EXTRATERRITORIAL PRIVATE RIGHTS OF ACTION: REDEFINING THE TRANSACTIONAL TEST IN MORRISON V. NATIONAL AUSTRALIA BANK

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Introduction

On June 24, 2010, the Supreme Court handed down a landmark decision in *Morrison v. National Australia Bank*,[1] throwing out decades of circuit precedent, and limiting the scope of Section 10(b) of the Securities and Exchange Act ("Exchange Act") to transactions that occur in the United States.[2] Less than a month after the Supreme Court released its decision, however, Congress restored in the Dodd-Frank Act ("Dodd-Frank" or "Act") the ability of the Securities and Exchange Commission ("SEC") and the United States to bring actions under Section 10(b) in cases involving transnational securities fraud.[3] Additionally, the Act directed the SEC to conduct a study to determine whether and to what extent private plaintiffs should be able to bring actions extraterritorially.[4]

Even though *Morrison*'s so-called "transactional" test was meant to provide clarity and guidance, in practice it has failed to do so. In the past year, courts have not applied the test consistently, particularly in cases involving purchasers of American Depository Receipts ("ADRs").[5] Courts have restricted participation in class

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[1] *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2883 (2010) (holding that under the presumption against extraterritorial application, Section 10(b) does not apply extraterritorially because it does not contain an affirmative indication to that effect).

[2] *Id*. at 2878.

[3] The Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929P, Pub. L. 111-203, 124 Stat.1376 (2010) [hereinafter *Dodd-Frank Act*].

[4] Dodd-Frank Act § 929Y.

[5] ADRs represent a fraction of a share or multiple shares of a foreign stock. *See* Stackhouse v. Toyota Motor Co., No. CV 10-0922 DSF (AJWx), 2010 U.S. Dist. LEXIS 79837, at *3 (C.D. Cal. July 16, 2010) (holding that the purchase of Toyota ADRs in the United States was a domestic purchase).

action securities litigation only to those investors who actually purchased stock in the United States.[6] Other reference securities—such as security-based swaps—have presented an obstacle for *Morrison*'s transactional test as well. Further complicating the test's application is the cross-border consolidation of national exchanges, as well as the Dodd-Frank-mandated transition of certain security-based swap transactions from over-the-counter markets to organized exchanges.

This note argues that *Morrison*'s test should include all securities listed on American exchanges, regardless of whether the underlying transaction occurred within the United States. This note further submits that a transaction should be considered as having occurred in the United States if the issuer solicited the investor in the country. Part I discusses the background of extraterritorial application of U.S. securities laws by analyzing the Second Circuit's "conduct and effects" test—the predecessor to the *Morrison* test. Part II expounds on the Supreme Court's transactional test implemented in *Morrison*. Part III explores the subsequent application of the *Morrison* test to dually-listed and reference securities, while Part IV identifies developing issues with applying the test. Part V discusses Congress's response to the *Morrison* decision in Dodd-Frank, which consists in reinstating the conduct and effects test to actions by the United States, and directing an SEC study on whether Section 10(b)

But see In re Societe Generale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 U.S. Dist. LEXIS 107719, at *19 (S.D.N.Y. Sep. 29, 2010) (holding that trading in Societe Generale ADRs was a "predominantly foreign securities transaction" and Section 10(b) was inapplicable because the ADRs were not purchased on an official American securities exchange) [hereinafter *In re Societe Generale*]; *In re* Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 337 (S.D.N.Y. 2011) (dismissing case because, although the ADRs are sold on the New York Stock Exchange, none of the plaintiffs purchased ADRs) [hereinafter *In re Royal Bank of Scotland*].

[6] *See In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469, 473 (S.D.N.Y. 2010) (holding that *Morrison* warranted dismissal of claims asserted by plaintiffs who purchased defendant's shares on French exchange, even if company's shares were also available for purchase on a U.S. exchange); Terra Sec. ASA Konkursbo v. Citigroup, Inc., 740 F. Supp. 2d 441, 447 (S.D.N.Y. 2010) (dismissing case because plaintiff had purchased a Norwegian securities firm's fund-linked notes arranged by a U.S. bank for sale to U.S. investors); Sgalambo v. McKenzie, 739 F. Supp. 2d 453, 463, 487 (S.D.N.Y. 2010) (dismissing case where plaintiff purchased defendant's shares on the Toronto Stock Exchange).

should be similarly re-extended to private rights of action. Part VI analyzes arguments in favor of and against the *Morrison* test. Finally, Part VII offers a recommendation for the future of extraterritorial application by private plaintiffs.

I. The "Conduct and Effects" Test

Extraterritorial private actions are pursued through Section 10(b) of the Exchange Act. Section 10(b), however, provides no indication as to whether it applies extraterritorially to primarily foreign securities transactions that contain some domestic conduct, or have some domestic effect or impact. Prior to *Morrison*, most circuits had adopted some variation or combination of the Second Circuit's "conduct and effects" test to determine whether Section 10(b) applies to extraterritorial transactions.[7]

In *Schoenbaum v. Firstbrook*, the Second Circuit first began to extend Section 10(b) extraterritorially.[8] Although the fraudulent transactions at issue in *Schoenbaum* took place outside the United States, the court found that the fraud affected the value of the common shares publicly traded in the United States; thus, application of Section 10(b) was "necessary to protect American investors."[9] The *Schoenbaum* decision laid the groundwork for extraterritorial application, establishing the principle that the application of Section 10(b) could be premised upon some effect on the United States securities markets or investors.[10]

The Second Circuit further elaborated on this point in *Leasco Data Processing Equipment Corp. v. Maxwell*.[11]*Leasco* involved an American company that had been fraudulently induced to purchase securities in England.[12] Unlike *Schoenbaum*, some of the deceptive conduct had occurred in the United States, but the corporation's

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[7] *See, e.g.,* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977); Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421–422; Grunenthal GmbH v. Hotz, 712 F.2d 421, 424–425 (9th Cir.1983); Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998).
[8] 405 F.2d 200, 206 (2d Cir. 1968).
[9] *Id.* at 206, 208–09.
[10] James M. Wilson Jr., *One Year Later: The Reach of U.S. Securities Laws after Morrison*, Jun.16, 2011, http://www.lexisnexis.com/community/corpsec/blogs/secanalysis/archive/2011/06/16/one-year-later-the-reach-of-u-s-securities-laws-after-morrison.aspx.
[11] 468 F.2d 1326, 1341 (2d Cir. 1972).
[12] *Id.* at 1334.

securities were not listed on any domestic exchange, and instead traded abroad.[13] The Second Circuit held that because Congress had prescriptive jurisdiction to regulate deceptive conduct in the United States, the language of the Exchange Act could be read to cover the conduct in *Leasco*.[14] The Court therefore concluded that "if Congress had thought about the point," it would have wanted Section 10(b) to apply.[15]

Following *Schoenbaum* and *Leasco*, the Second Circuit formalized application of Section 10(b) into a conduct and effects test, extending the section's scope to instances where "the wrongful conduct occurred in the United States," or where the "wrongful conduct had a substantial effect in the United States or upon Unites States Citizens."[16]

