From:	Jay Chaudhuri
Sent:	Friday, February 18, 2011 1:07 PM
To:	rule-comments@sec.gov
Cc:	Susan Clare-Benjamin; Lee, Tom; Andrew Holton; Vance Holloman; Kara Petteway; Shelton, Ken; Baddour, David
Subject:	S7-45-19
Attachments:	Letter from Jay Chaudhuri to Elizabeth Murphy re letters from the ST dated 2-22-2011.pdf; Chair of LGC Letter from Janet Cowell to Elizabeth Murphy dated 2-22-2011.pdf; Chair of IAC and SRBOT Letter from Janet Cowell to Elizabeth Murphy dated 2-22-2011.pdf
Importance:	High

Dear Mrs. Murphy:

You will find attached two separate comment letters from the State Treasurer of the State of North Carolina due to her role as Chair of the North Carolina Local Government Commission ("LGC"), Investment Advisory Committee ("IAC"), and Supplemental Retirement Board of Trustees ("SRBOT"). In addition, we are submitting paper comments in triplicate today via Federal Express.

The first comment letter expresses her view as Chair of LGC. As you will note, this view has also been endorsed by numerous other entities, including the North Carolina Housing Financing Agency, the Board of Governors of the University of North Carolina, North Carolina Medical Care Commission, and North Carolina State Ports Authority. The second comment letter sets out the State Treasurer's view as Chair of the IAC and SRBOT.

Thank you for the opportunity to present these views. If you have any questions, please do not hesitate to contact me.

Sincerely yours,

Jay J. Chaudhuri
General Counsel & Senior Policy Advisor
Department of State Treasurer
325 North Salisbury Street
Raleigh, North Carolina 27603-1385
(919) 508-5176 (phone)
(919) 508-5167 (fax)
www.nctreasurer.com

NORTH CAROLINA

OFFICE OF THE TREASURER

JANET COWELL, TREASURER

February 22, 2011

Mrs. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Dear Mrs. Murphy:

You will find attached two separate comment letters from the State Treasurer of the State of North Carolina due to her role as Chair of the North Carolina Local Government Commission ("LGC"), Investment Advisory Committee ("IAC"), and Supplemental Retirement Board of Trustees ("SRBOT").

The first comment letter expresses her view as Chair of LGC. As you will note, this view has also been endorsed by numerous other entities, including the North Carolina Housing Financing Agency, the Board of Governors of the University of North Carolina, North Carolina Medical Care Commission, and North Carolina State Ports Authority. The second comment letter sets out the State Treasurer's view as Chair of the IAC and SRBOT.

Thank you for the opportunity to present these views. If you have any questions, please do not hesitate to contact me.

Sincerely,

Jay J. Chaudhuri
General Counsel & Senior Policy Advisor

325 NORTH SALISBURY STREET, RALEIGH, NORTH CAROLINA 27603-1385 · (919) 508-5176 · FAX (919) 508-5167
WWW.NCTREASURER.COM

NORTH CAROLINA

OFFICE OF THE TREASURER

JANET COWELL, TREASURER

February 17, 2011

Mrs. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number S7-45-10

This letter is in response to proposed Rule 15B(a)(1) of the Securities and Exchange Commission regarding a permanent registration regime with the Securities and Exchange Commission (the "Commission") for municipal advisors and record keeping requirements on such advisors. In particular, this letter is in response to the interpretation of the Commission set forth in Release Number 34-63576, (the "Release"), and the request of the Commission for comments thereon.

I. Background.

The undersigned is the State Treasurer of the State of North Carolina, elected to such office by a vote of the people of the State of North Carolina. As State Treasurer, the undersigned is also the head of the Department of State Treasurer, a constitutional and statutorily-created office within the executive branch of the State of North Carolina. Customarily, the Department of State Treasurer has played the lead role in executing most bond issues and other financings by the State. In addition, the State Treasurer is the Chairman of the North Carolina Local Government Commission (the "LGC"), a statutorily-created commission of the State that is responsible for oversight of almost all local government bond issues and other financings and many bond issues and other financings by State agencies and departments.

In addition to the views of the Department of State Treasurer, the views set forth in this letter have been endorsed and are supported by:

- North Carolina Local Government Commission.

- North Carolina Housing Finance Agency, a State agency empowered by law to issue bonds to provide financing of housing for persons of low and moderate income within the State.

SSR-001904

- The Board of Governors of the University of North Carolina, the governing body of the 16-campus State University system, empowered by law to issue revenue bonds to finance improvements on the campuses of the University.

- North Carolina Medical Care Commission, a State commission empowered by law to issue bonds to provide financing of private healthcare facilities within the State.

- The North Carolina Capital Facilities Finance Agency, a State agency empowered by law to issue bonds to finance improvements for private colleges and universities within the State and certain other types of projects.

- North Carolina Municipal Power Agency No. 1 and North Carolina Eastern Municipal Power Agency, joint agencies created by municipalities located within the State and empowered by law to issue bonds to finance the cost of power generating and other facilities used by such municipalities in providing public power.

- North Carolina State Ports Authority, a State agency empowered by law to operate the State ports and issue bonds to finance the costs of port facilities within the State.

- North Carolina State Education Assistance Authority, a State agency empowered by law to issue revenue bonds to finance costs of higher education for North Carolinians and students enrolled in higher education institutions in the State.

- Raleigh-Durham Airport Authority, a public instrumentality and agency created to own and operate an airport to serve the Triangle Region of North Carolina and empowered to issue bonds for such purpose.

- Piedmont Triad Airport Authority, a public instrumentality and agency created to own and operate an airport serving the Piedmont Triad area of the State and empowered to issue bonds for such purpose.

The governing bodies of each of the entities endorsing and supporting the comments set forth herein are composed of members who were not elected to the governing body by the voters, with the exception of certain members of the LGC who are elected officials serving in an *ex officio* capacity. Such non-voter elected members of governing bodies assume their positions through a variety of processes established by North Carolina law, including appointment by an elected official (such as the Governor), election by a governing board comprised of elected officials (such as a City Council or Board of County Commissioners), *ex officio* membership based on appointment by public officials to other positions within State or local government and membership by election by persons holding appointive office.

II. Members of governing bodies of municipal entities, whether elected or appointed, should not be treated as "municipal advisors".

In the Release, the Commission sets forth the proposed rule for registration of municipal advisors pursuant to the requirements of the Dodd-Frank Act, together with the Commission's interpretive commentary regarding, among other things, what entities should properly be excluded from these requirements.

Dodd-Frank defines a "municipal advisor" expansively, including not only those entities playing the role of what is commonly referred to in municipal bond transactions as the "financial advisor," but also including others that provide advice "with respect to the structure, timing, terms and other similar matters" concerning a municipal bond issue. While the definition is clearly designed to cover a universe larger than a formal "financial advisor" for a bond issue, it is also apparent that not every person covered by this broad definition was to be covered by the new requirements for municipal advisors.[1]

The definition of "municipal advisor" provides that such term means a person "who is not a municipal entity or an employee of a municipal entity" performing certain activities. Apparently, a commentator requested clarification from the Commission that the definition also excluded members of the governing board of the municipal entity in question. In the Release, the Commission took the view that the term "employees of a municipal entity" should include any person serving as an elected member of the governing body of the municipal entity within its meaning, but the term excludes appointed members of the governing body.

I wish to express our disagreement with this interpretation.

First, I do not believe that the registration and other requirements imposed by Dodd-Frank on municipal advisors were ever intended by Congress to apply to the governing body of the municipal entity. The purpose of this provision of Dodd-Frank appears to have been to establish federal regulatory oversight over financial institutions and professionals that are advising the municipal entities, who are acting through their governing bodies. All of the North Carolina entities referred to above act through actions of their governing boards. When a municipal advisor is advising a municipal entity, it is advising the people on the governing board of that entity. Therefore, saying that the governing board members might be a municipal advisor means that one person could at one time be both the advisor and advisee. Clearly, this would not be the result Congress intended. It would seem that it should be perfectly acceptable for the Commission to take the view that when Congress excluded the municipal entity itself and its employees from being a "municipal advisor," it intended that exclusion to cover the governing body of that municipal entity.

[1]Many States have procedures for public hearings and other input on municipal bond issues (such hearings are also often required by federal tax laws). Members of the general public will often offer their advice regarding the structure, timing, terms and even the wisdom of the bond issue during such proceedings (and are encouraged to do so)—yet no one would seriously argue that such activity would make those participants a "municipal advisor" within the meaning of Dodd-Frank. Thus, clearly the Commission must have some room for discretion in determining who should be covered by the requirement.

Second, I do not believe that the distinction drawn between a governing body's elected and appointed members is a rational one. While elected members are directly answerable to their voters, the laws of our State (and, I suspect, the laws of other states) set forth the duties of the members of any such governing body regardless of whether they are elected or appointed. Governing board members, whether elected or appointed, typically must take an oath of office to faithfully execute the constitution and laws of the State, which include laws restricting acting when there is a conflict of interest. Many members of these governing bodies are subject to conflict of interest reporting requirements and a broad base of ethics rules that include continuing education on State ethics laws. Furthermore, all of these bodies are subject to the requirements of our State's open meetings laws, under which members of the press and general public have the absolute right to attend and observe public business taking place, and the State's public records law, under which almost all documents of these agencies (certainly all documents involving bond issues) are subject to inspection by anyone who requests that they be made available. Therefore, although appointed members are not directly answerable to the voters, it is not as if such members are without regulation at the State level. Finally, I note that throughout the federal government, there are numerous bodies (including the Commission) that are governed by persons not elected to their offices by the voters. No one would suggest that these various non-elected officials would fail to faithfully execute the responsibilities of their offices because they are not directly answerable to the voters (or that there are not adequate legal ramifications that can address the failure to do so).

Third, I question whether subjecting appointed members of governing bodies to the registration requirements, record-keeping requirements and other requirements imposed by the new rules would carry out the purpose for which the Dodd-Frank Act intends to regulate. The purpose of the legislation (and the Commission's actions carrying out that legislation) was to set up a regime of regulation for members of the financial services industry offering their services to the municipal entities. Requiring numerous public-spirited (and usually uncompensated) volunteers to register with the Commission, pay the various registration fees, and maintain the records by the regulations does not advance that legislative objective.

II. Members of State appointed commissions, authorities, and other organizations with oversight responsibility for municipal entity borrowings should not be municipal advisors.

In addition to the concerns set forth above regarding whether members of the governing boards of municipal entities should be treated as municipal advisors, there is a particular situation in North Carolina, which may be repeated at some level in other states, that should be expressly excluded from the rule.

Many years ago, the North Carolina Legislature created the LGC as a State-level commission with oversight over most matters of finance for local governments within our State, including the issuance of bonds and other financings. We believe that this State-level regulatory system has served our State well, by providing an independent State-level review of all local government borrowings. Over time, the oversight of the LGC has been extended to many (though not all) State agencies and departments that may incur debt. The findings that the LGC must make in order to approve a bond issue or other financing under its jurisdiction are

established by law (and include requirements of feasibility and suitability, evidence that the entity incurring the debt is conducting its financial affairs responsibly, certain requirements regarding the projects to be financed, and other credit-quality-related findings). The actions the LGC members undertake could be taken as advising the municipal entity regarding its bond issue – the LGC imposes various guidelines and requirements regarding bond issue size, security structures, length of maturities, acceptable ranges of interest rates and other terms of the bond issues it approves on a regular basis.

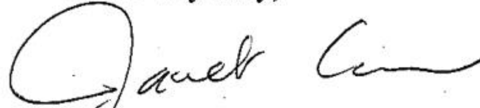
Our office is concerned that the term "municipal advisor" as described in the Release would cover members of the LGC in carrying out their statutory responsibilities. Further, if a change to the SEC's interpretation as set forth in the Release is made to exclude all members of a governing board from being a municipal advisor, whether elected or appointed, that exclusion would not apply to the LGC members because the LGC, while maintaining supervisory authority over the local government borrowing, is not the governing board of the municipal entity.

We therefore would request a further interpretation to the effect that the definition of "municipal advisor" does not include persons carrying out their duties within a regulatory scheme established pursuant to State law.

III. Conclusion.

Thank you for the opportunity of presenting these views. If you have any questions or seek any clarification on the thoughts set forth in this letter, please feel free to give a call to the undersigned.

