

Article

A Contemporary Challenge for Securities Fraud Litigation after the *Morrison v. National Australia Bank* Case

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ABSTRACT

As worldwide securities markets continue to integrate rapidly, it is important that Congress undertake a complete, thoughtful, and nuanced consideration before giving a legal shape to the challenge of fraud securities litigation. A contemporary challenge is now a prominent market decline as the recent crisis brings questions of legal responsibility which are no longer confined to one single jurisdiction, but rather spans the world. The purpose of this article is to present this contemporary challenge for the securities fraud litigation after the Morrison case. By covering the historical development of fraud securities litigation within the U.S., this article assesses the implications of the Morrison case on fraud securities litigation, discusses how SEC could employ approaches and strengthen its ability to enforce the post-Morrison fraud securities litigation, and then offers a critical analysis of the post-Morrison cases. This is followed by a review of conduct-effects tests and global fraud securities litigation. With these reviews in mind, this article concludes with an invitation and recommendation for the SEC to re-examine and reconsider its contemporary regulatory reach, especially after the Morrison case, which expresses the most recent and relevant word from the U.S. Supreme Court on the topic.

Keywords: *Anti-fraud Provision, Extraterritorial Application, Conduct Test, Effects Test, Transactional Test*

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I. INTRODUCTION

A number of federal and state statutes criminalize conduct involving misrepresentations, omissions and other aspects of fraud in securities litigation. The most significant federal securities acts are of 1933¹ and of 1934.² These statutes provide for civil remedies and criminal sanctions. *Morrison v. National Australia Bank*,³ decided by the Supreme Court of the United States in 2010, is an important decision in a number of aspects. It was the first case to address the extraterritorial reach of U.S. fraud securities legislation, in particular, section 10(b) of the 1934 Act.⁴ The Court's supposition against extraterritoriality had the practical impact of noticeably reducing the regulatory reach of the anti-fraud provisions of the U.S. securities laws and changing the setting of U.S. class action litigation in the securities field. The decision has also invited new interests in analyzing the appropriate reach of U.S. statutes in other areas.⁵ Because the ruling was one of legal explanation only, it has left open the challenges for future⁶ legislation to extend the reach of the fraud securities litigation beyond the limits imposed in the *Morrison* case and the U.S. Congress has directed further study on that question.⁷ A contemporary challenge is now a prominent market decline as the recent crisis brings questions of legal responsibility which are no longer confined to simply one jurisdiction, but rather spans the world. This deserves a careful post-*Morrison* decision analysis and presents a contemporary challenge for securities fraud litigation, particularly when it is rampant in the U.S. courts.

1. 15 U.S.C.A. § 77a (2012).

2. 15 U.S.C.A. § 78a (2012).

3. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

4. 15 U.S.C. § 78j (b). *See also* Joshua Boehm, *Private Securities Fraud Litigation after Morrison v. National Australia Bank: Reconsidering a Reliance-Based Approach to Extraterritoriality*, 53 HARV. INT'L L.J. 249, 280 (2012).

5. William S. Dodge, *Morrison's Effects Test*, 40 SW. U. L. REV. 687, 687-88 (2011).

6. Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72(3) OHIO ST. L.J. 537, 570-71 (2011) ("the language of the Act as drafted ... may not have any effect on the application of Section 10(b), depending on the willingness of the courts to overlook the plain language of the statute").

7. In a month after the decision of *Morrison* case, Congress, in section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (21 July, 2010), amended the Securities Exchange Act of 1934 to provide for extraterritorial jurisdiction for actions brought by the US Department of Justice or the Securities Exchange Commission (SEC). Section 929Y of the Dodd-Frank Act also directs the SEC to solicit public comment and to conduct a study to determine the extent to which private rights of action under the anti-fraud provisions of the Exchange Act should be extended. Securities Exchange Commission (SEC), *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934* (2012), available at <http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf> (last visited Nov. 29, 2013).

This article does not aim to resolve the ongoing dispute over what is the appropriate role for the Securities and Exchange Commission (SEC) in administering and enforcing fraud securities legislation. Instead this article presents a contemporary challenge for securities fraud litigation after the *Morrison* case. This article consists of the following parts. First it covers the historical development of securities fraud litigation in the U.S. The second part assesses the *Morrison* case, offering a critical review of the post-*Morrison* cases. The third part presents conduct-effects tests as the baseline standard and a U.S. requirement for securities fraud litigation, in the shadow of *Morrison*, and then discusses the global securities markets and the challenges they face. Finally, this article, in the conclusion, invites the SEC to re-examine and reconsider its contemporary regulatory reach, especially after *Morrison*, which represents the most recent and relevant position of the U.S. Supreme Court on the topic.

II. HISTORICAL DEVELOPMENT OF SECURITIES FRAUD LITIGATION

The main purpose of federal securities regulation is to stop fraud practices in the sale of securities and to promote the confidence of the public in the securities market. Fraud securities legislation consists mainly of two statutes: the Act of 1933,⁸ which focuses mainly on the issuance of fraud securities litigation, and the Act of 1934,⁹ which deals mainly with fraud in issued securities. SEC, an independent, quasi-judicial organization consisting of five commissioners, administers both acts of 1933 and 1934. The responsibilities of the SEC include interpreting federal securities laws; issuing new regulations and revising the existing regulations; and coordinating U.S. securities laws with federal, state, and overseas authorities.¹⁰ In 1996, Congress enacted legislation requiring the SEC, when making rules under either of the securities statutes, to consider, in addition to the protection of foreign investors, whether its action will promote effectiveness, competition, and capital formation.

The SEC has the power to seek civil orders in a federal district court against violations of the statutes; to recommend that the Justice Department bring criminal prosecutions; and to issue orders censuring, suspending, or expelling broker-dealers, investment advisers and investment companies. The Act of 1990¹¹ granted the SEC the power to issue cease-and-desist

8. 15 U.S.C.A. § 78a (2012).

9. *Id.*

10. The U.S. Securities and Exchange Commission (SEC) is an agency of the United States federal government. It holds primary responsibility for enforcing the federal securities laws and regulating the securities industry, the nation's stock and options exchanges, and other activities and organizations, including the electronic securities markets in the United States.

11. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No.

orders and to impose administrative civil penalties. Congress enacted the 1995 Reform Act¹² (or PSLRA) to amend both the 1933 and the 1934 Acts. One of its provisions grants authority to the SEC to bring civil actions for specified violations of the 1934 Act against aiders and abettors (those who knowingly provide substantial help to a person who violates the statute). In July 2010, President Obama signed in the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank),¹³ a most significant change in the U.S. economic regulation since the acts of 1933 and 1934. One of the many standalone statutes included in the Dodd–Frank is the Investor Protection and Securities Reform Act of 2010,¹⁴ which imposes new corporate governance and investor protection rules on publicly held companies. The Dodd–Frank¹⁵ has extended SEC’s authority in two ways: (1) it has empowered the SEC to bring enforcement actions under the 1933 Act against aiders and abettors and (2) it has amended the 1933 and 1934 Acts to allow *recklessness* as well as knowledge to satisfy the mental state required for the SEC to bring aiding and abetting cases. Its first goal is to limit the risk of contemporary finance - what critics often call the shadow banking system;¹⁶ and the second is to limit the harm caused by the failure of large financial institutions.

Dodd–Frank tackles the first task by putting brand-new regulatory structures in place for both the instruments and the institutions of the new financial world. The principal instruments in question are derivatives. A derivative is simply a contract between two parties (each called a counterparty), whose value is based on changes in an interest rate, currency, or almost anything else, or on the occurrence of some specified event (such

101-429, 104 Stat. 931(1990), *available at* <http://insidertrading.procon.org/sourcefiles/SecuritiesEnforcementRemediesAct1990.pdf> (last visited Nov. 29, 2013).

12. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67 (1995), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-104publ67/pdf/PLAW-104publ67.pdf> (last visited Nov. 29, 2013).

13. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/content-detail.html>. (last visited Nov. 29, 2013).

14. *Id.*

15. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376 (2010). Section 929P addresses the securities fraud litigation in the subsection (b) entitled “Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws.” Section 929(P)(b)(2) contains the provisions relevant to the Exchange Act of 1934 - Section 27 of the Act of 1934 (15 U.S.C. 78aa). In Section 929Y, Congress directs the SEC to solicit comments and conduct a study on the extent to which the conducts-effects tests should be restored for private anti-fraud actions under the Exchange Act (DFA § 929Y(a)). Congress also set forth particular areas for consideration and analysis, including whether the private right of action should be limited by the type of actor (that is, institutional investors), how the right would affect international comity, what the economic costs and benefits of the right would be, and whether a narrower extraterritorial standard ought to be adopted.

16. Steven L. Schwarcz, *Regulating Shadow Banking*, 31 REV. BANKING & FIN L. 619, 620-26 (2012).

as a company's default). An airline may buy an oil derivative - a contract under which it will be paid if the price of oil has risen at the end of the contract term - to hedge against changes in oil prices. Southwest Airline's judicious use of these derivatives was one of the keys to its early success.

Dodd-Frank's main policy for managing the riskiness of these contracts is to require that derivatives are cleared and traded on exchanges. To clear a derivative (or anything else, for that matter), the parties arrange for a clearinghouse to backstop both parties' performance on the contract. If the bank that had sold southwest an oil derivative failed, for instance, the clearinghouse would pay southwest the difference between the current and original oil price or would arrange for a substitute contract. If the same derivative were exchange traded, it would have standardized terms and would be purchased on an organized exchange, rather than negotiated privately by southwest and the bank. Clearing reduces the risk to each of the parties directly, while exchange trading reduces risk to them and to the financial system indirectly by making the derivatives market more transparent.

To better regulate institutions, the Dodd-Frank seeks to discern financial institutions that are most likely to cause system wide problems if they fail, and subjects them to more intensive regulation. The legislation focuses in particular on bank holding companies that have at least \$50 billion in assets, and nonbank financial institutions such as investment banks or insurance holding companies that the new Financial Stability Oversight Council deems to be systematically important. ("Bank" in this context means a commercial bank - a bank that accepts customer deposits. A bank holding company is a group of affiliated companies that has at least one commercial bank somewhere in the network, or has chosen to be subject to banking regulation, as Goldman Sachs and Morgan Stanley did in the fall of 2008). The Dodd-Frank instructs regulators to require that these systematically important firms keep a larger buffer of capital than ordinary financial institutions, to reduce the danger that they will fail.

If Dodd-Frank's first goal is to limit the risk before the fact - before an institution or market collapses - the second objective is to limit the destruction caused in the event that a systematically important institution does fail, despite everyone's best efforts to prevent that from taking place. For this second objective, the legislation introduces a new insolvency framework - the Dodd-Frank rules. If regulators find that a systematically important financial institution has defaulted or is at risk of defaulting, they can file a petition in the federal court in Washington, D.C. They can also start resolution proceedings and appoint the Federal Deposit Insurance Corporation (FDIC) as receiver to take over the financial institution in question to liquidate it, much as the FDIC has long done with ordinary

commercial banks.

Like the New Deal reforms, which gave rise to the FDIC and the SEC, among others, the Dodd–Frank creates a number of regulators to achieve these two objectives, including the Financial Stability Oversight Council, whose members include the heads of all the major financial regulators, and a new federal insurance regulator.

