

## Section 6: Voting

Each trustee shall have one vote on any question coming before the Board during any regular or special meeting which he or she attends in person. Trustees who participate by telephone or video or audio conference are not entitled to vote except and only at special meetings called in accordance with Article III Section 4 of these Bylaws. Concurring votes by a majority of the trustees presently servicing on the Board shall be necessary for the adoption of any resolution or action by the Board. A tie vote fails.

Thanks to everyone who participated in our Listserve survey. If you have any questions, please contact Cynthia Fain at cfain@trs.illinois.gov, or (217) 753-0375.

## Endnotes

1. NAPPA Listserve posted June 4, 2010.
2. 5 ILCS 120.
3. 5 ILCS 120/7(b).
4. 5 ILCS 120/7(a).
5. 5 ILCS 120/7(c).
6. Bylaws of the TRS Board of Trustees, Article III, Meetings, Section 3, Attendance; Section 6, Voting (emphasis added).

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# Morrison v. National Australia Bank: The Potential Impact On Public Pension Fund Fiduciaries

By

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In a case with far reaching importance to public pension funds across the country, the United States Supreme Court held in *Morrison v. National Australia Bank Ltd.*, that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder, reach "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." 130 S.Ct. 2869 (emphasis added). Many commentators suggest *Morrison* provides a bright-line rule for the application of Section 10(b) and Rule 10b-5. Justice Stevens's concurring opinion interprets the Court's opinion as doing just that. Justice Stevens notes, "[i]magine, for example, an American investor who buys shares in a company listed only on an overseas exchange . . . under the Court's new test, [the investor would] be barred from seeking relief under §10(b)."<sup>2</sup> The district courts that have addressed the issue post-*Morrison* agree.<sup>3</sup>

In *Toyota*, the court held that "'domestic transactions' or 'purchase[s] or sales[s]...in the United States' means purchases and sales of securities explicitly solicited by the issuer within the United States rather than transactions in foreign-traded securities where the ultimate purchaser or seller has physically remained in the United States." The decision swings the scope of potentially recoverable damages in the *Toyota* litigation from potentially more than \$10 billion including all the losses on the Tokyo exchange, to possibly less than \$1 billion in ADR losses. Similarly in *Cornwell v. Credit Suisse Group, et al.*, the court granted partial summary judgment dismissing the claims of all plaintiffs that bought shares

on the Swiss Stock Exchange.<sup>4</sup> The court stated that "read as a whole, the *Morrison* opinions indicate that the Court considered that under its new test § 10(b) would not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the trade occurred in the United States." *Id.* The economic impact to the *Credit Suisse* litigation will be similarly large in scope.

Accepting Justice Stevens' and the *Toyota* and *Credit Suisse* court's reading of the *Morrison* decision, what impact will this have on public pension funds? Does the lack of access to U.S. courts to redress fraud relating to the purchase and sale of securities traded on foreign exchanges suggest the potential necessity for public pension funds to review existing investment guidelines?

Public pension fiduciary responsibilities are much discussed and the responsibilities of those who oversee and manage the operation, benefits, and investments of public plans are set forth in state law and developed through common law. While these fiduciary duties vary slightly depending on specific law, they generally require that a fiduciary is bound by fiduciary duties including the duty of care and the duty of prudence.<sup>5</sup> By way of example, the California Constitution provides "the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys" and "members of the [board] shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing [of] a prudent person."<sup>6</sup> To fulfill these duties, public pension fund trustees typically establish written investment policies.<sup>7</sup> The investment policies often

define acceptable levels of risk. Consistent with the philosophy of limiting risk and fulfilling their fiduciary duties, some states place a cap on "alternative investments"<sup>8</sup> while other states already limit investments in foreign equities.<sup>9</sup> If public pension funds will no longer have redress for fraud committed in connection with the purchase and sale of foreign stocks traded on foreign exchanges, can fund fiduciaries continue to invest overseas when arguably or practically, they have little or no recourse if fraud occurs? It will be interesting to see as the *Morrison* decision is digested whether public pension funds will now analyze the risk of securities fraud coupled with the costs of litigating overseas as part of the investment metric, similar to the analysis performed prior to public pension funds arriving at various current investing limits.

