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# A Look at the Effects of Morrison v. National Australia Bank on American Depository Receipts and Section 10(B) Liability

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## I. INTRODUCTION

American purchasers of American Depositary Receipts (ADRs) – securities used by many non-U.S. companies to raise capital in the United States and by American investors to hold equity in a foreign company -- may no longer be able to assert a claim under the anti-fraud provisions of the Exchange Act where the fraud impacts U.S. investors or takes place in U.S. The Supreme Court in *Morrison v. National Australia Bank* recently held that §10(b) and Rule 10b-5 apply only when a purchase or sale of securities is “made in the United States or involved a security listed on a domestic exchange.”<sup>1</sup> The Court’s decision was a landmark ruling in transnational securities fraud litigation reversing decades of jurisprudence on the extraterritorial reach of §10(b) of the Exchange Act. Before *Morrison* lower courts applied two tests to determine whether they possessed subject matter jurisdiction over a § 10(b) claim with respect to transnational securities fraud cases.<sup>2</sup> First, a court looked to whether the wrongful conduct occurred in the United States -- the “conduct test.”<sup>3</sup> Second, a court looked to whether the wrongful conduct, even if it occurred in a foreign country, had a substantial effect on U.S. investors or markets -- the “effects test” -- in determining whether §10(b) applied.<sup>4</sup> When the courts found there were sufficient “conduct” or “effects” or a combination of both “conduct” and “effects” on U.S. investors or markets, §10(b) was given extraterritorial application.<sup>5</sup> In *Morrison* the Court reversed these tests and sought to impose a different, bright-line standard. The *Morrison* Court announced a new “transactional test” to determine the geographical reach of the Exchange Act: §10(b) and Rule 10b-5 are satisfied only “with the purchase or sale of a

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<sup>1</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (U.S. 2010).

<sup>2</sup> See Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities*, 72 OHIO ST. L.J. 537, 542 (2011).

<sup>3</sup> *Id.* at 543.

<sup>4</sup> *Id.* at 542-43.

<sup>5</sup> *Id.* at 542.

security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”<sup>6</sup> In so holding, the Court ruled that these key antifraud provisions do not have extraterritorial application.<sup>7</sup> While *Morrison* tries to clarify decades of muddled jurisprudence on the proper extraterritorial application of U.S. anti-fraud securities laws, by rejecting the “conduct” and “effects” test that federal courts have applied in adjudicating claims brought by foreign investors against a foreign company based on shares bought on a foreign exchange, the “f-cubed” or “foreign cubed case,”<sup>8</sup> the Court’s decision closes many doors on U.S. investors. As a result of lower courts’ recent application of the *Morrison* “transactional test,” the Exchange Act does not even apply to dual-listed securities and more so American Depository Receipts (ADRs) – the so-called “f-squared” cases.<sup>9</sup>

*Morrison* started out as a mix of “f-cubed” and “f-squared” claims.<sup>10</sup> However, by the time the case was before the Supreme Court, the U.S. ADR holder claim was dismissed and the case had become a purely an “f-cubed” case.<sup>11</sup> Though *Morrison*’s transactional test indicates a bright-line rule for “f-cubed” plaintiffs, the decision appears to limit, if not preclude, claims under the Exchange Act for U.S. investors. The transactional test in *Morrison* Court leads to unfair results. Potential plaintiffs with extraterritorial §10(b) claims may fall into a mixture of a

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<sup>6</sup> *Morrison*, 130 S. Ct. at 2888.

<sup>7</sup> See Lauren Macias, Case Note, *The “Transactional Test” Replaces the Conduct and Effects Tests” When Determining the Extraterritorial Reach of Private Rights of Action Pursuant to Section 10(B) of the Securities Exchange Act of 1934: Robert Morrison, et al. v. National Australia Bank Ltd.*, 13 DUQ. BUS. L.J. 75, 81 (2011).

<sup>8</sup> Joshua L. Boehm, *Presuming Too Much? The Extraterritorial Reach of U.S. Securities Laws After Morrison and Dodd Frank* (2011), <http://www.law.harvard.edu/programs/about/pifs/llm/select-papers-from-the-seminar-in-international-finance/index.html>.

<sup>9</sup> *Id.* at 25. Boehm discussed that there are three potential types of F-Squared claims: “(1) foreign investors suing foreign issuers for fraud arising from a U.S. transaction; (2) U.S. investors suing foreign issuers for fraud arising from a foreign transaction; and (3) foreign investors suing U.S. issuers for fraud arising from a foreign transactions.”

<sup>10</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 169 (2d Cir. N.Y. 2008). The complaint alleged violation of the antifraud provision of U.S. securities laws was filed by three plaintiffs who were Australian citizens and who had purchased National Australia Bank (“NAB”) shares abroad, (foreign plaintiffs) and sought to represent a class of non-America purchasers of NAB ordinary shares, and a fourth plaintiff, Robert Morrison, a U.S. citizen who had purchased NAB’s ADRs, and sought to represent a class of American purchasers.

<sup>11</sup> *Morrison*, 130 S. Ct. at 2876 (noting that Robert Morrison, the American investor in NAB’s ADRs, claims were dismissed by the District Court because he failed to allege damages).

class: some plaintiffs are ADRs holders, others purchased their shares on a foreign exchange that are dual-listed on a U.S. exchange, and others who are pure foreign investors. However, because of the decision in *Morrison*, the geographic location where these investors purchased their securities will affect whether they can bring a §10(b) claim, with some investors being able to retain a §10(b) and other investors will not, even though they invested in the same securities from the same issuer.<sup>12</sup> *Morrison's* ruling leaves very little, or no exception for distinguishing the characteristics and logic for non-U.S. based transactions.<sup>13</sup> Therefore, whether *Morrison's* “transaction test” can be applied to transactions on a foreign exchange where the same securities involved are dual-listed and cross-listed/ADRs on a U.S. exchange remains unresolved. This leaves open the broad question whether U.S. investors will be able to assert any Exchange Act claims against non-U.S. companies.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) that Congress enacted soon after *Morrison* contains provisions that purport to overturn *Morrison's* bar on §10(b)'s extraterritorial application. While the Dodd-Frank Act attempts to preserve the substantive reach of U.S. securities law extraterritorially, thus clarifying the ancillary issue that §10(b) applies to U.S. security holders who purchased dual-listed securities and ADRs that was not addressed in *Morrison*, the Act may not have that effect. This is due to the fact the Dodd-Frank Act merely repeats what *Morrison* evinced: federal courts have subject matter jurisdiction in transnational fraud cases. Thus, *Morrison* and the Dodd-Frank Act have turned transactional securities law on its head. Given the globalization of financial markets and the increase in securities lawsuits, one would think that the law governing the extraterritorial reach of U.S. securities law would be clearly established by now. This is not the case. Neither

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<sup>12</sup>Teleconference: *Morrison v. National Australia Bank - Implications for Investors*, <http://www.cii.org/events/aug4TeleconferenceMorrisonVNational> (follow and click on MP3 recording of the call).

<sup>13</sup> *Id.*

Congress nor the Supreme Court has addressed the extent of Rule §10b's jurisdictional reach to dual-listed securities and ADR transactions. This paper analyzes *Morrison's* bright-line test and its implication for dual-listed securities and ADRs for U.S. investors.<sup>14</sup> The paper argues the need for a clear and compelling pronouncement for determining the reach of §10(b) to apply to dual-listed and ADRs transactions, so that companies that commit fraud affecting U.S. investors may not be able to structure their transactions in such a way as to avoid §10(b)'s application.

