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SECURITIES LAW ALERT

SEPTEMBER 2013

This edition of the Alert addresses two Second Circuit decisions: one ruling that the limits on the extraterritorial application of Section 10(b) established in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) apply with equal force to criminal actions under Section 10(b); and another holding that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precludes Madoff-related state law claims against JPMorgan Chase & Co. and the Bank of New York Mellon because those claims concern Madoff's purported transactions in covered securities.

We also discuss a Delaware Supreme Court decision declining to broaden the fraud exception to the continuous ownership rule for shareholder derivative standing set forth in *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984).

Second Circuit Holds *Morrison*'s Limits on the Extraterritorial Application of Section 10(b) Apply to Criminal Securities Fraud Actions

In a decision issued on August 30, 2013, the Second Circuit considered "a question left open after the Supreme Court's decision" in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010): "whether *criminal* liability under Section 10(b) of the Securities Exchange Act of 1934 … extends to conduct in connection with an extraterritorial purchase or sale of securities." *United States v. Vilar*, 2013 WL 4608948 (2d Cir. Aug. 30, 2013) (Cabranes, J.). The Second Circuit held that "Section 10(b) and its implementing regulation, Rule 10b-5, do not apply to extraterritorial conduct, regardless of whether liability is sought criminally or civilly."

Background

Between July 1986 and May 2005, Alberto Vilar and Gary Alan Tanaka, two prominent investment managers, "offered clients the opportunity to invest in 'Guaranteed Fixed Rate Deposit Accounts' ('GFRDAs')" that promised investors "a high, fixed rate of interest over a set term." Vilar and Tanaka represented that "GFRDA funds would be invested in high-quality, short-term deposits," but the two actually "invested all of the funds in technology and biotechnology stocks." After the burst of the dot.com bubble in the fall of 2000, "the value of the investments held by the GFRDAs dropped precipitously" and "Vilar and Tanaka could not pay the promised rates of return."

In June 2002, Vilar and Tanaka persuaded Lily Cates, a long-time client, to invest $5 million in a

The Securities Law Alert is edited by Paul C. Gluckow (pgluckow@stblaw.com/212-455-2653), Peter E. Kazanoff (pkazanoff@stblaw.com/212-455-3525) and Jonathan K. Youngwood (jyoungwood@stblaw.com/212-455-3539).

purported Small Business Investment Company ("SBIC"). The two then "quickly drew on these funds in order to meet various personal and corporate obligations." After Cates unsuccessfully attempted to withdraw her funds and close the account in early 2005, she grew suspicious and filed a report with the SEC.

In August 2006, the DOJ indicted Vilar and Tanaka in connection with the GFRDA and SBIC schemes. On November 19, 2008, a jury convicted Vilar and Tanaka of securities fraud. The Supreme Court subsequently handed down its decision in *Morrison*, holding 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." *Morrison*, 130 S. Ct. 2869. The *Morrison* Court expressly "rejected any extraterritorial application of Section 10(b) and 10b-5." *Vilar*, 2013 WL 4608948.

Relying on *Morrison*, Vilar and Tanaka appealed their convictions, claiming, *inter alia*, that "the conduct underlying their convictions for securities fraud was 'extraterritorial,' and therefore not criminal under Section 10(b) or Rule 10b-5." The Government responded that "*Morrison*'s geographic limit on the reach of Section 10(b) and Rule 10b-5 applie[d] only in the civil context and therefore was no bar to Vilar and Tanaka's criminal convictions." Alternatively, the Government contended that "Vilar and Tanaka's illegal conduct was 'territorial' within the meaning of *Morrison*."

Second Circuit Holds *Morrison*'s Presumption Against Extraterritoriality Applies with Equal Force to Criminal Statutes, Including Section 10(b)

The Second Circuit explained that the appeal required it to determine "whether *Morrison*'s limit on the scope of Section 10(b) liability extends to criminal prosecutions brought under that provision." The court had "no problem concluding that *Morrison*'s holding applies equally to criminal actions brought under Section 10(b)" for two reasons. First, the Second Circuit determined that "the presumption against extraterritoriality applies to criminal statutes." Second, the court found that "the presumption against extraterritoriality applies to Section 10(b)."

