



Morrison v. National Australia Bank

The Impact on Institutional Investors

Prepared by

Christian J. Ward

J. Campbell Barker

Yetter Coleman LLP

February 2012

This white paper was commissioned by the Council of Institutional Investors to educate its members, policymakers and the general public about the impact on institutional investors of the U.S. Supreme Court's decision in Morrison v. National Australia Bank. The views and opinions expressed in the paper do not necessarily represent the views or opinions of Council members, directors or staff.

Contents

Executive Summary	1
I. The Conduct and Effects Tests Before <i>Morrison</i>	3
II. <i>Morrison</i> and the Territorial Reach of U.S. Securities Law	5
III. Impact on Institutional Investors' Pursuit of Meritorious Claims	7
IV. Impact on Institutional Investors' Investment Options	10
V. Incentives for Issuers to Move Offshore	11
VI. Government Agencies' Extraterritorial Enforcement Authority	12
VII. Recommendations	13
Endnotes	18



Council of Institutional Investors
The Voice of Corporate Governance

Executive Summary

American securities law is at an important crossroads, and the direction it takes will affect investors well into the future. For decades, federal securities law protected U.S. domiciled and citizen investors against fraud affecting the securities they purchased, even if purchased on foreign markets. Under the longstanding conduct and effects tests, the antifraud provisions of U.S. securities law covered all conduct that injured American investors. Fraudsters could not escape a private right of action for securities fraud by consummating a transaction abroad.

The U.S. Supreme Court's June 2010 ruling in *Morrison v. National Australia Bank*¹ changed the landscape for U.S. investors. In *Morrison*—a dispute about the territorial reach of the antifraud provisions of U.S. securities law—the Supreme Court rejected four decades of federal court jurisprudence applying the conduct and effects tests and adopted a new rule that focuses narrowly on the location where securities were purchased and sold. Under prior law, if the fraud involved conduct in the United States or had an effect in the United States, victims had a private right to bring suit. Under *Morrison*'s new test, so long as the fraud relates to securities that trade only on foreign exchanges or other foreign platforms, no amount of harm to American investors triggers the antifraud protection of U.S. securities law, even if investors submitted their orders from the United States.

Morrison thus alters the risk profile of foreign investments, stripping institutional and other private investors of the significant protection previously afforded by federal securities law. After *Morrison*, Congress restored the conduct and effects tests as the jurisdictional limit of antifraud actions brought by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), but it has so far not created a corresponding private right of action.

The current state of U.S. securities law presents significant concerns for institutional investors. Those investors are among America's largest shareowners, and many routinely invest according to modern portfolio theory, which requires diversification of investments for the greatest return at the most responsible level of risk. In the global economy, diversification requires substantial investment in foreign stocks and other foreign securities. Accordingly, U.S. institutional investors have significant foreign equity holdings.

Reliance on government action alone to recover American investors' losses from transnational securities fraud is insufficient. The SEC is underfunded and overburdened, and private causes of action recover far more for defrauded investors than does the government. Thus, courts and the SEC itself have recognized that a private right of action is a vital tool for deterring and combating securities fraud. That is particularly true with respect to fraud involving complex international transactions, which can be among the most difficult to investigate.

Extending the private right of action to all securities fraud that affects U.S. investors, regardless of where the securities transaction settles, best comports with investors' expectations and allows recovery for domestic harm. Investors buying and selling securities from the United States reasonably expect protection for fraud affecting them, even if the trade occurs on an overseas exchange. And the benefits of restoring a private right of action for fraud in connection with foreign securities transactions outweigh the costs.

In addition to permitting greater recoveries for defrauded investors, a private right of action promotes more efficient capital markets by enhancing investors' confidence in the truth of financial disclosures. That, in turn, improves capital allocation and fosters higher growth. And it is not at all clear that a private right of action would engender any more substantive conflict between the securities laws of the United States and those of other countries than would *Morrison*'s transactional test or that it would upset international comity.

Importantly, restoring a private right of action for fraud in connection with foreign transactions would be more in sync with the reality of today's global markets than *Morrison's* transactional test. In the capital markets today, an investor may not even know whether a transaction is routed through a domestic exchange or a foreign one. A private right of action relieves American investors from the burdens—and probable loss of substantive and procedural protections—involved in using foreign courts to litigate over domestic losses.

Further, Congress should consider a new private right of action extending to foreign investors (those who are not U.S. citizens or domiciled in the United States) who purchased their shares on a foreign stock exchange. Policing domestic conduct that plays a clear and direct part in causing a foreign injury can promote ethical conduct in a way that benefits all investors. Moreover, many transnational securities frauds involving foreign-traded securities injure both domestic and foreign investors, meaning that domestic investors would have a private right of action if the effects test is restored.

Securities law already allows injured investors to bring a private right of action for fraud in connection with domestic transactions. Restoring the scope of the private right of action to encompass all fraud that harms U.S. investors does no more than afford them the protection of their own country's laws. And doing so will have far-reaching net benefits. Congress should adopt an effects test to define the territorial reach of the Section 10(b) private right of action. Congress should also clarify the nature and extent of domestic conduct required to allow foreign investors to sue defendants over the foreign sale of stock. All investors will benefit from these reforms.

The Conduct and Effects Tests Before *Morrison*

Since the 1930s, companies that commit fraud in the sale of their securities have been liable to private investors under the U.S. securities laws, which include a number of remedies for investors who are injured by violations of the laws. The most prominent is Section 10(b) of the Securities Exchange Act,² implemented by SEC Rule 10b-5,³ which prohibits material misrepresentations or omissions and fraudulent conduct and provides a general antifraud remedy for purchasers and sellers of securities.

Under a longstanding private right of action, investors who have been the victim of securities fraud can sue the issuer of the security under Section 10(b) and Rule 10b-5. Section 10(b) does not contain any textual limitation on its territorial scope, and for decades, the federal courts of appeals applied a conduct test and an effects test to determine whether a fraud with foreign elements fell within the statute's territorial reach.⁴ Under those tests, Section 10(b) applied if the conduct underlying the claim occurred in the United States (the conduct test) or had some effect on American securities markets or investors (the effects test).⁵ By focusing on where the wrongful conduct occurred and whether that wrongful conduct had a substantial effect in the United States or on U.S. citizens, the law utilized American resources to address conduct that presents substantial domestic concerns.⁶

The effects test protected American investors against securities fraud causing domestic injury.

The federal courts of appeals almost universally agreed that, under the effects test, Section 10(b) applied if the plaintiff investor was a U.S. entity, regardless of whether the securities transaction occurred abroad. In the 1975 Second Circuit case of *Bersch v. Drexel Firestone, Inc.*, Judge Friendly explained that “the anti-fraud provisions of the federal securities laws ‘[a]pply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country.’”⁷ Similarly, in 1987, the D.C. Circuit court of appeals noted that relief was available in U.S. courts “whenever any individual is defrauded in this country, regardless of whether the offer originates somewhere else.”⁸

The effects test afforded American institutional investors significant protection against securities fraud that involved foreign elements. For almost all claims brought by American shareowners who purchased shares of foreign corporations on foreign exchanges, the investor's status as a U.S. entity showed the domestic injury necessary to trigger the protections of Section 10(b).⁹

Thus, prior to *Morrison*, U.S. securities law offered domestic investors robust protection against securities fraud with foreign elements. As Judge Friendly explained in delineating the scope of that protection: when U.S. investors are defrauded, Congress wished the “resources of United States courts and law enforcement agencies to be devoted to [even largely foreign transactions] rather than leave the problem to foreign countries.”¹⁰

By contrast, when the plaintiff was not a U.S. entity, courts often held that the effects test did not apply. For example, in *IIT v. Vencap, Ltd.*,¹¹ the Second Circuit considered whether a foreign investment trust that had U.S. investors could satisfy the effects test. In that case, the U.S. investors had chosen to delegate investment decisions to a foreign trustee, and only 0.2 percent (or about 300) of the trust's investors were Americans. The foreign trust sued foreign defendants

for selling allegedly fraudulent securities to the trust, and the Second Circuit held that the trust could not sue the foreign defendants under U.S. securities law because “the fraud was practiced not on individual Americans who purchased securities but on the trust in which they had invested.”¹²

The conduct test also promoted integrity in the securities industry.