Part I of this paper provides a background of the extraterritorial application of U.S. securities laws prior to *Morrison* and how *Morrison* changed jurisprudence in this area. Part II looks at the Congressional response after *Morrison* by passing the Dodd-Frank Act and amending the securities acts to include provisions aimed at restoring the “conduct and effects” test to allow the extraterritorial application of §10(b), and also assesses the argument that Congress enacted a poorly drafted statute that did nothing more than articulate what *Morrison* concludes, i.e., federal courts have subject matter jurisdiction over transnational securities fraud cases. Part III focuses on how *Morrison* impacts dual-listed securities and ADRs. Part IV concludes that Congress is now well-positioned to make a clear pronouncement that the antifraud provisions of U.S. securities laws reach dual-listed securities and ADRs, without which would affect U.S. investors, U.S. securities markets and Congressional regulatory goals in the area of transnational securities transactions. The paper urges Congress to adopt legislation that accomplishes this worthwhile objective.

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<sup>14</sup> Beyea, *supra* note 2, at 574 (discussing that “Cross-listed companies' shares trade primarily on a local exchange, but are also traded in a secondary listing on an exchange in another country, generally in the form of depositary receipts. (If the secondary listing is in the U.S., for example, these will be American Depositary Receipts.) Dual-listed companies have their shares directly listed on multiple stock exchanges”).

## II. THE EXTRATERRITORIAL LANDSCAPE OF U.S. SECURITIES LAW BEFORE *MORRISON v. NATIONAL AUSTRALIA BANK* AND AFTER

### A. The Framework of U.S. Securities Law and §10(b) Jurisprudence Before Morrison

The Securities Act of 1933, as amended (the “33 Act”), and the Securities Exchange Act of 1934, as amended (the “34 Act”) are the two fundamental statutes in U.S. securities law enacted to protect the public and investors from fraudulent activities on the securities markets.<sup>15</sup> The ‘33 Act regulates the public offering of securities. Generally, unless an exemption applies, an issuer is required to file a registration statement and prospectus with the Securities and Exchange Commission (“SEC”) prior to offering or selling any securities.<sup>16</sup> The “33 Act generally contains three key antifraud provisions: Sections 11, 12(a) and 17.<sup>17</sup> Section 11 provides a private cause of action to investors when a registration statement contains “an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”<sup>18</sup> Section 12(a)(2) also provides a private cause of action when any person who offers or sells a security, by “means of a prospectus or oral communication” that includes a material misstatement or omission, is liable to her purchaser for rescission or damages.<sup>19</sup> Section 17 prohibits “fraudulent interstate transactions.”<sup>20</sup>

Similarly, the ‘34 Act contains antifraud provisions that prohibit fraudulent conduct in the market.<sup>21</sup> The most important antifraud provisions of the ‘34 Act are §10(b) and Rule 10b-5 promulgated under section 10(b) that prohibits “manipulation or deception...in connection with

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<sup>15</sup> See Julie B. Rubenstein, *Fraud on the Global Market: U.S. Courts Don't Buy It; Subject-Matter Jurisdiction in F-Cubed Securities Class Actions*, 95 CORNELL L. REV. 727, 632 (2010).

<sup>16</sup> *Id.*; See JAMES D. COX ET AL, SECURITIES REGULATION CASES AND MATERIALS 115 (6th ed. 2009).

<sup>17</sup> The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2006).

<sup>18</sup> 15 U.S.C. § 77k; Rubenstein, *supra* note 18, at 632-33.

<sup>19</sup> 15 U.S.C. § 771(a)(2).

<sup>20</sup> 15 U.S.C. § 77q(a).

<sup>21</sup> Rubenstein, *supra* note 15, at 633.

the purchase or sale of any security.”<sup>22</sup> “The “overwhelming majority” of class actions based on securities fraud claims, including transnational cases, are filed under Rule 10b-5.<sup>23</sup>

The ‘33 Act applies to *all issuers* who are subject to its registration requirements.<sup>24</sup> Likewise, Rule 10b-5 applies broadly to “*any person directly or indirectly by the use any means or instrumentality of interstate commerce*” defrauds an investor.<sup>25</sup> However, both the ‘33 Act and the ‘34 Act are silent on the extent to which U.S. securities laws apply outside of the United States.<sup>26</sup> Notwithstanding that these laws do not specifically cover extraterritorial acts, prior to *Morrison*, the guiding principle that U.S. courts applied as to the extraterritorial application of U.S. securities laws was whether Congress intended §10(b) to protect United States or foreign investors against fraudulent securities transactions that occurred abroad.<sup>27</sup> Over pass several decades U.S. courts have, albeit with some difficulty, applied two different tests, the “conduct” test and the “effect” test to find that they have jurisdiction to hear f-cubed cases, giving the “34 Act extraterritorial force.<sup>28</sup> Mainly developed by the Court of Appeals for the Second Circuit, the case law prior to *Morrison* “presupposed that a foreign issuer’s conduct within the United States or the effect of the conduct within the United States or a mixture of both,”<sup>29</sup> gave rise to U.S. securities liability even though the transactions occurred outside the United States. Though the “conduct and/or effects” test became the avenue the U.S. courts used to extend jurisdiction to

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<sup>22</sup> 17 C.F.R. § 240.10b-5 (2009).

<sup>23</sup> See Amanda Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1302 (2008).

<sup>24</sup> Boehm *supra* note 8, at 5. (emphasis added).

<sup>25</sup> 17 C.F.R. § 240.10b-5 (2009). (emphasis added)

<sup>26</sup> Boehm *supra* note 8, at 7.

<sup>27</sup> *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (stating that when Congress passed the Securities Laws regulation it could not have foresee the development of overseas transaction forty years later. Thus, its decision rest on what Congress would have wished for, that is, the extraterritorial application of the antifraud provisions of U.S. Securities laws).

<sup>28</sup> See Franca A. Franz, *Offshore Funds and Rule 10b-5: An International Approach to Extraterritorial Jurisdiction under the Exchange Act of 1934*, 8 FORDHAM INT’L L.J. 396, 428 (1984).

<sup>29</sup> Wolf-George Ringe et al, *The International Dimension of Issuers Liability – Liability and Choice of Law from a Transatlantic Perspective*, 31 O.J.L.S. 35, 39 (2011).



hear transnational securities fraud claims, because it was left to the federal courts to shape the extraterritorial bounds of the securities laws, many commentators criticized the conduct and effect test for not creating a bright-line rule.<sup>30</sup> Consequently, critics noted that the “conduct” and/or “effect” tests were arbitrarily applied, with §10(b) jurisprudence being interpreted and applied differently across the circuit courts at the time the Supreme Court decided to hear the *Morrison* case.<sup>31</sup>

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

In ruling that §10(b) and Rule 10b-5 do not apply extraterritorially, the Supreme Court in *Morrison* announced a new “transactional test” which instructs lower courts not to look for some wrongful conduct or effect to bring non-US issuers under the ambit of the antifraud provisions of U.S. securities laws.<sup>32</sup> Rather, the transactional test requires courts to look to “only transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”<sup>33</sup>

In *Morrison*, a group of Australian investors holding National Australia Banks’ (“NAB”) ordinary shares and an American investor holding NAB’s ADRs filed a putative class action against the bank alleging that it knowingly issued misleading financial statements and press releases to its shareholders in violation of §10(b), Rule 10b-5 and §20(a) of ’34 Act.<sup>34</sup> The plaintiffs alleged that NAB “misled investors concerning its American subsidiary’s financial

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<sup>30</sup> See Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuit*, 2009 WIS. L. REV. 465, 505; See Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1092 (2010); See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 24 (2007).

<sup>31</sup> *Id.*; See Elizabeth Cosenza, *Paradise Lost: §10(b) After Morrison v. National Australia Bank*, 11 CHI. J. INT’L L. 343, 358 (2011) (noting that the Second, Fifth and Seventh Circuits adopted a similar interpretation of the “conduct test,” “requiring that the domestic conduct be predominant and sufficiently central to the claim of fraud, ... while the Third, Eighth, and Ninth Circuits have followed a much less restrictive approach, “requiring only that at least some activity designed to further a fraudulent scheme occur in the United States”).

<sup>32</sup> Kara Baquizal, Note, *The Extraterritorial Reach of Section 10(B): Revisiting Morrison in Light of Dodd-Frank*, 34 FORDHAM INT’L L.J. 1544, 1568 (2011).

