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A New Era in the Application of U.S. Securities Law Abroad: Valuing the Presumption Against Extraterritoriality and Managing the Future with the Sustainable- Domestic-Integrity Standard

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A NEW ERA IN THE APPLICATION OF U.S. SECURITIES LAW ABROAD: VALUING THE PRESUMPTION AGAINST EXTRATERRITORIALITY AND MANAGING THE FUTURE WITH THE SUSTAINABLE-DOMESTIC-INTEGRITY STANDARD

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ABSTRACT

The U.S. Supreme Court in *Morrison* held that Section 10(b) of the Exchange Act did not apply extraterritorially, lacking a clear indication by Congress of the intent to do so. In reaching this conclusion, it clarified that the reach of Section 10(b) is a merits question, not a question of subject matter jurisdiction and stated that the focus of the statute was upon purchases and sales of securities in the United States while articulating a bright-line transactional test to determine whether extraterritorial application was appropriate. The transactional test completely rejected the conduct/effects tests, which had been used by courts for over four decades. It is now the location of transaction, not the

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location of the fraudulent conduct or its harmful effects, that supports a claim in post-*Morrison* cases.

One month later, Congress responded to *Morrison* and drafted Section 929P(b) of the Dodd-Frank Act, which aimed to codify the conduct/effects tests in proceedings brought by the SEC/DOJ. The legislation was drafted in jurisdictional language, resulting in confusion over whether this enactment had any effect since *Morrison* concluded that courts already have jurisdiction over violations under the Exchange Act and that a clear indication by Congress of extraterritorial application was needed, none of which Dodd-Frank demonstrated.

The solution would be to amend the statute to include a clear indication of congressional intent to apply Section 10(b) extraterritorially. But even if congressional intent was clear, does the jurisdictional wording of 929P(b) render that intent meaningless? Absolutely. The intent has no effect since a jurisdictional statute can do no more than confer jurisdiction. It appears the solution would be not only to address the congressional intent but also to redraft the language of the statute to geographically reach the substance of the transaction. But what would we be left with? – the conduct/effects tests that have been urged as unpredictable, poorly formulated, arbitrary, and confusing. Thus, the optimal solution is a statutory amendment to 929P(b) that includes a clear indication and an alternative standard.

This study promotes a new approach, a reformulated standard for determining the extraterritoriality of U.S. federal securities laws: the sustainable-domestic-integrity standard. This standard will (1) substantively reach the antifraud provisions of the Exchange Act; (2) guide courts with a clear indication of congressional intent; (3) provide a private cause of action for U.S. claimants; and (4) vest the SEC/DOJ with the responsibility of initiating enforcement proceedings against any defendant (domestic or foreign) with conduct/effects in the United States for injury reasonable likely upon U.S. investors, U.S. capital markets, or the integrity of the territory of the United States. This approach serves to preserve international comity and promote global cooperation in securities regulation.

INTRODUCTION: AN INHERENT CONTRADICTION

Regulation under and enforcement of Section 10(b) of the Exchange Act,[1] especially where the interests of other sovereigns are concerned, can present problems when our branches of government create inconsistencies in applying U.S. securities law abroad, as this introduction demonstrates.

What are lower courts to do when the Supreme Court makes one ruling that *"Courts shall do X"* and a month later Congress enacts new legislation that *"Courts shall do non-X"*? It seems courts should apply the duly enacted law, but what if that law was not properly enacted? Drafting error? Congressional oversight? Such a situation should not pose any problems if congressional intent is clear, absent any other problems in its enactment. But what if the intent is not *entirely* clear? Or what if that intent does not even matter because the statute was improperly drafted? The Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[2] and Congress's subsequent, and hastily, passage of Section 929P(b) of the Wall Street Reform and Consumer Protection Act (hereinafter Dodd-Frank)[3] highlight such a situation.

Consider the following hypothetical that has yet to be encountered in our courts: The SEC/DOJ brings an enforcement action against a foreign defendant about a violation of the law involving foreign securities. Also, assume that substantial fraudulent conduct in connection with those securities takes place within the United States and that this conduct directly causes harm to U.S. investors and becomes the target of the enforcement action. Under Dodd-Frank scrutiny,[4] the suit can proceed. Under *Morrison* scrutiny,[5] it cannot.

The solution is to address the current post-*Morrison* problem through a statutory amendment to Section 929P(b) of Dodd-Frank. This paper proceeds in the following manner. Part I offers a background on congressional authority, extraterritorialty, and the antifraud provisions of the

1. *See* 15 U.S.C. § 78j (Rule 10(b), Manipulative and deceptive devices).

2. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

3. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929P(b), Pub. L. No. 111-203, 124 Stat. 1376, 1865 (2010) [hereinafter Dodd-Frank Act] (with the stated purpose "to promote the financial stability of the United States by improving accountability and transparency in the financial system . . . to protect consumers from abusive financial services practices, and for other purposes").

4. "Dodd-Frank scrutiny" will be used throughout this analysis to refer to Congress's codification of the "conduct/effects" tests in Section 929P(b); see Dodd-Frank Act § 929P(b).

5. "*Morrison* scrutiny" will be similarly used to refer to the Supreme Court's formulation of the "transactional" test and the statutory "focus" analysis.

Exchange Act. It also provides a brief synopsis of both *Morrison* and Dodd-Frank. Part II gives an in-depth analysis of the *Morrison* opinion and the main scholarly arguments regarding the opinion's implications. Next, varying interpretations of Section 929P(b) of Dodd-Frank are revealed, including whether the provision was drafted with deliberate intent or simply a mere error. It closes with a summary of the ambiguities that faced the lower courts following *Morrison* and Dodd-Frank.

Part III sets forth the arguments for and against *Morrison*'s transactional approach versus Dodd-Frank's codified conduct/effects approach. It proceeds to analogize other areas of law to the securities context to demonstrate how the judiciary and legislature have previously dealt with this concept in other settings. It then argues that the conduct/effects tests are over-inclusive, while the transactional test is under-inclusive. Lastly, it makes a final recommendation for a statutory amendment to Section 929P(b) of Dodd-Frank that articulates a new standard to guide lower courts and protect U.S. investors/capital markets.

Part IV presents the significance of the proposed amendment – the *sustainable-domestic-integrity* standard – that preserves the private right of action for U.S. claimants and leaves remaining claims to the judgment of the SEC/DOJ, who can consider international principles such as reasonableness, comity, and deference. Part IV also addresses the three main areas to be incorporated within the text: (1) geographic scope, (2) clear statement, and (3) standard. It then presents the actual text of the proposed draft, which reflects the three areas. Part V revisits the hypothetical under the new standard, and Part VI provides the concluding remarks. Also, Appendix A summarizes pre-*Morrison* case law, the pre-*Morrison* circuit split under the conduct/effects tests, post-*Morrison* case law, and a graphical representation of all prior approaches as well as the newly proposed standard. Lastly, Appendix B briefly references the results of the SEC's study on the private right of action.

I. BACKGROUND: SETTING THE STAGE

Part I provides the necessary background for extraterritorial application in securities regulation and its relation to congressional power and judicial interpretation of statutes.

A. Two Radical Changes Made by Supreme Court in *Morrison*

Morrison was a monumental decision that made two significant changes to our U.S. securities legal system: (1) it held that the extraterritorial

reach of Section 10(b) is now a merits question, not a question of subject matter jurisdiction, which was so ardently the procedural process previously applied in courts; and (2) it overturned over four decades of jurisprudence applying the "conduct"[6] and "effects"[7] tests to determine the reach of U.S. federal securities laws over acts having a substantial effect in the United States or over acts with a substantial portion of the fraud occurring in the United States and replaced it with a transactional test. The newly-articulated transactional test would form the basis of U.S. adjudication of foreign claims only if there was a security on a domestic exchange or a domestic transaction in other securities. It is significant due to the outright abandonment of the previously used approaches in adjudicating the same area.

B. Tracing the History of Securities Litigation

1. Background and Principles

Congress has the power to pass statutes that have extraterritorial effect as long as such laws are consistent with the Constitution.[8] It is even possible for Congress to pass a statute that violates international law – for example, by using its authority, though excessively and arguably violating international law principles, under prescriptive jurisdiction – even though it will be domestically enforceable and binding.[9] However, an

6. *Morrison*, 561 U.S. at 257-58 (defining the "conduct" doctrine as supporting the application of domestic law where "the wrongful conduct occurred in the United States," but noting that U.S. investors need only show that material acts in the United States significantly contributed to the harm, whereas foreign investors must show that such acts directly caused the harm); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (noting, as the first case to formulate the subjective conduct test, that "[c]onduct within the territory alone would seem sufficient from the standpoint of jurisdiction to prescribe a rule" and thus, a statute can have extraterritorial application where "there has been significant conduct within the territory").

7. *Morrison*, 561 U.S. at 257 (defining the "effects" doctrine as a justification for extraterritorial application where "the wrongful conduct had a substantial effect in the United States or upon United States citizens"); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (stating, as the first case to articulate the objective effects test, that Congress had intended the Exchange Act to apply extraterritorially "in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities").

8. Tonya L. Putnam, Courts Without Borders: Law, Politics, and U.S. Extraterritoriality 36 (Cambridge Univ. Press 2016) ("Before a U.S. court may consider a dispute, it must first confirm its authority to do so under the U.S. Constitution and any relevant statutes.").

9. *Id.* at 37 ("The U.S. Constitution contains no expressed limits on congressional power to create rules with extraterritorial application."); Cedric Ryngaert, Jurisdiction in International Law 73 (2d ed. 2015) ("Under U.S. law, Congress is indeed not bound by international law . . . ."); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 Yale L.J. 2277, 2287 n.54 (1991) ("It seems well established that Congress may, if it chooses, specify greater extra-

Act of Congress is not to be construed to violate customary international law if another possible construction is available.[10]

Jurisdiction in early cases was upheld by the judiciary over foreign plaintiffs only when the securities fraud had an adverse effect on American investors or U.S. capital markets. Some courts have required a showing that either the conduct test *or* effect test be completely satisfied.[11] Other courts have embraced the notion of an "admixture or combination"[12] as a legally sufficient basis for justifying extraterritoriality of the U.S. federal securities acts.

Securities decisions in the 1980s-90s have resulted in multiple judicially-created versions and standards of the conducts/effects tests in determining whether extraterritorial application was appropriate and justified.[13] These different tests led to a nation-wide circuit split of different standards for determining the reach of U.S. securities law throughout pre-*Morrison* cases only to be definitively displaced by *Morrison*'s bright-line standard.[14]

2. An Introduction to Extraterritoriality

As a starting point, extraterritoriality refers to the application of a nation's laws abroad.[15] The presumption against extraterritoriality serves to guard against this application unless there is "a *clear indication* of

territorial scope than international law would allow, since Congress generally is held to have the power to violate international law.").

10. *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804); *see also* Restatement (Fourth) of Foreign Relations Law: Jurisdiction § 205, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) ("Where fairly possible, U.S. courts construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. Where a federal statute cannot be so construed, the federal statute is controlling as a matter of U.S. law.").

11. *See* Dennis R. Dumas, *United States Antifraud Jurisdiction over Transnational Securities Transactions: Merger of the Conduct and Effects Tests*, 16 U. PA. J. INT'L L. 721, 746 (1995) (noting that some cases "contained adequate evidence to support the jurisdictional decision under one of the two tests, and therefore did not require an extensive discussion of elements relevant to the other test").

12. Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) ("There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.").

13. For a brief analysis of the progression of the conduct/effects tests in pre-*Morrison*-cases, see Appendix A.

14. For a breakdown of the pre-*Morrison* circuit split, see Appendix A.

15. *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 169 (Oxford Univ. Press) (2d ed. 2015) (defining extraterritoriality as "the application of federal and state law to conduct that takes place at least partially outside the territory of the United States . . . .").

congressional intent to the contrary."[16] The Restatement (Fourth) of Foreign Relations Law: Jurisdiction, Tentative Draft does not require a *clear or explicit statement* to demonstrate this intent, leaving more room for judges to consult context in order to determine intent.[17] Like most presumptions, the presumption against extraterritoriality is rebuttable;[18] however, even if it is rebutted, it may not be the end of the analysis, as the presumption serves as a "threshold requirement."[19] An analysis of prescriptive jurisdiction[20] requires that judges first look to the text of the statute and, where that fails to provide a clear indication of extraterritorial application, then to the statute's legislative history, intended purpose, and prior record of application.[21]

3. The Securities Exchange Act of 1934 ("Exchange Act")

Courts have the burden of accommodating two very important principles in the securities context: to protect investors in the United States and to maintain the integrity of U.S. capital markets. But, does this responsibility permit courts to exercise jurisdiction beyond U.S. territorial borders to achieve this goal (absent congressional authorization)? The Exchange Act as well as the subsequent antifraud section and regulation (Section 10(b) and Rule 10b-5) are completely silent as to the matter of extraterritorial application.[22]

16. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 203, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) ("U.S. courts interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a *clear indication* of congressional intent to the contrary") (emphasis added).

17. *See* United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) ("[I]n examining the statute for congressional intention of extraterritorial application, we consider both contextual and textual evidence."); *see also* United States v. Bowman, 260 U.S. 94, 98 (1922) ("Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be *inferred from the nature of the offense*.") (emphasis added).

18. *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 21 (2007) [hereinafter Buxbaum, Multinational Class Actions] ("[T]he presumption against extraterritoriality can be overcome by a finding that Congress intended the legislation in question to reach foreign conduct or transactions.").

19. RYNGAERT, *supra* note 9, at 76 (noting that additional techniques of jurisdictional restraint, such as interest-balancing, may have to be overcome as well; if not, "the analysis ends, and the statute is not applied extraterritorially").

20. *See* BRADLEY, *supra* note 15, at 186 (noting that there five bases of prescriptive jurisdiction – territoriality, nationality, protective principle, passive personality, and universality).

21. See PUTNAM, *supra* note 8, at 37 (noting that this "multi-step analysis" is especially necessary with "novel extraterritorial claims").

22. *See* 15 U.S.C. § 78j (Section 10(b), Manipulative and deceptive devices); *see also* 17 C.F.R. 240 (Rule 10b-5, Employment of manipulative and deceptive devices).

Additionally, congressional intent and legislative history have been virtually silent at worst, or ambiguous at best in regards to the Exchange Act. The judiciary has thus been charged with the responsibility for interpreting these issues. Such gaps have prompted courts to consider the principles of international law[23] and construct their decisions around policy-based justifications to achieve a certain result.

Even though the Exchange Act is silent on private rights of action, judicial creation and congressional acquiescence have formed the private right of action for domestic/foreign claims, which has been utilized extensively by private litigants – both domestic and foreign – in the past four decades.[24] To determine the extraterritorial reach of Section 10(b), international law principles should be examined by both the legislature and judiciary when subsequent statutes and interpretations have possible implications on foreign states/nationals.[25] Courts initially inquired whether Congress intended the statute to apply to foreign individuals and foreign conduct;[26] in other words, whether Congress had considered extraterritoriality.[27] However, asking courts to infer congressional inten-

23. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION §§ 201, cmt. l, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) (The Tentative Draft appears to endorse this approach when there are conflicts of prescriptive jurisdiction: "Two or more states may have jurisdiction to prescribe with respect to the same persons, property, or conduct. Courts in the United States limit conflicts with the laws of other nations by applying principles of interpretation based on international comity.").

24. *See* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10 (b)".); *see also* Justin Marocco, *When Will It Finally End: The Effectiveness of the Rule 10b-5 Private Action as a Fraud-Deterrence Mechanism Post-Janus*, 73 LA. L. REV. 633, 633 (2013) ("Neither Section 10(b) nor Rule 10b-5 contains language providing for a private cause of action under the rule. Instead, federal courts have implied it.").

25. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 211, pt. II, ch. 2 (Am. Law Inst., Tentative Draft No. 2, 2016) ("Customary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate"); *see* BRADLEY, *supra* note 15, at 186 (noting that "[i]t is generally thought that customary international law imposes limitations on 'prescriptive jurisdiction' . . .").

26. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975) (Pre-*Morrison* cases ask whether, "if Congress had thought about the point," it would have "wished to protect an American investor" under the circumstances and whether "Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."); *see also* IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners. . . . [I]t is hard to believe Congress meant to prohibit the SEC from policing similar activities within this country."); *Leasco*, 468 F.2d at 1337 (considering what "Congress would have wished"); *contra Morrison*, 561 U.S. at 255 (Post-*Morrison* cases, on the other hand, look directly at the statute at issue; "When a statute gives no clear indication of an extraterritorial application, it has none.").

27. Interestingly, courts have refused to find any indication of extraterritoriality in Section 10(b), despite the definition of interstate commerce in Section 3 of the statute: "Interstate com-

tions is not optimal and because of the statute's silence, most courts hold that U.S. securities law is to be confined within the territory of the United States.[28]

In securities regulation, courts have analyzed the extraterritorial reach of Section 10(b) in terms of subject matter jurisdiction and not prescriptive jurisdiction.[29] While both concepts use the word "jurisdiction," there are several distinctions that should be noted. First, prescriptive jurisdiction refers to Congress' power to apply a rule to conduct/persons abroad, while subject matter jurisdiction refers to a tribunal's power to hear a case. Second, the case can be dismissed for lack of subject matter jurisdiction[30] or for failure to state a claim,[31] which can have different consequences shall the claimant decide to re-file their claim. Lastly, prescriptive jurisdiction usually refers to Congress, and subject matter jurisdiction is most likely for the courts.

Nevertheless, the difference seems to be harmless, since the analysis used by the courts (Section 10(b) is a jurisdictional question) and the principles of prescriptive jurisdiction are very similar. Such reasoning implies that courts were calling their approach one of "subject-matter jurisdiction," while actually applying a "merits determination" under prescriptive – subjective and/or objective – jurisdiction.[32] Use of the sub-

merce" means trade, commerce, transportation, or communication among the several States, or *between any foreign country and any State*, or between any State and any place or ship outside thereof (emphasis added); *see* Michael J. Calhoun, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 Loy. U. Chi. L.J. 679, 702 (1999) (noting "the language of Section 10(b) is broad and is meant to cover all sales and purchases of securities, regardless of whether the transactions transpire on an organized United States market or not").

28. *See* Jennifer Wu, *Morrison v. Dodd-Frank: Deciphering the Congressional Rebuttal to the Supreme Court's Ruling*, 14 U. Pa. J. Bus. L. 317, 325 (noting that the practice of the courts of confining securities law within the U.S. territory because of statutory silence on extraterritoriality is the "presumption against extraterritoriality at work").

29. Restatement (Fourth) of Foreign Relations Law: Jurisdiction § 201 cmt. a, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) (defining jurisdiction to prescribe as "the authority of a state to make laws applicable to persons, property, or conduct"); see also Putnam, *supra* note 8, at 1 (stating that domestic courts are "consequential actors in international politics" when they apply U.S. law to cases with extraterritorial dimensions); *see* Ryngaert, *supra* note 9, at 10 (noting that even though prescriptive jurisdiction is for Congress, the courts also exercise prescriptive jurisdiction when a statute is silent and the courts "determine the reach of the statute, in light of the international law principles of jurisdiction").

30. Fed. R. Civ. P. 12(b)(1).

31. Fed. R. Civ. P. 12(b)(6).

32. *See Bersch*, 519 F.2d at 985 ("We have no doubt that the activities within the United States, detailed in the judge's thorough factual findings, were sufficient to authorize the United States to *impose a rule* with respect to consequences flowing from them wherever they might appear, under the principle stated in Restatement (2d) of the Foreign Relations Law of the United States § 17, 'Jurisdiction to Prescribe with Respect to Conduct, Thing, Status, or Other Interest

jective territoriality principle has been justified based on conduct that occurs within the territory of the United States (*conduct test*), while use of the objective territoriality principle has been premised on the substantial and foreseeable effects within the territory of the United States regardless of where those acts took place (*effects test*).[33]

C. Adding Dodd-Frank to the Confusion

Less than one month after *Morrison* was decided, Dodd-Frank was enacted. Section 929P(b) was inserted as a response to *Morrison* and states that the district courts of the United States have extraterritorial jurisdiction over the antifraud provisions of the Exchange Act – Section 10(b) – if conduct in the United States constitutes "significant steps in furtherance of the violation" or if conduct outside the United States has "foreseeable substantial effect" in the United States.[34] That standard appears to be the functional equivalent of the Second Circuit's "conduct/effects" tests. The SEC was also directed to conduct a study and solicit public

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within Territory.'") (emphasis added); *see also Vencap*, 519 F.2d at 1016 ("Although the United States has *power to prescribe* the conduct of its nationals everywhere in the world, see Restatement (2d) of the Foreign Relations Law of the United States, § 30(1)(a) (1965), Congress does not often do so and courts are forced to *interpret the statute* at issue in the particular case.") (emphasis added); *see also Leasco*, 468 F.2d at 1334 (concluding that "if Congress has expressly *prescribed a rule* with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction" and noting that conduct in the United States "would seem sufficient from the standpoint of *jurisdiction to prescribe a rule*" and that determining congressional intent "is a question of the *interpretation of the particular statute*.") (emphasis added); *see also Schoenbaum*, 405 F.2d at 206 (noting that "the antifraud provision of § 10(b), which enables the Commission to *prescribe rules* 'necessary or appropriate in the public interest or for the protection of investors' reaches beyond the territorial limits of the United States . . . ") (emphasis added).

33. *See* Restatement (Fourth) of Foreign Relations Law: Jurisdiction §§ 201, 212-13 cmt. e & f, pt. II, chs. 1-2 (Am. Law Inst., Tentative Draft No. 2, 2016) (defining jurisdiction based on territory as jurisdiction "with respect to persons and property within its territory and with respect to conduct that occurs in whole or in part within its territory" and defining jurisdiction based on effects as jurisdiction "with respect to conduct outside its territory that has or is intended to have a substantial effect within its territory").

34. Dodd-Frank Act § 929P(b) (2010). The text of Section 929P(b) provides for the following addition to the Exchange Act of 1934: (b) EXTRATERRITORIAL JURISDICTION – 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 of this title involving—

- **(1)** conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
- **(2)** conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

comment on whether the conduct/effects codification in Dodd-Frank should also extend to actions by private parties.[35]

Section 929P(b) does not address the geographic and substantive reach of the Exchange Act, but does demonstrate the intent, though implied, to codify the conduct/effects tests. Also, the provision appears to partially overrule *Morrison*, but not address the private right of action.[36] Because of this contradiction, lower courts have no guidance about whether to follow *Morrison* or Dodd-Frank in enforcement proceedings brought by the Commission or the United States (the SEC/DOJ). Also, even if congressional intent is clear, does the jurisdictional wording of Section 929P(b) render the intent meaningless?

Courts are now faced with a complicated issue – in actions brought by the SEC/DOJ, should they apply *Morrison* or Dodd-Frank scrutiny? *Morrison* and Dodd-Frank raise three important issues: (1) procedurally, is extraterritoriality of the Exchange Act a question of subject matter jurisdiction or a question on the merits (prescriptive jurisdiction of Congress)?; (2) substantively, should the standard be the conduct/effects tests, transactional test, or something else?; and (3) should the private right of action extend to private parties in its entirety, partially, or not at all? What do courts do with such an inconsistency? Or, more appropriately, what *should* they do?

II. MODERN APPLICATION OF SECURITIES LAW

Courts have taken a more active role in adjudicating disputes in securities transactions in the 1900s and early 2000s, including disputes that extend over our nation's borders. Part II elaborates on how *Morrison* and Dodd-Frank have disrupted the trend of the circuit courts and presents the initial reactions.

A. Consistent Practice of Courts

Modern securities regulation has increased in the two decades prior to *Morrison* and has been characterized by foreign transactions and foreign

35. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929Y, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010) – for a summary of the results of the study and comment letters, see Appendix B.

36. *See* Wu, *supra* note 28, at 337 (mentioning that *Morrison* separates "two discrete categories: (1) actions brought by private litigants and (2) actions brought by the SEC or the Government" and concluding that "private litigant actions remains undisturbed").

actors, cleverly coined "foreign-cubed" litigation.[37] Use of the conduct/effects tests increased, as the circuits formulated either modified approaches or adopted the approach of a sister circuit. Such a trend remained constant and was not abandoned despite the sporadic skepticism of its desirability and logic.[38] However, the pattern of following the crowd without question was about to meet its end. Criticism surfaced, alleging that the conduct/effects tests comprise judge-made formulations with no identifiable standard,[39] the policy justifications are increasing,[40] and the judge's decisions are based on unfounded assumptions in complete disregard of the presumption against extraterritoriality.[41]

B. *Morrison v. National Australia Bank Ltd.*

1. Facts, Holding, and Analysis

The Supreme Court in *Morrison* addressed for the first time the extraterritorial application of U.S. securities laws. The dispute involved the application of a foreign-cubed transaction: Australian plaintiffs suing an Australian corporation, National Australia Bank (hereinafter NAB), for shares traded on the Australian and other foreign exchanges. NAB is the largest bank in Australia whose shares are traded on the Australian Stock Exchange Limited and other foreign exchanges,[42] though its ADRs[43] are

37. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 172 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010) (defining a foreign-cubed lawsuit as a case in which "(1) foreign plaintiffs is suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries").

38. *See* AVC Nederland B.V. v. Atrium Inv. Pshp., 740 F.2d 148, 153 (2d Cir. 1984) (hesitating regarding the application of U.S. securities laws to transactions partly in the United States and partly abroad, but noting that "[i]n view of the established jurisprudence of this circuit, we feel constrained to do likewise").

39. *See* Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. Davis L. Rev. 1071, 1081 (2010) (stating that the federal courts' adoption of the conduct and effects tests in the area of securities regulation have been "premised on judicial guesses as to whether federal courts should exercise jurisdiction . . ."); *see* Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need For The Clear and Restrained Scope of Extraterritorial Subject Matter Jurisdiction*, 9 Fordham J. Corp. & Fin. L. 89, 107 (2003) (noting that the problem is that courts apply U.S. securities laws abroad on an "ad hoc judicial decision-making basis, not by clear rules that the legislative or executive branches have formulated").

40. *See* Reuveni, *supra* note 39, at 1082 (stating that the "invocation of these policy concerns has led to the expansion of the effects and conduct tests far beyond their original bounds, causing much of the confusion, inconsistency, and lack of predictability inherent in modern jurisdictional analysis of the 1934 Act").

41. *See Morrison*, 561 U.S. at 248 ("This disregard of the presumption against extraterritoriality has occurred over many decades in many courts of appeals and has produced a collection of tests for divining congressional intent that are complex in formulation and unpredictable in application.").

42. *Id.* at 251.

listed on the NYSE. In 1998, NAB acquired HomeSide Lending, Inc. (hereinafter HomeSide), a mortgage servicing company in Florida.[44] From 1998 until 2001, NAB's annual reports displayed the success of HomeSide, which also appeared in NAB's public statements.[45]

In 2001, NAB announced a write-down of the value of HomeSide's assets by $450 million and another write-down of $1.75 billion about two months later.[46] A class of foreign purchasers of NAB's shares filed suit against NAB, HomeSide, and some of its directors/officers for violations of the Exchange Act of 1934, including Rule 10b-5, as promulgated by Section 10(b).[47] The plaintiffs alleged that NAB's U.S. subsidiary, HomeSide, had fraudulently manipulated its internal financial records to inflate its earnings and make its business appear more valuable and that NAB was aware of the fraud and did nothing.[48]

The District Court dismissed for lack of subject matter jurisdiction, reasoning that HomeSide's alleged conduct "amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."[49] The Second Circuit affirmed that there is no subject matter jurisdiction because the alleged financial manipulation by HomeSide was not the "heart of the alleged fraud;" the conduct in Australia was more central.[50] The Supreme Court granted certiorari.

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43. *See* Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 365 (3d Cir. N.J. 2002) (noting that ADRs are "financial instruments that allow investors in the United States to purchase and sell stock in foreign corporations in a simpler and more secure manner than trading in the underlying security in a foreign market").

44. *Morrison*, 561 U.S. at 251 (HomeSide receives fees for servicing mortgages and records the present value of the rights to receive such fees based on likelihood of repayment, the resulting values of which are recorded by HomeSide, appear in NAB's financial statements, and subsequently promulgated in NAB's annual public consolidated financial statements.).

45. *Id.* at 251-52.

46. *Id.* at 252 (NAB attempted to justify the write-down as a "failure to anticipate the lowering of prevailing interest rates," "mistaken assumptions," and "loss of goodwill.").

47. *Id.* at 252-53 n.1 (Note: "Robert Morrison, an American investor in National's ADRs, also brought suit, but his claims were dismissed by the District Court because he failed to allege damages." "Inexplicably, Morrison continued to be listed as a petitioner in the Court of Appeals and here.").

48. *Id.* at 252.

49. *In re* Nat'l Austl. Bank Sec. Litig., 2006 U.S. Dist. LEXIS 94162, at *8, 25 (S.D.N.Y. Oct. 25, 2006).

50. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 174-76 (2d Cir. 2008), *aff'd*, 561 U.S. 247 (2010) (finding that the manipulation was not the "heart of the alleged fraud" by also concluding the following three factors: (1) the conduct in Australia was significantly more central than those in Florida, (2) there was no allegation that the alleged fraud "affected American investors or America's capital markets," and (3) the "lengthy chain of causation" between the manipulation and the harm was too attenuated).

In affirming the dismissal, the Supreme Court sought to clarify two issues: (1) the extraterritorial reach of Section 10(b); and (2) the standard used to analyze extraterritorial application of U.S. law. While the briefs for both the petitioners[51] and respondents[52] were impressive, the Supreme Court did not necessarily rely on any argument – in its entirety – advanced by either party. Instead, it provided guidance on the procedure to be used and articulated a new substantive standard to follow in statutory extraterritoriality analyses in the context of securities regulation.

Justice Scalia, writing for the majority, first addressed the procedural matter and clarified that the extraterritorial reach of Section 10(b) is a merits question since extraterritoriality concerns inquiries into the facts and circumstances of the transaction – the foreign conduct, and not the power to hear the case.[53] First, Justice Scalia went through an analysis of statutory construction, reciting the most important principles that legislation, unless contrary intent appears, is meant to apply only within the territory of the United States and that Congress ordinarily legislates with respect to domestic matters.[54] "When a statute gives no clear indication of an extraterritorial application, it has none."[55]

Next, Justice Scalia criticized the Second Circuit's approach of discerning what Congress would have wanted when a statute is silent and noted that this approach has led to a "collection of tests" both "complex in formulation and unpredictable in application."[56] Justice Scalia saw that

51. Brief for Petitioners at 23, 29, 33, 45, 48, 53, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 U.S. LEXIS 5257, at *35. Petitioners, plaintiffs in *Morrison*, relied primarily on the following arguments: the complaint was improperly dismissed solely on grounds of subject matter jurisdiction, petitioners had asserted jurisdiction because the Exchange Act applies to foreign commerce, and applying U.S. law to conduct committed in the United States comports with sovereignty, territoriality, does not offend foreign relations, and is consistent with international comity.

