The Aftermath of Morrison v. National Australia Bank and Elliott Associates v. Porsche

by

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This article evaluates the ambiguities and shortcomings of the U.S. Supreme Court decision in *Morrison* with a particular emphasis on the implications of the recent *Porsche* decision in the Southern District of New York. We conclude that the ambiguities in *Morrison* and the implications of interpreting *Morrison* for persons and companies in European jurisdictions and elsewhere in the world make it necessary for the U.S. Congress to further clarify the extraterritorial reach of the implied right of action under the Securities Exchange Act of 1934. We also conclude that the U.S. Congress should clarify its intent in Section 929P(b) of the Dodd-Frank Act of 2010 to give extraterritorial enforcement authority to the U.S. Securities and Exchange Commission (SEC) and U.S. Department of Justice. An SEC study of private rights of action is also required by the Dodd-Frank Act, but regardless of the outcome of this study, Congress should decline to reinstate private rights of action in "foreign-cubed" cases. Restraining and clarifying the U.S. approach to extraterritoriality could help provide certainty to international securities markets and avoid a downturn in international economic cooperation.

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In a landmark case the U.S. Supreme Court in *Morrison v. National Australia Bank*[1], clarified many issues pertaining to the extraterritorial reach of

1 130 S. Ct. 2869 (2010).

Section 10(b) of the Securities Exchange Act. The decision holds that most, if not all, suits over securities transactions taking place outside the U.S. are not covered by the anti-fraud provisions of U.S. securities laws and thus cannot be brought successfully in U.S. courts.

Prior to *Morrison*, U.S. courts of appeals had analyzed the question of whether Section 10(b) of the Securities and Exchange Act of 1934[2] and Rule 10b-5 thereunder can be applied to foreign litigants in securities fraud suits on a case-by-case basis as a question of subject matter jurisdiction. The Second Circuit's so-called "conduct and effects" tests looked at whether conduct constituting the violation took place in the United States or whether the conduct had an effect on U.S. investors[3]. U.S. courts had avoided a bright line rule for determining which cases can be litigated in U.S. courts and which cannot. As a result, U.S. courts applied the conduct and effects tests inconsistently[4]. This inconsistency was especially problematic in the context of "foreign cubed" litigation[5], i.e., securities lawsuits where a non-U.S. plaintiff sues a non-U.S. issuer or other non-U.S. defendants over securities transactions outside the U.S., claiming that those non-U.S. transactions were the result of fraudulent conduct inside the United States[6].

I. The Morrison Holding and its Ambiguities

In *Morrison,* the U.S. Supreme Court dramatically limited the extraterritorial reach of Section 10(b) of the Exchange Act, finding that Section 10(b) and Rule 10b-5 thereunder[7] do not create a private right of action for foreign purchasers of foreign securities outside the United States. The logic of the holding strongly suggests that there would also be no enforcement rights for the SEC with respect to securities transactions taking place outside the United States (as discussed below, the Securities and Exchange Commission's extraterritorial enforcement authority is addressed in the 2010 Dodd-Frank Act). The *Morrison* decision rejects over four decades of case law, including the

2 15 U.S.C. § 78j (2006) in 48 Stat. 881, 15 U.S.C § 78a et seq. (enacted June 6, 1934).

3 For a thorough discussion of case law *see* Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. Davis L. Rev. 66, Part I (2010), *available at* SSRN: http://ssrn.com/abstract=1496049.

4 *Id.*

5 *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 17 (2007).

6 *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 172 (2d Cir. 2008), *cert. granted*, 2009 WL 4111014 (U.S. Nov. 30, 2009) (No. 08-1191).

7 15 U.S.C. § 78j (2006); 17 C.F.R. § 240.10b-5.

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Second Circuit's "conduct and effects tests"[8] and establishes what appears to be a bright-line rule. Section 10(b) and Rule 10b-5 apply "only in connection with the purchase or sale of a security listed on an American stock exchange [or] the purchase or sale of any other security in the United States."[9]

In *Morrison v. National Australia Bank*[10], the U.S. Supreme Court thus ruled that securities fraud suits cannot be brought under U.S. law against foreign defendants by foreign plaintiffs who bought foreign securities outside the United States. In *Morrison*, Australian plaintiffs, who purchased shares of National Australia Bank (NAB) on an Australian stock exchange and claimed they had been misled in Australia by statements by Australian bank officials regarding the performance of a U.S. subsidiary, attempted to pursue their claims under U.S. securities law. The Court rejected the limited involvement of the U.S. subsidiary as sufficient justification to apply Section 10(b) extraterritorially to transactions in the parent company's stock on the Australian stock exchange.

In its opinion, the Court held that Section 10(b) does not apply extraterritorially[11], and that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[12] Thus, the Court rejected the views of the U.S. Solicitor General and the SEC that the Exchange Act should be held to apply to fraud in an extraterritorial securities transaction that "involves significant conduct in the United States that is material to the fraud's success."[13] The Court concluded with a transaction-based test, stating that Section 10(b) reaches only fraud in connection with the "purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[14]

8 Under the Second Circuit's "conduct" and "effects" tests, the extraterritorial application of the antifraud provisions in Section 10(b) and Rule 10b-5 of the Exchange Act required that the alleged wrongful conduct have substantial effects in the United States (the "effects test") or that sufficient fraudulent conduct has to have occurred in the United States in connection with a securities transaction outside the United States (the "conduct test").

9 130 S. Ct. at 2888.

10 *Id.*

11 *Id.* at 2883.

12 *Id.* at 2884.

13 *Id.* at 2886-88.

14 *Id.* at 2888.

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II. Open Questions After Morrison

The *Morrison* decision is a landmark case that clarifies some questions pertaining to the extraterritorial application of Section 10(b). Nevertheless, *Morrison* leaves open some unanswered questions, many of which are being further explored in subsequent securities litigation. The outcome of several cases now pending in the United States District Court for the Southern District of New York[15] could clarify the reach of *Morrison* and could have a lasting impact on the future of litigation over non-U.S. securities transactions.