The 1995 Reform Act sought to prevent abuse in private securities fraud lawsuits. To prevent certain state private securities class action court cases alleging fraud from being used to upset the objectives of the Reform Act, Congress enacted the Securities Litigation Uniform Standards Act of 1998.¹⁷ The Act sets nationwide standards for securities class action lawsuits involving nationwide-traded securities while it preserves the appropriate enforcement powers of state securities regulators but does not change the current treatment of individual lawsuits. The 1998 Act amends both 1933 and 1934 Acts by prohibiting any private class action suit in state or federal courts by any private party based upon state statutory or common law. This includes allegations of “(1) a false statement or lapse about the purchase and sale of a covered security or (2) that the defendant used any scheming or deceiving device regarding such a transaction”¹⁸

In April 2012, Obama signed into law the acronym-friendly Jump-start Our Business Start-ups Act (or JOBS Act).¹⁹ This Act aimed to allow a wider class of the U.S. citizens to invest in the startups. When this Act passed, Section 302(b) included a not-so-much-discussed provision that limits the capability of the middle class investors to partake in venture investing.²⁰ This exclusion will make it hard, if not impossible, for middle-income investors to diversify their investments.²¹

In general, diversification of investment is of particular and critical importance, and in particular even more so when it comes to angel investing.²² The theory of contemporary finance suggests that portfolio diversification, the integration of assets with uncorrelated profits, will

17. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998), available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ353/pdf/PLAW-105publ353.pdf> (last visited Nov. 29, 2013).

18. *Morrison*, 130 S. Ct. at 2877.

19. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 3606 (2012), available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ106/pdf/PLAW-112publ106.pdf> (last visited Nov. 29, 2013).

20. Asher Bearman, *You Cannot “Crowdfund” a Fund (in Case You Were Wondering)*, VENTURE CAPITAL BLOG (Apr. 24, 2012), <http://www.lexisnexis.com/legalnewsroom/banking/b/venture-capital/archive/2012/04/24/you-cannot-crowdfund-a-fund-in-case-you-were-wondering.aspx> (last visited Nov. 29, 2013).

21. See JOBS, *supra* note 19.

22. Kevin J. Stiroh & Adrienne Rumble, *The Dark Side of Diversification: The Case of US Financial Holding Companies*, 30 J. OF BANKING & FIN. 2131, 2432 (2006).

largely lower the risk.²³ James Williamson suggests that this diversification can increase generally all returns if the risk level remained constant.²⁴ With startup companies, in particular, investments often assume a forked return profile. The majority of companies failed, taking with them the money invested by investors; a small number of others get meek returns; and, hardly ever, a company will be very successful and return grows the money invested.²⁵ In startup investment, perhaps much more than any other field, the handy investor must have a well-diversified set of investments to make sure that the startups balance the failures.

The simplest way to diversify an investment portfolio is to take part in a collective fund managed by an expert investor.²⁶ By collecting capital, even an investor with restricted capital can gain the advantages of diversification by spreading her capital among a number of different startups. Thus, even if a number of companies are unsuccessful, investors may still favorably get a smart return. A similar rule has worked advantageously in general stocks, with over thirteen trillion dollars invested by the U.S. citizens in diversified joint funds and similar vehicles.²⁷

This favorable investment climate in the U.S. has not only enticed foreign investors, but also litigants (both U.S. and overseas) seeking the benefits of the U.S. securities laws. Victims of securities fraud litigation committed outside the country find attractive the many features of the U.S. securities litigation: broad liability standards, a competent and knowledgeable federal judiciary, liberal process and discovery rules, relatively expeditious litigation, and powerful tools for the enforcement of judgments.²⁸

In the jurisdictional reach of the U.S. antifraud rules, particularly Rule 10b-5,²⁹ the U.S. courts face a predicament, caused by both fear and desire for foreign-flavored securities transactions. On the one hand, the fraud securities legislation is meant to protect U.S. investors and the integrity of the U.S. securities markets. Excusing securities violations simply because a

23. TIM KOLLER, MARC GOEDHART & DAVID WESSELS, *VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES* 33 (2010); BEVIS LONGSTRETH, *MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE* 29-32 (1986).

24. James J. Williamson, *The JOBS Act and Middle-Income Investors: Why it Does Not Go Far Enough?*, 122 YALE L.J. 2069, 2075-80 (2013).

25. *Id.*

26. *Id.*

27. *Id.*

28. I. Kim & D. J. Skinner, *Measuring Securities Litigation Risk*, 53 J. ACCT. & ECON. 290, 310 (2012).

29. *Dirks v. SEC*, 463 U.S. 646, 666 (1983). (“[T]o constitute a violation of Rule 10b-5, there must be fraud.”); see also David S. Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 NW. U. L. REV. 627, 665 (1963) (“All three subsections of section 17(a) and Rule 10b-5 should be viewed as fraud sections and recovery should be allowed only in the event that the fraud can be discovered.”)

party or transaction has foreign attributes undermines this U.S. promise. However, the U.S. is not alone in the world, and it is in its countrywide interest to respect foreign sovereignty and abide by the rules of international comity. Inviting securities litigants to the U.S. may impinge on the regulatory cost-benefit choices in other countries, thus sowing international conflict and insecurity. It may also overly discourage overseas persons from engaging in securities-related behavior with the Americans or in the United States.³⁰

Federal courts have resolved this predicament using tests that generously measure U.S. interests in the challenged transactions. Under the effects test, illegal transactions outside the U.S. are subject to U.S. jurisdiction if they cause harm to U.S. investors or U.S. securities markets - an investor protection rationale. Within America, under the conduct tests, acts that are part of a fraudulent securities transaction are subject to U.S. jurisdiction even though reliance and harm occur abroad - a *market integrity* rationale.

For the past two decades or so, numerous cases have been addressing the reach of fraud litigation relating to U.S. securities laws, which impose liability on types of misconduct in relation to the purchase and sale of securities. Until the U.S. Supreme Court's decision in July 2010, the U.S. Courts of Appeals - often in the opinions of the late Judge Henry Friendly of the Court of Appeals of the Second Circuit - had defined that reach.³¹ Those decisions and subsequent ones throughout the U.S. had uniformly extended application of those laws to cases with some foreign elements. Indeed, the private right of action under the Act of 1934 is a judicially created right - there is no express private right of action found in the statute. The Second Circuit precedents - followed by the other Circuits - had accepted an extraterritorial reach for the securities laws when there was "significant fraudulent conduct that directly caused the plaintiffs losses" (the conduct test) or when there were "significant effects" on the U.S. securities markets (the effects test). The particular paradigm after *Morrison* - a claim under the U.S. securities laws brought by a foreign plaintiff who bought shares from an overseas issuer on a foreign exchange - that is, the Foreign-Cubed case - was actually not decided by the Court of Appeals until it reached the Second Circuit in the *Morrison* case.

30. James J. Park, *Rule 10B-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 394, 408 (2010).

31. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (asserting that U.S. securities laws apply to losses from sales of securities to foreigners outside the United States only when acts or culpable failures to act within the United States directly caused such losses).

III. MORRISON V. NATIONAL AUSTRALIA BANK

The *Morrison*³² case involved claims for violation of the U.S. securities law brought by both foreign and domestic lead plaintiffs on behalf of foreign investors who purchased shares in National Australia Bank, an Australian corporation, on the Australian order and other foreign exchanges, and on behalf of U.S. investors who bought American Depositary Receipts (ADRs) on the New York Exchange. (The U.S. lead claimant dismissed for failure to show any damage, and the claims of the U.S. purchasers were not pursued).³³ The plaintiffs alleged that HomeSide Lending, Inc., a U.S. wholly owned subsidiary of National Australia Bank located in Florida and engaged in the business of servicing mortgages, had made fraudulent statements. Specifically, HomeSide had overvalued HomeSide's portfolio during a declining interest rate environment in which customers were refinancing and thus had misrepresented the value of its mortgage-servicing rights.³⁴ This fraudulent financial information was transmitted to National Australia Bank and National Australia Bank integrated the fraudulent information into its annual reports, disseminating the information via public filings and statements in Australia.

Applying the traditional conduct and effects tests, the district court dismissed the claims of the foreign investors, and the Court of Appeals for the Second Circuit affirmed this decision,³⁵ characterizing the "heart of the alleged fraud" as taking place in Australia. The Supreme Court's conclusion that the U.S. securities laws did not apply in this case was not surprising, and the Supreme Court could easily have affirmed the decision under the traditional conduct and effects tests, but the Supreme Court in *Morrison* went much further.

A five-person majority imposed a bright line "transactional test" for all securities claims, stating that, "Section 10(b) reaches [...] only [...] 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."³⁶ This exchange-based interpretation limits the reach of the U.S. Securities Laws not only in the Foreign-cubed case, but also in cases in which the U.S. investors purchase - whether from a U.S. or foreign issuer - on a foreign exchange. The three other concurring Justices would have gone no further

32. *Morrison*, 130 S. Ct. at 2869.

33. *Id.*

34. *Id.*

35. See *in re National Australia Bank Securities Litig.*, No 03 Civ. 6537 (BSJ), 2006 WL 3844465 (SDNY 2006), affirmed in *Morrison v. National Australia Bank Ltd*, 547 F.3d 167 (2d Cir. 2008). Although endorsing both the "conduct" and "effects" tests, the Second Circuit did not apply the effects test because the plaintiffs relied only on the conduct component.

36. *Morrison*, 130 S. Ct. at 2888.

than to hold that the Exchange Act did not reach the Foreign-Cubed situation itself. Both Justice Breyer and Justice Stevens wrote concurring opinions, with Justice Ginsburg joining Stevens' opinion. Breyer focused on the language in the Exchange Act referring to, "the purchase or sale of any security registered on a national securities exchange",³⁷ which clearly (he says) does not include sales on a foreign exchange. As for the other part of that provision of the Act, which refers to the purchase or sale of "any security not so registered",³⁸ Justice Breyer invoked the presumption against extraterritoriality on the particular facts of this case. He noted that the "relevant purchases of these unregistered securities took place entirely in Australia and involved only Australian investors."³⁹ Justice Stevens wrote an extensive opinion taking issue with the majority's textual argument, which he approved was "plausible but not compelling."⁴⁰ He agreed with the dismissal of the foreign investors' claims because the suit had "Australia written all over it",⁴¹ but would have continued to apply the conducts test as developed by the Second Circuit. However, he indicated he would be prepared to integrate "one bright line" into that test by categorically excluding the Foreign-Cubed case.⁴²

While this decision explains the basic rules governing the extraterritorial applicability of the fraud securities litigation in the U.S., important issues remain unresolved. After the *Morrison* decision, the securities litigation landscape has featured constant battles in the trial courts regarding the precise scope and application of *Morrison*. The most prominent examples of these were probably *Elliott Associates v. Porsche Automobile Holding*⁴³ and *In re Vivendi Universal, SA Securities Litigation*.⁴⁴ *Vivendi* litigation, which had gone to a jury verdict prior to *Morrison* and was the subject of post-trial motions, has attempted to bring themselves within the parameters of *Morrison* by emphasizing language in Justice Scalia's opinion. Justice Scalia stated that Section 10(b) reaches the use of a deceptive device "only in line with the purchase or sale of a security listed on an American stock exchange."

In *Vivendi*, foreign issuers list or register their shares on a U.S. exchange to facilitate the registration and trading of ADRs or Global Registered Shares in the U.S. Pointing to the listed language in Justice Scalia's opinion, plaintiffs have argued that where shares are "listed" on a U.S. exchange

37. *Morrison*, 130 S. Ct. at 2888.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2894.

43. *Elliott Associates v. Porsche Automobile Holding SE*, 759 F. Supp. 2d 469 (S.D.N.Y. 2010).

44. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

(even if not traded) the *Morrison* test is satisfied. This argument overlooks the central message in the *Morrison* case - which reflects a traditional private international law concept - that the U.S. Securities Laws apply only to purchases or transactions that occur in the U.S. The *Morrison* rule reflects a view that the state with the strongest regulatory interest in applying its law is the market in which the purchases are made.

A number of district courts,⁴⁵ including the decision in *Vivendi*,⁴⁶ have rejected the technical “listed securities” argument made by plaintiffs, where purchases have been made on a foreign exchange but the stock was registered and listed on the New York Stock Exchange. These courts have viewed *Morrison* as emphasizing the point that “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the U.S.” This concluded that the Supreme Court was concerned with the territorial location of where the purchase or sale was executed when determining whether U.S. securities laws govern the transaction.

