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REGULATION OF GLOBAL FINANCIAL FIRMS AFTER *MORRISON V. NATIONAL AUSTRALIA BANK*

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INTRODUCTION

Several large financial firms straddle the globe. They have well known names, such as Deutsche Bank, Barclays, JPMorgan Chase, BNP Paribas, and HSBC. The U.S. Securities and Exchange Commission ("SEC" or "Commission") has a strong interest in regulating the securities activities of these firms to help ensure investor protection. For those firms located outside of the United States, the SEC has applied the federal securities laws extraterritorially using doctrines developed over years by the agency and the courts, including the conduct and effects test, described below. The law of extraterritoriality is complicated, a patchwork quilt of cases, administrative rules, and SEC staff no-action letters applying and interpreting the federal securities laws.[1] Notwithstanding the complexity, the SEC has not shrunk from applying the federal securities laws to non-U.S. domiciled firms.

In 2010, the U.S. Supreme Court issued an opinion that rewrote the law of extraterritoriality, shattering decades of precedent and calling into question the SEC's ability to regulate foreign firms. In *Morrison v. National Australia Bank Ltd.*, the

† Professor, Rutgers University School of Law. I wish to thank Jean Galbraith, Kathryn Kovacs, Beth Stephens, and David Zaring for comments on an earlier draft. I am grateful also for comments received from participants at the 2012 St. John's University School of Law Symposium, Revolution in the Regulation of Financial Advice: The U.S., the U.K. and Australia, the 2012 German-American Lawyers Association Annual Conference on German and American Law at Fordham Law School, and a 2013 lecture at the Martin-Luther-Universität Halle-Wittenberg, Germany.

1 In a no-action letter, an authorized member of the SEC staff indicates that the staff will not recommend enforcement action to the Commission if a proposed transaction described in an incoming letter is consummated. *See* Procedures Utilized by the Division of Corporation Finance for Rendering Informal Advice, Securities Act Release No. 6253, 21 SEC Docket 320 n.2 (Oct. 28, 1980).

Court disallowed an action brought under Securities Exchange Act section 10(b)[2] by non-U.S. plaintiffs suing a non-U.S. company with shares listed outside of the United States.[3] In doing so, the Supreme Court invalidated the long-standing conduct and effects test to determine extraterritorial application of the securities laws.[4] As soon as the case was decided, Congress attempted to reverse it for SEC actions and for criminal actions brought by the U.S. Department of Justice ("DOJ") in the Dodd-Frank Wall Street Reform and Consumer Protection Act.[5] The legislative fix, however, is incomplete.[6] *Morrison*, therefore, continues to have broad implications for the government's extraterritorial application of the securities laws.

In *Morrison*'s aftermath, Congress, the SEC, and commentators focused on its enforcement implications. In Dodd-Frank, Congress sought to provide the SEC and DOJ with authority to enforce the securities laws against non-U.S. domiciled persons.[7] The SEC, as evidenced by a study of cross-border actions required by Dodd-Frank, appears to be focused on *Morrison*'s enforcement implications.[8] Scholarship stemming from *Morrison* has similarly focused on the ability of government or private plaintiffs to sue non-U.S. domiciled defendants.[9]

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[2] Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

[3] 130 S. Ct. 2869 (2010).

[4] *Id.* at 2881.

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 41 U.S.C. (Supp. IV 2010)) [hereinafter Dodd-Frank Act].

[6] *See infra* Part III.A.

[7] Dodd-Frank Act, § 929P(b), 124 Stat. 1376, 1865 (2010).

[8] *See* SEC. & EXCH. COMM'N STAFF, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AS REQUIRED BY SECTION 929Y OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2012). Although Congress directed the SEC to study the cross-border scope of private rights of action, the seventy page study does not mention *Morrison*'s regulatory and registration implications.

[9] *See, e.g.*, Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 548–49 (2012) (analyzing actions brought under state law after *Morrison*); Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of* Morrison v. National Australia Bank Ltd., 7 HASTINGS BUS. L.J. 223, 225 (2011) (criticizing the opinion and arguing that non-U.S. plaintiffs continue to have access to U.S. courts); Alex Reed, *But I'm an American! A Text-Based Rationale for Dismissing F-Squared Securities Fraud Claims After* Morrison v. National Australia Bank, 14 U. PA. J. BUS. L. 515, 537–38 (2012) (proposing a text-based rationale as opposed to a policy rationale for *Morrison*).

This Article is different. I shall focus not on enforcement but rather on regulatory implications of the Court's decision. By regulatory implications, I am referring to the SEC's efforts to require registration of non-U.S. domiciled firms and regulate those firms in the ordinary course of their business operations. Regulation and registration of such firms occur regardless of whether the firms ever become the subject of an enforcement investigation or proceeding. As I describe below, *Morrison* dealt a severe blow to the SEC's ability to regulate non-U.S. domiciled investment advisers and broker-dealers. The Supreme Court overturned doctrines the SEC relied on for many years when regulating foreign firms. As a result, the SEC must revise its regulatory approach. In particular, SEC regulation of non-U.S. advisers can no longer rely solely on the conduct and effects test; regulation of non-U.S. broker-dealers under Securities Exchange Act Rule 15a-6[10] will likely be revisited as well.

These implications, although of paramount importance to the SEC's regulatory program, to the firms affected, and to investor protection, have escaped attention. As of January 2014, no U.S. court of appeals has addressed *Morrison*'s regulatory implications and only one district court, discussed below, has had occasion to rule on related issues.[11] The goal of this Article is to identify these implications and the challenges posed in addressing them. I shall not attempt here to resolve those challenges or develop an argument for or against extraterritoriality.

Part I of the Article reviews the *Morrison* decision with particular focus on the regulation of non-U.S. firms. Part II discusses SEC regulation of non-U.S. domiciled investment advisers and broker-dealers, focusing on elements of regulation most relevant to *Morrison*. Part III identifies regulatory challenges arising from *Morrison*.

I. THE *MORRISON* CASE

In *Morrison v. National Australia Bank*, the Supreme Court held that section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act")[12] does not provide a cause of action for non-U.S.

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[10] *See* Exchange Act Rule 15a-6, 17 C.F.R. § 240.15a-6 (2013).
[11] *See* SEC v. Benger, 934 F. Supp. 2d 1008 (N.D. Ill. 2013).
[12] Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

plaintiffs suing U.S. and non-U.S. defendants for misconduct in connection with securities traded on a non-U.S. exchange.[13] In an opinion written by Justice Scalia, the Court applied a robust presumption against extraterritorial application of the Exchange Act and invalidated the conduct and effects test to determine when the Exchange Act applies outside of the United States.[14] The case is of vital importance to law enforcement officials, private litigators, regulators, and international lawyers.[15]

A. Background

Morrison's facts are straightforward. In 1998, National Australia Bank ("NAB") bought HomeSide Lending, Inc., a Florida mortgage servicing company.[16] HomeSide's income depended on the number of mortgages it serviced and was therefore tied in part to the rate at which borrowers prepay their mortgages. Senior HomeSide officers allegedly manipulated HomeSide's financial models to minimize estimates of early prepayments thereby inflating potential future income. On July 5, 2001, and again on September 3, 2001, NAB announced that it was writing down the value of HomeSide's assets. The *Morrison* complaint alleges that by July 2000, NAB and a senior NAB officer were aware of HomeSide's deception and did nothing.[17]

The petitioners in *Morrison*, most of whom were non-U.S. persons, had purchased shares of NAB before the write-downs.[18] After the alleged fraud was exposed, they sued NAB, HomeSide, and certain NAB and HomeSide officers in federal court in New York for violations of sections 10(b) and 20(a) of the Exchange Act and for a violation of Exchange Act Rule 10b-5.[19] The petitioners sought to represent a class of foreign purchasers. Thus, *Morrison* was a case of *foreign* investors suing a *foreign* issuer regarding purchases on a *foreign* securities exchange. For this reason, *Morrison* was called a "foreign cubed" or "f-cubed"

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[13] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010).

[14] *Id.* at 2877–81.

[15] *See* Florey, *supra* note 9, at 535–40.

[16] *Morrison*, 130 S. Ct. at 2875–76.

[17] *Id.*

[18] *Id.* at 2876.