1. Does Section 10(b) Apply to Dually Listed Securities?

The summary of the *Morrison* opinion states: "And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."[16] At the end of the opinion, there is similar language: "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[17] Looking at these two sentences alone, it could be argued that a security of a class listed on a U.S. exchange is covered by Section 10(b), even if that security is purchased inside the United States.

Plaintiffs' lawyers are already using these sentences to argue that even if most of a foreign issuer's shares are traded outside the United States, as long as any shares are listed on a U.S. exchange, transactions in all of the issuer's shares everywhere, including on foreign exchanges, are covered by Section 10(b)[18]. Many Canadian companies, for example, have one class of common shares that trades on both the Toronto Stock Exchange and the New York Stock Exchange. Applying the language of these sentences of *Morrison* literally, Section 10(b) would apply to a purchase of securities in Canada on the Toronto

15 *See In Re* Vivendi Universal, S.A. Sec. Litig. (Case 1:02-cv-05571, Civil Action No. 02 Civ. 5571(RJH/HBP) Filed 07/16/2010; (S.D.N.Y.)); In Re UBS AG Sec. Litig., No. 07 CV 11225 (RJS) (S.D.N.Y.); Elliott Associates, L.P., v. Porsche Automobil Holding, SE, No. 10 Civ. 0532 (S.D.N.Y.)(HB); Black Diamond Offshore Ltd. v. Porsche Automobil Holding SE, No. 10 Civ. 4155 (S.D.N.Y.) (HB).

16 130 S. Ct. at 2884.

17 *Id.* at 2888. Justice Scalia probably used the summarizing language he did because the language in the Exchange Act reads: "the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. § 78j (2006).

18 *See* Plaintiffs' Supp. Mem. Concerning the Impact of *Morrison v. NAB* at 10-16, in *In re Vivendi Universal, S.A., Sec. Litig.*, No. 02 Civ. 5571 (S.D.N.Y. July 16, 2010).

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exchange by a Canadian citizen, simply because the shares are of a class that is also listed in New York. And the SEC, in a recent insider trading enforcement case involving transactions in Toronto, has taken the position that it can sue under Section 10(b) as to transactions in Canada because the shares are also listed in New York[19].

This interpretation is inconsistent with the basic thrust of the *Morrison* opinion, which focuses on the location of the transactions and the fact that Section 10(b) does not apply extraterritorially. Furthermore, the Supreme Court knew that NAB had American Depositary Receipts (ADRs) listed in New York (purchasers of the ADRs were not parties to the case in *Morrison,* and NAB did not deny that they could sue under Section 10(b)). Indeed, in order for a foreign issuer to sponsor and list ADRs on a U.S. exchange, it must register its shares with the SEC under the Exchange Act and list the shares on the New York Stock Exchange (though not for trading). NAB's registration statement under the Exchange Act thus pertained to the "ordinary shares."[20] The entire point of the *Morrison* opinion, however, is that Section 10(b) did not apply to trades in NAB's ordinary shares in Australia. This is inconsistent with a theory that the Court would apply Section 10(b) to any security listed on a U.S. exchange, even if the transaction in that security is outside the United States. It also makes little sense to argue that the result would be different, and Section 10(b) would apply to transactions in NAB's ordinary shares outside the United States, if NAB had listed its ordinary shares for trading on the NYSE instead of listing the ADRs. There is little substantive difference between these two types of arrangements.

Furthermore, in Section 30 of the Exchange Act[21], Congress specifically ad-

19 *See* Sec. & Exch. Comm'n v. MacDonald, No. 09 Civ. 5352 (HB) (S.D.N.Y.), at 11, n. 2. Perhaps wisely, the SEC sought only disgorgement of profits from trades in the United States and did not seek disgorgement of profits from trades in Toronto. *See id.* at n. 2. It is thus unlikely that a court will rule on this issue in this case.

20 At page 58 of the Supplemental Joint Appendix in *Morrison v. NAB*, the 20-F cover says NAB's ordinary shares were "registered" on the "NYSE". This cover looks exactly like the 20-F cover for *Vivendi* on which the plaintiffs are relying. The registration regulation is cited in the *Vivendi* plaintiffs' brief. *See* Plaintiffs' Supp. Mem. Concerning the Impact of *Morrison v. NAB* at 11, in *In re Vivendi Universal, S.A., Sec. Litig.*, No. 02 Civ. 5571 (S.D.N.Y. July 16, 2010) (citing 17 C.F.R. § 240.12d1-1).

21 Section 30 provides:
(a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the

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dressed the extraterritorial reach of the Exchange Act. The *Morrison* opinion observed that Section 30 addresses those situations where the SEC needs to protect investors in the United States against violations of the Exchange Act in foreign trading markets. The *Morrison* opinion also makes it clear that Congress did not intend the extraterritorial effect of the Exchange Act to go beyond the specific provisions of Section 30, which is Congress's only articulation of the extraterritorial reach of Section 10(b)[22].

The Supreme Court should have avoided confusion by summarizing its holding in language that conforms with the logic of the opinion, which clearly supports the conclusion that Section 10(b) applies only to securities bought or sold in the United States. When the Court referred to "transactions in securities listed on domestic exchanges" it had to mean transactions on those exchanges, not the mere listing of the securities on those exchanges. The entirety of the opinion – in particular the emphasis throughout on the place of the securities transaction – supports this interpretation. Furthermore, allowing Section 10(b) suits over dually listed securities traded outside the United States would undermine the strongest policy arguments discussed in the *Morrison* opinion -that applying Section 10(b) to foreign exchanges would interfere with the laws of other countries and turn the U.S. into a Shangri-La for plaintiffs' lawyers suing on behalf of investors who purchased their shares on foreign exchanges[23].

2. *Does Section 10(b) Apply to Derivative Transactions in the U.S. that Are Based on Foreign Traded Stocks?*

Elliott Associates, L.P. v. Porsche Automobile Holding SE[24] (Porsche) raises issues that were not before the Supreme Court in *Morrison.* In *Porsche*, plain-

protection of investors or to prevent the evasion of this title.
(b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title. 15 U.S.C. § 78dd.

22 130 S. Ct. at 2882-83.