52. Brief for Respondents at 42-43, 47, 68, 88, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 U.S. LEXIS 5257, at *149. Respondents, NAB, advanced the following arguments: the presumption against extraterritoriality bars foreign-cubed claims, the presumption requires a clear statement for which Congress had not provided, application of U.S. law would interfere with the sovereign authority of other nations, and the purchaser-seller requirement of the private right of action requires that the plaintiffs had purchased or sold in the United States.

53. *Morrison*, 561 U.S. at 254 ("But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question" and not one of subject matter jurisdiction since the "District Court here had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to National's conduct.").

54. *Id.* at 255.

55. *Id.*; EXTRATERRITORIALITY AND COLLECTIVE REDRESS 381-82 (Duncan Fairgrieve & Eva Lein eds., Oxford Univ. Press) (2012) (noting that the minority opinion stated that there was jurisdiction to prescribe and Congress had properly exercised it, while the majority opinion stated that even if there had been jurisdiction to prescribe, Congress had not exercised it).

56. *Id.* at 256.

practice as a repudiation and disregard of the presumption against extraterritoriality and seized the opportunity to revitalize it in all cases to avoid the "judicial-speculation-made-law."[57]

He also compared § 10(b) to § 30(a), which did contain a "clear statement of extraterritorial effect" by explicitly referring to exchanges "not within or subject to the jurisdiction of the United States."[58] He used this comparison to conclude that the specific provision of extraterritorial application in § 30(a) would be superfluous if the entire Exchange Act applied to foreign transactions.[59] Thus, since § 10(b) lacks this explicit language, the presumption had not been rebutted; "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."[60]

The plaintiffs next argued that, even if the statute does not apply extraterritorially, U.S. law should still apply in this case because the deceptive conduct occurred in Florida by HomeSide.[61] In rejecting that argument, Justice Scalia noted that most cases do involve *some* contact with the United States, otherwise the presumption would be useless.[62] The Court analyzed the "focus," or "objects of the statute's solicitude," as the pivotal question and found 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 United States."[63] Thus, Section 10(b) applies only to "securities listed on domestic exchanges" and "domestic transactions in other securities," while excluding the location of the foreign transaction, "absent regulations by the Commission;"[64] thus, the transactional test was articulated.

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57. *Id.* at 261 ("Rather than guess anew in each case, this Court applies the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.").

58. *Id.* at 264.

59. *Id. at* 265.

60. *Id.*; *see also* EXTRATERRITORIALITY AND COLLECTIVE REDRESS, *supra* note 55, at 383 (concluding that in interpreting whether Congress intended Section 10(b) to have some transnational or extraterritorial effect, the minority opinion would have found such intent; the majority opinion refused to).

61. *Id.* at 266.

62. *Id.* ("For it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.").

63. *Id.* at 266-67 ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct '*in connection with* the purchase or sale of any security registered on a national securities exchange or any security not so registered.'") (emphasis added).

64. *Id.* at 667-68.

In developing the appropriate standard, Scalia formulated the "transactional test" to prevent "interference with foreign securities regulation" and provide a "clear test" to avoid such interference.[65] While the conduct/effects tests were the "north star of the Second Circuit's §10(b) jurisprudence," they were also "not easy to administer," "not necessarily dispositive in future cases," viewed as "resolving matters of policy," and constituted an "unpredictable and inconsistent application of § 10(b) to transnational cases."[66] The transactional test would purportedly avoid these consequences. The majority concluded that the case at bar "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."[67] Thus, § 10(b) does not apply extraterritorially and the dismissal was affirmed.[68]

Justice Breyer wrote a short concurrence, where he simplified the Court's reasoning and noted that such a lengthy analysis was not necessary because the securities were not registered on a domestic exchange and the purchases occurred in Australia.[69] Thus, Justice Breyer noted, while some statutes such as mail fraud or wire fraud "may apply to the fraudulent activity alleged here to have occurred in the United States," Section 10(b) did not apply to this case and the Court was not required to consider other circumstances.[70]

Justice Stevens also wrote a concurrence, in which he, in affirming the dismissal, noted several inconsistencies in the majority's analysis. He first emphasized that the federal courts have been construing Section 10(b) differently (from the majority's approach) by applying the conduct/effects tests and the majority's "textual analysis" did not "warrant the abandonment" of that doctrine and its application."[71] Justice Stevens applauded the analysis of the Second Circuit in developing the conduct/effects tests in the absence of legislative guidance and that "numerous cases flesh out the proper application" of each test.[72] He promoted the Second Circuit as the "'north star' of § 10(b) jurisprudence" that did the most to shape the regulation of our nation's securities laws, with the "tacit approval of Congress and the Commission."[73]

65. *Id.* at 269.
66. *Id.* at 257-60.
67. *Id.* at 273.
68. *Id.*
69. *Id.* at 273.
70. *Id.* at 274.
71. *Id.*
72. *Id.* at 275.
73. *Id.* at 275-78.

Second, Justice Stevens questioned the majority's new "clear statement rule" and noted that "[w]e have been here before."[74] The presumption can be useful at "managing international conflict," but "does not relieve courts of their duty to give statutes the most faithful reading possible."[75] He further clarified that these cases are not about "wholly foreign frauds," but rather "what kinds of *domestic* contacts are sufficient to trigger application of § 10(b)."[76]

Third, Justice Stevens took issue with the majority's "beginning *and ending* its inquiry with the statutory text."[77] Justice Stevens would have considered the congressional intent as courts have always done.[78] In other words, as opposed to the majority's *clear indication* requirement, Justice Stevens would allow courts to *infer* congressional intent. Also, he would have determined the "focus" of the statute to be the public interest and the interest of investors, not transactions on domestic exchanges, as the majority found.[79] His last point was that the majority "narrows the provision's reach to a degree that would surprise and alarm generations of American investors" and "the Congress that passed the Exchange Act."[80] Nevertheless, he affirmed the dismissal because the claimants had failed to allege that the heart of the fraud either occurred in the United States or had an adverse impact on U.S investors or U.S. markets.[81]

Is there a difference between a *clear indication* and a *clear statement*? It can make a difference when courts interpret congressional statutes. For example, Justice Scalia's position in *Morrison* was that it is not the job of the courts to legislate by discerning Congress's intent. On the other hand, Justice Stevens' concurrence suggests that the "focus" of the statement can be discerned by congressional intention, not solely based on congressional text. Thus, congressional indication in favor of extraterritorial application is arguably supported without necessarily finding a "clear statement" to the same effect.

74. *Id.* at 278.
75. *Id.* at 280.
76. *Id.* at 280-81.
77. *Id.* at 283.
78. *Id.* at 284.
79. *Id.*
80. *Id.* at 285.
81. *Id.* at 285-86.

2. Scholarly Debates

Morrison's result was correct. The dismissal was warranted because the case involved no securities listed on a domestic exchange and because all conduct alleged occurred outside the United States. Nevertheless, depending on how the Supreme Court characterized the transaction, it is possible to argue that the case could have resulted in the opposite outcome.[82] A result in favor of either Morrison or NAB presents (or would have presented) its own set of benefits and consequences. For example, had Morrison received the victory, potential conflicts with foreign sovereigns may have resulted, even though U.S./foreign investor protection would have been at its peak. On the other hand, because NAB prevailed, international business relationships and foreign investment were promoted; however, it was accompanied by decreased investor protection from the little recourse that is available to U.S. investors who eventually discover that U.S. law does not apply to them when they buy/sell on foreign exchanges.

Some scholars assert that *Morrison* negatively impacts the globalization efforts of foreign shareholders and advocates, considering the new limit placed on the private right of action "when investor confidence is already on shaky ground in the wake of the 2008 financial crisis."[83] However, others suggest that *Morrison*'s narrowed standard was necessary to prevent the over-regulation of U.S. securities law abroad and restrain the abuse from the private right of action.[84]

82. *See* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1340-42 (2014) [hereinafter Colangelo, *What Is Extraterritorial Jurisdiction?*] (noting that the plaintiff's claim in *Morrison* failed because the "focus" was construed as the purchase or sale of securities, not based on the fraudulent conduct); *see also* Stephen J. Choi & Linda J. Silberman, *The Continuing Evolution of Securities Class Actions Symposium: Transnational Litigation and Global Securities Class Action Lawsuits*, 2009 WIS. L. REV. 465, 492 (2009) ("Another court, analyzing the same facts, might have decided the case differently and found prescriptive jurisdiction because the initial decision to commit fraud originated in the U.S. subsidiary and took place in Florida.").

83. Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 570, 573-74 (2011) [hereinafter Beyea, *Morrison v. National Australia Bank*] (concluding that, under *Morrison*, more securities fraud may go unpunished and that eliminating the private right of action may do more harm than good, though optimistic that this effect will encourage foreign nations to amend their own antifraud regulations).

84. See PUTNAM, *supra* note 8, at 86 (A "heavy reliance on private rights of action" affects the amount of extraterritorial litigation in the United States and "shapes the development of underlying rules.").

Morrison's "transactional" test, though extraordinary, has previously been urged by scholars.[85] Prior to *Morrison*, the concept of strict territorial jurisdiction based on the connection between the transaction and U.S. capital markets has been supported because it allows both investors and issuers to "opt-out of the domestic regulatory system" and "choose among different countries' securities regimes."[86] However, the problem here is that "the cure offered (the new transactional test) is not much better than the disease (the traditional conduct-effects test)."[87] A more restrained approach to extraterritoriality will avoid several "problematic features" that characterize the conduct and effects test, such as the fear of being sued.[88]

Under *Morrison*, the claimant's nationality, the place of the transaction's negotiations or completion (conduct), and the location of the transaction's harm (effects) are wholly irrelevant. Is this ideal or, more plainly, is this fair? Also, following *Morrison*, what are the purposes of Section 10(b) now? How are courts to protect U.S. investors and U.S. markets when the new "focus" under the majority's analysis is placed strictly and solely on "domestic exchanges" and "domestic transactions in other securities"?

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85. *See* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 355, 394 (2010) (arguing for a "presumption against extrajurisdictional application" in which "courts would look to the international law of legislative jurisdiction to guide their interpretation of the jurisdictional reach of federal statutes" which "would extend to foreign actions without direct, substantive effects in the United States *only where there is unmistakably clear statutory language*") (emphasis added); *see also* Choi & Silberman, *supra* note 82, at 468, 492-93 (arguing for a bright-line "exchange-based rule" that confers jurisdiction on the nation that regulates the exchange where the transaction took place); *see also* Buxbaum, *Multinational Class Actions*, *supra* note 18, at 68 (suggesting that the best option is a "transaction-based approach" that "limits subject-matter jurisdiction under the anti-fraud provisions to claims arising out of transactions on U.S. markets"); *see also* John D. Kelly, *Let There Be Fraud (Abroad): A Proposal for a New US Jurisprudence With Regard to the Extraterritorial Application of the Anti-fraud Provisions of the 1933 and 1934 Securities Acts*, 28 LAW & POL'Y INT'L BUS. 477, 498 (1997) (proposing a "domestic-traded test," in which "the conduct analyzed is the trading of the security, not the commission of the fraudulent act").

86. Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 208, 224, 240-41 (1996) (questioning the desirability of extraterritoriality for securities laws and finding it "both unnecessary and ineffective" and arguing for a more "direct approach" that educates investors and provides clear jurisdictional lines).

87. Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's "Transactional Test"*, 52 VA. J. INT'L L. 405, 437 (2012) (characterizing post-*Morrison* decisions as dependent upon how the transactional test is interpreted: "it can either present ambiguities that are no less significant than the ones embedded in the conduct-effects test or it can lead to an unacceptable reduction of the protections offered by the securities laws to U.S. investors").

88. *See* Young Chang, *supra* note 39, at 91-92 (suggesting that the possibility of being sued results from the "inconsistent and expansive" scope of federal jurisdiction and based on "redundant and unnecessarily costly systems of overlapping regulations" of the United States).

The analyses in *Morrison* depend on two assumptions in the securities context: (1) the focus of the statute does not encompass the protection of U.S. investors and U.S. markets and (2) the statute does not contain any indication of congressional intent. Neither assumption holds merit.

First, the "focus" test only applies to statutes that lack an extraterritorial indication in determining whether extraterritorial application is appropriate. If the statute directly authorizes extraterritorial application, there should be no need for a "focus" inquiry. However, the focus should still reflect the purpose of the statute, which is aimed at U.S. investors and U.S. markets.

Second, even though *Morrison* – and the Restatement (Fourth): Jurisdiction, Tentative Draft[89] – directs courts to determine the "focus" of the statute, there are strong arguments that the explicit provision demanded by *Morrison* is not necessary.[90] If not accepted, there is another way around the rigid rule. For example, if *Morrison* wants to promote a bright-line test – "When a statute gives no clear indication of an extraterritorial application, it has none"[91] – then it must concede that if the statute has a "clear indication," then courts must correspondingly apply it.[92] A revision to Dodd-Frank providing the requisite intent will solve these issues.

89. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 203 cmt. b & Reporter's Note 6, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) ("To apply the presumption against extraterritoriality, a court must determine the focus of the provision. This focus may have a geographic aspect, such as the place of the transaction, or it may be non-geographic.").

90. *Id.* at § 203 cmt. d ("The presumption against extraterritoriality may be rebutted by a clear indication of congressional intent. *The presumption is not a clear-statement rule*, and a court will examine all evidence of congressional intent to determine if the presumption has been overcome.") (emphasis added).

91. *Morrison*, 561 U.S. at 248.

92. *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads—An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 291 (1982) ("Courts in the United States are not free to give effect to international legal requirements in the face of a clear congressional direction to do otherwise. Thus, whenever Congress acts within its broad constitutional powers and clearly intends that the statute in question shall be applied in the situation before the court, the court must apply the legislation even though that application would violate international law.").

C. The Dodd-Frank Act: Section 929P(b)

1. Congressional Intent and Purpose

"People don't always say exactly what they mean. Judges and legislators are no exception."[93] Some scholars assert that, despite confusion, congressional intent in Dodd-Frank is clear.[94] A possible reason appears to be redundancy: why should the statute be understood as purely jurisdictional if courts already had jurisdiction under the Exchange Act?[95]

On the other hand, other scholars have argued that this drafting error is fatal and does nothing but reconfirm what was already there – that courts have jurisdiction.[96] Thus, these scholars assert that, because of the jurisdictional language used, lower courts should be applying *Morrison* scrutiny for both private claimants and government actions.[97]

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93. Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. Australia National Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 Minn. J. Int'l L. 1, 1, 19 (2011) (asserting that a literal reading of Dodd-Frank does not reflect congressional intent).

94. *Id.* at 21 ("The Dodd-Frank language apparently was intended by the SEC, when it was initially drafted, to codify the courts of appeals approach to extraterritoriality.").

95. 15 U.S.C.S. § 78aa ("The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations . . . or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty" created by the Exchange Act.); *see* Anthony J. Colangelo & Christopher R. Knight, *Post-Kiobel Procedure: Subject Matter Jurisdiction or Prescriptive Jurisdiction?*, 19 UCLA J. Int'l L. & For. Aff. 49, 54 (2015) (noting that even the court in *Morrison* noted that "judicial subject matter jurisdiction existed under the Exchange Act's jurisdictional provisions" in all cases, including those where the plaintiff, defendant, and transaction were all foreign); *see also* Painter, Dunham & Quackenbos, *supra* note 93, at 20 ("Congress could not possibly have intended only to give federal courts jurisdiction over SEC and DOJ cases simply for the purpose of dismissing those cases on the merits.").