Under pre-*Morrison* law, Section 10(b) also applied to fraudulent conduct occurring in this country even if the harm was felt abroad.¹³ That conduct test was satisfied when the conduct within the United States directly caused the claimed losses; the test was not satisfied when the domestic conduct was merely preparatory to a fraud committed elsewhere.¹⁴ Under that test, Section 10(b) would apply, for example, when fraudsters make misrepresentations from the United States,¹⁵ when the fraudulent scheme is run from the United States,¹⁶ or when the fraud is consummated in a transaction on United States markets.¹⁷ Section 10(b) would not apply, however, based simply on U.S. meetings or communications that are incidental to the fraud.¹⁸

That conduct test advances Section 10(b)'s purpose “to achieve a high standard of business ethics in the securities industry,”¹⁹ in order “to insure honest securities markets and thereby promote investor confidence.”²⁰ By ensuring that the United States is not used as a base to peddle frauds to foreign victims, that test gives investors at home confidence in American securities markets.²¹

***Morrison* and the Territorial Reach of U.S. Securities Law**

Morrison adopts a transactional test that focuses narrowly on where securities are purchased and sold.

In *Morrison*, the Supreme Court examined a so-called “foreign-cubed” or “f-cubed” action for securities fraud—a lawsuit by foreign plaintiffs, against a foreign defendant, concerning securities traded on a foreign exchange. The defendant, National Australia Bank, was a bank organized under the laws of Australia, and its ordinary shares (the equivalent of common stock) traded on Australian and other foreign stock exchanges, but not on any U.S. exchange. The plaintiffs were Australian purchasers of those ordinary shares. They complained that statements made by bank officials artificially inflated the share prices, and they alleged that the deceptive statements derived from misleading accounting used by one of the bank’s subsidiaries in the United States.²²

The Southern District of New York and the Second Circuit court of appeals applied the conduct and effects tests, holding that the action should be dismissed because it involved harm to only foreign investors and because the alleged fraudulent conduct in this country was too far removed from the alleged injury.²³

The Supreme Court affirmed the dismissal of the action, but on very different grounds. Jettisoning the longstanding conduct and effects tests, the Court adopted a test that focuses solely on the place where securities are purchased and sold. If the securities transaction occurs on a U.S. exchange or otherwise occurs in this country, the antifraud provisions of Section 10(b) apply. Those provisions do not apply, however, if the transaction does not occur in the United States. That holds regardless of the domestic effect of the fraud or the scope of domestic conduct in furtherance of the fraud.²⁴

The Court grounded its reasoning in the presumption against extraterritorial application of laws, which the Court stated could be rebutted only by some affirmative indication in the statute. Finding no such affirmative indication in the securities law, the Court held that the presumption against extraterritorial reach applies. Coupling that conclusion with its conclusion that the “focus” of Section 10(b) is on the purchase or sale of securities,²⁵ the Court held that domestic application of the statute means that it reaches “only transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”²⁶ The Court then applied that transactional test to hold that, because the transactions in the bank’s shares occurred abroad, Section 10(b) did not apply.²⁷

Congress expands the securities laws’ jurisdictional reach in government enforcement actions, but not in private actions.

One month after *Morrison*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.²⁸ In the act, Congress responded to *Morrison* by expanding the “extraterritorial jurisdiction of the antifraud provisions of the federal securities laws,” but only in actions brought by the SEC or the DOJ.²⁹ In such government enforcement actions, jurisdiction now exists over any violation of the antifraud provisions that involves:

(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.³⁰

Congress thus restored the traditional conduct and effects tests for government enforcement actions.³¹

Congress did not, however, change the reach of the private right of action under Section 10(b). Instead, Congress directed the SEC to conduct a study and report on whether the private right of action should have the same territorial scope as a right of action by the government.³² Thus, even after Dodd-Frank, *Morrison's* narrow transactional test defines the territorial reach of the private right of action under Section 10(b) for securities fraud.

Impact on Institutional Investors' Pursuit of Meritorious Claims

For more than four decades, the primary private remedy for fraud in connection with the purchase and sale of securities has been the right of action under Section 10(b)³³ and Rule 10b-5.³⁴ Rule 10b-5 has been used to recover for false statements made by corporations and corporate officers, manipulative trading that artificially inflates stock prices, and insider trading—perhaps the rule's most well-known use.

Although U.S. securities law contains other antifraud provisions, none have the breadth and utility to investors of Section 10(b). For example, although Section 17(a) of the 1933 Securities Act outlaws fraud in the offering of securities, it is generally accepted that no private right of action exists under Section 17(a).³⁵ Likewise, although *Morrison* does not affect the government's use of mail and wire fraud statutes to prosecute transnational securities fraud,³⁶ there is no private right of action under those statutes.³⁷ Other provisions of federal securities law prohibit fraud in certain contexts, but they do not afford the broad protection of Section 10(b) and Rule 10b-5.³⁸

Accordingly, the reach of Section 10(b) has “a tremendous impact on a broad spectrum of securities litigation,”³⁹ and the limitation on its reach seriously affects investors' remedies for fraud. In the year and half since *Morrison*, lower courts have applied *Morrison* to limit the scope of Section 10(b) in the following ways:

Stocks traded on a foreign exchange. *Morrison* involved foreign purchasers and therefore economic harm felt in foreign countries, but courts have universally applied *Morrison*'s transactional test to hold that American purchasers of stock on a foreign exchange have no protection under Section 10(b) against securities fraud. Even if investors place their purchase from the United States with a U.S. broker, courts have ruled that the transaction is not “domestic” if it settles on a foreign exchange.⁴⁰

A representative case is *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*,⁴¹ which involved a U.S. pension fund that had purchased the stock of a Swiss corporation on a foreign exchange. The pension fund subsequently filed an action under Section 10(b), alleging that the corporation and two of its senior officers misled investors about the company's business fundamentals. But although the fund placed its stock orders in the United States, and although the economic harm was felt in the United States, the district court dismissed the claim under *Morrison* because the company's stock transacted on a foreign exchange.⁴²

Courts also have applied that limitation in the context of companies that dually list their shares on foreign and domestic exchanges, holding that only parties who purchased on the domestic exchange may invoke Section 10(b). Investors who purchased on the foreign exchange have argued for Section 10(b) protection because they purchased the same type of shares that transact in the United States. District courts, however, have applied *Morrison* to hold that Section 10(b)'s antifraud provisions extend only to parties to a purchase or sale that occurs domestically.⁴³

Off-exchange transactions. When parties buy or sell securities off-exchange, courts applying *Morrison*'s transactional test have generally looked to the location where liability on the transaction became irrevocable to determine whether Section 10(b) applies.

For example, in *SEC v. Goldman Sachs & Co.*,⁴⁴ the district court considered an alleged fraudulent scheme that included mailing misleading marketing materials to the victim in the United States and sending emails to the victim in the United States encouraging purchase of the securities.⁴⁵ (Because the claim arose before the Dodd-Frank Act, *Morrison* limited the SEC's enforcement authority in the same way that it currently limits private investors.) The defendant, however, used

a foreign affiliate to close the transaction overseas. The SEC argued that the location of the securities transaction for purposes of *Morrison* should be determined by looking to the entire selling process. But the district court concluded that the location of the sale is defined by the place where “irrevocable liability” attached and that irrevocable liability was not shown to have attached in the United States.⁴⁶ Accordingly, the court dismissed the SEC’s Section 10(b) claims.