23 The application of *Morrison* to dually listed securities is explored in 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 (2011). So far the courts have not been willing to apply Section 10(b) in this context. See e.g. In re Royal Bank of Scotland Securities Litigation, 09 Civ. 300, Opinion and Order (S.D.N.Y. January 11, 2011).

24 No. 10 Civ. 0532 (HB)(THK) (S.D.N.Y. filed Jan. 25, 2010).

tiffs, a collection of international hedge funds, betting that the value of Volkswagen AG shares would decline, established short positions through short sales and over-the-counter equities-based swap agreements relating to common stock of Volkswagen AG, the German car manufacturer based in Wolfsburg, Germany[25]. Plaintiffs in *Porsche* alleged that: "all steps necessary to transact the swap agreements were carried out in the United States, and investment managers in New York signed swap confirmations at their offices in [New York], ... [and] all steps necessary to transact the security-based swap agreements at issue in that action were carried out in Dallas, Texas, with counterparties acting on behalf of financial institutions located in New York."[26] Plaintiffs allege that any investment decisions made on their behalf in VW stock were made by "US-based investment managers"[27] and the swaps at issue were governed by New York law[28].

After the European Commission, in 2004, determined that the so-called VW Act, a German law that limited the voting power in VW shares to twenty percent and increased the shareholder approval threshold for takeovers of VW from seventy-five percent to eighty percent, violated the European Union law by hindering the free movement of capital, "Porsche decided to increase its share ownership in VW."[29] By the end of 2007, Porsche had accumulated approximately thirty-one percent of VW shares[30], and increased its stake further by October 2008[31]. Despite this, Porsche allegedly denied its intent to take over VW. Plaintiffs alleged that Porsche, before its public announcement of its accumulation of seventy-four percent of VW shares on October 26, 2008, privately disclosed to the government of Lower Saxony (holding twenty percent ownership in VW) its planned takeover of VW[32].

"As a result of Porsche's disclosure [on October 26, 2008], and the market's recognition of the scarcity of shares, the price of VW shares rose and forced Plaintiffs and other holders of short positions in VW to cover their positions at

25 Sullivan & Cromwell LLP, Memorandum of Law in Support of Defendant Porsche Automobile Holding SE's Motion to Dismiss Pursuant to Rule 12(b)(6) or on the Basis of Forum Non Conveniens, at 1 (Aug. 31, 2010) (on file with authors) [hereinafter S&C].

26 Judge Baer granted the motion to dismiss in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 3-4.

27 *Id.* at 3.

28 *Id.* at 4.

29 *Id.* at 4.

30 *Id.* at 5.

31 *Id.* at 6.

32 *Id.*

great cost."[33] Plaintiffs sought to recover in litigation against Porsche for alleged misrepresentations and market manipulation in violation of Section 10(b), which Plaintiffs claimed ultimately resulted in over $2 billion in losses by the Plaintiffs[34]. Plaintiffs alleged that to corner the market, the defendants "induce[d] the Plaintiffs to enter into short sales as a means by which Porsche could acquire more and more VW shares."[35] Although the alleged misstatements and market manipulation occurred outside the United States, Plaintiffs invoked Section 10(b)[36] and Rule 10b-5 thereunder, on the theory that the swap agreements had been entered into in the United States[37]. Swap agreements with U.S. parties, Plaintiffs argued, took place inside the U.S. and therefore were a sufficient connection with the U.S. for a cause of action to arise under Section 10(b). As Porsche's lawyers pointed out in briefing the case, under Plaintiff's theory "Section 10(b) would regulate foreign markets in foreign securities traded solely on foreign exchanges and subject to foreign law, as long as private parties signed confirmations in the United States for swap agreements referencing those foreign securities."[38]

The Supreme Court in *Morrison* established a bright-line test, concluding that Section 10(b) reaches only fraud in connection with the "purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[39] In the oral argument in the Southern District of New York of Porsche's motion to dismiss the complaint, Judge Baer implied that *Morrison's* reference to "purchase or sale of a security listed on an American stock exchange"[40] would perhaps have no bearing on whether

33 *Id.*

34 *Id.* at 7; *see also* S&C, *supra* note 25, at 1; *see also* Second Amended Complaint in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), Dec. 7, 2010, at 2 ("Plaintiffs did not know that (1) they were selling borrowed shares to Porsche, directly and indirectly, and (2) that Porsche had launched a secret plan to use shares it controlled to take over VW. In essence, Porsche lured the Plaintiffs into a trap, making Plaintiffs believe VW shares were overvalued while hiding from Plaintiffs the risk of a massive short squeeze that soon would send the price skyrocketing several hundred percent.").

35 *Id.*

36 15 U.S.C. §78j(b) (2010).

37 17 C.F.R. §240.10b-b. There is no indication in the complaint or supporting documentation indicating where the swap agreements may have taken place. *See* Transcript of Oral argument in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), Dec. 7, 2010, at 40 (Judge Baer) ("MR. GIUFFRA: Your Honor, there's nothing in the complaint about where these swap agreements occurred."). ("MR. HEATON: [...] there's no secret that there are securities-based swaps going on in the world, and as to this point that somehow people know about ADRs but they don't know about swaps, not only is that nowhere in the record, [...]."). *Id.* at 30.

38 S&C, *supra* note 25, at 2.

39 130 S. Ct. at 2888.

40 *Id.*

Section 10(b) applied to individually negotiated swap agreements in the U.S. because the swap agreements were not traded on exchanges[41]. The question thus was whether the swaps could be characterized as the purchase or sale of any other security in the United States.

According to Judge Baer the answer to this question was no. This was because the swap agreements at issue were not the equivalent of the purchase or sale of a security in the United States. Judge Baer dismissed the complaint against Porsche and focused on the purpose of Section 10(b) and on the economic reality of a swap agreement. Judge Baer examined several factors including the fact that Congress had added swap agreements to Section 10(b) because of concerns about fraud, manipulation and insider trading that affects the market for the underlying security. He noted that under *Morrison*, Section 10(b) does not apply simply because a buy order is made in the U.S. for a foreign traded security. He then observed that: "The economic reality is that Plaintiff's swap agreements are essentially 'transactions conducted upon foreign exchanges and markets,' and not 'domestic transactions' that merit the protection of [Section] 10(b)."[42] Judge Baer's decision to grant the motion to dismiss is good news for Porsche and for non-U.S. issuers generally, but the decision is likely to be appealed.