II. Morrison v. National Australia Bank

On June 24, 2010, the Supreme Court swept aside thirty-three years of Section 10(b) jurisprudence, which had developed a test for determining whether sufficient conduct occurred—or significant effects could reasonably occur—within the United States to justify the enforcement of securities laws against foreign issuers.[17] Writing for the Court in *Morrison*, Justice Scalia restricted the application of Section 10(b) to actions involving securities listed on domestic exchanges, and for those not listed on domestic exchanges—to securities purchased or sold within the United States.[18]

In *Morrison*, the foreign purchasers of National Australia Bank ("NAB") ordinary shares sued NAB for its misrepresentations regarding HomeSide Mortgage, NAB's wholly-owned American subsidiary. The plaintiffs brought the action in the Southern District of New York under Section 10(b), alleging that NAB manipulated the financial models of HomeSide to reflect an unrealistically low rate of early payment, thereby inflating the subsidiary's value.[19] The

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[13] *Id.* at 1330–31.
[14] *Id.* at 1334.
[15] *Id.* at 1334–37.
[16] SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003).
[17] *Morrison*, 130 S. Ct. at 2879.
[18] *Id*. at 2888.
[19] *Id*. at 2876.

defendants moved to dismiss for lack of subject-matter jurisdiction.[20] Applying the conduct and effects test, the district court granted the motion because the acts contributing to the fraud in the United States were "at most . . . a link in the chain of an alleged overall securities fraud scheme that culminated abroad."[21] The Second Circuit subsequently affirmed on similar grounds—it found that the acts performed in the United States did not "compris[e] the heart of the alleged fraud."[22] Unlike the Second Circuit, however, the Supreme Court did not consider the question of whether Section 10(b) applied to be a question of subject-matter jurisdiction, but rather a merits question:

> [W]e must correct a threshold error in the Second Circuit's analysis. It considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction . . . . But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.[23]

The Court invoked a presumption against extraterritoriality, declaring that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[24] The Court then rejected the Second Circuit's conduct and effects test,[25] finding that it lacked any textual or "even [an] extratextual basis"; it further noted that the test is not only difficult to administer, but is also susceptible to yielding unpredictable results.[26] The Court was particularly troubled by the fact that, in administering the test, the Second Circuit abided by the principle that "the presence or absence of any single factor which

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[20] *In re* Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 U.S. Dist. LEXIS 94162 at *8 (S.D.N.Y. Oct. 25, 2006).
[21] *Id*. at *25.
[22] Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 175–76 (2d Cir. 2008).
[23] *Morrison*, 130 S. Ct. at 2877.
[24] *Id*. at 2878.
[25] *Id*. at 2883. *See also* Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010) ("In *Morrison*, the Supreme Court roundly (and derisively) buried the venerable 'conduct and effect' test the Second Circuit devised and for years had employed to determine whether the protections and remedies contained in [Section] *10(b)* of the Exchange Act apply extraterritorially to reach fraudulent securities transactions abroad . . . .").
[26] *Morrison*, 130 S. Ct. at 2879–80.

was considered significant in other cases . . . is not necessarily dispositive in future cases."[27]

Having rejected the conduct and effects tests, the Supreme Court then implemented a new, bright-line test intended to yield consistent and certain results—the transactional test.[28] The Court stated that "it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which [Section] *10(b)* applies."[29] The Court further explained that "*Section 10(b)* reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[30] The new rule was not only meant to bring clarity and certainty to the securities law field, but to also avoid conflicts with foreign securities laws; the Court observed that "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange," the transactional test will avoid the problem of "interference with foreign securities

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[27] *Id.* at 2879 (citing ITT v. Cornfeld, 619 F.2d 909, 918 (2nd Cir. 1980)). Specifically, the Court found the conduct and effects tests were not easy to administer:

> [C]onduct contributing to the fraud applied differently the conduct was held to apply differently depending on whether the harmed investors were American or foreigners: When the alleged damages consisted of losses to American investors abroad, it was enough that acts of material importance performed in the U.S. significantly contributed to that result; whereas those acts must have directly caused the result when losses to foreigners abroad were at issue. And merely preparatory activities in the United States did not suffice to trigger application of the securities laws for injury to foreigners located abroad. This required the court to distinguish between mere preparation and using the United States as a "base" for fraudulent activities in other countries. But merely satisfying the conduct test was sometimes insufficient without some additional factor tipping the scales in favor of the application of American law. District courts have noted the difficulty of applying such vague formulations.

Id. (internal citations omitted).

[28] *Cornwell*, 729 F.Supp.2d at 625.

[29] *Morrison*, 130 S. Ct. at 2884.

[30] *Id*. at 2888.

regulation that application of [Section] *10(b)* abroad would produce."[31]

Applying the transactional test, the Court held that plaintiffs failed to state a claim upon which relief could be granted under Section 10(b), and found that the purchase or sale of NAB ordinary shares in Australia "involve[d] no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States."[32]

III. Application of the Transactional Test

The clear, bright-line rule the Supreme Court believed it had created has not turned out so. In the past year, courts have faced issues applying the *Morrison* test, primarily with respect to: (1) whether securities registered, but not listed, on a domestic exchange fall under the purview of Section 10(b); and (2) whether a transaction involving securities not listed on a domestic exchange is a "domestic transaction." Section A of this part reviews cases applying the *Morrison* test to securities referencing underlying foreign ordinary shares, particularly ADRs and security-based swap transactions. Section B analyzes cases determining whether a transaction occurred in the United States.

A. The Listing Requirement and Reference Securities

In *Stackhouse v. Toyota Motor Co.*, the district court for the Central District of California tackled the issue of what the Supreme Court meant by "domestic transactions in other securities."[33] While the opinion in *Morrison* did not directly address what was meant by "domestic transactions," the Supreme Court later provided "an alternative, presumably equivalent, formulation of the scope of [Section] 10(b), which included 'the purchase or sale of any other

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[31] *Id*. at 2886.

[32] *Id*. at 2888. NAB traded its Ordinary Shares on the Australian Stock Exchange and on other foreign exchanges, but not on any exchange in the United States. NAB's ADRs, however—which represent a specified number of Ordinary Shares—were listed on the New York Stock Exchange. *Id*. at 2875.

[33] *Stackhouse*, 2010 U.S. Dist. LEXIS 79837, at *2.

security in the United States.'"[34] The *Stackhouse* court identified two possible interpretations of the Supreme Court's holding: (1) that "if the purchaser or seller resides in the United States and completes a transaction on a foreign exchange from the United States, the purchase or sale has taken place in the United States"; and (2) that because "the actual transaction takes place on the foreign exchange, the purchaser or seller has figuratively traveled to that foreign exchange—presumably via a foreign broker—to complete the transaction."[35] Under the second interpretation, "domestic transactions" means "purchases and sales of securities explicitly solicited by the issuer within the United States rather than transactions in foreign-traded securities where the ultimate purchaser or seller has physically remained in the United States."[36] The Court adopted the second interpretation believing such position is "better supported" by *Morrison* and its discussion of the problems of conflicting laws of various countries.[37] Based on this interpretation, the district court appointed the plaintiff with the largest American Depository Share ("ADS")[38] loss lead plaintiff in the securities class action.[39]