Lower courts in the post-*Morrison* era have also rejected arguments that Section 10(b) would cover transactions in securities that traded only on foreign exchanges in the purchase or sale involving U.S. parties, or if some aspects of these foreign transactions occurred within the U.S.⁴⁷

Another set of open issues remain for situations where the transaction does not take place on an exchange - the so-called “off-exchange” cases. Consistency with *Morrison* will necessitate courts to recognize the place of the transaction as the U.S. in order to apply the U.S. securities laws, and the question perhaps becomes harder than in the exchange-based trade.

Since the *Morrison* case involved only foreign investors, who sued a foreign issuer and had also bought their securities abroad (foreign-cubed securities fraud action),⁴⁸ the Supreme Court did not spend too much time thinking about the question of whether U.S. investors, who bought National’s ADRs on a U.S. stock exchange, could have brought their case to court under Rule 10b-5. When taking the ruling seriously, there seems hardly any doubt that investors, who purchase ADRs in the U.S. on an exchange or over-the-counter, fulfill the requirements of the *Morrison* test. While in most cases this seems hardly objectionable, in constellations where ADRs are

45. See, e.g., *In re Alstom S.A. Sec. Litig.*, 406 F. Supp. 2d 346, 370 (S.D.N.Y. 2005) (holding that Section 10(b) applied to antifraud claims by American investors suing a French company for using false statements to induce them to buy stock on a French exchange at artificially inflated prices).

46. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512.

47. See *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010) (This states that dependence on the U.S. connection of the purchaser or seller was futile attempt to resurrect the “effects” test and emphasis on U.S. acts relating to transaction abroad does nothing more than reintroduce the “conduct” test).

48. Hannah L. Buxbaum, *Multinational Class Actions under Federal Securities Law: Managing Jurisdiction Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 17 (2007).

exclusively issued by the U.S. brokers this result is dubious. It was also not entirely clear whether the ban of *Morrison* extends to transactions of U.S. residents on foreign exchanges in securities that were not listed in the U.S. (“foreign-squared” securities fraud action).⁴⁹ According to *Morrison*, Rule 10b-5 applies to *domestic* purchases and sales, but the Court did not specify whether this pertains only to the venue of the trade or also to the location of the person purchasing or selling. Yet, considering that according to Justice Scalia, “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the U.S.” and given *Morrison*’s explicit goal of forestalling conflicts with foreign law, it seems safe to assume that foreign-squared claims were not intended to be covered by Rule 10b-5. A number of recent decisions including *Cornwell v Credit Suisse Group*⁵⁰ and *In re Vivendi Universal, SA Securities Litigation*⁵¹ have now confirmed this tendency. Most importantly, because of the new approach established in the *Morrison* case every legal provision has to be scrutinized separately whether, “there is the affirmative intention of the Congress clearly expressed to give [that] statute extraterritorial effect.”⁵²

In *Morrison*, the Court already remarked in an obiter dictum that the Act of 1933 had the same focus on domestic transactions as Rule 10b-5 and - in accordance with the interpretation given by Regulation S - did not include sales that occur outside the U.S.⁵³ This suggests that the Supreme Court would not only limit those prospectus liability provisions that explicitly relate to the registration of securities with the SEC to domestic transactions, but also claims based on section 12(a)(2) of the Securities Act 1934, which literally comprises any prospectus or oral communication.

In the situation of takeover bids, the international applicability before *Morrison* followed the effects test. After *Morrison*, it can be expected that only offers directed to ADRs holders will fulfill the transaction test and thus trigger the application of Rule 10b-5. However, it remains unclear whether this principle extends to section 14(e) of the Securities Exchange Act 1934. This provision applies to untrue statements *et cetera* in “connection with any tender offer”, is not restricted to equity securities, and it does not matter whether the target companies’ securities are registered with the SEC. This broad scope of section 14(e) seems to leave the possibility of catching the abovementioned case where the offer does not relate to the ADRs but only to the underlying (foreign) shares. However, it seems safe to assume that after

49. Junsun Park, *Global Expansion of National Securities Laws: Extraterritoriality and Jurisdictional Conflicts*, 12 U.N.H. L. REV. 69, 69-84. (2014)

50. *Cornwell*, 729 F. Supp. 2d 620.

51. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512.

52. *Morrison*, 130 S. Ct. at 2885.

53. *Morrison*, 130 S. Ct. at 2869.

Morrison the courts will request some U.S. elements in the tender offer, notably the existence of U.S. share- or ADRs-holders being included in the offer, be it via their depository bank.

The majority's holding also prevented the SEC and the U.S. Department of Justice (DOJ) from bringing actions with respect to purchases made on a foreign exchange. In the context of the SEC and the DOJ, however, Congress - in the Dodd-Frank,⁵⁴ passed shortly after the *Morrison* case - purported to change that result and expressly permits such actions by the SEC and the DOJ. Thus, an amended section of the SEC entitled "Extraterritorial Jurisdiction" extends the reach of section 10(b).⁵⁵ It has extended to (a) conduct within the U.S. that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the U.S. and involves only foreign investors; or (b) conduct occurring outside the U.S. that has a predictable significant effect within the U.S.⁵⁶ However, because the provision drafted in the terms that the courts "shall have jurisdiction of an action or proceeding brought by the Commission or the U.S.,"⁵⁷ this questions the achievement of the objective. That is because the Supreme Court in *Morrison* emphasized that the extraterritoriality limitation was not one of "subject-matter jurisdiction" but rather an issue of "merits."⁵⁸ Therefore, there is concern that the Dodd-Frank provisions merely restate what *Morrison* already clearly held - that the federal courts have jurisdiction in such cases - and that by using the language of "jurisdiction" Congress failed to extend a cause of action on behalf of the SEC and DOJ to situations involving significant U.S. conduct or substantial U.S. effects.⁵⁹ Nonetheless, it was clearly the intention of Congress to reinstate the "conduct" and "effects" tests with respect to suits by the DOJ and the SEC.

IV. CONDUCTS AND EFFECTS TESTS

A. *Conduct Tests*

So far, no Supreme Court authority exists on the operation of the conduct test. As a result, federal courts have been able to exercise significant

54. See SEC, *supra* note 7.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See George T. Conway III, *Extraterritoriality after Dodd Frank*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 5, 2010), <http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank/> (last visited Nov. 30, 2013).

discretion in constructing this test, often employing “policy considerations” along with the courts’ best judgment in determining its realm.⁶⁰ This has resulted in a gamut of different approaches emerging. To illustrate the varying approaches, the more restrictive interpretations of the Second, Fifth, and District of Columbia Circuits are considered and compared to the somewhat more lenient versions from the Third, Fourth, Seventh, Eighth, and Ninth Circuits.

A variety of groups have identified the relative court groupings differently. For instance, the court in *In re Royal Ahold N. V. Securities & ERISA Litigation*⁶¹ recognizes the Third Circuit as having the most expansive approach, the Second, Fifth and District of Columbia circuits as having the most restrictive interpretations, and the Seventh, Eighth, and Ninth circuits as occupying the “middle ground.”

The case of *Leasco Data Processing Equipment Corporation v. Maxwell*⁶² initially articulated the approach of the Second Circuit. In this case, the plaintiff alleged that the defendants deceived it by purchasing stock at artificially inflated prices in a British corporation controlled by one of the defendants, a British citizen. The series of misrepresentations made by the defendants regarding the company allegedly amounted to violations of the antifraud provision of the Securities Exchange Act. These misrepresentations took place in both Britain and the U.S. The court held that where there is significant conduct within a territory, “a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relation law.”⁶³ To that end, because some of the fraud took place within the U.S., frauds that were an “essential link” in inducing the plaintiff to make the stock purchases, the case fell within the subject matter jurisdiction of the U.S. courts. It was of no result that foreign entities issued the securities of fraud litigation.

The court in *Bersch v. Drexel Firestone, Inc.*⁶⁴ further elaborated these principles. Here in *Bersch v. Drexel Firestone, Inc.*, the court explained the justification for the conduct test exception, noting that “Congress did not mean the U.S. to be used as a base for fraudulent securities schemes even when the victims are foreigners.” However, the ambit of the test was somewhat narrowed when the court held that the test would not be satisfied in “cases where the U.S. activities are just introductory or to take the form of

60. See *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998) (stating the Seventh Circuit’s intent to follow the Second and Fifth Circuit’s approach, with some reservations).

61. *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004).

62. *Leasco Data Processing Equip. Corp v. Maxwell*, 468 F.2d 1326 (1972).

63. *Id.* at 1330.

64. *Bersch*, 519 F.2d at 974.

guilty nonfeasance and are relatively small in comparison to those in a foreign country.” From this it appears that the satisfaction of the conduct test requires that the conduct be satisfactorily significant and classified as an “essential link” in the overall scheme.

The Fifth Circuit Court of Appeals in the case of *Robinson v. TCI/US West Communication Incorporation*⁶⁵ clearly adopted the Second Circuit approach. The court specifically emphasized that the national conduct should have “material importance” to or have “directly caused” the hard suffering by the applicants to satisfy the conduct test.

The District of Columbia Court has perhaps the most restrictive interpretation of the conduct test. The Court of Appeals in *Zolesch v Arthur Anderson*⁶⁶ explicitly adopted the approach of the Second Circuit. However, the court’s view of the Second Circuit approach appears to be narrower than that emerging from the aforementioned Second Circuit cases. The court noted that “the Second Circuit’s rule seems to be the justification will lie in the U.S. courts where the national conduct consists of all the elements of a defendant’s conduct essential to establish a violation of section 10(b) and Rule 10b-5. These elements include the fraudulent statements or misrepresentations must originate in the U.S., must be made with scienter and in connection with the sale or purchase of securities, and must cause harm to those who claim to be deceived and cheated, even though the real dependence and damages may take place elsewhere.”⁶⁷ This narrowed test reflects the opinion of the court that because issues of extraterritorial application are principally concerned with policy considerations, the growth of the ambit of statute by courts usurps the role of Congress. Nowhere is this more obvious than in the passage of the Court of Appeals.⁶⁸

The facts of *Zolesch v Arthur Anderson* are as follows. The U.S. defendant prepared a financial statement which briefly referred to the prospectus of a German company as the basis of some of the data contained within the prospectus. The plaintiff alleged that this constituted a misrepresentation, and as it was prepared in the U.S., it gave subject matter jurisdiction to the courts of the U.S. However, the Court of Appeals, in adopting a restrictive conduct test, affirmed the decision of the district court to the effect that the conduct in the U.S. was so “relatively insignificant when compared with the nature and breadth of the allegedly fraudulent

65. See *Robinson v. TCI/US W. Commc’ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) (adopting the Second Circuit’s approach).

66. *Zolesch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987).

67. *Zolesch*, 824 F.2d at 29.

68. *Id.* at 31 (When the passage specifically states that “were it not for the Second Circuit’s pre-eminence in the field of securities law, and [their] desire to avoid a multiplicity of jurisdictional tests, [they] might be inclined to doubt that the U.S. court should ever assert justification over domestic conduct that causes loss to foreign investors”).

conduct abroad that it was “merely preparatory” and thus granted no subject matter justification.

The Third Circuit Court of Appeals in *SEC. v. Kesser*⁶⁹ adopted a more lenient approach. This explicitly stated that “the federal securities law do grant jurisdiction in transnational securities cases where at least some activity designed to further a fraudulent scheme occurs within this country.” In applying this test, the court held on the facts that because there was conduct within the U.S. that was “crucial to the consummation of the fraud”⁷⁰ the conduct test was satisfactory. It is not clear whether the court, in finding that the conduct was “crucial,”⁷¹ implied that such a degree of significance was required or whether it merely reflected the court’s view of the facts; one which necessarily satisfied the test. In the most recent consideration of this issue in the Third Circuit, the District Court in *Markus Blechner v. Daimler Benz AG*,⁷² found that where the conduct alleged to comprise the fraud occurs “predominantly outside the United States” it will be insufficient to satisfy the conduct test. This suggests that the domestic conduct must bear some degree of importance by reference to the entirety of the alleged fraud.