Yours very truly,



Janet Cowell
State Treasurer, State of North Carolina

NORTH CAROLINA

OFFICE OF THE TREASURER

JANET COWELL, TREASURER

February 22, 2011

Mrs. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number S7-45-10

This letter is in response to proposed Rule 15B(a)(1) of the Securities and Exchange Commission regarding a permanent registration regime with the Securities and Exchange Commission (the "Commission") for municipal advisors and record keeping requirements on such advisors. In particular, this letter is in response to the interpretation of the Commission set forth in Release Number 34-63576, (the "Release"), and the request of the Commission for comments thereon.

I. Background.

The undersigned is the State Treasurer of the State of North Carolina, elected to such office by a vote of the people of the State of North Carolina. As State Treasurer, the undersigned is also the head of the Department of State Treasurer, a constitutional and statutorily-created office within the executive branch of the State of North Carolina.

The General Assembly of the State of North Carolina has established by statute an Investment Advisory Committee ("IAC") to advise the State Treasurer with respect to investments of the Teachers' and State Employees' Retirement System, the Local Government Employees' Retirement System, the Legislative Retirement System, the Firemen's and Rescue Workers' Pension Fund, the Consolidated Judicial Retirement System, and the North Carolina National Guard Pension Fund (hereinafter referred to collectively as the "Retirement Systems"). As stated in the IAC Charter, among other things, the IAC is responsible for advising and assisting the State Treasurer in the following areas: assisting in selection and evaluation of the Chief Investment Officer; self-assessment of the IAC; reviewing and recommending investment policies; reviewing asset allocations; reviewing and commenting on investment manager structure; reviewing and evaluating the selection and monitoring of investment managers; reviewing the performance review of the Retirement Systems; reviewing and evaluating the custodian arrangement; and evaluating the selection of investment consultants.

325 North Salisbury Street, Raleigh, North Carolina, 27603-1385 • (919) 508-5176 • Fax (919) 508-5167
www.nctreasurer.com

Under the IAC Charter, IAC members do not owe any fiduciary, trust, or similar obligation in connection with their membership on the IAC other than the duty to act in good faith and as expressly set forth in the IAC Charter and applicable law and policies. In addition to the Charter, the State Treasurer has adopted a Code of Ethics setting forth standards of conduct for members of the IAC. Members of the IAC are required to sign an affirmation pledging to uphold both the letter and the spirit of the Code of Ethics. Meetings of the IAC are held in compliance with North Carolina open meetings law. IAC members serve without compensation (although they do receive reimbursements for out-of-pocket expenses and allowances consistent with those granted to members of other State boards).

Separately, the General Assembly of the State of North Carolina has established by statute the Supplemental Retirement Board of Trustees ("SRBOT"), to administer the Supplemental Retirement Income Plan and the North Carolina Public Employee Deferred Compensation Plan (collectively, the "Supplemental Plans"). Of its nine members, eight are appointed (six by the Governor and two by the General Assembly). The final member of the SRBOT is the State Treasurer, who is the Chairman of the SRBOT and serves *ex officio*. The SRBOT has fiduciary responsibility for the Supplemental Plans; its duties are to manage all aspects of the Supplemental Plans, including the receipt, maintenance, investment and disposition of all Supplemental Plan assets. The appointed members serve without compensation (although they do receive reimbursements for out-of-pocket expenses and allowances consistent with those granted to members of other State boards).

II. Members of statutorily created volunteer advisory boards of municipal entities should not be treated as "municipal advisors".

In the Release, the Commission sets forth the proposed rule for registration of municipal advisors pursuant to the requirements of the Dodd-Frank Act. The Release includes the Commission's interpretive commentary regarding, among other things, which entities should properly be excluded from these requirements. Under the Commission's proposed rule, a "municipal advisor" would include those entities that advise municipal entities on investment strategies and the management of public monies. Dodd-Frank explicitly excludes from such definition (i) municipal entities and (ii) employees of municipal entities.

The Release notes that the Commission is proposing to interpret the exclusion for employees of municipal entities to extend only to elected members of the governing body of the municipal entity, and not to appointed members of the municipal entity's governing body (unless such appointed members are *ex officio* members of the governing body by virtue of holding an elective office). The Commission requests comment on whether these distinctions are appropriate and further on whether there are other persons associated with municipal entities who might not be "employees" of the municipal entity that the Commission should exclude from the definition of municipal advisor.

I have responded in a separate letter stating my position that (i) the registration and other requirements imposed by Dodd-Frank on municipal advisors was not intended by Congress to apply to the governing body of a municipal entity, (ii) the distinction between elected and appointed members of the governing body of a municipal entity is not rational, and (iii) requiring

appointed members of governing bodies of municipal entities to comply with the registration, record-keeping and other requirements imposed by the new rules is inconsistent with the legislative objectives of Frank-Dodd.

I write separately here to suggest that members of statutorily created volunteer advisory boards of municipal entities also should be excluded from the definition of "municipal advisor."

Frank-Dodd defines the term "municipal entity" to mean "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including… any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality…." Clearly, the Department of State Treasurer is (itself) a municipal entity under this definition. Like many other states, the General Assembly of the State of North Carolina has made a legislative determination that the Department of State Treasurer would benefit from the advice of an independent advisory board. While the IAC in North Carolina has no actual governing authority within the Department of State Treasurer, it does act as a sounding board and filter for the Department, shaping and influencing its decisions and activities. In that respect, the IAC is analogous to a governing board. And just as when a municipal advisor is advising a municipal entity it is advising the individuals on the governing board of such municipal entity, by extension such municipal advisor is also advising the individuals on any advisory board of such municipal entity. Saying that the advisory board members are themselves municipal advisors would be saying that one person could at the same time be both the advisor and advisee. I do not believe Congress intended this result. Rather, it would seem perfectly acceptable for the Commission to take the view that when Congress excluded the municipal entity itself and its employees from the definition of "municipal advisor," it intended that exclusion to cover not only the governing body of that municipal entity, but also any advisory boards of such municipal entity that the state legislature deemed important enough to create by statute.

Such an interpretation would be entirely consistent with the legislative purpose of Dodd-Frank, which was to establish a regime of regulation for members of the financial services industry offering their services to municipal entities. Interpreting Dodd-Frank to require the imposition of this new regulatory regime on statutorily-created volunteer advisory boards such as the IAC would be inconsistent with this legislative objective and could have a devastating impact on such boards. It is unlikely that public-spirited and qualified (but uncompensated) volunteers would agree to register with the Commission and maintain the records required by the regulations, solely in order to serve on the IAC.

I request an interpretation of the legislation which would exclude statutorily created volunteer advisory boards of municipal entities from the definition of "municipal advisors," under the same rationale that governing bodies of municipal entities should be so excluded.

III. Members of the governing body of North Carolina's Supplemental Retirement Board of Trustees should not be treated as "municipal advisors."

As discussed briefly above and in greater detail in my separate letter, I reiterate here my belief that (i) the registration and other requirements imposed by Dodd-Frank on municipal advisors was not intended by Congress to apply to the governing body of a municipal entity,

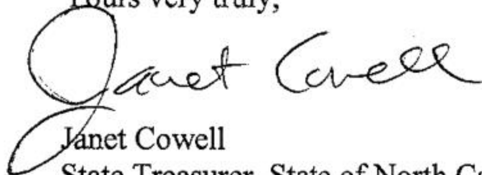
(ii) the distinction between elected and appointed members of the governing body of a municipal entity is not rational, and (iii) requiring appointed members of governing bodies of municipal entities to comply with the registration, record-keeping and other requirements imposed by the new rules is inconsistent with the legislative objectives of Frank-Dodd.

I request an interpretation of the legislation which excludes all members of the governing body of the SRBOT from the definition of "municipal advisors."

IV. Conclusion.

Thank you for the opportunity of presenting these views. If you have any questions or seek any clarification on the thoughts set forth in this letter, please feel free to give a call to the undersigned.

Yours very truly,



Janet Cowell
State Treasurer, State of North Carolina

From:	Rule-Comments <Rule-Comments@SEC.GOV>
Sent:	Friday, February 18, 2011 1:08 PM
To:	Jay Chaudhuri
Subject:	Thank you for your comment

Thank you for submitting a comment to the U.S. Securities and Exchange Commission. This auto-reply is your notification that we received your comment letter. The SEC will post all comments on the SEC's Internet Web site (http://www.sec.gov/). Comments will also be available for public inspection and copying in the SEC's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00pm. 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. We generally post comments within 2 to 3 business days after we receive them electronically. Also, please review our privacy policy at http://www.sec.gov/privacy.htm.

If you are an investor, check out the "Investor Information" section of our website, at http://www.sec.gov/investor.shtml, to find helpful information and tools. If you have a securities-related question, please visit our website at http://www.sec.gov/answers.shtml to find fast answers to your questions and solutions to common investment problems. If you are a securities professional needing assistance on technical matters, please check the "SEC Divisions" and "Information For" pages on the top right of our website, www.sec.gov.

We appreciate your taking the time to communicate your thoughts on our proposed rules.

Sincerely,

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission

SSR-001913

From: Jay Chaudhuri
Sent: Friday, February 18, 2011 1:28 PM
To: rule-comments@sec.gov
Subject: File Number 4-617

Dear Mrs. Murphy:

We are submitting this comment letter on behalf of U.S. public pension funds with assets under management of more than $720 billion. If you have any questions, please do not hesitate to contact me.

Sincerely,

Jay J. Chaudhuri
General Counsel & Senior Policy Advisor
Department of State Treasurer
325 North Salisbury Street
Raleigh, North Carolina 27603-1385
(919) 508-5176 (phone)
(919) 508-5167 (fax)
www.nctreasurer.com

Letter to Elizabeth Murphy re....

California State Teachers' Retirement System • Colorado Public Employees' Retirement System • Delaware Public Employees' Retirement System • State Board of Administration of Florida • North Carolina Department of State Treasurer • Connecticut Treasurer's Office • Maryland State Retirement and Pension System • Pennsylvania Public School Employees' Retirement System • Rhode Island General Treasurer • Pennsylvania State Employees' Retirement System • New York City Employees' Retirement System • New York City Police Pension Fund • 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 • Pension Reserves Investment Management Board Commonwealth of Massachusetts

February 18, 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:

The undersigned are public pension funds managing assets of approximately $720 billion as of December 31, 2010. We submit the following comments in response to Release No. 34-63174 of the Securities and Exchange Commission ("SEC" or "the "Commission"), which seeks comments regarding the impact of and changes to the U.S. securities laws that may be required as a result of the decision of the United States Supreme Court in *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010) ("*Morrison*"). We request that the SEC make a finding that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and the rules and regulations promulgated thereunder, including SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"), and other provisions of the Exchange Act, should be applicable to all purchases and sales of securities by financial institutions located in the United States and individuals or entities who are resident in the U.S. (collectively "U.S. Investors") and that, accordingly, the Commission recommend to the U.S. Congress that the Exchange Act be so amended.

This would effectively re-establish the long-standing and easy to apply pre-*Morrison* interpretation of the Exchange Act under which U.S. Investors were afforded the protection of the laws of the United States in connection with their purchases and sales of securities. Because all that is being requested is the application of U.S. laws to protect U.S. Investors, no unique international comity or economic cost-benefit concerns apply.

I. THE DECISION IN *MORRISON* HAS NEGATIVELY IMPACTED U.S. INVESTORS

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 noted that unless there is the "affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is **primarily concerned with domestic conditions**." *Morrison,* 130 S. Ct. at 2877-78 (emphasis added). The Court then examined the language and history of Section 10(b) of the Exchange Act and concluded that it should not be applied extraterritorially. *Id.* at 2881-83. The Court held that "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.

Commenting on the approach of the majority, Justice Stevens' concurrence in *Morrison* noted the potential negative impact of the Court's ruling on U.S. Investors' claims:

> 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.

Morrison, 130 S.Ct. at 2895 (Stevens, J., concurring). In fact, the results imagined by Justice Stevens quickly have come to pass. Since June, 2010, a number of cases alleging violations of the federal securities law on behalf of U.S. investors have been dismissed.