96. *See* Ryngaert, *supra* note 9, at 16 (pointing out that courts have "undisputed subject matter jurisdiction over complaints alleging antitrust and securities laws violations if they are not frivolous;" however, the real question is whether "the plaintiff has a *cause of action* under U.S. law, or whether instead foreign laws should apply to the dispute) (emphasis added); *see also* Richard Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 Harv. Bus. L. Rev. 195, 208-09, 229 (2011) ("Congress passed a poorly drafted provision that may not do anything other than confer jurisdiction that courts already have, although Congress probably intended for it to do more," and even if it does do something more, it reinstates the "ambiguities" and "confusion" that previously existed under the conduct and effects tests.).

97. *See* Andrew Rocks, *Whoops - The Imminent Reconciliation of U.S. Securities Laws with International Comity after Morrison v. National Australia Bank and the Drafting Error in the Dodd-Frank Act*, 56 Vill. L. Rev. 163, 167, 198 (2011) ("due to a drafting error in the Dodd-Frank Act that framed the extraterritorial reach of the antifraud provisions as a jurisdictional statute, *Morrison* inadvertently extends beyond private rights of action to encompass SEC and DOJ enforcement actions").

2. Deliberate or Drafting Error?

Professor Richard Painter notes at least four explanations for what Congress actually intended in Section 929P(b) of Dodd-Frank regarding jurisdiction: (1) Congress and the SEC simply made a mistake and that the provision is meant to be a merits question; (2) there was a drafting mistake but Congress nevertheless decided not to redraft it due to time constraints; (3) some members of Congress intended to confer *only* jurisdiction and nothing more; or (4) Congress did intend to address the extraterritorial application as a jurisdictional question as pre-*Morrison* cases have always done and to address the merits by saying that federal courts have jurisdiction over *certain* SEC/DOJ proceedings.[98]

Furthermore, perhaps Congress thought to overturn not only the transactional test by enacting a codified version of the conduct/effects tests, but also intended to overturn *Morrison*'s approach to treat extraterritoriality in securities law as a merits question. If so, then the jurisdictional wording of Section 929P(b) would be entirely appropriate under this explanation, as Congress would have no need to explicitly address the substance of the transaction. However, if this were the case, then the same criticisms would arise when courts try to discern congressional intent, a task not intended for the courts.

Even though we can speculate what Congress most likely meant,[99] courts look to Congress for guidance and rely on objective and explicit authorization for reasons of clarity and caution. An amendment becomes necessary; after all, "Congress enacts statutes; it does not enact 'intent.'"[100]

98. Painter, *supra* note 96, at 200, 202-04 (concluding that under the fourth possibility, "Congress intended to reinstate the case law that had existed in courts of appeals before *Morrison* was decided") (emphasis added).

99. *Id.* at 199 ("Dodd-Frank appears to include a *directive from Congress* that Section 10(b) should have extraterritorial reach in cases brought by the SEC and DOJ.") (emphasis added); *see also* Junsun Park, *Global Expansion of National Securities Laws: Extraterritoriality and Jurisdictional Conflicts*, 12 U.N.H. L. REV. 69, 80 (2014) (concluding that the extraterritoriality provision of Dodd-Frank does not remove pre-*Morrison* ambiguity but also noting that "the Dodd-Frank Act allows the SEC to keep using the effects and conduct tests . . .").

100. Painter, Dunham & Quackenbos, *supra* note 93, at 19, 25 ("Congress should make the statutory language in the Dodd-Frank Act say what it meant to say.").

D. Ambiguities and Reactions within the Circuit Courts

1. The Cases That Followed *Morrison* and Dodd-Frank

The ambiguities in the Supreme Court's analyses in *Morrison* resulted in judicial confusion and guesswork.[101] Because the focus test has been either hard to ascertain or too inflexible to work with, courts have attempted to formulate ways around it[102] by narrowing its holding or establishing even more standards.[103] *Morrison*'s result is that U.S. law applies if either "the presumption is relevant but rebutted, or the presumption is irrelevant."[104] This reasoning has the effect of giving a plaintiff "two bites at the apple" to show that U.S. law can apply to her case.[105]

2. Present-Day Conclusions

Long gone are the days that every sovereign may do as it wishes unless it contravenes a prohibition of international law.[106] By now, it is well-settled in the legal community that the globalization of securities is inevitable;[107] what continues in the debate is how to deal with the implica-

101. For a summary of the difficulties in post-*Morrison* case law, see Appendix A.

102. *See* Doe v. Drummond Co., 782 F.3d 576, 592 (11th Cir. 2015) ("Displacement of the presumption will be warranted if the claims have a U.S. focus and adequate relevant conduct occurs within the United States.").

103. *See Securities Regulation—Securities Exchange Act—Second Circuit Holds that Transactions in Unlisted Securities Are Domestic if Irrevocable Liability is Incurred or if Title Passes Within the United States*, Case Comment, 126 Harv. L. Rev. 1430, 1437 (2013) [hereinafter *Securities Regulation—Securities Exchange Act—Second Circuit*] ("While the Second Circuit's irrevocable liability and title transfer test may have some salutary effects in terms of making evasion more difficult, it ultimately reflects and illustrates the *same fundamental problems* underlying *Morrison*'s location-based standard.") (emphasis added).

104. Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law*, 40 Sw. L. Rev. 655, 658, 668 (2011) [hereinafter, Brilmayer, *The New Extraterritoriality*] ("*Morrison*'s two-step approach is the logical equivalent of a rule stating that where the focus of the dispute is not in the United States - as determined in accordance with a judicially crafted standard - then for U.S. law to apply Congress must indicate its wishes clearly.").

105. *Id.* at 661 (noting that U.S. law can apply if either "(1) the case is sufficiently tied to the United States (because the focus occurred there) so that Congress does not need to specify that U.S. law applies, or (2) Congress indicated sufficiently and unambiguously its preference that U.S. law should apply so that it does not matter that the focus is located somewhere else").

106. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 45-47 (defining the *Lotus Principle*).

107. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997) ("We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."); *see also* Steinberg & Flanagan, *Transnational Dealings — Morrison Continues to Make Waves*, 46 Int'l Law. 829, 865 (2012) ("With the globalization of finance and business markets, ascertaining the requisite U.S. nexus under an appli-

tions of the phenomenon that "turn[ed] § 10(b) jurisprudence (and the presumption against extraterritoriality) on its head."[108] So much for that "legislative acorn"[109] long ago and the efforts of the "Mother Court"[110] at fostering its growth. The transactional test rejects subjective reasoning, making policy considerations and judicial assumptions a thing of the past.

Morrison was arguably an attempt to limit the overbroad application of U.S. law abroad and to re-acknowledge the principle that "United States law governs domestically but does not rule the world . . . ."[111] But in doing so, it created a type of scrutiny that may too be restrictive in that it can deny relief to U.S. investors, interfere with the goals of the Exchange Act, and negatively impact investor confidence.[112] What is certain is that a transnational securities situation cannot be adjudicated in the United States without implicating the interests of other nations involved.[113]

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cable statute will become increasingly critical in discerning the boundaries of U.S. law."); *see also* Brett R. Marshall, *Morrison v. National Australia Bank Ltd.: A Clear Statement Rule or a Confusing Standard*, 37 IOWA J. CORP. L. 203, 221 (2011) ("The *Morrison* court attempted to address some of the questions that inevitably arise in an age of globalization where cross-border business transactions are essential to domestic financial activity."); *see also* Gunnar Schuster, *Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts*, 26 LAW & POL'Y INT'L BUS. 165, 166 (1994) ("The internationalization of capital markets has led to conflicts, mainly in the areas of insider trading, fraud claims, registration and disclosure laws, margin requirements and takeover regulations, as well as others.").

108. *Morrison*, 561 U.S. at 285 (Stevens, J., concurring in judgment).

109. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (Justice Rehnquist noted, "When we deal with private actions under Rule 10b-5, we deal with a ju*dicial oak which has grown from little more than a legislative acorn*." Justice Rehnquist acknowledged that the growth of 10(b) actions is consistent with congressional enactment and the judiciary's task at interpreting it and argued that it was proper for continued judicial interpretations as would be "disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5" and that courts must "flesh out the portions of the law" where Congress offers no guidance.) (emphasis added).

110. *Id.* at 762 (Blackmun, J., dissenting) (presumably referring to the Second Circuit as the "esteemed panel" in this area of law in its establishment of the "conduct" and "effects" tests).

111. Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).

112. *See* Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities*, 1 GLOBAL BUS. L. REV. 139, 154, 156 (2011) [hereinafter Beyea, *Transnational Securities Fraud*] (concluding that too narrow an approach could result in under-regulation "if no country has a sufficient basis or motivation for applying their law to a case" and over-regulation producing "jurisdictional conflict with other countries seeking to regulate the same transaction").

113. *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1044 (2011) [hereinafter Colangelo, *A Unified Approach*] (asserting that the concept that all elements of a multijurisdictional claim can be narrowed to the laws of one nation without implicating extraterritoriality is "to engage in a legal fiction").

It is clear that the following points are agreed upon: (1) lower courts are unsure on the standard to apply;[114] (2) Congress will not act any time soon;[115] (3) the transactional test is more likely to be applied by lower courts, though hesitantly;[116] and (4) lower courts will continue to narrow or broaden previous holdings based on new factual scenarios presented to them.[117]

Why all the uncertainty? Why is each holding different? A plausible explanation is that courts want justice for aggrieved parties and desire a clear standard to follow. The transactional test does not provide relief for all injured parties (namely, U.S. investors buying or selling securities traded on foreign exchanges) and the conduct/effects tests are by no means a clear baseline for courts to rely on.[118] Thus, the need arises more than ever to clarify an optimal standard that provides clear guidance and addresses the injury of U.S. investors, U.S. markets, and the territory of the United States.

III. EVALUATING THE ARGUMENTS IN A BROADER CONTEXT: *MORRISON*'S TRANSACTIONAL TEST V. DODD FRANK'S CONDUCT/EFFECTS TESTS

Part III discusses the benefits and potential consequences of the conduct/effects tests and the transactional test. As elaborated below, extraterrito-

114. *See* Reuveni, *supra* note 39, at 1091-92 (criticizing the unpredictable nature of the effects and conduct tests as a "multiheaded hydra applied without reference to its original purposes" and responsible for "confusion in the lower courts and an absence of any consistency in the test's application").

115. *See* SEC. AND EXCH. COMM'N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 69-70 (2012), *available at* http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf ("[T]his area will be subject to further legal development in the years ahead. Absent legislation, lower federal courts in particular will likely be called upon to resolve myriad novel and difficult issues regarding the application of the new transactional test.").

116. *See* Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 214, 217 (2d Cir. 2014) (limiting *Morrison* to the facts and noting that courts must "proceed cautiously in applying teachings the *Morrison* Court developed" and that a court's conclusion "cannot, of course, be perfunctorily applied to other cases based on the perceived similarity of a few facts").

117. *Id.* at 217 ("We believe courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law on this elusive question."); *see also* John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 645 (2011) [hereinafter Knox, *The Unpredictable Presumption Against Extraterritoriality*] (noting that *Morrison* introduced "new levels of unpredictability, as lower courts try to guess what the Supreme Court would consider to be the focus of the statutes at issue").

118. For a figurative representation of the various examples of actors and transactions under these standards, as well as the newly proposed standard, see Appendix A.

rial application of U.S. securities law raises issues of international comity, foreign relations, interest analysis, and reasonableness.

A. Commentaries by Scholars and Other Sources

1. Pro- *Morrison*

Arguments in favor of the transactional test include fear that private actions create conflict[119] because too much extraterritoriality can result in "frequent conflicts between the United States and other nations"[120] but that the transactional test would respect international comity.[121] In fact, respecting the authority of another sovereign has long been an important aspect of comity that is to be maintained and respected.[122] Some argue that the bright-line rule provides greater guidance for investors and more clearly outlines the potential liability for issuers.[123] It also promotes greater stability and cooperation among nations with fewer risks,[124] while maintaining objectivity and predictability.[125] The transactional test is more workable for courts and involves less fact-sensitive analyses and

119. *See* Kara Baquizal, *The Extraterritorial Reach of Section 10(B): Revisiting Morrison in Light of Dodd-Frank*, 34 Fordham Int'l L.J. 1544, 1552, 1554 (2011) (noting how the private right of action under U.S. law, namely class action suits, is particularly susceptible to abuse and consequently detrimental to market power and the United States' position as a leader in the global financial market).

120. Choi & Guzman, *supra* note 86, at 208.

121. *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

122. *See* New York C. R. Co. v. Chisholm, 268 U.S. 29, 31-32 (1925) (noting that to treat a person according to the laws of another country rather than those where he did those acts "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent").

123. *See* Rocks, *supra* note 97, at 186, 198 (concluding that *Morrison*'s interpretation would comport with the principles of international law by "respecting the sovereignty of nations with their own regulatory frameworks for securities fraud and whose own markets are primarily affected by such fraud").

124. *See* Baquizal, *supra* note 119, at 1582 ("[S]uccessful international cooperation in controlling securities markets calls for the transactional test in *Morrison*. The economic risks associated with the conduct-and-effects test, not to mention its procedural shortcomings, outweigh its benefits. Furthermore, the interests of American investors are not seriously undermined. *Morrison* was correctly decided and should not be overturned.").

125. *See* Kelly, *supra* note 85, at 498, 507 (noting that a domestic-traded test that analyzes the trading of the security "provides the predictability that the global business community needs, eliminates the dubious and problematic distinctions between foreign and U.S. plaintiffs, and ensures a more efficient U.S. securities market with greater opportunities for U.S. investors").

assumptions.[126] Lastly, these scholars assert that Dodd-Frank likely did not provide the congressional intent that was lacking in *Morrison*.[127]

2. Anti- *Morrison*

Arguments against the transactional test include apprehension that it created more problems than anticipated such as the following unresolved and/or debated issues: (1) mere listing (or dual listing) v. actual purchase and sale?;[128] (2) American depository receipts (ADRs)?;[129] (3) swap agreements?;[130] (4) foreign-squared transaction?;[131] (5) what is "domestic"?;[132] (6) what if brokers/dealers are used?;[133] and (7) *Morrison*'s applicability to other areas of law?[134] In addition to these questions,

126. *See* Erica Siegmund, *Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims*, 51 VA. J. INT'L L. 1047, 1076 (2011) (arguing that adopting an approach "depending on the particular facts, regulatory scheme, or level of substantive conflict, would force courts to engage in a complex and costly evaluation of prescriptive comity on a case-by-case basis").

127. *See* Marshall, *supra* note 107, at 221 (suggesting that recent congressional amendments likely do not satisfy "the kind of clarity the Supreme Court require[d]" in *Morrison*).

128. *See In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469, 472 (S.D.N.Y. 2010) (Before concluding that mere listing without purchasing on a domestic exchange was insufficient under *Morrison*, the Court conceded that "isolated clauses of the opinion may be read as requiring only that a security be 'listed' on a domestic exchange . . . those excerpts read in total context compel the opposite result" and then found that *Morrison* "was concerned with the territorial location where the purchase or sale was executed . . . .").

129. *See* EXTRATERRITORIALITY AND COLLECTIVE REDRESS, *supra* note 55, at 411 (questioning whether U.S. investors who buy foreign ADRs on a U.S. exchange are covered by Rule 10b-5 because *Morrison* did not address this issue).

130. *See* Maria Slobodchikova, *Private Right of Action in Transactions with Cross-Border Security-Based Swaps*, 35 REV. BANKING & FIN. L. 739, 775, 780 (2016) (arguing that *Morrison* "did not create a clear and predictable method of determining whether transactions with SBS were domestic for purposes of section 10(b) of the Exchange Act" and "failed to accomplish the goals the Supreme Court sought to achieve").

131. *See* EXTRATERRITORIALITY AND COLLECTIVE REDRESS, *supra* note 55, at 411 (noting that *Morrison* left many questions unanswered, including whether *Morrison* scrutiny extend to claims by U.S. investors who bought shares on foreign exchanges; in other words, whether it applies to foreign-squared transactions).