While the swap agreements in *Porsche* are not the equivalent of a transaction conducted upon a U.S. securities exchange, they are also not the equivalent of a transaction on a German stock exchange, as Judge Baer's opinion implies. If German parties in Frankfurt entered into a swap agreement referencing General Motors (GM) stock, that swap agreement would not be the equivalent of a transaction in GM stock on the New York Stock Exchange. A range of factors, including the relationship, if any, between GM and the swap agreement would need to be considered to determine whether one of these German parties would be entitled to sue GM in the United States under *Morrison*. If the defendant had no relationship with the plaintiff and said nothing about the

41 Transcript of Oral Argument in *Elliot Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB) at 40 (Dec. 7, 2010) (Judge Baer) [hereinafter Transcript] ("THE COURT: I am not just not sure that Morrison, that that court really gave a darn about whether or not it was traded or not traded on an exchange. I think, frankly, it would be unlikely for them to, not that I interpret anything they do before it's done, but it would seem to me in a free enterprise system that they seem to be touting, that that aspect, that is, whether the ADR is traded here and the swap isn't on an exchange, might really not be pivotal in terms of their decision."). Judge Baer's opinion in *Porsche* confirmed that the focus of his analysis was on whether the swaps were "domestic transactions in other securities." *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 8.

42 Judge Bear granted the motion to dismiss in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 12.

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swaps, there should be no cause of action. On the other hand, it is not clear that if the dispute had been between U.S. counterparties to a U.S. swap agreement (for example, if one lied about the ability to perform), a U.S. court would have dismissed the suit simply because the reference security was traded in Germany. The logic behind the *Morrison* opinion does not appear to require dismissal of such a claim when the swap agreement was entered into entirely in the United States.

In the actual *Porsche* case, however, the swap transactions were not the functional equivalent of a transaction on a U.S. securities exchange, even if they also were not the functional equivalent of a transaction on an exchange in Germany. Furthermore, the complained about conduct of the defendants that affected the swap transaction occurred outside the United States. In this context, Judge Baer was right to determine that the alleged fraud in connection with the purchase or sale of a security or security-based swap agreement – the conduct that allegedly violated Section 10(b)[43] – took place outside the United States, and thus pursuant to *Morrison* was not actionable under Section 10(b). Of importance in this case is the fact that the plaintiffs failed to allege that their counterparties were in the U.S., plaintiffs failed to allege that payments were to be made in U.S. dollars and that settlement payments would be made in the U.S., and the only public markets affected by defendants' alleged disclosure deficiencies and manipulation were in Germany, not the United States. The complaint was properly dismissed by Judge Baer, under the totality of the circumstances even if some of the reasons he articulates in the opinion are less clear than others.

In sum, Judge Baer's holding is correct under *Morrison*, but some of the reasoning needs further refinement. The logic of *Morrison* can be applied to securities-based swap agreements and should exclude application of Section 10(b) in the *Porsche* case, but it will not be as simple as always applying the *Morrison* analysis to the underlying reference security for a swap agreement, regardless of the other circumstances in the case. If, on appeal, the Second Circuit should – erroneously – overrule Judge Baer and hold that a non-U.S. purchaser or seller of reference securities traded outside the U.S. can be sued under Section 10(b) because of third party swap agreements in the U.S., the *Porsche* case could have major implications for issuers, investors,

43 Section 10(b) applies to fraud "in connection" with the purchase or sale of a security or security based swap agreement and the fraud alleged against Porsche is most directly in connection with the underlying VW stock, a security traded in Germany and not in the U.S. In this circumstance it is appropriate for a court – when locating the transaction in one jurisdiction or the other in order to apply *Morrison* – to find that the transaction occurred in the place most directly connected with the alleged fraud, in this case Germany.

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financial intermediaries and other parties in the United States and abroad. If Section 10(b) is held to apply to cases involving swap agreements based on stocks traded outside the U.S., plaintiffs' attorneys would be encouraged to use such a holding in *Porsche* as precedent to limit the application of *Morrison* in a wide range of contexts. Other courts might follow in creating a more general exception to *Morrison* for U.S. derivative contracts that reference non-U.S. securities. Particularly after the increased regulatory scrutiny of derivatives and derivative trading in the U.S. under the 2010 Dodd-Frank Act[44], the outcome of the *Porsche* decision and other similar cases could have significant implications for world securities markets. Because the Dodd-Frank Act also requires some derivative securities to be traded on organized exchanges in the United States, it also raises new questions about when Section 10(b) applies to derivative contracts and who can be sued. Until these issues are resolved, world markets will have to live with uncertainty about whether the mere existence of a derivatives contract in the United States can be a premise for unilateral imposition of U.S. law in circumstances where neither the U.S., Congress, nor the foreign countries involved intended for U.S. law to apply. The Second Circuit should uphold Judge Baer's ruling based on the totality of the circumstances and also explain more completely how these circumstances should be evaluated for the purpose of determining the location of a swap agreement under *Morrison.*

Underscoring the interest that European governments take in the case[45], the German Consul General in New York, Dr. Oliver Schnakenberg, filed with Judge Baer a letter asking the court to dismiss the case on the basis of forum non conveniens. Consul General Schnakenberg points out that German courts would also have jurisdiction in the matter, that "the German legal system equally protects the rights and property interests of persons trading in securities;"[46] neither Porsche nor Volkswagen shares are listed in the U.S.; all evidence, witnesses and correspondence are situated in Germany; German law contains similar procedural guarantees as U.S. law; and any sanctions by the U.S. courts would disproportionally impact Germany[47]. (Porsche's and VW's

44 Louise Story, *A Secretive Banking Elite Rules Derivatives Trading – Clubby Clearinghouses Limit Competition, and Consumers Face Higher Prices*, N.Y. TIMES, Dec. 12, 2010, at 1, 26-27.

45 The governments of Australia, the United Kingdom and France filed amicus briefs with the U.S. Supreme Court in *Morrison* and other foreign governments made submissions in other formats.

