Federal Trade Commission - Bureau of Consumer Protection
Securities and Exchange Commission – Office of International Affairs
Commodity Futures Trading Commission - Division of Enforcement

July 11, 2005

By Facsimile and Mail

Drafting Committee on the
Uniform Foreign Country Money Judgments Recognition Act
National Conference of Commissioners on Uniform State Laws 211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611

Re: Revision of Uniform Foreign Country Money Judgments Recognition Act

Dear Members of the Drafting Committee,

We write to encourage the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to include express language in the Reporter's Notes to the revised Uniform Foreign Country Money Judgments Recognition Act ("UFMJRA" or "Act") clarifying that it applies to judgments obtained by governmental units for the purpose of providing monetary restitution to members of the public. In particular, we propose incorporating such language into Section 3, comment 4 of the revised UFMJRA that will be considered by NCCUSL at its annual meeting later this month. We appreciate that the Drafting Committee has included some clarifying language in its proposed commentary on the scope of the Act, and we propose only a few amendments to the current draft.[1] This letter follows the presentation made by Maneesha Mithal, Assistant Director for International Consumer Protection at the Federal Trade Commission, who reported on this issue at the March 2005 meeting of the NCCUSL Drafting Committee on Foreign Judgments in Chicago. It represents the views of the undersigned and does not necessarily reflect the views of our respective Commissions.

Our agencies – the Federal Trade Commission ("FTC"), the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC") – have the authority to obtain judgments from U.S. federal district courts providing for compensation to

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[1] Our letter is based on the final 2005 Annual Meeting Draft of the UFMJRA available on the NCCUSL website at http://www.law.upenn.edu/bll/ulc/ufmjra/2005annmtgdraft.htm.

injured consumers, investors, and customers. This authority is critical to alleviating victims' economic injury and to restoring their confidence in international markets. Increasingly, however, our agencies face substantial obstacles in recovering money from foreign defendants who hold their assets abroad and from domestic defendants who have transferred their assets abroad. Significantly, some foreign courts have held that judgments obtained by our respective agencies are not enforceable under the exclusionary principle of international law that prohibits the enforcement, directly or indirectly, of a foreign state's public laws, such as its tax laws, revenue laws, or penalties.[2]

This exclusion for foreign penal and public judgments should not apply to judgments obtained by governmental agencies for the purpose of providing monetary restitution. We believe the correct principle is that such judgments, which are designed to compensate members of the public for economic injuries, should be recognized and enforced. The law in this area has begun to evolve in this direction. The Restatement (Third) of the Foreign Relations Law of the United States § 483, for example, states that, "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."[3] The commentary to this section notes, however, that, "A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its

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[2] For example, the High Court of the Cook Islands dismissed, on the basis of the exclusionary principle for foreign penal and public laws, an action brought by the Department of Justice, on behalf of the FTC, challenging the defendants' transfer of funds to a Cook Islands trust to defeat a final judgment obtained by the FTC from a U.S. court. *See United States v. Asiatrust Limited*, Plaint No. 57/1999(4 Dec. 2001 Judgment at 8) (unreported decision on file with FTC). *See also Schemmer, et al. v. Property Resources, Ltd.* (1975) 3 A11 ER 451 (U.K. court refused to permit receiver appointed in SEC enforcement action from recovering funds in defendants' London bank accounts after characterizing the Securities Exchange Act of 1934 as a penal law and, as such, unenforceable in UK courts); *Stutts v. Premier Benefit Capital Trust*, CICR 605 (1992-3) (unreported Cayman Islands decision); *Nanus Asia Co. v. Standard Chartered Bank*, 1988 HKC 377 (1988) (Hong Kong).