<sup>33</sup> *Id.* at 1583 (citing *Morrison*, 130 S. Ct. n.138).

<sup>34</sup> *Morrison*, 130 S. Ct. at 2876 (Robert Morrison, the American who was initially involved cases was dismissed for failure to show damages at the district court level).

performance and operation based on false calculations of its subsidiary's mortgage servicing fees to meet overinflated earnings targets."<sup>35</sup>

The Supreme Court dismissed the case under its "transactional test" because the conduct plaintiffs' alleged occurred outside the United States.<sup>36</sup> The majority opinion reasoned that the inference that the securities laws indicate an extraterritorial application was not a compelling reason for lower courts to surmise that Congress intended the act to apply extraterritorially.<sup>37</sup> On this basis the Court rejected the "conduct and effects" test stating that there's no explicit language in the Exchange Act as to the extraterritorial application of §10(b).<sup>38</sup> *Morrison's* holding changed over forty years of §10(b) jurisprudence. U.S. securities laws no longer reach fraudulent transactions that occur outside of the United States.

### C. The Dodd-Frank Act: Why Congress Needs to Make Clear its Intent

When Congress passed the Dodd-Frank Act in the immediate aftermath of *Morrison*, the Act adds an extraterritoriality provision to §10(b), which attempts to foreclose the Court's limitation to §10(b) and Rule 10b-5 applicability outside the United States. The Act aimed to empower the SEC and the Department of Justice to bring suits based on foreign conduct that satisfied either the effects or conduct tests and to study whether the "conduct" and "effect" test for extraterritorial application should be extended to private litigants.<sup>39</sup> However, many scholars

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<sup>35</sup> Brief and Special Appendix for Plaintiffs-Appellants at 16, *Morrison v. Nat'l Australia Bank Ltd.*, 547, F.3d 167 Cir. (2d Cir. 2008) (NO. 07-0583-cv).

<sup>36</sup> *Morrison*, 130 S. Ct. at 2888.

<sup>37</sup> Boehm *supra* note 8, at 20 (discussing that the Court considered and rejected the principal argument by SEC that Congress intended some extraterritorial application of §10(b) because of references to foreign commercial activity in several sections of the 1934 Act).

<sup>38</sup> *Id.*

<sup>39</sup> Dodd Frank Act §929(P)(b)(2) 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

noted that a closer look at the Dodd-Frank Act shows that it does not undo *Morrison* but merely repeats what the *Morrison* Court said: that federal courts have subject matter jurisdiction for cases brought against foreign issuers under §10(b).<sup>40</sup> As a result, the Dodd-Frank Act exacerbates the confusions as to the extraterritorial application of §10(b) and Rule 10b-5.

The Dodd-Frank Act was amended soon after the Supreme Court reiterated the presumption against extraterritoriality of the application of Rule 10(b), that the legislative history of the '34 Act and §30 of the Exchange Act support that U.S. securities laws reach outside the United States.<sup>41</sup> One would think that the Dodd-Frank Act resolved any uncertainties following *Morrison* that §10(b) and Rule 10b-5 will apply to foreign transactions, especially where the foreign shares are dual-listed on a U.S. exchange or ADR programs. However, a reading of the provisions shows that the Dodd-Frank Act does not. The language of the Dodd-Frank does not make clear the extraterritorial changes in the application of the securities law.<sup>42</sup> Many commentators observed that the Dodd-Frank Act speaks to subject matter jurisdiction that lower courts have employed for claims arising under the anti-fraud provision of the '34 Act, which the

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(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.<sup>39</sup>

Under §929Y The study:

shall consider and analyze, among other things—

(1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;

(2) what implications such a private right of action would have on international comity;

(3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and

(4) whether a narrower extraterritorial standard should be adopted.

<sup>40</sup> See Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient*, 1 HARV. BUS. L.J. 195, 205 (2011); See Richard W. Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 19 (2011); See George T. Conway III, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged* (2010).

<http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf>.

<sup>41</sup> See Meny Elgadeh, *Morrison v. National Australia Bank: Life After Dodd-Frank*, 16 FORDHAM J. CORP. & FIN. L. 573, 585-87 (2011).

<sup>42</sup> Beyea *supra* note 2, at 571; Painter *supra* note 40, at 200.

Supreme Court pronounced in *Morrison*.<sup>43</sup> The language of the Act is silent on the geographic scope of the substantive reach of §10(b) and Rule 10b-5.<sup>44</sup> As a result, the Dodd-Frank Act further muddied the waters even more as to the extraterritorial reach of U.S. securities laws leaving unanswered the questions: whether Dodd-Frank Act overturns the holding in *Morrison* by applying Section 10(b) to some securities transactions outside the United States; and whether Dodd-Frank reinstates the conduct and effects test that the Second Circuit and many other circuits had used prior to *Morrison* and, if so, what conduct does §10(b) and Rule 10b-5 reach and prohibit.<sup>45</sup>

The hazy legislative history of the Dodd-Frank Act of any change in the extraterritorial application of U.S. securities law makes the Dodd-Frank Section 929P extraterritorial provisions irrelevant, unless Congress makes clear the applicable scope of the '34 Act. It is unclear whether Congress intended to address the merits of §10(b) extraterritorial application or whether Congress intended only to address jurisdiction, the power of the courts to hear a case.<sup>46</sup> However, many commentators reason that Congress simply made a mistake and drafted the provisions incorrectly, by relying on the language that the various courts of appeals have used over the years to address the extraterritorial reach of Section 10(b) as a question of subject matter jurisdiction rather than as a merit question – namely whether §10(b) applies outside the United States.<sup>47</sup> When the Supreme Court in *Morrison* articulated the extraterritorial reach of Section 10(b) a question of the merits rather than jurisdiction, the drafters of the Act failed to change the

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<sup>43</sup> See *supra* note 40.

<sup>44</sup> See George T. Conway III, *Extraterritoriality After Dodd Frank*, -The Harvard Law School Forum on Corporate Governance and Financial Regulation, <http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank/>.

<sup>45</sup> Painter *supra* note 40, at 200.

<sup>46</sup> Painter *supra* note 40, at 206.

<sup>47</sup> Painter *supra* note 40, at 202; Beyea *supra* note 2, at 571; See Andrew Rocks, Note, *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, 192 (2011).

statutory language.<sup>48</sup> Irrespective of the reason for Congress' drafting error, lower courts still must determine whether there is Congressional intent to provide substantive extraterritoriality to §10(b). The district courts applied *Morrison* and ruled that §10(b) applies only to domestic transactions, dismissing claims of U.S. plaintiffs who have either purchased ADRs or securities on a foreign exchange that are dual-listed on an American exchange.<sup>49</sup> Given the district courts' helter skelter treatment of *Morrison* in extraterritorial cases and the SEC's forthcoming study of the extraterritorial application of §10(b), Congress should enact legislation that "domestic transactions in other securities"<sup>50</sup> means that §10(b) and Rule 10b-5 extends to dual-listed securities and ADRs.

### **III. HOW *MORRISON'S* NARROW TEST MAY PRECLUDE VIABLE §10(B) CLAIMS OF U.S. INVESTORS AND DIMINISH THE TRANSNATIONAL MARKET REGULATORY GOALS OF U.S. SECURITIES LAW**

As *Morrison* is known as an "f-cubed" case, what the decision will signify for dual-listed securities and ADRs transaction remains a tangled web of case law. For example, since *Morrison* U.S. plaintiffs in cases pending before the lower federal courts have argued that because the facts of *Morrison* lend themselves to an "f-cubed" case, the Court's language that §10(b) applies to "securities listed on a domestic exchange," does not preclude §10(b)'s application where a foreign company issues misleading statements overseas and the stocks about which the misleading statements were made are also dual or cross-listed/ADRs transactions.<sup>51</sup> However, the lower courts have rejected plaintiffs' argument and have interpreted *Morrison's*

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<sup>48</sup> Painter *supra* note 40, at 200 (discussing that Congress's drafting error is supported by legislative records because an earlier version of the "provisions provided extraterritorial jurisdiction with respect to antifraud provisions in the federal securities laws if there is "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").

