SEC Issues Study on Cross Border Scope of Private Right of Action after Morrison

The staff of the U.S. Securities and Exchange Commission (SEC) has issued a Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934.

After the *Morrison* case and the reform of the 1934 Act for the purpose of indicating that the Act applies extraterritorially for actions involving transnational securities frauds brought by the SEC and the U.S. Department of Justice, the Dodd-Frank Act directed the SEC to solicit public comment and then conduct a study to consider the extension of the cross-border scope of private actions in a similar fashion, or in some narrower manner, and to consider and analyze the potential implications on international comity and the potential economic costs and benefits of extending the cross-border scope of private actions.

The study eventually advances the following options regarding the cross-border reach of section 10(b) private actions:

> ***Options Regarding the Conduct and Effects Tests****. Enactment of conduct and effects tests for Section 10(b) private actions similar to the test enacted for Commission and DOJ enforcement actions is one potential option. Consideration might also be given to alternative approaches focusing on narrowing the conduct test's scope to ameliorate those concerns that have been voiced about the negative consequences of a broad conduct test. One such approach (which the Solicitor General and the Commission recommended in the Morrison litigation) would be to require the plaintiff to demonstrate that the plaintiff's injury resulted directly from conduct within the United States. Among other things, requiring private plaintiffs to establish that their losses were a direct result of conduct in the United States could mitigate the risk of potential conflict with foreign nations' laws by limiting the availability of a Section 10(b) private remedy to situations in which the domestic conduct is closely linked to the overseas injury. The Commission has not altered its view in support of this standard.*

Another option is to enact conduct and effects tests only for U.S. resident investors. Such an approach could limit the potential conflict between U.S. and foreign law, while still potentially furthering two of the principal regulatory interests of the U.S. securities laws – i.e., protection of U.S. investors and U.S. markets.

***Options to Supplement and Clarify the Transactional Test**. In addition to possible enactment of some form of conduct and effects tests, the Study sets forth four options for consideration to supplement and clarify the transactional test. One option is to permit investors to pursue a Section 10(b) private action for the purchase or sale of any security that is of the same class of securities registered in the United States, irrespective of the actual location of the transaction. A second option, which is not exclusive of other options, is to authorize Section 10(b) private actions against securities intermediaries such as broker-dealers and investment advisers that engage in securities fraud while purchasing or selling securities overseas for U.S. investors or providing other services related to overseas securities transactions to U.S. investors. A third option is to permit investors to pursue a Section 10(b) private action if they can demonstrate that they were fraudulently induced while in the United States to engage in the transaction, irrespective of where the actual transaction takes place. A final option is to clarify that an off-exchange transaction takes place in the United States if either party made the offer to sell or purchase, or accepted the offer to sell or purchase, while in the United States.*

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