Other courts have likewise applied an irrevocable-liability test to hold that Section 10(b) affords investors no remedy for fraud in connection with an off-exchange securities transaction because the transaction occurred overseas.⁴⁷

American Depositary Receipts. An American Depositary Receipt (ADR) is a security traded in the United States that represents the right to receive the shares of a foreign company. It is a way for foreign companies to raise capital in the United States and for American investors to earn dividends on foreign stock without engaging in a cross-border and cross-currency transaction. U.S.-based depository banks hold the foreign company’s shares in custody overseas, and the banks convert dividends and other proceeds into U.S. currency for the ADR holders. ADRs are securities that may be listed on any of the major American exchanges or may be traded in over-the-counter markets; their price typically fluctuates with the price of the foreign shares. They are a substantial market in the United States—the value of ADRs bought and sold each year is in the hundreds of billions of dollars.⁴⁸

Morrison noted that National Australia Bank’s shares traded through ADRs on an American exchange, but the Supreme Court did not expressly resolve whether investors who buy and sell ADRs on domestic exchanges are protected by Section 10(b).⁴⁹ The lower courts have held that when investors buy ADRs on an American stock exchange, such as the New York Stock Exchange, Section 10(b) applies under *Morrison*’s transactional test because the purchase or sale is domestic.⁵⁰

One district court decision, however, holds that Section 10(b) does not apply to the purchase of ADRs on a domestic over-the-counter market. In *In re Société Générale Securities Litigation*,⁵¹ the court reasoned that the purchase of ADRs is a “predominantly foreign” transaction because the security gives its owner the right to receive shares of a foreign company.⁵² The court found it relevant that the ADRs at issue were not “traded on an official American securities exchange,”⁵³ although the court did not explain why the purchase of ADRs in an over-the-counter market in this country does not qualify as a domestic transaction. The court’s decision was not appealed and has not been followed, and it appears to be an outlier. Nonetheless, its existence creates some risk that courts applying *Morrison* will deny the antifraud protection of Section 10(b) to American investors who buy ADRs in an over-the-counter (off-exchange) market in the United States.

Equity swaps. Another possible limit on institutional investors’ ability to pursue meritorious claims stems from the Southern District of New York’s decision in *Elliott Associates v. Porsche Automobil Holdings SE*.⁵⁴ The security involved in that case was an equity swap—a privately negotiated contract through which investors gain or lose money based on the price of a reference stock traded on a foreign exchange. Plaintiffs purchased equity swaps referencing a foreign company’s stock, and they alleged that Porsche manipulated that company’s stock price through deceptive practices. The district court did not dispute that the investors transacted the equity swaps in the United States. But the district court nonetheless dismissed the investors’ Section 10(b) claims under *Morrison*’s transactional test, reasoning that the equity swap agreements “were the functional equivalent of trading the underlying [] shares on a [foreign] exchange” because the value of the swap agreements was tied to the value of the foreign stock.⁵⁵

That reasoning has the capacity to drastically constrict the scope of Section 10(b)’s protection. By looking not to where the security is transacted, but to whether the security is the “functional equivalent” of buying or selling on a foreign exchange, the court’s reasoning could exempt a broad class of domestic investors from antifraud protection. For

example, because the value of ADRs is typically tied to the value of the associated foreign stock, the court's reasoning would likely deny all purchasers of ADRs a remedy under Section 10(b)—even purchasers who buy those securities on the New York Stock Exchange.

Likewise, under that “functional equivalence” standard, a fraudster could sell in the United States physical share certificates for securities listed and traded on a foreign exchange. Even though the defrauded investors would purchase the shares in the United States, they would have no remedy under Section 10(b) for blatant fraud and deceit because their purchases would be deemed the “functional equivalent” of purchases on the foreign exchange.

Morrison affects recovery for significant frauds. Justice Stevens' concurring opinion in *Morrison* starkly illustrates how the Supreme Court's new transactional test eliminates the availability of private remedies:

Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under § 10(b).⁵⁶

Indeed, several significant and high-profile fraud actions have resulted in large recoveries for institutional investors, but would most likely be barred in whole or part under *Morrison*'s transactional test. To pick just three representative examples:

- In *In re Royal Ahold N.V. Securities & ERISA Litigation*,⁵⁷ plaintiffs brought antifraud claims on behalf of class members including American investors who purchased the defendant's ADRs on a domestic exchange and its common shares on a foreign exchange. Applying the conduct and effects tests, the court denied motions to dismiss, and the case ultimately settled for \$1.1 billion. Indeed, Royal Ahold ultimately stipulated to certification of a worldwide class, finding it beneficial to include foreign purchasers in the U.S. adjudication in order to make settlement administration and proceeds available to purchasers anywhere in the world. *Morrison*'s transactional test, however, likely would have denied purchasers of Royal Ahold's common shares (which traded on a foreign exchange) any recovery for their substantial losses.
- In *In re Royal Dutch/Shell Transport Securities Litigation*,⁵⁸ two American pension funds brought a class action on behalf of investors who had purchased the foreign defendants' shares and ADRs on foreign and domestic stock exchanges. The class was eventually narrowed to American investors—including those who bought shares on foreign exchanges—and their claims were settled for more than \$130 million. Under *Morrison* and its progeny, the American investors who purchased the defendants' shares on foreign exchanges likely would have been unable to recover their losses.
- In *In re Converium Holding AG Securities Litigation*,⁵⁹ public and private institutional investors served as lead plaintiffs in a securities-fraud action on behalf of investors who purchased the defendant's shares on a foreign stock exchange and its ADRs on a domestic exchange. After the district court approved the class under the conduct and effects tests, the parties settled for \$85 million.⁶⁰ If the *Morrison* transactional test had applied, purchasers of defendant's common stock on the foreign exchange likely would have been denied any recovery for their losses.

Impact on Institutional Investors' Investment Options

Institutional investors typically invest according to modern portfolio theory, which turns on the premise that “diversification among different types of investments is the appropriate way to optimize an investor’s overall return while minimizing the investor’s aggregate risk.”⁶¹ Indeed, many institutional investors have a regulatory mandate to diversify their investment holdings.⁶²

Because the United States capital markets represent only about half of the world’s capital markets,⁶³ and because the correlation between United States markets and foreign markets is sufficiently low,⁶⁴ institutional investors routinely diversify globally, often denominating certain fund amounts to be held in foreign equities. For example, according to its 2010 report, the California Public Employees’ Retirement System—the largest state pension fund in the United States—had 24 percent of its investments in international equities, compared to just 21 percent in domestic equities.⁶⁵ Moreover, when institutional investors diversify within a specific industry segment, they often cannot avoid buying foreign stocks. An investor seeking broadly diversified holdings in the oil and gas industry, for example, cannot avoid buying foreign stock such as British Petroleum and Royal Dutch Shell.

Morrison’s restriction of the scope of antifraud protection significantly alters the risk profile of foreign investments. Under *Morrison*, U.S. investors will have no recourse in U.S. courts for fraud by the numerous foreign companies that list their shares outside the United States but raise money in the United States through the purchase of those shares by Americans. The lack of a remedy under U.S. law may make American institutional investors more wary of diversifying their portfolios, as the purchase of stock on a foreign exchange will not carry the same legal safeguards as the purchase of stock on a domestic exchange.

Moreover, to maintain global diversification while retaining the same antifraud protection existing before *Morrison*, institutional investors may seek to move their international holdings from shares purchased and sold on foreign exchanges to ADRs traded on domestic exchanges. That option, however, has several practical costs and limitations that do not make it a ready substitute for the prior state of affairs. As an initial matter, there may be too few ADRs available for trading on domestic exchanges to allow institutional investors to fully move their sizable holdings of foreign-traded shares into ADRs. But even if investors move their foreign shares, that reallocation into ADRs will entail large transaction costs that institutional investors did not anticipate at the time of their purchase of the foreign securities. And, in light of the Southern District of New York’s holding in *In re Société Générale Securities Litigation*, institutional investors cannot be completely sure that their domestic purchase of ADRs on an over-the-counter market or other off-exchange trading platform will in fact secure the antifraud protections of Section 10(b).

In addition, because of the fees assessed by ADR issuers,⁶⁶ institutional investors would incur a new layer of continuing costs if they were to seek global equity exposure solely through ADRs instead of foreign stock transactions. A recent study by economist Mark D. Levinson and the Consolidated Retirement Fund concludes that the additional transactional cost to institutional investors under that strategy, assuming a turnover rate per security of one trade per year, would be \$2.2 billion annually.⁶⁷ Thus, American institutional investors may now face a significant “tax” simply to obtain antifraud protection under the U.S. law that has protected them for the past four decades.

Incentives for Issuers to Move Offshore

American institutional investors benefit when issuers list their securities on American exchanges, where they can be purchased without the need for a cross-currency transaction. *Morrison's* transactional test, however, creates new incentives for issuers to withdraw from American stock markets. By listing securities only on foreign exchanges, issuers would remain free to sell their securities to Americans and raise money from American investors without liability to private investors under the antifraud provisions of Section 10(b) and Rule 10b-5.