The approach adopted by the Eighth Circuit is demonstrated by the following case. In *Continental Grain (Australia) Pty Ltd v. Pacific Oilseeds Incorporated*,⁷³ the Court of Appeals held that where “conduct in the U.S. is in furtherance of a fraudulent scheme and is significant with respect to its accomplishment”, subject matter jurisdiction will exist. The Ninth Circuit Court of Appeals in *Grunenthal GmbH v. Hotz*⁷⁴ and the Seventh Circuit in *Kauthar SDN BHD v. Sternberg*⁷⁵ expressly adopted this test. In *Kauthar* the court noted that while the “conduct must be more than just preparatory in nature” it need not “itself satisfy the elements of securities violation.”

Most recently, the Fourth Circuit District Court in the case of *Royal Ahold* adopted the conduct and effects tests and cited and followed the approach of the court in *Kauthar SDN BHD v. Sternberg*. In *Re Ahold*, it was held that because reasonable investors would ordinarily rely on the information contained within SEC filings, misleading and deceptive statements made in such filings could form the basis of a finding of subject matter jurisdiction. These statements were held material in the overall securities fraud litigation and a contributing cause to the loss suffered by the

69. *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977).

70. *Id.* at 114.

71. *Id.* at 116.

72. *Markus Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366 (3d Cir. 2006).

73. *Continental Grain (Austl.) PTY. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979).

74. *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983).

75. *Kauthar*, 149 F.3d at 667.

plaintiffs.

B. *Effects Test*

The effects test assesses whether conduct outside the U.S. has a substantial adverse effect on the U.S. investors or securities markets. Frequently dubbed as the “Mother Court of securities law,”⁷⁶ the Second Circuit is the principal purveyor of jurisprudence on the effects test. The fact that the origin of the effects tests was found in the Second Circuit case of *United States v. Aluminum Co. of America*⁷⁷ exemplifies this, where this case adopted it in an antitrust context. As a result, the decisions of the Second Circuit necessarily form the central focus of any discussion of the effects test.

The first application of the effects test to the Securities Exchange Act took place in 1968 in *Schoenbaum v. Firstbrook*.⁷⁸ There, the Court of Appeals held that a “District Court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions alleged to violate the Act take place outside the U.S., at least when the transactions involved are stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors.”⁷⁹ It is this basic concept, that the transactions give rise to detrimental effects domestically, that forms the basis of the effects test.

Most relevantly, *Schoenbaum v. Firstbrook* explicitly endorsed the finding of subject matter jurisdiction in cases where the relevant security is listed on the U.S. marketplace. The Court held that “Congress intended the Exchange Act to have extraterritorial application to...protect the domestic securities markets from the effects of improper foreign transactions in American securities.”⁸⁰ This authority is now well entrenched.⁸¹

However, issues arise while applying the Securities Exchange Act to transactions involving foreign securities. Regarding the effect tests, section 27(b)(2) of the Exchange Act gears to a foreseeable substantial effect within the U.S. Once again, this is a strict concept of territoriality. However, unlike section 27(b)(1) of the Exchange Act, the location of the fraudulent conduct is deemed irrelevant. Instead, section 27(b)(2) of the Exchange Act draws upon the localization of an effect within the U.S. territory. This rule, largely,

76. James J. Finnerty, *The Mother Court and the Foreign Plaintiff: Does Rule 10b-5 Reach Far Enough?*, 61 *FORDHAM L. REV.* 287, 288 (1993).

77. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

78. *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968) (This was so in the first case to articulate the effects test).

79. *Id.*

80. *Id.* at 200.

81. *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170 (5th Cir. 1990).

adopts the standard that the Second Circuit originally set up in the *Schoenbaum* decision. However, one explanation, if not modification, seems essential. To keep away from a conflict with the implemented concept of territoriality, the term “American” cannot refer to the *nationality* but has to be interpreted as to the *residence* of an investor.⁸²

The first alternative amazingly comports with the holding of the *Morrison* decision. In the same way,⁸³ this raises the complex questions of whether the transaction has to be “effectuated” on a nationwide securities exchange or whether it is sufficient that, while the stock is registered and enlisted on a national securities exchange, the transaction takes place out of the country. Courts tend to have construed the requirement in the first sense,⁸⁴ and so do, in line with general academic proposals to put a “domestic-traded test”⁸⁵ into practice, some recent authorities with respect to *Morrison*.⁸⁶

However, it seems highly dubious if this approach is endorsed under the wording of section 27(b)(2) of the Exchange Act, which simply requires a predictable substantive effect. This condition may be met even if the securities are traded on securities exchanges of different countries. In such a situation the price development of a security in one market, due to arbitrage dealers, will quickly have an effect on the price of that security in another market.⁸⁷ This not only seems true if the same class of securities is cross-listed on a U.S. securities exchange but also in the frequent case of ADRs that correspond to foreign securities.⁸⁸

The second alternative proves that general effects on the confidence of U.S. securities markets are not enough.⁸⁹ However, it raises the question of how many U.S. investors must be impaired to be considered significant. Traditionally, courts have been relatively lenient,⁹⁰ and no indication exists in the wordings of section 27(b)(2) of the Exchange Act that Congress intended to put a change into practice.

82. *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) (stating that the key element of the conduct test is whether “U.S. activity directly cause[s] harm to [a] foreign interest”).

83. *Schoenbaum*, 405 F.2d at 206.

84. *See, e.g., McNamara v. Bre-X Minerals, Ltd.*, 32 F. Supp. 2d 920, 923 (E.D. Tex. 1999); *Koal Indus. Corp. v. Asland, S.A.*, 808 F. Supp. 1143, 1155 (S.D.N.Y. 1992).

85. *See* Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1489-91 (2008).

86. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512.

87. Buxbaum, *supra* note 48, at 22.

88. M. Lang, J. Smith Raedy, & M. H. Yetman, *How Representative Are Firms That Are Cross-Listed in the United States? An Analysis of Accounting Quality*, 41 J. OF ACCT. RES. 363, 386 (2003).

89. *In re Alstom S.A. Sec. Litig.*, 406 F. Supp. 2d 346.

90. Jacqueline B. Berman, *Consolidated Gold Fields, PLC v. Minorco, S.A.: The Growing Over-Extension of United States Antitrust Law*, 6 AM. U. INT'L L. REV. 399, 433 (1991).

Thus, the subject matter jurisdiction of the U.S. courts to apply U.S. laws is mainly determined based on conduct-effects tests. In recent times, however, a combination of the conduct-effect tests, at the same time, has appeared in some cases.⁹¹ From a U.S. perspective the extraterritorial fraud litigation, for example, is justified because fraud is ‘bad’ and no country should seriously object to the application of the U.S. antifraud provisions abroad where the result is beneficial for all. Although other countries do not necessarily share this view, it is the logical result of a situation where the market for securities is becoming increasingly global but the regulation of the market, practically, is expected to be undertaken only by governments at the national level.⁹² The following section presents a contemporary challenge from fraud securities litigation after the *Morrison* case.

V. A POST-MORRISON CHALLENGE FOR FRAUD SECURITIES LITIGATION

The *Morrison* case was decided only a few days before the enactment of Dodd–Frank, but its holding quickly became a target for that legislation. As noted above, Dodd–Frank amended both the 1933 and 1934 Acts to extend the SEC’s jurisdiction. Dodd–Frank directed the SEC to conduct a study to determine whether private rights of action should be allowed for claims falling under a broadened jurisdictional umbrella.⁹³ As it stands now, however, Dodd–Frank foreign jurisdiction will apply to SEC actions in the future and the *Morrison* standard will continue to apply to private rights of action, at least until Congress takes some action in response to the SEC report.⁹⁴

One of the cases affected by the *Morrison* decision was an action brought against Goldman Sachs & Co. and Fabrice Tourre, one of its sales representatives, which the Obama administration used to justify enactment of the Dodd–Frank provisions that closed the Enron loophole and regulated over the counter swaps.⁹⁵ Goldman Sachs settled the case and paid \$550 million in settlement, the largest ever SEC settlement,⁹⁶ but Tourre moved to dismiss the charges against him on *Morrison* grounds. That motion was

91. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 123 (2d Cir. 1995).

92. Donald C. Langevoort, *Fraud and Insider Trading in American Securities Regulation: Its Scope and Philosophy in a Global Marketplace*, 16 HASTINGS INT’L & COMP. L. REV. 175, 187 (1993).

93. See Dodd–Frank Act, *supra* note 13.

94. Richard W. Painter, *The Dodd–Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 208 (2011) (“Section 929P was ‘stillborn’ in that it conferred jurisdiction that could not be used for anything substantive ... until a further statute were enacted.”).

95. *Id.*

96. JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS: FROM ENRON TO REFORM 377–98 (2005).

granted partly and denied partly by the district court. The SEC accused Tourre of fraudulently arranging a synthetic collateralized debt obligation (CDO) called ABACUS 2007-AC1 that sold to institutional investors in Europe. The SEC charges was laid on the fact that Goldman did not tell those investors that the subprime mortgages in ABACUS was selected by hedge fund manager John Paulson, who had become famous for having made \$5.7 billion personally during 2007 and 2008 by betting against subprime mortgages. That omission was deemed important by the SEC because Paulson was taking a short position against the ABACUS CDOs through credit default swaps.⁹⁷

The district court dismissed SEC charges under Rule 10b-5 insofar as the SEC alleged that a synthetic collateralized debt obligation was fraudulently sold to a German commercial bank and that a European bank engaged in a related credit default swap. The court concluded that those entities engaged in no purchase or sale of those interests in the U.S. The court concluded that, without a purchase or sale, those parties did not engage in a “domestic transaction” within the *Morrison* test.⁹⁸ The district court, however, found jurisdiction with respect to claims made by the SEC under Section 17(a) of the 1933 Act because, unlike Section 10(b), Section 17(a) applies not only to the “sale” but also to the “offer...of any securities or any security-based swap agreement.”⁹⁹ The court held that an offer from the U.S. was a domestic transaction even if made to a foreign party for the purpose of Section 17(a). In *SEC v. Ficeto*,¹⁰⁰ a district court denied a motion to dismiss a SEC manipulation charge involving thinly traded over the counter securities that manipulated by making the close. The court also held that *Morrison* did not apply to bar charges against a foreign trade manipulating over-the-counter stock in the U.S.

The SEC developed two methods and in due process buttressed its case literally. First, the SEC called the court’s attention to those post-*Morrison* cases involving non-exchange transactions, advancing the position that the “sale” of securities [as required under Section 10(b)] encompassed the “entire selling process.” Second, it is argued in favor of a narrow reading of Regulation S, limiting its scope only to the registration requirement - not those dead set against fraud provisions - of the federal securities laws.

The SEC first invited the court to consider the broad definition of

97. *SEC v. Goldman Sachs & Co. (Tourre)*, 790 F. Supp. 2d 147 (S.D.N.Y. 2011). This argues for equal treatment of all domestic traders irrespective of nationality because of SC’s equal protection jurisprudence.

98. *Tourre*, at 157.

99. 15 U.S.C. § 77q(a) (prohibiting fraud and materially false statements by “any person in the offer or sale of any securities”).

100. *Absolute Activist Value Master Fund Ltd. v. Ficeto*, No. 11-0221-cv, 2012 WL 661771 (2d Cir. 2012).

“offer.”¹⁰¹ It then asserted that, consistent with the *Morrison* case, courts must review the “entire selling process” to determine whether any given transactions occurred in the U.S., a faint echo of the now abandoned “conduct and effects” test. Taking an expansive approach, in *Plumbers’ Union Local No. 12 Pension Fund v Swiss Reinsurance Co.*, the court ruled that “a purchase does not occur when and where an investor places a buy order.”¹⁰² There, a pension fund plaintiff made a series of purchase orders for shares of Swiss Re domestically, with its orders placed by traders located in Chicago. However, those orders routed through electronic connections for purposes of matching buy and sell orders. The plaintiff’s trades ultimately executed in transactions on the SWX, a stock exchange based in Switzerland.¹⁰³ The court, in an opinion sharing the concerns expressed by Judge Marrero in *Cornwell*, neatly concluded: “As the Supreme Court emphasized in *Morrison*, where a security is traded only on a foreign exchange, the adoption of a clear test that will avoid interference with foreign securities litigation is of paramount concern. This could not be accompanied if every security traded on a foreign exchange were subject to section 10(b) whenever an investor located in the U.S. placed an electronic order.”