<sup>49</sup> Macias *supra* note 7, at 88; Beyea *supra* note 2, at 573; See Daniel Hemel, Comment, *Issuer Choice After Morrison*, 28 YALE J. ON REG. 471, 473-75 (2011).

<sup>50</sup> *Morrison*, 130 S. Ct. at 2888.

<sup>51</sup> See Irwin H. Warren et al, *Transnational Securities Litigation In The U.S. Courts After Morrison v. National Australia Bank: An "F-Cubed" Regression Analysis*, <http://www.weil.com/news/pubdetial.aspx?pub=10061>.

transactional test to focus on the place where the securities transaction occurred.<sup>52</sup> According to the lower courts, §10(b) will not apply if the transactions took place abroad even if the security at issue is listed on a U.S. exchange.<sup>53</sup> Given that ADRs “are hybrids of foreign and domestic securities,”<sup>54</sup> the issue of whether *Morrison’s* transactional test applies to ADRs is unclear. As a result of the unsettled law as to ADRs lower courts’ interpretation of *Morrison* should give U.S. investors concern that the protection of §10(b) may no longer be available to their ADR transactions.

In the months following *Morrison* lower federal courts, particularly the U.S. District Court for the Southern District of New York (SDNY) in interpreting the meaning of the first prong of *Morrison’s* transaction test “securities listed on a domestic exchange,” held that in order for §10(b) to apply the actual transaction must occur on a domestic exchange.<sup>55</sup> *In Re Alstom SA Securities Litigation* is a case where U.S. investors-plaintiffs purchased securities on a French stock exchange but the foreign issuer’s common shares were registered and listed on the New York Stock Exchange. The plaintiffs argued that because the foreign issuer’s shares were also listed on a domestic exchange, §10(b) should apply. The court concluded, however, that it is not enough for a security to be merely listed on a domestic exchange. Rather, the transaction must also occur on that domestic exchange.<sup>56</sup> Likewise, in *In re Royal Bank of Scot. Group PLC Sec. Litigation*, the court rejected plaintiffs’ arguments that the defendants’ ADRs, traded on the

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<sup>52</sup> Hemel *supra* note 50, at 474.

<sup>53</sup> *Id.*

<sup>54</sup> Vincent M. Chiappini, *How American are American Depository Receipts? ADRs, Rule 10B-5 Suits, and Morrison v. National Australia Bank*, 52 B.C. L. REV. 1795, 1816 (2011) (discussing that ADRs are hybrids of U.S. and foreign securities because “they are sold in the United States and represent shares in a foreign corporation”).

<sup>55</sup> Hemel *supra* note 50, at 474; *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 473 (S.D.N.Y. 2010).

<sup>56</sup> *In Re Alstom* at 473.

NYSE, were “listed” securities under *Morrison* and therefore triggered §10(b) application.<sup>57</sup> In another case, *In re Societe Generale Securities Litigation* where plaintiffs included those who purchased SocGen ADRs in the U.S. over-the-counter market, the court opined that “trade in ADRs is considered to be a predominantly foreign securities transaction.”<sup>58</sup> In a more recent case, *In re Vivendi Universal, S.A. Sec. Litigation*, the court concluded that §10(b) does not apply to overseas transactions in securities that are cross-listed on domestic and foreign exchanges.<sup>59</sup> In interpreting the second prong of *Morrison*’s transaction test “domestic transaction in other securities,” the court held that under *Morrison*, §10(b) does not apply to any securities purchased on a foreign exchange even if some aspects of the transaction occurred in the United States.<sup>60</sup> The lower courts’ interpretation of *Morrison* severely limits the protection of U.S. anti-fraud securities laws to protect the U.S. public and investors who invest in foreign companies.<sup>61</sup>

The negative consequences of *Morrison* for ADR holders are significant. To understand *Morrison*’s implication it is necessary to understand that dual-listed securities and ADR transactions have become essential instruments for U.S. investors to own equity interest in foreign companies, and for foreign companies to raise capital in the United States,<sup>62</sup> and how these securities operate and are treated within the substantive law of U.S. securities regulation. The term dual-listed and cross-listed or ADRs securities are used interchangeably. The

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<sup>57</sup> Boehm *supra* note 8, at 38; *In re Royal Bank of Scot. Group PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011) (holding that plaintiffs argument failed under *Morrison* because §10(b) does not apply to securities “merely because it has “listed” some securities in the United States”).

<sup>58</sup> Boehm *supra* note 8, at 28; *In re Societe Generale Sec. Litig.*, No. 08. Civ. 2495, 2010 U.S. Dist. LEXIS 107719, at\*14 (S.D.N.Y. Sept. 29, 2010).

<sup>59</sup> Hemel *supra* note 50, at 473; *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 531 (S.D.N.Y. 2011).

<sup>60</sup> Robert P. Bartlett, III et al, *Commentary, Comments by Forty-Two Professors on 4-617: Study on Extraterritorial Private Rights of Action*, <http://www.sec.gov/comments/4-617/4617-28.pdf>; *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010).

<sup>61</sup> See Linda J. Silberman, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions* (2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1864786](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1864786) (observing the *Morrison*’s exchange-based interpretation not only limits the reach of U.S. securities laws in f-cubed cases by also in cases in which U.S. investors purchase on a foreign exchange).

<sup>62</sup> *Teleconference: Morrison v. National Australia Bank - Implications for Investors supra* note 12.

difference between the two is that dual listed companies “have their shares directly listed on multiple stock exchanges,” whereas cross-listed or ADRs are securities that are traded locally on a foreign issuer home country exchange “but are also traded on a secondary listing in another country.”<sup>63</sup> Where the local country is the United States the cross-listed securities are ADRs.<sup>64</sup> ADRs were first introduced in the United States in 1927 and are the most popular method used by foreign companies to raise capital in the United States.<sup>65</sup> Similarly, foreign firms can also raise capital in the United States by directly listing their ordinary shares on a U.S. exchange.<sup>66</sup> Likewise, “U.S. investors interested in investing in a foreign firm can do so by purchasing the ADRs in the U.S. or by purchasing the underlying stocks in the home market of the firm, or by doing both.”<sup>67</sup> An ADR is dollar-denominated certificate that represents proof of ownership of foreign securities of a publicly traded non-U.S. company.<sup>68</sup> A U.S. depository bank holds the foreign firm's stock and issues depository certificates to an investor who has ownership of the ADRs.<sup>69</sup> The investor can convert his ADRs for the underlying shares of the foreign company.<sup>70</sup> Each ADR represents a set number of the underlying shares.<sup>71</sup> Once the foreign shares are deposited, the ADRs “are quoted and traded in U.S. dollars on a U.S. exchange,” like listed U.S. securities.<sup>72</sup> The dividends are also paid in U.S. dollars to the ADR holders.<sup>73</sup> There are two

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<sup>63</sup> Beyea *supra* note 2, at 574 n.159.

<sup>64</sup> *Id.* n.159.

<sup>65</sup> See Mark Saunders, *American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 *FORDHAM INT'L L.J.* 48, 50 (1993).

<sup>66</sup> See Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 *CHI. J. INT'L L.* 141, (2003) (noting that the dominant factor for the choice of cross-listing is to “access cheaper finance and enhance the issuer’s visibility”).

<sup>67</sup> Renna Aggarwal et al, *ADR Holdings of U.S. Bases Emerging Market Funds* (2005) <http://faculty.msb.edu/prog/Cmrc/papers/CMRC-05-04.pdf>.

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.* at 7.

<sup>70</sup> *Id.* (discussing there is an additional cost that the investor will incur is cost such as conversion fee and foreign exchange transactional cost).