Morrison's Presumption Against Extraterritoriality Applies to Criminal Statutes

The Second Circuit rejected the Government's contention that "the presumption against extraterritoriality for civil statutes … simply does not apply in the criminal context." In support of this argument, the Government relied on *United States v. Bowman*, 260 U.S. 94 (1922). The *Bowman* Court recognized that "[c]rimes against private individuals or their property … must, of course, be committed within the territorial jurisdiction of the government." However, the *Bowman* Court stated that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their location for the government's jurisdiction, but are enacted because of the right of the government

to defend itself." The Government claimed that *Bowman* "limit[ed] the presumption against extraterritoriality to civil statutes." *Vilar*, 2013 WL 4608948.

Finding the Government's reliance on *Bowman* "misplaced," the Second Circuit explained that *Bowman* limits the presumption against extraterritoriality only "in situations where the law at issue is aimed at protecting 'the right of the government to defend itself.'" The Second Circuit stated that the purpose of Section 10(b) is to "prohibit '[c]rimes against private individuals or their property,' which *Bowman* teaches is exactly the sort of statutory provision for which the presumption against extraterritoriality does apply."

Moreover, the Second Circuit found that "the distinction the [G]overnment attempt[ed] to draw between civil and criminal laws [was] no response to the fundamental purposes of the presumption." The court explained that "Congress generally legislates with domestic concerns in mind" and the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations." The Second Circuit found that "these concerns [were] no less pertinent in the criminal context." Therefore, the Second Circuit held that as a "general rule … the presumption against extraterritoriality applies to criminal statutes."

Morrison's Presumption Against Extraterritoriality Applies to Section 10(b) Criminal Actions

Turning to Section 10(b) specifically, the Second Circuit explained that "[t]he presumption against extraterritoriality is a method of interpreting a statute" rather than "a rule to be applied to the specific facts of each case." Either a statute "applies extraterritorially or it does not." In this case, "[t]he Supreme Court has already interpreted Section 10(b)" and has held "in unmistakable terms" that Section 10(b) does not apply extraterritorially.

The Second Circuit found meritless the Government's contention that "Section 10(b) is interpreted differently in the criminal and civil contexts because different elements are required to prevail in each." (While "private plaintiffs must prove reliance, economic loss, and loss causation," the government must only "prove that the fraud was committed willfully in criminal cases.") The Second Circuit explained that "[r]eliance, economic loss, and loss causation relate to who … may bring suit and not to the conduct prohibited by Section 10(b)." As to the element of willfulness in criminal actions, which "comes directly from Section 32 of the Securities Exchange Act of 1934," the Second Circuit determined that "Section 32 provides no basis for *expanding* the conduct for which a defendant may be held criminally liable under Section 10(b)." Similarly, the Second Circuit held that Rule 10b-5 could not "provide for the extraterritorial reach that [Section 10(b)] lacks."

Second Circuit Finds Defendants Committed Fraud in Connection with Domestic Securities Transactions

Having determined that *Morrison*'s presumption against extraterritoriality applies to criminal actions under Section 10(b), the Second Circuit next considered "whether the jury would have found, beyond a reasonable doubt, that Vilar and Tanaka [had] engaged in fraud in connection with a *domestic* purchase or sale of securities." The Second Circuit applied the test set forth in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012) for determining "whether a security not listed on an American exchange was purchased or sold in the United States." Under *Absolute Activist*, "a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States." *Absolute Activist*, 677 F.3d 60.