The district court for the Southern District of New York in *In re Societe Generale Securities Litigation*, on the other hand, dismissed the plaintiffs' claims because the plaintiffs were purchasers of ADRs, which the court held did not satisfy the *Morrison* test.[40] Plaintiffs purchased ADRs of Societe Generale, a French company whose ordinary shares traded on the Euronext Paris stock exchange, on the over-the-counter market in New York.[41] An ADR, the Court discussed, "represents one or more shares of a foreign stock or a fraction of a share."[42] Societe Generale's ADRs traded over-the-counter and not on an official American exchange, thereby having less exposure to American buyers.[43] The court concluded that

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[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*. at *3.
[38] ADSs are the individual shares issued by a depository, while ADRs are the entire issuance. U.S. SEC. AND EXCH. COMM'N, *International Investing*, http://www.sec.gov/investor/pubs/ininvest.htm (last visited Nov. 18, 2011).
[39] *Stackhouse*, 2010 U.S. Dist. LEXIS 79837, at *3.
[40] *In re Societe Generale*, 2010 U.S. Dist. LEXIS 107719, at *8.
[41] *Id*. at *4–5.
[42] *Id*. at *20 (citing Copeland v. Fortis, 685 F. Supp. 2d 498, 506 (S.D.N.Y 2010)). *See also Morrison*, 130 S. Ct. at 2875.
[43] *Id*. at *20.

trade in Societe Generale ADRs was considered a "predominantly foreign securities transaction" and, accordingly, Section 10(b) was inapplicable to plaintiffs' ADR transactions.[44]

Four months later, in *In re Royal Bank of Scotland Group PLC Securities Litigation*, the district court for the Southern District of New York began to retract on the position that ADR transactions fail under *Morrison*. The defendant, the Royal Bank of Scotland ("RBS") Group—a British company whose ordinary shares were listed on the London Stock Exchange and Euronext Amsterdam stock exchange—additionally listed ADRs representing ordinary shares on the New York Stock Exchange ("NYSE").[45] The plaintiffs argued that "the plain reading of *Morrison* requires that when a security is 'listed' on an American stock exchange. [sic] Section 10(b) applies, regardless of whether the security is purchased in the United States or through the American Exchange."[46] The Court interpreted the plaintiffs' reading of *Morrison* to "[suggest] that the listing itself provides the U.S.-nexus, thus requiring application of Section 10(b) any time there is such a listing."[47] Plaintiffs argued that "RBS's ordinary shares were clearly 'listed' (and registered) on the NYSE in October 2007, for *Morrison* purposes, as RBS listed and registered ADRs."[48] The Court rejected plaintiffs' arguments, finding that "[t]he idea that a foreign company is subject to U.S. securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*."[49] While rejecting plaintiffs' additional arguments, the Court nonetheless indicated that had the plaintiffs purchased ADRs and alleged injury in connection with such purchase or sale of ADRs, Section 10(b) would have applied.[50]

Eventually, in *In re Vivendi Universal, S.A. Securities Litigation*, the district court for Southern District of New York applied Section 10(b) to claims involving purchases of ADRs.[51] American and foreign shareholders of Vivendi brought the action in 2002

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[44] *Id*. at *19 (citing *Copeland*, 685 F. Supp. 2d at 506).
[45] *In re Royal Bank of Scotland*, 765 F. Supp. 2d at 329, 337.
[46] *Id*. at 335.
[47] *Id*. at 336.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 337–38.
[51] *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 521 (S.D.N.Y. 2011) [hereinafter *In re Vivendi Universal*].

alleging that they had purchased either ordinary shares or ADRs at "artificially inflated prices as a result of defendants' material misrepresentations and omissions between October 30, 2000 and August 14, 2002 . . . in violation of Section 10(b) of the Exchange Act."[52] While some Vivendi ordinary shares were listed on the NYSE, they were not listed for trading purposes; they traded primarily on the Paris Bourse, and not on any U.S. exchange.[53] These shares were listed solely as backup to the ADRs that were traded in the United States.[54]

After an overview of the *Morrison* decision, the *Vivendi* court pointed out that the Supreme Court was "never presented with and did not consider the arguments plaintiffs make here, that the listing of [the issuer's] ADRs on the NYSE required the simultaneous listing of its ordinary shares (albeit not for trading purposes) and, therefore, that NAB's ordinary shares actually met the test enunciated."[55] Because the ADRs were listed on the NYSE, the Court concluded that *Morrison* had no impact on the claims of ADR purchasers.[56] However, the treatment of the claims of foreign and American purchasers of ordinary shares—which involved transactions that necessarily took place on foreign exchanges—remained in question.[57]

The plaintiffs argued unpersuasively, however, that because Vivendi registered a discreet number of shares with the SEC, this registration caused the entire class of shares to be deemed registered for purposes of satisfying the *Morrison* test.[58] Vivendi listed and sold ADRs on the NYSE and, because the ADRs were sold in the United States as part of a U.S. public offering,[59] Vivendi registered, as required by the Securities Act of 1933, a "corresponding number of its ordinary shares."[60] The plaintiffs, relying on 17 C.F.R. § 240.12d1-1(a),[61] then argued that "the registration of the ordinary

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[52] *Id*.
[53] *Id*. at 521, 525.
[54] *Id*. at 525 n.2.
[55] *Id.* at 527.
[56] *Id*.
[57] *Id*.
[58] *Id*. at 528.
[59] *Id*. at 527.
[60] *Id*. at 528.
[61] Securities and Exchange Act of 1934, 17 C.F.R. § 240.12d1-1(a) (2011) ("Registration effective as to class or series. (a) An application filed pursuant to section 12 (b) and (c) of the act for registration of a security on

shares underlying Vivendi's ADR issuance caused the *entireclass* of Vivendi's ordinary shares (including those ordinary shares that did not underlie any ADRs') to be registered with the SEC."[62] Furthermore, "Vivendi . . . was required to register its ordinary shares pursuant to § 12(b) of the Exchange Act and did so."[63] The plaintiffs ultimately contended that—because Vivendi's ordinary shares were registered with the SEC—"all of Vivendi's ordinary shares were registered or listed . . . on a United States exchange" since "listed" and "registered" are interchangeable terms.[64] All purchasers of ordinary shares, plaintiffs concluded, can bring Section 10(b) claims under the test announced in *Morrison*, regardless of whether shares they purchased shares on a foreign or American.[65]

The court, however, found a "technical flaw" in the plaintiffs' argument—that registration with the SEC, which extends registration to the entire class of securities, is not the same as "listing (registering)" on an exchange.[66] After reviewing the NYSE listing application, the court observed that the application required the issuer to list only an isolated number of ordinary shares.[67] Specifically, only the number of ordinary shares "needed to back-up the ADRs being listed."[68] Therefore, while the SEC will deem all the ordinary shares of a foreign issuer to be registered, the issuer actually lists only a select number with the NYSE.[69] Ordinary shares that are not listed on an exchange accordingly "fall outside plaintiffs' literalist reading of the *Morrison* bright-line test as well as the underlying language of *Section 10(b)*."[70] The court concluded that American purchasers of ordinary shares did not satisfy the *Morrison* test, and could not bring

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a national securities exchange shall be deemed to apply for registration of the entire class of such security. Registration shall become effective, as provided in section 12(d) of the act, (1) as to the shares or amounts of such class then issued, and (2), without further application for registration, upon issuance as to additional shares of amounts of such class then or thereafter authorized.").