[19] Section 10(b) provides for antifraud liability under the Exchange Act. 15 U.S.C. § 78j(b) (2012). Rule 10b-5 is the SEC's antifraud rule adopted under Exchange Act section 10(b). 17 C.F.R. § 240.10b-5 (2013). Exchange Act section 20(a) provides for controlling person liability. 15 U.S.C. § 78t(a) (2012).

case.[20] The respondents moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court granted the motion on subject matter jurisdiction grounds finding that acts in the United States were "at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."[21] The Second Circuit affirmed, stating that the NAB's acts in Australia were "significantly more central to the fraud and more directly responsible for the harm" than actions taken in Florida.[22] The Supreme Court granted certiorari.[23]

Before reaching the merits, the Court clarified a significant procedural matter, which, as discussed later, is important to determine whether the Dodd-Frank Act overrules the Court's opinion. According to the Supreme Court, the Second Circuit considered the extraterritorial reach of section 10(b) and Rule 10b-5 to present an issue of subject matter jurisdiction.[24] The Second Circuit, the Court added, was not alone in this position; it followed a long line of federal appellate court precedent.[25] But the Supreme Court held that looking at extraterritorial reach as a question of subject matter jurisdiction was a mistake. "[T]o ask what conduct § 10(b) reaches is to ask what conduct §10(b) prohibits, which is a merits question."[26] By contrast, subject matter jurisdiction refers to a court's power to hear a case, which is different from whether a plaintiff is entitled to relief. There is no question that the district court had jurisdiction to adjudicate the claim of whether section 10(b) applied to the conduct in question.[27] The petitioners asked the Court to remand based on this procedural error. The Court, however, found that remand was not necessary since an analysis of the lower courts' decisions did not turn on this mistake.[28] The lingering question is whether

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[20] Richard Painter et al., *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, 5 (2011).

[21] *Morrison*, 130 S. Ct. at 2876 (2010) (quoting In re Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006)).

[22] Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008).

[23] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 783 (2009).

[24] *Morrison*, 130 S. Ct. at 2877.

[25] *Id.*

[26] *Id.*

[27] *Id.* (citing Exchange Act § 27, 15 U.S.C. § 78aa (2012)).

[28] *Id.*

the *Morrison* holding still can be considered one of jurisdiction, which Dodd-Frank addressed, or must be deemed one of substantive statutory reach.

B. Morrison*'s Extraterritoriality Disquisition*

With this procedural matter out of the way, the Court began by asserting that there is a longstanding principle of American law that legislation, absent a contrary intent, applies only within the territorial jurisdiction of the United States.[29] "When a statute gives no clear indication of an extraterritorial application," the Court wrote, "it has none."[30] The Court explained that, in this case, as in previous cases, the Second Circuit disregarded the presumption against extraterritorial application and, instead, sought to discern whether Congress would have wanted the statute to apply.[31]

Justice Scalia explained that the presumption against extraterritoriality was wrongly eroded in a pair of cases decided in the late 1960s and early 1970s, *Schoenbaum v. Firstbrook*,[32] and *Leasco Data Processing Equipment Corp. v. Maxwell*.[33] In *Schoenbaum*, the Second Circuit held that the presumption against extraterritoriality did not apply to a transaction in securities traded in the United States, even if the transaction was effected outside of the United States, because the trading would affect the value of shares traded in the United States.[34] The *Leasco* court held that the presumption against extraterritoriality applied only when Congress lacked prescriptive jurisdiction to regulate and Congress had prescriptive jurisdiction to regulate when conduct took place in the United States.[35]

The *Morrison* Court explained that these twin tests developed into the conduct and effects test, which asked whether wrongful conduct occurred in the United States or whether wrongful conduct had a substantial effect in the United States or

[29] *Id.*
[30] *Id.* at 2878.
[31] *Id.*
[32] 405 F.2d 200, 206 (2d Cir. 1968).
[33] 468 F.2d 1326, 1333–34 (2d Cir. 1972).
[34] *Schoenbaum*, 405 F.2d at 206–09.
[35] *Leasco*, 468 F.2d at 1334–37.

on U.S. citizens.[36] The conduct and effects test, according to the Court, was of limited benefit. The question of extraterritoriality was reduced to a question of whether a court thought Congress would have wanted the resources of U.S. law enforcement to be devoted to regulating a foreign transaction as opposed to leaving the matter to a foreign government.[37] The Court then reviewed a court of appeals case and scholarly writings critical of the conduct and effects test and concluded that the criticisms were justified.[38] Problems with judicial speculation of Congress's intent, wrote the Court, militate in favor of the presumption against extraterritoriality, which should be applied in all cases.[39]

C. Morrison*'s Holding*

The Court then turned to Exchange Act Rule 10b-5, explaining that the rule does not extend beyond conduct regulated by Exchange Act section 10(b), and that section 10(b) contains no language suggesting extraterritorial application.[40] The Court addressed three arguments the petitioners raised in support of extraterritorial application. First, the definition of interstate commerce in section 10(b) includes commerce and other activity "between any foreign country and any State."[41] The Court dismissed this argument, stating that general reference to "foreign commerce" in a definition of interstate commerce does not defeat the presumption against extraterritoriality.[42] Second, Congress stated in the Exchange Act that prices established in transactions conducted on securities exchanges and in the over-the-counter markets are "disseminated and quoted throughout the United States and foreign countries."[43] The Court pointed out, however, that this provision of the Exchange Act also states that the transactions

[36] *Morrison*, 130 S. Ct. at 2879 (quoting SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003)).
[37] *Id.* at 2879–80.
[38] *Id.* at 2880–81.
[39] *Id.* at 2881.
[40] *Id.*
[41] *Id.* at 2882 (quoting Exchange Act § 3(a)(17), 15 U.S.C. § 78c(a)(17) (2012)).
[42] *Id.* (quoting E.E.O.C v. Arabian Am. Oil. Co., 499 U.S. 244, 251–52 (1991)).
[43] *Id.* (quoting Exchange Act § 2(2), 15 U.S.C. § 78b(2)).

are "affected with a national public interest" and reference to the dissemination of prices abroad does not defeat the extraterritoriality presumption.[44]

The petitioners' third argument deserves more explanation. As background, Exchange Act section 30(b) grants rulemaking authority to the SEC and references extraterritorial application. Under this section, the Exchange Act does not apply to persons who engage in securities transactions outside of the United States unless in contravention of rules the Commission may prescribe "to prevent the evasion of this chapter."[45] The petitioners argued that section 30(b) would be superfluous if the Act did not apply extraterritorially. The Court, however, was not persuaded. This narrow grant of rulemaking authority designed to prevent parties from evading U.S. law by transacting overseas does not demonstrate that the entire statute applies extraterritorially.[46] Moreover, section 30(a) of the Act specifically provides for extraterritorial application when a broker-dealer transacts outside of the United States in a security of a U.S. issuer in violation of SEC rules.[47] The specificity in section 30(a) would be unnecessary if the entire Act applied extraterritorially. The Court concluded, therefore, that there is "no affirmative indication" in the statute that section 10(b) applies extraterritorially.[48]

The Court also addressed the petitioners' argument that certain deceptive activity occurred in the United States and section 10(b) was meant to address domestic conduct.[49] According to the Court, the Exchange Act's focus is not where the deception originated, but rather where the purchases and sales occurred.[50] Section 10(b), the Court explained, does not prohibit deceptive conduct, but rather deceptive conduct in connection with a purchase or sale of a security. The statute regulates the transaction, not the deception; the transaction location drives the statute's application.[51]

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[44] *Id.*
[45] Exchange Act § 30(b), 15 U.S.C. § 78dd(b).
[46] *Morrison*, 130 S. Ct. at 2882.
[47] Exchange Act § 30(a), 15 U.S.C. § 78dd(a).
[48] *Morrison*, 130 S. Ct. at 2883.
[49] *Id.* at 2883–84.
[50] *Id.* at 2884.
[51] *Id.*

The Court then articulated a new test, known as the "transaction test," limiting the scope of section 10(b)'s application to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[52] The phrase "transactions in securities listed on domestic exchanges" is fairly precise. Less certain is the meaning of "domestic transactions in other securities."[53] Presumably the phrase refers to transactions executed in the United States in securities of a U.S. issuer, even if the securities are not listed on an exchange. The Court, in other words, is stating the obvious: The Exchange Act's application is not limited to exchange listed securities; the Act also covers non-exchange listed securities when traded in the United States. Non-exchange listed domestic securities, in other words, are unaffected by the holding.[54]

In articulating the scope of the phrase "domestic transactions," the Court referenced the Securities Act of 1933 passed one year before the Exchange Act by the same Congress.[55] The Securities Act, the Court wrote, prohibits making use of the means of interstate commerce to sell a security unless a registration statement is in effect.[56] The Court pointed out that the SEC, in its rules, has interpreted the Securities Act not to reach sales outside of the United States.[57]

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[52] *Id.*; *see* Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132, 193 (2012); Painter et al., *supra* note 20, at 20 n.84.

[53] *See* SEC v. Ficeto, 839 F. Supp. 2d 1101, 1108 n.6 (D.C. Cal. 2011) ("In *Morrison*, the Court did not define what kind of transactions would fall into this second category."); *see also* Marc I. Steinberg & Kelly Flanagan, *Transactional Dealings*–Morrison *Continues To Make Waves*, 46 INT'L LAW. 829, 854 (2012) ("The second prong of the Morrison transactional test raises a host of questions.").

[54] *Ficeto*, 839 F. Supp. 2d at 1113 ("[T]he Court considered non-exchange domestic securities markets to be unaffected by its holding.").