In contrast, making foreign issuers subject to Section 10(b) and Rule 10b-5 whenever their fraudulent conduct injures American entities would afford Americans full protection under the securities laws without creating an incentive for domestic issuers to move offshore. Even if those issuers listed their securities only on foreign exchanges, U.S. law would provide American investors a remedy for corporate malfeasance that injures them.⁶⁸

Government Agencies' Extraterritorial Enforcement Authority

If investors lack a private right of action to combat transnational securities fraud, government agencies will be the only entities that can challenge that fraud. This will put even more fiscal pressure on agencies like the SEC, which already operate on tight budgets. For example, last year, Congress cut the 2012 fiscal budget requested by the SEC by \$223 million (or more than 15 percent).⁶⁹

At the same time, “the [SEC’s] responsibilities were vastly expanded under the Dodd-Frank Wall Street Reform and Consumer Protection Act,” such that the SEC is “the nation’s front-line defense against financial fraud.”⁷⁰ The chairman of the SEC has already “warned that her agency doesn’t have enough money to police Wall Street adequately.”⁷¹ If the SEC lacks adequate funds to police Wall Street, the agency will not possibly be able to combat global securities fraud injuring U.S. investors.

That is particularly true because transnational securities fraud cases are some of the most complex and costly to investigate. They often involve foreign nations, far-flung witnesses and mountains of documents. But as SEC Commissioner Luis Aguilar recently described, the SEC’s budgetary pressures have caused it to cut back on investigatory and prosecution steps such as sending examiners on travel, taking depositions and hiring expert witnesses in certain trials, “such as in complex securities cases.”⁷² Such volatility in funding leaves government agencies poorly suited to serve as the sole enforcement authority for transnational securities fraud.

Recommendations

Benefits and costs of a private right of action for fraud in connection with non-domestic securities transactions

Benefits. The private right of action under Section 10(b) has long been recognized as an important means of protecting the rights of investors. Former SEC Chairman Arthur Levitt stated in testimony before Congress that “[p]rivate actions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws.”⁷³

Similarly, former SEC Chairman Richard Breeden testified before Congress that the existence of private securities-fraud actions was an “essential tool in the enforcement of the federal securities laws,” as “the Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws.”⁷⁴ And former SEC General Counsel Giovanni Prezioso explained to the American Bar Association that the SEC “has long advocated private rights of action precisely because they supplement its own enforcement program in deterring misconduct.”⁷⁵ Whereas government resources may be limited, private investors will have the incentive and resources to root out transnational securities fraud. Thus, a private right of action would ease the burden on government agencies, which otherwise may not have the resources to address transnational securities fraud that significantly harms domestic investors.

Indeed, the Supreme Court itself “has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.”⁷⁶ The entrepreneurial motivation of these actions enables private plaintiffs and their attorneys to vigorously pursue deceptive conduct.

Moreover, pension funds and other employee benefit funds have a legal obligation to safeguard beneficiaries’ assets, and the private right of action under Section 10(b) remains important to those and other institutional investors for the simple reason that it results in recoveries that exceed recoveries by government enforcement agencies. For example, in *In re Royal Ahold N.V. Securities & ERISA Litigation*, discussed above, investors’ private action for securities fraud resulted in a \$1.1 billion settlement, whereas the SEC declined to seek a financial penalty at the request of the Dutch government, whose enforcement action resulted in a settlement of less than \$10 million.⁷⁷ Similarly, although the SEC recovered \$440 million for investors defrauded by Enron, investors recovered more than \$7 billion in private suits.⁷⁸

Likewise, in 2008 and 2009, SEC enforcement of securities laws resulted in total recoveries of \$3.5 billion,⁷⁹ and, although that is a significant amount, it is nevertheless less than the amount recovered for defrauded investors by private actions in that period—\$6.6 billion.⁸⁰ Indeed, the top 100 private securities-fraud settlements have recovered more than \$46 billion.⁸¹

Allowing investors to assert claims to recover losses caused by fraud also ensures investors’ confidence in the truth of financial disclosures, which, in turn, promotes the efficiency of capital markets. Former SEC Chairman David Ruder has explained:

Although the primary objective of requiring honesty is to protect investors, honesty also improves market efficiency. Honest markets will be more liquid, since investors will be more likely to risk their resources in an honest market. Additionally, since dishonest market investors will seek higher prices for securities as compensation for the risks of loss due to dishonesty, an honest market will facilitate the transfer of assets at lower prices, thereby lowering the price of capital.⁸²

The SEC thus recognizes that “[o]nly through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions. The result of this information flow is a far more active, efficient, and transparent capital market that facilitates the capital formation so important to our nation’s economy.”⁸³

Empirical evidence supports the SEC’s conclusion that stronger investor protections will improve capital allocation and result in higher economic growth. A 2002 study for the World Bank by a group of economic experts, including the former chairman of the Council of Economic Advisers, established, based on a sample of firms across 38 countries, a positive correlation between investor protection and capital formation. The study found that investor protection allows firms to turn to outside investors to raise funds: “[T]he weaker is investor protection, the higher is the concentration of inside equity ownership. And second, the higher is the concentration of inside ownership, the higher is the implied cost of capital.”⁸⁴ Numerous other studies have established a positive correlation between investor protection and capital allocation.⁸⁵

Institutional investors, moreover, can use private litigation as a tool to win corporate governance reforms that a company’s board of directors might resist otherwise. For example, settlements in recent securities class actions have included governance requirements addressing insider trading, board openness and independence, director term limits and executive compensation.⁸⁶ With institutional investors favored as lead plaintiffs after the Private Securities Litigation Reform Act,⁸⁷ corporate governance provisions in settlement agreements have grown in popularity and breadth.⁸⁸

Costs. The Supreme Court in *Morrison* stated that one cost of a private right of action for transnational securities fraud would be a probability of substantive conflict between the securities laws of the United States and those of other countries.⁸⁹ The extent of those conflicts, however, is not clear. *Morrison* described the aspects of Section 10(b) and Rule 10b-5 that it found likely to create conflict with foreign regulatory regimes:

[T]he regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney’s fees are recoverable, and many other matters.⁹⁰

But *Morrison*’s transactional test itself applies U.S. securities law (and civil procedure) to investors suing foreign companies concerning the purchase or sale of ADRs on American exchanges. Because many foreign companies whose common stock trades on foreign exchanges also have ADRs listed on American exchanges (as with the defendant bank in *Morrison*, for example), many foreign companies will still be subject to U.S. civil procedure and securities law.

Commentators have expressed concern that Section 10(b) and Rule 10b-5 prohibit some conduct that foreign countries’ securities laws do not. Although that might be said to implicate the doctrine of international comity, that doctrine applies when there is a true conflict between the law of the United States and the law of another country.⁹¹ There is no conflict for purposes of comity “where a person subject to regulation by two states can comply with the laws of both.”⁹² Thus, the doctrine looks to whether compliance with the laws of both countries is impossible.⁹³ Rule 10b 5 may sometimes cover more conduct than does another country’s analogous law, but it does not appear that any country *prohibits* disclosure beyond what is required by local law.

The heart of the objection, then, is that American law should not impose additional antifraud demands on persons or companies who sell securities in foreign countries (even if they sell to American investors). But there is no proof that restoring a private right of action based on foreign purchases would undermine or upend international relations. All nations have an interest in combating fraud and protecting investors, an interest particularly important in this era of transnational securities frauds that know no border and affect the intertwined global economy. And American investors would naturally expect to be protected by American securities law, regardless of where the securities transaction ultimately occurs. Indeed, the GC100—an association of general counsel and company secretaries of the 100 largest

companies on the London Stock Exchange—has acknowledged that exposure to Section 10(b) would be a natural result of marketing securities to U.S. investors.⁹⁴ If anything, permitting American investors to bring such claims would restore the United States' standing as a leader in the global community in combating fraud.⁹⁵

U.S. investors should have the right to sue for transnational securities fraud.

