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NOTE

MORRISON AND DODD-FRANK: THE IMPACT AND INTERSECTION

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I. INTRODUCTION

There are many situations where the Supreme Court of the United States makes a decision with which scholars and members of the bar disagree. Less often, however, does Congress disagree with the Court and take action. This article is about one such case. In its attempt to overrule the Supreme Court, Congress instead created a source of confusion for lower courts. On June 24, 2010, the Supreme Court rendered a decision limiting the extraterritorial reach of United States securities laws. Since *Morrison v. National Australia Bank Ltd.*,[1] transnational securities issues can be brought under Section 10(b) of the Securities Exchange Act of 1934[2] (the Exchange Act) only when the transaction is in "securities listed on domestic exchanges" or a "domestic [transaction] in other securities."[3] If the transaction does not fit into either category, a suit cannot be brought under Section 10(b) through Rule 10b-5.

Morrison changed the course of the extraterritorial enforcement of Section 10(b) of the Exchange Act and Rule 10b-5.[4] The transactional test developed in *Morrison* moves away from its predecessors, the conduct and effects tests, previously used in "f-cubed" cases. "F-cubed" cases are suits brought against foreign issuers by foreign plaintiffs who bought securities outside the United States.[5] *Morrison* also changed the focus from an issue

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1. 130 S. Ct. 2869 (2010).
2. 15 U.S.C. § 78j(b) (2006).
3. *Morrison*, 130 S. Ct. at 2884.
4. *Id.*
5. Richard 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 Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 5 (2011); Stephen R.

of subject matter jurisdiction to an issue of merits—in other words, the geographic reach of Section 10(b) and Rule 10b-5.[6] In his majority opinion, Justice Scalia focused on the general presumption against extraterritoriality.[7] Because, at the time, there was no evidence of congressional intent that Section 10(b) should apply extraterritorially, Justice Scalia applied the presumption and affirmed dismissal of the suit.[8]

The actions of Congress post-*Morrison*, however, reflect congressional intent to allow the Securities and Exchange Commission (the SEC) and the United States government, specifically the Department of Justice (the DOJ), to bring suits that apply Section 10(b) and Rule 10b-5 extraterritorially. Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) on June 25, 2010, and it was signed into law by President Obama on July 21, 2010.[9] This law was developed in response to the financial crisis that began in 2008.[10] Congress drafted the provision relevant to this article, Section 929P(b), as a very small part of this overall reform of the banking and lending industries. Congress worded the provision as a grant of subject matter jurisdiction to the courts. This was Congress's attempt to codify the Second Circuit approach used by courts for forty years prior to *Morrison*. The day before Congress passed Dodd-Frank, though, the Supreme Court established that the issue is about the geographic reach of Section 10(b) and Rule 10b-5, not the jurisdiction of the courts.[11] Since *Morrison* was decided the day before Congress passed Dodd-Frank, there was no time for Congress to adjust the language of the section to address the actual issue—the geographic reach of Section 10(b) and Rule 10b-5. Since the language of Dodd-Frank does not refer to the geographic reach of Section 10(b), Congress did not necessarily overrule *Morrison* in suits subsequently filed by the SEC or the DOJ. It did, however, create a complicated issue about how courts should approach Section 10(b) cases—or in other words, which test should apply (the *Morrison* transactional test or the Dodd-Frank codification of the conduct and effects tests).

Several issues arise regarding how *Morrison* and Section 929P(b) of Dodd-Frank should be applied, specifically in cases brought by the SEC or the DOJ. First, there is no clear explanation of what qualifies as a "domestic

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Smerek & Jason C. Hamilton, *The Long Arm of the Law:* Morrison*, Dodd-Frank, and the Extraterritorial Reach of U.S. Regulators*, 42 Sec. Reg. & L. Rep. (BNA) Oct. 4, 2010, at 2.

6. *Morrison*, 130 S. Ct. at 2877.

7. *Id.* at 2877–83.

8. *Id.* at 2881.

9. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

10. Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431, 1434–35 (2011).

11. *See* Dodd-Frank Act § 929P(b).

transaction." Second, the Court did not establish what happens in "f-squared" cases where foreign securities are purchased on a foreign exchange but one of the parties is from the United States. Finally, lower courts have no guidance about whether to follow *Morrison* or Dodd-Frank in cases brought by the SEC or the DOJ. Although some of these general issues have been discussed by other scholars, most other articles do not address how these issues are affected by Dodd-Frank nor do any (at this point in time) propose language to amend Dodd-Frank. This article addresses how lower courts have interpreted *Morrison*, how they have addressed (or failed to address) Dodd-Frank, and it proposes sample language that Congress could use to amend Section 929P(b) of Dodd-Frank in order to remedy the confusion.