The Second Circuit found that with respect to the GFRDA fraud, one set of alleged victims "entered into and renewed their agreement in Puerto Rico" and another alleged victim "did so in New York." *Vilar*, 2013 WL 4608948. As to the SBIC scheme, the Government presented evidence that Lily Cates had executed the investment documents in New York. The Second Circuit concluded that under *Absolute Activist*, these allegations were "precisely the sort" that would "suffice to prove that irrevocable liability was incurred in the United States." Finding that Vilar and Tanaka "did perpetrate fraud in connection with domestic securities transactions" within the meaning of *Morrison*, the Second Circuit affirmed their convictions.

Second Circuit Affirms Dismissal of Madoff-Related State Law Claims Against JPMorgan Chase and the Bank of New York Mellon on SLUSA Grounds

On September 16, 2013, the Second Circuit affirmed dismissal of state law claims brought by investors in foreign "feeder funds" for Bernard L. Madoff Investment Securities ("Madoff Securities") against JPMorgan Chase & Co. and the Bank of New York Mellon ("BNY"), the banks which held Madoff Securities' accounts. *In re Herald*, 2013 WL 5046509 (2d Cir. Sept. 16, 2013) (Rakoff, J.). The Second Circuit held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precluded plaintiffs' claims because the claims were "integrally tied" to "Madoff Securities' Ponzi scheme, which indisputably engaged in purported investments in covered securities" under SLUSA.

Background

Beginning in the mid-1990s, several foreign investment funds allegedly "secretly funneled investors' assets" to Madoff Securities. Following the collapse of Madoff Securities, investors in these funds brought suit in the Southern District of New York against a broad range of defendants, including JPMorgan and BNY, the banks which held Madoff Securities' accounts.

Plaintiffs contended that "as Madoff Securities' principal banker, JPMorgan had not simply ignored 'red flags' of fraud, but 'had actual knowledge that [Madoff Securities] was violating its fiduciary duties and committing fraud.'" Nevertheless, JPMorgan had allegedly "furthered Madoff's fraud by 'funnel[ing] hundreds of millions of dollars to Madoff.'" Plaintiffs claimed that JPMorgan was required to alert authorities to the Madoff fraud, but instead opted to stay silent "to ensure [its] own profits." With respect to BNY, plaintiffs similarly alleged that BNY had "ignored the evidence of fraud and failed to disclose the fraud" "because it 'was collecting such large fees.'"

Based on these allegations, plaintiffs asserted state law causes of action against JPMorgan and BNY, including claims for unjust enrichment and aiding and

abetting breaches of fiduciary duty by the investment funds and their advisors. JPMorgan and BNY moved to dismiss plaintiffs' claims. On November 29, 2011, the Southern District of New York held, *inter alia*, that SLUSA precluded plaintiffs' claims against JPMorgan and BNY. Plaintiffs appealed.

Second Circuit Finds Plaintiffs' Claims Against JPMorgan and BNY "Integrally Tied" to Madoff's Securities Fraud for SLUSA Purposes

The Second Circuit began its analysis with a review of the history and purpose of SLUSA. The court explained that in order to "combat abusive and extortionate securities class actions," Congress enacted the Private Securities Litigation Reform Act ("PSLRA"), which established "stringent pleading requirements for certain securities fraud class actions brought in federal courts." To avoid the PSLRA's heightened pleading requirements, plaintiffs began filing securities-related class actions in state court. Congress responded by enacted SLUSA.

SLUSA provides that no state law-based class action seeking damages on behalf of more than fifty prospective class members "may be maintained in any State or Federal court by any private party alleging … a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). The Second Circuit explained that "SLUSA is broadly worded" in order to further "Congress's purpose" of "negat[ing] the artful pleading by which certain plaintiffs evaded the dictates of the PSLRA" and "Congress's desire to have class actions affecting the national securities markets be more completely governed by federal securities laws." *Herald*, 2013 WL 5046509.