Restoring to American investors a private right of action under Section 10(b) for securities fraud, regardless of where the securities were transacted, brings benefits that outweigh the potential costs. As explained above, U.S. securities law has long recognized the value of enlisting private investors in deterring and detecting securities fraud, and fraud concerning a security purchased on a foreign exchange hurts U.S. retirement funds, health funds, and other public and private investment funds just as much as fraud regarding securities purchased on a domestic exchange.

Indeed, in today's globally connected economy, investors may have no idea where a purchase order for securities is carried out. Some securities are listed on two exchanges—one domestic and one foreign—and investors will not know through which exchange their transaction is routed. For example, both the United States and the European Union have laws requiring brokers to adopt a “best execution” policy that ensures orders to buy and sell securities are executed to a client's best benefit.⁹⁶ To secure “best execution” in the case of a security listed on both a domestic and a foreign exchange, the broker will select the exchange that provides the maximum advantage to the client, accounting for factors such as price, exchange rate, speed, size and likelihood of settlement.⁹⁷ The best exchange could be a domestic or foreign market, depending on the circumstances.

Morrison's transactional test fails to take account of this reality. Indeed, even securities that regularly trade on U.S. exchanges may also be sold and purchased by brokers on behalf of their clients off-exchange in private markets. Although some institutional investors may have an obligation to know who executes their trades, other investors may have no idea that their brokers used a foreign, off-exchange market—such as a “dark pool”—to execute a purchase or sell order for securities listed and sold on a United States exchange.⁹⁸ *Morrison's* technical focus on the place where the transaction clears is punitive to those investors, who place orders in the United States yet have no idea that the order is transacted on a foreign exchange.

Under *Morrison's* transactional test, large multinational companies with billions of dollars in assets and revenues in this country will be allowed to raise substantial funds from American investors, while avoiding the primary antifraud provision of U.S. securities law by listing their securities only on foreign exchanges. And even though the domestic listing of these companies' ADRs may provide some exposure to American securities law, companies often limit their ADR listings at a small percentage of their market capitalization, allowing them to insulate themselves from liability for lies and deceptions offered by corporate officers to American purchasers.

Extending American investors' private right of action would also relieve investors from the need to bring foreign litigation to recover for domestic securities losses. Institutional investors can hold stock purchased in dozens of diverse jurisdictions, and each country has its own legal system, potentially lacking procedures like those of the proven American system for recovering losses from fraud. Congress' goal of protecting American investors is best served by allowing them recourse to those established remedies.

Foreign investors' private right of action for transnational securities fraud

Some foreign investors will have claims for securities fraud that involve substantial fraudulent conduct in the United States but involve the purchase or sale of securities only on foreign exchanges or trading platforms. Courts have traditionally ruled that such foreign investors do not have a private right of action under the effects test, on the theory that even if the overall fraudulent scheme caused adverse effects in the United States, foreign investors do not have standing to assert those effects.⁹⁹ Thus, courts turned to the conduct test to allow foreign investors a private right to recovery for fraud tied to this country that caused harm abroad.

Congress should consider the several potential benefits of restoring a conduct test to define the territorial scope of the private right of action under Section 10(b). It is important to recognize, as an initial matter, that many instances of transnational securities fraud involve securities purchased on a foreign exchange by both foreign investors and American investors. That fact has two, related implications. First, it means that American investors will already have a private right of action against the fraudster if the effects test is restored. Hence, U.S. securities law will already apply to the fraud, meaning that allowing foreign investors to recover as well would not result in the application of American securities law where it otherwise did not apply. Defendants would already be subject to Section 10(b) and Rule 10b-5, as they injured American investors. Second, allowing foreign investors to recover through a private action would benefit American investors who were defrauded by the same scheme, as it would bring into the action additional litigation resources and investigatory capabilities.

Additionally, allowing foreign investors to sue for securities fraud when U.S. conduct plays a clear part in causing foreign injury would have the salutary effect of promoting strong ethical norms in the American securities industry. Those norms, in turn, work to the benefit of all investors, foreign and domestic.

In considering a private right of action for foreign investors who purchase foreign securities, Congress should be mindful that courts applying the conduct test have had some difficulty deciding whether domestic conduct is sufficiently connected to the fraud. Courts often applied different standards or came to seemingly incompatible conclusions.¹⁰⁰ Thus, Congress should pay particular attention to clarity. One option would be to codify the standard for a conduct test, such as the Dodd-Frank Act's standard (for government enforcement actions) requiring that conduct within the United States "constitutes significant steps in furtherance of the violation."¹⁰¹ As an alternative to enacting a conduct test, Congress may consider granting foreign investors standing to proceed under the effects test—allowing any investor, foreign or domestic, to sue under Section 10(b) for securities fraud that had a foreseeable effect in the United States, even if the particular investor's injury was felt overseas.

Congress should also balance against those benefits the potential costs of extending to foreign investors a private right of action for securities fraud related to a foreign securities transaction. Such a private right of action could in theory allow foreign plaintiffs to bring suits involving securities never sold to U.S. investors and defendants headquartered outside of the United States. The Australian plaintiffs in *Morrison* brought such an action—the "foreign-cubed" or "f-cubed" suit. According to anecdotal evidence, foreign corporations consider f-cubed actions to be the most problematic type of private action under Section 10(b),¹⁰² and that perception may limit institutional investors' investment options by causing some corporations to avoid U.S. markets.

At the same time, Justice Stevens' concurrence in *Morrison* indicates that many true f-cubed actions (those not including American plaintiffs in the class of injured investors, and involving only foreign defendants and foreign transactions) would fail the conduct test on their own merits: "the odds of [an f-cubed] fraud having a substantial connection to the United States are low."¹⁰³ Indeed, f-cubed actions are a small percentage of the securities class actions brought in the United

States.¹⁰⁴ Accordingly, an appropriately defined conduct test may be able to weed out problematic f-cubed actions that lack a substantial relation to this country while preserving foreign investors' ability to sue over securities fraud that is advanced by significant domestic activity, even if the securities purchase or sale occurs overseas. Congress should consider these options carefully in responding to *Morrison*.

Endnotes

- ¹ *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).
- ² 15 U.S.C. § 78j(b).
- ³ 17 C.F.R. § 240.10b-5.
- ⁴ See *Morrison*, 130 S. Ct. at 2879.
- ⁵ *Id.*
- ⁶ In recent years, however, the Supreme Court has lessened U.S. investors' ability to recover under Section 10(b) and Rule 10b-5 for even domestic fraud. See, e.g., *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (limiting definition of who "makes" a statement for purposes of Rule 10b-5); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (holding that a corporation's vendors and customers involved in an alleged sham transactions are not liable as primary actors under § 10(b)); *Cent. Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994) (holding that private plaintiffs may not maintain aiding-and-abetting suit under § 10(b)).
- ⁷ 519 F.2d 974, 993 (2d Cir. 1975).
- ⁸ *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 n.4 (D.C. Cir. 1987) (Bork, J.).
- ⁹ See, e.g., *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 370 (S.D.N.Y. 2005) (holding that Section 10(b) applied to antifraud claims by American investors suing a French company for using false statements to induce them to buy stock on a French exchange at artificially inflated prices).
- ¹⁰ *Bersch*, 519 F.2d at 985.
- ¹¹ 519 F.2d 1001, 1017 (2d Cir. 1975).
- ¹² *Id.* at 1016-17.
- ¹³ E.g., *SEC v. Berger*, 322 F.3d 187, 193-94 (2d Cir. 2003) (stating that the securities laws apply when substantial acts in furtherance of the fraud were committed within the United States).
- ¹⁴ *Id.*; see, e.g., *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) (stating that the key element of the conduct test is whether "U.S. activity directly cause[s] harm to [a] foreign interest").
- ¹⁵ E.g., *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 426 (9th Cir. 1983).
- ¹⁶ E.g., *SEC v. Berger*, 322 F.3d 187, 195 (2d Cir. 2003).
- ¹⁷ E.g., *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983).
- ¹⁸ E.g., *Banque Paribas London*, 147 F.3d at 131.
- ¹⁹ *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) (citation omitted).
- ²⁰ *United States v. O'Hagan*, 521 U.S. 642, 658 (1997).
- ²¹ See *Grunenthal*, 712 F.2d at 425.
- ²² *Morrison*, 130 S. Ct. at 2875.
- ²³ *Id.* at 2876.
- ²⁴ *Id.* at 2884.
- ²⁵ *Id.* at 2884.