When considering the litigation options now available, an important but not exhaustive consideration includes that prosecution of claims by U.S. investors abroad is difficult. Foreign jurisdictions often have loser pay provisions, shifting all costs and fees to the loser.<sup>10</sup> These fees and costs, in addition to the cost of a foreign prosecution, can be considerable in these inherently complex cases. Other countries generally do not provide for class actions,<sup>11</sup> and devotion of the public pension fund's staff time to an overseas prosecution could be prohibitively disruptive. Moreover, the differences between U.S. law and the laws of various other countries will impact recently filed securities class actions against multinational corporations such as BP p.l.c (U.K. law), Toyota Motor Corp. (Japanese law), and UBS AG (Swiss law) and Credit Suisse (Swiss law).<sup>12</sup>

If Justice Stevens and the *Toyota* and *Credit Suisse* courts are correct and there is no longer any recourse under the federal securities laws for defrauded U.S. purchasers or sellers of securities on foreign exchanges, the *Morrison* decision may well spark efforts at the expansion of class actions overseas and of investor litigation abroad. In the meantime, public pension fiduciaries may need to consider the risk of overseas investments.

## Endnotes

1. Barbara J. Hart is a shareholder and Todd S. Garber an associate at Lowey Dannenberg Cohen & Hart in White Plains (www.lowey.com). Ms. Hart is head of Lowey Dannenberg's securities litigation practice and Mr. Garber focuses on litigation involving shareholder rights, and securities fraud.
2. *Morrison*, 130 S.Ct. 2869.
3. *Harry Stackhouse v. Toyota Motor Co., et al.*, 2:10-cv-00922-DSF-AJW (C.D. Cal.) (D.K.# 144); *Cornwell v. Credit Suisse Group, et al.*, 1:08-cv-03758-VM (S.D.N.Y.).
4. 1:08-cv-03758-VM (S.D.N.Y.) (D.K. # 82).

5. See Government Finance Officers Association of the United States and Canada Best Practice, March 5, 2010 at [http://www.gfoa.org/downloads/GFOA\\_governanceretirementbenefits-systemsBP.pdf](http://www.gfoa.org/downloads/GFOA_governanceretirementbenefits-systemsBP.pdf)
6. Cal. Const. art. 16, § 17 (2008).
7. See Government Finance Officers Association of the United States and Canada Best Practice, October 2009, at [http://www.gfoa.org/downloads/PublicEmployeeRetirementSystemInvestments\\_BestPractice.pdf](http://www.gfoa.org/downloads/PublicEmployeeRetirementSystemInvestments_BestPractice.pdf)
8. Florida and North Carolina limit investment in private firms to 5% of fund assets. See Fla. Stat. Ann. §§ 215-44, 215-47 (2008); see also N.C. Gen. Stat. Ann. § 147-69.2(b)(9) (2008); Texas caps hedge fund investments at 5%. Tex. Gov't Code § 825.3012.
9. N.Y. Retire. and Soc. Sec. Law § 177(8) (2008). The New York State Retirement Fund has a 10% cap on investments in foreign equities.
10. See, e.g., Stefano M. Grace, Strengthening Investor Confidence in Europe, 15 J. TRANSNAT'L L. & POL'Y 281, 289 (2005) ("The 'English rule' is the predominant rule in Europe, and only one EU member state, Luxembourg, has rejected the rule requiring each party to pay their own litigation costs similar to the American approach.").
11. Very few countries outside of the United States allow for private class actions for securities violations. See Stephen J. Choi & Linda J. Silberman, Transnational Litigation and Global Securities Class-Action Lawsuits, 2009 WIS. L. REV. 465, 484 (2009) ("only a few other countries have adopted class-action mechanisms for securities violations").
12. Japan and Switzerland both have no class action device. Ikuo Sugawara, "The Current Situation of Class Action in Japan," a national report for the conference "The Globalization of Class Actions," held in Oxford, England, on December 12-14, 2007 (co-sponsored by Stanford Law School and the Centre for Socio-Legal Studies of Oxford University). Available at [http://www.law.stanford.edu/library/globalclassaction/PDF/Japan\\_National\\_Report.pdf](http://www.law.stanford.edu/library/globalclassaction/PDF/Japan_National_Report.pdf) ("class action does not exist in Japan."); Samuel P. Baumgartner, "Group Litigation in Switzerland," a national report for the conference "The Globalization of Class Actions," held in Oxford, England, on December 12-14, 2007 (co-sponsored by Stanford Law School and the Centre for Socio-Legal Studies of Oxford University). Available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/Switzerland\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Switzerland_National_Report.pdf) ("Switzerland is one of the many countries that do not currently have an American-style class action.").