46 Letter from German Consul General in New York, Schnakenberg, with Judge Baer, the presiding judge in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), Dec. 7, 2010.

47 *Id.*

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ADRs were trading over-the-counter in the U.S., but the ADRs were not the reference securities in the swap agreements at issue in this case.)

The Schnakenberg letter shows that, at least in the context of a German company, Porsche AG, touching on a sense of identity and collective pride in Germany, potential sanctions imposed by a U.S. court are perceived as threatening. Albeit seemingly without its own common stock trading in the U.S. or the common stock of Volkswagen trading in the U.S., Porsche could be exposed to substantial sanctions in the U.S. merely because of swap agreements in which Porsche had no involvement. Schnakenberg's letter underscores the importance of finding an appropriate and lasting solution to remaining concerns about foreign-cubed cases and other similar cases in U.S. courts after *Morrison.* These concerns about extraterritorial reach of the Exchange Act hold true not only in the context in which the letter was written, potential loopholes in *Morrison* created by a vibrant U.S. derivatives industry, but also in the context of the SEC's purported extraterritorial powers under Section 929P(b) of Dodd-Frank, discussed infra.

Given the interest that Congress has expressed through the Dodd-Frank Act in regulating the U.S. derivative securities market, Congress should consider whether it needs to be clearer about when Section 10(b) does and does not apply to a derivative transaction with extraterritorial components. Unless courts can clearly construe *Morrison* in the context of swap agreements and other derivative securities, in a manner that is consistent with the logic as well as the language of the Court's opinion, Congress will have to enact new legislation that clarifies this issue. Congress hopefully will be cognizant, as was Judge Baer in the *Porsche* decision, of the dangers of allowing swaps and other derivatives transactions referencing foreign traded securities to become a basis for lawsuits in the United States.

3. When Does a Private Transaction Take Place in the U.S.?

Porsche also raises a larger issue: where privately negotiated transactions actually take place[48]. More specifically, it seems that if privately negotiated trans-

48 Transcript, *supra* note 41, at 41. ("THE COURT: Where do they actually take place? It seems to me they took place here, the agreements. MR. GIUFFRA: Your Honor, there's nothing in the complaint about where these swap agreements occurred. THE COURT: I see. If indeed they had occurred here, then you would sit down and give up? COURT: I gather that's what you are telling me to do. And the way you look at it, I would come out your way. MR. GIUFFRA: Correct, your Honor. But there is a logical reason why you would want to come out our way. That is – THE COURT: In addition to those nine men – MR. GIUFFRA: But, your Honor, the whole – THE COURT: – and women? MR. GIUFFRA: The statute on its face says that securities-based swap agreements

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actions involving securities of non-U.S. issuers, or swap agreements relating to the securities of non-U.S. issuers, are deemed to take place in the U.S., Section 10(b) could apply. Derivative contracts, such as credit default swaps, often are not traded on exchanges. Structured products specifically tailored by investment banks to the needs of individual clients are often so highly complex and specialized that there is rarely a market for them. The location of persons trading them privately is also not always easy to determine. Stock or other securities of a foreign issuer also sometimes change hands privately, but in circumstances where the location of the parties may not be easy to determine.

The main problem is defining when these privately negotiated transactions take place in a particular location. Judge Baer in *Porsche* opined: "The economic reality is that Plaintiff's swap agreements are essentially 'transactions conducted upon foreign exchanges and markets,' and not 'domestic transactions' that merit the protection of [Section] 10(b). [quoting *Morrison*] 130 S.Ct at 2882, 2884."[49] Judge Baer was right that these swap agreements were not transactions in the United States, but the "economic reality" of swap agreements does not support fixing a location for the transaction in every case based solely on the market for the reference security. There are currently no clear parameters for defining the location of privately negotiated transactions as domestic or foreign transactions under *Morrison*. *Morrison* did not explore this issue because that case involved securities that were publicly traded – in Australia.

Ambiguities abound. Even in the *Porsche* case itself, the complaint, motion to dismiss, and supporting documentation do not allege where the counterparties to the swap agreement were located or where payments were settled or in what currency[50]. There need not be a swap agreement or other complex derivative security, however, for private transactions to be confusing. If, for example, the alleged misrepresentation about the terms of a private transaction occurred in the United States, is this enough for Section 10(b) to apply, even though the securities may have technically changed hands elsewhere, for example a share

should be treated to the same extent as securities. The words "to the same extent" is in the statutory language.").

49 Judge Baer granted the motion to dismiss in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 12.

50 *Id.* ("MR. GIUFFRA: Your Honor, there's nothing in the complaint about where these swap agreements occurred."). ("MR. HEATON: [...] there's no secret that there are securities-based swaps going on in the world, and as to this point that somehow people know about ADRs but they don't know about swaps, not only is that nowhere in the record, [...].") *Id.* at 30. Judge Baer granted the motion to dismiss in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 4 ("Notably, neither Complaint appends a copy of any swap agreement, and none of the Plaintiffs spell out the identify of the counterparty.").

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transfer on the stock registry of a private company located outside the United States? Is it required instead that the agreement to purchase the securities be entered into by both parties in the United States? This also, however, may not be clear. If a structured product is set up for an international hedge fund, is the location of the transaction the headquarters of the hedge fund or the headquarters of the investment bank?

One parameter that might help define the location of a private transaction is the location of the parties to the transaction[51]. Plaintiffs' attorney in *Porsche* claimed that twenty-two plaintiffs were located in the United States[52]. Even though the identity of the counterparties to the swap agreement was not alleged[53], Judge Baer appeared to give some credence in oral argument to the location of the parties as a factor in determining where the transaction took place[54]. It is unclear, however, whether the presence of one U.S. party alone would suffice to establish that a privately negotiated transaction took place in the United States or if both parties need to be in the United States. If the presence of one party alone should suffice, U.S. parties to privately negotiated derivative transactions would be able to sue in U.S. courts regardless of other factors, such as where the counterparties were located, the domicile of the issuer of the securities involved, where these securities were ordinarily traded, or where the alleged fraud occurred. As pointed out above, Judge Baer's opinion in *Porsche* avoided these problems by switching the emphasis away from the location of the parties back to the location of trading for the reference security, here VW stock, which was Germany.