In the case at hand, plaintiffs had "purchased interests in foreign feeder funds," which the parties agreed were "not included within the definition of 'covered security.'"[1] The district court had concluded that SLUSA nonetheless applied to preclude plaintiffs' claims against JPMorgan and BNY because "'Madoff's purported trading strategy utilized indisputably covered securities'" and the alleged bank misconduct was "'in connection with'" Madoff's securities fraud.

On appeal, the Second Circuit first determined that Madoff Securities' failure to "actually execute[ ] [its] pretended securities trades" did not take the case "outside the ambit of SLUSA." The Second Circuit next considered and rejected plaintiffs' argument that it was "inappropriate" for the district court to base its SLUSA analysis on "Madoff's 'downstream' transactions in covered securities" rather than plaintiffs "purchase of 'uncovered' interests in the foreign feeder funds." The Second Circuit explained that "on the very face of plaintiffs' complaints, the liability of JPMorgan and BNY is predicated not on these banks' relationship with plaintiffs or their investments in the feeder funds but on the banks' relationship with, and alleged assistance to, Madoff Securities' Ponzi scheme." Because "plaintiffs' allegations with respect to BNY and JPMorgan relate directly to Madoff's purported transactions in covered securities," the Second Circuit noted that it was "appropriate … to look to Madoff's purported transactions as the relevant transaction in covered securities for SLUSA's purposes."

The Second Circuit also agreed with the district court's finding that SLUSA precluded plaintiffs' claims against JPMorgan and BNY even though plaintiffs did not "style their claims against JPMorgan and BNY as securities fraud claims." The court explained that "plaintiffs cannot avoid SLUSA 'merely by consciously omitting references to securities or to the federal securities law.'" Considering the "'realities underlying the claims,'" the Second Circuit found that plaintiffs' claims against JPMorgan and BNY

1. A "covered security" is one that is "listed, or authorized for listing, on the [national exchanges]" or "issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." 15 U.S.C. § 78bb(f)(1).

were "'integrally tied to the underlying [securities] fraud committed by Madoff.'" Plaintiffs alleged that JPMorgan and BNY "knew of the fraud, failed to disclose the fraud, and helped the fraud succeed—in essence, that JPMorgan and BNY were complicit[ ] in Madoff's fraud." The Second Circuit held that " [t]hese allegations [were] more than sufficient to satisfy SLUSA's requirement that the complaint allege a 'misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.'"

The Second Circuit therefore affirmed dismissal of plaintiffs' claims against JPMorgan and BNY on SLUSA grounds.

Delaware Supreme Court Declines to Expand the Fraud Exception to the Continuous Ownership Rule for Shareholder Derivative Suits Set Forth in *Lewis v. Anderson*

In a decision issued on September 10, 2013, the Delaware Supreme Court responded to the following certified question from the Ninth Circuit:

> Whether, under the "fraud exception" to Delaware's continuous ownership rule, shareholder plaintiffs may maintain a derivative suit after a merger that divests them of their ownership interest in the corporation on whose behalf they sue by alleging that the merger at issue was necessitated by, and inseparable from, the alleged fraud that is the subject of their derivative claims.

Arkansas Teacher Retirement System v. Countrywide Financial Corp., 2013 WL 4805725 (Del. Sept. 10, 2013) (Holland, J.) (*Countrywide Financial*). The Delaware Supreme Court "answer[ed] that question in the negative," and "reaffirm[ed] the continuous ownership rule and the fraud exception" set forth in *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984).

Background

In October 2007, five institutional investors brought a shareholder derivative action against the directors and officers of Countrywide Financial Corporation in the Central District of California. On July 1, 2008, "Countrywide merged into a wholly-owned subsidiary of Bank of America Corporation ('BofA') in a stock-for-stock transaction that divested the plaintiffs of their Countrywide shares." In December 2008, the district court granted defendants' motion for judgment on the pleadings on the grounds that the merger had terminated plaintiffs' standing to pursue derivative claims on Countrywide's behalf because plaintiffs could not satisfy the "continuous ownership" requirement established in *Lewis v. Anderson*.