In order to understand the full impact of this provision of Dodd-Frank, this article provides some background information about securities litigation with international elements prior to *Morrison*. Part II addresses the case law pre-*Morrison* establishing the conduct and effects tests—the predecessors of the transactional test. Part III focuses on *Morrison* itself and the Court's changes regarding the proper approach to securities cases with international elements. Part IV discusses the relevant provisions of Dodd-Frank and the problems associated with the language used by Congress. Part V addresses some of the issues mentioned above in cases decided post-*Morrison*. The final section provides this author's proposal for an amendment to Section 929P(b) of Dodd-Frank including sample language.

II. Cases Pre-*Morrison*: Establishing the Conduct and Effects Tests

A discussion of the effect of *Morrison* and Dodd-Frank must begin with a brief explanation of the case law and history of Section 10(b) litigation involving transnational issues prior to *Morrison*. The relevant provision of the Exchange Act for this article is Section 10(b) along with Rule 10b-5. Section 10(b), the antifraud provision of the Exchange Act, prohibits any person from using interstate commerce to commit fraud in the purchase or sale of any security registered in the United States or any security "not so registered."[12] This is a general ban on fraudulent activities under the Exchange Act, and securities fraud suits are generally brought under this section. This section itself, however, does not provide for a private cause of action, so the SEC developed Rule 10b-5 to implement Section 10(b). To-

12. "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (2006).

gether they prohibit the unlawful use of manipulative practices or deceptive devices in the purchase or sale of securities.[13] Litigation based on this section and rule led to the creation of the conduct and effects tests—developed by the Second Circuit and used by many circuits—for securities cases involving foreign elements.[14]

Before the Supreme Court decided *Morrison*, courts looked to the Court of Appeals of the Second Circuit for guidance in cases involving foreign securities on foreign exchanges with foreign parties (or with at least one foreign party). Courts applying Section 10(b) of the Exchange Act "to situations with foreign elements"[15] focused on "whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than [to] leave the problem to foreign countries."[16] This inquiry developed into two tests—the effects test and the conduct test. In order to determine whether a court had jurisdiction over a case with foreign elements, the court looked at whether "the wrongful conduct occurred in the United States" or "had a substantial effect in the United States or upon United States citizens."[17] Most courts applied the two tests together,[18] and jurisdiction was appropriate if either test was satisfied.[19]

The effects test developed first. In *Schoenbaum v. Firstbrook*, treasury shares of a Canadian corporation were listed on a domestic stock exchange as well as a Canadian stock exchange, but the shares at issue were sold on the Canadian exchange.[20] Shareholders filed a derivative lawsuit under Section 10(b) of the Exchange Act.[21] The Second Circuit reversed the district

13. "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (2010).

14. *See infra* notes 15–34. It is crucial to note that these tests focused on whether a court had *jurisdiction* to hear a case, not whether Section 10(b) applied to the case. This is one major distinction between these tests and the transactional test developed in *Morrison*.

15. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975).

16. Sec. & Exch. Comm'n v. Berger, 322 F.3d 187, 192 (2d Cir. 2003) (quoting *Bersch*, 519 F.2d at 985).

17. *Id.* at 192–93.

18. *See, e.g.*, *id.* at 193; Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) ("[A]n admixture or combination of the two [tests] often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.").

19. *See, e.g.*, *Berger*, 322 F.3d at 195 (holding that there was no need to consider the effects test because the conduct test was satisfied); Tri-Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 573 (W.D. Pa. 2002) ("Satisfaction of either test may independently establish jurisdiction.").

20. Schoenbaum v. Firstbrook, 405 F.2d 200, 204–05 (2d Cir. 1968), *modified on other grounds en banc*, 405 F.2d 215 (2d Cir. 1968).

21. *Id.* at 204.

court decision, which applied the presumption against extraterritoriality, and dismissed the case based on the lack of subject matter jurisdiction.[22] The Second Circuit determined that the presumption was rebutted since the transaction affected domestic investors and markets—the effect on domestic investors and markets overcame the presumption.[23] This became known as the "effects" test. A plaintiff could establish jurisdiction if the nondomestic conduct caused actual harm to United States sellers, investors, or markets.[24]

The second test, the conduct test, focused on "the nature of conduct within the United States as it relate[d] to carrying out the alleged fraudulent scheme."[25] This originated in *Leasco Data Processing Equipment Corp. v. Maxwell*.[26] In *Leasco*, a British company fraudulently induced an American company to buy British stock listed on the London Exchange and not registered or listed on any domestic exchange.[27] The British brokers practiced fraudulent conduct in the United States to induce the American company to purchase the shares.[28] The court looked at the nature of the domestic conduct and concluded it was sufficient to establish jurisdiction.[29] This general query is the basis of the conduct test. Courts refined the test in subsequent cases to also address whether the domestic conduct was merely preparatory[30] or directly caused the harm.[31]

Although most circuits followed these tests, courts applied them inconsistently. Some circuits required higher levels of conduct in order to permit jurisdiction while others required minimal conduct.[32] One circuit, however,

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22. *Id.* at 206.

