of the private right of action for securities fraud as a supplement to Commission enforcement. (See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (private actions are an “essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission”); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (“the availability of private securities fraud actions” acts to deter fraud and thereby helps maintain “public confidence in the [securities] marketplace”); *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (private right of action “constitutes an essential tool for enforcement of the [Exchange] Act’s requirements”)(citations omitted); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (noting “the deterrent value of private rights of action” under the securities laws); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (implied private actions provide ‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [Commission] action’) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).)

Indeed, when Congress enacted the Private Securities Litigation Reform Act of 1995 (“PSLRA”), it recognized that private securities litigation is “an indispensable tool with which defrauded investors can recover their losses” and is crucial “to the integrity of American capital markets.” (H.R. Conf. Rep. No. 104-369, p. 31.)

***Morrison* Severely Curtailed The Role Of Private Securities Litigants**

By limiting the U.S. securities laws “only in connection with the purchase or sale of a security listed on an American exchange or any other security in the United States”, *Morrison*, (130 S. Ct. at 2888), the Supreme Court severely curtailed the rights of and protections for U.S. investors. As Justice Stevens noted with prescience:

“Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company’s doomed securities. Both of these investors would, under the Court’s new test, be barred from seeking relief under § 10(b).” **The oddity of that result should give pause.**

(*Id.* at 2895 (Stevens, J., concurring). (Emphasis added).)

Justice Stevens' concerns have quickly materialized. In less than eight months since the *Morrison* decision was issued, at least three cases alleging violations of the U.S. securities laws on behalf of U.S. investors have been dismissed in cases involving factual situations similar to those predicated by Justice Stevens. (See *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010) (dismissed claims of U.S. plaintiffs who purchased stock on Swiss Stock Exchange); *In re Royal Bank of Scotland Group PLC Sec. Litig.*, No. 09 Civ. 300 (DAB), 2011 WL 167749 (S.D.N.Y. Jan. 11, 2011) (dismissed claims of U.S. plaintiffs who purchased stock on foreign exchanges); *In re Societe Generale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) (dismissed claims of U.S. plaintiffs who purchased stocks on foreign exchanges).)

Furthermore, the Supreme Court in *Morrison* overruled a long line of precedent that recognized the transnational application of the U.S. securities laws. The federal courts pre-*Morrison* did not confine jurisdiction to securities transactions consummated in the United States. "It is elementary that the anti-fraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets." (*Europe & Overseas Commodity Traders v. Banque Paribas London*, 147 F.3d 118, 123 (2d Cir. 1998).) Indeed, the courts plainly recognized that "subject matter jurisdiction may extend to claims involving transnational securities frauds." (*S.E.C. v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003).)

Where the actual plaintiff was a U.S. resident or entity, the courts applied the "effects test", which focused on whether domestic investors or markets were affected as a result of actions occurring outside the United States. (See, e.g., *Europe & Overseas Commodity Traders*, 147 F.3d at 125.)

Where the plaintiff was not a U.S. resident or entity, the courts employed the "conduct test," in which "subject matter jurisdiction exists if activities in this country were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad." (*Morrison v. National Australia Bank*, 547 F.3d 167, 171 (2d Cir. 2008), *overruled by Morrison*, 130 S. Ct. 2869.) *Morrison* wiped away the conduct test, disregarding decades of well-established precedent that protected U.S. investors.

***Morrison* Will Severely Impact Public Pension Funds Such As CalPERS, Which Has Long Championed Investors' Rights**

The goal of the PSLRA was to eliminate abuses in securities class actions without eviscerating investor protections. Key among the PSLRA's reforms was a mechanism designed to encourage institutional investors – and in this context Congress specifically identified public pension funds – to take the lead role in monitoring and prosecuting securities class actions.

In that regard, CalPERS has successfully led individual and class action securities fraud lawsuits, which have resulted in billions of dollars in recovery for its beneficiaries and other shareholders. (See, e.g., *In re Cendant Corp. Litig.*, Master File No. 98-1664 (WHW)(D.N.J. 2000)(\$3.2 billion settlement); *In re United Health Group Inc. PSLRA Litig.*, Civil. No. 0:06-cv-01691-JMR-FLN (D. Minn. 2009) (\$925.5 million).)

Indeed, a review of the recoveries obtained by private securities litigants in the top 100 securities class action settlements alone shows that private litigants have recovered more than \$46.736 billion for defrauded shareholders.