[62] *In re Vivendi Universal*, 765 F. Supp. 2d at 528 (emphasis in original).
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 529.
[67] *Id.*
[68] *Id*.
[69] *Id*.
[70] *Id*.

actions under Section 10(b).[71] The *Vivendi* court thus joined other lower courts rejecting "the argument that a transaction qualifies as a 'domestic transaction' under *Morrison* whenever the purchaser or seller resides in the United States, even if the transaction itself takes place entirely over a foreign exchange."[72] The Court followed by stating:

> Though the Supreme Court in *Morrison* did not explicitly define the phrase 'domestic transactions,' there can be little doubt that the phrase was intended to be a reference to the location of the transaction, not to the location of the purchaser and that the Supreme Court clearly sought to bar claims based on purchases and sales of foreign securities on foreign exchanges, even though the purchasers were American.[73]

B. "Transactions in the United States" and Reference Securities

It was not until *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.* that the district court for the Southern District of New York began to tackle the question of whether a purchase or sale of securities occurs in the United States.[74] The court's opinion first looked at the statutory definitions of "purchase" and "sale," which the Exchange Act has defined to "include any contract to buy, purchase, or otherwise acquire" and to "any contract to sell or otherwise dispose of."[75] Furthermore, the court recognized that the word "purchase" has been interpreted "to make an individual a 'purchaser' when he or she 'incurred an irrevocable liability to take and pay for the stock.'"[76] The court focused on the notion of

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[71] *Id*. at 532.
[72] *Id*.
[73] *Id*.
[74] Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010).
[75] *Id*.
[76] *Id.* (citing Blau v. Ogsbury, 210 F.2d 426, 427 (2d Cir. 1954)). *See also* DiLorenzo v. Murphy, 443 F.3d 224, 229 (2d Cir. 2006) (finding that Exchange Act "purchase" occurs when a purchaser "fully and irrevocable [pays]" for the securities at issue); Cascade Fund, LLP v. Absolute Capital

"irrevocable liability"—the principle notion of *Plumbers' Union*—as the core of both a "sale" and a "purchase": just like a purchaser, "at some point in time, incurs 'irrevocable liability to take and pay for' a security . . . , a 'seller,' at some moment in time, incurs 'irrevocable liability to' deliver a security."[77] The court nonetheless dismissed the SEC's Section 10(b) claim because the SEC failed to allege facts "from which the Court [could] draw the reasonable inference that any party to the . . . transaction incurred 'irrevocable liability' in the United States."[78]

Similarly, in *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group*, the district court for the Southern District of New York found little guidance in the *Morrison* decision for establishing whether a purchase or sale is made in the United States.[79] In this case, a Cayman Islands mutual fund and limited liability company under the laws of the Cayman Islands purchased securities from a collateralized debt obligation in the form of credit default swaps from Goldman Sachs International, which had offices in London and New York.[80] Following *Morrison*, the court indicated that, in order to "determine *where* the transaction took place," courts have to define "*when* a purchase or sale occurs."[81] Moreover, the "plaintiff must allege that the parties incurred irrevocable liability to purchase or sell the security in the United States" to state a claim under Section 10(b).[82]The plaintiff's complaint included "numerous instances of U.S.-based conduct that led up to the sale of the security, including most notably the alleged fraudulent statements of [Goldman Sachs Group's] New York-based Managing Director David Lehman on the . . . conference call that allegedly induced [Basis Yield Alpha Fund] to purchase [the securities]."[83] The court found, however, that under the *Morrison* transactional test, the plaintiff failed to allege that any

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Mgmt. Holdings Ltd., No. 08-cv-01381 (MSK) (CBS), 2011 U.S. Dist. LEXIS 34748, at *22 (D. Colo. Mar. 31, 2011) (finding that a transaction was not completed, for a post-Morrison Exchange case, "until [the seller] finally accepted an application").

[77] SEC v. Goldman Sachs, No. 10 Civ. 3229 (BSJ) (MHD), 2011 U.S. Dist. LEXIS 62487, at *26 (S.D.N.Y. Jun. 10, 2011).

[78] *Id.* at *35.

[79] Basis Yield Alpha Fund v. Goldman Sachs Group, No. 10 CV 4537 (BSJ) (DCF), 2011 U.S. Dist. LEXIS 80298, at *10 (S.D.N.Y. Jul. 20, 2011).

[80] *Id*. at *5.

[81] *Id*. at *10.

[82] *Id*.

[83] *Id.*

purchase or sale occurred in the United States, and, accordingly, dismissed the plaintiff's claims for failing to plead sufficient facts that would permit a reasonable inference that the purchase or sale was made in the United States.[84]

The determination of whether a transaction occurred in the United States is likely more complicated for swap transactions. In *ElliottAssociates, L.P. v. Porsche Automobil Holding*, the plaintiffs, hedge fund managers, took short positions in equity based-swap agreements of Volkswagen AG.[85] The agreements referenced Volkswagen ordinary shares that traded in Germany, but not in the United States.[86] The plaintiffs brought suit against Porsche in the Southern District of New York, arguing that the swap transactions passed the *Morrison* test because they were entered into in the United States.[87] The plaintiffs further alleged that Porsche increased its ownership in Volkswagen while denying its intent to take over the company.[88] The plaintiffs suffered losses when Porsche's Volkswagen position was revealed and the price of Volkswagen stock increased.[89] The court examined the totality of the circumstances, including the fact that the plaintiffs "failed to allege that their counterparties were in the U.S., that the swap transactions were cleared in the U.S. or even in U.S. dollars and the fact that the reference security was traded in Germany."[90]The judge stated that "the economic reality is that Plaintiffs' swap agreements are essentially 'transactions conducted upon foreign exchanges and markets,' and not 'domestic transactions' that merit the protection of § 10(b)."[91]

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[84] *Id.* at *11.
[85] Elliot Assocs. v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469, 471 (S.D.N.Y. 2010).
[86] *Id.*
[87] *Id.* at 474.
[88] *Id.* at 472.
[89] *Id.* at 473.
[90] Comment Letter of Richard W. Painter on Release No. 34-63174, Study on Extraterritorial Private Rights of Action, SEC File No. 4-617, at 5 (Feb. 17, 2011), *available at* http://www.sec.gov/comments/4-617/4617-7.pdf [hereinafter *Painter*].
[91] *Elliot Assocs.*, 759 F. Supp. 2d at 476.

*IV. Case Analysis of Post-***Morrison** *Decisions*

Following *Morrison*, courts have reasonably sought to restrict the application of Section 10(b) only to those investors who purchased securities in the United States. Courts have interpreted the *Morrison* decision to focus on transactions in securities, consistently rejecting arguments that listing securities on an American exchange satisfies *Morrison* when the transaction occurred over a foreign exchange. Whether an investor has "purchased" a security within the United States, however, is not as clear a finding as the Supreme Court envisioned.