[55] *Morrison*, 130 S. Ct. at 2885.

[56] *Id.*

[57] *Id.* (citing Securities Act Regulation S, 17 C.F.R. § 230.901 (2013)). The Court's reliance on Regulation S is curious. Securities Act Rule 901 is one of several rules that compose Regulation S, a safe harbor in which the SEC has determined that certain offers and sales will be deemed outside of the United States and therefore not subject to the registration provisions of Securities Act section 5. This provision, however, applies only to section 5. The preliminary notes to Regulation S limit its application to the Securities Act's registration context. The SEC stated that the rules do not apply "to antifraud or other provisions of the federal securities laws." Securities Act Regulation S, Preliminary Note 1, 17 C.F.R. § 230.901 Refs & Annos (2013). Ironically, the Supreme Court is doing just what the SEC cautioned against: reasoning about the application of the antifraud provision of the Exchange

Justice Stevens, writing a concurring opinion, rebuked the majority for upsetting a significant body of securities law. According to the concurrence, the Second Circuit refined the conduct and effects test with the approval of Congress, other circuit courts, and the SEC.[58] The conduct and effects test, therefore, should be celebrated, not purged from section 10(b) jurisprudence. As for the presumption against extraterritoriality, the concurrence stated that the majority misapplied it for two reasons. First, the presumption should not be considered a clear statement rule; it should be seen as a background norm that can be overcome even absent clear congressional direction.[59] Second, the presumption applies only when a fraud has no effect in the United States and is executed outside of the United States and, therefore, has only "marginal relevance" to *Morrison*.[60] According to the concurrence, the real issue, never addressed by the majority, is whether the quality and quantity of contacts in the United States are sufficient to apply section 10(b).[61]

The majority opinion was immediately recognized as significant. Lawyers knew it was highly controversial, predicting it would have a "profound" effect on securities litigation.[62] Defense lawyers praised the decision for providing "much needed clarity" to the scope of the securities laws' antifraud provisions.[63] For plaintiffs seeking to sue non-U.S. parties, the decision was

Act by relying on language intended for a different purpose under a different statute.

[58] *Morrison*, 130 S. Ct. at 2890–91 (Stevens, J., concurring). Justice Breyer wrote another concurrence emphasizing that the purchases took place in Australia and involved Australian investors. *Id.* at 2888 (Breyer, J., concurring).

[59] *Id.* at 2891–92 (Stevens, J., concurring).

[60] *Id.* at 2892.

[61] *Id.*

[62] Matthew W. Close et al., *SEC Report on the Supreme Court's* Morrison *Decision and Commissioner Aguilar's Dissent Set the Stage for Congress To Consider Legislation To Expand the Reach of US Securities Laws*, O'MELVENY & MYERS LLP (Apr. 16, 2012), http://www.omm.com/sec-report-on-the-supreme-courts-morrison-decision-and-commissioner-aguilars-dissent-set-the-stage-for-congress-to-consider-legislation-to-expand-the-reach-of-us-securities-laws-04-16-2012.

[63] *Supreme Court's* Morrison *Decision Puts an End to Litigating Foreign-Cubed Cases in U.S. Courts*, ROPES & GRAY (June 24, 2010), http://www.ropesgray.com/files/Publication/04201a69-4c08-445c-b8ee-33f821ea527e/Presentation/PublicationAttachment/959da9cc-9dc4-46b5-b10a-37fd019edfc0/06252010SecLitAppellateAlert.pdf.

called "heartbreaking."[64] *Morrison* is also significant because it mirrors Supreme Court jurisprudence in other contexts limiting the scope of extraterritorial jurisdiction.[65]

II. SEC REGULATION OF NON-U.S. INVESTMENT ADVISERS AND BROKER-DEALERS

The Court's robust application of the presumption against extraterritoriality and rejection of the conduct and effects test have important implications for the regulation and registration of non-U.S. domiciled firms. Although the public face of the SEC is most clearly seen through enforcement actions, much of the agency's day-to-day responsibilities have little or nothing to do with enforcement. Enforcement decisions are ex post; the federal securities laws empower the SEC to investigate violations of statutes and rules.[66] By contrast, regulatory actions are ex ante. Examples are adopting administrative rules, granting exemptive applications, writing no-action letters, and making registration determinations. Through these actions, the agency determines in advance whether and when persons, firms, or transactions should be subject to rules or standards of conduct and what those rules or standards should be.[67]

Morrison raises questions about the extraterritorial application of the securities laws at the ex ante stage as well the ex post stage. This Part discusses extraterritorial regulation of non-U.S. domiciled advisers and brokers. Regulation here refers

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[64] Luke Green, *Reflecting on Securities Class Actions One Year After* Morrison v. NAB, INSIGHT: SECURITIES LITIGATION (ISS) (June 24, 2011, 2:39 PM), http://blog.issgovernance.com/slw/2011/06/reflecting-on-securities-class-actions-one-year-after-morrison.html.

[65] *See* F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 163–64 (2004) (holding that the U.S. antitrust laws do not apply to conduct with adverse foreign effect independent of adverse domestic effect); *see also* Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 75 (2011) (arguing that *Empagran*, *Morrison*, and other cases call for U.S. restraint in adjudicating foreign claimants' claims in U.S. class actions).

[66] *See, e.g.*, Exchange Act § 21(a), 15 U.S.C. § 78u(a) (2012); *see also* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 803–07 (2009) (describing the SEC's enforcement processes).

[67] For the SEC's own summary of its responsibilities, including both enforcement and regulatory actions, *see The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Dec. 13, 2013); *see also* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 29–30 (rev. 6th ed. 2009) (describing the responsibilities of the SEC's operating divisions).

to governmental decisions regarding whether a non-U.S. domiciled firm must register with the SEC or is otherwise subject to SEC regulation in its course of business.[68] For non-U.S. advisers, the SEC has relied in large part on the conduct and effects test. For non-U.S. brokers, the SEC has assumed that the Exchange Act applies extraterritorially. Thus, in both cases, the SEC has applied the securities laws extraterritorially in ways *Morrison* roundly rejected. This Part first discusses advisers and then turns to brokers.

A. Investment Advisers

Investment advisers are regulated under the Investment Advisers Act of 1940 ("Advisers Act"), one of several securities laws passed in the aftermath of the Crash of 1929 and the Great Depression.[69] The Advisers Act grew out of an SEC study on investment companies and investment trusts and was passed alongside the Investment Company Act of 1940, which regulates mutual funds and other types of investment companies. The Advisers Act generally defines "investment adviser" as any person in the business of providing advice about securities for compensation.[70] The Act contains an antifraud provision applicable to advisers that meet the definition.[71] It also requires advisers to register with the SEC, unless exempted or prohibited from registration.[72] Registered advisers are subject to detailed regulation, including in-person inspection and examination by SEC staff,[73] books and records requirements,[74] restrictions on advisory contracts,[75] and custody safeguards.[76]

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[68] The securities laws often impose regulatory requirements even if the entity is not required to register. Investment advisers, for example, must comply with Advisers Act section 206, the antifraud provision, regardless of whether the adviser must register. Investment Advisers Act of 1940 § 206, 15 U.S.C. § 80b-6 (2012).

[69] Advisers Act, 15 U.S.C. §§ 80b-1 et seq. (2012). For an overview, *see generally* TAMAR FRANKEL & ANN TAYLOR SCHWING, THE REGULATION OF MONEY MANAGERS: MUTUAL FUNDS AND ADVISERS (2d ed. 2013); THOMAS P. LEMKE & GERALD T. LINS, REGULATION OF INVESTMENT ADVISERS (2012).

[70] Advisers Act § 202(a)(11), 15 U.S.C. § 80b-2(a)(11).

[71] § 206, 15 U.S.C. § 80b-6.

[72] § 203, 15 U.S.C. § 80b-3.

[73] § 204(a), 15 U.S.C. § 80b-4(a).

[74] *Id.*

[75] § 205(a), 15 U.S.C. § 80b-5(a).

[76] § 223, 15 U.S.C. § 80b-18b.

The SEC historically has presumed that the Advisers Act applies extraterritorially. As originally passed in 1940, the Act was shorn of reference to non-U.S. advisers and did not address extraterritoriality.[77] In 1954, the SEC adopted a rule, which required non-U.S. investment advisers registering with the SEC to file an irrevocable consent and power of attorney appointing the SEC as agent to receive service of process, pleadings, and other papers in civil actions under the federal securities laws.[78] In adopting the rule, the SEC recognized that as a practical matter its rights might be unenforceable against non-U.S. advisers servicing non-U.S. persons. The rule was intended to give "full effect" to the securities laws and to give the SEC and others the same rights against non-U.S. advisers that they have against U.S. advisers.[79]

In a 1992 study, the SEC staff struck an aggressive pose to apply the Advisers Act extraterritorially, stating that the Act contains no territorial limits other than a requirement to use the jurisdictional means of interstate commerce.[80] The staff noted that when regulating non-U.S. advisers, it sought to balance the broad reach of the statutory provisions with congressional intent, principles of international law, and market realities.[81]

Twelve years later, when formulating rules for hedge fund advisers, the SEC once again assumed the Advisers Act applied extraterritorially.[82] The Commission stated that its concern when developing regulation was to ensure investor protection

[77] Investment Advisers Act of 1940, ch. 686, 54 Stat. 847–57 (codified as amended at 15 U.S.C. §§ 80b-1 et seq. (2012)).