This recovery on behalf of U.S. investors has been and will be curtailed by *Morrison*. For example, public pension funds such as CalPERS diversify their assets in order to protect their beneficiaries. (See, e.g., CalPERS's Total Fund Statement of Investment Policy at 2 ("The assets of CalPERS will be broadly diversified to minimize the effect of short-term losses within any investment program.") (Available at www.calpers.ca.gov/index.jsp?bc=/investments/policies/invo-policy-statement/home.xml).)

To comply with this mandate, CalPERS, like most public pension funds, invests in international equities. As of December 31, 2010, CalPERS invested 28.0% of its assets in international equities, which is more than the 24.5% of its assets CalPERS invests in domestic equity. In dollar terms, CalPERS had \$63.3 billion invested in international equities. (See the CalPERS February 14, 2011 Agenda Item 7A at Attachment 2 presented to the CalPERS Investment Committee.) Given the enormous size of this investment and the limited number of foreign issuers whose securities trade in the U.S. in the form of ADRs, most of CalPERS international equity investments cannot be purchased as ADRs. In any event, CalPERS typically does not purchase ADRs even when they are available because of the additional costs of trading ADRs.

Under *Morrison*, CalPERS and its beneficiaries will have no opportunity to obtain redress in U.S. courts for fraud committed in the U.S. by foreign entities in which CalPERS invests. *Morrison* has decimated CalPERS's ability to protect its beneficiaries and others in its investments in international equities. Unless the Commission takes appropriate action, CalPERS and its beneficiaries will not have the protection of the U.S. securities laws for these international equity investments.

Private Litigants Such As CalPERS Should Be Able To Supplement The Commission's Enforcement Role

The Commission has stressed the importance of private securities litigation as a supplement to its limited enforcement resources. For example, in Congressional testimony during the consideration of the PSLRA, former Commission Chairman Arthur Levitt stated, "Private actions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws." (S. Rep. No. 104-98, at 38 (1995),

reprinted in 1995 U.S.C.C.A.N. 679,716.) Similarly, in 1991, then Chairman Richard Breeden testified before the Banking Committee that private securities actions were an “essential tool in the enforcement of the federal securities laws. Because the Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws, private actions perform a critical role in preserving the integrity of our securities markets.” (*Id.* at 37, 1995 U.S.C.C.A.N. at 716.)

Commission Chairman Mary Shapiro stated recently that the Commission faces severe challenges in doing its existing job and in taking on new duties mandated under the 2010 Dodd-Frank market reform law. Commission enforcement head Robert Khuzami also said recently that budget constraints are hurting the Commission. (See “SEC Warns Budget Threats Give Swindlers The Upper Hand,” *Westlaw Business Currents*, Feb. 4, 2011.)

The Commission certainly will not have the resources to effectively monitor foreign issuers. Private attorneys general, such as CalPERS, should be permitted to assist the Commission in enforcing the U.S. securities laws through individual and class action litigation against foreign issuers.

Conclusion

For the reasons set forth above and in the letter from CalPERS and other public pension funds to Senators Dodd and Shelby and Representatives Frank and Bachus, dated November 5, 2010, a copy of which is attached, the Commission should strongly urge Congress to overrule *Morrison*. CalPERS also respectfully requests that the Commission consider the comments submitted on behalf of public pension funds including the letter representing the California State Teachers’ Retirement System, the North Carolina State Department of Treasury, and other public pension plans totaling \$720 billion in assets as well as the letter submitted on behalf of the Ohio state funds.

Respectfully,

A handwritten signature in cursive script that reads "Peter Mixon (for)".

PETER MIXON
General Counsel

PHM:wrh

Attachment



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

THOMAS P. DiNAPOLI
STATE COMPTROLLER

LUKE BIERMAN
GENERAL COUNSEL
Tel: 518-474-3444
Fax: 518-473-9104

November 5, 2010

The Honorable Christopher J. Dodd
Chair, Committee on Banking, Housing,
and Urban Affairs
United States Senate
448 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Barney Frank
Chair, Committee on Financial Services
United States House of Representatives
2252 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Richard C. Shelby
Ranking Member, Committee on Banking,
Housing, and Urban Affairs
United States Senate
304 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Spencer Bachus
Ranking Member, Committee on Financial
Services
United States House of Representatives
2246 Rayburn House Office Building
Washington, D.C. 20515

Dear Senators Dodd and Shelby, and Representatives Frank and Bachus:

The undersigned public pension funds, which collectively constitute the largest institutional investors, we are writing to request that you take action to provide U.S. investors with a remedy under the Securities Exchange Act of 1934 ("Exchange Act") to protect them from securities fraud that is committed on American soil or that affects U.S. investors. The investment community believed that such protection existed, based on U.S. District Court and Court of Appeals decisions, until the Supreme Court's June 24, 2010 decision in Morrison v. National Australia Bank, Ltd. ("Morrison"), a decision that affects investors when they purchase or sell securities of foreign companies that trade on a foreign exchange.