In other circumstances also, including some cases involving relatively straightforward private transactions in conventional securities, the location of the

51 *Id.* at 41.

52 *Id.* at 31.

53 Judge Baer granted the motion to dismiss in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 4.

54 *Id.* at 41 ("MR. GIUFFRA: [...] there is a logical reason why would you want to come out our way. That is – THE COURT: In addition to those nine men [who are from New York and present in the courtroom] – MR. GIUFFRA: But, your Honor, the whole – THE COURT: – and women?"). *See also* Second Amended Complaint in *Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), Dec. 7, 2010, at 2 ("Upon information and belief, Defendants knew that hedge funds and the managers who make their investment decisions are concentrated in a small number of locations, with the large majority of investment managers based in and around New York, New York. Therefore, upon information and belief, Defendants (a) needed to affect investment decisions in the United States to pull off their plan and (b) knew that American-based investment managers would rely, in the United States, on Defendants' fraudulent misstatements – and that the hedge funds they advised would be the primary victims of Defendants' fraud and manipulation.").

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parties may not be a useful basis for analysis. Parties to a private transaction are often institutions having a simultaneous presence in the U.S. and abroad. Individual parties to a private transaction are often in transit. In a worst case scenario, courts could be asked to determine the applicability of Section 10(b) based on where the airplane of a party was located when making a telephone call to sign off on a private transaction. What if the plane was halfway over the Atlantic over international waters? Given these shortcomings of an analysis based on location of the parties, perhaps de-emphasizing the location of the parties while focusing on the totality of the circumstances could help establish appropriate parameters to determine where a privately negotiated derivative transaction took place.

4. Does a Transaction Take Place in the U.S. if a U.S. Broker Is Involved?

Morrison does not address whether a transaction takes place in the U.S. when a U.S. broker is used to place an order on a foreign exchange. Arguably, if a non-U.S. purchaser buys non-U.S. securities through a U.S. broker, the cross-border contractual commitment to buy the security is made inside the United States. The U.S. broker places the order based on an order from a foreign client, and U.S. securities law arguably would apply to the securities purchase, even if executed on a non-U.S. exchange. This line of argument would circumvent most of the holding in *Morrison.*

Assuming that U.S. broker fees equal or are substantially similar to non-U.S. broker fees, non-U.S. purchasers of securities would be encouraged to order securities that are traded on an exchange in their home jurisdiction through a U.S. broker if they wanted to retain the right to sue under Section 10(b) in the United States. If U.S. securities law applies when a non-U.S. client buys non-U.S. securities on a non-U.S. securities exchange through a U.S. broker, the client would have the right to sue under U.S. securities laws that probably go beyond the protections available to the non-U.S. client in his or her home jurisdiction. Indeed, the home jurisdiction of non-U.S. clients of U.S. brokers is not likely to provide many of the attractive features of the U.S. legal system, such as unparalleled discovery, a tendency towards higher damages and settlement amounts, the availability of securities class actions, opt-out procedures for class actions, as well as little or no exposure of plaintiffs to liability for defendants' legal costs. The client would furthermore gain the protection of two legal systems because the home jurisdiction of the client may still have jurisdiction in the matter, given that the security would have been purchased on an exchange in the home jurisdiction.

If this "location of the broker" theory were to be accepted by U.S. courts

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interpreting *Morrison*, suits by non-U.S. investors using U.S. brokers for transactions on non-U.S. exchanges could also be used to obtain discovery and other advantages that could then be used in home jurisdiction litigation by similarly situated non-U.S. investors who bought the same securities but who did not use U.S. brokers. Some courts have already refused to give significant weight to the location of the broker, or where a plaintiff places an order for foreign traded securities, in assessing a claim under *Morrison*[55]. Courts should continue to recognize that for exchange-traded securities in particular, the location of the exchange, not the location of the plaintiff's broker, should be the controlling factor, but it remains to be seen whether this bright line test will in fact be the rule adopted by all courts.

III. The Dodd-Frank Act

Congress, in the Dodd-Frank Act of 2010 sought to address the future of cases brought by the SEC or by the Department of Justice (DOJ) in view of the *Morrison* holding and any subsequent court rulings. The language in Section 929P(b) of the Act[56] is under the heading "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws" and reads:

Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa) is amended—

...

by adding at the end the following new subsection:

"(b) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—"

"(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or"

55 As Judge Baer pointed out in his opinion in *Porsche*, several courts in the Southern District of New York have already rejected the notion that the phrase "domestic transactions in other securities" includes buy orders placed in the United States for securities traded abroad. *See Elliott Associates, L.P. v. Porsche Automobile Holding SE*, 10 Civ. 532 (HB), at 10, citing Plumbers Union, 2010 Westlaw 3860397 at *6; In Re Societe Generale Secs. Litig. 2010 Westlaw 3910286 at *6 (S.D.N.Y September 29, 2010); Cornwell v. Credit Suisse, 2010 Westlaw 3069597 (S.D.N.Y July 27, 2010). Judge Baer considered these cases to be important to his analysis because, as discussed supra, he viewed the swap transactions as the functional equivalent of an order to buy the VW shares traded in Germany.

56 H.R. 4173, 111th Cong. § 929P (2010).

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"(2) conduct occurring outside the United States that has a foreseeable substantial effect with in the United States."[57].

The Act contains similar provisions with respect to Section 17A of the Securities Act and Section 214 of the Investment Advisors Act[58]. This statutory language expressly confers jurisdiction on federal courts in these cases.

As pointed out in Part II of the *Morrison* holding, there had been considerable confusion in the courts of appeals as to whether the federal courts had jurisdiction over such cases. The *Morrison* opinion settles that confusion by stating that federal courts have subject matter jurisdiction over all cases brought under Section 10(b), and the statutory language in Dodd-Frank reaffirms this, at least for the circumstances described in the statute. The *Morrison* opinion goes on to hold that, while federal courts have jurisdiction over all cases brought under Section 10(b), the statute itself has no extraterritorial application. This raises the question whether the subsequent Dodd-Frank provision legislatively overrules the *Morrison* holding with respect to the extraterritorial reach of Section 10(b) in cases brought by the SEC or DOJ.