Plaintiffs subsequently moved for reconsideration of the district court's order based on the Delaware Supreme Court's intervening decision in *Arkansas Teacher Retirement Systems v. Caiafa*, 996 A.2d 321 (Del. 2010) (*Arkansas Teacher*), "which arose from the same underlying facts and involved the [same] parties." The Central District of California denied plaintiffs' motion on the grounds that *Arkansas Teacher* "'did not change Delaware law regarding the loss of derivative standing after a merger.'" Plaintiffs appealed to the Ninth Circuit, which in turn certified to the Delaware Supreme Court the question of the scope of the fraud exception to the continuous ownership rule for derivative standing.

Lewis v. Anderson: The Continuous Ownership Rule for Derivative Standing and the Fraud Exception

In *Anderson*, the Delaware Supreme Court "held that for a shareholder to have standing to maintain a derivative action, the plaintiff 'must not only be a stockholder at the time of the alleged wrong and at the time of commencement of suit but … must also maintain shareholder status throughout the litigation.'" *Countrywide Financial*, 2013 WL 4805725 (discussing *Anderson*, 477 A.2d 1040). These two requirements "are referred to, respectively, as the 'contemporaneous ownership' and the 'continuous ownership' requirements." The *Anderson* court ruled that if "the corporation on whose behalf a derivative action is pending is later acquired in a merger that deprives the derivative plaintiff of her shares," the plaintiff "loses standing to maintain the derivative action," because she "can no longer satisfy the continuous ownership requirement."

The *Anderson* court recognized a fraud exception to the continuous ownership rule. Pursuant to this exception, a plaintiff can maintain standing to bring a derivative suit post-merger in cases "where the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of their standing to bring or maintain a derivative action."

The Delaware Supreme Court's Decision in *Arkansas Teacher*

In *Arkansas Teacher*, the Delaware Supreme Court affirmed a Chancery Court decision approving the settlement of certain claims brought by Countrywide shareholders. The *Arkansas Teacher* court stated that the closing of the Countrywide-BofA merger had "extinguish[ed] [plaintiffs'] standing to pursue derivative claims." *Arkansas Teacher*, 996 A.2d 321.

The *Arkansas Teacher* court stated in *dictum* that plaintiffs could have theoretically pled a direct claim alleging a "single, inseparable fraud" in which Countrywide's directors had allegedly "cover[ed] massive wrongdoing with an otherwise permissible merger." The court made it clear that "the injured parties" in such a claim "would be the shareholders who would have post-merger standing to recover damages instead of the corporation." However, plaintiffs "did not present this claim" and therefore the *Arkansas Teacher* court found that the Chancery Court had not "abuse[d] [its] discretion in approving the settlement, despite facts in the complaint suggesting that the Countrywide directors' premerger agreement fraud [had] severely depressed the company's value at the time of [BofA's] acquisition, and [had] arguably necessitated a fire sale merger."

Plaintiffs' Motion for Reconsideration Based on *Arkansas Teacher*

In their motion for reconsideration, the *Countrywide Financial* plaintiffs argued that *Arkansas Teacher* "represented 'a new material change of law' that 'expanded the post-merger standing fraud exception to include situations where, as here, the plaintiffs sufficiently allege[d] fraudulent conduct that necessitated the merger." *Countrywide Financial*, 2013 WL 4805725. Plaintiffs contended that "because they allege[d] 'a single, inseparable fraud' by which the defendant Countrywide 'directors [had] covere[d] massive wrongdoing with an otherwise permissible merger,' they maintain[ed] post-merger derivative standing under the fraud exception to the continuous ownership rule, as interpreted by *Arkansas Teacher*."

Defendants opposed plaintiffs' motion for reconsideration, asserting that *Arkansas Teacher* "merely reaffirmed the traditional scope of the fraud exception, as articulated in *Lewis v. Anderson*." Defendants argued that "the fraud exception to the continuous ownership requirement applies only where the plaintiffs allege that the merger was

executed 'merely' to destroy derivative standing and lacked any legitimate business purpose."