132. *See* Stackhouse v. Toyota Motor Co., 2010 U.S. Dist. LEXIS 79837, at *2 (C.D. Cal. July 16, 2010) (acknowledging that *Morrison* "unfortunately does not directly address what is meant by 'domestic transactions'" before concluding that it believes the securities must be solicited by the issuer in the United States and that such an approach is "better supported by *Morrison*").

133. *See* Absolute Activist Value Master Fund Limited v. Homm, 2010 U.S. Dist. LEXIS 137150, at *18-19 (S.D.N.Y. Dec. 22, 2010) (Before concluding that Section 10(b) did not apply to intermediaries who engaged in the fraudulent conduct in the United States, the Court stated that the "plain language of the 'transaction test' established in *Morrison* precludes this action from moving forward," but also noting the strategic and deceptive efforts that the plaintiffs took to avoid regulation of the securities laws and that "[i]t would be illogical, and inconsistent with *Morrison*, to allow them to seek redress in this Court").

134. *See* Colangelo, *A Unified Approach*, *supra* note 113, at 1081 (pointing out that *Morrison* left the following question regarding foreign conduct and silent U.S. statutes unanswered: "[I]f the

scholars argue that *Morrison* is also susceptible to assumptions and policy-making by judges.[135] Furthermore, they maintain that statutes should not be analyzed solely by text; judges should look to other sources, including the statute's purpose, intent, context, as well analyses articulated by prior judicial decisions.[136]

These arguments assert that *Morrison* resulted in confusion and/or disagreement among the courts (especially after Dodd-Frank) in applying *Morrison* or disagreement with the decision itself.[137] The implications of *Morrison* have their own set of arbitrary consequences distinct from those associated with the conduct/effects tests[138] and have frequently been criticized as unjustified and having no basis in overturning over forty years of case law.[139]

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presumption against extraterritoriality applies so vigorously in the securities context, why does it not also apply with equal vigor in other contexts? For example, why does it not apply with the same force to the ATS?"); *see also* Marshall, *supra* note 107, at 221 (stating that because *Morrison's* holding was in the context of securities laws, lower courts received no guidance in how and when to apply the presumption to "other areas of law and a variety of factual scenarios").

135. *See* EXTRATERRITORIALITY AND COLLECTIVE REDRESS, *supra* note 55, at 386 (concluding that U.S. courts may sometimes "act in a manner consistent with international comity by reading down the meaning of the statutory language" and apply it only where a "significant and material connection" with U.S. jurisdiction is found).

136. *See Morrison*, 561 U.S. at 265 (Before concluding that "there is no clear indication of extraterritoriality here," Justice Scalia in *Morrison* did in fact acknowledge that the presumption is *not a clear statement rule* and that "[a]ssuredly *context can be consulted* as well") (emphasis added); *see also* Kollias v. D & G Marine Maintenance, 29 F.3d 67, 73 (2d Cir. 1994) ("[T]he Supreme Court has made clear since *Aramco* that reference to non-textual sources is permissible"; *see also* RYNGAERT, *supra* note 9, at 70 (noting that the Supreme Court has articulated a three-factor analysis in discerning congressional intent: (1) express language of the statute; (2) legislative history of the statute; and (3) administrative interpretations of the statute (quo*ting* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285-90 (1949))); *see also* Knox, *The Unpredictable Presumption Against Extraterritoriality*, *supra* note 117, at 652 (recommending that "courts should take into account the entire range of tools they use to determine legislative meaning, including deference to reasonable interpretations of a statute by the agency entrusted with its implementation and congressional acquiescence in long-standing judicial interpretations").

137. *See Parkcentral Global HUB Ltd.*, F.3d at 217 (rejecting the bright-line test by noting the following: "Neither do we see anything in *Morrison* that requires us to adopt a 'bright-line' test of extraterritoriality when deciding every § 10(b) case"); *see also* Ventoruzzo, *supra* note 87, at 443 (noting that further litigation will be required to determine the scope of *Morrison* and that the two most likely judicial interpretations will be inadequate: "If the decision is interpreted narrowly, the purpose of, not to mention the practical need for, U.S. securities laws will be frustrated as American investors lose essential protections. If, instead, the decision is interpreted broadly, the same ambiguities that afflicted previous tests will afflict *Morrison*'s new transactional test.").

138. *See* Wu, *supra* note 28, at 339 ("[S]uch a strictly geographically-focused approach, though easy in its application, often reaches absurd and counter-intuitive results. Potential for such arbitrariness and unfairness exists under the *Morrison* 'transactional' test").

139. *See* Marshall, *supra* note 107, at 214 (concluding that "the Court's reasons for rejecting the conduct and effects tests are inconsistent with its previous decisions").

It is now easier for foreign issuers to structure the transaction to their advantage and avoid U.S. scrutiny,[140] thus transforming the United States into a safe haven for defrauders and damaging its integrity. A test that looks solely to location of the transaction is urged as too rigid and inflexible for today's world[141] and has the possibility of not only disrespecting foreign sovereigns, but also contradicting the intent of Congress, creating separation of powers concerns.[142] Such concerns are valid since extraterritoriality is in the "eye of the beholder"[143] and can be circumvented.

3. Pro- Dodd-Frank

Arguments in favor of the conduct/effects tests codified by Dodd-Frank include assertions that the tests reflect economic reality, include the unique factual circumstances of each case,[144] and promote investor pro-

140. *See* Beyea, *Morrison v. National Australia Bank*, *supra* note 83, at 570, 574 (noting that *Morrison* may "let more fraud slip through the cracks," but at the same time may indirectly incentivize foreign nations to reform their own antifraud laws to encourage U.S. investment and cooperation in their own nation); *see also* Knox, *The Unpredictable Presumption Against Extraterritoriality*, *supra* note 117, at 646 (*Morrison* added another decision that allows "domestic effects to avoid or overcome the presumption"); *see also* Ted Farris, *Implications of Morrison v. National Australia Bank Ltd.-US Supreme Court Limits Extraterritorial Application of Rule 10b-5 Adopting Location Based Bright Line Test for Securities Transactions-Rule 10b-5 Does Not Apply to Transactions in Securities Outside the United States*, DORSEY & WHITNEY LLP, June 28, 2010, https://www.dorsey.com/newsresources/publications/2010/06/implications-of-morrison-v-national-australia-ba__ ("[F]oreign issuers selling non US listed securities to US institutions may insist that those purchasers buy their securities in an offshore transaction by a non US affiliate in an effort to remain beyond the reach of Rule 10b-5. Conversely, large U.S. institutional investors may insist that their Rule 144A purchases be made directly into the United States so that Rule 10b-5 would be applicable to the sale.).

141. *See Securities Regulation—Securities Exchange Act—Second Circuit*, *supra* note 103, at 1437 ("[I]n a world where physical location is becoming increasingly illusory, a location-based standard does not serve as a meaningful principle for distinguishing which cases should stay in the United States.").

142. *See* Brilmayer, *The New Extraterritoriality*, *supra* note 104, at 664, 667, 669, 6772 (concluding that *Morrison* has "diminished the importance of congressional preferences," created a "misleading" impression that "congressional intent is the most important concern," and thus will result in "contradicting the result that Congress wanted" with the "indirect consequence of restricting the power of Congress and the Executive"); *see also* Colangelo, *A Unified Approach*, *supra* note 113, at 1044 ("*Morrison* . . . may undermine both respect for foreign sovereigns and deference to the political branches.").

143. RYNGAERT, *supra* note 9, at 73 (noting that courts have attempted to "bypass Congress's foreign relations prerogatives, and give the statute an application which in reality may well be extraterritorial").

144. *Id.* at 40 (suggesting that "[l]egal certainty in jurisdictional matters is then not derived from the classical extraterritoriality doctrine, but from a case-by-case reasonableness analysis"); *see* Wu, *supra* note 28, at 340 (noting that even though the conduct and effects tests were "malleable, unpredictable, and difficult to apply," they nevertheless allowed for "great flexibility, enabling intuitively equitable outcomes by thoroughly considering unique factual scenarios").

tection and business relations.[145] Defrauders cannot easily avoid liability because a thorough analysis will be given to each factual circumstance.[146] The conduct/effects tests are promoted because they recognize the need for increased regulation in a globalized world[147] and provide the flexibility needed.[148] Lastly, the responsibility lodged with the SEC/DOJ is appropriate because the SEC/DOJ are presumably in better positions than private litigants.[149] However, the responsibility is very sensitive and should not be undertaken where other countries have equal or greater interests.[150]

4. Anti- Dodd-Frank

Arguments against Dodd-Frank's conduct/effects tests include statements that the tests are arbitrary, not uniform, and largely based on policy reasons articulated by the courts.[151] The tests purportedly cause a decrease in willingness to participate with U.S. issuers and within U.S. markets

145. *See* Wu, *supra* note 28, at 342 (urging that "from a public policy perspective," the conduct and effects tests "may be preferable to the 'transactional' test for securities litigation, given the commonly cross-border manner in which business is conducted today").

146. *See* Ventoruzzo, *supra* note 87, at 409 ("International disputes often defy bright-line rules and depend heavily on the factual circumstances of a particular case.").

147. *See* Colangelo, *What Is Extraterritorial Jurisdiction?*, *supra* note 82, at 1348-49 (noting the "increasing interconnectedness of the world" and "collapse or merger of traditionally separate spheres of public and private law" and urging for a reconsideration of extraterritoriality); *see also* Park, *supra* note 99, at 69 ("As securities fraud has grown increasingly transnational, it has become necessary to expand the reach of antifraud provisions to persons and entities participating in global securities markets"); *see also* Beyea, *Transnational Securities Fraud*, *supra* note 112, at 140 ("With globalization, securities markets have become progressively more interconnected, and securities fraud has increasingly crossed borders, creating problems for national regulators seeking to deter and punish fraud."); *see also* Young Chang, *supra* note 39, at 90 ("As securities markets have become increasingly globalized in recent years, the growth of transactions in cross-border securities raises an issue of the regulation of transnational securities fraud.").

148. *See* Beyea, *Transnational Securities Fraud*, *supra* note 112, at 168 ("U.S. courts should be careful to preserve a flexible approach to the question of the extraterritorial application of U.S. antifraud rules, while still screening out claims by foreign plaintiffs that are not based on sufficient conduct within the United States").

149. *See* Ventoruzzo, *supra* note 87, at 439 (noting that in light of *Morrison* and Dodd-Frank, "[i]t is not surprising that enforcement agencies and government branches are granted broader reach and stronger legal instruments to seek damages than are private parties"); *see also* Choi & Silberman, *supra* note 82, at 468, 504 (noting that the "SEC stands in a better position" to make determinations regarding which countries U.S. jurisdiction should extend extraterritorially because the SEC is a "centralized decision maker with expertise on securities-enforcement issues").

150. *See* Park, *supra* note 99, at 82 (cautioning against extraterritorial application in actions brought by the SEC or DOJ under Dodd-Frank and noting that "[i]f the SEC and the DOJ aggressively, abusively, or unilaterally insist upon extraterritorial application of U.S. antifraud provisions under the Dodd-Frank Act, international relations can be significantly impaired").

151. *See* Wu, *supra* note 28, at 328 (noting that "courts had stepped into a quasi-legislative role" in pre-*Morrison* cases when determining whether the antifraud provisions should apply to transnational securities cases).

because foreign issuers are afraid their small U.S. presence will subject them to domestic law;[152] which, in turn, may lead to less foreign capital in the United States.

Further arguments surmise that the conduct/effects tests make it easy for class action lawyers to maintain a global lawsuit.[153] These scholars assert that the tests are too fact-specific, contain too many exceptions, are too subjective,[154] and disrespect the principle of international comity.[155]

B. Analogizing Extraterritoriality to Other Areas of Law

1. The Securities Exchange Act of 1933 ("Securities Act")

Extraterritoriality issues have also arisen under the Securities Act and show how courts have extended the presumption to other provisions within the same subject matter. Opinions under the Securities Act support the argument that while *Morrison*'s approach may be appropriate in some circumstances, there may more leeway allowed when the SEC initiates proceedings.[156]

2. Other Provisions of the Dodd-Frank Act

Extraterritoriality also plays a role in other parts of the Dodd-Frank Act and establishes that courts have recognized the importance of the presumption against extraterritoriality in other statutes. Cases suggest that international relation concerns are gaining more importance in judicial decisions when analyzing whether extraterritorialty is warranted.[157]

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152. *See* Kelly, *supra* note 85, at 493 (noting that foreigners "do not know what constitutes a substantial effect or what behavior abroad might affect U.S. securities" and become "wary of being haled into U.S. courts").

153. *See* Buxbaum, *Multinational Class Actions*, *supra* note 18, at 67 (noting that the "multinational class action practice will generate excessive levels of conflict with other countries, as well as mounting uncertainty for litigants").

154. *See* Beyea, *Transnational Securities Fraud*, *supra* note 112, at 153 ("Because of the case-by-case nature of the inquiry and the lack of uniformity among courts in interpreting the conduct test, cases with similar facts will often have disparate outcomes, without any clear indicators from courts as to what tips the balance one way or the other.").

155. *See* Kelly, *supra* note 85, at 493-98 (noting the "dubious nationality distinctions," "unfounded moral rationale," "failure to uphold comity," and "detrimental economic effect" among the many problems associated with the conduct test).

156. For a discussion of extraterritoriality in light of *Morrison* and Dodd-Frank in disputes brought under the Securities Act of 1933, see *SEC v. Tourre*, 2013 U.S. Dist. LEXIS 78297 (S.D.N.Y. June 4, 2013).

157. For an example of a decision that emphasized the importance of a U.S. connection in the claim, congressional intent, and avoiding international ramifications in analyzing extraterritoriality, see *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. N.Y. 2014).

3. Antitrust Law

Antitrust law cases arose before securities disputes and demonstrate how and when courts have articulated a clear statement to apply (or not apply) the statute abroad. Antitrust law is highly related to securities laws, with securities law viewed as an extension of antitrust law.[158] For example, clear congressional intent in antitrust statutes appears to be the optimal approach to clarify prior ambiguities and provides courts with guidance in resolving future disputes.[159]

4. The Alien Tort Statute (ATS)

The Alien Tort Statute gives a prominent example of how courts have justified the presumption by either deference to the political branches or respect to foreign nations.[160] In relying on the presumption, courts deemed the matter too important to have been overlooked by Congress, thus requiring a more specific statement.[161] Decisions under the ATS reflect a general reluctance to restrictive, bright-line rules over more flexible, fact-sensitive inquiries.[162]

158. *See* Siegmund, *supra* note 126, at 1060 (noting that both antitrust and securities fraud cases involve "global consequences that cause adverse U.S. domestic effects" but that the "core of the argument" in both areas is that "the effects of the schemes are realized worldwide").

159. For an example of a statute that clarified the application of U.S. antitrust law to trade or commerce with foreign nations (Foreign Trade Antitrust Improvements Act), see 15 U.S.C. § 6a.

160. For a brief discussion of *Morrison* in ATS decisions and how courts have acknowledged the importance of the presumption and respect for foreign sovereigns/political branches, see *Kiobel v. Royal Dutch Petro. Co.*, 185 L. Ed. 2d 671 (2013).