Public pension funds must have an opportunity to obtain redress in U.S. courts for fraud committed in the U.S. by foreign entities in which public funds invest, and U.S. federal securities laws should deter fraudulent statements by foreign entities to investors.

Background

The question before the Supreme Court in Morrison was whether, under the particular facts before it, foreign investors who purchased securities of a foreign company on a foreign exchange could pursue claims under the anti-fraud provisions of the Exchange Act. The Court ruled that Section 10(b) applies only to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities,” holding “there is no affirmative indication in the Exchange Act that Section 10(b) applies extraterritorially.”

Companies being sued have and will continue to argue that the decision denies the anti-fraud protections of the Exchange Act to *all* investors – foreign and domestic alike – who purchase securities listed on non-U.S. exchanges, regardless of the extent of fraudulent conduct in which foreign companies engage on our nation’s shores, or the effect of such conduct in the United States or on U.S. citizens.¹ This would mean that all of the many companies whose shares are listed on foreign exchanges – including such household names as BP, Toyota, Sony, Hitachi, Samsung, Nokia, DaimlerChrysler, and ING Group – can market those shares to American investors, can obtain a significant portion of their market capitalization from American investors, can file their financial statements with the Securities and Exchange Commission (the “Commission”), *and can even engage in fraudulent conduct on U.S. soil*, yet cannot be held liable in U.S. courts to the victims of their fraud.

U.S. investors previously were permitted to bring Exchange Act claims when they were victimized by fraudulent acts committed in the U.S., even if committed by foreign companies (e.g., Vivendi, Royal Dutch Shell, and Parmalat). Trial and appellate-level courts around the country had recognized the availability of an Exchange Act remedy to American investors – and some had extended that remedy to foreign investors – in such situations. For example, the U.S. Court of Appeals for the Second Circuit permitted investors to pursue Exchange Act claims against wrongdoers whose misconduct “occurred in the United States” or “had a substantial effect in the United States or upon United States citizens.” S.E.C. v. Berger, 322 F.3d 187, 192-193 (2d Cir. 2003).²

¹ For example, Vivendi Universal, S.A. – a company that a jury found liable under Section 10(b) for making 57 fraudulent statements to investors, and whose shares are listed on an overseas exchange – now seeks to overturn that verdict, asserting that Morrison “must result in dismissal of any claim arising under Section 10(b) based upon a transaction in a Vivendi security not listed on an American exchange.”

² Although a trial court in Anwar v. Fairfield Greenwich, Ltd., 2010 U.S. Dist. LEXIS 86716 (S.D.N.Y. 2010) permitted discovery to determine whether plaintiffs’ purchase of offshore funds occurred in the U.S. under the new transactional test, the Morrison progeny makes plain that “as a general matter, a purchase order in the United States for a security that is sold on a foreign exchange is insufficient to subject the purchase to the coverage of Section 10(b) of the Exchange Act.” Plumbers Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., et al., 1:08-cv-01958 (S.D.N.Y. 2010); *see also* Cromwell v. Credit Suisse Group, 2010 U.S. Dist. LEXIS 76543 (S.D.N.Y. 2010) holding that “the Supreme Court roundly (and derisively) buried the venerable ‘conduct or effect’ test” and any attempt to limit the transactional approach – even in a situation where the investment decision and initiation of a purchase of foreign securities occurred in the U.S. – was an attempt “to exhume and revive the body.” Indeed, not

The Honorable Christopher J. Dodd
The Honorable Richard C. Shelby
The Honorable Barney Frank
The Honorable Spencer Bachus
Page 3

Now, not only will retirees be left without a remedy if they are defrauded by a foreign issuer, this nation's institutional investors, including public pension funds and their beneficiaries, also will be left without a remedy. Indeed, there are several other unintended consequences.

First, investors will be denied the right to recover billions of dollars lost due to fraud by the numerous foreign companies that list their shares outside the U.S., yet are also able to solicit the purchase of such shares from U.S. investors, thereby building their businesses and profiting from U.S. investors. Such companies include BP, Toyota, and countless others that are held in the portfolios of many American investors.