To resolve the parties' dispute, the Ninth Circuit asked the Delaware Supreme Court to clarify the scope of the fraud exception to the continuous ownership rule after *Arkansas Teacher*.

Delaware Supreme Court Finds *Arkansas Teacher* Did Not Change *Lewis v. Anderson*'s Fraud Exception to the Continuous Ownership Rule

Responding to the Ninth Circuit's certified question, the Delaware Supreme Court held that *Arkansas Teacher* "did not 'clarify,' 'expand,' or constitute 'a new material change' in *Lewis v. Anderson*'s continuous ownership rule or the fraud exception." The Delaware Supreme Court observed that "*Lewis v. Anderson* is settled Delaware law" that has been "consistently followed since 1984."

The Delaware Supreme Court underscored that "[i]n the first paragraph of *Arkansas Teacher*—*i.e.*, the portion that is not *dictum*," the court "unequivocally held that the Countrywide-BofA merger [had] extinguished the plaintiffs' derivative standing." The Delaware Supreme Court explained that *Arkansas Teacher*'s "*dictum* about 'inseparable fraud' referred to direct, not derivative, claims." The *Arkansas Teacher* court "stated that any injury flowing from the 'inseparable fraud' would be suffered by the shareholders rather than the corporation and any recovery would go to the shareholders rather than the corporation." In view of this "unambiguous language in *Arkansas Teacher*," the Delaware Supreme Court found that "any 'inseparable fraud' claim would be direct."

Answering the certified question in the negative, the Delaware Supreme Court ruled that that *Arkansas Teacher* "did not change the scope of the fraud exception" to the continuous ownership rule.

NEW YORK

Bruce D. Angiolillo
212-455-3735
bangiolillo@stblaw.com

Mark G. Cunha
212-455-3475
mcunha@stblaw.com

Paul C. Curnin
212-455-2519
pcurnin@stblaw.com

Michael J. Garvey
212-455-7358
mgarvey@stblaw.com

Paul C. Gluckow
212-455-2653
pgluckow@stblaw.com

Nicholas Goldin
212-455-3685
ngoldin@stblaw.com

David W. Ichel
212-455-2563
dichel@stblaw.com

Peter E. Kazanoff
212-455-3525
pkazanoff@stblaw.com

Joshua A. Levine
212-455-7694
jlevine@stblaw.com

Linda H. Martin
212-455-7722
lmartin@stblaw.com

Joseph M. McLaughlin
212-455-3242
jmclaughlin@stblaw.com

Lynn K. Neuner
212-455-2696
lneuner@stblaw.com

Barry R. Ostrager
212-455-2655
bostrager@stblaw.com

Thomas C. Rice
212-455-3040
trice@stblaw.com

Mark J. Stein
212-455-2310
mstein@stblaw.com

Alan C. Turner
212-455-2472
aturner@stblaw.com

Mary Kay Vyskocil
212-455-3093
mvyskocil@stblaw.com

George S. Wang
212-455-2228
gwang@stblaw.com

David J. Woll
212-455-3136
dwoll@stblaw.com

Jonathan K. Youngwood
212-455-3539
jyoungwood@stblaw.com

LOS ANGELES

Michael D. Kibler
310-407-7515
mkibler@stblaw.com

Chet A. Kronenberg
310-407-7557
ckronenberg@stblaw.com

PALO ALTO

Alexis S. Coll-Very
650-251-5201
acoll-very@stblaw.com

James G. Kreissman
650-251-5080
jkreissman@stblaw.com

WASHINGTON, D.C.

Peter H. Bresnan
202-636-5569
pbresnan@stblaw.com

Cheryl J. Scarboro
202-636-5529
cscarboro@stblaw.com

Peter C. Thomas
202-636-5535
pthomas@stblaw.com

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UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000