As demonstrated by cases applying the *Morrison* test, a developing issue is whether foreign securities trading over an American exchange in the form of ADRs are "listed" for purposes of satisfying the *Morrison* test. Soon after the *Morrison* decision, the district court for the Central District of California nevertheless applied Section 10(b) to such transactions, appointing as lead plaintiff a purchaser of ADSs.[92]

In contrast, following *Morrison*, the district court for the Southern District of New York held that ADRs do not qualify as domestic purchases.[93] The court in *In re Societe Generale Securities Litigation* refused to apply Section 10(b) to purchases of Societe Generale's ADRs because they "were not traded on an official American securities exchange," and that trading in them, therefore, was a "predominantly foreign securities transaction."[94] The district court for the Southern District of New York soon began to retract its position on whether ADRs qualify as domestic purchases. The court in *In re Royal Bank of Scotland Group PLC*—while admitting that Section 10(b) reaches ADRs trading on the NYSE—dismissed the plaintiffs' complaint because none of the named plaintiffs had purchased ADRs.[95]

One distinction that can be made is that ADRs can be either sponsored or unsponsored.[96] A "sponsored" ADR facility is one in

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[92] *See Stackhouse*, 2010 U.S. Dist. LEXIS 79837, at *2–5.
[93] *In re Soceite Generale*, 2010 U.S. Dist. LEXIS 107719, at *19.
[94] *Id.* at *20. *See also* Wilson, *supra* note 10.
[95] *See In re Royal Bank of Scotland*, 765 F. Supp. 2d at 337.
[96] Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 367 (3d Cir. 2001); American Depositary Receipts, Exchange Act Release No. 33-6894, 48 S.E.C. Docket 1440, 1442 (May 23, 1991) [hereinafter *American Depository Receipts*].

which the foreign issuer participates in establishing the facility with the depositary bank, exercising control over how many ADRs are registered for trading, and the rights holders of such ADRs are granted.[97] Sponsored ADR facilities fall into three categories indicating lower to higher degrees of foreign issuer participation: Level 1, Level 2 and Level 3.[98] Level 1 facilities are those in which the ADRs trade over-the-counter, for example, through the "pink sheets," but are not listed on an American exchange.[99] Level 1 facilities do not have reporting obligations and are not required to comply with U.S. securities laws.[100] Level 2 facilities refer to programs that list ADRs on an American exchange or quote them on the NASDAQ.[101] These ADR facilities must comply with Exchange Act registration and reporting requirements in addition to the requirements of the exchange.[102] Finally, Level 3 facilities refer to ADR programs quoted on the NASDAQ or listed on an American exchange after a United States public offering of ADR securities.[103] Level 3 facilities are required to register the underlying securities and ADRs under the Securities Act of 1933 and compliance with the Exchange Act reporting requirements.[104] In contrast, if a depositary establishes an ADR facility without participation by the issuer of the referenced security, the ADR facility is "unsponsored."[105] Corporations that have Level 2 or Level 3 sponsored ADRs trading on the American exchange agree to abide by the rules and reporting requirements of the exchange and to file reports with the SEC.[106] Such foreign issuers may be said to be "soliciting" sales with the United States.[107]

Although the court in *In re Vivendi Universal, S.A. Securities Litigation* discussed the requirement to establish a sponsored ADR program of listing the underlying ordinary shares, it went on to hold that purchases of ordinary shares, registered for a sponsored ADR

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[97] Shearman & Sterling LLP, *Understanding and Dealing with Unsponsored ADR Programs* 1, Nov. 2008.
[98] American Depository Receipts, *supra* note 96, at 1443 n.21.
[99] Shearman & Sterling LLP, *supra* note 97, at 4.
[100] *Id.*
[101] *Id.* at 4 n.2.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] American Depository Receipts, *supra* note 96, at 1442–43.
[106] Shearman & Sterling LLP, *supra* note 97, at 4 n.2.
[107] Wilson, *supra* note 10.

program, do not qualify under the *Morrison* test.[108] Although Vivendi listed its ordinary shares on the NYSE, which arguably satisfies the *Morrison* test, the court viewed this as a "technical" distinction and sought to interpret the test "in the spirit of *Morrison*," holding that where a foreign corporation lists its securities on multiple exchanges, *Morrison* does not extend to investors who purchased the listed securities on foreign exchanges.[109]

A second issue developing since *Morrison* concerns what constitutes a "purchase" in the United States. As made apparent by *SEC v. Goldman Sachs* and *Basis Yield Alpha Fund*, providing evidence to demonstrate *where* the parties incurred "irrevocable liability" has been an elusive pursuit. Courts have yet to determine that a party has alleged any facts sufficient for the court to draw reasonable inferences that the party purchased a foreign security within the United States.

Although the result reached in *Elliot Associates* is arguably correct,[110] by dismissing the plaintiffs' complaint when they were essentially placing side bets in swap agreements in the United States over the performance of German securities, may have been the sign of flawed reasoning. In future lawsuits, it will likely be increasingly more difficult to determine the location of a swap transaction for purposes of the *Morrison* test, and perhaps more importantly, resolving the issue will not always involve looking to the location of the security-based transaction.[111] For example, suppose two foreign counterparties entered into a swap agreement referencing an American Exchange-traded stock.[112] Such a transaction probably should not give the parties the right to bring a Section 10(b) suit in the United States against the American-listed company or another

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[108] *See In re Vivendi Universal*, 765 F. Supp. 2d at 529.
[109] *Id.* at 531. *But see* Painter, *supra* note 90, at 3 ("[T]he summary of the *Morrison* opinion states, '[a]nd it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which Section 10(b) applies. . . . Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.' Looking at these two sentences alone, it could be argued that a security listed on a U.S. exchange is covered by Section 10(b), even if that security is purchased outside the United States.").
[110] *See* Painter, *supra* note 90, at 6.
[111] *Id.*
[112] *Id.*

party trading in the company's shares in the United States simply because the foreign swap agreement referenced the American-traded stock.[113] However, if a court followed the reasoning in *Elliot Associates*, the foreign parties may have a claim under 10(b) against the referenced issuer because the "economic realities" of the agreement are the same as if the transaction occurred over the American Exchange.[114]

Magnifying this issue, Dodd-Frank requires that certain swap agreements trade on organized exchanges in the United States.[115] Because the Act did not define when a swap transaction referencing a foreign-security is to be deemed entered into in the United States, it will be difficult to claim that a swap traded on an American exchange is essentially a foreign transaction for purposes of the *Morrison* test.[116]

V. Congress Responds to **Morrison** *in the Dodd-Frank Act*

Less than a month after the release of the *Morrison* decision, Congress, in Dodd-Frank, restored the ability of the SEC and the United States to bring actions under Section 10(b) in cases involving transnational securities fraud.[117] In doing so, Congress may not have effectively reversed the core holding of *Morrison* in section 929P of the Act. Whereas the Supreme Court in *Morrison* expressly framed the issue of extraterritorial application as a *merits* issue—whether Section 10(b) prohibits the conduct[118]—the Act merely states that

> the district courts of the United States and the United States courts of any Territory shall have *jurisdiction* of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions. . . even if the securities transaction occurs outside the United States and involves only foreign investors; or conduct occurring outside the United States . . . has a

[113] *Id.*
[114] *Id.*
[115] *Id*. at 7.
[116] *Id.*
[117] Dodd-Frank Act § 929P.
[118] *See Morrison*, 130 S. Ct. at 2877.