[78] Adoption of Rule Requiring Non-Resident Investment Advisers and Non-Resident General Partners of Managing Agents of Investment Advisers to File Consent to Service of Process, Pleadings and Other Papers, Investment Advisers Act Release No. 74, Securities Act Release No. 3506, Exchange Act Release No. 5057, 19 Fed. Reg. 4300 (July 14, 1954). At the time, the relevant forms were numbered 4-R, 5-R, 6-R, and 7-R, depending on the type of entity filing. *Id.*

[79] *Id.* In 2000, the SEC amended its rules, creating Form ADV-NR (for "non-resident") to replace Forms 4-R, 5-R, 6-R and 7-R. *See* Electronic Filing by Investment Advisers; Amendments to Form ADV, Investment Advisers Act Release No. 1897, Exchange Act Release No. 43282, 65 Fed. Reg. 57,438 (Sept. 22, 2000).

[80] DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, PROTECTING INVESTORS: A HALF CENTURY OF INVESTMENT COMPANY REGULATION 227 (1992), *available at* http://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf.

[81] *Id.*

[82] Registration Under the Advisers Act of Certain Hedge Fund Advisers, Advisers Act Release No. 2333, 69 Fed. Reg. 72,054, 72,072 (Dec. 10, 2004), *vacated by* Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006).

and a "level playing field" for market participants.[83] According to the SEC, a level playing field is best achieved through a single set of rules so that investors can be confident they are receiving the same level of protection, regardless of where their adviser is located.[84] Commentators generally agreed that, because the Advisers Act contains no limit on extraterritorial application, non-U.S. advisers are brought under the tent of U.S. law.[85]

When determining the conditions under which it would apply the Advisers Act outside of the United States and require non-U.S. firms to register, the Division of Investment Management borrowed from the Division of Enforcement and applied the conduct and effects test.[86] The staff recognized that the antifraud provisions of the securities laws generally have broader effect than "purely regulatory" provisions.[87] The staff argued, however, that as long as the effects are significant or the conduct important, "assertion of regulatory jurisdiction is appropriate."[88]

The conduct and effects test for advisers evolved over time. Early SEC regulation of non-U.S. advisers followed an entity approach, regulating each adviser on an entity basis.[89] If a non-U.S. adviser registered with the SEC, for example, the Commission would regulate the entire firm as a single entity, subjecting all of the firm's activities to regulation. SEC registration, however, is often undesirable because of the regulatory burdens imposed.[90] Moreover, the entity approach was onerous for non-U.S. domiciled advisers because the entire firm would be subject to SEC regulation, not only the adviser's relationships with U.S. clients.[91]

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[83] *Id.* at 72,071.

[84] *Id.*

[85] CLIFFORD E. KIRSCH, INVESTMENT ADVISER REGULATION: A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW § 35:1 (2011).

[86] DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, *supra* note 80, at 227–29

[87] *Id.* at 228.

[88] *Id.* For support, the SEC staff relied on section 416 of the Restatement (Third) of Foreign Relations, entitled Jurisdiction To Regulate Activities Related To Securities. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416 (1987). A careful reading of this provision does not clearly support the open-ended application of the conduct and effects test for regulating investment advice. The SEC, however, has crafted the regulatory structure for advisers under a conduct and effects regime.

[89] DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, *supra* note 80, at 223–24 n.7.

[90] *Id.* at 223–24.

[91] *Id.* at 224.

The SEC responded by permitting a dedicated affiliate to register with the SEC.[92] Under this model, a non-U.S. adviser would establish a U.S. or foreign affiliate dedicated to servicing U.S. clients. The affiliate would register with the SEC and the foreign firm would continue to conduct its business outside of the United States, avoiding SEC oversight.[93] The Commission, however, was concerned that this structure could be prone to abuse.[94] A non-U.S. adviser, wishing to serve U.S. clients might establish an SEC-registered entity for U.S. clients, but the heart of the advice would be provided by the non-U.S. domiciled unregistered firm. The non-U.S. adviser would effectively be advising U.S. clients, but it would avoid regulation and registration as result of interposing an SEC-registered affiliate.[95] As a result, the SEC had to determine when it would "look through" the registered adviser to the non-U.S. firm and regulate the non-U.S. firm as if it were the registrant.

1. Separate Structure

In a 1981 no-action letter called *Richard Ellis*, the SEC staff provided guidance on when it would refrain from "looking through" the SEC-registered entity to the non-U.S. domiciled adviser.[96] To avoid "look through" treatment by the SEC, the wall between the non-U.S. firm and the SEC-registered affiliate had to be sufficiently strong to ensure that the non-U.S. firm was not the real entity advising U.S. clients.[97] As long as the wall was strong enough, the foreign firm could engage in certain communications with the SEC-registered affiliate and not subject itself to SEC registration.[98]

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[92] *Id.* at 224–25.

[93] *Id.*

[94] *Id.* at 229.

[95] *See* Recordkeeping Requirements and Exemption from Definition of "Investment Adviser," Investment Advisers Act Release No. 353, Investment Company Act Release No. 7605, 38 Fed. Reg. 1649 (1973) ("Where all or substantially all of the duties and functions related to the rendering of investment advice undertaken to be performed by a registered investment adviser are in fact performed by the person controlling the registered adviser or an affiliate of such controlling person . . . a serious question is raised whether such persons . . . should be required to register.").

[96] Richard Ellis, Inc., SEC No-Action Letter, 1981 WL 25241 (Sept. 17, 1981).

[97] *Id.*

[98] *Id.*

The SEC staff stated that it would recognize affiliates as separate entities as long as certain conditions were met.[99] The conditions are generally summarized as follows: (1) the registered affiliate must be adequately capitalized; (2) the registered affiliate must have a buffer between its personnel and the foreign firm's personnel, such as a board of directors, a majority of whose members are independent; (3) the registered affiliate must have employees who, if engaged in providing advice for the affiliate, must not also engage in providing advice for the other entity; (4) the registered affiliate must be responsible for deciding what advice is communicated to clients—and the registered affiliate must have its own sources of information; and (5) the registered affiliate must keep confidential the substance of its advice until communicated to clients[100]—if the SEC registrant is the true source of the advice, it should have no difficulty in keeping the advice confidential. As long as these conditions were met, the SEC-registered affiliate could communicate with the non-U.S. firm and advise U.S. clients, and the non-U.S. firm would avoid SEC regulation.[101]

2. Integrated Structure

It soon became apparent that the *Ellis* conditions were too onerous for certain firms. Under the third condition, for example, a non-U.S. firm had to decide whether to dedicate senior advisory personnel to its U.S. affiliate.[102] Also, this condition might not be in the best interest of U.S. investors if it meant that a firm would not assign its top advisory personnel to the U.S. registrant or if it prevented a free exchange of information with personnel advising U.S. investors.[103]

As a result, in 1992, the SEC staff instituted a new approach to the regulation of non-U.S. advisers.[104] The SEC relaxed the requirements for the strict separation between the non-U.S. parent and the U.S. affiliate, agreeing that the Commission

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[99] According to the SEC staff 1992 study, *supra* note 80, at 225 n.10, the conditions were derived from the 1972 SEC Release under the Investment Advisers Act and the Investment Company Act. *See supra* note 95.

[100] DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, *supra* note 80, at 224–25.

[101] Richard Ellis, Inc., *supra* note 96; *see also* DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, *supra* note 80, at 224–25.

[102] DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, *supra* note 80, at 226.

[103] *Id.*

[104] *Id.* at 228–30.

would not apply the substantive provisions of the Advisers Act to non-U.S. clients of a non-U.S. adviser that also serviced U.S. clients.[105] In establishing this approach, the SEC staff employed the conduct and effects test to determine when it would apply the Advisers Act.[106] The staff explained that the conduct and effects test typically was applied in the antifraud context.[107] Nevertheless, wrote the staff, "if the effect in the United States is sufficiently significant, or the conduct sufficiently important, the assertion of regulatory jurisdiction is appropriate."[108] As recently as 2012, the SEC staff reaffirmed this approach, stating that the Commission and the Division of Investment Management do not apply the substantive provisions of the Advisers Act to a registered non-U.S. adviser's activities with regard to non-U.S. clients.[109]

One caveat to the new approach was that a non-U.S. adviser was required to keep books and records for all of its clients—both U.S. and non-U.S.—and make them available to the SEC staff upon request.[110] Information regarding all clients was important to the SEC because it could not determine whether an adviser fulfilled its fiduciary duty to U.S. clients unless the SEC also had information about treatment of non-U.S. clients.[111]

In its new approach, codified in an SEC no-action letter known as *Unibanco*, the SEC staff utilized a conduct and effects test and revised the conditions for when an affiliate would be considered separate and independent from the non-U.S. parent.[112] Under the new guidelines, the non-U.S. parent would not be required to register as long as the following conditions were met: (1) the affiliate was separately organized; (2) the affiliate was staffed with persons able to provide advice; (3) advisory personnel involved in advising U.S. persons in both

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[105] *Id.* at 231.