The plaintiff’s claims against Swiss Re were dismissed with prejudice. If anything, *Plumber’s Union* suggested that post-*Morrison* courts have been remarkably rigid when considering the pleadings of section 10(b) claims. It remains unseen whether Judge Jones, persuaded that the broad readings of the terms “offer” and “sale”, as advanced by SEC lawyers, comports with *Morrison*. The following section addresses the post-*Morrison* challenge for fraud securities litigation to address extraterritorial enforcement authority.

In *Morrison*, the issue presented before the Supreme Court was whether a private litigant could state a claim for extraterritorial application of the U.S. securities laws. The Supreme Court’s answer was a resounding “no” because Congress did not express an affirmative intent to give section 10(b) any extraterritorial effect.¹⁰⁴ Interestingly, one member of the *Morrison* court presaged attacks on the SEC’s ability to invoke section 10(b) in global fraud cases. Justice John Paul Stevens included a cautionary footnote in his concurring opinion, advising that *Morrison* does not “exclude the Commission from bringing enforcement actions in additional situation, as no

101. *Id.*

102. *Plumbers’ Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166 (S.D.N.Y. 2010) (“the mere act of electronically transmitting a purchase order from within the United States” to a foreign exchange is “insufficient to subject the purchase to the coverage of Section 10(b)”).

103. *Id.* at 178.

104. *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013).

issue regarding the commission's authority presented in this case.”¹⁰⁵ Because section 10(b) covers private litigants and government enforcement agencies, however, the transactional test could conceivably apply with equal force to limit global enforcement activity by the SEC. *Morrison* did not establish any extraterritorial jurisdiction for government agencies pursuing fraud cases under section 10(b), although Justice Stevens ensured to note that the opinion rested on its own facts, pertaining to the implied private right of action for shareholder litigants. Nonetheless, the decision presented the potential to severely curtail SEC enforcement powers, in particular, its ability to pursue global cases.

Almost undoubtedly, Congress was responding directly to the Supreme Court's *Morrison* ruling by empowering the SEC to pursue offshore securities fraud litigation cases. Section 929P (b) of Dodd–Frank, as noted above, resurrects the “conduct-effects” test and creates expressive extraterritorial jurisdiction over actions brought by the SEC. This is where the actions (1) “conduct within the U.S....constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the U.S. and involves only foreign investors” or (2) “conduct occurring outside the U.S....has a foreseeable substantial effect within the U.S.”¹⁰⁶ The legislative text clearly strays from Justice Scalia's new transactional test, at least regarding SEC enforcement action.

Strangely, Dodd–Frank approached the issue of extraterritoriality as one of jurisdiction. The *Morrison* court, however, had decided immediately that federal courts enjoyed jurisdiction over cases involving foreign securities transactions. Moreover, the SEC (together with the solicitor general) maintained in its opposition of the *Morrison certiorari* petition that extraterritoriality raises an argument of substance, not jurisdiction. This argument states, “If a particular suit is otherwise an apt means of enforcing a ‘liability or duty created by’ the Exchange Act or rules promulgated there under by the Commission, Section 78a decidedly vests the district courts with jurisdiction to decide it.”¹⁰⁷ Some commentators contend that Dodd–Frank did nothing more than confer jurisdiction on the U.S. courts without addressing the substantive reach of section 10(b). In a published memo to clients, George T. Conway III - counsel for National Australia Bank - contested the view that Dodd–Frank provided the SEC extraterritorial jurisdiction.¹⁰⁸ In view of that, the statute's extraterritoriality provision

105. *Morrison*, 130 S. Ct. at 2894.

106. Dodd–Frank Act, *supra* note 13.

107. Brief for Petitioners at 39, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) (quoting 15 U.S.C. § 78b(2) (2006)).

108. George T. Conway III, *Extraterritoriality of the Federal Securities Laws after Dodd–Frank Partly Because of a Drafting Error: the Status Quo Should Remain Unchanged* (2010), <http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf>. (last visited

(because of oversight) leaves the *Morrison* holding unchanged. Dodd–Frank, after all, did not make improvements in the text upon which the court based its transactional test.

To intimate that Dodd–Frank did not bump up the substantive scope of section 10(b) would ignore legislative intent. The legal language relating to extraterritorial jurisdiction first inserted in the congressional record shortly following the oral arguments in *Morrison*. It would make sense then that Congress - like the Second Circuit - tackled the issue as a question of jurisdiction.¹⁰⁹ More revealing still are the comments in the congressional record by Rep. Paul Kanjorski who contributed to the legislative drafting: “This bill’s provisions concerning the extraterritoriality, however, intended to rebut the presumption against extraterritoriality (in *Morrison*) by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC.” “Thus.” Kanjorski continued, “the purpose of the language of Section 929P (b) is to make clear that in actions and proceedings brought by the SEC...the specified provisions of the [U.S. securities laws] may have extraterritorial application, and that application is appropriate, irrespective of whether the securities traded on a domestic exchange or the transactions occur in the U.S., when the conduct within the U.S. is significant or when conduct outside the U.S. has a foreseeable substantial effect within the U.S.”¹¹⁰

Thus, Dodd–Frank explicitly extended the application of section 10(b) (and, more generally, the antifraud provisions of federal securities laws) extraterritorially. Courts, in turn, are not likely to aggravate congressional intent concerning extraterritorial application of federal securities laws, particularly as the record shows that the measure was a direct legislative response to the *Morrison* rationale. It remains a big challenge, however, that how SEC will litigate cases under the disjunctive Dodd–Frank variation of the conduct-effects test. In addition, the opinion does not create an exception for the extraterritorial reach of SEC and DOJ actions. Therefore, the opinion could be construed as placing the same limitations on these agencies as it does on private claimants. There may be considerable interest in providing statutory means for these agencies to pursue remedies for fraudulent conduct that occurs in the U.S., even if in connection with transactions on foreign

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109. *Morrison*, 130 S. Ct. at 2875 (Prior to the scheduling or oral arguments in *Morrison*, however, the SEC (in its brief opposing the grant of certiorari) did frame the issue as one going to the substantive scope of Section 10(b) - not one of jurisdiction.)

110. Compare Statement of Representative Paul Kanjorski, 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (purpose of Section 929P(b) “is to make clear” that in actions or proceedings brought by SEC or Department of Justice, federal securities laws “may have extraterritorial application ... irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States”).

exchanges.¹¹¹ For now, SEC investigations and settlements in connection with global fraud cases offer insight into the agency's need of an hour.

Despite the ever more global nature of securities offerings and the geographic diversification in both institutional and retail investment portfolios,¹¹² the regulation of markets has remained a largely territorial affair. Regulation in jurisdictions with highly developed securities law regimes may resist coordination with, or mutual recognition of, foreign fraud securities laws or listing standards on foreign markets (for example, respecting disclosure, corporate governance, and shareholder rights) for fear that insufficient foreign regulation or support will do less to a loss of investor confidence. At the same time, Ioannis Kokkoris and Rodrigo Olivares-Caminal¹¹³ argue that the world's major stock exchanges have experienced a wave of global unions and mutual investment with a view of creating platforms worldwide for offering and trading fraud securities litigation of global interest. The natural result of this trend, Karmel and Kelly¹¹⁴ suggest, is the growth of a uniform set of corporate rules that not only ensures efficient capital markets, but also eliminates disparities in regulation that can de-stabilize financial markets. Even after the U.S. Supreme Court's decision in the *Morrison* case, in which the Supreme Court re-asserted the "presumption against territoriality" in the application of Rule 10b-5 in private rights of action,¹¹⁵ U.S. fraud securities litigation will continue to regulate the affairs of foreign issuers, investors, and exchanges in numerous ways. What is more, Mark Roe¹¹⁶ argues, the division of regulatory responsibility in the U.S. contributes to an atmosphere in which the SEC views its role as that of preventing a race to the bottom among individual states (and perhaps even foreign jurisdictions) in setting baseline standards of transparency and corporate governance. This globalization of capital-markets regulation compels a greater allocation of power and

111. See U.S. SEC. & EXCHANGE COMMISSION, ROADMAP FOR THE POTENTIAL USE OF FINANCIAL STATEMENTS PREPARED IN ACCORDANCE WITH INTERNATIONAL FINANCIAL REPORTING STANDARDS BY U.S. ISSUERS, RELEASE NO. 33-8982 (Nov. 14, 2008) [73 FR 70816 (November 21, 2008)] ("Proposed Roadmap").

112. Brett R. Marshall, *Morrison v. National Australia Bank Ltd: A Clear Statement Rule or a Confusing Standard*, 37 J. OF CORP. L. 203, 218-21 (2011).

113. Ioannis Kokkoris & Rodrigo Olivares-Caminal, *Lessons from the Recent Stock Exchange Merger Activity*, 4 J. OF COMP. L. & ECON. 837, 847 (2008) (This article discusses a recent merger activity and provides data on listings, trade volumes, and fees).

114. Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 904 (2009) (This article is important as it discusses the role of international organizations and self-regulatory organizations setting standards for securities litigation).

115. *Morrison*, 130 S. Ct. at 2883.

116. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 625-32 (2003) (That is, the uninhibited competition among a number of states for corporate charters, on the one hand, and the assertion of authority over key aspects of corporate governance and disclosure by federal fraud securities regulators, on the other).

responsibility from SEC to global self-regulatory authorities such as stock exchanges. Individual issuers have been tentative to grant exchanges greater flexibility to make choice-of-law determinations regarding capital markets transactions, even if the *Morrison* decision in the end spurs the SEC to exercise greater oversight over access by U.S. investors to foreign exchanges. The looming challenge is whether exchanges can succeed in developing listing standards for issuers of global interest, and persuade nationwide regulators and the investing public that they have the compliance and enforcement tools required to implement them.

The U.S. legal system promotes rivalry among the states in the development of corporation law, and yet it rigidly standardizes fraud litigation in the development of capital-market law. Issues regarding the domestic affairs of U.S. corporations - such as the fiduciary responsibilities of directors, the rights and privileges of shareholders, and the scope and conduct of remedial actions - are, as a longstanding issue, resolved in accordance with the law of the state in which the corporation is organized (*lex incorporationis*).¹¹⁷ Because of the relative ease of integration, the promoters and managers of U.S. corporations enjoy a great deal of discretion with regard to the choice of law application to corporate governance. Stanley Kaplan¹¹⁸ suggests that deference to this umbilical tie in corporation law disputes contrasts significantly with the other areas of federal and state law, in which disputes regarding the choice of law or the forum involving a corporate party may turn on a number of factors.¹¹⁹

Both Renee Jones¹²⁰ and Mark Lowenstein¹²¹ argue that the comparative rarity of such a challenge to the application of the integrating state's corporation law stands in contrast with the encroachment of U.S. federal securities law in traditional areas of corporate governance. Unlike corporation law, which governs the terms of the relationship among shareholders, managers and the corporation, Roberto Romano¹²² suggests

117. See *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1933) (It has long been settled doctrine that a court...sitting in one state will, generally, decline to interfere with...the management of internal affairs of a corporation organized under the laws of another state).

118. Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 464 (1968).

119. See Kaplan, *supra* note 118.

120. Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 IOWA J. CORP. L. 625, 653-54 (2004).