<sup>71</sup> *Id.* at 7-8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



types of ADRs: (1) sponsored ADRs, whereby the foreign issuer participates in the ADR program by depositing its shares in a depository bank;<sup>74</sup> and (2) unsponsored ADR programs whereby a depository establishes an ADR facility without the participation of the foreign issuer.<sup>75</sup> ADRs are traded on U.S. exchanges.<sup>76</sup>

ADRs are established under one of four different levels.<sup>77</sup> Level I and IV “involve over-the-counter (‘OTC) pink sheet listing, are issued under Rule 144/Reg S and require ‘minimal or no SEC registration.”<sup>78</sup> Levels II and III are publicly traded on U.S. exchanges and the foreign issuer is subject to U.S. securities law disclosure requirements.<sup>79</sup> Level II ADRs require registration under the 1934 Act.<sup>80</sup> Level III ADRs are subject to disclosure requirements under both the 1933 and 1934 Act.<sup>81</sup> The 1934 Act requires that securities that are traded on an exchange in the United States must be registered. As such, under the 1934 Act the depository shares represented by the ADRs are securities and unless the ADRs are exempt they must be registered before they are publicly distributed within the United States.<sup>82</sup> Foreign issuers that list on a U.S. exchange must comply with the registration and reporting standards of the 1934 Act.<sup>83</sup>

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<sup>74</sup> Saunders *supra* note 66, at 55-56 (discussing that issuers of ADRs enter into an agreement with the depository, a U.S. commercial bank by signing Form F-6 registration statement, which in turn issues depository certificates for the sales of the underlying shares in the United States. “The agreement governs the responsibility of the parties and set forth the fees”).

<sup>75</sup> *Id.* at 55 (discussing that the depository must file a registration statement under the Securities Act of 1933 and “the depository can accept deposits of securities of a foreign private issuer and issue ADRs with respect to such deposits.” The ADR certificate acts as a contract between the ADR holder and the depository).

<sup>76</sup> *Id.* at 57 (discussing that “ADRs are traded in the United States on the New York Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers Automatic Quotation System (“NASDAQ”), and the National Association of Security Dealers (“NASD”) over-the-counter pink sheets”).

<sup>77</sup> See J. Michael Pinegar, *When does Bonding Bond? The Case of ADRs and GDRs* (2003) available at SSRN: <http://ssrn.com/abstract=499804>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Saunders *supra* note 66, at 58.

<sup>83</sup> *Id.*

In addition foreign companies must reconcile their financial statements in accordance with the US General Accepted Accounting Principles (GAAP).<sup>84</sup>

ADRs have become one of the most common financial instruments purchased by U.S. investors to diversify their investment portfolio and access foreign equities through domestically traded securities.<sup>85</sup> In the first half of 2011, “\$1.91 trillion of DRs traded on U.S. and non-U.S. markets and exchanges, a record high and a 4.5% increase year-over-year.”<sup>86</sup> ADR programs and cross-listings have generated significant positive returns for shareholders in the United States.<sup>87</sup> Specifically, U.S. institutional investors holding ADRs through Rule 144 offerings have become an essential part of acquiring a diversified portfolio.<sup>88</sup> If the lower courts interpretation of *Morrison* holds, U.S. investors would have limited legal protection under U.S. securities laws for ADR transactions. Consider too that *Morrison* will shrink if not extinguish U.S. investors’ ability to recover money lost on a foreign exchange, and these investors will be less willing to invest in ADRs if they cannot deploy U.S. antifraud protection laws to sue for securities misconduct overseas.

As noted above the SDNY has applied *Morrison*’s transaction test “in strict fashion,” holding that §10(b) applies to transactions that occur on a U.S. exchange by looking solely to the location of the transactions and nothing more.<sup>89</sup> The lower courts have not distinguished or examined the different types of ADR programs and their varied characteristics to determine that

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<sup>84</sup> Pinegar *supra* note 78, at 2. The International Financial Reporting Standards (IFRS) has been developing new disclosure standards for incorporating into GAAP to remove the differences between international standards and U.S. GAAP accounting standards. The purpose of this is to converge both domestic and cross-border financial reporting standards for U.S. and non-U.S. companies, <http://www.ifrs.org/Home.htm>.

<sup>85</sup> Beyea, *supra* note 2, at 568.

<sup>86</sup> See, “The Depository Receipts Market 2011 Mid-Year Market Review,” [http://www.adrbnymellon.com/dr\\_pub\\_statistics.jsp](http://www.adrbnymellon.com/dr_pub_statistics.jsp) (last visited Dec. 14, 2011).

<sup>87</sup> Hemel *supra* note 50, at 477.

<sup>88</sup> *Teleconference: Morrison v. National Australia Bank - Implications for Investors supra* note 12; See Roger W. Kirby, *Access to United States Courts by Purchases of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd*, 7 HASTING BUS. L.J. 223, 251 (2011).

<sup>89</sup> Boehm *supra* note 8, at 25.

different categories of ADR transactions “merit different levels of liability under §10(b).”<sup>90</sup> The SDNY has dismissed many cases that would not have been rejected prior to *Morrison*.<sup>91</sup> These post-*Morrison* cases have created further “confusion and ambiguity”<sup>92</sup> in the application of U.S. securities law for fraudulent conduct outside the United States involving dual-listed securities and ADRs on a U.S. exchange. Consequently, the lower courts interpretation of *Morrison* has limited, if not prohibited, the protection that U.S. securities laws afforded U.S. investors.<sup>93</sup> Based on *Morrison*’s reasoning U.S. investors having similar securities from an issuer are treated differently purely based on where the securities may have been purchased.<sup>94</sup> Whether a U.S. investor may purchase ADRs on a U.S. exchange or the underlying shares on a foreign exchange, or in cases where the investor may not know he executed a particular ADR or foreign share trade because the investor bought the shares based on best price, could detrimentally effect his ability to bring a claim under §10(b) against the issuer for the same fraudulent conduct.<sup>95</sup> Prior to *Morrison*, it was clear that U.S. investors could seek a remedy in the court against a foreign issuer. Today, given that §10(b) may not apply to certain ADR and foreign shares purchases, U.S. investors not only have to ponder as to where to purchase their securities, but what are the legal risks involve based on the location of the purchase of such investment.<sup>96</sup>

*Morrison* will impact the ability of U.S. institutional investors --and individual investors - - ability to bring class action claims for fraudulent conduct overseas.<sup>97</sup> The standard set out by the lower courts to exclude ADR plaintiffs makes it easier for foreign issuers to capitalize on this

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<sup>90</sup> Chiappini *supra* note 55, at 1821.

<sup>91</sup> Boehm *supra* note 8, at 32 (discussing that many cases have been dismissed because of *Morrison*’s transactional test).

<sup>92</sup> Robert P. Bartlett, III et al *supra* note 61, at 13.

<sup>93</sup> *Id.*

<sup>94</sup> *Teleconference: Morrison v. National Australia Bank - Implications for Investors supra* note 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Kirby *supra* note 89, at 251.

trend and structure their transactions to avoid §10(b) application “while still benefitting from the fraudulent conduct of their U.S. subsidiaries.”<sup>98</sup> The effect of *Morrison* has the potential of leaving a significant group of investors without adequate remedy when harmed by fraudulent conduct outside the United States, which in turn can indirectly harm U.S. markets.<sup>99</sup> The negative impact of *Morrison* is no small matter. There are approximately 421 non-US companies whose ordinary shares are listed on the U.S. exchange valued at \$11.4 trillion.<sup>100</sup> “The total value of U.S. investment in non-U.S. equities (both DRs and non-U.S. shares) increased 13.8% year-over-year to \$4.6 trillion.”<sup>101</sup> Not only are foreign issuers able to raise a significant amount of capital, but listing on a U.S. exchange such as the NYSE, the largest equities marketplace in the world, enables foreign issuers to increase their visibility with U.S. institutional investors, “which makes it easier to raise additional capital in the future, and increases liquidity for the company’s shares.”<sup>102</sup> The Southern District’s decision in post-*Morrison* cases that under *Morrison*’s precedent §10 (b) doesn’t apply to the transaction so long as it takes place abroad,<sup>103</sup> not only bar a significant number of investors from raising a §10(b) claim against these foreign issuers, but could also lead to inequitable results. ADRs issuer could structure their securities transactions to defraud U.S. investors while at the same time reap the benefits of the markets to sell their securities.<sup>104</sup>

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<sup>98</sup> See Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities* (2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1773744](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773744)

<sup>99</sup> Beyea *supra* note 2, at 558.