[106] *Id.*

[107] *Id.* at 228.

[108] *Id.*

[109] *See* Industrial Alliance, Investment Management, Inc., SEC No-Action Letter, 2012 WL 888978, at *2 n.4 (March 14, 2012).

[110] DIV. OF INV. MGMT., SEC. & EXCH. COMM'N, *supra* note 80, at 230.

[111] Allocation of investment opportunities is an example. The SEC could determine if the adviser was allocating securities to U.S. investors and non-U.S. investors fairly if it had access to the adviser's records with respect to both sets of clients.

[112] Uniao de Bancos de Brasileiros S.A., SEC No-Action Letter, 1992 WL 183054 (July 28, 1992).

affiliates would be considered "associated persons" of the SEC-registered affiliate, thereby subjecting them to SEC scrutiny; and (4) the SEC had access to records of each affiliate involved in U.S. advisory activity to the extent necessary to monitor conduct that could harm U.S. investors.[113] As of 1992, therefore, the conduct and effects test took root as the approach the SEC used to regulate non-U.S. advisers.

Any challenge to these regulatory actions calls for an analysis of the level of deference a court should give the SEC. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, federal agencies are generally entitled to deference when interpreting statutes they implement.[114] Determining the appropriate level of deference to accord an agency, however, is a fraught exercise with many unanswered questions. The U.S. Supreme Court only recently has held that a court must apply *Chevron* deference when reviewing an agency's determination of its own jurisdiction, which is arguably what the SEC has done regarding the regulation of non-U.S. domiciled advisers and brokers.[115] The fact that the agency interpretations discussed here were announced through SEC staff no-action letters, however, further complicates whether deference should be accorded and if so how much.[116]

B. Broker-Dealers

The SEC's regulation of non-U.S. domiciled broker-dealers after *Morrison* raises a similar problem to that of advisers. In regulating non-U.S. brokers, the SEC presumed that the Exchange Act applies extraterritorially.[117] According to *Morrison*, that presumption is erroneous.[118]

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[113] *Id.*

[114] 467 U.S. 837, 842–44 (1984) (requiring a federal court to accept an agency's construction of a statute if the statute is ambiguous and the construction is reasonable).

[115] Arlington v. FCC, 133 S. Ct. 1863 (2013).

[116] *See* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 978 (1998) ("When the SEC announces a regulatory interpretation in a no-action letter, application of the Supreme Court's deference principles becomes far more difficult.").

[117] *See infra* notes 130–32 and accompanying text.

[118] Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2887 (2010).

The Securities Exchange Act of 1934[119] was enacted one year after the seminal Securities Act of 1933.[120] While the Securities Act regulated new issues of securities and was primarily a registration and disclosure law, the Exchange Act regulated trading in the secondary market.[121] As a result, the Exchange Act provided for detailed oversight of the exchanges and of broker-dealers, including registration, prudential regulation, and antifraud controls.[122] The Exchange Act also established the U.S. Securities and Exchange Commission to implement and enforce the securities laws.[123] Four years later, the Maloney Act amendments were enacted, which provided for self-regulation of broker-dealers and resulted in the creation of the National Association of Securities Dealers ("NASD"), now the Financial Industry Regulatory Authority ("FINRA"), the primary self-regulatory authority for broker-dealer firms.[124]

The registration requirement for broker-dealers is found in Exchange Act section 15(a), which makes it unlawful for any broker or dealer to use the means of interstate commerce, such as telephone, fax, or email, unless registered.[125] Section 15(a) does not, on its face, apply extraterritorially. The SEC, however, has addressed the regulation of foreign broker-dealers in Exchange Act Rule 15a-6, adopted in 1989.[126] Rule 15a-6 is an exemptive rule. It provides bases on which non-U.S. broker-dealers can have contact with certain U.S. persons without having to register with the SEC.[127] In contrast to investment advisers, for whom the law developed through SEC staff no-action letters, in the context of broker-dealers, the SEC adopted Rule 15a-6 through

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[119] Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C.A. §§ 78a–78oo (2012)).

[120] *See* Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

[121] *See* COX ET AL., *supra* note 66, at 7–8.

[122] For an overview, *see generally* 1 CLIFFORD E. KIRSCH, BROKER-DEALER REGULATION, §§ 1.2, 2.1 (2d ed. 2012); 2 NORMAN S. POSER & JAMES A. FANTO, BROKER-DEALER LAW AND REGULATION, § 17.01 (4th ed. Supp. 2012).

[123] Securities Exchange Act of 1934, ch. 404, 48 Stat. at 885 (codified at 15 U.S.C. § 78d(a) (2012)).

[124] Maloney Act of 1938, ch. 677, 52 Stat. 1070 (codified as amended at 15 U.S.C. § 78o-3) (2012)) (adding § 15A to the Exchange Act).

[125] Securities Exchange Act of 1934, ch. 404, 49 Stat. at 895 (codified at 15 U.S.C. § 78o(a) (2012)).

[126] *See* Exchange Act Rule 15a-6, 17 C.F.R. § 240.15a-6 (2013).

[127] *See id.*

agency rulemaking procedures. As a result, the agency would likely receive more deference than in the case of no-action letters.[128]

Rule 15a-6 generally exempts from registration four types of activity by non-U.S. broker-dealers: (1) effecting unsolicited transactions with U.S. customers; (2) providing research reports to major U.S. institutional investors and effecting transactions in the securities discussed in those research reports for those investors; (3) soliciting and executing transactions for U.S. institutional customers as long as an SEC-registered broker-dealer chaperones the transactions and the broker-dealer agrees to provide information to the SEC; and (4) effecting transactions on a solicited or unsolicited basis with a U.S. broker-dealer, bank, or other persons identified in the rule.[129]

In adopting Rule 15a-6, the SEC turned the presumption against extraterritoriality on its head, assuming, in the face of silence, that the statute applies extraterritorially—precisely the reasoning criticized in *Morrison*. When adopting Rule 15a-6, the SEC stated that the definitions of the terms "broker" and "dealer" do not refer to nationality and include both domestic and foreign persons.[130] In a footnote, the SEC explained further that the term "person" is also defined in the Exchange Act and includes no reference to nationality.[131] Thus, the SEC concluded that "any" use of the U.S. jurisdictional means could subject a foreign broker-dealer to the registration provisions of the Exchange Act, regardless of whether the broker was a domestic or a foreign person.[132]

One might reflect for a moment on the meaning of this statement. According to the SEC, any use of the U.S. jurisdictional means, such as a single phone call or email into the United States, could trigger the application of the statute.

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[128] *See generally* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

[129] *See* Exchange Act Rule 15a-6, 17 C.F.R. § 240.15a-6 (2013).

[130] Registration Requirements for Foreign Broker Dealers, Exchange Act Release No. 27017, 54 Fed. Reg. 30,013, 30,016 (July 18, 1989).

[131] *Id.* at 30,016 n.40.

[132] *Id.* at 30,016.

Although the SEC might have discretion to overlook minimal use of the jurisdictional means, according to the Commission, a single instance could theoretically trigger the Exchange Act registration provision.

The Commission included a lengthy footnote in the Rule 15a-6 adopting release explaining that a potential limitation on extraterritorial application may be found in section 30(b) of the Act.[133] As mentioned, section 30(b) provides that the Act does not apply to persons transacting in securities "without the jurisdiction of the United States," unless in violation of an SEC rule adopted to prevent evasion of the Act.[134] In its footnote, the SEC wrote that the exclusion in section 30(b) is not applicable if (1) transactions occur in a U.S. securities market, (2) offers and sales are made abroad to U.S. persons or in the United States to facilitate sales of securities abroad, or (3) the United States is used as a base for perpetrating fraud on non-U.S. persons.[135] Note that items (2) and (3) are expressions of the conduct and effects test, which, by 1989, was well accepted in the U.S. courts of appeals.[136]

The Commission staked out a fairly aggressive position in Rule 15a-6. The SEC stated that the phrase "without the jurisdiction of the United States" in section 30(b) does not refer to territorial limits.[137] And even if the phrase refers to territorial limits, section 30(b) does not exempt non-U.S. broker-dealers engaging in directed selling efforts inside the United States.[138] Such selling efforts, in the SEC's view, traverse the territory of the United States. The SEC stated:

> A broker-dealer operating outside the physical boundaries of the United States, but using the U.S. mails, wires, or telephone lines to trade securities with U.S. persons located in this

[133] *Id.* at 30,016 n.41.