- *Cornwell v. Credit Suisse Group*, 2010 U.S. Dist. LEXIS 76543, 2010 WL 2069597 (S.D.N.Y. July 27, 2010), addressed Section 10(b) claims brought on behalf of all investors who had purchased Credit Suisse Group ("CSG") securities traded on the Swiss Stock Exchange ("SWX") or CSG ADSs traded on the New York Stock Exchange ("NYSE"). Defendants moved to dismiss claims concerning the purchases of shares on the SWX as barred by *Morrison.* The lead plaintiff, a U.S. investor, contended that its claims were not barred because it "made an investment decision and initiated a purchase of CSG from the U.S." and "took the CSG stock into its own account in the U.S. and incurred an economic risk in the U.S." 2010 U.S. Dist. LEXIS 76543, at *6. The court dismissed plaintiffs' claims and stated that the *Morrison* Court established a "new bright-

line transactional rule" and "was entirely aware that its new test would preclude extraterritorial application of § 10(b) to foreign securities transactions involving alleged wrongful conduct that could cause harm to American investors in the United States, or that entail occurrence of some acts in the United States in furtherance of [a] purchase or sale." *Id.* at **11, 18.

- *In re Alstom SA Sec. Litig.*, 2010 U.S. Dist. LEXIS 98242, 2010 WL 3718863 (S.D.N.Y. Sept. 14, 2010), involved claims brought primarily on behalf of U.S. investors who had purchased Alstom SA ("Alstom") shares traded on non-U.S. exchanges and Alstom American Depository Receipts ("ADRs") traded on the NYSE. The court considered *Morrison* after earlier certifying a class consisting primarily of U.S. investors who had purchasing ADRs and common shares on certain non-U.S. exchanges. Post-*Morrison*, the court dismissed the claims of U.S. investors who had purchased Alstom common shares. 2010 U.S. Dist. LEXIS 98242, at *17.

- In *In re Societe Generale Sec. Litig.*, 2010 U.S. Dist. LEXIS 107719, 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) plaintiffs brought claims on behalf of U.S. investors who had purchased Societe Generale shares traded on the EuroNext or Societe Generale ADRs traded on the over-the-counter market in the United States. Defendants argued that *Morrison* barred claims based on the EuroNext stock, while plaintiffs argued that these purchases were "domestic purchases" because the transactions involved "United States investors purchas[ing] foreign securities in the United States, even if the securities happen to be listed on a foreign exchange." 2010 U.S. Dist. LEXIS 107719, at **15-16. The court was unconvinced by plaintiffs' argument and dismissed the EuroNext claims. Going beyond previous cases, however, the court also *sua sponte* dismissed an American pension fund's claims concerning ADR purchases on the grounds that trades in Societe Generale's ADRs, which were traded over-the-counter in the United States, are "predominantly foreign" transactions. *Id.* at *20.

- In *Elliott Associates LP v. Porsche Automobil Holding SE*, Case No. 1:10-cv-00532, Doc. No. 52 (S.D.N.Y. Dec. 30, 2010), American hedge funds brought claims alleging that Porsche misrepresented its intention to take over Volkswagen ("VW") and concealed its acquisition of VW stock. Plaintiffs had entered into swap agreements which referenced VW stock that was traded on German stock exchanges. Despite the fact that the swap agreements were entered into in New York, the court found that plaintiffs' claims were barred by *Morrison*. Specifically, the court concluded that the "swaps were the functional equivalent of trading the underlying VW shares on a German exchange" and "are essentially 'transactions conducted upon foreign exchanges and markets.'" *Id.*, at 12. Moreover, the court concluded that *Morrison*'s definition of a "domestic transaction" did not apply to swap agreements, like those in this case, "where only the purchaser is located in the United States." *Id.* at 13.

Morrison and its recent progeny increasingly are making it clear that the antifraud protections of the Exchange Act will not be extended to those U.S. Investors 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. 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 Commission, *and can even engage in fraudulent conduct on U.S. soil,* yet cannot be held liable under U.S. law to the victims of their fraud. This situation is inconsistent with the law prior to *Morrison* and, for the reasons noted below, should be reversed.

II. A PRIVATE RIGHT OF ACTION FOR SECURITIES FRAUD SHOULD BE AVAILABLE TO U.S. INVESTORS

The threshold question here is whether a private right of action for securities fraud should be available to U.S. Investors regardless of where they purchase or sell securities. The answer historically was, and should continue to be, that all U.S. Investors are afforded the protection of U.S. laws.

A. PRIOR TO *MORRISON,* THE LAW WAS UNCONTROVERTED THAT U.S. INVESTORS WERE PROTECTED BY THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS, REGARDLESS OF THE NATIONALITY OF THE COMPANIES IN WHICH THEY INVESTED OR THE LOCATIONS WHERE THEIR SECURITIES TRANSACTIONS WERE EFFECTUATED

Pre-*Morrison*, courts had found that there could be extraterritorial application of the Exchange Act where U.S interests were affected. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991). In examining this issue, courts historically employed two tests, known as the "conduct test" and the "effects test," to determine whether "wrongful conduct had a substantial effect in the United States or upon United States citizens." *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-122 (2d Cir. 1995).[1]

Where the plaintiff was a U.S. entity, courts almost universally agreed that the U.S. securities laws were applicable, regardless of the nationality of the defendant(s) or the place where the transaction was effectuated.[2] Beginning in the seminal case of *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975), Judge Friendly held that "the anti-fraud provisions of the federal securities laws '[a]pply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of

[1] Through longstanding jurisprudence, courts concluded that "the effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 & n.12 (2d Cir. 1998).

[2] *But see Cornwell v. Credit Suisse Group*, 2009 WL 3241404 (S.D.N.Y. 2009), where the court concluded that he had "no information whether [plaintiffs] were United States residents." *Id.* at *13. However, he stated: "Even if they were, the Court cannot conclude that [they] have demonstrated the required effects on United States investors." *Id.*

material importance occurred in this country....'" In 1987, the U.S. Court of Appeals in the District of Columbia agreed with *Bersch*, noting that a United States court would have jurisdiction to hear a 10b-5 fraud claim "whenever any individual is defrauded in this country, regardless of whether the offer originates somewhere else." *Zoelsch v. Arthur Andersen & Co.,* 824 F.2d 27, 33 n.4 (D.C. Cir. 1987). The D.C. Circuit later explicitly held "that when a resident of the United States is allegedly defrauded in the United States in connection with the sale of securities, the courts of the United States have jurisdiction under the 1934 Act." *Securities Exchange Commission v. Banner Fund International,* 211 F.3d 602, 609 (D.C. Cir. 2000); *see also In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 346, 370 (S.D.N.Y.2005) (in a decision prior to the *Morrison* case, the court held that it has jurisdiction over the claims of domestic shareholders and may adjudicate their rights).

On the other hand, where the actual plaintiff was not a U.S. entity, under prior case law, the courts often found that the U.S. securities laws were inapplicable solely under the "effects" test.[3] In *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1017 (2d Cir.1975), decided the same day as *Bersch* and also written by Judge Friendly, the Court addressed whether a foreign investment trust that had U.S. investors could satisfy the effects test. There, a foreign investment trust sued a corporation and individuals for selling allegedly fraudulent securities to the trust. Only .2% of the trust's fundholders -- about 300 investors -- were United States citizens and residents. Judge Friendly concluded that jurisdiction was lacking because the foreign trust was the only party defrauded:

> "In contrast to Bersch ... this day decided, **the fraud was practiced not on individual Americans who purchased securities but on the trust in which they had invested**.... We cannot believe that Congress would have intended the anti-fraud provisions of the securities laws to apply if [defendant] had defrauded a British investment trust by selling foreign securities to it simply because half of one per cent of its assets was held by Americans."

Id. at 1016-17 (emphasis added).

In sum, prior to *Morrison*, the law was clear – U.S. investors were afforded the protection of American law in connection with their purchases/sales of securities – regardless of the location where those transactions were eventually executed.

B. The Adoption Of The Dodd-Frank Act, By Reinstituting The Traditional Conduct And Effects Tests, Effectively Constitutes Recognition By Congress That U.S. Investors Should Be Subject To The Protection Of The U.S. Securities Laws

[3] In *Bersch,* the Second Circuit addressed the application of the effects test where some of the plaintiffs were foreign, and some were American. In that case, the court found that where acts within the United States had not directly caused the plaintiffs' losses (*i.e.* the conduct test had not been satisfied), the federal securities laws applied to losses from sales to Americans resident in the United States, but not to losses from sales to foreigners outside the United States. *See Bersch,* 519 F.2d 974.

Section 929P(b) ("Section 929P") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or the "Act") "largely codified the long-standing appellate court interpretation of the law that had existed prior to ... *Morrison* by setting forth an expansive conduct and effects test." SEC Release No. 63174, n.1. As explained above, the "effects" test, as it has been long interpreted, applies the anti-fraud provisions of the U.S. securities laws to U.S. Investors, regardless of where they may have purchased or sold shares. *See supra* Section I.A. There is no reason not to apply this test to private, as well as SEC-initiated, securities litigation.

Any arguments suggesting that a return to a pre-*Morrison* standard, particularly as that standard is applied to U.S. Investors, would transform the United States into the world's court are wholly without merit. Returning the federal legal regime applicable to U.S. Investors to the standards that applied pre-*Morrison* amounts to nothing more than a nation affording its citizens the benefits of its laws. Further, extending the benefits of the Exchange Act to U.S. Investors who complete transactions outside of the United States cannot and should not be equated to an attempt by a U.S. citizen who travels overseas and is injured there to obtain the benefit of U.S. laws for actions and injuries that occurred outside the United States. On the contrary, in virtually all cases under the rule proposed herein, the investment decision by a U.S. Investor will have been made in the U.S. and the purchase or sale transaction will have been initiated domestically. Further, to the extent that the U.S. investor is harmed by a transaction, that harm will have occurred in the United States. Under these conditions, choice of law principles would indicate that U.S. laws would apply. *See* Restatement of the Law Second Conflict of Laws 2d Chapter 7. § 145 ("(2) Contacts to be taken into account ... to determine the law applicable to an issue include: (a) **the place where the injury occurred** ....") (emphasis added). Thus, applying the federal securities laws to U.S. Investors' securities transactions is wholly consistent with long-standing legal principles.

Finally, it is irrational to expect government regulators (because of budgetary or other constraints) to uncover and prosecute all frauds. Restoring private litigants' rights to pre-*Morrison* levels, as Section 929P did for the Commission, simply provides investors the opportunity to assert claims on their own behalf, and to not rely entirely on government enforcement to remedy injuries. Of course, with respect to private litigants, and especially those seeking to bring class actions, all of the other safeguards already in place to filter out weaker actions would be unaffected by any of the proposed changes to the scope of Section 10(b). *See* 15 U.S.C. §78u-4(b) (setting forth, *inter alia*, heightened pleading requirements for private actions and establishing automatic stay of discovery). No additional rules to filter particular classes of private litigants are required.

III. AFFORDING U.S. INVESTORS THE PROTECTION OF THE U.S. SECURITIES LAWS FURTHERS THE SEC'S MISSION[4]

[4] This addresses the Commission's request that commenters -- "consider and analyze . . . (3) the economic costs and benefits of extending a private right of action for transnational securities frauds".

A. THE SEC'S MISSION OF PROTECTING INVESTORS IS ESSENTIAL TO PROMOTING THE EFFICIENT FUNCTIONING OF CAPITAL MARKETS

The primary purpose of the Exchange Act is protecting "the interests of investors." *See Morrison*, 130 S.Ct. at 2894 ("it is the 'public interest' and 'the interests of investors' that are the objects of the statute's solicitude") (Stevens, J., concurring). The SEC specifically recognizes this paramount aspect of its mandate, stating on its website that its mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." This tripartite mission is complementary, *i.e.*, it is recognized that increased investor protection necessarily enhances efficient markets and capital formation. *See* Mary Schapiro, Testimony before the House Financial Services Subcommittee (March 11, 2009) ("we must have a renewed commitment to protecting investors, as it is investors who provide the capital used to fund the productive enterprises that create jobs and wealth. While we have a tripartite mission at the SEC, investor protection is an essential piece from which our other responsibilities flow.").