<sup>100</sup> [http://www.nyse.com/international/nonuslisted/int\\_listed.html](http://www.nyse.com/international/nonuslisted/int_listed.html) (last visited 11/29/2011).

<sup>101</sup> See, “The Depository Receipts Market 2011 Mid-Year Market Review.”

[http://www.adrbnymellon.com/dr\\_pub\\_statistics.jsp](http://www.adrbnymellon.com/dr_pub_statistics.jsp) (last visited Dec. 14, 2011).

<sup>102</sup> Paul B. Maslo, Commentary, *Amputating the Long Arm of the Law: An Analysis of the U.S. Supreme Court’s Decision in Morrison and Why Section 10(b) Still Reaches Issuers of ADRs*, WASH. U. L. REV. (2011) available at <http://lawreview.wustl.edu/category/commentaries/>.

<sup>103</sup> Hemel *supra* note 50, at 473-74.

<sup>104</sup> Beyea *supra* note, 99 at 28.

Despite the legal loophole that *Morrison* created about the application of U.S. securities laws to dual-listed securities and ADR transactions, proponents of *Morrison*'s transaction test argued that the lower courts' interpretation of the decisions as applied to dual-listed securities "is consistent with the basic thrust of *Morrison* which focuses on the location of the transactions."<sup>105</sup> Proponents noted that plaintiffs' attorneys' argument that §10(b) applies to securities listed on an U.S. exchange, even though the foreign issuers' shares are traded on a foreign exchange, is wrong.<sup>106</sup> Wulf A. Kaal and Richard W. Painter who co-authored an article on the Supreme Court's decision in *Morrison* argued that the Supreme Court recognized that National Australia Bank's ADRs were listed on the New York exchange and when the court referred to "transaction in securities listed on a domestic exchange" the court "had to mean transaction in those exchanges, not merely the listing of securities on those exchanges."<sup>107</sup> Further, according to Irwin H. Warren and Matthew E.K. Howatt, lawyers in a New York law firm, the registering and listing of ADRs in the United States should not be used as a "Trojan horse" to get to U.S. courts for claims arising out of foreign purchase of common shares.<sup>108</sup> Citing to the holding in *In re Alstom SA Securities Litigation*, as a correct reading of *Morrison*, Warren and Howatt argued that foreign issuers list their common shares for technical purposes and thus such claim should not fall within the "ambit of Morrison's transactional test."<sup>109</sup> In addition, though the *Morrison* court did not define what constitutes "listed," the definition of "listed" under the '34 Act and the common meaning of "listed security" militate against the argument that §10(b) reaches non-U.S.

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<sup>105</sup> Wulf A. Kaal & Richard W. Painter, *The Aftermath of Morrison v. National Australia Bank and Elliott Associates v. Porsche*, ECFR (2011) available at SSRN: <http://ssrn.com/abstract=1765901>; Basquizar, *supra* note 32 at 1568.

<sup>106</sup> Warren et al *supra* note 52, at 23-24; Kaal et al *supra* note 106, at 82.

<sup>107</sup> Kaal et al *supra* note 106, at 82.

<sup>108</sup> Warren et al *supra* note 52, at 20.

<sup>109</sup> *Id.* at 24.

purchases of the common stocks underlying ADRs that are listed on a U.S. exchange.<sup>110</sup> Proponents also suggest that *Morrison's* bright-line rule would deter non-U.S. companies from listing in the United States because of fear that they would be subject to U.S. securities laws for transaction that occur outside of the United States, which in turn will affect the U.S. markets.<sup>111</sup>

Despite these arguments, proponents of *Morrison's* bright-line rule cast aside that the Supreme Court ruling indicates that either the Court failed to grasp the nature of ADRs” transactions or “simply made a mistake in drafting the opinion.”<sup>112</sup> The defendant NAB’s ADRs were listed on the New York Stock Exchange and the company was subjected to U.S. securities laws reporting requirements.<sup>113</sup> When a foreign issuer sponsors and lists ADRs on the New York Stock Exchange, the ADRs and the underlying shares must be registered with the SEC.<sup>114</sup> “ADRs unquestionably are securities, and Morrison explicitly acknowledges that § 10(b) reaches “the purchase or sale of any other security in the United States.”<sup>115</sup> The Court’s decision then that §10(b) applies to any security listed on a U.S. exchange and that Section 10(b) did not apply to NAB’s ordinary shares seems inconsistent and shows that the court either “overlooked” this or “failed to grasp that Levels 2 and 3 ADRs are in fact listed on U.S. exchanges,”<sup>116</sup> and subject to the 1934 Act reporting requirements. Concomitantly, the lower court’s interpretation of *Morrison* that “ADRs is considered to be a predominantly foreign securities transaction,”<sup>117</sup> means that §10(b) may not apply to U.S. plaintiffs who purchased ADRs in the United States -- especially Levels II and III ADRs – even though when an investor purchases ADRs through a

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* See generally Howell E. Jackson, *Summary Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 *PLI/Corp*, 1243, 1253-54(2009).

<sup>112</sup> *Beyea supra* note 2, at 566.

<sup>113</sup> *Id.*; Bartlett, III et al, *supra* note 61, at 11.

<sup>114</sup> *Beyea supra* note 2, at 566.

<sup>115</sup> *Kirby supra* note 89, at 253.

<sup>116</sup> *Beyea supra* note 2, at 251.

<sup>117</sup> *In re Societe Generale Sec. Litig.*, at \*14.

depository bank he is trading in the U.S. market.<sup>118</sup> The ramification of the lower courts' interpretation of *Morrison* is that courts treat economically equivalent shares differently<sup>119</sup> and *Morrison* has produced uncertainty.

Further, though ADR certificates represent the ownership of the underlying security in a non-U.S. company, ADR holders can convert their ADRs into the underlying share.<sup>120</sup> Similarly, “holders of underlying shares can convert the shares into ADRs if they exist in the US markets.”<sup>121</sup> Though price dynamics such as foreign exchange rates differentiate the dollar price between the ADR and the underlying shares,<sup>122</sup> since ADRs are traded in the US markets like ordinary shares and are securities under §3(10) of the Exchange Act,<sup>123</sup> American purchasers own the underlying foreign security.<sup>124</sup> ADRs, specifically Levels II and III, are subjected to U.S. securities regulation.<sup>125</sup> Rule 144A offerings and Level I ADR programs, though they are unlisted and are sold over-the-counter, both “have significant connections to the United States.”<sup>126</sup> Rule 144A offerings and Level I ADR programs trade in U.S. dollars, are designed by foreign corporations to gain access to American investors, and in the case of Rule 144 offerings to raise capital in the United States.<sup>127</sup> Furthermore, unlike the ADR transaction, “the securities sold in a Rule 144A offering are not really even foreign securities; they are new

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<sup>118</sup> Beyea *supra* note 2, at 574 n.177 (discussing that it would be a radical result that *Morrison* would not apply to plaintiffs who had purchased U.S.-listed ADRs in the United States and “the more likely explanation... is that lower courts are simply misconstruing *Morrison* in applying it to dismiss the claims of U.S. purchasers who bought ADRs in the United States”); Chiappini *supra* note 55, at 1825.

<sup>119</sup> Robert P. Bartlett, III et al *supra* note 61, at 7.

<sup>120</sup> See Minh Kim, Andrew C. Szakmary & Ike Mathur, *Price Transmission Dynamics Between ADRs and Their Underlying Foreign Securities*, 24 JOURNAL OF BANKING & FIN. 1356, 1362 (2000) (discussing that the “ADRs holder will accrue a transactional cost for the conversion such as a conversion and foreign exchange fees”).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1362-63.