23. *Id.*

24. Eur. & Overseas Commodity Traders v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998).

25. Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983).

26. 468 F.2d 1326 (2d Cir. 1972).

27. *Id.* at 1330–33.

28. *Id.*

29. *Id.* at 1334.

30. *See, e.g.*, Sec. and Exch. Comm'n v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977) ("[J]urisdiction is limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activities were performed in foreign countries."); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992 (2d Cir. 1975) ("While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident."); IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) ("Our ruling on this basis of jurisdiction is limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities . . . .").

31. *See, e.g.*, Sec. and Exch. Comm'n v. Berger, 322 F.3d 187, 192 (2d Cir. 2003) ("[A]ctivities or culpable failures to act within the United States 'directly cause' the claimed losses."); *In re* Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 169–70 (S.D.N.Y. 2003) (holding a move to the United States "allegedly to better direct corporate operations" created a reasonable inference that the move was a "significant contributing cause" in investor decisions to invest in foreign stock, thus allowing jurisdiction).

32. *See, e.g.*, *Kasser*, 548 F.2d at 114 (focusing on whether "at least some activity designed to further a fraudulent scheme occurs within [the United States]"); Continental Grain (Austl.) Pty.

disagreed entirely with the Second Circuit approach. The Court of Appeals of the District of Columbia Circuit stated that it would be better to focus on "what jurisdiction Congress in fact thought about and conferred" instead of determining jurisdiction by "divining what 'Congress would have wished' if it had addressed the problem."[33] The court ultimately deferred to the Second Circuit approach, however, based on the Second Circuit's "preeminence in the field of securities law."[34]

Overall, although there were recognized tests applied in cases involving transnational securities fraud, the circuits disagreed about their application. Perhaps this lack of clarity and uniformity was one of the reasons the Court decided *Morrison* as it did.

III. Morrison v. National Australia Bank

The most important case relevant to Section 929P(b) of Dodd-Frank is the case of *Morrison v. National Australia Bank Ltd.*[35] The events leading up to the *Morrison* case began in 1998. National Australia Bank Limited (National) was the largest bank in Australia in the late 1990s and early 2000s.[36] Its stock was listed on foreign securities exchanges but not on any United States exchange except for its American Depository Receipts (ADRs) for its ordinary shares, which were listed on the New York Stock Exchange.[37] In February of 1998, National purchased HomeSide Lending, Inc. (HomeSide), a Florida corporation.[38] HomeSide, a mortgage servicing company, manipulated its financial records to make its mortgage-servicing rights appear more valuable than they actually were.[39] As a result, National wrote-down the value of HomeSide's assets by $450 million and then, three

Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 420 (8th Cir. 1979) (establishing jurisdiction where a defendant used instrumentalities of interstate commerce and his or her "conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment"); Travis v. Anthes Imperial, Ltd., 473 F.2d 515, 526 (8th Cir. 1973) (holding that "a slowly unfolding scheme to defraud the plaintiffs involving the use of the mails and instrumentalities of interstate commerce" was sufficient); Butte Mining PLC v. Smith, 76 F.3d 287, 290–91 (9th Cir. 1996) ("The United States is not a haven for the [d]efendants because . . . they are not here and have not operated from here."); Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (adopting the test established in *Continental Grain*).

33. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (D.C. Cir. 1987).

34. *Id.*

35. 130 S. Ct. 2869 (2010).

36. *Id.* at 2875.

37. *Id.*; Foreign companies that want to trade shares in the United States can either list their stock in the United States or issue ADRs—negotiable instruments that are backed by physical stock at an issuing bank. An investor can exchange the receipt with the bank for the shares of the foreign company. *American Depositary Receipt*, Fin. Times Lexicon, http://lexicon.ft.com/term.asp?t=American-Depositary-Receipt--ADR (last visited Dec. 4, 2011).

38. *Morrison*, 130 S. Ct. at 2875.