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subdivisions, and primarily punitive rather than compensatory in character."[4] The Restatement also notes, with respect to fiscal judgments, that the determination whether a judgment obtained by a governmental entity is a civil judgment entitled to recognition depends on the purpose of the claim and the law on which the judgment is based: "For instance, a judgment in an action by a central bank of a state for restitution of foreign currency unlawfully exported from that state would probably be enforced, but a fine for violation of exchange controls would not be."[5]

Other common law countries have also begun to adopt a new approach to judgments obtained by governmental units for the purpose of compensating members of the public. Several Canadian courts have recognized and enforced the non-penal portions of orders obtained by our respective agencies.[6] And, at least one appellate court in Australia has recognized, in the context of a proceeding brought by a court-appointed receiver in an FTC matter, that cases brought by governmental entities for the "recoupment of funds with a view to their return to persons deprived of those funds" do not fall within the exclusionary rule for foreign penal and public judgments.[7] In addition, the Australia-U.S. Free Trade Agreement, which was ratified by the Senate last year, contains a provision facilitating the efforts of government agencies in each jurisdiction to enforce such judgments on behalf of defrauded consumers and investors. It states:

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4 *Id.*, comment b.

5 *Id.*, comment d.

6 *See United States (Securities and Exchange Comm'n) v. Robert H. Cosby*, 2000 BCSC 0338 (B.C. Sup. Ct. 2000) (enforcing restitutionary judgment obtained by SEC) ; available at http://www.courts.gov.bc.ca/jdb-txt/sc/00/03/s00-0338.htm; *see also See United States (Federal Trade Comm'n) v. Ernest Levy et al.*, [2002] O.J. No. 2298 (Ontario Sup. Ct. Justice – C. Campbell J.) (affirmed by the Court of Appeal - 10 Jan. 2003) (enforcing restitutionary judgment obtained by FTC).

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> When an agency . . . obtains a civil monetary judgment from a judicial authority of a Party for the purpose of providing monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled, a judicial authority of the other Party generally should not disqualify such a monetary judgment from recognition and enforcement on the ground that it is penal or revenue in nature, or based on other foreign public law, including where such judgment contains provisions for the recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a judgment.[8]

Although this provision is not binding on courts in either Australia or the United States, it seeks to provide courts with interpretative guidance on the purpose of such legal actions.[9]

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[8] U.S.-Australia Free Trade Agreement, art. 14.7.2, U.S.-Austl., May 18, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.htm.

[9] The Hague Conference on Private International Law considered similar language in the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters, issued in 2000. The text of the draft provided that: "A dispute is not excluded from the scope of the Convention by the mere fact that a government, a government agency, or any person acting for the State is a party thereto." *See* "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters" (adopted by the Special Commission on 30 October, 1999) Art. 1.3, available at http://hcch.e-vision.nl/upload/wop/jdgmpd11.pdf. (This draft Convention has not been adopted; instead, it has been superseded by a narrower Convention that deals solely with business-to-business transactions.) The accompanying report included commentary explaining that restitutionary judgments obtained by governmental agencies could fall within the scope of the Convention. Though the Convention excluded penal and revenue judgments, it recognized that a "claim for restitution sought for injured consumers in a governmental proceeding which also seeks an order prohibiting the wrongful conduct . . ." could fall within the scope of the Convention." *See* Peter Nygh and Fausto Pocar, "Report of the Special Commission," available at http://hcch.e-vision.nl/upload/wop/jdgmpd11.pdf.

We believe that these developments recognize the realities of the global marketplace for consumers and investors, and represent an inevitable evolution of the law on the enforcement and recognition of foreign judgments. In this regard, we urge NCCUSL to extend these principles through the revised UFMJRA to foreign government agencies who seek recognition and enforcement of judgments obtained for the purpose of providing monetary restitution in U.S. courts. Given the primacy of UFMJRA in enforcing money judgments from foreign litigants, we believe that including such guidance to state courts in the Act would encourage other countries to recognize and enforce the non-penal judgments obtained by U.S. government agencies. It would also serve as a model for other countries, and thereby influence the development of the law in other jurisdictions.