121. Mark J. Lowenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353, 384-85 (2004).

122. See ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 64-73 (2002). (Here Romano observes that choice-of-law disputes in securities litigations are generally resolved in favor of the investor's domicile. This is true because state securities laws generally excluded from the scope of the domestic affairs doctrine to the extent that they involve communications or transactions with resident shareholders that entail jurisdictional contact).

that the U.S. federal and state fraud securities litigation have traditionally governed the solicitation and execution of transactions in securities. At its conceptual appeal, Amir Licht¹²³ suggests that federal fraud securities litigation regulates the disclosures that induce investors to buy, sell, and vote or tender shares, which the actual states have the exclusive authority to regulate the substantive terms of the agreement between managers and shareholders (“fairness”). Over time, however, federal litigation of the fraud securities activities of issuers has expanded into areas such as the regulation of tender offers and certain activities of insiders and major shareholders,¹²⁴ the use of non-public confidential business information,¹²⁵ and most recently, board composition and the allocation of certain managerial responsibilities between officers and directors.¹²⁶

U.S. federal fraud securities law is notable for the reach of its application, particularly regarding private rights of action. William Dodge¹²⁷ suggests that courts in the U.S., at least before the Supreme Court’s 2010 decision in *Morrison*,¹²⁸ supported a theory of objective territorial jurisdiction in the application of federal fraud securities litigation to transactions that might otherwise appear extraterritorial in nature,¹²⁹ such as a transaction in which foreign parties trade foreign shares on a foreign exchange.¹³⁰

The SEC has also struggled to fulfill the broad mandate outlined by the *Schoenbaum*¹³¹ line of cases while maintaining respect for comity among regulatory jurisdictions. The SEC’s approach has been primarily to provide

123. Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227, 253 (1998).

124. 76 Pub. L. No. 90-439, 82 Stat. 454 (1968), 15 U.S.C. § 78 m(d)-(e), n(d)-(f); see also Julian T. Perlmutter, *The New Rules on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings: Competition or Harmonization?*, 22 MICH. J. INT’L L. 169, 181 (2001).

125. Laura Nyantung Beny, *Do Insider Trading Laws Matter?*, 7 AM. L. & ECON. REV. 144, 144 (2005) (“[C]ountries with more prohibitive insider trading laws have more diffuse equity ownership, more accurate stock prices, and more liquid stock markets.”).

126. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ204/pdf/PLAW-107publ204.pdf>.

127. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 155 (1998).

128. *Morrison*, 130 S. Ct. at 2689.

129. See Restatement (Third) of Foreign Relations Law of the United States § 416 (1987) (This suggests that courts have an increasing tendency to look at “significance of contacts” rather than the existence of minimum contacts necessary to assert subject matter jurisdiction).

130. *Morrison*, 130 S. Ct. at 2869, 2895. Justice Breyer wrote a brief and narrow concurrence. He stated that the purchased securities at issue in *Morrison* were not registered with the SEC, and the purchases “took place entirely in Australia and involved only Australian investors.” *Id.* In light of the presumption against extraterritoriality, he did not believe that Section 10(b)(1) or (2) therefore reached plaintiffs’ claims. *Id.* Justice Stevens, joined by Justice Ginsburg, wrote a more lengthy concurrence arguing for preservation of the Second Circuit test. See *id.* at 2888-95 (Stevens, J., concurring).

131. Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities*, 1 GLOBAL BUS. L. REV. 139, 159 (2011).

narrowly tailored relief from individual provisions of federal fraud securities legislation. For example, foreign private issuers whose securities held by the U.S. investors may be exempt from periodic disclosure requirements under the Exchange Act as long as, among other conditions, the securities are not listed on a U.S. exchange and they trade primarily in a foreign market where the securities are listed.¹³² Regulation S generally exempts U.S. and overseas issuers from complying with U.S. offering and prospectus delivery requirements,¹³³ including restrictions on re-sales during a distribution, if the securities are offered or sold in certain “offshore transactions” (including transactions on a non-US exchange) with “no directed selling efforts”¹³⁴ in the U.S., and if certain additional conditions are satisfied. Tender offers by the bidders for securities of a foreign private issuer may meet the criteria for limited relief from the requirements of the Williams Act depending, among other things, on the number of U.S. shareholders.¹³⁵ Moreover, until the enactment of the Sarbanes-Oxley Act of 2002,¹³⁶ overseas private issuers were exempt from nearly all provisions of U.S. federal fraud securities litigation regarding corporate governance.

The Supreme Court’s decision in *Morrison* has considerably narrowed the reach of Rule 10b-5 in private rights of action. Justice Scalia’s majority opinion rejected the Second Circuit’s conduct-effects approach favoring a “transactional” test for defining the reach of Rule 10b-5 private rights of action¹³⁷. As noted above, the transaction in *Morrison* involved an foreign-cubed transaction: the purchase of a foreign issuer’s securities by foreign investors on a foreign exchange. The justices had the same opinion that the plaintiffs had not passably pleaded a claim for which help could be given under Rule 10b-5. This was simply because fraudulent statements were developed in part by the U.S. officers of a U.S. subsidiary of the issuer, in the absence of allegations that the “bulk of heart of the fraud” occurred in the U.S.

In its rule-making initiatives affecting non-U.S. corporations and securities mediators, Ethiopis Tafara and Robert Peterson¹³⁸ suggest that the

132. See Securities Exchange Act Release No. 27017, Registration Requirements for Foreign Broker-Dealers (Aug. 15, 1989), 17 C.F.R. § 240.

133. See *Tourre*, at 147.

134. See 17 CFR § 230.903.

135. The term “foreign private issuer” is defined in Exchange Act Rule 3b-4(c) [17 CFR §240.3b-4(c)]. A foreign private issuer means any foreign issuer other than a foreign government, except an issuer that meets the following conditions: (1) more than 50 percent of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

136. See Beny, *supra* note 125.

137. *Morrison*, 130 S. Ct. at 2886.

138. Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors*:

SEC has defended the extraterritorial reach of federal fraud securities litigation because it is charged to protect the most liquid and efficient market worldwide. Tafara and Peterson discuss the SEC's traditional interpretation of its Congressional mandate to regulate in the national public interest in the light of the international character of capital markets. This hegemonic attitude toward regulation, however, has encountered opposition from at least two fronts. First the transformation of the regulatory landscape in the European Union has created a credible counterweight to the dominance of the SEC in international standard-setting. Second, the emergence of rival securities markets in Asia and the Middle East may cause the SEC to reconsider alternative strategies towards reducing the U.S.'s extraterritorial footprint in fraud securities litigation.

The first challenge to the hegemony of the U.S. market regulation is the rapid integration of both securities markets and securities regulation within the European Union.¹³⁹ For example, following a spree of successful and failed business combinations over the past twenty years, Ioannis Kokkoris and Rodrigo Olivares-Caminal¹⁴⁰ suggest that a number of major exchange families have emerged in Europe, including the London Stock Exchange, NYSE-Euronext, *Deutsche Borse*, and NASDAQ-OMX. These authors describe this recent merger activity in Europe and listing trading volumes and listings for exchanges by continent. The integration of capital market regulation accompanies this process of integration.¹⁴¹ Much as in the U.S., the EU has approached capital-markets regulation with a focus on developing equivalent standards across jurisdictions while preserving the diversity of regimes within individual member states. Unlike the incremental federalization of US capital markets, Niamh Moloney¹⁴² suggests that the EU's Financial Services Action Plan (FSAP), launched in 1999,¹⁴³ set out to create a single unified EU financial market in the court of a five-year period. Moloney suggests that these 42 measures outlined in the plan developed through the relevant EU organs in consultation with both member states and

A New International Framework, 48 HARV. INT'L L.J. 31, 42-56 (2007).

139. Roberta S. Karmel, *The EU Challenge to the SEC*, 31 FORDHAM INT'L L.J. 1692, 1712 (2007).

140. See Kokkoris & Olivares-Camina, *supra* note 113.

141. MCDERMOTT WILL & EMERY LLP, MORRISON V. NATIONAL AUSTRALIA BANK AND ITS PROGENY: US CAPITAL MARKETS BECOME SAFER AND MORE HOSPITABLE FOR NON-U.S. CORPORATES (2012), available at <http://www.mwe.com/files/Uploads/Documents/News/Morrison%20v%20National%20Australia%20Bank%20May%202012%20Final%20Print%20Version.pdf> (last visited Nov. 30, 2013).

142. Niamh Moloney, *Time to Take Stock on the Markets: The Financial Services Action Plan Concludes as the Company Law Action Plan Rolls Out*, 53 INT'L & COMP. L. Q. 999, 1010 (2004).

143. European Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM (1999) 232, 11.05.99, available at http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf. (last visited Nov. 30, 2013).

the public under the multi-stage “Lamfalussy” process.¹⁴⁴ To preserve some opportunity for nuances in implementation among member states, each measure are implemented by the legislation of the individual member states.¹⁴⁵

The variety of directives promulgated under the FSAP somewhat echo major U.S. securities legislations and rules. These include the standardization of the public offering and listing processes, the establishment of minimum ongoing reporting requirements of companies admitted to trading in the EEA, the protection of minority shareholders in takeovers, prohibitions against insider-trading and deterrence of variety of forms of market manipulation, and quality of statutory audits and corporate governance.¹⁴⁶ In a number of respects, however, the integration of capital markets under the FSAP is intentionally incomplete, in recognition of the supranational structure of the EU. For example, the Takeover Bids Directive does not include a standard definition of “control” for purposes of triggering the variety of measures of protection for shareholders. This gives member states the option not to necessitate companies that have their registered offices within their territories to apply certain “broad passivity” and “breakthrough” rules designed to dampen resistance by incumbent managers and controlling shareholders.¹⁴⁷ A number of the FSAP directives, likewise, provide for “maximum or minimum” coordination directives in each member state, which creates the prospective for regulatory arbitrage if certain member states wish to retain “super-equivalent” requirements.¹⁴⁸ The depth and scope of the substantive review of a particular issuer or transaction also left to the discretion of the member state charged with its regulation. Frederick Tung¹⁴⁹ suggests that substantive liability, in criminal, civil or private litigation, for the violation of prospectus and transparency requirements remains subject to each individual member state’s domestic legislation.

As luck would have it, the coordination of supranational standards has occurred at the same time that the European Court of Justice (ECJ) has interpreted the EU’s “freedom of establishment” to present greater authority on issuers to choose the laws of the member states to govern their domestic

144. See Moloney, *supra* note 142 (Moloney describes the methodology of the FSAP and the EU’s progress in its implementation).

145. *Id.*

146. *Id.*

147. See generally Council Directive No. 2001/34, O.J. L 184/1 (2001), amended by Council Directive No. 2003/71, O.J. L 345/64 (2003); Council Directive No. 2001/34, O.J. L 184/1 (2001), amended by Council Directive No. 2004/109, O.J. L 390/38 (2004).

148. Karmel, *supra* note 139, at 1692-94.

149. Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 560 (2005).

affairs. While Werner Ebke¹⁵⁰ states that there is “no obligation under public international law for states to recognize the legal personality of a foreign corporation”, two-sided friendship treaties and other commercial investment treaties among states may need mutual recognition of companies formed under the laws of either party to the treaty. Not universally accepted, however, such a state will comply with the laws of the state of integration or organization when resolving disputes regarding its internal affairs. Abke¹⁵¹ suggests that some EU member states have historically applied the law of jurisdiction in which the company’s principal role of business or headquarters are located, while others have applied the laws of the state of integration to adjudicate disputes over a company’s corporate governance. The “freedom of establishment” provided by the Treaty Establishing the European Community¹⁵² has given constitutional dimensions to this tension and raised the question of whether issuer choice - and therefore regulatory competition among states - in selecting the law of corporate governance will in the end prevail in Europe.¹⁵³

Recent decisions of the ECJ have held that member states may not apply the real seat doctrine to companies originally organized in another member state, regardless of the preliminary or subsequent location of their principal place of business or administration. In *Centros*¹⁵⁴ and *Inspire Art*,¹⁵⁵ the ECJ held that a member state could not say no to register a branch of a company, or impose additional requirements on a company, managed under the laws of another member state because the company’s business was principally located within the jurisdiction. In *Centros*, the ECJ held that Denmark could not refuse to register a branch of a company duly formed under UK law on the ground that the company was principally established within Denmark. Although both Denmark and the UK applied the ‘state of integration’ doctrine, Denmark argued that Centros had abused the freedom of establishment by integrating abroad to circumvent the application of domestic capital requirements. In *Inspire Art*, the ECJ held that the Netherlands could not apply minimum capital requirements to foreign

150. Werner F. Ebke, *The “Real Seat” Doctrine in the Conflict of Corporate Laws*, 36 INT’L LAW. 1015, 1016 (2002).

151. See Ebke, *supra* note 150.

152. See Council Directive No. 2004/109, O.J. L 390/38 (2004).

153. Didier Martin & Forrest Alogna, *New Delaware*, WALL ST. J. EUR. (Dec. 20, 2007) (In this article, the authors argue that Britain, the Netherlands, and France are poised to lead the race for corporate charters in the European Union, at the expense of member states with relatively inflexible corporation laws, such as Germany), <http://online.wsj.com/news/articles/SB119810493339240635> (last visited Nov. 30, 2013).