The protection of investors provides substantial benefits to society at large by enhancing capital market efficiency. For example, David Ruder, former SEC chairman from 1987 to 1989 wrote a paper in 2005 discussing the interplay of investor protection and capital formation:

> *The federal securities statutes emphasize the need for corporate and market honesty and integrity as a means of protecting investors. They mandate adequate disclosure of information, prohibit dishonesty and fraud in the sale and purchase of securities, and require brokers, dealers, investment advisers and other market professionals to act in the best interests of investors.*
>
> ***Although the primary objective of requiring honesty is to protect investors, honesty also improves market efficiency. Honest markets will be more liquid, since investors will be more likely to risk their resources in an honest market. Additionally, since in a dishonest market investors will seek higher prices for securities as compensation for the risks of loss due to dishonesty, an honest market will facilitate the transfer of assets at lower prices, thereby lowering the cost of capital.***

David Ruder, "Balancing Investor Protection With Capital Formation Needs After the SEC Chamber of Commerce Case," 26 Pace Law Review 39, 41-42 (2005) (emphasis added).

The empirical evidence strongly supports the Commission's position that properly functioning financial markets require the protection of investors' rights. In a study for the World Bank in 2002, former Chairman of the Council of Economic Advisors Glenn Hubbard and others empirically established a strong positive correlation between investor protection and capital formation. The results of the study imply that policies aimed at strengthening

investor protection laws and their enforcement will improve capital formation and result in higher economic growth economy-wide. This link was found precisely because higher rates of insider equity ownership are strongly correlated with market inefficiencies. As investor protection is strengthened, firms can increasingly turn to outside investors to meet their capital needs. Conversely, if investor confidence is low due to weak investor protection, firms have a more difficult time raising capital from outsiders, and must increasingly resort to insiders to meet their capital needs, which is highly inefficient. The study concluded:

> *The weaker is investor protection, the higher is the concentration of inside equity ownership. And second, the higher is the concentration of inside ownership, the higher is the implied cost of capital.*

Charles P. Himmelberg, R. Glenn Hubbard and Inessa Love, "Investor Protection, Ownership, and the Cost of Capital," The World Bank Development Research Group, p. 38 (2002).

Thus, there should be no dispute that protecting investors provides critical benefits to the proper and efficient functioning of capital markets and must form an essential component of the securities regulatory regime in the United States. Accordingly, the only relevant question is whether protection of investors requires a private right of action. As shown below, court opinions and economic research strongly support the link between a private right of action, investor protection and the efficient operation of capital markets.

B. THE EXISTENCE OF A PRIVATE RIGHT OF ACTION IS ESSENTIAL TO THE PROTECTION OF INVESTORS' RIGHTS

The Commission has long-recognized the importance of a private right of action as a means of protecting the rights of investors. Giovanni P. Prezioso, General Counsel of the SEC, told the American Bar Association in 2004:

> *private securities litigation has always formed a major - **and essential** - component of the enforcement of the federal securities laws. **The Commission has long advocated private rights of action precisely because they supplement its own enforcement program in deterring misconduct.***

The Supreme Court itself also "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an ***essential supplement*** to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (private rights of action under the securities laws are a "**necessary**" supplement to Commission action.") (emphasis added). The Supreme Court has stated that this is especially true when it comes to actions under Section 10(b): "a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." *Herman & McLean v. Huddleston*, 459

U.S. 375, 380 (1983). In fact, even when limiting the scope of a private right of action to exclude aiding and abetting liability, the Supreme Court unequivocally recognized that the Congress has ratified and endorsed the existence of a private right of action for the enforcement of the securities laws:

> "Congress thus ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 , and n. 66 (1982); *cf. Borak, supra*, at 433. It is appropriate for us to assume that when §78u–4 was enacted, Congress accepted the §10(b) private cause of action as then defined…."

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 773 (2008).

Recent research provides significant support for the courts' longstanding support of a private right of action as an essential component of protecting investors and support the proper functioning of capital markets.[5] A recent study by academics in Europe provides evidence that individual firms that are the target of enforcement actions can also become more efficient as a result of the action, particularly when the violations are the result of violations of the duty of loyalty by management, such as accounting fraud or insider trading. This result recently was reported by Professor Rob Bauer at the Maastrict University School of Business and Economics in the Netherlands. Rob Bauer and Robin Braun, "Misdeeds Matter: Long-Term Stock Price Performance after the Filing of Class-Action Lawsuits," *Financial Analysts Journal*, Vol. 66, No. 6, (Nov./Dec. 2010).

Bauer and Braun examined the longstanding assumption that companies facing securities enforcement action, especially private litigation, by definition would experience long-term share price declines, as the truth of past false statements are disclosed, and the public loses confidence in management (and perhaps also in the core business model of the firm). They found, however, at least when the action relates to violations of the duty of loyalty (especially insider trading or accounting fraud), that share prices actually can benefit from an enforcement action:

> *In the case of insider trading, the filing of the lawsuit and reputational costs discipline the existing managers, or a more efficient and ethical management replaces them. In the latter case, new managers are aware of the lawsuit that their predecessors faced, and this information deters them from any self-dealing actions. . . .*

[5] This addresses the Commission's request that commenters -- "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."

> *We further documented shareholder wealth effects for companies that face accounting fraud allegations. . . . . [S]ubsequent to the disclosure of fraud (implicitly, the filing of the lawsuit in our case and, eventually, the final verdict), companies typically shed labor and capital to become more productive. . . . Therefore, institutional investors initiating or joining a class action lawsuit can, to some degree, expect substantial reorganizations in the sued company, which can result in medium- to long-term outperformance.*

Id. at 90.

Given the complementary role to government enforcement private litigation has historically played in the Section 10(b) context, to preclude private litigation where government actions are available would lead to a material deficiency in the enforcement of Section 10(b). If suddenly one aspect of 10(b) enforcement (protection of U.S. Investors in connection with their non-U.S. securities transactions) is reserved to the SEC, and private actions remain prohibited, this creates an artificial and indefensible inconsistency in the securities laws. Despite the SEC's and the Supreme Court's recognition of the necessary assistance provided by private litigation, an entire class of investors would be carved out of the securities laws and enforcement would be reserved to the SEC. Such a result is contrary to the mission of the SEC and the established record of the benefits of private actions.

IV. *MORRISON'S* PURPORTED "BRIGHT LINE" TRANSACTIONAL TEST FOR DETERMINING THE EXISTENCE OF A PRIVATE RIGHT OF ACTION CREATES A NUMBER OF POTENTIAL ISSUES[6]

Another important reason to reinstitute the protection of the U.S. securities laws for U.S. Investors is because the current "transaction" test in *Morrison* is unworkable under many circumstances. In *Morrison*, the Supreme Court held that Section 10(b) only reaches the purchase or sale of a security listed on an American stock exchange, or other domestic transactions. *Morrison,* 130 S.Ct. at 2888. However, determining whether a transaction has occurred domestically can prove to be difficult and potentially can result in entirely anomalous results. Thus, reversion to the pre-*Morrison* case law under which U.S. Investors were afforded the protection of the U.S. securities laws is an appropriate mechanism for the Commission and Congress to adopt for private securities litigation.

The *Morrison* Court failed to recognize that, in the modern environment, just because a security is listed on an exchange does not mean the security is traded there. Thus, courts already have begun to reject the listing portion of the *Morrison* test.[7]

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[6] This addresses the Commission request that commenters -- "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 a non-exchange trading platform or other alternative trading system outside of the United States."

The analysis is complicated further by the simple fact that most investors have no idea which exchange their order is directed through, assuming it even occurs on an exchange. Both the European Union[8] and the United States[9] have adopted legislation requiring brokers to establish a best execution policy to make sure that orders for securities are executed to the best benefit of the client. In order to achieve "best execution," in the case of securities that can be purchased in the United States (as an ordinary share or an ADR) or on a foreign exchange, the broker will execute on the exchange that provides the greatest advantage to the client, which could be a U.S. or foreign exchange, depending on conditions. For example, Merrill Lynch (in one of its foreign subsidiaries) in its policy relating to the execution of securities transaction, states that "if the securities are listed on more than one financial instruments exchange ("Multiple Listing"), we will place the order on the exchange which is selected by Quick Corporation as the primary exchange at the time of the execution. (The details of this determination are available upon request from our offices.)."[10] If purchasers of shares only have a 10b-5 cause of action if the trade occurs on a U.S. exchange, the purchaser has no idea at the time of purchase whether U.S. law will protect them, and investor protection becomes a random event. Such a result cannot possibly further the SEC's primary mission of investor protection.

This problem is accentuated by the need for U.S. Investors, and particularly pension funds, to diversify their assets, including through investments outside the United States. State and local public employee retirement systems are subject to applicable state and local laws that govern, among other things, investment policy objectives and constraints placed on pension plan fiduciaries. Prudence requires the diversification of assets into different asset classes and in multiple geographic areas. Thus, most state pension plans are required to adopt prudent diversification plans by statute.[11]

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[7] At least one court recently has held that, despite the clear statement in *Morrison* that listing on a U.S. exchange is sufficient for the U.S. securities laws to apply, in fact that will not make the laws applicable. *In re RBS Securities Litig.*, 09 Civ. 300 (DAB) (S.D.N.Y. Jan. 11, 2011), slip op. at 17-18 ("The idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has "listed" some securities in the United States is simply contrary to the spirit of *Morrison*").

[8] Markets in Financial Instruments Directive (MiFID), "Directive 2004/39/EC". Official Journal of the European Union. 2004. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:02004L0039-20060428:EN:NOT.

[9] FINRA Rule 2320 ("(a)(1) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.")

[10] Bank of Merrill Lynch in Japan – Best Execution policy. 5.2; Information on J.P. Morgan's Execution Policy for Professional Clients March 2010 ("In the absence of express instructions from you JPMorgan will exercise its own discretion, having regard for the terms of your order in determining the factors that it needs to take into account for the purpose of providing you with Best Execution.");

[11] *See e.g.*, Conn. Gen. Stat. § 45a-541c (2010) ("Diversification. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are

To fulfill their statutory mandates, and to act as prudent expert fiduciaries, virtually all public pension funds adopt investment objectives and polices that diversify globally and provide for a fixed or range of percentage investment in international equities. Further, when buying in specific industry segments, often it is required to buy non-U.S. stocks (for example, an investor seeking to have automotive industry representation simply cannot avoid buying Toyota or Volkswagen and cannot buy into energy without purchasing BP or Royal Dutch Shell). To take two of the largest public pension funds as an example, New York State Common Fund, according to its 2010 annual report, had a target and actual allocation of 16% in international equities, and CALPERS invested 24% in international equities (compared to just 21.1% in domestic equities). *See* New York State and Local Retirement Systems Comprehensive Annual Financial Report for Fiscal Year Ended March 31, 2010; CALPERS June 30, 2010 Comprehensive Annual Financial Report. This level of international diversification not only makes sense from a prudent investment perspective, but it is in a very real sense required in order to fulfill the legislative mandates designed to protect a state's public employees, as well as taxpayers who ultimately fund these plans. However, given the issues noted above with determining where orders are executed, even those U.S. Investors that seek to engage in diversification by purchasing securities from non-U.S. issuers through options on U.S. exchanges may be unable to do so (for example, because there are insufficient ADRs) or at least will be unable to determine whether they have done so in a fashion that, after *Morrison,* permits them to take obtain the protection of the U.S. securities laws.

At its core, Section 10(b) is not about whether the SEC or private investors can sue errant foreign issuers for securities fraud. Such right of action is secondary to the aim of the underlying securities laws, which is truthful disclosures. Instead, the ability of investors and the SEC to bring actions deters issuers from making false statements to the public, and creates additional incentives for issuers to comply with the disclosure laws. Under the current test articulated in *Morrison*, U.S. investors simply may not know in many cases whether they have a private right of action to seek redress for fraud. Reinstituting the longstanding rule that U.S. Investors are subject to the protection of U.S. laws will resolve these ambiguities and further the paramount purpose of protecting investor rights.

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better served without diversifying."); Wis. Stat. § 25.15 (2010) ("[T]he standard of responsibility applied to the board when it manages money and property shall be all of the following: ... (b) To diversify investments in order to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, considering each trusts or funds portfolio as a whole at any point in time."); Mont. Code Ann. § 17-6-201 ("[P]ublic funds must be administered by the board of investments in accordance with the prudent expert principle, which requires an investment manager to:...(b) diversify the holdings of each fund within the unified investment program to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly prudent not to do so"); 840 Code of Mass. Regs. 1.01 (2010) ("A board member shall discharge all of his/her duties...(3) By diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.").