39. *Id.* at 2876.

months later, by another $1.75 billion.[40] The write-downs caused the prices of the common stock and the ADRs to plummet.[41]

A group of Australians who purchased National's common stock before the write-downs sued National, HomeSide, National's chief executive officer, and three HomeSide executives in the District Court for the Southern District of New York.[42] The suit alleged violations of Section 10(b) and 20(a) of the Exchange Act[43] and Rule 10b-5.[44] The district court granted the defendants' motion for dismissal based on the lack of subject matter jurisdiction.[45]

The Court of Appeals of the Second Circuit affirmed.[46] The court determined that National's actions in Australia were far "more central to the fraud and more directly responsible for the harm to investors" than its actions in Florida.[47] The court determined that the chain of causation between the actions in the United States and the harm was very complex.[48] Applying the conduct and effects tests, the court held that there were no allegations that the fraud had any effect on American investors or American markets and, in turn, affirmed the dismissal.[49]

The Supreme Court granted the writ of certiorari and affirmed the dismissal.[50] The Court made three decisions that altered the future of Section 10(b) litigation involving transnational securities fraud: it focused on the geographic reach of Section 10(b) and Rule 10b-5, applied the presumption against extraterritoriality, and developed the transactional test. Each of these developments shall be discussed in turn.

The Court began its decision by refocusing the question. The issue turned into a matter of the geographic reach of Section 10(b) and Rule 10b-5 instead of the subject matter jurisdiction of the court.[51] Subject matter jurisdiction regards "a court's power to hear a case,"[52] which is different than asking whether Section 10(b) and Rule 10b-5 apply to a case with foreign elements.[53] The Second Circuit, and other circuits following its lead, previously addressed the issue of whether a court could hear a securi-

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40. *Id.*
41. *Id.*
42. *Id.*
43. 15 U.S.C. § 78j(b) (2006); 15 U.S.C. § 78t(a) (2006).
44. 17 C.F.R. § 240.10b-5 (2011).
45. *See In re* Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537, 2006 WL 3844465 (S.D.N.Y. Oct. 25, 2006).
46. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 176 (2d Cir. 2008).
47. *Id.* at 176.
48. *Id.*
49. *Id.* at 176–77.
50. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010).
51. "[T]o ask what conduct [section] 10(b) reaches is to ask what conduct [section] 10(b) prohibits, which is a merits question." *Id.* at 2877.
52. United States v. Cotton, 535 U.S. 625, 630 (2002).
53. *Morrison*, 130 S. Ct. at 2877.

ties case involving international elements based on the subject matter jurisdiction of the court. All of the cases discussed above in Part II applied the conduct and effects tests to determine whether the courts had jurisdiction over those cases.[54] The Court in *Morrison* established that the question is not a matter of jurisdiction but instead about the geographic reach of Section 10(b) and Rule 10b-5. This altered the essence of how to address situations involving foreign securities, and this change created much of the confusion between *Morrison* and Section 929P(b) of Dodd-Frank.

The next significant change was the Court's direct application of the presumption against extraterritoriality to Section 10(b). The Court stated that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[55] Justice Scalia explained how the lack of a "clear indication" of extraterritorial application meant that there should be no extraterritorial reach.[56] The Court found that there was no text in the Exchange Act that gave any indication that Section 10(b) was meant to apply extraterritorially. Even though the definition of "interstate commerce" in the Exchange Act includes a specific reference to foreign commerce, the Court determined that the reference was insufficient to make the statute apply abroad.[57] The Court contrasted Section 10(b) with Section 30 of the Exchange Act and found that Section 30, unlike Section 10(b), provided a "clear statement of extraterritorial effect."[58] Since Congress included an explicit statement of extraterritorial effect in one section, the Court reasoned that Congress could have done the same in Section 10(b) if it intended for Section 10(b) to apply extraterritorially.[59] The Court ultimately determined there was no indication that Section 10(b) should apply extraterritorially.[60] The Court stated that since there was

54. *See supra* notes 15–34.

55. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

56. *Morrison*, 130 S. Ct. at 2878.

57. *Id.* at 2881–82; EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 251 (1991). There are other articles that critique the court on this point. The focus of this article, however, is not to critique this approach but simply to address the interplay between this decision and Section 929P(b) of Dodd-Frank.

58. "(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 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(a)–(b) (2006) (italics added for emphasis); *Morrison*, 130 S. Ct. at 2883.

59. *Morrison*, 130 S. Ct. at 2883.

60. *Id.* at 2891.