154. Werner F. Ebke, *Centros - Some Realities and Some Mysteries*, 48 AM. J. COMP. L. 623, 624 (2000).

155. Patrick S. Ryan, *Case C-167/01. Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. (E.C.J. SEPTEMBER 23, 2003)*, 11 COLUM. J. EUR. L. 187, 190 (2004).

companies ‘formally’ controlled under the rules of the member states with which they lacked substantive ties. In both cases, the objecting member state sought to prevent an entity that was principally operating in its territory from circumventing domestic minimum-capital requirements by integrating in another state. While the ECJ recognized that member states might have the right to regulate the trade or business of foreign companies in their territory, the applicable local disclosure-requirements were sufficient to make potential counterparties aware that such entities integrated abroad.¹⁵⁶ What is more, the ECJ has suggested in *Uberseering*¹⁵⁷ that freedom of establishment would uphold the integrating state’s corporate rules regardless of member state’s domestic choice-of-law rule. In this case, the ECJ held that freedom of establishment prohibited Germany, which applies the real seat doctrine to corporate governance disputes, from denying the legal capacity to sue to a company integrated in the Netherlands. This applied despite the fact that the company was acquired by two German nationals and was consequently deemed to have its “actual center of administration” in Germany under German law. While these cases mainly concern the preliminary integration decision, the possibility that member states might compete for the reintegration of existing companies (without requiring formal dissolution) has also been raised in decisions of the ECJ.¹⁵⁸

Another potential source of challenge on U.S.’s SEC is the incremental growth and accessibility of capital markets beyond the traditional Western stock exchanges. The Tokyo Stock Exchange and the Hong Kong Stock Exchange have, certainly, long been among the largest exchanges in the world as measured by the market capitalization of their domestic listed companies,¹⁵⁹ and most countries have a domestic stock market that caters to nationwide companies and investors. However, many Asian companies searching for deeper capital markets have often pursued a cross-listing on an international exchange such as the NYSE, the NASDAQ Stock Market, the London Stock Exchange, or the Hong Kong Stock Exchange.¹⁶⁰ Such

156. See Council Directive 89/666/EEC, 1989 O. J. L. (L395) 36, Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Type of Companies Governed by the Law of Another State.

157. *UberSeering B.V. v. Nordic Countrs. Co. Baumanagement GmbH (NCC)*, Case C-208/00 (2002).

158. See *The Queen v. HM Treasury and the Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc*, Case 81/87 (1988) (This decision in *Daily Mail* broadly implied that a company could not rely on the freedom of establishment to relocate to another state without sacrificing its legal personality in its state of integration (and thus giving rise to potential tax liability upon liquidation)).

159. See World Federation of Exchanges-Statistics, <http://www.world-exchanges.org/statistics>. By this measure, the Tokyo Stock Exchange was the third largest exchange (US \$3.8 trillion) and the Hong Kong Exchange was the seventh largest (US \$2.7 trillion).

160. Erica Fung, *Regulatory Competition in International Capital Markets: Evidence from China in 2004-2005*, 3 N.Y.U. J. L. & BUS. 243, 262-71 (2006).

cross-listing not only provide issuers with access to the exchange's broader investor base, but also signal a willingness to abide by internationally recognized fraud securities litigation reforms to attract investment from a broader pool of investors.¹⁶¹ To the extent that regional markets undertake fraud securities legislation reforms to replicate these features, they may gain the ability to retain - or possibly attract - listings that would otherwise migrate to the U.S. and European countries.

Recently, a number of countries have started to develop the legal structure and reputation required to create an excellent capital market. For example, China, India, and the UAE have undertaken significant reforms in company law and capital markets laws. China has also undertaken a variety of reforms in company law, disclosure and accounting standards, and auditor independence,¹⁶² and has strengthened (at least, as a formal issue) the independence of the Chinese Securities Regulatory Commission in comparison with the Chinese government and the Communist Party.¹⁶³ In addition, China has sought to reduce the government's interference in the operation of stock exchanges by delegating greater self-regulatory authority to the exchanges of overseeing listing standards with which both SOEs and private corporations must comply.¹⁶⁴

The rise of Chinese financial markets has prompted much speculation about the viability of the U.S. markets.¹⁶⁵ The long-term success of China's domestic stock markets, however, depends on China's commitment to investor protection. Commentators express concern about the effectiveness of the China Securities Regulatory Commission (CSRC),¹⁶⁶ particularly in the light of China's conflict of interest as both regulator and controlling shareholder of SOEs, and its incentive to manipulate securities fraud litigation.

In similar lines, the UAE's struggling efforts to build up an International

161. Hua Cai, *Bonding, Law Enforcement and Corporate Governance in China*, 13 STAN. J.L. BUS. & FIN. 82, 105 (2007) (This article describes the "bonding" hypothesis and the use of cross-listing by Chinese firms).

162. Noelle Trifiro, *China's Financial Reporting Standards: Will Corporate Governments Induce Compliance in Listed Companies?*, 16 TUL. J. INT'L & COMP. L. 271, 280 (2007).

163. Yuwa Wei, *The Development of Securities Market and Regulation in China*, 27 LOY. L.A. INT'L & COMP. L. REV. 479, 500 (2005) (This article describes the evolution of the CSRC's formal role in securities market regulation under Chinese law).

164. Benjamin L. Liebman & Curtis J. Milhaupt, *Reputational Sanctions in China's Securities Market*, 108 COLUM. L. REV. 929, 957 (2008) (The authors discuss the advantages of exchange sanctions over CSRC actions in China).

165. See David Barboza, *Sparse U.S. Listings Prompt Rush on China I.P.O.'s*, N.Y. TIMES (Feb. 11, 2010), http://www.nytimes.com/2010/02/12/business/global/12ipo.html?pagewanted=all&_r=0. David Barboza cites statistics showing that, from 2005-2010, Chinese companies have outpaced American companies in proceeds from initial public offerings.

166. See Chi-Wei Huang, *Worldwide Corporate Convergence within a Pluralistic Business Legal Order: Company Law and the Independent Director System in Contemporary China*, 31 HASTINGS INT'L & COMP. L. REV. 361, 429 (2008).

Islamic financial center in Dubai serves as a second example of challenge to the hegemony of the SEC. The UAE has sought to attract issuers and investors from the Gulf Cooperation Council and the broader investor community to Dubai through tax incentives, the promise of unrestricted capital movement and robust financial market regulation,¹⁶⁷ as well as legal and regulatory support to startup companies and other entities engaged in research and development.¹⁶⁸

The SEC's approach in constructing exemptions cedes little ground when transactions have foreseeable substantial effect to U.S. investors or other significant jurisdictional contacts within the U.S. .¹⁶⁹ For example, Congress and the Commission have viewed a less important list on a U.S. exchange as sufficient contact to assert jurisdiction over an issuer, even if its shares are listed and primarily traded in another country.¹⁷⁰ And, unlike jurisdictions in which securities litigation is exclusively a public litigation, moreover, the existence of private remedies under the SEC's antifraud rules has, nevertheless, remained a concern to both foreign issuers and financial services providers, even if they are otherwise relieved of compliance with SEC rules.¹⁷¹ To the extent that the *Morrison* case acknowledged that transactions in securities enlisted on a US securities exchange implicate sufficient national interest to rebut the presumption against extraterritoriality,¹⁷² Richard Painter and colleagues¹⁷³ made an argument that such dually listed securities should remain subject to the reach of Rule 10b-5 in both public and private actions.

However, Congress and the SEC have explored the variety of strategies to limit the scope of Rule 10b-5 authority over non-US firms accessing international capital markets. These include imposing one-sided limits on the application of its rules to overseas issuers, balancing national standards with international standards, and recognizing the sufficiency of home country regulation in limited contexts.

167. Amir H. Khoury, *Dubai's New Intellectual Property-Based Economy: Prospects for Development without Dependency*, 9 J. MARSHALL REV. INTELL. PROP. L. 84, 99-102 (2009).

168. *Id.*

169. Frederick Tung, *From Monopolists to Markets?: A Political Economy of Issuer Choice in International Securities Regulation*, 2002 WIS. L. REV. 1363, 1367-71 (2002).

170. 17 CFR 240.12g3-2(b). When read in conjunction with Exchange Act Rules 12g-1 (17 CFR 240.12g-1) and 12g3-2(a) (17 CFR 240.12g3-2(a)), Exchange Act Section 12(g) requires an issuer to file an Exchange Act registration statement regarding a class of equity securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, the number of its U.S. resident holders is 300 or more, and the issuer's total assets exceed \$10 million.

171. See Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1130-33 (2010).

172. *Morrison*, 130 S. Ct. at 2884.

173. See Richard Painter, Douglas Dunham and Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 24-25 (2011).

One significant problem with this approach is that, as fraud securities litigation expands domestically, conflicts with non-U.S. regulatory regimes become increasingly frequent and inadvertent. For example, The Sarbanes-Oxley Act (SOX) has discomfited foreign issuers - as well as domestic issuers - who had grown comfortable with the distinction between regulations of fraud of domestic affairs. While the Commission created specific exemptions from audit committee requirements to accommodate companies with unique governance structures, U.S.-listed foreign private issuers remain subject to the Act's rules regarding the adequacy of internal financial and disclosure controls and the independence of its audit committee.¹⁷⁴

The contemporary debate over the choice of accounting standards for public company financial frauds is illustrative. In light of the differences in accounting standards exposed by the recent financial crisis,¹⁷⁵ and the difficulty in achieving a "single set of high-quality, global accounting standards",¹⁷⁶ the SEC has reaffirmed its commitment to convergence. The SEC has also cautioned that it will make its determination whether to integrate International Financial Reporting Standards (IFRS) into the U.S. domestic reporting system based on evidence of "sufficient development and application of IFRS" and "the independence of standard setting for the benefit of investors," among other factors.¹⁷⁷ The factors considered in the Work Plan, however, touch at the heart of IFRS' implementation in other jurisdictions. For example, in assessing the development and application of IFRS, the SEC has noted concern about the comprehensiveness, auditability, enforceability, and consistent application of IFRS across jurisdictions.¹⁷⁸ While many jurisdictions have claimed to adopt some subset of the IFRS promulgated by the International Accounting Standards Board (IASB) in their accounting standards,¹⁷⁹ individual EU member states and other

174. 17 CFR § 240.10 A-3. This discusses application to foreign private issuers.

175. See Michael Greenberger, *Overwhelming a Financial Regulatory Black Hole with Legislative Sunlight: Dodd-Frank's Attack on Systemic Economic Destabilization Caused by an Unregulated Multi-Trillion Dollar Derivatives Market*, 6 HARV. J. OF BUS. & TECH. 127, 138-39 (2011).

176. SECURITIES AND EXCHANGE COMMISSION, COMMISSION STATEMENT IN SUPPORT OF CONVERGENCE AND GLOBAL ACCOUNTING STANDARDS, release No. 33-9109 (Mar. 2 2010) (This report specifically states that a "more comprehensive work plan is essential to lay out transparently the work that must be done to support our decision on the appropriate course to integrate IFRS into the U.S. financial reporting system for U.S. issuers").