V. ALLOWING U.S. INVESTORS TO BRING SECTION 10(b) CLAIMS AGAINST FOREIGN ISSUERS WILL NOT OFFEND PRINCIPLES OF INTERNATIONAL COMITY

Under the doctrine of international comity, a court that otherwise has jurisdiction over a matter will defer to a foreign court that also has jurisdiction over that matter. The doctrine is implicated when there is a true conflict between American law and the law of a foreign jurisdiction. *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 798 (1993). Where there is a material domestic component to the fraud, it is clear that providing a remedy to U.S. investors will not raise concerns about extraterritoriality or create a conflict between American and foreign law, even when the transaction took place on a foreign exchange. *See, e.g., Small v. United States*, 544 U.S. 385, 400 (2005) (Thomas, J., dissenting) (describing the presumption against extraterritorial application as "restricting federal statutes from reaching conduct *beyond U. S. borders*," and having no role to play in a case involving "conduct *within U.S. borders*."). In most cases involving a U.S. Investor, that material domestic component will exist since investment decisions will have been made in the U.S., fraudulent statements will have been received in the U.S., securities purchases and sales will have been initiated in the U.S. and harm will occur to entities resident in the U.S.

The *Restatement (Third) of Foreign Relations Law of the United States* (1987), which the Supreme Court relied upon in *Hartford Fire*, 509 U.S. at 764, also supports the application of American law to a fraud that contains a material domestic component. Section 416 applies specifically to securities actions, and provides that "The United States may generally exercise jurisdiction to prescribe with respect to (a) (i) any transaction in securities carried out in the United States to which a national or resident of the United States is a party...." *Id.* § 416(1)(a)(i). Accordingly, it would not be right -- or fair -- to deny U.S. Investors the protections offered by the U.S. court system simply because they bought their shares on a foreign stock exchange.

The *Restatement* also makes it clear that providing a remedy to U.S. Investors will not create a conflict between American law and the law of foreign jurisdictions even where the fraud occurred predominantly abroad and the transaction was executed abroad. Section 402 of the *Restatement* provides that "a state has jurisdiction to prescribe law with respect to...conduct outside its territory that has...substantial effect within its territory." *Restatement* § 402(1)(c). Thus, Congress has the power to provide a remedy to U.S. Investors even where the fraudulent conduct and the purchase transaction occurred outside the United States, so long as the exercise of jurisdiction is reasonable under Section 403. *See id.* An examination of the Section 403 factors makes it clear that there is no offense to principles of international comity.

Section 403 makes it clear that regulation by one country can be reasonable where the activity in question "has substantial, direct, and foreseeable effect upon or in the territory," or where there are connections between the regulating state [i.e., the U.S.] and "those whom the regulation is designed to protect." *Id.*, § 403(2)(a)&(b). Here, both subsections are

applicable. Given the globalization of stock trading, it is certainly foreseeable to a foreign issuer that a U.S. Investor may purchase its securities. In addition, there is the strongest of connections between the U.S. [i.e., the regulating state] and its own citizens that the federal securities laws are designed to protect.

Another factor to be examined under Section 403 is "the extent to which the regulation is consistent with the traditions of the international system." *Id.*, § 403(2)(f). As explained earlier, for more than 40 years prior to *Morrison*, the "tradition" of the international economic system has been that U.S. Investors affected by a fraud have a remedy under the federal securities laws, *regardless of where the fraud or the securities transaction occurred*. Thus, providing a remedy to U.S. Investors under Section 10(b) based on the nationality of U.S. citizens would not offend principles of international comity.

We appreciate the opportunity to provide the Commission our views on this critical issue.

Respectfully,

Brian Bartow, General Counsel
California State Teachers' Retirement System

Greg Smith, General Counsel & COO
Colorado Public Employees' Retirement System

Cynthia Collins, General Counsel
Delaware Public Employees' Retirement System

Maureen Hazen, General Counsel
State Board of Administration of Florida

Jay Chaudhuri, General Counsel
North Carolina Department of State Treasurer

Catherine LaMarr, General Counsel
Connecticut Treasurer's Office

R. Dean Kenderdine, Executive Director
Maryland State Retirement and Pension System

Gerald Gornish. Chief Counsel
Pennsylvania Public School Employees' Retirement System

Mark Dingley, General Counsel
Rhode Island General Treasurer

Samuel S. Yun, Acting Chief Counsel
Pennsylvania State Employees' Retirement System

Michael G. Trotsky, Executive Director
Pension Reserves Investment Management Board
Commonwealth of Massachusetts

Inga Van Eysden,
Chief, Pensions Division, New York City Law Department
New York City Employees' Retirement System
New York City Police Pension Fund
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

Hank Kim, Executive Director and Counsel
National Conference on Public Employees Retirement System

From: Rule-Comments <Rule-Comments@SEC.GOV>
Sent: Friday, February 18, 2011 1:29 PM
To: Jay Chaudhuri
Subject: Thank you for your comment

Thank you for submitting a comment to the U.S. Securities and Exchange Commission. This auto-reply is your notification that we received your comment letter. The SEC will post all comments on the SEC's Internet Web site (http://www.sec.gov/). Comments will also be available for public inspection and copying in the SEC's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00pm. 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. We generally post comments within 2 to 3 business days after we receive them electronically. Also, please review our privacy policy at http://www.sec.gov/privacy.htm.

If you are an investor, check out the "Investor Information" section of our website, at http://www.sec.gov/investor.shtml, to find helpful information and tools. If you have a securities-related question, please visit our website at http://www.sec.gov/answers.shtml to find fast answers to your questions and solutions to common investment problems. If you are a securities professional needing assistance on technical matters, please check the "SEC Divisions" and "Information For" pages on the top right of our website, www.sec.gov.

We appreciate your taking the time to communicate your thoughts on our proposed rules.

Sincerely,

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission

SSR-001930

From: Jay Chaudhuri
Sent: Friday, February 18, 2011 3:30 PM
To: rule-comments@sec.gov
Cc: Susan Clare-Benjamin
Subject: File No. 4-617

Dear Mrs. Murphy:

Please accept this comment letter as a substitute for the previous comment submitted within the last two hours as it omitted the West Virginia Investment Management Board as a signatory.

My apologies.

Letter to Elizabeth Murphy re....

Sincerely,

Jay J. Chaudhuri
General Counsel & Senior Policy Advisor
Department of State Treasurer
325 North Salisbury Street
Raleigh, North Carolina 27603-1385
(919) 508-5176 (phone)
(919) 508-5167 (fax)
www.nctreasurer.com

California State Teachers' Retirement System • Colorado Public Employees' Retirement System • Delaware Public Employees' Retirement System • State Board of Administration of Florida • North Carolina Department of State Treasurer • Connecticut Treasurer's Office • Maryland State Retirement and Pension System • Pennsylvania Public School Employees' Retirement System • Rhode Island General Treasurer • Pennsylvania State Employees' Retirement System • New York City Employees' Retirement System • New York City Police Pension Fund • 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 • Pension Reserves Investment Management Board Commonwealth of Massachusetts

February 18, 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:

The undersigned are public pension funds managing assets of approximately $732 billion as of December 31, 2010. We submit the following comments in response to Release No. 34-63174 of the Securities and Exchange Commission ("SEC" or "the "Commission"), which seeks comments regarding the impact of and changes to the U.S. securities laws that may be required as a result of the decision of the United States Supreme Court in *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010) ("*Morrison*"). We request that the SEC make a finding that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and the rules and regulations promulgated thereunder, including SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"), and other provisions of the Exchange Act, should be applicable to all purchases and sales of securities by financial institutions located in the United States and individuals or entities who are resident in the U.S. (collectively "U.S. Investors") and that, accordingly, the Commission recommend to the U.S. Congress that the Exchange Act be so amended.

This would effectively re-establish the long-standing and easy to apply pre-*Morrison* interpretation of the Exchange Act under which U.S. Investors were afforded the protection of the laws of the United States in connection with their purchases and sales of securities. Because all that is being requested is the application of U.S. laws to protect U.S. Investors, no unique international comity or economic cost-benefit concerns apply.

I. THE DECISION IN *MORRISON* HAS NEGATIVELY IMPACTED U.S. INVESTORS

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 noted that unless there is the "affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is **primarily concerned with domestic conditions**." *Morrison,* 130 S. Ct. at 2877-78 (emphasis added). The Court then examined the language and history of Section 10(b) of the Exchange Act and concluded that it should not be applied extraterritorially. *Id.* at 2881-83. The Court held that "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.

Commenting on the approach of the majority, Justice Stevens' concurrence in *Morrison* noted the potential negative impact of the Court's ruling on U.S. Investors' claims:

> 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.

Morrison, 130 S.Ct. at 2895 (Stevens, J., concurring). In fact, the results imagined by Justice Stevens quickly have come to pass. Since June, 2010, a number of cases alleging violations of the federal securities law on behalf of U.S. investors have been dismissed.

- *Cornwell v. Credit Suisse Group*, 2010 U.S. Dist. LEXIS 76543, 2010 WL 2069597 (S.D.N.Y. July 27, 2010), addressed Section 10(b) claims brought on behalf of all investors who had purchased Credit Suisse Group ("CSG") securities traded on the Swiss Stock Exchange ("SWX") or CSG ADSs traded on the New York Stock Exchange ("NYSE"). Defendants moved to dismiss claims concerning the purchases of shares on the SWX as barred by *Morrison.* The lead plaintiff, a U.S. investor, contended that its claims were not barred because it "made an investment decision and initiated a purchase of CSG from the U.S." and "took the CSG stock into its own account in the U.S. and incurred an economic risk in the U.S." 2010 U.S. Dist. LEXIS 76543, at *6. The court dismissed plaintiffs' claims and stated that the *Morrison* Court established a "new bright-

line transactional rule" and "was entirely aware that its new test would preclude extraterritorial application of § 10(b) to foreign securities transactions involving alleged wrongful conduct that could cause harm to American investors in the United States, or that entail occurrence of some acts in the United States in furtherance of [a] purchase or sale." *Id.* at **11, 18.

- *In re Alstom SA Sec. Litig.*, 2010 U.S. Dist. LEXIS 98242, 2010 WL 3718863 (S.D.N.Y. Sept. 14, 2010), involved claims brought primarily on behalf of U.S. investors who had purchased Alstom SA ("Alstom") shares traded on non-U.S. exchanges and Alstom American Depository Receipts ("ADRs") traded on the NYSE. The court considered *Morrison* after earlier certifying a class consisting primarily of U.S. investors who had purchasing ADRs and common shares on certain non-U.S. exchanges. Post-*Morrison*, the court dismissed the claims of U.S. investors who had purchased Alstom common shares. 2010 U.S. Dist. LEXIS 98242, at *17.
- In *In re Societe Generale Sec. Litig.*, 2010 U.S. Dist. LEXIS 107719, 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) plaintiffs brought claims on behalf of U.S. investors who had purchased Societe Generale shares traded on the EuroNext or Societe Generale ADRs traded on the over-the-counter market in the United States. Defendants argued that *Morrison* barred claims based on the EuroNext stock, while plaintiffs argued that these purchases were "domestic purchases" because the transactions involved "United States investors purchas[ing] foreign securities in the United States, even if the securities happen to be listed on a foreign exchange." 2010 U.S. Dist. LEXIS 107719, at **15-16. The court was unconvinced by plaintiffs' argument and dismissed the EuroNext claims. Going beyond previous cases, however, the court also *sua sponte* dismissed an American pension fund's claims concerning ADR purchases on the grounds that trades in Societe Generale's ADRs, which were traded over-the-counter in the United States, are "predominantly foreign" transactions. *Id.* at *20.
- In *Elliott Associates LP v. Porsche Automobil Holding SE*, Case No. 1:10-cv-00532, Doc. No. 52 (S.D.N.Y. Dec. 30, 2010), American hedge funds brought claims alleging that Porsche misrepresented its intention to take over Volkswagen ("VW") and concealed its acquisition of VW stock. Plaintiffs had entered into swap agreements which referenced VW stock that was traded on German stock exchanges. Despite the fact that the swap agreements were entered into in New York, the court found that plaintiffs' claims were barred by *Morrison*. Specifically, the court concluded that the "swaps were the functional equivalent of trading the underlying VW shares on a German exchange" and "are essentially 'transactions conducted upon foreign exchanges and markets.'" *Id.*, at 12. Moreover, the court concluded that *Morrison*'s definition of a "domestic transaction" did not apply to swap agreements, like those in this case, "where only the purchaser is located in the United States." *Id.* at 13.