- ²⁶ *Id.*
- ²⁷ *Id.* at 2888.
- ²⁸ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act).
- ²⁹ Dodd-Frank Act § 929P(b).
- ³⁰ *Id.* § 929P(b)(1), (2).
- ³¹ In the Dodd-Frank Act, Congress clearly intended to restore the SEC's and DOJ's ability to bring antifraud actions whenever the conduct or effects test is satisfied. See, e.g., 156 Cong. Rec. H5237 (June 30, 2010) (remarks of Rep. Kanjorsky) (explaining that the Dodd-Frank Act overrules *Morrison* with respect to government enforcement actions by "clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department").

Nevertheless, some commentators have suggested that the Act is itself inadequate to achieve Congress's intent, as the Act expands district courts' "jurisdiction" to hear cases involving foreign elements. See George T. Conway III, *Extraterritoriality After Dodd-Frank*, The Harvard Law School Forum on Corporate Governance and Financial Regulation (Aug. 5, 2010, 8:58 AM), available at <http://goo.gl/6EnGb> (<http://.../////after-dodd-frank/>). The Supreme Court in *Morrison* held that the territorial reach of Section 10(b) is not a question of subject-matter jurisdiction, which refers to a tribunal's power to entertain a claim, but instead a merits question going to the extent to which Congress intended Section 10(b) to reach certain conduct. Accordingly, those commentators argue that Congress enacted a provision with no substantive effect—expanding courts' power to hear cases without creating any new right of action to be heard.

Others commentators disagree. They note that the Dodd-Frank Act speaks in the same jurisdictional terms historically used by courts applying the conduct and effects tests, indicating Congress's intent to overrule the Supreme Court's treatment of the issue as nonjurisdictional. Margaret Sachs, *International Securities Fraud Makes Supreme Court Debut*, *Opinio Juris* (June 25, 2010, 11:12 AM), available at <http://goo.gl/rhke8> (<http://juris.///25/morrison-and-the-presumption-against-extraterritoriality>). Moreover, *Morrison* applied the presumption against extraterritoriality because it found no affirmative indication of contrary intent in the securities laws. But the Dodd-Frank Act explicitly links the conduct and effects tests it enacts to the jurisdiction "of the federal securities law." Dodd-Frank Act § 929P(b). The SEC has therefore concluded—and this paper likewise assumes—that the Dodd-Frank Act "restored the ability of the [SEC and DOJ] to bring actions under Section 10(b) in cases involving transnational securities fraud." U.S. Securities and Exchange Commission, *Study on Extraterritorial Private Rights of Action*, 75 Fed. Reg. 66822, 66822 (2010).

- ³² Dodd-Frank Act § 929Y.
- ³³ 15 U.S.C. § 77q(a) (prohibiting fraud and materially false statements by "any person in the offer or sale of any securities").
- ³⁴ 3 Thomas Lee Hazen, *Law of Securities Litigation* § 12.4[1] (6th ed. 2009).
- ³⁵ Virtually all of the circuits have held that there is no implied private right of action under Section 17(a). See *Maldonado v. Dominguez*, 137 F.3d 1 (1st Cir. 1998); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir. 1992); *Newcome v. Esrey*, 862 F.2d 1099, 1101-07 (4th Cir. 1988) (en banc); *Landry v. All Am. Assurance Corp.*, 688 F.2d 381, 391 (5th Cir.1982); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 943 (7th Cir. 1989); *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 328 (8th Cir. 1986); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1358 (9th Cir. 1987) (en banc); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 334 (10th Cir. 1993). *Currie v. Cayman Res. Corp.*, 835 F.2d 780, 784 (11th Cir. 1988). The Sixth Circuit has assumed that a private right of action exists, but has never expressly decided the question; so far, it has only dismissed putative private claims under Section 17(a) for lack of standing. See *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 492 (6th Cir. 1990); *Gaff v. FDIC*, 814 F.2d 311, 319 (6th Cir. 1987); see also *Herm v. Stafford*, 663 F.2d 669, 678 n.12 (6th Cir. 1981) (explicitly assuming without deciding that a private right of action exists).
- Section 17(a), moreover, may apply to a narrower class of conduct than does Section 10(b). See *United States v. Naftalin*, 441 U.S. 768, 773 n.4 (1979) (noting that Section 17(a) might be narrower than Section 10(b) in applying to conduct "in" the offer or sale of securities, as opposed to "in connection with" the purchase or sale of securities); *SEC v. Jakubowski*, 150 F.3d 675, 680 (7th Cir. 1998) (noting that Section 17(a) "requires proof that the fraud occurred 'in' an offer or sales of securities—a tighter link, one might suppose, than 'in connection with'").
- ³⁶ See, e.g., *United States v. Coffman*, 771 F. Supp. 2d 735 (E.D. Ky. 2011) (holding that *Morrison* does not affect use of mail and wire fraud statutes to prosecute transnational securities fraud run from Canada through use of accounts and drop boxes in the United States and involving oil wells in this country held out as investment opportunities).

- ³⁷ See, e.g., *Wisdom v. First Midwest Bank*, 167 F.3d 402, 408-09 (8th Cir. 1999); *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178 (6th Cir. 1979); *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 346 (5th Cir. 1977); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974). Although there is no private right of action for mail and wire fraud, mail and wire fraud are predicate acts that can establish a pattern of racketeering activity, 18 U.S.C. § 1961, which is one element of a private right of action under the Racketeer Influenced and Corrupt Organizations Act, see 18 U.S.C. §§ 1961, 1964(c).
- ³⁸ See, e.g., 15 U.S.C. §§ 77k, 77l, 78i, 78r.
- ³⁹ 3 Hazen, *Law of Securities Regulation*, supra § 12.4[1].
- ⁴⁰ See, e.g., *In re UBS Sec. Litig.*, No. 07-cv-11225, 2011 WL 4059356, at *7-8 (S.D.N.Y. Sept. 13, 2011); *In re Royal Bank of Scotland Group PLC Sec. Litig.*, 765 F. Supp. 2d 327, 335-36 (S.D.N.Y. 2011); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471-72 (S.D.N.Y. 2010); *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453, 487 (S.D.N.Y. 2010); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 627-28 (S.D.N.Y. 2010); *In re Celestica Inc. Sec. Litig.*, No. 07-cv-312, 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010), *rev'd on other grounds sub nom., New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, No. 10-4702, 2011 WL 6823204 (2d Cir. Dec. 29, 2011); *In re Société Générale Sec. Litig.*, No. 08-cv-2495, 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010); *Stackhouse v. Toyota Motor Co.*, No. 10-cv-0922, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010).
- ⁴¹ 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010).
- ⁴² *Id.* at 178-79.
- ⁴³ See, e.g., *In re UBS Sec. Litig.*, 2011 WL 4059356, at *5; *In re Royal Bank of Scotland Group PLC Sec. Litig.*, 765 F. Supp. 2d at 335-36; see also *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 529 (S.D.N.Y. 2011) (holding that claim by foreign investors did not survive *Morrison* where the company shares they owned were listed on an American exchange, but not bought or sold in the United States).
- ⁴⁴ 790 F. Supp. 2d 147 (S.D.N.Y. 2011).
- ⁴⁵ *Id.* at 158.
- ⁴⁶ *Id.* at 158-59 (citation omitted).
- ⁴⁷ See, e.g., *Absolute Activist Value Master Fund Ltd. v. Himm*, No. 09-cv-00862, 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010) (dismissing the claim of foreign mutual funds with American investors, made against American nationals and an American company registered as a U.S. broker-dealer, because the alleged fraudulent scheme involved off-exchange securities transactions that closed overseas).
- ⁴⁸ *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002) (describing ADRs).
- ⁴⁹ See *Morrison*, 130 S. Ct. at 2875.
- ⁵⁰ *In re Elan Corp. Sec. Litig.*, 2011 WL 1442328, at *1 (S.D.N.Y. 2011); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 529 (S.D.N.Y. 2011).
- ⁵¹ No. 08-cv-2495, 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010).
- ⁵² *Id.* at *6 (citation omitted).
- ⁵³ *Id.* (citation omitted).
- ⁵⁴ 759 F. Supp. 2d 469 (S.D.N.Y. 2010).
- ⁵⁵ *Id.* at 476.
- ⁵⁶ *Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring).
- ⁵⁷ 351 F. Supp. 2d 334 (D. Md. 2004).
- ⁵⁸ 380 F. Supp. 2d 509 (D.N.J. 2005).