177. *Id.*

178. In 2007, the Commission adopted rules permitting foreign private issuers to file financial statements using IFRS as issued by the IASB and to omit a reconciliation to U.S. GAAP. See SECURITIES AND EXCHANGE COMMISSION, ACCEPTANCE FROM FOREIGN PRIVATE ISSUERS OF FINANCIAL STATEMENTS PREPARED IN ACCORDANCE WITH INTERNATIONAL FINANCIAL REPORTING STANDARDS WITHOUT RECONCILIATION TO U.S. GAAP, release No. 33-8879 (Dec. 21, 2007).

179. *Id.*

nations have opted out significant “voluntary” provisions of IFRS.¹⁸⁰ In assessing the independence of the standard-setting of the IFRS, the SEC has commented on the effectiveness of the oversight, composition, and funding of the IFRS Foundation, as well as the composition and standard-setting processes of the IASB.¹⁸¹ Such commentary has, historically, ignited concerns that the U.S. might seek to exercise greater influence or regulatory oversight over the IFRS and the IASB.¹⁸²

Even those countries that assert that they have adopted the IFRS may stir controversy in the process. For example, commentators hailed China’s move to bring its accounting standards into line with the IFRS, and, in particular, the Ministry of Finance’s publication of significant revisions and additions to China’s Accounting Standards for business enterprises on February 15, 2006, which achieve substantial convergence with the IFRS.¹⁸³ The incidence of state control over the Chinese economy, however, required less onerous standards for disclosure of related party transactions, and, in November 2009, the IFRS revised its standard for the disclosure of related party disclosures (IAS 24) to accommodate SOEs.¹⁸⁴ These developments raised concern in some quarters that the IASB might be too willing to integrate compromises for individual jurisdictions and thus dilute the IFRS brand.¹⁸⁵ Moreover, Richard Meyer has remarked that the adoption of the IFRS in China may not be enough for foreign investors to gain a real and accurate picture of the financial health of Chinese enterprises for many years to come. This is in the light of the breakneck speed of the execution of the

180. Karel Van Hulle, *The True and Fair View Override in the European Accounting Directives*, 6 EUR. ACCT. REV. 711, 716 (1997).

181. The IASB, an accounting standard-setting body based in London, was established to develop global standards for financial reporting. The IASB is overseen by the IFRS Foundation (formerly called the “IASB Foundation,” this organization has been renamed as a result of recent amendments to its Constitution, effective March 1, 2010). The IFRS Foundation is responsible for the activities of the IASB. While national accounting standard setters traditionally have been accountable to a national securities regulator or other government authority, until 2009, the IFRS Foundation did not have a formal link with any national securities regulators. Recognizing that a relationship with national securities regulators would enhance the public accountability of the IFRS Foundation, its trustees agreed on amendments to its Constitution to establish a link between the IFRS Foundation and a Monitoring Board composed of public capital markets authorities, including the Commission, charged with the adoption or recognition of accounting standards used in their respective jurisdictions.

182. Stephen Bouvier, *Securities Regulators Stake Their Claims in IASB Funding, Standard-Setting Activities*, 50 SEC. REG. & L. REPT. (BNA) 173 (2007).

183. Walter Stuber et al., *International Securities and Capital Markets*, 41 INT’L LAW. 443, 449 (2007).

184. See IASB PRESS, IASB SIMPLIFIES REQUIREMENTS FOR DISCLOSURE OF RELATED PARTY TRANSACTIONS (2009), available at <http://www.ifrs.org/News/Press-Releases/Documents/IASBsimplifiesrequirementsfordisclosureofrelatedpartytransactions2.pdf> (last visited Nov. 30, 2013).

185. RICHARD MEYER, *IFRS Adoption: The China Experience*, COMPLIANCE WEEK (Sept. 3, 2008), <http://www.complianceweek.com/news/news-bulletin/ifrs-adoption-the-china-experience#.VCtxSvmSyaU>.

IFRS in China,¹⁸⁶ the lack of successfully centralized internal controls in large institutions, and the phantom of political pressure on independent auditors.¹⁸⁷

Two-sided or many-sided initiatives to allocate regulatory jurisdiction among competing sovereigns, such as through treaties or memoranda of understanding, present the least risk of loss of sovereignty over capital markets transactions while facilitating cross-border trading activity. The variety of measures promulgated under the FSAP take a two-sided approach to the question of extraterritoriality. For example, under the Prospectus and Transparency Directives, non-EU firms may offer securities in EU capital markets by designating a single member state as the “home state” for purposes of ongoing capital-markets regulation.¹⁸⁸ The Directives, moreover, contemplate a process of accommodating specific non-EU capital markets regimes that offer an “equivalent” regulatory regime in their home country.¹⁸⁹ This process, if pursued, would extend the FSAP internal harmonization process to non-EU member states whose capital market participants are likely to seek access to EU markets regularly, such as the U.S. and Japan.¹⁹⁰

The SEC’s efforts at two-sided recognition are restrained to date. The SEC has entered into a memoranda of understanding with the national fraud securities regulators of many individual jurisdictions, as well as the Multilateral Memorandum of Understanding (MMOU) created by the International Organization of Securities Commission (IOSCO), for the sharing of information regarding securities transaction and cooperation in enforcement of securities fraud violations.¹⁹¹ Building upon these shared regulatory values, the U.S. has experimented and continues to experiment with individualized accommodation of foreign jurisdictions. The predisposition of the U.S. regulators to impose the most burdensome features of U.S. law on the domestic standards of its counterparts, however, renders this approach apparently more accommodating than its one-sided rules of private issuers overseas.¹⁹²

186. *See id.*

187. Lawrence A. Cunningham, *The SEC’s Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 N.C.L. REV. 1, 43 (2008) (This article describes reports that China’s four state banks pressured Ernst & Young to withdraw its independent auditor’s report on the banks’ financial statements in 2006 because its estimate of the amount of the banks’ non-performing loans was higher than the official estimate).

188. *See* Council Directive No. 2004/109, O.J. L 390/38 (2004).

189. *Id.* In each case, the European Commission is authorized to adopt implementing measures to guarantee the equivalence of the required disclosures with international standards.

190. Karmel, *supra* note 139, at 1709-12.

191. Securities and Exchange Commission, *International Enforcement Assistance*, http://www.sec.gov/about/offices/oia/oia_crossborder.shtml. This documents the SEC memoranda of understanding.

192. *See generally* International Disclosure Standards, Securities Act Release No. 7745, 64 Fed.

More recently, members of the Commission staff have publicly considered a process by which overseas market intermediaries might meet the criteria to offer access to trading and financial services to U.S. persons based on “substituted compliance” with their home country’s regulations if the latter is deemed “comparable” to U.S. standards.¹⁹³ Under this approach, a foreign stock exchange or broker-dealer would be entitled to petition for an exemption from U.S. registration requirements if (i) its home-country regulator negotiates an agreement with the SEC for information-sharing and collaboration in compliance, enforcement and inspection, and (ii) the exchange or broker-dealer agrees to submit to U.S. jurisdiction regarding U.S. securities anti-fraud laws.¹⁹⁴ If the petition were granted, after notice and comment, foreign exchanges and broker-dealers would be able to market securities that are not subject to (or are exempt from) U.S. registration and disclosure requirements to U.S. investors.¹⁹⁵

Notably, Tafara and Peterson have entertained the possibility of negotiating choice-of-law or choice-of-forum arrangements with the petitioner and its home-country regulator for private rights of action.¹⁹⁶ If such a provision were effectively negotiated by a foreign securities intermediary, the result might be to limit the right of the U.S. investors to sue the intermediary (or even individual issuers) under U.S. fraud securities litigation in U.S. court.¹⁹⁷ It remains unseen, however, whether the SEC would ever confirm such an exemption and what pre-conditions would be essential to authorize such a petition to go on.

The bright-line rule in the *Morrison* case is the right substitute for application of the fraud securities litigation and best accommodates the regulatory interests of the U.S. and other countries. Whether this result should be mirrored worldwide is less obvious. Perhaps global classes that are able to take into account the substantive standards of different regulatory regimes are workable globally, perhaps on a regional ground where greater

Reg. 53,900 (Oct. 5, 1999) (codified at 17 C.F.R. §§ 210, 228, 229, 230, 239, 240, 249, 260). This Form applies to foreign issuers in the SEC disclosure regime. The SEC believed that its requirements for U.S. issuers exceeded the International Organization of Securities Commission’s (“IOSCO’s”) standards.

193. See Tafara & Peterson, *supra* note 138.

194. See International Disclosure Standards, Securities Act Release No. 7745, 64 Fed. Reg. 53,900 (Oct. 5, 1999).

195. See 17 CFR § 240.15a-6 (at present, foreign brokers and other foreign securities professionals effecting securities transactions using U.S. jurisdictional means qualify for limited exemptions from registration under the Exchange Act. This exempts foreign broker-dealers from registration in relation with unsolicited transactions, provision of research reports to major U.S. institutional investors, transactions with U.S. institutional investors chaperoned by a U.S. broker-dealer responsible for compliance with U.S. federal securities law, and transactions with certain U.S. financial counterparts).

196. See Tafara & Peterson, *supra* note 138.

197. See Tafara & Peterson, *supra* note 138.

coordination and consensus about procedures exists. What is certainly called for, however, is greater worldwide cooperation, which could take the form of augmented regulatory cooperation or perhaps even a global treaty.

VI. CONCLUSION

The SEC's traditional approach to limiting the reach of fraud securities legislation regarding foreign companies has been to construct narrowly-tailored exemptions forms of conduct expected to have the least impact on U.S. investors or markets. Therefore, the SEC has offered overseas private issuers varying degrees of relief from compliance with prospectus and disclosure requirements, and with the rules governing soft offers, depending on the extent of their contacts within the U.S. Under the Dodd-Frank, it seems that the SEC has benefited largely from an obvious growth of regulatory power. In the context of post-*Morrison* cases, on the other hand, the SEC stands to suffer a fleeting defeat if the courts rules in favor of the defendant on the basis of *Morrison* and decline to apply Dodd-Frank section 929P(b) with the benefit of hindsight. Excepting some mild confusion, the SEC's enforcement program will emerge generally intact, if not more robust in the after effects. In fact, arguments raised in the parties' filings could possibly be relegated to the legal dustbin. Following the ratification of Dodd-Frank, the Commission may resume enforcement litigation against so-called global fraudsters, whether the subject transactions are lengthy or small. As so it does, courts will commit themselves to reworking the conduct-effects test, aware of the complexity of applying such vague formulations. *Morrison's* stern, bright-line rule has given ways to an amorphous test under which the SEC is expected to increase its regulatory reach with new drive. As global securities markets continue to expand and integrate quickly, this paper recommends that the SEC undertakes a complete, thoughtful, and nuanced global consideration reviewed in this article prior to giving legal shapes to the challenge of fraud securities litigation.

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*Morrison v. National Australia Bank*案後 證券詐欺訴訟的當前挑戰

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摘 要

面對全球資本市場持續快速的整合，導致證券市場的連動性愈來愈高，美國國會在透過法律的形式來規範證券詐欺行為前，預先進行一個健全、完整且系統性的考量是非常重要的。當前的挑戰是，全球經濟成長呈現明顯的下滑趨勢，且最近全球金融市場動盪所引發的證券交易爭訟問題，不再只侷限於單一的國家或地區的管轄，而是遍布全球。本文主要研究問題有二：首先，介紹*Morrison*案之後當前證券詐欺訴訟的挑戰，並藉由美國證券詐欺訴訟發展之沿革，詳細的分析*Morrison*案對證券詐欺訴訟的影響，並探討美國證券交易委員會如何因應及加強管制在*Morrison*案後的證券詐欺行為；其次，藉由*Morrison*案的相關分析，來探討行為檢驗標準、效果檢驗標準及交易檢驗標準與證券詐欺訴訟行為的關聯。綜上所述，本文嘗試提出假設並建議美國證券交易委員會應重新審視及考量其當前的管制範圍，尤其是在*Morrison*案後，來自美國最高法院有關證券詐欺訴訟的最新及相關之見解。

關鍵詞：反詐欺條款、境外適用、行為檢驗標準、效果檢驗標準、交易檢驗標準