Morrison and its recent progeny increasingly are making it clear that the antifraud protections of the Exchange Act will not be extended to those U.S. Investors 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. 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 Commission, *and can even engage in fraudulent conduct on U.S. soil,* yet cannot be held liable under U.S. law to the victims of their fraud. This situation is inconsistent with the law prior to *Morrison* and, for the reasons noted below, should be reversed.

II. A PRIVATE RIGHT OF ACTION FOR SECURITIES FRAUD SHOULD BE AVAILABLE TO U.S. INVESTORS

The threshold question here is whether a private right of action for securities fraud should be available to U.S. Investors regardless of where they purchase or sell securities. The answer historically was, and should continue to be, that all U.S. Investors are afforded the protection of U.S. laws.

A. PRIOR TO *MORRISON*, THE LAW WAS UNCONTROVERTED THAT U.S. INVESTORS WERE PROTECTED BY THE ANTI-FRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS, REGARDLESS OF THE NATIONALITY OF THE COMPANIES IN WHICH THEY INVESTED OR THE LOCATIONS WHERE THEIR SECURITIES TRANSACTIONS WERE EFFECTUATED

Pre-*Morrison*, courts had found that there could be extraterritorial application of the Exchange Act where U.S interests were affected. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991). In examining this issue, courts historically employed two tests, known as the "conduct test" and the "effects test," to determine whether "wrongful conduct had a substantial effect in the United States or upon United States citizens." *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-122 (2d Cir. 1995).[1]

Where the plaintiff was a U.S. entity, courts almost universally agreed that the U.S. securities laws were applicable, regardless of the nationality of the defendant(s) or the place where the transaction was effectuated.[2] Beginning in the seminal case of *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975), Judge Friendly held that "the anti-fraud provisions of the federal securities laws '[a]pply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of

[1] Through longstanding jurisprudence, courts concluded that "the effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 & n.12 (2d Cir. 1998).

[2] *But see Cornwell v. Credit Suisse Group*, 2009 WL 3241404 (S.D.N.Y. 2009), where the court concluded that he had "no information whether [plaintiffs] were United States residents." *Id.* at *13. However, he stated: "Even if they were, the Court cannot conclude that [they] have demonstrated the required effects on United States investors." *Id.*

material importance occurred in this country....'" In 1987, the U.S. Court of Appeals in the District of Columbia agreed with *Bersch*, noting that a United States court would have jurisdiction to hear a 10b-5 fraud claim "whenever any individual is defrauded in this country, regardless of whether the offer originates somewhere else." *Zoelsch v. Arthur Andersen & Co.,* 824 F.2d 27, 33 n.4 (D.C. Cir. 1987). The D.C. Circuit later explicitly held "that when a resident of the United States is allegedly defrauded in the United States in connection with the sale of securities, the courts of the United States have jurisdiction under the 1934 Act." *Securities Exchange Commission v. Banner Fund International,* 211 F.3d 602, 609 (D.C. Cir. 2000); *see also In re Alstom SA Sec. Litig.*, 406 F.Supp.2d 346, 370 (S.D.N.Y.2005) (in a decision prior to the *Morrison* case, the court held that it has jurisdiction over the claims of domestic shareholders and may adjudicate their rights).

On the other hand, where the actual plaintiff was not a U.S. entity, under prior case law, the courts often found that the U.S. securities laws were inapplicable solely under the "effects" test.[3] In *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1017 (2d Cir.1975), decided the same day as *Bersch* and also written by Judge Friendly, the Court addressed whether a foreign investment trust that had U.S. investors could satisfy the effects test. There, a foreign investment trust sued a corporation and individuals for selling allegedly fraudulent securities to the trust. Only .2% of the trust's fundholders -- about 300 investors -- were United States citizens and residents. Judge Friendly concluded that jurisdiction was lacking because the foreign trust was the only party defrauded:

> "In contrast to Bersch ... this day decided, **the fraud was practiced not on individual Americans who purchased securities but on the trust in which they had invested**.... We cannot believe that Congress would have intended the anti-fraud provisions of the securities laws to apply if [defendant] had defrauded a British investment trust by selling foreign securities to it simply because half of one per cent of its assets was held by Americans."

Id. at 1016-17 (emphasis added).

In sum, prior to *Morrison*, the law was clear – U.S. investors were afforded the protection of American law in connection with their purchases/sales of securities – regardless of the location where those transactions were eventually executed.

B. THE ADOPTION OF THE DODD-FRANK ACT, BY REINSTITUTING THE TRADITIONAL CONDUCT AND EFFECTS TESTS, EFFECTIVELY CONSTITUTES RECOGNITION BY CONGRESS THAT U.S. INVESTORS SHOULD BE SUBJECT TO THE PROTECTION OF THE U.S. SECURITIES LAWS

[3] In *Bersch,* the Second Circuit addressed the application of the effects test where some of the plaintiffs were foreign, and some were American. In that case, the court found that where acts within the United States had not directly caused the plaintiffs' losses (*i.e.* the conduct test had not been satisfied), the federal securities laws applied to losses from sales to Americans resident in the United States, but not to losses from sales to foreigners outside the United States. *See Bersch,* 519 F.2d 974.

Section 929P(b) ("Section 929P") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or the "Act") "largely codified the long-standing appellate court interpretation of the law that had existed prior to … *Morrison* by setting forth an expansive conduct and effects test." SEC Release No. 63174, n.1. As explained above, the "effects" test, as it has been long interpreted, applies the anti-fraud provisions of the U.S. securities laws to U.S. Investors, regardless of where they may have purchased or sold shares. *See supra* Section I.A. There is no reason not to apply this test to private, as well as SEC-initiated, securities litigation.

Any arguments suggesting that a return to a pre-*Morrison* standard, particularly as that standard is applied to U.S. Investors, would transform the United States into the world's court are wholly without merit. Returning the federal legal regime applicable to U.S. Investors to the standards that applied pre-*Morrison* amounts to nothing more than a nation affording its citizens the benefits of its laws. Further, extending the benefits of the Exchange Act to U.S. Investors who complete transactions outside of the United States cannot and should not be equated to an attempt by a U.S. citizen who travels overseas and is injured there to obtain the benefit of U.S. laws for actions and injuries that occurred outside the United States. On the contrary, in virtually all cases under the rule proposed herein, the investment decision by a U.S. Investor will have been made in the U.S. and the purchase or sale transaction will have been initiated domestically. Further, to the extent that the U.S. investor is harmed by a transaction, that harm will have occurred in the United States. Under these conditions, choice of law principles would indicate that U.S. laws would apply. *See* Restatement of the Law Second Conflict of Laws 2d Chapter 7. § 145 ("(2) Contacts to be taken into account … to determine the law applicable to an issue include: (a) **the place where the injury occurred** ….") (emphasis added). Thus, applying the federal securities laws to U.S. Investors' securities transactions is wholly consistent with long-standing legal principles.

Finally, it is irrational to expect government regulators (because of budgetary or other constraints) to uncover and prosecute all frauds. Restoring private litigants' rights to pre-*Morrison* levels, as Section 929P did for the Commission, simply provides investors the opportunity to assert claims on their own behalf, and to not rely entirely on government enforcement to remedy injuries. Of course, with respect to private litigants, and especially those seeking to bring class actions, all of the other safeguards already in place to filter out weaker actions would be unaffected by any of the proposed changes to the scope of Section 10(b). *See* 15 U.S.C. §78u-4(b) (setting forth, *inter alia*, heightened pleading requirements for private actions and establishing automatic stay of discovery). No additional rules to filter particular classes of private litigants are required.

III. AFFORDING U.S. INVESTORS THE PROTECTION OF THE U.S. SECURITIES LAWS FURTHERS THE SEC'S MISSION[4]

[4] This addresses the Commission's request that commenters -- "consider and analyze . . . (3) the economic costs and benefits of extending a private right of action for transnational securities frauds".

A. THE SEC'S MISSION OF PROTECTING INVESTORS IS ESSENTIAL TO PROMOTING THE EFFICIENT FUNCTIONING OF CAPITAL MARKETS

The primary purpose of the Exchange Act is protecting "the interests of investors." *See Morrison*, 130 S.Ct. at 2894 ("it is the 'public interest' and 'the interests of investors' that are the objects of the statute's solicitude") (Stevens, J., concurring). The SEC specifically recognizes this paramount aspect of its mandate, stating on its website that its mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." This tripartite mission is complementary, *i.e.*, it is recognized that increased investor protection necessarily enhances efficient markets and capital formation. *See* Mary Schapiro, Testimony before the House Financial Services Subcommittee (March 11, 2009) ("we must have a renewed commitment to protecting investors, as it is investors who provide the capital used to fund the productive enterprises that create jobs and wealth. While we have a tripartite mission at the SEC, investor protection is an essential piece from which our other responsibilities flow.").

The protection of investors provides substantial benefits to society at large by enhancing capital market efficiency. For example, David Ruder, former SEC chairman from 1987 to 1989 wrote a paper in 2005 discussing the interplay of investor protection and capital formation:

> *The federal securities statutes emphasize the need for corporate and market honesty and integrity as a means of protecting investors. They mandate adequate disclosure of information, prohibit dishonesty and fraud in the sale and purchase of securities, and require brokers, dealers, investment advisers and other market professionals to act in the best interests of investors.*
>
> ***Although the primary objective of requiring honesty is to protect investors, honesty also improves market efficiency. Honest markets will be more liquid, since investors will be more likely to risk their resources in an honest market. Additionally, since in a dishonest market investors will seek higher prices for securities as compensation for the risks of loss due to dishonesty, an honest market will facilitate the transfer of assets at lower prices, thereby lowering the cost of capital.***

David Ruder, "Balancing Investor Protection With Capital Formation Needs After the SEC Chamber of Commerce Case," 26 Pace Law Review 39, 41-42 (2005) (emphasis added).

The empirical evidence strongly supports the Commission's position that properly functioning financial markets require the protection of investors' rights. In a study for the World Bank in 2002, former Chairman of the Council of Economic Advisors Glenn Hubbard and others empirically established a strong positive correlation between investor protection and capital formation. The results of the study imply that policies aimed at strengthening

investor protection laws and their enforcement will improve capital formation and result in higher economic growth economy-wide. This link was found precisely because higher rates of insider equity ownership are strongly correlated with market inefficiencies. As investor protection is strengthened, firms can increasingly turn to outside investors to meet their capital needs. Conversely, if investor confidence is low due to weak investor protection, firms have a more difficult time raising capital from outsiders, and must increasingly resort to insiders to meet their capital needs, which is highly inefficient. The study concluded:

> *The weaker is investor protection, the higher is the concentration of inside equity ownership. And second, the higher is the concentration of inside ownership, the higher is the implied cost of capital.*

Charles P. Himmelberg, R. Glenn Hubbard and Inessa Love, "Investor Protection, Ownership, and the Cost of Capital," The World Bank Development Research Group, p. 38 (2002).

Thus, there should be no dispute that protecting investors provides critical benefits to the proper and efficient functioning of capital markets and must form an essential component of the securities regulatory regime in the United States. Accordingly, the only relevant question is whether protection of investors requires a private right of action. As shown below, court opinions and economic research strongly support the link between a private right of action, investor protection and the efficient operation of capital markets.