<sup>123</sup> §3(10) of the Exchange Act defines “security” as “any certificate of deposit for security. 15 U.S.C §7a.

<sup>124</sup> Chiappini *supra* note 55, at 1826.

<sup>125</sup> *Id.* at 1818.

<sup>126</sup> *Id.* at 1829.

<sup>127</sup> *Id.* at 1829-30.

securities created exclusively for American investors.”<sup>128</sup> By sponsoring these varied ADRs programs an issuer brings itself into the U.S. securities law regime, in particular §10(b).<sup>129</sup> Having to satisfy U.S. securities laws reporting requirements, ADR issuers then should “naturally and fairly” be held liable “for deceptive acts related to the U.S. securities it caused to be issued.”<sup>130</sup> Thus, though lower courts treat ADRs as a foreign transaction by the mere fact that the depository bank purchased the underlying foreign security, the U.S. investor’s purchase of the ADR issued by the depository bank should be a transaction subject to §10(b).<sup>131</sup>

Further, “§10(b) explicitly encompasses purchases or sales of securities.”<sup>132</sup> Therefore, an exchange of shares qualifies as a sale for § 10(b) purposes.<sup>133</sup> When U.S. shareholders sell or convert their ADRs, the sale or conversion of ADRs should receive § 10(b) protection.<sup>134</sup> It is incongruous that investors holding similar shares from the same issuer can sue under §10(b) for the shares that are purchased on a U.S. exchange, but not for the shares purchased on a foreign exchange for precisely the same conduct particularly in light of increasing globalization of securities markets. Thus, the lower courts’ decision that ADRs are foreign transactions underscores the need for Congress to pass legislation for the extraterritorial application of the anti-fraud provision of U.S. securities law.

Furthermore, although *Morrison* provides some certainty in the law for “f-cubed” cases, the Supreme Court’s standard, if applied purely to domestic transactions, could “frustrate the goals of the U.S. regulatory regime”<sup>135</sup> in addressing transnational fraud affecting the U.S. public, U.S. investors and the integrity of the securities market. The lower courts’ interpretation

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<sup>128</sup> *Id.* at 1830.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1829.

<sup>131</sup> *Id.*

<sup>132</sup> Kirby *supra* note 89, at 254.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Hemel *supra* note 50, at 486.



of *Morrison* opens the door for a foreign issuer to issue material misstatements overseas involving stocks listed on a U.S. exchange, and the issuer will be immune from §10(b) and Rule 10b-5 liability “than would a comparably positioned U.S. issuer listed on the U.S. exchange.”<sup>136</sup> As such, foreign issuers would have less incentive to comply with U.S. disclosure laws even when they are subjected to U.S. securities law regulatory requirements.<sup>137</sup> The United States has a legitimate reason for extending its antifraud provisions outside the United States.

U.S. securities regulations protect against fraudulent conduct, mainly misleading public disclosures. The purpose of this rule is to protect investors by employing devices for corporate disclosure. Therefore, for foreign issuers whose securities are dual-listed on a U.S. exchange or chose to sponsor ADRs programs, U.S. securities laws provide for “two securities regulation regimes: one for domestic issuers and one for foreign ones.”<sup>138</sup> Foreign firms are excluded from certain of the corporate governance provisions of securities law if they satisfy certain requirements. However, as discussed above foreign firms sponsoring ADRs are subjected to U.S. disclosure laws.<sup>139</sup> Similarly, dual-listed companies are “subjected to §10(b) liability with respect to material misrepresentations or omissions in connection with the securities listed on a U.S. exchange.”<sup>140</sup> However, regulation governing corporate governance relating to corporate insiders is inferior to those governing American issuers, in particular “disclosure of corporate interest.”<sup>141</sup> “Foreign issuers are exempt from disclosing data concerning material transactions with officers, directors, and control persons, unless the issuer already makes such disclosure,”<sup>142</sup>

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<sup>136</sup> See Merritt B. Fox, *Fraud-on-the Market Class Actions Against Foreign Issuers*, (Columbia Law and Economics Working Paper No. 400. Colum. L. and Econ. Working Paper No. 400) available at/papers.ssrn.com/sol3/papers.cfm?abstract\_id=1831453.

<sup>137</sup> *Id.*

<sup>138</sup> Licht *supra* note 67, at 151-153 (discussing the different SEC disclosure requirements for foreign firms).

<sup>139</sup> *Id.*

<sup>140</sup> Beyea *supra* note 2, at 568.

<sup>141</sup> Licht *supra* note 67, at 152.

<sup>142</sup> *Id.*

as compared to U.S. issuers who must meet more demanding disclosure in this area. The result of *Morrison* is that foreign issuer insiders could trade in “cross-listed securities with information on price differences of the same security in both their home market and the U.S. market “with impunity as long as they relegate their transactions to foreign exchanges,”<sup>143</sup> giving potential violators the “opportunity to engage in cross-exchange regulatory arbitrage.”<sup>144</sup> Yet according to *Morrison* §10(b) may not apply to the insider trading activities simply because the fraudulent act took place outside the United States, even though the conduct involves and affects shares dual or cross-listed on an American exchange. Thus, *Morrison*’s ruling leads to investors being treated differently for the same injury.<sup>145</sup> A strict interpretation of *Morrison* poses the problem that “§10(b) may become a dead letter,” if it doesn’t apply to dual listed and ADRs listed on U.S. exchange.<sup>146</sup> If *Morrison* is interpreted to restrict §10(b) to only domestic transactions, without clarification from Congress, U.S. securities law would not be able to protect some classes of U.S. investors.

Proponents of *Morrison*’s bright-line rule argue that *Morrison* was correctly decided, and neither the courts nor the Dodd Frank Act should abrogate its decision.<sup>147</sup> One of the primary arguments that proponents put forth is that *Morrison* upholds the principle of international comity.<sup>148</sup> Citing Justice Scalia’s reasoning that comity justifies the limitation on §10(b)’s

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<sup>143</sup> Hemel *supra* note 50, at 486.

<sup>144</sup> *Id.*; Robert P. Bartlett, III et al *supra* note 61, at 8; See Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT’L L. 563, 565-67 (1988) (discussing regulatory arbitrage whereby when a stock trades on more than one market trading is split among several markets, but arbitrageurs can close the gap that develops between the markets with price information that develops between prices of the same security in each market and if those securities transactions are subject to more than one legal regimes, should one country fail to curb insider trading, insiders this could direct their trades to the market with a lower regulatory burden and thus frustrate the regulatory objectives of the other countries).

<sup>145</sup> Robert P. Bartlett, III et al *supra* note 61, at 7.

<sup>146</sup> Hemel *supra* note 50, at 486.

<sup>147</sup> Baquizal *supra* note 32, at 1574; Rocks *supra* note 48, at 197; Elgadeh, *supra* note 41, at 598-600 (discussing that the several amicus briefs that were filed by international bodies in support of the Respondent, National Australia Bank, show that a large group of foreign nations reject the extraterritoriality reach of §10(b)).