- ⁵⁹ No. 04-cv-7897, 2006 WL 3804619 (S.D.N.Y. Dec. 28, 2006).
- ⁶⁰ See Sept. 30, 2011 Memorandum and Order, *SEC v. Zurich Fin. Servs.*, No. 08-cv-10760, at 1, 3 (S.D.N.Y.), available at <http://goo.gl/wyDu5> (<http://.../courts/new-york/2008cv10760/pdf?317482757>).
- ⁶¹ *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756, 765 (E.D. Va. 2006).
- ⁶² See, e.g., Conn. Gen. Stat. § 45a-541c (2010) (“Diversification. A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.”); Wis. Stat. § 25.15 (2010) (“[T]he standard of responsibility applied to the board when it manages money and property shall be all of the following: . . . (b) To diversify investments in order to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, considering each trusts or funds portfolio as a whole at any point in time.”); Mont. Code Ann. § 17-6-201 (“[P]ublic pension funds must be administered by the board of investments in accordance with the prudent expert principle, which requires an investment manager to: . . . (b) diversify the holdings of each fund within the unified investment program to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly prudent not to do so.”); 840 Mass. Code Regs. § 1.01 (2010) (“A board member shall discharge all of his/her duties . . . (3) By diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.”).
- ⁶³ Hal S. Scott & Philip A. Wellons, *International Finance* 49 (4th ed. 1997).
- ⁶⁴ Stanley J. Kon, *Modern Portfolio Theory: Implications for Prudent Investment Strategies*, International Mutual Funds & The Prudent Investor Act, App. 125-26 (1995).
- ⁶⁵ CalPERS, Comprehensive Annual Financial Report 89 (2010), available at <http://goo.gl/Wfyux> (<http://www.calpers.ca.gov/eip-docs/about/pubs/member/calpers-reports/comprehensive-/comprehensive-annual-fina-rept-10.pdf>).
- ⁶⁶ The depositary banks that issue ADRs charge fees for taking custody of the foreign stock and converting foreign currency into U.S. dollars, such that purchasing an ADR costs more than purchasing the foreign-traded stock directly. See U.S. Securities and Exchange Commission, *International Investing*, available at <http://goo.gl/3qY6H> (<http://www.sec.gov/investor/pubs/ininvest.htm>) (last visited Jan. 18, 2012) (describing fees).
- ⁶⁷ Consolidated Retirement Fund Letter of February 18, 2011, to U.S. Securities and Exchange Commission Secretary Elizabeth M. Murphy, available at <http://goo.gl/94t9B> (<http://www.../4-617/4617-36.pdf>).
- ⁶⁸ For the same reasons, restoring a domestic-effects test to define Section 10(b)'s territorial reach would not deter foreign issuers from entering U.S. capital markets. Indeed, a survey conducted by Harvard Law School students in 2008 found that the principal deterrent to foreign issuers entering the U.S. capital market was the prospect of “f-cubed” actions—U.S. actions involving foreign plaintiffs suing foreign defendants about foreign securities purchases. Courtney Haraguchi & Howell Jackson, *Extraterritorial Application of the U.S. Securities Laws and the F-Cubed Plaintiff Problem*, International Finance Seminar, at 8 (March 16, 2009), available at <http://goo.gl/bGKfs> (http://www.law.harvard.edu/programs/about/pifs/llm/select-papers-from-the-seminar-in-international-finance/llm-papers-2008_2009/haraguchi.pdf). In *Morrison*, however, all eight Justices agreed that the f-cubed complaint at issue fell outside the territorial scope of U.S. securities law, see 130 S. Ct. at 2888, and any domestic-conduct test limited to the same extent would alleviate foreign corporations’ perceived concern with f-cubed actions.
- ⁶⁹ See James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. Times, July 15, 2011, available at <http://goo.gl/XP2uS> (<http://nytimes.com/////cuts-to-sec-reduce-its-effectiveness.html>).
- ⁷⁰ *Id.*
- ⁷¹ Jim Puzzanghera, *SEC Chief Warns Against Budget Cuts*, L.A. Times, Feb. 5, 2011, available at <http://goo.gl/o6crd> (<http://articles.latimes.com/2011/feb/05/business/la-fi-sec-schapiro>).
- ⁷² Luis A. Aguilar, *Setting Forth Aspirations for 2011: Address to the Practising Law Institute’s SEC Speaks in 2011 Program* (Feb. 4, 2011), available at <http://goo.gl/2QXLe> (<http://.../news/speech/2011/spch020411laa.htm>).
- ⁷³ S. Rep. No. 104-98, at 33 (1995).
- ⁷⁴ S. Rep. No. 104-98, at 32 (stating that “private actions perform a critical role in preserving the integrity of our securities market”).
- ⁷⁵ Giovanni P. Prezioso, *Remarks Before the American Bar Association Section of Business Law, General Counsel Forum* (June 3, 2004), available at <http://goo.gl/JcNLM> (<http://www.sec.gov/news/speech/spch060304gpp.htm>).

- ⁷⁶ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord, e.g., 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”).
- ⁷⁷ See U.S. Securities and Exchange Commission, Litigation Release No. 18929 (Oct. 13, 2004), available at <http://goo.gl/stuS5> (<http://www.sec.gov/litigation/litreleases/lr18929.htm>); Stanford Law School Securities Class Action Clearinghouse, *Ahold Reaches Settlement With Dutch Prosecutor* (Oct. 1, 2004), available at <http://goo.gl/R5wRE> (http://.../news-archive//20041001_Settlement100073_Pals.html).
- ⁷⁸ See Thomas C. Pearson, *Enron’s Banks Escape Liability* (2010), available at <http://goo.gl/vPpmE> (<http://www.bus.lsu.edu/////n1a5.pdf>).
- ⁷⁹ Gibson Dunn, *2010 Year-End Securities Enforcement Update* 8 (Jan. 10, 2011), available at <http://goo.gl/3Xd8V> (<http://www.gibsondunn.//.>).
- ⁸⁰ Cornerstone Research, *Securities Class Action Settlements* 1 fig. 1 (2010), available at <http://goo.gl/E5dvU> (http://www.cornerstone.com/files/Publication/1ab95c24-3653-41ca-909f-c1c48/Presentation/PublicationAttachment/abdb055f-1e09-4a16-9a0f-ebb0cc/Cornerstone_Research_Settlements_2009_Analysis.pdf).
- ⁸¹ Louise Story & Gretchen Morgenson, *A.I.G. Sues Bank of America Over Mortgage Bonds*, N.Y. Times, Aug. 8, 2011, available at <http://goo.gl/EuEP1> (<http://www.//08/business/aig-to-sue-bank-of-america-over-mortgage-bonds.html>).
- ⁸² David S. Ruder, *Balancing Investor Protection With Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 Pace L. Rev. 39, 41-42 (2005), available at <http://goo.gl/VFNby> (<http://pace.edu/cgi/viewcontent.cgi?%=1149&=>).
- ⁸³ U.S. Securities and Exchange Commission, *The Investor’s Advocate*, available at <http://goo.gl/2GRpo> (<http://www.sec.gov/about/whatwedo.shtml>) (last visited Jan. 18, 2012).
- ⁸⁴ Charles P. Himmelberg, R. Glenn Hubbard & Inessa Love, *Investor Protection, Ownership, and the Cost of Capital*, The World Bank Development Research Group, at 38 (April 2002), available at <http://goo.gl/PVQD2> (<http://siteresources.//WPS2834.pdf>).
- ⁸⁵ *E.g.*, Bo Becker et al., *Does Shareholder Proxy Access Improve Firm Value?* 4 (Harv. Bus. School, Working Paper No. 11-052, 2012) (concluding from an event study that “financial markets placed a positive value on shareholder access”), available at <http://goo.gl/wQ1ch> (<http://www.hbs.edu/research/pdf/11-052.pdf>); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws* 2 (Harv. Pub. Law, Working Paper No. 0-28, 2009) (“Allocating more resources to public enforcement is positively associated with robust capital markets, as measured by market capitalization, trading volume, the number of domestic firms, and the number of initial public offerings.”), available at <http://goo.gl/HLT6F> (<http://.//>); Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 Cornell L. Rev. 775, 831-832 (2006) (“Mandatory disclosure and antifraud provisions both contribute to share price accuracy and because both decrease costs and increase fairness for parties participating in capital markets, they also improve liquidity.”), available at <http://.k1GRT> (<http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Prentice.pdf>); Laura Nyantung Beny, *Do Insider Trading Laws Matter?*, 7 Am. L. & Econ. Rev. 144, 144 (2005) (“[C]ountries with more prohibitive insider trading laws have more diffuse equity ownership, more accurate stock prices, and more liquid stock markets.”); John C. Coffee, Jr., *Racing Towards the Top?*, 102 Colum. L. Rev. 1757, 1828 (2002) (“The available empirical evidence suggests that adopting and enforcing a prohibition against insider trading significantly reduces the cost of capital.”).
- ⁸⁶ See Luke Green, *Governance Reforms Through Securities Class Actions* 5, 7-8 (2011) (listing examples of corporate governing reforms obtained in securities class actions), available at <http://goo.gl/75BFu> (<http://www.issgovernance.com/docs/GovernanceReformsClassActions>); NERA Economic Consulting, *Recent Trends in Shareholder Class Action Litigation* 11 (2005) (table of corporate reforms in nine securities class action settlements), available at <http://goo.gl/eJ6DB> (http://www.nera.com/extImage/Recent_Trends_Final_2.28.05.pdf). For example, as part of its 2003 settlement, Homestore.com agreed to limit the terms of directors to two years, allow shareholders to appoint a new director, required minimum stock retention by officers after an options exercise, and added requirements for independent directors and special committees. *Id.*
- ⁸⁷ Pub. L. No. 104-67, 109 Stat. 737 (1995).
- ⁸⁸ See Green, *Governance Reforms Through Securities Class Actions*, *supra*, 3-6; Phyllis Plitch, *Governance at Gunpoint*, Wall Street Journal, Oct. 17, 2005, at R6 (noting that it has become mainstream to include governance reforms as a way to settle shareowner lawsuits), available at <http://goo.gl/XkEUL> (http://pages.stern.nyu.edu/~adamodar/New_Home_Page/articles/governanceatgunpoint.htm); see also C.S. Agnes Cheng et al., *Institutional Monitoring Through Shareholder Litigation*, 95 Journal of Financial Economics 356 (2010) (concluding, based on an empirical study, that within three years of the filing of a lawsuit, defendant firms sued by institutional lead plaintiffs have more improvement in board independence than defendant firms sued by individual lead plaintiffs), available at <http://goo.gl/nw3c5> (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930532).