B. THE EXISTENCE OF A PRIVATE RIGHT OF ACTION IS ESSENTIAL TO THE PROTECTION OF INVESTORS' RIGHTS

The Commission has long-recognized the importance of a private right of action as a means of protecting the rights of investors. Giovanni P. Prezioso, General Counsel of the SEC, told the American Bar Association in 2004:

> *private securities litigation has always formed a major -* ***and essential*** *- component of the enforcement of the federal securities laws.* ***The Commission has long advocated private rights of action precisely because they supplement its own enforcement program in deterring misconduct.***

The Supreme Court itself also "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an ***essential supplement*** to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (private rights of action under the securities laws are a "**necessary**" supplement to Commission action.") (emphasis added). The Supreme Court has stated that this is especially true when it comes to actions under Section 10(b): "a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." *Herman & McLean v. Huddleston*, 459

U.S. 375, 380 (1983). In fact, even when limiting the scope of a private right of action to exclude aiding and abetting liability, the Supreme Court unequivocally recognized that the Congress has ratified and endorsed the existence of a private right of action for the enforcement of the securities laws:

> "Congress thus ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 , and n. 66 (1982); *cf. Borak, supra*, at 433. It is appropriate for us to assume that when §78u–4 was enacted, Congress accepted the §10(b) private cause of action as then defined…."

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 773 (2008).

Recent research provides significant support for the courts' longstanding support of a private right of action as an essential component of protecting investors and support the proper functioning of capital markets.[5] A recent study by academics in Europe provides evidence that individual firms that are the target of enforcement actions can also become more efficient as a result of the action, particularly when the violations are the result of violations of the duty of loyalty by management, such as accounting fraud or insider trading. This result recently was reported by Professor Rob Bauer at the Maastrict University School of Business and Economics in the Netherlands. Rob Bauer and Robin Braun, "Misdeeds Matter: Long-Term Stock Price Performance after the Filing of Class-Action Lawsuits," *Financial Analysts Journal*, Vol. 66, No. 6, (Nov./Dec. 2010).

Bauer and Braun examined the longstanding assumption that companies facing securities enforcement action, especially private litigation, by definition would experience long-term share price declines, as the truth of past false statements are disclosed, and the public loses confidence in management (and perhaps also in the core business model of the firm). They found, however, at least when the action relates to violations of the duty of loyalty (especially insider trading or accounting fraud), that share prices actually can benefit from an enforcement action:

> *In the case of insider trading, the filing of the lawsuit and reputational costs discipline the existing managers, or a more efficient and ethical management replaces them. In the latter case, new managers are aware of the lawsuit that their predecessors faced, and this information deters them from any self-dealing actions. . . .*

[5] This addresses the Commission's request that commenters -- "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."

> *We further documented shareholder wealth effects for companies that face accounting fraud allegations. . . . . [S]ubsequent to the disclosure of fraud (implicitly, the filing of the lawsuit in our case and, eventually, the final verdict), companies typically shed labor and capital to become more productive. . . . Therefore, institutional investors initiating or joining a class action lawsuit can, to some degree, expect substantial reorganizations in the sued company, which can result in medium- to long-term outperformance.*

Id. at 90.

Given the complementary role to government enforcement private litigation has historically played in the Section 10(b) context, to preclude private litigation where government actions are available would lead to a material deficiency in the enforcement of Section 10(b). If suddenly one aspect of 10(b) enforcement (protection of U.S. Investors in connection with their non-U.S. securities transactions) is reserved to the SEC, and private actions remain prohibited, this creates an artificial and indefensible inconsistency in the securities laws. Despite the SEC's and the Supreme Court's recognition of the necessary assistance provided by private litigation, an entire class of investors would be carved out of the securities laws and enforcement would be reserved to the SEC. Such a result is contrary to the mission of the SEC and the established record of the benefits of private actions.

IV. *MORRISON'S* PURPORTED "BRIGHT LINE" TRANSACTIONAL TEST FOR DETERMINING THE EXISTENCE OF A PRIVATE RIGHT OF ACTION CREATES A NUMBER OF POTENTIAL ISSUES[6]

Another important reason to reinstitute the protection of the U.S. securities laws for U.S. Investors is because the current "transaction" test in *Morrison* is unworkable under many circumstances. In *Morrison*, the Supreme Court held that Section 10(b) only reaches the purchase or sale of a security listed on an American stock exchange, or other domestic transactions. *Morrison,* 130 S.Ct. at 2888. However, determining whether a transaction has occurred domestically can prove to be difficult and potentially can result in entirely anomalous results. Thus, reversion to the pre-*Morrison* case law under which U.S. Investors were afforded the protection of the U.S. securities laws is an appropriate mechanism for the Commission and Congress to adopt for private securities litigation.

The *Morrison* Court failed to recognize that, in the modern environment, just because a security is listed on an exchange does not mean the security is traded there. Thus, courts already have begun to reject the listing portion of the *Morrison* test.[7]

[6] This addresses the Commission request that commenters -- "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 a non-exchange trading platform or other alternative trading system outside of the United States."

The analysis is complicated further by the simple fact that most investors have no idea which exchange their order is directed through, assuming it even occurs on an exchange. Both the European Union[8] and the United States[9] have adopted legislation requiring brokers to establish a best execution policy to make sure that orders for securities are executed to the best benefit of the client. In order to achieve "best execution," in the case of securities that can be purchased in the United States (as an ordinary share or an ADR) or on a foreign exchange, the broker will execute on the exchange that provides the greatest advantage to the client, which could be a U.S. or foreign exchange, depending on conditions. For example, Merrill Lynch (in one of its foreign subsidiaries) in its policy relating to the execution of securities transaction, states that "if the securities are listed on more than one financial instruments exchange ("Multiple Listing"), we will place the order on the exchange which is selected by Quick Corporation as the primary exchange at the time of the execution. (The details of this determination are available upon request from our offices.)."[10] If purchasers of shares only have a 10b-5 cause of action if the trade occurs on a U.S. exchange, the purchaser has no idea at the time of purchase whether U.S. law will protect them, and investor protection becomes a random event. Such a result cannot possibly further the SEC's primary mission of investor protection.

This problem is accentuated by the need for U.S. Investors, and particularly pension funds, to diversify their assets, including through investments outside the United States. State and local public employee retirement systems are subject to applicable state and local laws that govern, among other things, investment policy objectives and constraints placed on pension plan fiduciaries. Prudence requires the diversification of assets into different asset classes and in multiple geographic areas. Thus, most state pension plans are required to adopt prudent diversification plans by statute.[11]

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[7] At least one court recently has held that, despite the clear statement in *Morrison* that listing on a U.S. exchange is sufficient for the U.S. securities laws to apply, in fact that will not make the laws applicable. *In re RBS Securities Litig.*, 09 Civ. 300 (DAB) (S.D.N.Y. Jan. 11, 2011), slip op. at 17-18 ("The idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has "listed" some securities in the United States is simply contrary to the spirit of *Morrison*").

[8] Markets in Financial Instruments Directive (MiFID), "Directive 2004/39/EC". Official Journal of the European Union. 2004. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:02004L0039-20060428:EN:NOT.

[9] FINRA Rule 2320 ("(a)(1) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.")

[10] Bank of Merrill Lynch in Japan – Best Execution policy. 5.2; Information on J.P. Morgan's Execution Policy for Professional Clients March 2010 ("In the absence of express instructions from you JPMorgan will exercise its own discretion, having regard for the terms of your order in determining the factors that it needs to take into account for the purpose of providing you with Best Execution.");

[11] *See e.g.*, Conn. Gen. Stat. § 45a-541c (2010) ("Diversification. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are

To fulfill their statutory mandates, and to act as prudent expert fiduciaries, virtually all public pension funds adopt investment objectives and polices that diversify globally and provide for a fixed or range of percentage investment in international equities. Further, when buying in specific industry segments, often it is required to buy non-U.S. stocks (for example, an investor seeking to have automotive industry representation simply cannot avoid buying Toyota or Volkswagen and cannot buy into energy without purchasing BP or Royal Dutch Shell). To take two of the largest public pension funds as an example, New York State Common Fund, according to its 2010 annual report, had a target and actual allocation of 16% in international equities, and CALPERS invested 24% in international equities (compared to just 21.1% in domestic equities). *See* New York State and Local Retirement Systems Comprehensive Annual Financial Report for Fiscal Year Ended March 31, 2010; CALPERS June 30, 2010 Comprehensive Annual Financial Report. This level of international diversification not only makes sense from a prudent investment perspective, but it is in a very real sense required in order to fulfill the legislative mandates designed to protect a state's public employees, as well as taxpayers who ultimately fund these plans. However, given the issues noted above with determining where orders are executed, even those U.S. Investors that seek to engage in diversification by purchasing securities from non-U.S. issuers through options on U.S. exchanges may be unable to do so (for example, because there are insufficient ADRs) or at least will be unable to determine whether they have done so in a fashion that, after *Morrison,* permits them to take obtain the protection of the U.S. securities laws.

At its core, Section 10(b) is not about whether the SEC or private investors can sue errant foreign issuers for securities fraud. Such right of action is secondary to the aim of the underlying securities laws, which is truthful disclosures. Instead, the ability of investors and the SEC to bring actions deters issuers from making false statements to the public, and creates additional incentives for issuers to comply with the disclosure laws. Under the current test articulated in *Morrison*, U.S. investors simply may not know in many cases whether they have a private right of action to seek redress for fraud. Reinstituting the longstanding rule that U.S. Investors are subject to the protection of U.S. laws will resolve these ambiguities and further the paramount purpose of protecting investor rights.

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better served without diversifying."); Wis. Stat. § 25.15 (2010) ("[T]he standard of responsibility applied to the board when it manages money and property shall be all of the following: ... (b) To diversify investments in order to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, considering each trusts or funds portfolio as a whole at any point in time."); Mont. Code Ann. § 17-6-201 ("[P]ublic funds must be administered by the board of investments in accordance with the prudent expert principle, which requires an investment manager to:...(b) diversify the holdings of each fund within the unified investment program to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly prudent not to do so"); 840 Code of Mass. Regs. 1.01 (2010) ("A board member shall discharge all of his/her duties...(3) By diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.").

V. ALLOWING U.S. INVESTORS TO BRING SECTION 10(b) CLAIMS AGAINST FOREIGN ISSUERS WILL NOT OFFEND PRINCIPLES OF INTERNATIONAL COMITY

Under the doctrine of international comity, a court that otherwise has jurisdiction over a matter will defer to a foreign court that also has jurisdiction over that matter. The doctrine is implicated when there is a true conflict between American law and the law of a foreign jurisdiction. *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 798 (1993). Where there is a material domestic component to the fraud, it is clear that providing a remedy to U.S. investors will not raise concerns about extraterritoriality or create a conflict between American and foreign law, even when the transaction took place on a foreign exchange. *See, e.g., Small v. United States*, 544 U.S. 385, 400 (2005) (Thomas, J., dissenting) (describing the presumption against extraterritorial application as "restricting federal statutes from reaching conduct *beyond U. S. borders,*" and having no role to play in a case involving "conduct *within U.S. borders*."). In most cases involving a U.S. Investor, that material domestic component will exist since investment decisions will have been made in the U.S., fraudulent statements will have been received in the U.S., securities purchases and sales will have been initiated in the U.S. and harm will occur to entities resident in the U.S.

The *Restatement (Third) of Foreign Relations Law of the United States* (1987), which the Supreme Court relied upon in *Hartford Fire*, 509 U.S. at 764, also supports the application of American law to a fraud that contains a material domestic component. Section 416 applies specifically to securities actions, and provides that "The United States may generally exercise jurisdiction to prescribe with respect to (a) (i) any transaction in securities carried out in the United States to which a national or resident of the United States is a party…." *Id.* § 416(1)(a)(i). Accordingly, it would not be right -- or fair -- to deny U.S. Investors the protections offered by the U.S. court system simply because they bought their shares on a foreign stock exchange.

The *Restatement* also makes it clear that providing a remedy to U.S. Investors will not create a conflict between American law and the law of foreign jurisdictions even where the fraud occurred predominantly abroad and the transaction was executed abroad. Section 402 of the *Restatement* provides that "a state has jurisdiction to prescribe law with respect to…conduct outside its territory that has…substantial effect within its territory." *Restatement* § 402(1)(c). Thus, Congress has the power to provide a remedy to U.S. Investors even where the fraudulent conduct and the purchase transaction occurred outside the United States, so long as the exercise of jurisdiction is reasonable under Section 403. *See id.* An examination of the Section 403 factors makes it clear that there is no offense to principles of international comity.

Section 403 makes it clear that regulation by one country can be reasonable where the activity in question "has substantial, direct, and foreseeable effect upon or in the territory," or where there are connections between the regulating state [i.e., the U.S.] and "those whom the regulation is designed to protect." *Id.*, § 403(2)(a)&(b). Here, both subsections are

applicable. Given the globalization of stock trading, it is certainly foreseeable to a foreign issuer that a U.S. Investor may purchase its securities. In addition, there is the strongest of connections between the U.S. [i.e., the regulating state] and its own citizens that the federal securities laws are designed to protect.