161. *Id.* at 686 (While the Court quoted *Morrison* to explain that Congress did not provide a clear indication of extraterritorial application, it also appears that the Court in *Kiobel* did not adopt *Morrison*'s "focus test" in its statutory analysis and instead articulated a slightly less burdensome "touch and concern" standard. Interestingly, *Kiobel*'s "touch and concern" standard sounds strikingly similar to the conduct/effects tests. For example, the requirement that the claim "touch" the territory of the United States resembles the objective effects test, while the "concern" prong arguably refers to the subjective conduct test. However, as mentioned, there were flaws with the conduct/effects tests, but this appears to be addressed by *Kiobel*'s added requirement that the claims touch and concern the United States "with sufficient force," which demonstrates the demand for a higher burden under this standard and is, thus, a more logical approach.).

162. For examples of cases that have rejected bright-line rules, adopted a case-by-case analysis, and adhered to judicial caution in interpreting the ATS, see *John Doe I, et al. v. Nestle USA, et al.*, 766 F.3d 1013 (9th Cir. 2014); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

5. Criminal Law – Criminal Prosecutions under Section 10(b) and the Racketeer Influenced and Corrupt Organizations Act (RICO)

Criminal law can also be subject to the presumption against extraterritoriality and provides a helpful illustration as to how courts have analogized the same reasoning in favor of the presumption from the civil to some criminal contexts. For example, opinions decided under RICO or criminal prosecutions under Section 10(b) appear to favor limits on private action suits but allow more leeway in cases brought by the United States against foreign defendants based on foreign misconduct.[163]

C. Reasons for Amendment: On the Domestic and International Levels

1. The Conduct/Effects Tests are Over-Inclusive

Consider the following oversimplified example. At a meeting in New York, a foreign issuer fraudulently sells foreign shares to a foreign investor. Based on conduct in New York, U.S. law can be applied to this otherwise wholly foreign transaction. As a twist to the example, if the foreign issuer fraudulently induces one U.S. investor and hundreds of foreign investors, the effects of that one harmed U.S. investor can justify a worldwide class action in the United States.[164] Such a situation clearly demonstrates the need for a restrained approach on the overly broad application.[165]

2. The Transactional Test is Under-Inclusive

Now consider another example with the transactional test. A U.S. investor buys shares on a foreign exchange based on a foreign issuer's fraudulent financial statements. The U.S. investor has no U.S. remedy under

163. For a discussion of extending the presumption against extraterritoriality to criminal actions and the difference between suits brought by private parties versus the United States, see *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, (2016); *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013).

164. *See Morrison*, 561 U.S. at 270 (noting the abuse of class action suits and supporting a restrictive view that would not increase fraud but would uphold international comity, Justice Scalia stated, "[w]hile there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets").

165. *See* Young Chang, *supra* note 39, at 120-21 (warning that "[t]oo broad a scope . . . would do harm to the establishment of the effective and cooperative scheme of transnational securities regulation that most countries seek").

Morrison solely because the transaction was not domestic. Not only does the transactional test punish bona fide U.S. purchasers, it also rewards U.S. defrauders. As an alternative to the above example, a U.S. investor who trades on a foreign exchange based on inside information, making millions, can escape U.S. liability under *Morrison* (though presumably cannot escape foreign liability). These deceptive strategies are likely to result in a system of under regulation.[166]

3. Concluding Remarks: The Need for An Alternative Standard

To say that the conduct/effects tests are over-inclusive is not to imply that the tests are completely without merit; in fact, such tests are practical approaches and should not be abandoned in their entirety.[167] The conduct/effects tests more clearly align to the goals of the Exchange Act and more accurately reflect current economic reality,[168] which, like the two tests, is volatile and flexible, yet adaptable. In formulating an optimal approach, the protection of U.S. investors and U.S. capital markets as well as maintaining the integrity of the territory of the United States should remain the fundamental objectives, as the "application of the antifraud provisions of U.S. securities laws is essential to protect domestic markets and investors."[169]

The presumption against extraterritoriality is important and should be maintained.[170] It prevents the United States from ruling on other countries' cases for other countries' nationals and strikes the proper balance

166. *See* Beyea, *Transnational Securities Fraud*, *supra* note 112, at 156 ("Although broad assertions of extraterritoriality risk cause jurisdictional conflict and overregulation, too narrow of an approach to extraterritoriality will make it easier for opportunistic issuers to structure transactions specifically to avoid application of U.S. antifraud rules, and may result in under-regulation.").

167. *See* Young Chang, *supra* note 39, at 121 (noting that when Congress provides clear standards, they "should not ignore the merits of the current effects and conduct tests utilized by federal courts" as these tests have been "practical approaches to decide a reasonable scope for extraterritoriality").

168. *See* Hannah L. Buxbaum, *National Jurisdiction and Global Business Networks, Earl A. Snyder Lecture in International Law*, 17 IND. J. GLOBAL LEG. STUD. 165, 177 (2010) ("Yet much securities activity is global: companies list their securities on multiple markets, and investors seek out foreign as well as domestic opportunities. As a result, much securities fraud has a global aspect . . . ."); *see also* Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 62-63 (1999) ("In recent years, the internationalization of securities markets has accelerated in pace and broadened in scope, due in part to advances in telecommunications and computer technology." "The internationalization of securities markets bears directly on American firms and individuals.").

169. Young Chang, *supra* note 39, at 120.

170. *See* PUTNAM, *supra* note 8, at 277 (concluding that with an "economically integrated" and "territorially fragmented" international world, extraterritoriality in this area will remain an "important issue in international politics and international law"); *see also* Wu, *supra* note 28, at 344 (concluding that although there is confusion regarding *Morrison* and Dodd-Frank that resulted in a

between judicial efficiency and international comity.[171] Courts must afford a degree of deference to the particular securities laws of other nations and consider broader factors such as "economic policy, procedural rules accompanying those regulations, and the spirit of that state's civil litigation system."[172]

An amendment should begin with the exercise of prescriptive judication, providing a private right of action for U.S. citizens/residents and tasking the SEC/DOJ with the more complicated, foreign transactions. This approach accords with the Restatement (Fourth): Jurisdiction, Tentative Draft and goals of the Exchange Act in assuring reasonableness when extending U.S. law abroad to protect U.S. investors and U.S. capital markets.[173] Also, case law supports a long-standing practice of analyzing U.S. securities laws based on the "statute's conduct-regulating rules," and thus falls under prescriptive jurisdiction, not subject matter jurisdiction.[174]

Persuasive arguments to resolve these predicaments are frequently presented, though none have been fully realized or implemented.[175]

"flawed mechanism for analysis by courts," the presumption against extraterritoriality "remains valuable").

171. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 201(2), pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) ("In exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity.").

172. Baquizal, *supra* note 119, at 1564-65.

173. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 204 & § 204 cmt. b, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) ("To avoid unreasonable interference with the legitimate sovereign authority of other states, U.S. courts may interpret federal statutory provisions to include other limitations on their applicability as a matter of prescriptive comity." "However, application of the presumption does not preclude U.S. courts from interpreting the statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision.").

174. Colangelo & Knight, *supra* note 95, at 54 ("Under *Morrison*, therefore, the extraterritorial reach of a statute is a question of prescriptive, not judicial subject matter, jurisdiction.").

175. *See* RYNGAERT, *supra* note 9, at 190, 231 (proposing a "positive sovereignty principle," in which a State can apply their laws to foreign situations if either (1) it has the "strongest nexus" to the situation or (2) if another State that has the "stronger nexus" fails to adequately deal with the matter that is harmful to the "regulatory interests of the international community" and the exercise of jurisdiction by the first State "serves the global interest"); *see also* Ventoruzzo, *supra* note 87, at 409, 442 (promoting an "effect-only test" to eliminate judicial discretion and preserve flexibility," while keeping out situations where the "only contact with the United States is conduct in this country that exclusively produces effects abroad"); *see also* Beyea, *Transnational Securities Fraud*, *supra* note 112, at 157 (promoting an exchange-based rule which would provide "valuable certainty as to the applicable law" and "lead to a socially optimal level of regulation"); *see also* Marshall, *supra* note 107, at 219 (recommending that either (1) courts refer to the legislative purpose, not legislative intent, of the Exchange Act, or (2) Congress amend the Exchange Act to include extraterritorial effect); *see also* Young Chang, *supra* note 39, at 121, 125 (suggesting a narrowed conduct and effects test that balances the goals of protecting U.S. investors and U.S. markets against "policy

Nevertheless, the conduct/effects tests are too broad in application, while *Morrison* scrutiny is too narrow in scope. Dodd-Frank only added further, and different, confusion among the circuits and district courts. The goal of the proposed amendment is to provide a simpler basis for courts in determining when and how to apply U.S. securities laws abroad to protect U.S. investors, preserve U.S. capital markets, and maintain the integrity of the territory of the United States, including its global image and reputation.

IV. A PROPOSED SOLUTION

Part IV presents the proposed draft amendment to Section 929P(b), the significance of which is apparent within its three major variations: (1) U.S. investors, including U.S. citizens or U.S. residents, will have a private right of action in U.S. courts if the more narrowed conduct/effects tests are satisfied, which applies to the purchase or sale on either domestic or foreign exchanges; (2) foreign investors on U.S. exchanges may have enforcement actions brought by SEC/DOJ if no international principles are violated or, if no proceeding is initiated, may petition that the SEC/DOJ bring such an action if in the best interests of the United States and it aligns with the goals of the amendment; and (3) foreign-cubed transactions are properly dismissed, assuming the SEC/DOJ determine there are no pressing implications on, within, or about the United States.

Aside from the significance of the amendment, the proposed draft addresses the following provisions, thus beginning a new era of securities regulation: (1) geographic scope; (2) clear statement; and (3) standard.

A. Geographic Scope

While there are strong arguments in support of either subject matter jurisdiction[176] or a merits-based approach[177] for transnational securities fraud cases, the Act must reach the substantive transaction of the an-

issues such as international political harmony and market efficiency"); *see also* Reuveni, *supra* note 39, at 1133-34 (proposing that the extraterritorial scope of the securities laws is not properly a matter of jurisdiction, but rather a question of statutory standing that asks whether "Congress intended for the relevant statute to reach extraterritorial conduct"); *see also* David Michaels, *Subject Matter Jurisdiction Over Transnational Securities Fraud: A Suggested Roadmap to the New Standard of Reasonableness*, 71 Cornell L. Rev. 919, 947-48 (1986) (arguing for a standard of reasonableness that first determines whether the United States is most implicated either because "most of the relevant conduct occurred there or because most of the effects were felt there" and then, if it is not so clearly implicated, determine whether a "conflict in relevant regulatory policies or the expectations of the parties justify accepting or rejecting American jurisdiction").

176. *See* Calhoun, *supra* note 27, at 726 (arguing that a broader scope of subject matter jurisdiction should be adopted in transnational securities fraud cases because it better "comports with the

tifraud provisions of the Exchange Act to achieve the most advantageous results. The Supreme Court's decision in *Arbaugh* noted the complexities of jurisdictionally and non-jurisdictionally worded statutes.[178] Its analysis is instructive:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Co*ngress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional* in character.[179]

As it currently stands, Dodd-Frank is purely jurisdictional because Congress "affirmatively includ[ed] the issue in subject-matter jurisdiction provisions," making the language "not a drafting error"[180] under the *Arbaugh* explanation. Instead, it is a matter of prescriptive (or legislative) jurisdiction, meaning the geographical reach of the statute establishes the cause of action.

Amending the statute to delete the present jurisdictional references and include the geographic and substantive reach of the antifraud provisions of the Exchange Act is consistent with prior case law[181] and the Restatement (Fourth) of Foreign Relations Law: Jurisdiction, Tentative Draft.[182]

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remedial purposes of the federal securities laws" and "allows victims of transnational securities fraud to have access to federal courts without having to prove the merits of their claims first").

177. *See* Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 83 n.8 (2009) (in rejecting an argument for subject-matter jurisdiction, the Court referred to the statute at issue and stated that "neither provision speaks in jurisdictional terms or refers in any way to the jurisdiction"); *see also* Litecubes, LLC v. N. Light Prods., 523 F.3d 1353, 1368 (Fed. Cir. 2008) (holding that when there is no indication that Congress intended the extraterritorial limitations on the scope of the statute to limit the subject matter jurisdiction of federal courts, "the issue is properly treated as an element of the claim which must be proven before relief can be granted, not a question of subject matter jurisdiction . . .").

178. Arbaugh v. Y & H Corp., 546 U.S. 500, 513-15 (2006).

179. *Id.* at 515-16 (emphasis added).

180. Painter, *supra* note 96, at 204 ("The statutory language thus turns the extraterritorial issue into a question of jurisdiction rather than of the merits . . . .").

181. *See* F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 164-65 (2004) (interpreting extraterritoriality of the statute based on legislative acts and the "rule of construction" in accordance with the principles of customary international law and the Restatement (Third) of Foreign Relations Law section 403 regarding the limits on prescriptive jurisdiction and acknowledging the "legitimate sovereign interests of other nations" in "today's highly interdependent commercial world" with consideration that such application of U.S. law to foreign conduct be "reasonable" and "consistent with principles of prescriptive comity").

182. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION §§ 201(3), 203-05, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) ("If the geographic scope of a federal

Such an approach makes sense since a presumption cannot be used in the first place where the statute does not reach substantive conduct.[183]

B. Clear Statement

Congressional intent to apply provisions extraterritorially must be explicitly stated. If Congress reflects its clear intent in the text of the statute, the Supreme Court and the lower courts would be bound to follow the will of Congress and would have to apply the new standard in cases involving the antifraud provisions brought by private U.S. claimants or proceedings initiated by the SEC/DOJ.

C. Standard

A modified conduct/effects tests should be reinstated only for actions brought by SEC/DOJ and U.S. citizens/residents; *Morrison's* transactional test should be abolished. The standard will cover the following details: the private right of action, the distinction between a U.S. investor and foreign investor, the importance of the responsibilities of the SEC/DOJ, the significance of respect for other sovereigns, and the maintenance of a strong international presence, while aiming to achieve a *sustainable-domestic-integrity* standard.

1. The Private Right of Action

The amendment should extend to private parties only if they are a U.S. citizen or U.S. resident. Private U.S. investors should not be prevented from bringing a claim against a foreign issuer and should not be limited to relief only when they buy/sell on domestic exchanges or other domestic transactions. The risk of foreign issuers escaping U.S. liability and deceiving U.S. investors will be greatly reduced under the proposed amendment.

The plaintiff's U.S. citizenship or U.S. residency should be more important than the location of the transaction and a codification should embody this notion. Claimants under this category will also have a higher burden

law is not clear, federal courts apply the principles of interpretation set forth in §§ 203-205," which directs courts to the following: "Presumption Against Extraterritoriality," "Reasonableness in Interpretation," and "Interpretation Consistent with International Law.").

183. *Id.* at § 203 cmt. a, pt. II, ch. 1 ("The presumption against extraterritoriality applies to substantive provisions of federal statutes. The presumption does not apply to provisions granting subject-matter jurisdiction to federal courts."); *see also* Ryngaert, *supra* note 9, at 71 ("[T]he presumption against extraterritoriality only applies to *substantive* statutes . . . and not to *jurisdictional* statutes, which are supposed to govern their own territorial scope.").

than proceedings brought by the SEC/DOJ to avoid frivolous lawsuits and save judicial resources.

The change expresses a strong U.S. interest in its own investors and markets by providing only U.S. citizens/residents with a private right of action under the antifraud provisions, while leaving any remaining action to the sound judgment of the SEC/DOJ.[184] Additionally, deferring to the reasonable construction of an administrative agency in discerning a silent or ambiguous statute has long been a part of our jurisprudence in determining whether deference is or should be required.[185]

2. U.S. v. Foreign Investors

Foreigners should not be able to bring a claim against a foreign issuer for foreign shares using the laws of the United States as opposed to their own country, since it may have serious foreign relations concerns and harm international efforts at cooperation and harmonization. A limit in this respect will avoid the potential abuse from the private right of action of foreigner investors or from global class action lawsuits. Private foreigners must rely on the laws of their own country, with the hope that these countries will in turn become more involved in the enforcement proceedings and the securities regulation within their own borders.

