THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 18, 2011

Via email: rule-comments@sec.gov

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

Dear Ms. Murphy,

Re: Extraterritorial Private Rights of Action – Release 34-63174; File 4-617

I write on behalf of the National Business Law Section and the Canadian Corporate Counsel Association of the Canadian Bar Association (CBA), to comment on the Securities and Exchange Commission's Release No. 34-63174 on extraterritorial private rights of action under the antifraud provisions of the *Securities Exchange Act of 1934*.

The CBA is a national association representing 37,000 jurists, including lawyers, notaries, professors of law and law students across Canada. The Association's mandate includes improvement in the law and in the administration of justice. The Business Law Section, through its Securities Committees, is active in commenting on developments in securities law. Canadian Corporate Counsel Association members comprise corporate counsel employed in virtually every industry in Canada, encompassing public and private businesses, non-profit organizations, municipalities and crown corporations.

We are concerned about the prospect of this potential extension in light of worries about international comity and the potential volume of litigation that may result. We believe that the SEC should resist extending an U.S.-based private right of action to transactions subject to a comparable statutory regime unless certain criteria are met. One vital criterion should be the extent to which the conduct complained of is subject to a statutory regime in the country where the parties or conduct have a greater connection.

We generally support initiatives to address international securities fraud. Section 929P of the *Dodd-Frank Act* confirms the jurisdiction of U.S. Courts for proceedings instituted by the SEC alleging a violation of the antifraud provisions of the *Exchange Act* involving foreign persons. This jurisdiction appears appropriate as it involves a regulatory body that is subject to comprehensive laws relating to administrative bodies. The SEC's ability to

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pursue these matters is augmented by its cooperative arrangements with securities regulators in many countries, including those in Canada.

The creation of a private right of action, however, must be considered in a different light. While SEC action can be anticipated to operate in a manner consistent with U.S. regulatory policy, private litigants would likely operate with a significant degree of unpredictability. Issues would also be raised respecting international comity. In our view, it is imperative to place limitations on the scope of an extraterritorial private right of action.

Canadian securities legislation provides a comprehensive statutory private right of action for investors in cases where offering documents (including prospectuses, circulars and offering memoranda) or other communications (including all documents required to be filed under applicable Canadian securities laws) contain misrepresentations. Canadian statutory rights of action are subject to detailed procedural and substantive provisions. These Canadians rights of action are consistent in general intent to the civil liability and antifraud provisions of the *Securities Act of 1933* and the *Exchange Act*, although there are differences in operation. In most cases the differences arose as conscious decisions by Canadian provincial legislatures to address possible abuses by litigants. The Canadian legislatures have struck a balance between issuers and investors, which an extraterritorial private rht of action could upset, with no way to rectify the balance. If the SEC adopted a rule creating a private right of action for foreign plaintiffs alleging fraud by foreign corporations, it might allow Canadian plaintiffs to forum-shop and make an end-run around the Canadian statutory regime in another country. Canadian issuers would be exposed to a different civil liability regime than Canadian legislatures have deemed appropriate.

Civil liability under Canadian law for misrepresentations in prospectuses, take-over bid circulars and other offering documents is longstanding and comparable to the same provisions in U.S. law. Broader civil liability to secondary market participants for misrepresentations in corporate disclosure, similar to the SEC's Rule 10b-5 as interpreted over the years, is more recent. The Toronto Stock Exchange Committee on Corporate Disclosure (whose recommendations were the basis for the Canadian legislation) noted significant distinctions between the Canadian and American litigation environments.[1] The Canadian liability regime seeks to provide a meaningful remedy to investors who suffer losses in connection with misleading disclosure while providing safeguards against frivolous litigation.

Creating an extraterritorial private right of action would affect claims that should more properly be litigated in the jurisdiction to which the parties or the conduct have a greater connection than to the United States. This threat was acknowledged by the U.S. Supreme Court in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), in which the Court asserted its concern that the U.S. has "become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."

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[1] These distinctions include:

- a "loser pays" cost rule in Canada;
- explicit statutory provisions expressed in the type of action that gives rise to liability and what the limits are; and
- proportionate rather than joint and several liability except in cases of intentional misrepresentation, in which case liability is joint and several.

The SEC Release suggests that restricting the private right of action to institutional investors only would remedy the threat of inordinate litigation. In our view, this restriction would not address the fundamental issue of international comity. Further, we see no principled reason why institutional investors should gain access to a legal recourse that is unavailable to individual investors.

In our view, the use of a private right of action as a tool for avoiding a different statutory regime in another jurisdiction should be discouraged. Extending a transnational private right of action may fail to acknowledge the differences in securities laws across national boundaries. In particular, it may provide an avenue for parties to pursue litigation in the U.S. in situations where the statutory regime in the country with a more significant connection to the matter provides greater safeguards to one of the parties.

These concerns are not merely about the volume of litigation. They go to the heart of international comity. Where Canadian laws set standards for plaintiffs and defendants alike, those conditions must be respected. While U.S. and Canadian securities law are largely comparable in intent, they are not identical. Permitting litigants to elect for U.S. law stand in place of Canadian law in private rights of action effectively and inappropriately extends the application of U.S. law to conduct which should be subject to Canadian law. It is not appropriate for the SEC to open the door to lawsuits in U.S. Courts for conduct or transactions with a significant connection to Canada and which are subject to laws that, albeit different from the U.S. regime, offer an appropriate means of redress.

It is understandable that the desire to protect investors has led to consideration of transnational private rights of action. However, the goal of investor protection must be balanced against equally important goals facing securities regulation. While a private right of action may enhance investor protection to some degree, it may also have a disproportionately negative effect on the maintenance of fair, orderly and efficient markets.

Issuers, underwriters, investors and other market participants need a reasonable degree of consistency in the application of regulations. They need to be confident about which regulations apply to them. The potential for transnational litigation drastically increases the possibility that all players in securities markets will be subject to rules they were unaware of or did not believe were applicable to them. Predictability and consistency in the operation of capital markets is as equally important an objective as investor protection. One cannot be sacrificed for the other.

Thank you for the opportunity to comment on this important legal question. We are available for further comment and look forward to the response of the SEC.

Yours truly,

(Original signed by Rebecca Bromwich for Ross Swanson and Robert G. Patzelt)

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