Second, because these companies will not be subject to civil liability under Section 10(b), as American companies are, they will be able to commit fraud within our borders with virtual impunity, and the United States will become a safe haven for securities fraud committed by foreign companies.

Third, the lack of a remedy under U.S. law in U.S. courts may make U.S. investors more wary of diversifying their portfolios, because a purchase of stock that is not listed on a U.S. exchange will not carry with it the same legal safeguards as a purchase of U.S.-listed stock. Most investment professionals agree that diversification is the most important component of reaching long-range financial goals while minimizing risk. Particularly in light of today's difficult economy, the government should be encouraging, not discouraging, diversification.

Fourth, to the extent American investors, especially major institutional investors, elect to reallocate their foreign portfolios to U.S. listed securities in order to retain their legal remedies under the U.S. securities laws, American investors will likely incur substantial and significant transaction costs that could not have been contemplated at the time of purchase.

Given the important mission of pension funds and their need to diversify, it is crucial that they not be denied the right to recover for losses caused by fraud on securities purchased on a foreign exchange, or otherwise be compelled to accept an investment alternative with characteristics less well suited to the rigors of proper asset allocation. In the case of public pension funds, any shortfalls associated with these frauds will ultimately and unjustly be shouldered by U.S. retirees and taxpayers.

only have the trial courts of the Second Circuit strictly and broadly applied the holding in Morrison (see Scalambo v. McKenzie, 2010 U.S. Dist. LEXIS 79688 (S.D.N.Y. 2010); Terra Secs v. Citigroup, Inc., 2010 U.S. Dist. LEXIS 84881 (S.D.N.Y. 2010), so too have the Eleventh Circuit trial courts. See Quail Cruises Ship Management Ltd. v. Agencia De Viagens CVC Tur Limitada, 2010 U.S. Dist. LEXIS 79445 (S.D.Fla. 2010) (designation of defendants' law office located in the U.S. as the place of closing the transaction of a purchase of foreign shares is insufficient to meet the transactional test); In re Banco Santander Securities-Optimal Litigation, 2010 U.S. Dist. LEXIS 87686 (S.D.Fla. 2010) (plaintiffs' purpose in buying foreign securities "in connection with" Madoff's investment fund, which purported to hold securities listed on the American stock exchanges, is insufficient to meet the transaction test as enunciated in Morrison).

The Honorable Christopher J. Dodd
The Honorable Richard C. Shelby
The Honorable Barney Frank
The Honorable Spencer Bachus
Page 4

Remedy

Foreign issuers who sell their securities to Americans and/or do business in this country should be subject to civil liability under the Exchange Act regardless of where they choose to list those securities.

Fortunately, there is a simple means by which to accomplish this. The Supreme Court in Morrison made clear that U.S. courts do not lack jurisdiction to hear the claims of investors defrauded by foreign companies. Instead, the Court merely stated that Congress has not explicitly made such claims part of the Exchange Act (despite decades of precedent allowing such claims). Congress can correct this situation by explicitly making such claims part of the Exchange Act. Specifically, Congress should amend the Exchange Act to adopt the approach previously endorsed by the Second Circuit, representing decades of jurisprudence, to give investors the ability to sue in the United States to redress corporate fraud under Section 10(b) when conduct occurring within the United States was a significant step in furtherance of the fraud, or had a substantial effect in the United States or upon United States citizens. Such an amendment would simply provide investors with the ability to pursue claims that is co-extensive with the enforcement jurisdiction afforded to the Commission and the Department of Justice under the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act.³ This amendment should be made applicable to pending cases involving fraud occurring prior to its adoption to close the gap in coverage that might otherwise exist.

³ The Act extends to U.S. District Courts jurisdiction over actions brought by the Commission or the United States alleging violations of Section 10(b) to “(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.”

The Honorable Christopher J. Dodd
The Honorable Richard C. Shelby
The Honorable Barney Frank
The Honorable Spencer Bachus
Page 5

Sincerely,

The Retirement Systems of Alabama
Montgomery, Alabama

California State Teachers' Retirement System
Sacramento, California

California Public Employees' Retirement
System
Sacramento, California

Public Employees' Retirement Association
of Colorado
Denver, Colorado

State Board of Administration of Florida
Tallahassee, Florida

Office of the New York State Comptroller
Common Retirement Fund
Albany, New York

New York City Employees' Retirement System
Teachers' Retirement System of the City of New York
New York Fire Department Pension Fund
Board of Education Retirement System of the City of New York
New York, New York

North Carolina Retirement System
Raleigh, North Carolina