[134] Securities Exchange Act of 1934, ch. 404, 48 Stat. 904 (codified at 15 U.S.C. § 78dd(b) (2012)).

[135] Registration Requirements for Foreign Broker Dealers, Exchange Act Release No. 27017, 54 Fed. Reg. at 30,016.

[136] *See* Mark I. Steinberg & Kelly Flanagan, *Transnational Dealings*—Morrison *Continues To Make Waves*, 46 INT'L LAW. 829, 830–32 (2012).

[137] Registration Requirements for Foreign Broker Dealers, Exchange Act Release No. 27017, 54 Fed. Reg. at 30,016 n.41.

[138] *Id.*

country, would not be, in the words of section 30(b), "transact[ing] a business in securities without the jurisdiction of the United States."[139]

This section shows that the regulation of non-U.S. domiciled advisers and brokers has for years turned on doctrines invalidated by *Morrison*. The regulation of non-U.S. advisers, at least since 1992, is based largely on the conduct and effects test. The regulation of foreign broker-dealers, embodied in Exchange Act Rule 15a-6, depends on a presumption of extraterritorial application of the statute abrogated by *Morrison*. The regulatory system for brokers and advisers over the past twenty-five to thirty years was carefully choreographed on a stage where the backdrop included the conduct and effects test and a presumption of extraterritoriality. The implications of *Morrison*, therefore, are tremendous and will be explored in the next Part.

III. *MORRISON*'S IMPLICATIONS FOR INVESTMENT ADVISERS AND BROKER-DEALERS

This Part discusses *Morrison*'s implications for the regulation and registration of non-U.S. domiciled advisers and brokers. It only takes one adviser or broker to challenge the SEC's authority to require registration of non-U.S. domiciled firms after *Morrison*. Challenges are most likely to occur in the context of an enforcement proceeding alleging failure to register. In at least one case brought by the SEC, broker-dealers argued that *Morrison* applies in the registration context and, therefore, registration was not required. In *SEC v. Benger*, the Commission included a broker-dealer registration claim against both U.S. and non-U.S. brokers effecting allegedly foreign transactions.[140] The court sided with the defendants and held that, in light of *Morrison*, a broker is not required to register with the SEC where the purchase and sale of securities is foreign and, therefore, beyond the scope of the Exchange Act.[141] Other courts undoubtedly will be called upon to address *Morrison*'s effect in the registration context.[142]

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[139] *Id.*

[140] SEC v. Benger, 934 F. Supp. 2d 1008, 1010 (N.D. Ill. 2013).

[141] *Id.* at 1012, 1016.

[142] *See, e.g.*, Complaint, SEC v. Banc de Binary Ltd., No. 2-13-cv-00993 (D. Nev. June 5, 2013), *available at* http://www.sec.gov/litigation/complaints/2013/comp-pr2013-103.pdf (alleging that entity based in Republic of Cyprus and regulated by

Before exploring the particulars, I address one matter that is not specific to either advisers or brokers, but is essential to analyzing *Morrison's* effect. The matter at issue is whether Dodd-Frank section 929P effectively reverses *Morrison*, in which case there would be no need to continue the analysis. After addressing section 929P, this Part turns to *Morrison*'s implications for advisers and brokers.[143]

A. *The Dodd-Frank Act*

In July 2010, shortly after the Court handed down the *Morrison* decision, the Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted.[144] The Dodd-Frank Act is sweeping legislation designed to address systemic risk in the financial system, banking, mortgage loans, securitization, derivatives, and other topics.[145] In addition, Dodd-Frank contained a number of provisions not related to the financial crisis—stowaways placed on board by those seeking their passage regardless of the means. Section 929P is one of those provisions. As a result of *Morrison*, Dodd-Frank amended the Securities Act, the Advisers Act, and the Exchange Act to provide for extraterritorial jurisdiction.[146] Under section 929P, United States district courts "shall have jurisdiction" over SEC and DOJ actions alleging a violation of the antifraud provisions of these

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the Cyprus SEC, but with an office in New York, must register with the U.S. SEC as a broker-dealer because it solicited U.S. investors).

[143] One other general matter is worth mentioning. Perhaps *Morrison* should be limited to its facts and, therefore, have no bearing on the regulation and registration of foreign firms. At least one post-*Morrison* court noted that the Supreme Court framed the issue narrowly. SEC v. Gruss, 859 F. Supp. 2d 653, 661 (S.D.N.Y. 2012); SEC v. Ficeto, 839 F. Supp. 2d 1101, 1108 (C.D. Cal. 2011). It would be a mistake, however, to limit *Morrison* to its facts. The Court spent a large part of the opinion condemning the conduct and effects test. Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2877–81 (2010). Courts of appeals view Supreme Court dicta as having great weight. *See, e.g.*, Coeur D'Alene Tribe v. Hammond, 384 F.3d 674, 683 (9th Cir. 2004) (stating that Supreme Court dicta is entitled to "great weight"); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (stating that appellate courts are bound by the Supreme Court's dicta). Thus, arguing for continued application of the conduct and effects test, even in a different context, is a formidable task. As a matter of practice, post-*Morrison* courts have applied the case outside the *Morrison* facts. Cascade Fund, LLP v. Absolute Capital Management Holdings Ltd., No. 08-cv-01381(MSK), 2011 WL 1211511, at *5 (D. Colo. March 31, 2011); SEC v. ICP Asset Mgt., LLC, 10 Civ. 4791(LAK), 2012 WL 2359830, at *2 (June 21, 2012).

[144] Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[145] *See generally* DAVID SKEEL, THE NEW FINANCIAL DEAL (2011).

[146] Dodd-Frank Act § 929P(b).

statutes so long as the violations involve conduct in the United States or conduct outside of the United States that has a foreseeable substantial effect within the United States.[147]

Congress intended section 929P(b) to overrule *Morrison*. Representative Kanjorski's statement in the legislative record referred to *Morrison* and stated that the purpose of the section was to rebut the presumption against extraterritoriality and clarify that, for actions brought by the SEC and DOJ, the specified provisions of the Exchange Act, the Securities Act, and the Advisers Act have extraterritorial application when the conduct and effects test is met.[148] Thus, in light of section 929P, one possibility is that *Morrison* does not apply to the regulation of advisers and brokers because *Morrison* was overruled by statute. This section discusses two reasons why the amendments in section 929P might not affect the regulation of advisers and brokers discussed here. One is a drafting reason; the other is a matter of scope.

As George Conway has pointed out, the language added by Dodd-Frank may be insufficient to overrule *Morrison*.[149] The problem is a technical drafting deficiency. Recall that Justice Scalia explained that the courts of appeals erred by considering the extraterritorial reach of the Exchange Act a question of jurisdiction.[150] Jurisdiction refers only to a court's power to hear a case. By contrast, the reach of section 10(b), Justice Scalia explained, is a merits question. District courts undoubtedly have *jurisdiction* to determine whether the Exchange Act applies to a defendant's conduct, but the jurisdictional determination is "quite separate" from whether the plaintiff is entitled to relief.[151]

The Dodd-Frank amendments do not expand the type of conduct covered by the statutes; they provide only that district courts "shall have jurisdiction" when the conduct and effects test is met.[152] The amendments arguably do not change current law

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[147] *Id.*

[148] 156 CONG. REC. H5233, H5237 (June 30, 2010) (statement of Rep. Kanjorski).

[149] *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*, WACHTELL, LIPTON, ROSEN & KATZ (July 21, 2010), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf.

[150] Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2877 (2010).

[151] *Id.*

[152] *See* Conway, *supra* note 149.

when jurisdiction is not in doubt.[153] Ironically, the language of section 929P could be read to diminish the overall extraterritorial scope of the federal securities laws because jurisdiction, the power to hear extraterritorial disputes, might now be limited to the conduct and effects test as articulated in section 929P, when no such limitation existed before. The effect of section 929P will likely be litigated in the enforcement context. The SEC believes that section 929P overrules *Morrison*[154] and at least one court has suggested that the SEC's view could prevail.[155] But there is a reasonable possibility that courts will rule that the amendments have no effect on the extraterritorial application of the securities laws due to unartful drafting.[156]

The second reason the Dodd-Frank amendments might not affect the analysis here is that the amendments cover SEC and DOJ enforcement cases, not regulation and registration. One might argue that Congress's intent with respect to enforcement should apply equally to regulatory authority. There are reasons, however, to avoid simple cross-application from enforcement to regulation. The reach of the antifraud provisions in the enforcement context is greater than the reach of purely regulatory provisions.[157] Courts have given three reasons for this: congressional desire to combat fraud; reduced likelihood of conflicts with foreign law; and congressional guidance limiting the applicability of regulatory provisions in contrast with silence regarding antifraud provisions.[158] Thus, even if courts agree with the SEC that Dodd-Frank section 929P restores the ability of the SEC and the DOJ to bring enforcement actions when the conduct

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[153] *See id.*

[154] SEC. & EXCH. COMM'N STAFF, *supra* note 8, at 6.