- ⁸⁹ 130 S. Ct. at 2885-86. The private right of action for securities fraud has also been criticized as ineffective in increasing shareowner value, resulting only in a transfer of costs from current shareowners to past shareowners. Of course, that mechanism would affect institutional investors less than other investors because they typically take longer-term positions in companies. But, in any event, that potential cost would apply equally to private rights of action in connection with domestic and foreign securities transactions. And existing procedures in United States law filter out weaker securities claims, and promote the role of institutional investors in class securities litigation. See Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995). Even if there are arguments for modifying those procedural provisions, they hardly seem to justify completely denying a remedy under Section 10(b) for transnational securities fraud directly affecting American investors.
- ⁹⁰ 130 S. Ct. at 2885; see, e.g., *Amicus Curiae Br. for the Republic of France* 20, *Morrison*, 130 S. Ct. 2869 (Feb. 26, 2010); *Amicus Curiae Br. of the Gov't of the Commonwealth of Australia* 22, *Morrison*, 130 S. Ct. 2869 (Feb. 26, 2010); *Amicus Curiae Br. of the United Kingdom of Great Britain and N. Ireland* 19, *Morrison*, 130 S. Ct. 2869 (Feb. 25, 2010).
- ⁹¹ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993).
- ⁹² *Id.* at 799 (citing Restatement (Third) of Foreign Relations Law § 403).
- ⁹³ E.g., *Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180 (2d Cir. 2002).
- ⁹⁴ GC100 Letter of February 18, 2011, to U.S. Securities and Exchange Commission Secretary Elizabeth M. Murphy, at 2, available at <http://goo.gl/aiKEa> (<http://www.sec.gov/comments/4-617/4617-5.pdf>)
- ⁹⁵ And that leadership in antifraud regulation itself provides benefits to companies. Firms that have cross-listed on U.S. exchanges have lower costs of capital and increased valuations, demonstrating that investors rate companies more highly when they subject themselves to American laws and regulations. See, e.g., NYSE Euronext, Foreign Firms Cross-Listed in U.S. Valued Higher, *The Exchange*, Vol. 12, No. 10 (Oct. 2005), available at <http://goo.gl/BPB06> (<http://www.nyse.com/about/publication/1127731093408.html>); Niemeier, American Competitiveness in International Capital Markets (Sept. 30, 2006), available at <http://goo.gl/fhyaS> (http://pcaobus.org/News/Speech/Pages/09302006_NiemeierAtlanticMonthlyIdeasTour.aspx).
- ⁹⁶ See NASD Rule 2320(a)(1) (“In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.”); Directive 2004/39/EC of the European Parliament and of the Council, Article 21.1 (“Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.”), available at <http://goo.gl/X8ggN> (<http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0039:EN:NOT>).
- ⁹⁷ See, e.g., Citi Global Transaction Services (GTS) Securities Finance, Cash Investment Desk, *Best Execution Desk Policy* 3 (Oct. 24, 2011), available at <http://goo.gl/7qzD> (<http://icg.citi.com/transactionservices/////desk.pdf>).
- ⁹⁸ See Jacob Bunge, ‘Dark Pools’ Pick Up Stock-Trading Share, *Wall Street Journal*, Jan. 4, 2011, available at <http://goo.gl/8FBKa> (http://online.wsj.com//.html?ru=yahoo&mod=yahoo_hs).
- ⁹⁹ See, e.g., *McNamara v. Bre-X Minerals, Ltd.*, 32 F. Supp. 2d 920, 923 (E.D. Tex. 1999); *Koal Indus. Corp. v. Asland, S.A.*, 808 F. Supp. 1143, 1155 (S.D.N.Y. 1992).
- ¹⁰⁰ See *Morrison*, 130 S. Ct. at 2880 (discussing criticisms); see also Brett R. Marshall, Note, *Morrison v. National Australia Bank Ltd.: A Clear Statement Rule or a Confusing Standard?*, 37 J. Corp. L. 203, 210-11 (2011) (exploring varying standards under the conduct test, ranging from “substantial acts in furtherance of the fraud” in the United States, to whether each element necessary to establish a violation occurred in the United States, to whether conduct in the United States “significantly contributed” to the fraudulent scheme).
- ¹⁰¹ Dodd-Frank Act § 929P(b)(1), (2).
- ¹⁰² See Haraguchi & Jackson, *Extraterritorial Application of the U.S. Securities Laws and the F-Cubed Plaintiff Problem*, *supra*, at 5.
- ¹⁰³ *Id.* at 2894 n.11 (Stevens, J., concurring).
- ¹⁰⁴ See Haraguchi & Jackson, *Extraterritorial Application of the U.S. Securities Laws and the F-Cubed Plaintiff Problem*, *supra*, at 4.



Council of Institutional Investors
The Voice of Corporate Governance

About the Council of Institutional Investors

The Council of Institutional Investors (CII) is a nonprofit association of pension funds and other employee benefit funds, endowments and foundations with combined assets that exceed \$3 trillion. The Council is a leading voice for good corporate governance and strong shareowner rights.

The Council strives to educate its members, policymakers and the public about good corporate governance, shareowner rights and related investment issues, and to advocate on its members' behalf.

Corporate governance involves the structure of relationships between shareowners, directors and managers of a company. Good corporate governance is a system of checks and balances that fosters transparency, responsibility, accountability and market integrity.



Council of Institutional Investors
The Voice of Corporate Governance

888 17th Street, NW ■ Suite 500

Washington, DC 20006

202.822.0800 ■ www.cii.org