3. The Responsibilities of the SEC/DOJ

The proposed amendment does provide an opportunity for the foreign investor to seek U.S. relief. Foreign plaintiffs can petition the SEC/DOJ to take on their case. In turn, the SEC/DOJ may accept or decline after weighing competing concerns. This process prevents the potential of infringement on another sovereign's territory/nationals and guards against

184. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (stating that "private actions to enforce federal antifraud securities laws are an essential supplement" to enforcement proceedings brought by the SEC and DOJ, but cautioning that "[p]rivate securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals . . ."); *see also* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (stating that private rights of action under the securities laws are a "necessary supplement to Commission action").

185. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (noting that the question for the court is whether the agency gave a permissible construction); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 201 cmt. e, pt. II, ch. 1 (Am. Law Inst., Tentative Draft No. 2, 2016) (defining administrative interpretations and requiring deference with a reasonable agency construction); *see also* RYNGAERT, *supra* note 9, at 100 (noting that where the reasonableness analysis reveals that another State has a more legitimate jurisdictional case, "the former State may want to, or have to, defer").

the unjustified prevalence of foreign-cubed transaction where the United States has very little interest.[186]

There may be instances where it is better for the United States to "positively *assert* jurisdiction," rather than "*refrain* from exercising jurisdiction."[187] For example, if the SEC/DOJ determines there is a significant U.S. interest at stake, it is possible that not even a forum non conveniens argument will prevent U.S. law from applying extraterritorially,[188] even though it is typically invoked in foreign-cubed transactions.[189] In conclusion, if the SEC/DOJ reasonably determines that the conduct or effects within the United States falls within the standard outlined by the proposed amendment, they can bring the enforcement action against the foreign issuer.

4. Respecting Other Sovereigns and Maintaining International Presence

Under a *sustainable-domestic integrity* standard, the SEC/DOJ would be vested with the discretion to weigh competing factors and determine if domestic adjudication over the dispute is in best interests of the United States. Among such factors include analyses of comity, reasonableness, and deference. Overall, this standard is a higher burden than the conduct/effects tests, but not as overly burdensome and limited as *Morrison*.

The proposed amendment strives to increase global cooperation and motivate foreign nations to become involved in policing efforts and negotiations with United States, with a vision of serving as a significant step toward a multi-national treaty agreement on extraterritoriality in securities law.

186. *See* Ventoruzzo, *supra* note 87, at 407 (noting that the "conduct-effects approach excessively expanded the scope of the securities laws to cover transactions that the United States had little interest in regulating"); *see also* Beyea, *Transnational Securities Fraud*, *supra* note 112, at 144 (finding that foreign-cubed transactions are "predicated on transactions having little to do with the United States").

187. Ryngaert, *supra* note 9, at 44 (noting that there may be a "*positive* responsibility" to assert jurisdiction under a "more modern conception of international law as a law of cooperation").

188. *See In re* Corel Corp., Secs. Litig., 147 F. Supp. 2d 363, 367 (E.D. Pa. 2001) (rejecting a forum non conveniens argument based on the United States' "local interest" in maintaining the integrity of U.S. markets and protecting U.S. investors and the fact that domestic courts may be "more congested" than the alternative foreign court is irrelevant since the case can be adjudicated "without undue administrative difficulties").

189. *See* Extraterritoriality and Collective Redress, *supra* note 55, at 373 (noting that foreign-cubed cases – involving foreign plaintiffs, foreign defendants, and foreign law - are likely candidates for a forum non conveniens dismissal).

5. The Sustainable-Domestic-Integrity Standard in the Amendment

After considering these factors, the proposed wording of Dodd-Frank, Section 929P(b) would appropriately be re-drafted as follows, emphasis added to reflect the above reasoning:

> (b) EXTRATERRITORIAL ***APPLICATION***: Sustainable-Domestic-Integrity – The district courts of the United States and the United States courts of any Territory shall have jurisdiction ***and the antifraud provisions of the Exchange Act shall apply to and geographically reach*** any person under this title dealing with a fraudulent transaction in any proceeding, in law or equity, brought by –
>
> (1) A ***citizen of the United States and/or resident of the United States*** alleging a violation of the antifraud provisions which apply under this Act, involving –
>
> (a) ***material conduct*** occurring within the territory of the United States that constitutes significant steps in furtherance of the violation for which ***irrevocable liability***[190] ***is incurred***, even if the securities transaction occurs outside the United States and involves a claim against domestic and/or foreign issuers; or
>
> (b) ***material conduct*** occurring outside the territory of the United States that has a foreseeable substantial effect within the United States for which is ***reasonably likely to prevail***.
>
> (2) The Commission or the United States initiating an enforcement proceeding ***either against a domestic and/or foreign issuer or on behalf of a request of a domestic and/or foreign investor*** alleging a violation of the antifraud provisions of this Act involving—
>
> (a) conduct within the territory of the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves a claim with ***domestic and/or foreign issuers and/or investors***, for ***injury reasonably likely upon*** –
>
> (1) ***U.S. investors***;
>
> (2) ***U.S. capital markets***; or
>
> (3) the ***integrity*** of the territory of the United States; or

190. "Irrevocable liability," as adapted from the standard articulated in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012).

> (b) conduct occurring outside the territory of the United States that has a foreseeable substantial effect within the United States, ***for injury reasonably likely upon*** –
>
> (1) ***U.S. investors***;
>
> (2) ***U.S. capital markets***; or
>
> (3) the ***integrity*** of the territory of the United States; or
>
> – for which the Commission or the United States makes a ***reasonable judgment that such proceeding does not harm the interests of a foreign sovereign***, which may under certain circumstances have a greater interest, and is ***consistent with modern international law principles*** including, but not limited to, ***comity, reasonableness, and deference***; cases for which U.S adjudication ***may impair*** these principles at the reasonable judgment of the Commission or the United States will be ***dismissed***, absent ***compelling circumstances*** to the contrary.

V. APPLICATION IN A NEW ERA

For Part V, the hypothetical at the beginning of this study will be revisited. With the proposed amendment, *Morrison* is effectively nullified; thus, courts would be faced with the new provisions outlined in the amendment. First, the amendment does not contain jurisdictional language and specifically outlines that it reaches the substantive provisions of the Act. In fact, the text specifically reads "*the antifraud provisions of the Exchange Act shall apply to and geographically reach . . . .*" Second, there is clear indication of congressional intent to apply the U.S. law extraterritorially, which is evidenced in the title, "*Extraterritorial Application.*" Lastly, courts will use the *sustainable-domestic-integrity* standard, which is a higher standard than the conduct/effects tests, but not as narrow as the transactional test.

In the hypothetical, because the proceeding is brought by the SEC/DOJ, courts would analyze the complaint under the *sustainable-domestic-integrity* standard by following the elements in the statute to see if it states a cause of action; for example, if there is "*conduct . . . in furtherance of the violation*" or "*conduct . . . that has a foreseeable substantial effect"* for *"injury reasonably likely*" to "*U.S. investors*," "*U.S. capital markets*," or "*the integrity of the territory of the United States*." If these are insufficiently alleged, the claim will be dismissed *for failure to state a claim*, not for lack of subject matter jurisdiction. However, because it is the SEC/DOJ bringing the claim, they are usually given more deference

and, because of their position, have a lower burden of proof than private U.S. claimants.

Thus, there are no longer two different standards to apply, only one. Because of the substantial fraudulent conduct occurring in the United States and direct harm to U.S. investors, courts can reasonably find that extraterritorial application would be appropriate.

VI. CONCLUSION

In considering modern securities laws, the advancement of technology in global business transactions, and the basic principles of international law – including comity, reasonableness, and deference – extraterritoriality will continue to be of great significance. The optimal approach to a clearer, more consistent standard in determining the extraterritorial reach of the antifraud provisions of U.S. securities laws is to amend Dodd-Frank by codifying a modified and more restrained version of the conduct/effects tests in which courts would look to prescriptive jurisdiction under international law to discern congressional intent and, upon a finding of clear congressional indication from the text and additional tools of statutory construction, employ no presumption at all, absent other compelling reasons to refuse jurisdiction.

The *sustainable-domestic-integrity* standard would geographically reach the substance of the transaction, provide a clear indication of the express will of Congress, and create a standard that promotes the private right of action for U.S. claimants, maintains healthy foreign relations with other sovereigns, and leaves the remaining claims to the reasonable judgment of the SEC/DOJ. It is an important stepping stone designed to increase enforcement efforts and harmony among the international community and pave the way for a multi-lateral treaty agreement on extraterritoriality in securities regulation.

APPENDIX A

PRE-*MORRISON* CASE LAW

While the territoriality principle was premised on the "law of nations" in early cases, modern cases do not even reference international law but instead seek to ascertain the intent of Congress.[1] The presumption against extraterritoriality provides that where there is ambiguity in a statute, courts begin with the presumption that Congress intended the law to apply only within the United States and then "search for disconfirming evidence."[2]

In the early nineteenth century, courts put great emphasis on the territoriality principle.[3] Traditionally, a nation's laws can only be enforced if the violation took place within the nation's sovereign territory. Federal law applied only within the "full and absolute territorial jurisdiction" of the United States[4] and had "no force to control the sovereignty or rights of any other nation."[5] This era was characterized by tying the presumption to the restrictions imposed by international law, not to congressional intent.[6] Domestic courts have usually, though consistently, refused to apply U.S. law to conduct that occurred on foreign territory.[7] In the late nineteenth and early twentieth centuries, courts continued this approach.[8]

By the twentieth century, territorial jurisdiction started to expand. Domestic courts took a more flexible approach to the "principle of territorial exclusivity" in which courts have occasionally agreed to regulate disputes involving both U.S. and foreign conduct.[9] The most common and agreed upon reason for this flexible approach was the rising power of the United States relative to European states between the war.[10]

Beginning in the area of antitrust regulation, legislation was "prima facie territorial" with a limited scope[11] before judges broadened their approach to include U.S. adjudications of foreign agreements in restraint of trade,

1. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 65 (2d ed. 2015).
2. TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY 267 (Cambridge Univ. Press 2016).
3. *Id.* at 67.
4. The Schooner Exchange v. McFaddon, 11 U.S. 116, 137 (1812).
5. *Apollon*, 22 U.S. 362, 370 (1824).
6. See RYNGAERT, *supra* note 1, at 67.
7. See PUTNAM, *supra* note 2, at 20.
8. See RYNGAERT, *supra* note 1, at 68.
9. PUTNAM, *supra* note 2, at 21.
10. *Id.*
11. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

such as monopolies.[12] Nevertheless, courts always started with the assumption that "Congress is primarily concerned with domestic conditions."[13]

Around the mid-twentieth century, courts began to "shred the strict interpretation of territoriality."[14] This shift did not produce any sudden changes in U.S. jurisprudence; U.S. approaches to extraterritoriality took a more gradual approach, as U.S. law aimed towards social and civil rights was not as significant as extraterritoriality in the "economic sphere."[15] The presumption "fell into complete disuse in the post-1945 era only to be subsequently "revived following the end of the Cold War."[16]

While *Kook v. Crang* marked the first case to consider the extraterritoriality of securities laws (though dismissed),[17] it was not until 1963 that extraterritorial application was successful. This application was justified due to the need to "prevent fraud in the sale of securities and to minimize or prevent losses to investors."[18]

The effects developed before the conduct test. The effects test required that foreign conduct injure U.S. investors, making extraterritorial application "necessary to protect American investors."[19] However, action in the United States was not necessary when jurisdiction is "predicated on a direct effect,"[20] though courts have sometimes considered "international comity and fairness" before applying domestic law abroad.[21] Throughout the years, courts have relied on additional factors such as the "adverse impact on domestic securities markets,"[22] "aiding and abetting a deception,"[23] and other aspects "largely based upon policy considerations"[24] in analyzing extraterritoriality under the effects test.

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12. United States v. Aluminum Co. of America, 148 F.2d 416, 427, 431 (2d Cir. 1945).
13. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).
14. RYNGAERT, *supra* note 1, at 68.
15. PUTNAM, *supra* note 2, at 23.
16. *Id.* at 267.
17. 182 F. Supp. 388, 391 (S.D.N.Y. 1960).
18. Securities & Exchange Com. v. Gulf Intercontinental Finance Corp., 223 F. Supp. 987, 996 (S.D. Fla. 1963).
19. Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968).
20. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 991 (2d Cir. 1975).
21. Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 615 (9th Cir. 1976).
22. Des Brisay v. Goldfield Corp., 549 F.2d 133, 134 (9th Cir. 1977).
23. IIT, International Inv. Trust v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980).
24. Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979).

The conduct test required that the conduct in the United States constitute the "essential link" in the perpetration of the fraud; for example, that "substantial misrepresentations were made in the United States."[25] *Bersch* and *Vencap*, adjudicated on the same day, decided that more than "merely preparatory activities in the United States" is required,[26] while the "perpetration of fraudulent acts" is sufficient.[27] Judge Friendly in *Bersch* articulated a three-tiered test on the antifraud provisions of the 1934 Act in foreign securities: (1) American residents in the United States must show acts of "material importance" occurring in the United States; (2) American residents abroad must show acts of "material importance" occurring in the United States that "significantly contributed" to the fraud; and (3) foreigners must show actual fraudulent acts that "directly caused" their losses.[28]

Thus, up to this point, courts have incorporated policy justifications in their opinions, namely, the protection of American investors and the protection and integrity of U.S. security markets. However, this scope of this approach was greatly expanded in *Kasser*.[29]

In *Kasser*, the Court moved away from the mere prepatory to substantially material continuum of *Bersch* and *Vencap* and developed a quantitative approach that justified series of policy considerations.[30] Although the fraud had little to no direct impact on American investors, the Court found jurisdiction based on the defendant's activities carried out in the United States.[31] This case was a significant extension of securities laws in the international context because jurisdiction was found despite the lack of domestic impact and little domestic conduct. It was justified on the theories of protecting American investors by enforcing high standards of regulations and preventing America from turning into a "'Barbary Coast' . . . harboring international securities 'pirates.'"[32] In addition to the goals of protecting American investors and U.S. markets, the opinion closes with the court's additional policy justification to ensure the "*high standards of conduct in securities transactions within this*

25. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1335, 1337 (2d Cir. 1972).

26. *Bersch*, 519 F.2d at 992.

27. IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975).

28. *Bersch*, 519 F.2d at 993.

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

30. *Id.* at 116.

31. *Id.* at 110, 115.