> foreseeable substantial effect within the United States.[119]

Importantly, Dodd-Frank makes no reference to any change in the application of the securities laws. Rather, the Act only speaks to a court's power to hear a case, a power the Supreme Court recognized fully in *Morrison*, while focusing on whether Section 10(b) prohibited the conduct.[120]Dispute remains, however, over the meaning of Section 929P—whether it "confers jurisdiction only or changes the substantive reach of the statute."[121] While Congress certainly intended to expand the substantive reach of Section 10(b) in SEC and Department of Justice ("DOJ") suits, it did not do so.[122] The legislative history of the Act makes clear the intent of Section 929P: "the provisions concerning extraterritoriality . . . are intended to rebut [the Supreme Court's presumption against extraterritoriality] by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the [DOJ]."[123] Nevertheless, Congress failed to represent this intent in the statute.

Congress further directed the SEC to conduct a study to determine whether, and to what extent, private plaintiffs should also be able to bring such actions.[124] Pursuant to this order, the SEC solicited public comments to consider:

> (1) the scope of . . . a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;
>
> (2) what implications such a private right of action would have on international comity;

[119] Dodd-Frank Act § 929P (emphasis added).
[120] *See Morrison*, 130 S. Ct. at 2877.
[121] Painter, *supra* note 90, at 1. *See also* Wachtell, Lipton, Rosen & Katz, *Extraterritoriality of the Federal Securities Laws after Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged*, Jun. 21, 2010.
[122] Painter, *supra* note 90, at 1.
[123] 156 CONG. REC. H5235, H5237 (daily ed. Jun. 30, 2010) (statement of Rep. Kanjorski).
[124] Dodd-Frank Act § 929Y.

> (3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and
> (4) whether a narrower extraterritorial standard should be adopted.[125]

The SEC is required to complete its study and report its findings and recommendations to the Committee on Banking, Housing, and Urban Affairs of the Senate and Committee on Financial Services of the House by January 21, 2012.[126]

VI. Extending Extraterritorial Application to Private Rights of Action

The predictability of a bright-line transactional test, coupled with the ability of the SEC and the United States to pursue rights of action under the former conduct and effects test, provides sufficient protection and clarity for investors.[127] Investors that purchase securities listed on a domestic exchange or purchase or sell any other security in the United States can "logically and reliably expect the broad protection" of United States securities laws.[128] Additionally, investors considering purchasing foreign-listed securities will be better able to value the benefit or burden of U.S. securities laws when it is clear application of U.S. law is clear.

Similarly, issuers will also benefit from a clear transactional test. Issuers that do not sell securities in the United States will know with certainty that they will not be subject to private actions under U.S. securities laws. They will also have greater certainty when planning and executing transactions, which "is consistent with achieving fair, orderly, and efficient markets . . . ."[129] Therefore, only issuers who choose to solicit U.S. investors will fetch the premium,

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[125] Request for Comments on Study on Extraterritorial Private Rights of Action, U.S. Sec. & Exch. Comm'n, Release No. 34-63174 (Oct. 25, 2010).
[126] *Id.* at 4–5.
[127] Comment Letter from Skadden, Arps, Slate, Meagher & Flom LLP, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174, at 2 (Feb. 25, 2011), *available at* http://www.sec.gov/comments/4-617/4617-50.pdf [hereinafter *Skadden Arps*].
[128] *Id.*
[129] *Id.* at 3.

and incur the costs, of U.S.-regulated securities resulting from greater consumer protection and corporate governance.[130]

Additionally, a clear transactional test will encourage foreign companies to raise capital in U.S. markets. Armed with the assurance that their potential liability will be "limited to and commensurate with their U.S. capital raising activities, and will not threaten their broader international capital base,"[131] foreign companies not currently accessing U.S. capital markets may now be encouraged to do so. Combined with the authority of the SEC and other federal regulators to bring enforcement actions in appropriate cases where transnational fraud is alleged, limiting private rights to those passing the transactional test provides for more efficient investor protection than the pre-*Morrison* regime.

Moreover, the ability of the SEC and the United States to commence actions pursuant to Section 929P provides sufficient protection to investors when "necessary and appropriate."[132] Pursuant to its mission to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation,"[133] the SEC "has the authority and capability to weigh the impact of its actions against equally legitimate but potentially competing interests,"[134] such as those consequent to transnational securities disputes. Compared to

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[130] Comment Letter from G. Andrew Karolyi, Prof., Cornell Univ., to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n, on Study on Transnational Securities Fraud on Release No. 34-63174, at 1 (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-17.pdf (observing that ADRs trade at a premium compared to their ordinary share counterparts) [hereinafter *Karolyi*].

[131] Skadden Arps, *supra* note 127, at 6. *See also* Comment Letter from Vivendi, S.A., to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174, at 4 (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-38.pdf [hereinafter *Vivendi Comment*].

[132] Skadden Arps, *supra* note 127, at 6.

[133] U.S. SEC. AND EXCH. COMM'N, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, http://www.sec.gov/about/whatwedo.shtml (last visited Nov. 3, 2011).

[134] Skadden Arps, *supra* note 127, at 6; Painter, *supra* note 90, at 2 ("The SEC and DOJ are far more likely than private plaintiffs' lawyers to consider the totality of circumstances before deciding to bring a suit that goes beyond the domestic scope of Section 10(b) set forth in *Morrison*.").

private litigants who have neither the benefit of this broader outlook nor any meaningful incentive to consider such competing interests, the SEC is the appropriate party to enforce actions without a clear nexus to U.S. securities laws.[135]

Federal regulators have "both bilateral and multilateral relationships with foreign governments and foreign regulators."[136] These relationships allow the SEC Commissioner and the DOJ to cooperate "with foreign counterparties that can limit conflict with foreign regulation and duplicative litigation."[137] International comity requires the respect of a nation's sovereign right to regulate commerce occurring within its borders.[138] Exercising this sovereign right, many countries have enacted systems of securities regulation that "depart sharply from the U.S. model," reflecting "deliberate, considered policy choices."[139] The SEC and other federal regulators' relationships and agreements with foreign governments and regulators also benefit investors and the U.S. marketplace because such relationships facilitate the SEC's ability to consider "nuanced and delicate issues relating to international regulatory cooperation and comity both in establishing regulations and in determining whether or not to bring a particular enforcement action."[140]

Investors that decide to access foreign capital markets will not be without redress when harmed by foreign issuers engaging in misconduct. Most major non-U.S. jurisdictions provide investors with recourse when they have suffered injuries as a result of securities fraud.[141] Differences between American law and foreign

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[135] Painter, *supra* note 90, at 2.
[136] Skadden Arps, *supra* note 127, at 7.
[137] *Id.* (citing Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Respondents, *Morrison v. Nat'l Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723009, at*38–39).
[138] Vivendi Comment, *supra* note 131, at 35.
[139] *Id*. at 7.
[140] Skadden Arps, *supra* note 127, at 7.
[141] *Id*. *See also* Comment Letter from The Government of France, to Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174, at 6-7 (Feb. 17, 2011), *available at* http://www.sec.gov/comments/4-617/4617-29.pdf (explaining remedies available to individuals who purchase or sell shares in France); Comment Letter from The Australian Government to U.S. Sec. & Exc. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174 (Feb. 18, 2011), *available at*

law—such as differences in class action certification and, particularly, the availability of the fraud-on-the-market theory—"represent deliberate policy choices that should not be undermined by permitting litigation of foreign disputes in U.S. courts."[142] It is the SEC and the United States that are the appropriate parties to make judgments regarding the "trade-offs among these considerations in individual cases."[143] The SEC, if it finds appropriate, can determine to exercise its powers under Dodd-Frank to compensate injured investors effectively.[144]

Conversely, however, *Morrison*'s transactional test elicits concerns regarding investor protection. The evident merger between the NYSE Euronext and Deutsche Boerse stock exchanges creates a greater potential for trades between United States buyers and sellers to occur offshore.[145] Justice Stevens' example set forth in his concurrence in *Morrison* illustrates the danger for investors created by the *Morrison* test:

> Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and

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http://www.sec.gov/comments/4-617/4617-34.pdf ("[Australian law] contains prohibitions relating to insider trading, market manipulations and various other types of fraudulent and misleading conduct."); Comment Letter from The Government of the Federal Republic of Germany, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174, at 2 (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-12.pdf ("The Federal Republic of Germany, just like the USA, has established an effective system of securities markets supervision as well as effective legal protection of individuals by the national courts.").