Another factor to be examined under Section 403 is "the extent to which the regulation is consistent with the traditions of the international system." *Id.*, § 403(2)(f). As explained earlier, for more than 40 years prior to *Morrison*, the "tradition" of the international economic system has been that U.S. Investors affected by a fraud have a remedy under the federal securities laws, *regardless of where the fraud or the securities transaction occurred.* Thus, providing a remedy to U.S. Investors under Section 10(b) based on the nationality of U.S. citizens would not offend principles of international comity.

We appreciate the opportunity to provide the Commission our views on this critical issue.

Respectfully,

Brian Bartow, General Counsel
California State Teachers' Retirement System

Greg Smith, General Counsel & COO
Colorado Public Employees' Retirement System

Cynthia Collins, General Counsel
Delaware Public Employees' Retirement System

Maureen Hazen, General Counsel
State Board of Administration of Florida

Jay Chaudhuri, General Counsel
North Carolina Department of State Treasurer

Catherine LaMarr, General Counsel
Connecticut Treasurer's Office

R. Dean Kenderdine, Executive Director
Maryland State Retirement and Pension System

Gerald Gornish. Chief Counsel
Pennsylvania Public School Employees' Retirement System

Mark Dingley, General Counsel
Rhode Island General Treasurer

Samuel S. Yun, Acting Chief Counsel
Pennsylvania State Employees'
Retirement System

Michael G. Trotsky, Executive Director
Pension Reserves Investment Management Board
Commonwealth of Massachusetts

Craig Slaughter, Executive Director
West Virginia Investment Management Board

Inga Van Eysden,
Chief, Pensions Division, New York City Law Department
New York City Employees' Retirement System
New York City Police Pension Fund
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

Hank Kim, Executive Director and Counsel
National Conference on Public Employees Retirement System

From: Rule-Comments <Rule-Comments@SEC.GOV>
Sent: Friday, February 18, 2011 3:30 PM
To: Jay Chaudhuri
Subject: Thank you for your comment

Thank you for submitting a comment to the U.S. Securities and Exchange Commission. This auto-reply is your notification that we received your comment letter. The SEC will post all comments on the SEC's Internet Web site (http://www.sec.gov/). Comments will also be available for public inspection and copying in the SEC's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00pm. 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. We generally post comments within 2 to 3 business days after we receive them electronically. Also, please review our privacy policy at http://www.sec.gov/privacy.htm.

If you are an investor, check out the "Investor Information" section of our website, at http://www.sec.gov/investor.shtml, to find helpful information and tools. If you have a securities-related question, please visit our website at http://www.sec.gov/answers.shtml to find fast answers to your questions and solutions to common investment problems. If you are a securities professional needing assistance on technical matters, please check the "SEC Divisions" and "Information For" pages on the top right of our website, www.sec.gov.

We appreciate your taking the time to communicate your thoughts on our proposed rules.

Sincerely,

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission

From: Bill Titelman <btitelman@gelaw.com>
Sent: Wednesday, March 02, 2011 11:15 AM
To: Jay Chaudhuri
Cc: FerlautoR@sec.gov
Subject: Meeting with SEC on Extraterritorial Jurisdiction

Jay,
Following up on our discussion, you should communicate directly with Rich Ferlauto at the SEC who would welcome hearing from you as soon as possible. Rich can be reached at his office at 202-551-4658 (direct dial) and his email address is FerlautoR@sec.gov. You should communicate the desire of the public pension fund community to have a meeting with appropriate SEC staff to discuss this matter even though you have submitted a comment letter and ask if he could set that up. He is expecting to hear from you. Although I believe that this meeting should be a meeting that is led by and primarily involves a number of GCs of public pension funds like yourself, it is my strong suggestion that you include maybe two members of the plaintiffs bar who are particularly knowledgeable -- Jay Eisenhofer would be particularly good in this setting. Please keep me posted.

All the best.

Bill

Bill Titelman
Grant & Eisenhofer P.A.
202-258-5858 direct
wtitelman@gelaw.com

From: Jay Chaudhuri
Sent: Sunday, March 06, 2011 6:37 PM
To: FerlautoR@sec.gov
Cc: Bill Titelman; gsmith@copera.org; Susan Clare-Benjamin
Subject: Request for Conference Call

Rich:

Hope all is well, and I look forward to seeing you at the upcoming CII meeting. Greg Smith and I would like to see if you have some time to do a conference call with you as a follow-up on our letter to the SEC regarding the Morrison decision. We thought it be best if some key SEC staff heard from General Counsels at key public pension funds about the issue. Let us know a good time. Susan, my assistant, can work on coordinating a time.

Best,

Jay J. Chaudhuri
General Counsel & Senior Policy Advisor
Department of State Treasurer
325 North Salisbury Street
Raleigh, North Carolina 27603-1385
(919) 508-5176 (phone)
(919) 508-5167 (fax)
www.nctreasurer.com

From: Jay Chaudhuri
Sent: Sunday, March 06, 2011 6:59 PM
To: FerlautoR@sec.gov
Cc: Bill Titelman; gsmith@copera.org; Susan Clare-Benjamin
Subject: RE: Request for Conference Call

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From: Susan Clare-Benjamin
Sent: Monday, March 07, 2011 9:29 AM
To: Jay Chaudhuri; FerlautoR@sec.gov
Cc: Bill Titelman; gsmith@copera.org
Subject: RE: Request for Conference Call

All:

Jay is avalialbe for a conference call on April 6, 2011 at 10:00 am or 4pm. Please let me know if this date/ and which time is convenient for you and I will send out a meeting notice, which will include the call in number.

Thank you,
Susan Benjamin

From: Jay Chaudhuri
Sent: Sunday, March 06, 2011 6:59 PM
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From: Bill Titelman <btitelman@gelaw.com>
Sent: Monday, March 07, 2011 9:47 AM
To: Susan Clare-Benjamin; Jay Chaudhuri; 'FerlautoR@sec.gov'
Cc: 'gsmith@copera.org'
Subject: Re: Request for Conference Call

My thought is that an in-person meeting with the appropriate people at the SEC would be far better than a conference call and could be set up in conjunction with the upcoming CII meeting, so as not to require additional travel.

Bill Titelman
Grant & Eisenhofer P.A.
202-258-5858 direct
wtitelman@gelaw.com

From: Susan Clare-Benjamin <Susan.Clare-Benjamin@nctreasurer.com>
To: Jay Chaudhuri <jay.chaudhuri@nctreasurer.com>; FerlautoR@sec.gov <FerlautoR@sec.gov>
Cc: Bill Titelman; gsmith@copera.org <gsmith@copera.org>
Sent: Mon Mar 07 09:28:59 2011
Subject: RE: Request for Conference Call

All:

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From: Ferlauto, Richard C. <FerlautoR@SEC.GOV>
Sent: Monday, March 07, 2011 10:41 AM
To: btitelman@gelaw.com; Susan Clare-Benjamin; Jay Chaudhuri
Cc: gsmith@copera.org
Subject: Re: Request for Conference Call

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From: Bill Titelman
To: 'Susan.Clare-Benjamin@nctreasurer.com' ; 'jay.chaudhuri@nctreasurer.com' ; Ferlauto, Richard C.
Cc: 'gsmith@copera.org'
Sent: Mon Mar 07 09:47:10 2011
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From:	Jay Chaudhuri
Sent:	Wednesday, March 09, 2011 12:51 PM
To:	Ferlauto, Richard C.
Cc:	gsmith@copera.org
Subject:	Follow-up

Rich:

This is what I would propose: could we schedule a face-to-face meeting with key representatives from public pension funds (we can coordinate ahead of time with you as to number and representation) and SEC staff and/or commissioners for the afternoon (after 2 p.m.) on April 5 (after CII) or the morning of April 6 (I would prefer April 5 so I could return home). As you know, we can identify some key folks who will be at the CII meeting.

My direct # is 919.508.1024. Give me a call, and I can then update Greg.

Thanks,

Jay

From: Ferlauto, Richard C. [mailto:FerlautoR@SEC.GOV]
Sent: Monday, March 07, 2011 10:41 AM
To: btitelman@gelaw.com; Susan Clare-Benjamin; Jay Chaudhuri
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www.nctreasurer.com

From: Ferlauto, Richard C. <FerlautoR@SEC.GOV>
Sent: Wednesday, March 09, 2011 3:28 PM
To: Jay Chaudhuri
Subject: Re: Follow-up

Is there a good time to reach you by phone tomorrow, Thursday, morning?

From: Jay Chaudhuri
To: Ferlauto, Richard C.
Cc: gsmith@copera.org
Sent: Wed Mar 09 12:51:11 2011
Subject: Follow-up

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Sent: Sunday, March 06, 2011 6:59 PM
To: 'FerlautoR@sec.gov'
Cc: 'Bill Titelman'; 'gsmith@copera.org'; Susan Clare-Benjamin
Subject: RE: Request for Conference Call

Rich: One meeting proposal to consider is meeting sometime right after the spring CII meeting. Thanks, Jay

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Best,

Jay J. Chaudhuri

General Counsel & Senior Policy Advisor

Department of State Treasurer

325 North Salisbury Street

Raleigh, North Carolina 27603-1385

(919) 508-5176 (phone)

(919) 508-5167 (fax)

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From:	Jay Chaudhuri
Sent:	Wednesday, March 09, 2011 6:28 PM
To:	Ferlauto, Richard C.
Cc:	Susan Clare-Benjamin
Subject:	RE: Follow-up

Rich – How does 9:30 a.m. work tomorrow? Jay

From: Ferlauto, Richard C. [mailto:FerlautoR@SEC.GOV]
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My direct # is 919.508.1024. Give me a call, and I can then update Greg.

Thanks,

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From: Ferlauto, Richard C. [mailto:FerlautoR@SEC.GOV]
Sent: Monday, March 07, 2011 10:41 AM
To: btitelman@gelaw.com; Susan Clare-Benjamin; Jay Chaudhuri
Cc: gsmith@copera.org
Subject: Re: Request for Conference Call

I agree with Bill, it would be a better use of time to have an in person meeting with the appropriate staff during cii, and to have conference call soon to set that up.

From: Bill Titelman
To: 'Susan.Clare-Benjamin@nctreasurer.com' ; 'jay.chaudhuri@nctreasurer.com' ; Ferlauto, Richard C.
Cc: 'gsmith@copera.org'
Sent: Mon Mar 07 09:47:10 2011
Subject: Re: Request for Conference Call

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Bill Titelman
Grant & Eisenhofer P.A.
202-258-5858 direct
wtitelman@gelaw.com

From: Susan Clare-Benjamin <Susan.Clare-Benjamin@nctreasurer.com>
To: Jay Chaudhuri <jay.chaudhuri@nctreasurer.com>; FerlautoR@sec.gov <FerlautoR@sec.gov>
Cc: Bill Titelman; gsmith@copera.org <gsmith@copera.org>
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Sent: Wednesday, March 09, 2011 7:02 PM
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Subject: Re: Follow-up

Works for me. Should I call you.

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To: Ferlauto, Richard C.
Cc: Susan Clare-Benjamin
Sent: Wed Mar 09 18:27:54 2011
Subject: RE: Follow-up
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SSR-001965

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From: Jay Chaudhuri
Sent: Wednesday, March 09, 2011 7:04 PM
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Wanna chat now. In the office.

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From: Brenda Meidl <bmeidl@copera.org> on behalf of Greg Smith <gsmith@copera.org>
Sent: Thursday, March 10, 2011 9:56 AM
To: Jay Chaudhuri
Cc: Greg Smith; Ferlauto, Richard C.
Subject: RE: Follow-up

Hello Jay:

April 5 after 2 pm works best for Greg.

Please let me know if I can be of further assistance.

Regards,
Brenda

Brenda E. Meidl
Executive Administrative Assistant to the COO/General Counsel
Office of the General Counsel
Public Employees' Retirement Association of Colorado
1301 Pennsylvania St., Denver, CO 80203
(303) 863-3786 (direct)
(303) 863-3815 (fax)

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