1. What Does Section 929P(b) Do?

There is disagreement about whether Section 929P(b) of the Dodd-Frank Act does anything other than confirm the jurisdiction already recognized in *Morrison*. More specifically, does this provision affect the territorial reach of Section 10(b) in a suit brought by the SEC or DOJ and thus overturn the

57 *Id.*

58 Section 929Y the Dodd-Frank Act also provides that the SEC shall solicit public comment and then conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Exchange Act should be extended to cover the same conduct with respect to which actions brought by the SEC and the United States are authorized under Section 929P of the Act. 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.
The provision requires that a report of the study be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House within 18 months. For a number of reasons expressed in our amicus brief in *Morrison*, such a private right of action is very worrisome from a policy perspective.

holding in *Morrison* that Section 10(b) on the merits does not apply to transactions outside the United States? It is also unclear whether Section 929P(b) reinstates the conduct and effects tests that the Second Circuit and many other circuits had used prior to Morrison. If it should reinstate the conduct and effects test, it is unclear which pre-*Morrison* conduct and effect test precedents have been embraced by Congress.

George T. Conway III, counsel for NAB in the *Morrison* case, has concluded that the Dodd-Frank provisions address jurisdiction and nothing more. He pointed this out in a memo to his firm's clients on June 21, 2010, the day the Dodd-Frank Act was signed by the President[59]. Dodd-Frank he observed, said nothing about the issues addressed in the *Morrison* opinion other than jurisdiction. The Dodd-Frank Act said nothing about whether Section 10(b) on the merits reaches transactions outside the United States.

Representative Paul Kanjorski described Section 929P of the Dodd-Frank Act as granting: "new authority [to] the SEC and the [Department of Justice] to bring civil or criminal law enforcement proceedings involving transnational securities fraud."[60] In this context, Rep. Kanjorski opined that the Act is intended to rebut Morrison's presumption against extraterritoriality[61]. Nonetheless, as George Conway points out, the actual wording of Section 929P(b) does not expand the application of U.S. securities laws extraterritorially[62]. It merely addresses the "jurisdiction" of the "district courts of the United States" to hear cases involving extraterritorial elements[63]. On its face, the language of Section 929P(b) does not expand the geographic scope of substantive regulatory provisions of the U.S. Securities laws.

U.S. judges could, however, interpret Section 929P(b) as reaching the merits of

59 *See* Wachtell, Lipton, Rosen & Katz, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged*, June 21, 2010 (authored by George T. Conway III), *available at* www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf.

60 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

61 *Id.*

62 Conway, *supra* note 59.

63 H.R. 4173, 111th Cong. § 929P (2010).
(b) EXTRATERRITORIAL JURISDICTION. –The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—
"(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
"(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Section 10(b) and giving the SEC broader authority in extraterritorial cases because that is presumably what Congress intended to do despite the jurisdictional wording of the statute. The U.S. Supreme Court in *Morrison* restated that the territorial scope of a federal law is not a jurisdictional question but rather a question of substantive law, but the Court also changed the prevailing substantive law in this area, and presumably Congress intended to respond to this change even though Section 929P(b) approaches this issue as a jurisdictional and not as a substantive matter. Section 929P(b) was probably intended to authorize extraterritorial enforcement by the SEC and the U.S. Department of Justice against "conduct within the United States that constitutes significant steps in furtherance of the violation [of various antifraud provisions of the Securities Act, the Exchange Act and the Advisers Act] even if the securities transaction occurs outside the United States and involves only foreign investors"[64] and "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[65] Judges could thus use Rep. Kanjorski's and other comments by drafters of the Section as evidence that Section 929P(b) was intended as a substantive rule providing for extraterritorial reach of Section 10(b). At the same time, courts using legislative history in this manner should be cognizant of the Supreme Court's warning that it is "beyond [the courts'] province to rescue Congress from its drafting errors," and so "if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."[66]

It thus remains to be seen whether U.S. courts will recognize Rep. Kanjorski's statement that "the purpose of the language in Section 929P(b) is to make clear that in actions and proceedings brought by the SEC or DOJ [the U.S. securities laws] may have extraterritorial application."[67] It also remains to be seen how this statutory language will be reconciled with *Morrison's* holding that there is a presumption against extraterritoriality, but "the presumption against extraterritoriality does not apply if Congress [...] gives a statute extraterritorial effect."[68] There is substantial likelihood that U.S. courts could find that Congress has provided for some extraterritorial effect for SEC and DOJ suits in the Dodd-Frank Act and that therefore *Morrison* cannot be upheld in its entirety in suits by the SEC or the DOJ under Section 929P(b). Whether and how U.S. courts will use pre-*Morrison* precedent to explain newly codified conduct and effects tests in Section 929P(b) remains to be seen. Finally, there is

64 *Id.* The logic in this phrase is circular, because it does not address whether there is in fact a "violation" if the transaction occurs outside the United States. The *Morrison* court says there is not a violation.

65 *Id.*

66 130 S. Ct. 2869, 2888 (2010).

67 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

68 *Id.*

the possibility that a court, particularly the Supreme Court, could refuse to find any extraterritorial reach of Section 10(b) because, as George Conway points out, Section 929P(b) addresses only jurisdiction and not the merits. These and other issues need to be clarified by Congress in subsequent legislation[69].

2. *Was Section 929P(b) Necessary?*

Section 929P(b) furthermore may not have been necessary. Section 10(b) already gives the SEC enforcement authority whenever a single U.S. securities transaction is affected by the alleged fraud. National Australia Bank had ADRs listed in New York and could have been sued by the SEC for the alleged fraud. Section 30 of the Exchange Act gives the SEC yet more enforcement authority when fraudulent conduct in foreign markets is used to circumvent U.S. securities laws. *Morrison* and other foreign-cubed cases determined the size of the plaintiff class in private suits, an issue relevant to the compensation of plaintiffs' lawyers, but the rulings in these cases were irrelevant to whether the SEC could pursue enforcement in any situation where there are U.S. securities transactions and there is a connection between those transactions and the alleged fraud. There are likely very few cases where there is no U.S. transaction with a connection to the alleged fraud and the SEC still would still want to bring an enforcement action. Was there really a good reason for the SEC to have more enforcement authority than it already had, even after *Morrison*?