142 Skadden Arps, *supra* note 127, at 7.

143 *Id*. at 8.

144 *Id*.

145 Comment Letter from Forty-Two Law Professors, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174, at 6 (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-28.pdf [hereinafter *Forty-Two Law Professors*].

> which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under *§ 10(b)*.
>
> The oddity of that result should give pause. For in walling off such individuals from *§ 10(b)*, the Court narrows the provision's reach to a degree that would surprise and alarm generations of American investors—and, I am convinced, the Congress that passed the Exchange Act. Indeed, the Court's rule turns *§ 10(b)* jurisprudence (and the presumption against extraterritoriality) on its head, by withdrawing the statue's application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens.[146]

Even those "deeply skeptical" about extending United States securities laws extraterritorially agree that "it would make little sense to apply the approach in *Morrison* to preclude application of the securities laws to those trades."[147]

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[146] *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring).

[147] Forty-Two Law Professors, *supra* note 145, at 6. *But see* Painter, *supra* note 90, at 2 (arguing that concerns over the pending NYSE-Deutsche Boerse merger are unsubstantiated: "(1) [T]here is little evidence that the merger will result in a substantial number of transactions moving offshore; the NYSE trading platform will remain intact and will probably improve and become more competitive because of the merger . . . ; (2) [T]he two markets most often mentioned are London and Frankfurt and both are in countries that have done at least as well as the United States in protecting investors . . . ; (3) Section 10(b) already follows securities transactions abroad because the SEC and DOJ have enforcement authority pursuant to Section 929P of Dodd-Frank to enforce Section 10(b) in foreign markets [and] . . . ; (4) [F]or the NYSE-Deutsche Boerse merger to go smoothly and for the United States to be competitive in world financial markets, the United States must work with foreign regulators to combat securities fraud.").

Opponents of the *Morrison* test believe that it "does not comport with the fluid, international nature of modern financial markets."[148] The character of financial markets makes the application of the *Morrison* test both "unworkable and unwise" with respect to private plaintiffs because markets are "moving to a point where the 'site' of a trade is happenstance" and the connection between the site of a trade and a resulting injury is becoming arbitrary.[149] An alternative to the *Morrison* test that focuses on reliance would take into consideration the present character of financial markets.[150] Such approach recognizes that where an investor is "induced to trade should matter more than where the trade ultimately occurs."[151] Such an approach additionally accords with the presumption against extraterritoriality when the inducement occurs in the United States.[152] Supporters of this approach argue that in modern financial markets, it makes little sense to deny a private remedy when the transaction happened to be recorded on a foreign exchange, when the inducement clearly occurred in the United States.[153]

Moreover, when an issuer lists some of its securities in the United States, the arguments may be stronger for granting private rights of action.[154] By listing securities on American exchanges, issuers subject themselves to U.S. regulation of disclosures such as filing periodic reports with the SEC.[155] Foreign companies that choose to sponsor ADRs want the protections of, and are prepared to comply with, U.S. securities laws and the disclosure and liability framework such laws mandate.[156] Issuers that avail themselves by sponsoring benefit signal their intention to comply with U.S. securities laws.[157] Commentators have observed:

> The United States is often viewed as a gold standard for purposes of accurate and complete disclosure,

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148 Forty-Two Law Professors, *supra* note 145, at 7.
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.* (suggesting that an approach focusing on where the inducement to make a fraudulent trade occurred is consistent with presumptions against extraterritoriality).
153 *Id.*
154 *Id.*
155 *Id.* at 8.
156 Karolyi, *supra* note 130.
157 Forty-Two Law Professors, *supra* note 145, at 9.

> and foreign markets reward companies that meet these standards. As a result, foreign companies often list in the United States not because they want to raise capital but because of the resulting increase in share prices that comes with increased investor confidence.[158]

Foreign issuers benefit from electing to list on American exchanges in part because of the "positive signal conveyed to investors by the issuer's willingness to comply with fuller disclosure requirements and greater protection for minority investors."[159] Prior to *Morrison*, dually listing may have amounted to "a form of bonding . . . because the firm's managers have subjected themselves to SEC scrutiny and private and public enforcement systems that are unique to the United States."[160]

VII. Recommendation

The Supreme Court's aim in *Morrison* to replace the unpredictable conduct and effects test with a bright-line test is

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[158] *Id.* (quoting J. Robert Brown, Jr., *Criticizing the Critics: Sarbanes-Oxley and Quack Corporate Governance*, 90 MARQ. L. REV. 309, 327 (2006)).

[159] Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1129 (2005).

[160] Forty-Two Law Professors, *supra* note 145, at 9 (quoting John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 230 n.2 (2007)); *see also* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 691–92 (1999) ("The simplest explanation for the migration of foreign issuers to U.S. exchanges and NASDAQ is that such a listing is a form of bonding . . . ."); John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1830 (2002) ("Cross-listing may in part be . . . a bonding mechanism to assure public investors that they will not be exploited . . . ."). *But see* Jordan I. Seigel, Assoc. Prof., Harvard Univ., on Study on Extraterritorial Private Rights of Action, Release No. 34-63174 (Feb. 18, 2011) *available at* http://www.sec.gov/comments/4-617/4617-41.pdf (finding that the returns of cross-listed securities following the *Morrison* decision challenge the legal bonding hypothesis while suggesting that the U.S. regime may not have been seen as a source of economic value for outside investors).

legitimate and perhaps long overdue. Although application of the *Morrison* test has not yielded consistent results, with some guidance from Congress, an adapted test will balance international comity, corporate governance, and consumer protection, and will enable investors and issuers alike to make better-informed decisions.

Considering the complexity and international nature of financial markets, Congress should formally adopt a modified version of *Morrison's* transactional test that clarifies (1) whether listing a security on an American exchange, without the transaction occurring within the United States, is sufficient to justify application of United States securities laws, and (2) whether sufficient conduct between the parties exists for a purchase to be deemed to occur in the United States.

Listing a security on an American exchange is sufficient to justify application of United States securities laws. This conclusion is consistent with the language in *Morrison*. Further, by listing securities on an American exchange, issuers are signaling to the markets—both domestic and foreign—that they are willing to comply with disclosure and liability requirements and receive the benefit of the higher share prices that result. A rule making listing sufficient to trigger United States securities laws will provide much needed certainty to extraterritorial application of securities laws. Once established, issuers will have the assurance to make informed decisions regarding whether to list certain securities and will adjust financing activities to their particular regulatory preferences. Such clarification is also consistent with principles of international comity. Once it is firmly established that U.S. securities laws will apply to securities listed on an American exchange regardless of whether the transaction took place in the United States, issuers that continue to list securities on an American exchange will have availed themselves of U.S. securities laws. Principles of international comity are not violated in instances where a party has expressly availed itself of a particular set of laws.