[155] SEC v. Compania Internacional Financiera S.A., No. 11 Civ. 4904(DLC), 2011 WL 3251813, at *6 n.2 (S.D.N.Y. July 29, 2011).

[156] *See* Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed, or Sufficient?*, 1 HARV. BUS. L. REV. 195, 205–08 (2011), *available at* http://www.hblr.org/download/HBLR_1_1/Painter-DFA_Extraterritorial_Jurisdiction_Provision.pdf (asking whether Dodd-Frank does anything other than confer jurisdiction and stating that it is uncertain how courts will respond).

[157] *See* Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262 (2d Cir. 1989) ("[T]he antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements."); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 986 (2d Cir. 1975) ("It is elementary that the anti-fraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets.").

[158] E.ON AG v. Acciona, S.A., 468 F. Supp. 2d 569, 573–74 (S.D.N.Y. 2007).

and effects test is met, the Dodd-Frank amendments do not alter the circumstances when the SEC can regulate and require registration of non-U.S. domiciled firms.

B. Implications for Advisers

The sweeping language of *Morrison* regarding the conduct and effects test and the presumption against extraterritoriality may restrict the SEC's ability to regulate non-U.S. domiciled advisers. This section discusses reasons to support that claim. The Advisers Act on its face does not apply extraterritorially. The registration provision simply prohibits any investment adviser unless registered from using the means of interstate commerce in connection with its business as an investment adviser.[159] Although the term "interstate commerce" includes communication between any foreign country and any state,[160] as discussed above, a general reference to "foreign" in a definition of interstate commerce does not defeat the presumption against extraterritoriality.[161]

1. Extraterritoriality by Inference from Dodd-Frank

A response to the claim that the Advisers Act does not apply extraterritorially is that changes in Dodd-Frank, not aimed at *Morrison*, militate in favor of extraterritorial treatment, even if the Act did not apply extraterritorially before. Dodd-Frank amended the statutory exemptions from registration in the Act, adding a new exemption for "foreign private advisers."[162] The exemption replaced the private adviser exemption, which was an exemption for any investment adviser with fewer than fifteen clients. If the Act now exempts foreign private advisers as defined, one could argue that the statute by implication must apply extraterritorially or the exemption would be unnecessary.

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[159] Investment Advisers Act of 1940 § 203(a), 15 U.S.C. § 80b-3(a) (2012).

[160] § 202(a)(10), 15 U.S.C. § 80b-2(a)(10).

[161] *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2882 (2010).

[162] Advisers Act § 203(b)(3), 15 U.S.C. § 80b-3(b)(3). A foreign private adviser is, speaking generally, an adviser that has no place of business in the United States; has fewer than fifteen clients in the United States and investors in the United States in private funds advised by the adviser; has assets under management attributable to those clients and investors of less than $25 million; and does not hold itself out generally to the public in the United States as an investment adviser. § 202(a)(10), 15 U.S.C. § 80b-2(a)(30).

This argument by implication is unlikely to be sustained after *Morrison*, which requires more specificity before a statute applies extraterritorially. In *Morrison*, the Solicitor General argued that, as a result of language in Exchange Act section 30(b), the statute applies extraterritorially. Section 30(b) provides that the Act shall not apply to a person conducting a transaction outside of the United States unless in violation of an SEC rule to prevent evasion of the Act.[163] The Solicitor General argued that this provision would be unnecessary if the Act did not apply in the first instance to transactions abroad.

The Court disagreed. First, it would be odd, the Court stated, to indicate extraterritorial application of the entire statute by imposing a condition precedent to extraterritorial application.[164] Second, the Court asked rhetorically, if the entire Act applied extraterritorially, why would the Commission's authority to adopt regulations be limited to preventing evasion as opposed to simply preventing a violation?[165] Third, the Court stated that, although inferring extraterritoriality from section 30(b) might be possible, a merely possible interpretation is insufficient to override the strong presumption against extraterritoriality.[166] Finally, the Court pointed to Exchange Act section 30(a), which refers specifically to extraterritorial application.[167] Section 30(a) is a prohibition against transacting securities of a U.S. issuer on a non-U.S. exchange in violation of an SEC rule.[168] The Court wrote that *this* is the level of specificity needed before an act can apply extraterritorially.[169]

Thus, after *Morrison*, the new registration exemption in the Advisers Act for foreign private advisers is unlikely to demonstrate extraterritoriality for the Advisers Act as a whole. Just as *Morrison* held for the Exchange Act, it would be odd for Congress to indicate extraterritorial application of the entire statute through a registration *exemption* for a narrow subset of advisers. Moreover, as the *Morrison* Court wrote, when a statute provides for some extraterritorial application, that does not mean

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[163] Securities Exchange Act of 1934 § 30(b), 15 U.S.C. § 78dd(b) (2012).
[164] *Morrison*, 130 S. Ct. at 2882.
[165] *Id.*
[166] *Id.* at 2883.
[167] *Id.*
[168] *Id.*
[169] *Id.*

that the entire statute applies extraterritorially.[170] Rather, "the presumption against extraterritoriality operates to limit that provision to its terms."[171] Thus, under *Morrison*, the exemption for foreign private advisers is likely to be read as a clarification of the non-applicability of the registration provision in certain cases as opposed to a broad pronouncement to override the presumption against extraterritoriality in all cases under the Act.

If the Advisers Act does not apply extraterritorially, there is little basis for the SEC and the courts to use the conduct and effects test to determine whether and when to apply the statute extraterritorially. Post-*Morrison* courts have been clear that the conduct and effects test is no longer viable.[172] As discussed above, the Court dwelled on the conduct and effects test's infirmities and set forth a new test. After *Morrison*, it is doubtful that the test should be employed at all.

2. Extraterritoriality Based on the Advisers Act Context

There is another possibility to permit extraterritorial application that should be explored. Perhaps one can argue that the Advisers Act is sufficiently different from the Exchange Act to justify different treatment. Support for this argument can be found in *SEC v. Gruss*.[173] The SEC sued Perry A. Gruss, the Chief Financial Officer of D.B. Zwirn & Co., L.P., a defunct New York-based investment adviser.[174] D.B. Zwirn managed five hedge funds. One fund, located in the United States, had a severe cash shortage while another located offshore had a surplus. Gruss allegedly authorized $870 million in improper transfers between the funds.[175] Gruss argued that, in light of *Morrison*, fraud claims must be directed only at U.S. clients. Because the fraud involved an offshore fund, Gruss argued, the Advisers Act was inapplicable.[176]

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[170] *Id.*

[171] *Id.*

[172] *See, e.g.*, SEC v. Gruss, 859 F. Supp. 2d 653, 661 (S.D.N.Y 2012) (stating that the new transactional test "replaced" the conduct and effects test).

[173] *Id.* at 653.

[174] *Id.* at 655.

[175] *Id.* at 656.

[176] *Id.* at 660.

The *Gruss* court distinguished *Morrison* on several accounts.[177] First, *Gruss* was brought by a U.S. plaintiff—the SEC—not a foreign plaintiff.[178] Second, the action alleges claims against a U.S. adviser, not a foreign adviser.[179] Third, the action was brought under the Advisers Act, not the Exchange Act.[180] The *Gruss* court also pointed to the Dodd-Frank amendment in section 929P discussed above to support Congress's intent to apply the Act extraterritorially in SEC enforcement actions.[181] The court then identified a key difference between the two statutes: The purpose of the Exchange Act is to regulate transactions conducted on exchanges and over-the-counter; the purpose of the Advisers Act is to regulate fraudulent practices by advisers.[182] According to the court, the focus of the Advisers Act is on the adviser and its actions, not on the client.[183] This difference was cited to help justify different treatment under the Exchange Act and the Advisers Act.[184]

Gruss is noteworthy for the court's analysis of the differences between the Advisers Act and the Exchange Act and whether those differences justify a difference in extraterritorial application. There are several reasons to question *Gruss*'s conclusion that the Advisers Act focuses on the adviser and not the client. First, the Advisers Act is designed in part to protect advisory clients, just as the Securities Act and the Exchange Act are designed to protect investors. Without the presence of clients or potential clients, there *is* no adviser under the Advisers Act; the Act defines an investment adviser as someone in the business of advising *others* for compensation.[185] The Advisers Act's findings at the front of the statute provide that advisory arrangements "with clients" are negotiated and performed by using means of interstate commerce.[186] Clients are also

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[177] *Id.* at 661.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 664.

[182] *Id.* at 662.

[183] *Id.* ("Clients and prospective clients are mentioned in the section's subheadings and only in relation to advisers."); *id.* at 663 ("Section 206 offers no private right of action, further demonstrating that the focus of the IAA is the adviser and not the client.").