Accordingly, we propose that NCCUSL consider providing guidance to state courts on this issue in the Reporter's Notes to the revised UFMJRA. In particular, we propose that NCCUSL make the following amendments to Section 3, comment 4 of the revised Act:[10]

> Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters.
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> * * *
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> Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States § 483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another that are primarily punitive rather than compensatory in character. *Id.*, comment b. The exclusion of tax judgments and

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[10] A clean version and a redlined version of our proposed language to the 2005 Annual Meeting Draft text are attached in Appendix A.

judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 10, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp. 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium).

Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought by a government entity. In particular, a judgment obtained by a government entity that awards compensation or restitution to members of the public may be subject to recognition and enforcement under the Act, and shall not necessarily be excluded on the ground that it is penal or revenue in nature, or based on other foreign public law, even when such judgment includes an order prohibiting wrongful conduct or contains provisions for the recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a judgment.

This proposed language would permit state courts evaluating judgments obtained by government entities to provide compensation or restitution to members of the public to focus on the purpose – and not the form – of the monetary relief provisions of such a judgment. This, in turn, would encourage foreign courts to apply this type of analysis to our agencies' judgments.

We appreciate your consideration of this matter, and would be pleased to provide you with more information or answer any questions that you may have. Please feel free to contact the undersigned or the following individuals at our agencies, Stacy Feuer at the FTC ((202) 326-3072 – sfeuer@ftc.gov), Elizabeth Jacobs at the SEC ((202) 551-6676 – jacobse@sec.gov), and Grant Collins at the CFTC ((202) 418-5321 – gcollins@cftc.gov).

Sincerely yours,

Lydia B. Parnes
Director
Bureau of Consumer Protection
Federal Trade Commission

Ethiopis Tafara
Director
Office of International Affairs
Securities and Exchange Commission

Gregory G. Mocek
Director
Division of Enforcement
Commodity Futures Trading Commission

cc: Robert H. Cornell, Chair
Kathleen H. Patchel, Reporter

Appendix A

Proposed Section 3 Commentary:

Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters.

* * *

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States § 483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another that are primarily punitive rather than compensatory in character. *Id.*, comment b. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 10, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp. 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium).

Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought by a government entity. In particular, a judgment obtained by a government entity that awards compensation or restitution to members of the public may be subject to recognition and enforcement under the Act, and shall not necessarily be excluded

on the ground that it is penal or revenue in nature, or based on other foreign public law, even when such judgment includes an order prohibiting wrongful conduct or contains provisions for the recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a judgment.

Proposed Commentary redlined against NCCUSL Annual Meeting Draft:

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Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States § 483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another that are primarily punitive rather than compensatory in character. *Id.*, comment b. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 10, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

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This exclusion for foreign penal and public judgments should not apply to judgments obtained by governmental agencies for the purpose of providing monetary restitution. We believe the correct principle is that such judgments, which are designed to compensate members of the public for economic injuries, should be recognized and enforced. The law in this area has begun to evolve in this direction. The Restatement (Third) of the Foreign Relations Law of the United States § 483, for example, states that, "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."[3] The commentary to this section notes, however, that, "A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its

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Sincerely yours,

Lydia B. Parnes
Director
Bureau of Consumer Protection
Federal Trade Commission

Ethiopis Tafara
Director
Office of International Affairs
Securities and Exchange Commission

Gregory G. Mocek
Director
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cc: Robert H. Cornell, Chair
Kathleen H. Patchel, Reporter

Appendix A

Proposed Section 3 Commentary:

Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters.

* * *

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States § 483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another that are primarily punitive rather than compensatory in character. *Id.*, comment b. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 10, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp. 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium).

Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought by a government entity. In particular, a judgment obtained by a government entity that awards compensation or restitution to members of the public may be subject to recognition and enforcement under the Act, and shall not necessarily be excluded

on the ground that it is penal or revenue in nature, or based on other foreign public law, even when such judgment includes an order prohibiting wrongful conduct or contains provisions for the recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a judgment.

Proposed Commentary redlined against NCCUSL Annual Meeting Draft:

Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters.

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A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp. 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium).

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