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United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510–6075

May 25, 2007

The Honorable Christopher Cox
Chairman
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D. C. 20549

Dear Chairman Cox:

The U.S. Securities and Exchange Commission has vital responsibilities to protect investors and to promote fair and efficient securities markets. The Commission's successful performance of these responsibilities has promoted investor confidence and made our markets the envy of the world. I compliment you on recent initiatives which have furthered the role of the Commission as "the investor's advocate."

Recently, the United States Supreme Court accepted for review a case on appeal from the Eighth Circuit, *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 443 F.3d 987 (8th Cir. 2006), *cert. granted*, 127 S.Ct. 1873, (U.S. Mar. 26, 2007) (No. 06-43). The *Stoneridge* case raises a significant issue affecting private rights of action and civil liability under the Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder that some have called "scheme liability." The case is particularly important because its decision could resolve differences among the Fifth, Eighth and Ninth Circuits regarding the application of Exchange Act Section 10(b).

It is my understanding that in the past, the Commission has filed some amicus briefs with courts that were considering cases that raised similar issues. The preparation of such amicus briefs has been an important activity of the Commission and has provided the courts with the Commission's expert analysis of the statutes it administers. In some instances, the courts have embraced the Commission's reasoning or a variant thereof.

The Commission in its amicus briefs has recommended standards for interpreting these anti-fraud provisions of the Exchange Act. The Commission has said, for example, that:

- any person "who directly or indirectly engages in a manipulative or deceptive act as part of a scheme to defraud can be a primary violator of Section 10(b) and Rule 10b-5(a)." Brief of the Securities and Exchange Commission as Amicus Curiae at 16, *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, (9th Cir. 2006) (No. 04-55665). The SEC explained that "deceptive acts under Section 10(b) include conduct beyond the making of

false statements or misleading omissions, for facts effectively can be misrepresented by action as well as words." *Id.* at 8.

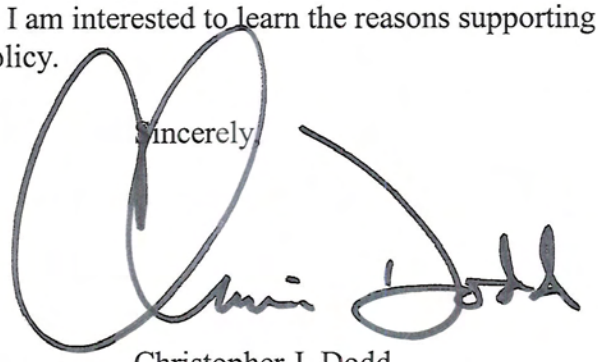
- "A person who creates a misrepresentation, but takes care not to be identified publicly with it, 'indirectly' uses or employs a deceptive device or contrivance and should be liable . . . In sum, by providing a safe harbor for anonymous creators of misrepresentations, a rule that imposes liability only when a person is identified with a misrepresentation would place a premium on concealment and subterfuge rather than on compliance with the federal securities laws." Brief of the Securities and Exchange Commission as Amicus Curiae at 10-11, *Klein v. Boyd*, 1998 WL 55245 (3d Cir. 1997) (No. 97-1143).

- "Section 10(b)'s coverage of 'deceptive device[s],' however, reaches deceptive *acts* as well as statements and omissions, and such acts have long been understood to constitute fraud . . . Section 10(b)'s prohibition of any 'deceptive device or contrivance' thus implies coverage of the full range of schemes to deceive, not just statements or omissions." Brief of the United States at 19, 20, n. 10, *United States v. O'Hagan*, 139 F.3d 641 (8th Cir. 1998) (Nos. 94-3714, 94-3856).

These standards have, in my view, been meritorious. As a co-author of the Private Securities Litigation Reform Act, I have worked to protect business from frivolous and meritless lawsuits. At the same time, I have supported efforts to protect the rights of investors who have been defrauded.

I understand that the Commission is considering whether to file an amicus brief in the *Stoneridge* case. I would appreciate knowing whether the Commission plans to file or intends to ask the Solicitor General to file an amicus brief in that case. If the Commission so intends, I would appreciate knowing whether it plans to advocate to the Court arguments consistent with its past positions in "scheme liability" cases. If it intends to file an amicus brief in *Stoneridge* that differs from past positions, I am interested to learn the reasons supporting this in order to better understand Commission policy.

Sincerely,



Christopher J. Dodd
Chairman