32. *Id.* at 116.

country in addition to protecting domestic markets and investors from the effects of fraud."[33]

Changes to the U.S. extraterritoriality approach began occurring in the 1980s and 1990s.[34] The Second Circuit soon became the nationwide leader at securities litigation, with other circuits adopting the same approach or formulating different approaches; for example, simply because they "feel constrained to do likewise."[35] The D.C. Circuit was the most restrictive circuit, requiring that the domestic conduct comprise "all the elements of a defendant's conduct necessary to establish a violation of section 10 (b) and Rule 10b-5."[36]

History demonstrated that the "presumption against extraterritoriality" has been inconsistent and uneven at first, and then almost completely disregarded in later decades.[37] Throughout the 1990s, the Supreme Court continued to reaffirm the presumption against extraterritoriality despite opposing arguments. In the early 1990s, the Supreme Court "revived a robust version" of the presumption after decades of not using it.[38]

The Supreme Court has noted that the presumption against extraterritoriality is a longstanding principle of American law and that Congress is primarily concerned with domestic decisions.[39] Such an analysis is a matter of statutory construction and if Congress wishes to apply a statute extraterritoriality, it could amend the statute.[40] In this era, the Supreme Court put forth a strict approach to the presumption against extraterritoriality, indicating that a clear statement of Congress's affirmative intention in the statute's text was necessary to overcome the presumption.[41]

The U.S. courts, even the Supreme Court, began to favor a "case-by-case" approach.[42] However, there were still great debates and inconsistencies regarding the use of the presumption.[43] While the Supreme Court held in 1993 that the Sherman Act applies extraterritorially to foreign conduct and was not subject to the presumption, despite Justice Scalia's

33. *Id.* (emphasis added).
34. *See* PUTNAM, *supra* note 2, at 23.
35. AVC Nederland B.V. v. Atrium Inv. Pshp., 740 F.2d 148, 153 (2d Cir. 1984).
36. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987).
37. *See* PUTNAM, *supra* note 2, at 23.
38. *Id.* at 267.
39. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).
40. *Id.* at 248, 259.
41. *Id.* at 248.
42. *See* PUTNAM, *supra* note 2, at 24.
43. *Id.*

dissent to the contrary,[44] it moved away from this position about ten years later, concluding that "independent foreign harm" is not covered by the Sherman Act.[45] Thus, the Supreme Court has regarded the presumption as "a critical factor" in prior cases and "conspicuously ignored" it in later cases.[46]

Nevertheless, Section 10(b) claims moved forward where the fraudulent scheme was "masterminded and implemented" in the United States[47] or "(1) significant and (2) substantial or material to the larger scheme."[48] This confusion paved the way for *Morrison*'s reasoning.

Under modern U.S. law, territoriality is not grounded upon international law, but rather based on "Congress's primary concern with domestic conditions."[49] This rationale is demonstrated in *Morrison* as well. The opinion contains few references to international law or comity; conversely, it is "centered almost entirely on ascertaining the intent of the U.S. Congress."[50] Questions regarding how, when, and if domestic laws apply extraterritorially will increase in both "frequency and in importance in contexts beyond the United States."[51]

Pre-*Morrison* Circuit Split

The following chart represents the three-way circuit split that existed prior to *Morrison*. Each group of circuits have articulated specific formulations for determining the extraterritoriality of U.S. securities laws, with each test grounded on different criteria. Michael J. Calhoun nicely categorizes the three-way split among the "Restrictive Conduct Approach: Actual Violation;" "Broad Conduct Approach: Lesser Quantum of Domestic Conduct;" and "Balancing Conduct Approach: Higher Quantum of Domestic Conduct."[52]

44. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 796, 814, 818-20 (1993).

45. F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 159 (2004).

46. Putnam, *supra* note 2, at 24.

47. SEC v. Berger, 322 F.3d 187, 194 (2d Cir. 2003).

48. *In re* Cable & Wireless, 321 F. Supp. 2d 749, 763 (E.D. Va. 2004).

49. Ryngaert, *supra* note 1, at 68.

50. *Id.* at 85.

51. Putnam, *supra* note 2, at 277.

52. Michael J. Calhoun, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 Loy. U. Chi. L.J. 679, 698, 700, 708 (1999).

Pre-Morrison Circuit Split → The "Conduct/Effects" Tests		
Restrictive Application	**Broad Application**	**Balanced Application**
D.C. Court of Appeals	Third, Eighth, & Ninth Circuits	Second, Fifth, & Seventh Circuits
D.C. Circuit: The domestic conduct alone must constitute an actual violation of the securities laws by satisfying all the elements for a cause of action under Section 10(b) and Rule 10b-5.[53]	**Third Circuit**: At least some activity that relates to the transnational fraud scheme must occur in the United States.[54] **Eighth Circuit**: In a transnational fraud case, there must be "significant conduct" in the United States regarding the alleged wrongdoing.[55] **Ninth Circuit**: The conduct at issue must be more than merely preparatory; the execution of an agreement in the United States will weigh in favor of U.S. jurisdiction.[56]	**Second Circuit**: Courts have jurisdiction where there is "substantial and material activity" and the antifraud provisions may regulate transactions that occur on foreign markets or that involve securities not registered under the Exchange Act.[57] Courts have also applied a multi-factoral approach in determining the extent to which U.S. federal securities laws will apply to transnational transactions.[58] **Fifth Circuit**: Jurisdiction "turns on the facts" in transnational securities fraud cases;[59] where events occurring in the United States are the "key events," jurisdiction may be proper.[60] **Seventh Circuit**: Articulated the "balancing approach" that required that the conduct occurring in the United States constitute a "substantial part" of the fraud and be "material to its success."[61]

POST-*MORRISON* CASE LAW

Judicial decisions following *Morrison* have been anything but consistent. Not only do courts discern congressional intent, but now they must discern *Morrison*'s legacy. Despite these shortcomings, there have been several less complex cases following *Morrison*. For example, lower courts have held that the purchase of foreign shares on a foreign ex-

53. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987); Calhoun, *supra* note 52, at 698.

54. SEC v. Kasser, 548 F.2d 109, 144 (3d Cir. 1977); Calhoun, *supra* note 52, at 705.

55. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972); Calhoun, *supra* note 52, at 701.

56. Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983); Calhoun, *supra* note 52, at 708.

57. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 986, 992-93 (2d Cir. 1975); Calhoun, *supra* note 52, at 710-11.

58. IIT v. Vencap, Ltd., 519 F.2d 1001, 1003-04 (2d Cir. 1975); Calhoun, *supra* note 52, at 712.

59. MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 173 (5th Cir. 1990); Calhoun, *supra* note 52, at 716.

60. Robinson v. TCI/US W. Cable Communications Inc., 117 F.3d 900, 907 (5th Cir. 1997); Calhoun, *supra* note 52, at 714.

61. Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); Calhoun, *supra* note 52, at 719.

change electronically from the United States is insufficient to maintain a cause of action against a foreign defendant.[62]

The same reasoning also applies to the holding that securities listed on a domestic exchange is not enough; the transaction must actually occur on the domestic exchange.[63] Following this analysis, a Section 10(b) action cannot apply to securities that are cross-listed on domestic and foreign exchanges where the purchase, sale, and trading do not arise from the domestic listing.[64]

A strict presumption against extraterritoriality, which had been revitalized by *Morrison*, has been extended to foreign-squared transactions[65] – involving domestic investors suing foreign issuers based on a foreign securities transaction – and criminal liability under Section 10(b) of the Exchange Act,[66] so that they do not apply extraterritorially. Furthermore, while some courts have held that domestic securities or domestic transactions in other securities is "necessary" under *Morrison*, but "not alone sufficient" to state a claim under the Exchange Act,[67] others have stated that it is sufficient where the offenses committed abroad violate a "predicate statute for which the presumption against extraterritoriality has been overcome."[68]

Other cases have not been so simple, especially when courts are faced with novel fact-patterns and other narrow circumstances that *Morrison* could not have contemplated. For example, a transaction on a domestic "over-the counter securities market"[69] that trades via dealers satisfies *Morrison*'s first prong (domestic exchanges). Also, a domestic transaction in unlisted securities where the buyer or the seller works with "U.S. market makers acting as intermediaries for foreign entities"[70] satisfies *Morrison*'s second prong (domestic transactions in other securities) and a transaction not traded on a domestic exchange is also domestic under

62. Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010).

63. *In re* Royal Bank of Scot. Group PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011).

64. *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 531 (S.D.N.Y. 2011).

65. *In re* UBS Sec. Litig., 2011 U.S. Dist. LEXIS 106274, at *22-23 (S.D.N.Y. Sept. 13, 2011).

66. United States v. Vilar, 729 F.3d 62, 67 (2d Cir. 2013).

67. Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 215 (2d Cir. 2014).

68. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2102 (2016).

69. SEC v. Ficeto, 839 F. Supp. 2d 1101, 1107-08 (C.D. Cal. 2011).

70. United States v. Georgiou, 777 F.3d 125, 130 (3d Cir. 2015).

the second prong if "irrevocable liability is incurred or title passes with the United States."[71]

Cases have been even more troubling where either the parties or the courts have raised Dodd-Frank concerns. For example, even though irrelevant to its holding, one district court acknowledged that "Congress explicitly granted federal courts extraterritorial jurisdiction" in Dodd-Frank,[72] while another district court stated that parties should be able to argue the "possible application of the Dodd-Frank Wall Street Reform and Consumer Protection Act."[73]

More explicit opinions have noted that Dodd-Frank "may demonstrate the Congressional intent for the extraterritorial application of certain provisions of the federal securities laws that the *Morrison* court found lacking"[74] and have even declined to resolve the *Morrison*/Dodd-Frank inconsistency in cases where the "SEC has stated a claim under either inquiry."[75] That reasoning demonstrates how complicated this matter can become when congressional guidance is lacking.

The table below displays when and under what circumstances extraterritoriality was applied under the various tests used by our courts in the past and how it should be under the *sustainable-domestic-integrity* standard. For each example for which it is relevant, assume the following:

Given

1. All investors satisfy the jurisdictional requirements.
2. The facts would not result in different outcomes among the pre-*Morrison* circuit split.
3. The investors who buy on a foreign exchange do not meet any criteria to qualify for a domestic transaction in other securities under *Morrison*'s second prong.
4. All private claimants can satisfy their burden under the applicable standard.
5. All stock is dually listed.
6. The issuers are either based in the United States or abroad.

71. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

72. Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620, 627 n.3 (S.D.N.Y. 2010).

73. United States v. Coffman, 771 F. Supp. 2d 735, 737 (E.D. Ky. 2011).

74. SEC v. Compania Internacional Financiera S.A., 2011 U.S. Dist. LEXIS 83424, *19 n.2 (S.D.N.Y. July 29, 2011).

75. United States SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 908 (N.D. Ill. 2013) (referring to *Morrison*'s transactional test and Dodd-Frank's conduct/effects tests by the words "either inquiry").

Likelihood of Extraterritorial Application of U.S. Securities Laws					
		Conduct/ Effects Test*	***Morrison*'s Transactional Test**	***Morrison*/ Dodd-Frank****	**Sustainable-Domestic-Integrity**
1. U.S. Investor U.S. Transaction U.S. Issuer	Private Action?	**Yes**	**Yes**	**Yes**	**Yes**
	SEC/DOJ?	**Yes**	**Yes**	**Yes**	**Yes**
2. U.S. Investor U.S. Transaction Foreign Issuer	Private Action?	**Yes**	**Yes**	**Yes**	**Yes**
	SEC/DOJ?	**Yes**	**Yes**	**Yes**	**Yes**
3. U.S. Investor Foreign Transaction Foreign Issuer	Private Action?	**Yes**	**No**	**No**	**Yes**
	SEC/DOJ?	**Yes**	**No**	**Yes**	**Yes**
4. U.S. Investor Foreign Transaction U.S. Issuer	Private Action?	**Yes**	**No**	**No**	**Yes**
	SEC/DOJ?	**Yes**	**No**	**Yes**	**Yes**
5. Foreign Investor U.S. Transaction U.S. Issuer	Private Action?	**Yes**	**Yes**	**Yes**	**No*****
	SEC/DOJ?	**Yes**	**Yes**	**Yes**	**Yes**
6. Foreign Investor Foreign Transaction U.S. Issuer	Private Action?	**Yes**	**No**	**No**	**No*****
	SEC/DOJ?	**Yes**	**No**	**Yes**	**Yes**
7. Foreign Investor U.S. Transaction Foreign Issuer	Private Action?	**Yes**	**Yes**	**Yes**	**No*****
	SEC/DOJ?	**Yes**	**Yes**	**Yes**	**Yes**
8. Foreign Investor Foreign Transaction Foreign Issuer	Private Action?	**Yes**	**No**	**No**	**No*****
	SEC/DOJ?	**Yes**	**No**	**Yes**	**No******

* usually sufficient if conduct is more than merely preparatory or at least one U.S. investor harmed
** assuming the court follows Dodd-Frank, not *Morrison*, in proceedings brought by the SEC/DOJ
*** unless SEC/DOJ takes case on behalf of foreign claimant & international comity not harmed
****unless SEC/DOJ determines risk of harm to the integrity of the territory of the United States

APPENDIX B

Results of the Study on the Cross-Border Scope of the Private Right of Action[1]

In Section 929P(b), Congress codified the conduct/effects tests and authorized the SEC/DOJ to bring enforcement proceedings under Section 10(b) in cases involving transnational securities fraud.[2] Section 929Y directed the Commission to conduct a study and solicit public comment to determine whether a private right of action should be extended.[3] This appendix displays its results and conclusions.

Results of the Comment Letters on the Transactional and Conduct/Effects Tests

Arguments in Favor of the Transactional Test[4]	**Arguments Against the Transactional Test**[5]	**Arguments in Favor of the Conduct/ Effects Tests**[6]	**Arguments Against the Conduct/Effects Tests**[7]
1. The conduct/ effects tests create significant conflicts with other nations' laws. 2. The conduct/ effects tests result in costly and abusive litigation. 3. The transactional test fosters market growth. 4. The bright-line standard allows issuers to reasonably predict their liability. 5. It respects international comity and sovereign interests.	1. The transactional test denies U.S. investors a private right of action. 2. It creates uncertainty about where a transaction occurs. 3. It impairs the ability of U.S. investment funds to diversify their portfolios. 4. It forecloses private actions for foreign transactions listed in the United States. 5. It arbitrarily disadvantages U.S. investors compared to foreign investors.	1. The conduct/effects tests promote investor protection through more vigorous enforcement of U.S. securities laws. 2. They draw more investment to the United States. 3. They reflect the economic realities of modern global businesses. 4. They ensure that fraudsters cannot avoid the reach of U.S. laws by arranging for the transaction to occur overseas. 5. They do not harm international comity.	1. The conduct/ effects tests impair U.S. relations with foreign nations because of the cross-border extension of U.S. law. 2. They reduce foreign direct investment in U.S. markets. 3. They increase litigation costs. 4. They divert judicial resources of the United States. 5. The tests are unnecessary, unpredictable, inappropriate, and redundant.

1. Sec. and Exch. Comm'n, Study on the Cross-Border Scope of the Private Right of Action Under Section 10(B) of the Securities Exchange Act of 1934 i (2012), *available at* http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.
2. *Id.* at 6.
3. *Id.* at 7.
4. *Id.* at 40-42.
5. *Id.* at 42-43, 45, 47-48.
6. *Id.* at 49-52.

Alternative Approaches by Comment Letters and Alternatives Recommended by the Staff

Alternative approaches proposed by the comment letters included the following: (1) "adoption of a conduct and effects tests that are limited to U.S. resident investors" and (2) "adoption of a fraud-in-the-inducement test."[8] The staff has also recommended additional options for consideration.[9] For the conduct/effects tests, the staff recommended to narrow the conduct test so that private plaintiffs would be required to demonstrate a direct injury.[10] For the transactional test, the staff presented the following options: (1) permit investors a private right of action for the purchase or sale of any security that is of the same class of securities registered in the United States, regardless of the transaction's location; (2) authorize a private action against intermediaries that engage in securities fraud while buying or selling overseas for U.S. investors; and (3) permit a private right of action if the investor can show that they were induced into the transaction, regardless of the transaction's location (a fraud in the inducement test).[11]

CONCLUSION

The study concluded by noting that securities litigation, whether addressed through "legislation, further judicial developments, or both," is still unsettled and "will be subject to further legal development in the years ahead" and that lower courts will be tasked with the responsibility to resolve the "difficult issues regarding the application of the new transactional test."[12]

7. *Id.* at 53-54.
8. *Id.* at 55, 57.
9. *Id.* at 58.
10. *Id.* at 60-62.
11. *Id.* at 64, 66-68.
12. *Id.* at 69-70.