Indeed there could be problems with this new authority. Instead of the targeted authority the SEC has under Section 10(b) to pursue fraud in connection with any securities transaction inside the United States and the additional authority bestowed by Section 30 where foreign transactions are used to evade U.S. securities laws, Dodd-Frank could be construed to be an open-ended statute, assuming it does anything other than confer jurisdiction. To the extent the provision gives the SEC additional powers, it may not be desirable that the SEC use these powers unilaterally without consulting with both foreign securities regulators and the United States foreign policy establishment.

The provision risks complications if the SEC pursues cases unilaterally when coordinated enforcement with foreign regulators would be more effective. Enforcement actions brought to enforce U.S. insider trading laws for transactions on non-U.S. exchanges might be one example of where problems could arise, particularly if the non-U.S. exchange in question does not enforce or even recognize insider trading laws similar to those in the United States. The risk of collateral litigation in non-U.S. jurisdictions piggybacking on SEC

69 Painter et al., *supra* note 23.

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enforcement actions is another problem, and could mean that the SEC could set the enforcement agenda and even the private litigation agenda in other countries. This is unlikely to improve U.S. foreign relations. There is serious risk that such SEC enforcement actions would be perceived to encroach upon the corporate governance of foreign companies, particularly those that have U.S. operations, like NAB. Overuse of this provision by the SEC or DOJ could deter foreign companies from having U.S. operations.

3. The SEC Study of Private Rights of Action – Section 929Y

The Dodd Frank Act also mandated a study by the SEC of whether *Morrison* should be legislatively overruled with a statutory private right of action covering securities transactions outside the United States. Section 929Y[70] of the Dodd-Frank Act authorizes the SEC to conduct a study on the purpose of private rights of action after *Morrison.* In the current political and economic environment it is less likely that Congress will reinstate extraterritorial private rights of action. In the coming years, however, Congress could do so. Many of the positive effects of the *Morrison* decision would be compromised if Congress should decide to do so.

Increasing the extraterritorial application of U.S. law through private rights of action could mean that European companies are exposed to U.S. law, even if they are not dually listed companies or choose to sell American Depositary Receipts (ADRs) or other securities in the United States. Non-U.S. companies could be subject to liability under Section 10(b) if they have any conduct in the U.S. – for example conduct inside U.S. business operations – that could be alleged to have resulted in securities fraud outside the U.S. As already pointed out by the large number of non-U.S. parties filing amicus briefs in the *Morrison* case, such a private right of action has serious implications for the financial reporting, corporate governance and business operations of non-U.S. companies. Much of global securities litigation would migrate to the United States[71].

If Congress decided to impose a private right of action in foreign-cubed cases, EU companies could be compelled to modify their U.S. business operations that expose them to Section 10(b) litigation, including business operations that have nothing to do with U.S. securities markets or U.S. investors. European governments also may take issue with pressure by the U.S. legal system on their legislatures and regulators. European Governments are thus likely to

70 H.R. 4173, 111th Cong. § 929Y (2010). *See also* Securities and Exchange Commission, Study on Extraterritorial Private Rights of Action, Release No. 34-63174; File No. 4-617.

71 See also Law Professors' Amicus Brief of Richard W. Painter et. al in *Morrison.*

protest strongly against U.S. lawsuits that bring companies subject to EU jurisdiction under U.S. jurisdiction, even when there are relatively few ties between those companies and the United States. Consul General Schnakenberg's letter[72] in *Porsche* illustrates the concern some EU governments may have in this context[73].

In the unlikely event that Congress should decide to enact a private right of action in foreign-cubed cases, the U.S. could, again, be perceived as establishing its courts as international courts with universal jurisdiction in securities matters. Despite some improvements, the U.S. does not always have a reputation for good cooperation in foreign relations[74], and some governments have voiced concern about U.S. attitudes towards international law[75]. Cooperation among nation states and their regulators to prevent securities fraud could help improve foreign relations. Changing national rules in the spirit of cooperation is likely to be more productive than imposing rules on foreign nations through extraterritorial imperialism.

The outcome of the SEC study and its possible bearing on a decision by Congress to overturn *Morrison* could have a lasting impact on European jurisdictions, companies, lawyers, and investors, as well as on foreign trade and diplomacy. These are just some of the concerns that could materialize if the SEC study recommends the implementation of a private right of action in foreign-cubed securities cases.

IV. Conclusion

The SEC study, whatever it recommends, is very unlikely to result in extending private rights of action extraterritorially so long as the Republicans control the House of Representatives. European boards of directors and company lawyers, the many amici curiae in *Morrison*, including foreign governments, nonetheless should urge both the SEC and Congress to reject the extension of a private right of action extraterritorially.

The current interpretations of the *Morrison* decision by U.S. judges could eventually require Congress to clarify certain aspects of *Morrison*, particularly in contexts such as swap agreements and derivative securities. Given the am-

72 Schnakenberg letter in *Elliot Associates v. Porsche AG.* (on file with authors).

73 *See* discussion *supra* Part II. 2.

74 *See* John R. Bolton, *Is There Really Law in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000); *See also* Symposium, *Toward an International Criminal Court?*, 14 EMORY INT'L L. REV. 159 (2000).

75 *See* Robert J. Delahunty, *The Battle of Mars and Venus: Why do American and European Attitudes Toward International Law Differ?*, 4 LOY. U. CHI. INT'L L. REV. 11 (2006).

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biguities in *Morrison* and Dodd-Frank and the implications of broadly interpreting *Morrison* for persons and companies in European jurisdictions and elsewhere in the world, Congress should also clarify its intent in Section 929P(b) with respect to SEC and DOJ suits over securities transactions outside the United States. A clear and restrained approach to extraterritoriality in the U.S. will bring predictability to global securities markets and avoid a downturn in international economic cooperation.

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