<sup>148</sup> *Id.*

extraterritorial application, proponents assert that *Morrison* respects the sovereignty of foreign nations by allowing them to establish liability rules best suited to their own financial markets.<sup>149</sup> Further, extending U.S. securities antifraud laws to private causes of action for the purchase of shares on foreign exchanges “would be an impermissible imposition of U.S. substantive and procedural law on foreign nations” against Section 403 of the Restatement (Third) of Foreign Relations Law, which prohibits jurisdiction over a person or activity with “connections to another state” where it is unreasonable to do so.<sup>150</sup> Moreover, proponents argue because other countries have enacted their own regulatory regime to enforce securities fraud within their borders, though the regulation of financial markets is desirable, allowing §10(b) to apply to other countries could create jurisdictional conflicts with the securities laws of other nations.<sup>151</sup>

The foregoing comity arguments are weak. There is a strong justifiable interest of the United States in providing U.S. investors and American markets with the antifraud provisions of §10(b) and Rule 10b-5 to address fraud in cross-border securities transactions. Foreign companies will benefit as well by having their cross-border securities transaction protected by U.S. anti-fraud law. With the increasing globalization of securities markets, securities transactions are connected from country to country, which makes it no longer feasible to define a domestic transaction or “where the transaction occurs with clarity.”<sup>152</sup> The integration of securities transactions and capital markets has increased transnational securities fraud. The

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<sup>149</sup> *Id.* See, e.g., Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees at 2, *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010) (No. 08-1191); See, e.g., Brief for the Republic of France as Amicus Curiae in Support of Respondents at 4-5, 34, *Morrison*, 130 S. Ct. 2869 (No. 08-1191); See, e.g., Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 2, 29, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

<sup>150</sup> Baquizal *supra* note 32, at 1574.

<sup>151</sup> See generally *supra* note 149; Beyea *supra* note 2, at 555 (discussing the amicus briefs filed by the Commonwealth of Australia and the United Kingdom which argued that “too broad an extraterritorial application of the U.S. antifraud rules can result in jurisdictional conflict with other countries seeking to regulate the same transaction”).

<sup>152</sup> Hannah L. Buxbaum et al, *Harmony and Dissonance in Extraterritorial Regulation* (American Society of International Law 105th Annual Meeting Proceedings, 2011; Indiana Legal Studies Research Paper No. 198) available at SSRN: <http://ssrn.com/abstract=1839653>.

“flow of transactions on global markets means that domestic conditions within the United States can sometimes be affected even if the specific claim in question does not flow from a domestic transaction.”<sup>153</sup> Pre-*Morrison* courts entertained securities fraud claims of investors who purchased on foreign exchanges where there was significant “conduct” or “effects” in the United States.<sup>154</sup> *Morrison* means that U.S. courts now only look to the location of the transaction in order for §10(b) to apply.<sup>155</sup> While the comity concerns should be acknowledged, because *Morrison*’s transactional test not only bars “f-cubed” claims but other kinds of cross-border activities such as dual-listed securities and ADRs, foreign companies could release fraudulent information in the United States, knowing that U.S. investors would not be able to file a successful §10(b) claim against them.<sup>156</sup> As Justice Stevens pointed out in his concurrence in *Morrison*, this would frustrate the goals of the ‘34 Act to protect the interest of the investors and the public.<sup>157</sup> Though certain commentators favor Section 403 of the Restatement (Third) of Foreign Relations Law to argue against a geographic extension of §10(b),<sup>158</sup> Section 402 of this Restatement allows for such extension, by permitting a state to prescribe laws with respect to conduct within its territory or outside conduct that has an effect within it’s territory.<sup>159</sup> Given that the goal of U.S securities laws is to protect U.S. investors and the integrity of U.S. markets, the U.S. has a justifiable interest in regulations that extend beyond specific transactions conducted on our markets or within our borders.

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<sup>153</sup> *Id.* at 8.

<sup>154</sup> Boehm *supra* note 8, at 12.

<sup>155</sup> *Id.* at 26.

<sup>156</sup> Buxbaum *supra* note 151, at 8.

<sup>157</sup> *Morrison*, 130 S. Ct. at 2985 (See Justice Stevens concurrence in *Morrison* providing an example of how *Morrison* could preclude the application of US securities law for U.S. investors).

<sup>158</sup> Baquizar *supra* note 32, at 1574; See also *supra* note 150.

<sup>159</sup> See Restatement (Third) of Foreign Rel. Law § 402 (listing the bases by which jurisdiction over non-US subjects is proper).

International law favors §10(b)'s extraterritoriality. “Under traditional long-arm or comity considerations, a foreign enterprise that purposefully enters a jurisdiction both to solicit funds, to list its securities for trading and then touts its business in order to enhance the value of these securities incurs the likelihood of finding itself falling personally under that forum's jurisdictional authority.”<sup>160</sup> As noted above, non-U.S. companies raise a significant amount of capital from U.S. investors. Foreign firms that come to the United States and solicit capital, given the financial stakes for U.S. investors, this complex relationship necessitates some kind of §10(b) protection. Moreover, a foreign issuer that takes steps necessary to sponsor ADRs or elect to dual-list its securities could hardly claim intrusion of U.S. securities law.<sup>161</sup> “International comity concerns are minimized when companies choose to subject themselves to U.S. law.”<sup>162</sup> If *Morrison* is interpreted by future courts to immunize foreign issuers from antifraud liability solely based on where the transaction occurs, unfair results follow and U.S. investors are deprived of important rights.

Remained unanswered from *Morrison*, is whether U.S. investors cannot bring a §10(b) claim in U.S. courts against a foreign issuer because the transaction did not take place on a U.S. exchange, could they bring their claim in another country or under another country's law in U.S. courts.<sup>163</sup> This question highlights that one has to assume that “all other countries with a stock exchange have an adequate antifraud enforcement regime” that addresses these securities fraud claims.<sup>164</sup> While some countries have enacted regulations against security fraud, certainly this

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<sup>160</sup> Kirby *supra* note 89, at 244.

<sup>161</sup> *Id.* at 244-45.

<sup>162</sup> Robert P. Bartlett, III et al *supra* note 61, at 10.

<sup>163</sup> Silberman *supra* note 62, at 11 (discussing that one of the question “asked by Justice Ginsburg at the oral argument that was never answered was whether the foreign investors could bring their claims under Australian law in U.S. courts”).

<sup>164</sup> Beyea *supra* note 2, at 561.

assumption is not true for all of them.<sup>165</sup> The potential impact of *Morrison* is that U.S. investors will be faced with a suit without a country, or where no law applies.<sup>166</sup> In cases brought by U.S. investors for securities fraud claims arising from transactions outside of the United States, though the investor may be an ADR holder of the affected security, given that U.S. securities law will not apply, the U.S. court and/or the a foreign court will dismiss the claim. This is because “courts have traditionally taken the view that courts of one nation will not enforce the “public law” of another country.”<sup>167</sup> Most importantly, even if the claim can be brought in the United States or a foreign court applying the securities laws of the respective country, there is the potential that the claim will be dismissed on *forum non-conveniens* grounds.<sup>168</sup> In such cases evidence supporting the “core facts” -- the non U.S. transaction – are elsewhere, which would mean that applying a foreign law “would introduce a host of inconveniences and prejudicial outcomes.”<sup>169</sup> Therefore *Morrison* transaction test could lead to no adequate remedy for defrauded investors. *Morrison* scream out for Congress to amend §10(b) to protect American investors in foreign transactions.

#### IV. CONCLUSION

This paper urges Congress to make a clear pronouncement that §10(b) and Rule 10b-5 apply to extraterritorial securities transactions and thus reaches dual-listed securities and ADR transactions. The Supreme Court's decision in *Morrison* significantly impacts whether U.S. securities laws apply to dual listed securities and ADR transactions. While *Morrison's* decision is applauded for creating a bright-line rule for foreign issuers, the decision carries important

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<sup>165</sup> *Id.* (discussing that countries for example Germany and the United Kingdom have securities regulation but they too have recently been reexamining their securities enforcement systems).

<sup>166</sup> *Beyea supra* note 99, at 24 ( discussing that under-regulation of U.S. securities law could mean no country would have a sufficient basis or motivation for applying their law to a case).

<sup>167</sup> *Silberman supra* note 62, at 12.

<sup>168</sup> *Id.* at 14.

<sup>169</sup> *Id.*; Robert P. Bartlett, III et al *supra* note 61, at 18.

implications for dual listed securities and ADR transactions. *Morrison's* transactional test creates loopholes for foreign companies to commit fraud affecting U.S. investors and U.S. markets. Given the volume of ADR transactions in the United States and the significant capital that foreign companies raise from such transactions, Congress must act now before *Morrison* erases the protection that the anti-fraud provisions of U.S. securities laws afforded U.S. investors.