[184] *Id.* at 664–65.

[185] Investment Advisers Act of 1940 § 202(a)(11), 15 U.S.C. § 80b-2(a)(11) (2012).

[186] § 201(1), 15 U.S.C. § 80b-1(1).

mentioned in the prohibition on advisory contracts,[187] the registration provision,[188] the antifraud provision,[189] and the custody provision.[190]

In addition, the fact that the Advisers Act supposedly focuses on advisers as opposed to clients is not a reason the conduct and effects test should survive *Morrison*. Recall that the Supreme Court invalidated the conduct and effects test as lacking a basis in law and as calling for speculation on what Congress may have wanted if it had thought about the case before the Court. The difference set forth in *Gruss* between the Exchange Act and the Advisers Act does not address the Supreme Court's fundamental criticism of the conduct and effects test.

If the conduct and effects test is no longer viable, one is left with the question of whether and when the Advisers Act can be applied extraterritorially. In a recent rulemaking release, the SEC answered this question by referring to the registration provision, which states that an adviser cannot use the means of interstate commerce unless registered.[191] According to the SEC, a determination of extraterritorial application hinges on "whether there is sufficient use of U.S. jurisdictional means."[192] This approach, however, is inconsistent with *Morrison*. The approach starts with a presumption that the Act applies extraterritorially and permits the SEC to claim extraterritorial application when use of jurisdictional means is "sufficient."[193] There is no basis, however, to determine what level of use would qualify as sufficient—and the conduct and effects test can no longer be a guide.

C. *Implications for Brokers*

The implications of *Morrison* for the regulation of non-U.S. domiciled broker-dealers are easier to assess than the implications for investment advisers because brokers are

[187] § 205(a), 15 U.S.C. § 80b-5(a).

[188] § 203(b), 15 U.S.C. § 80b-3(b).

[189] § 206, 15 U.S.C. § 80b-6.

[190] § 223, 15 U.S.C. § 80b-23.

[191] Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3222, 76 Fed. Reg. 39,646 (July 6, 2011).

[192] *Id.* at 39,674 n.415.

[193] *Id.*

regulated under the statute at issue in *Morrison*. According to *Morrison*, the Exchange Act, except in limited circumstances, does not apply extraterritorially. As discussed above, the *Morrison* Court referenced section 30(a) of the Exchange Act, which prohibits a broker-dealer from effecting on a non-U.S. exchange a transaction in a security of a U.S. issuer, in violation of an SEC rule. Section 30(a) is a very specific grant of authority to adopt rules prohibiting a broker-dealer from using the U.S. jurisdictional means to transact securities of U.S. issuers on a non-U.S. exchange. It applies only in the case of transactions in the securities of a U.S. issuer. The Court raised this example as the kind of specificity it believed necessary before an act can apply extraterritorially.

Morrison's affirmance of the presumption against extraterritoriality calls into question the framework behind Rule 15a-6 and the SEC's approach to regulating non-U.S. brokers. As discussed above, when the SEC adopted Rule 15a-6, it started with the assumption that the Exchange Act applies extraterritorially because the terms broker and dealer do not refer to nationality.[194] Instead of invoking a presumption against extraterritoriality in the face of congressional silence, the SEC invoked a presumption in favor of extraterritoriality, even pointing to the definition of the word "person," which similarly includes no reference to nationality.[195] After *Morrison*, the extraterritoriality presumption embodied in Rule 15a-6 is invalid, calling into question the legal regime instituted through the rule. In *SEC v. Benger*, discussed above, the SEC tried to use Rule 15a-6 to support its position on extraterritoriality. But the court stated that Rule 15a-6 could not control the case because it was adopted long before *Morrison* was decided.[196] This is further evidence that the SEC may be unable to rely on Rule 15a-6 to support extraterritorial application of the Exchange Act after *Morrison*.

The SEC might claim that, unlike the conduct and effects test for advisers, Rule 15a-6 is an agency rule, entitled to *Chevron*[197] deference. The *Morrison* Court left this door open. In

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[194] Registration Requirements for Foreign Broker Dealers, Exchange Act Release No. 27017, 54 Fed. Reg. 30,013, 30,016 (July 18, 1989).

[195] *Id.* at 30,016 n.40.

[196] SEC v. Benger, 934 F. Supp. 2d 1008, 1015 (N.D. Ill. 2013).

[197] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

Morrison, the Solicitor General argued that the SEC had adopted an interpretation similar to the conduct test, which should be accorded deference. The Court rejected that argument because, in the adjudications cited by the Solicitor General, the agency did not provide its own interpretation, relying instead on court decisions the Supreme Court was rejecting.[198] The *Morrison* Court, therefore, left open the possibility that the SEC's interpretation might stand if the agency provided an interpretation of extraterritorial application based on something other than citations to discredited cases. The obvious candidate where such deference would be accorded is in agency rulemaking. Thus, the Commission may restore or preserve its ability to regulate by arguing that the agency should be accorded deference in the Rule 15a-6 context, even if such deference is not available for the conduct and effects test in the Advisers Act context.[199]

Assessing this possibility would require a detailed discussion of administrative law. A more complete analysis of whether the SEC can now, post-*Morrison*, interpret the law in its favor would first require determining whether Rule 15a-6 provides an independent rationale for applying the Exchange Act extraterritorially, and, if yes, whether the analysis could withstand the Supreme Court's strong affirmance of the presumption against extraterritoriality. The analysis would likely depend on whether the *Morrison* Court's construction of the Exchange Act follows from the unambiguous terms of the statute, or whether there is room for discretion.[200] The agency might well prevail because *Morrison* suggested, albeit weakly, that interpreting the statute to apply extraterritorially was possible.[201] Moreover, in *Arlington v. FCC*, the Supreme Court

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[198] Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2887 (2010).

[199] *See supra* notes 114–16 and accompanying text.

[200] *Cf.* National Cable v. Brand X Internet, 545 U.S. 967, 982 (2005) (holding that a court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from unambiguous statutory terms).

[201] *Morrison*, 130 S. Ct. at 2883 ("At most, the Solicitor General's proposed inference is possible; but possible interpretations of statutory language do not override the presumption against extraterritoriality.").

held that an agency is entitled to deference in a determination of its own jurisdiction.[202] These administrative law topics deserve their own detailed analysis in a separate article.

Although *Morrison* asserted a strong presumption against extraterritoriality calling into question the SEC's approach in Rule 15a-6, there is a silver lining for the regulators. The Court's opinion prompts a suggestion that the SEC consider proposing two new rules under the Exchange Act, one under section 30(a) and the other under section 30(b). A new rule under section 30(a), modeled on Rule 10b-5, could prohibit a broker-dealer from fraudulently effecting a transaction on a non-U.S. exchange in a security of a U.S. issuer. A new rule under section 30(b) would be an anti-evasion rule, modeled on section 208(d) of the Advisers Act.[203] The rule would prohibit persons from transacting in securities outside of the United States if the purpose of conducting the transaction outside of the United States was to evade the application of the Exchange Act or rules adopted under the Act. Rules adopted under section 30 would have a different focus from Rule 15a-6. Such rules would target U.S. broker-dealers conducting business outside of the United States whereas Rule 15a-6 targets the conduct of non-U.S. broker-dealers seeking to do business in the United States.

CONCLUSION

Scholarship following *Morrison* has focused primarily on litigation and enforcement. Such focus is understandable because *Morrison*'s context is the application of Exchange Act section 10(b) and Rule 10b-5 in a private enforcement action. But *Morrison*'s implications extend beyond litigation. The case is also significant for determining whether and when the SEC can regulate and require registration of non-U.S. domiciled investment advisers and broker-dealers, regardless of whether litigation arises.

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[202] 133 S. Ct. 1863, 1874 (2013). As discussed above, it is unclear whether the Exchange Act's extraterritorial reach should be considered jurisdictional or substantive. *See supra* Part I.A.

[203] Investment Advisers Act of 1940 § 208(d), 15 U.S.C. § 80b-8(d) (2012) (providing that "[i]t shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder").

Regulation of non-U.S. advisers depends heavily on the conduct and effects test. Regulation of non-U.S. brokers assumes the Exchange Act applies extraterritorially in face of congressional silence. Regulation in both cases poses challenges after *Morrison*, which unmistakably rejected the conduct and effects test and forcefully asserted a presumption against extraterritoriality. Regulating foreign firms under doctrines rejected by the Supreme Court will not withstand the test of time.

Congress amended the federal securities laws in Dodd-Frank to provide for SEC and DOJ enforcement actions when the conduct and effects test is met. But the Dodd-Frank amendment may not be enforceable and, in any case, it applies in the enforcement context, not in the context of the regulation and registration of foreign firms. Regulators, therefore, will likely be considering their options and assessing whether and when regulation of non-U.S. domiciled advisers and brokers is appropriate in light of *Morrison*.