Additionally, the second prong of the *Morrison* test—"transactions occurring in the United States"—requires clarification to create a workable standard. The standard adopted thus far to determine whether a transaction occurred within the United States is ineffectual in modern financial markets. As demonstrated by *Basis Yield Alpha Fund* and *SEC v. Goldman Sachs*, alleging facts sufficient for courts to determine the location at which counterparties to a transaction incurred "irrevocable liability" is a fleeting target. Rather, a more practical standard is needed to determine whether a sufficient United States nexus exists to justify application of United States securities laws, such as whether a foreign issuer *solicited* transactions in the United States.[161]

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[161] Conway recommends some extraterritorial application of section 10(b) in instances when an investor is able to prove actual reliance, rather than relying on the Fraud-on-the-Market Theory; in such cases, the investor would also need to prove that the foreign issuer solicited the transaction to the investor:

> Section 10(b) litigation should be divided into at least three categories, each of which raises differing comity concerns:
>
> 1) The first category consists of enforcement proceedings brought [by] the Commission and criminal cases brought by the Department of Justice. Even under the now-abrogated conduct and effects tests, such litigation had never been thought to pose a significant threat to international comity . . . . The reported cases confirm these points: the Commission and the Department of Justice have sought to apply Section 10(b) to extraterritorial events only in a small number of circumstances, where the interests of the United States are most compelling. As a result, it probably makes sense, and would not offend international comity, to permit relatively broad extraterritoriality for enforcement and criminal proceedings. . . .
>
> 2) The second category of Section 10(b) litigation consists of individual cases brought by private plaintiffs who allege and prove that they actually relied upon deceptive or manipulative conduct of a defendant. These cases present a greater threat to international comity than do enforcement and criminal actions because "[a] private individual need not and often will not" consider comity concerns in deciding whether to bring suit. Zoelsch, 824 F.2d at 33 n.3. At the same time, however, individual private cases involving actual reliance on deceptive conduct do not pose the same threat to comity as do class actions involving plaintiffs who claim to have "relied" on the "integrity of the market prices[s]" on foreign exchanges under the fraud-on-the-market presumption. . . .
>
> As a result, in such actual-reliance cases, some extraterritorial application should be permitted, but should be carefully circumscribed—and specifically restricted to

Whether a transaction occurred within the United States is a vague inquiry, conceivably finding a transaction occurred both in and outside the United States.Rather than looking to the location the transaction is processed in, an inquiry into whether the issuer has solicited securities to United States investors may be determinative of the location a transaction occurred. Compared to the standard of irrevocable liability, which may result in finding that a transaction

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> circumstances in which the United States' interest in redressing fraudulent conduct is the strongest. . . .
>
> Accordingly, the hypothetical amendment also would require a plaintiff to prove that the defendant solicited the transaction or directed manipulative or deceptive conduct specifically at the plaintiff. . . .
>
> 3) The third and last category of Section 10(b) litigation involves private claims invoking the fraud-on-the-market presumption of reliance recognized in Basic v. Levinson. That powerful presumption greatly alleviates a plaintiff's burden of proof, and more importantly, is the doctrinal innovation that has permitted private securities cases to be brought as class actions. . . .
>
> Of all the types of transnational securities litigation that have been brought under Section 10(b), cases seeking to apply the fraud-on-the market presumption to foreign securities markets presented the greatest threat to international comity. After all, it was precisely this species of class action litigation, epitomized by Morrison, that prompted other nations to object forcefully to the extra-territorial application of Section 10(b). . . .
>
> Given the strong objections that fraud-on-the-foreign-market class litigation has drawn from other nations, application of the Basic presumption to private securities claims involving extraterritorial transactions would categorically contravene international comity. . . . Put another way, investors who claim that they relied on the integrity of foreign securities markets should have their claims decided under the law of the sovereigns that regulate those markets. That is why the hypothetical amendment would require *all* plaintiffs who seek recovery for losses on such transactions to establish actual reliance.

Comment Letter from George T. Conway III, to William K. Shirley, Counsel to the Gen. Counsel, U.S. Sec. & Exch. Comm'n, on Study on Extraterritorial Private Rights of Action in Release No. 34-63174 (Jun. 13, 2011), *available at* http://www.sec.gov/comments/4-617/4617-62.pdf:

occurred across multiple locations, whether an issuer solicited securities in the United States has the advantage of determining if the issuer is deemed to have sold securities in the country by soliciting investors.

The standard of whether an issuer solicited U.S. investors for purposes of satisfying the transactional test will not violate principles of international comity because, similar to listing securities in the United States, a foreign issuer may be deemed to have availed itself of U.S. securities laws. These cases will require individuals or a class to prove that the foreign issuer solicited the transaction in the United States. Thus, investors such as the unsophisticated retiree described in Justice Stevens' concurrence to *Morrison*, will have redress against foreign issuers that go knocking on doors in Manhattan.

Adopting the above-described recommendations would essentially create three tiers of extraterritorial application varying by the extent to which application may intrude on principles of international comity.[162] First, actions by the SEC or DOJ applying Section 10(b) under the conduct and effects test will have the greatest extraterritorial reach. Such actions by the U.S. government, however, do not violate principles of international comity because the SEC and DOJ bring actions only when the U.S. interest is greatest. Second, actions by plaintiffs that have purchased on a foreign exchange securities dually listed on an American exchange pose a greater threat to international comity. However, by listing the securities on an American exchange, the foreign issuer has expressly availed itself to U.S. securities laws, and principles of international comity are not violated.[163] Finally, actions by plaintiffs that have purchased on a foreign exchange securities not dually listed on an American exchange pose the greatest threat to international comity because the foreign issuer has not expressly availed itself of U.S. securities laws. In these instances, the plaintiff must prove that the issuer solicited the transaction in the United States. Once a plaintiff has satisfied this burden and established that the issuer has availed itself of U.S. securities laws, principles of international comity in an action against the foreign issuer would not be violated.

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[162] For a similar approach, see *id*.
[163] *See supra* text accompanying note 152.

Conclusion

The *Morrison* test gave much needed certainty to the extraterritorial reach of United States securities laws. Application of the transactional test, however, has been less than clear. The transactional test needs clarification to bring further predictability to extraterritorial private rights of action. Particularly, with the proposed merger of the NYSE Euronext with the Deutsche Boerse, the need for clarification on whether listing on an American exchange is alone sufficient to pass the *Morrison* test will only be magnified. Furthermore, the "irrevocable liability" standard implemented to determine a security transaction's location is illusory in fluid, international financial markets.

Congress will need to clarify these issues and tailor the scope of U.S. securities laws to fit within the international regulatory and enforcement framework. In doing so, Congress should extend application of Section 10(b) extraterritorially to securities listed on American exchanges, regardless of whether the security was purchased on an American exchange, and to instances in which the foreign issuer solicited transactions of foreign-listed securities in the United States.