"no affirmative indication in the Exchange Act that [Section] 10(b) applies extraterritorially, . . . it does not."[61]

The final major step the Court took was to adopt a transactional test for all cases brought under Section 10(b) or Rule 10b-5. It explicitly considered and rejected the conduct and effects tests.[62] The Court identified several problems with the tests, specifically: the lack of attention to the presumption against extraterritoriality;[63] the lack of textual basis;[64] the difficulty in applying the tests;[65] the differing results produced by the tests depending on whether the harmed investors were foreign or domestic;[66] and the high probability that the application of the tests would interfere with the enforcement of foreign securities laws.[67] The Court determined that the focus must be "not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[68] Based on these conclusions, the Court established that Section 10(b) only applies to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[69]

Overall, the Supreme Court in *Morrison* drastically altered the approach to Section 10(b) cases involving securities fraud issues with international elements. The location of the transaction, not the location of the fraudulent conduct or the location affected by the conduct, now determines whether a suit can be brought under Section 10(b).

IV. The Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act was developed in response to the financial crisis that began in the late 2000s. Congress created Dodd-Frank "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[70] Dodd-Frank is massive and complex, including many titles covering a variety of topics, ranging from regulation of the banking industry to regulation of the mortgage industry.[71] Along with larger, focused sections, there are miscellaneous provisions like Section 929P. Congress passed Dodd-Frank the day after *Morrison* was decided and

61. *Id.* at 2883.
62. *Id.* at 2878–81.
63. *Id.* at 2878.
64. *Id.* at 2879.
65. *Id.* at 2880–81.
66. *Id.* at 2879.
67. *Id.* at 2885.
68. *Id.* at 2884.
69. *Id.*
70. This is the actual title of the Dodd-Frank Act. *See* Dodd-Frank Act.
71. *See id.*

President Obama signed it into law one month later.[72] This one-day period did not give Congress time to alter Section 929P(b) so that it could actually achieve what it intended to achieve—codification of the Second Circuit's conduct and effects tests.

A. *The Relevant Language of Section 929P(b)*

Section 929P(b) amends Section 22 of the Securities Act of 1933,[73] Section 27 of the Exchange Act,[74] and Section 214 of the Investment Advisors Act of 1940.[75] The language proposed in the initial version of this bill granted jurisdiction to United States courts in securities cases where fraudulent conduct occurred within the United States or had a foreseeable substantial effect within the United States.[76] The language actually adopted and used in the final version narrows the grant of jurisdiction to cases brought by the SEC or the United States government in such situations.[77] Congress also included a provision requiring the SEC to survey and report on whether to extend this grant of jurisdiction to private rights of action.[78] This reflects Congress's intent to permit private causes of action, like the one in *Morri-*

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72. *Id.*

73. 15 U.S.C. § 77v(a) (2006).

74. 15 U.S.C. § 78aa (2006).

75. 15 U.S.C. § 80b-14 (2006).

76. "The jurisdiction of the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States described under subsection (a) includes violations of the antifraud provisions of this title, and all suits in equity and actions at law under those provisions, 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."
H.R. 4173, 111th Cong. § 7216 (2009).

77. "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."
Dodd-Frank Act § 929P(b) (2010) (italics added for emphasis).

78. The SEC must "solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 should be extended to cover—(1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; and (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." The Commission must focus on "(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" as well as other issues. The Commission was required to submit a report with recommendations by the beginning of 2012. Dodd-Frank Act § 929Y (2010).

son, along with SEC and governmental actions.[79] This means Congress essentially "commissioned the SEC to review and recommend whether to overturn *Morrison*."[80] The language of Section 929P(b) on its face does not raise any problems. Ascertaining the meaning of the section and how to apply it, however, is more difficult.

B. The Intent and Effect Of Section 929P(b)

There is very little discussion of Section 929P(b) in the legislative history of Dodd-Frank—it is mentioned only once in the legislative history of the bill. Former United States Representative Paul E. Kanjorski discussed Section 929P(b) on June 30, 2010, just days after *Morrison* was decided. In the debate, former Representative Kanjorski stated that Section 929P(b) created "new authority" in the SEC and the DOJ to bring proceedings "involving transnational securities frauds."[81] He stated that the bill was intended to authorize the SEC and the DOJ to bring enforcement proceedings and to reinstate the conduct and effects tests in cases brought by these agencies.[82] He mentioned the presumption against extraterritoriality applied in *Morrison* and explicitly stated that Dodd-Frank was meant to rebut that presumption in cases brought by the SEC or the DOJ.[83] Representative Kanjorski did not, however, discuss how *Morrison* changed the issue from a matter of jurisdiction to the geographic reach of Section 10(b) and Rule 10b-5 or why Congress did not alter the language of Section 929P(b) to reflect this change. He focused solely on the fact that Congress intended to extend the extraterritorial application of the antifraud provisions of the securities acts to cases brought by the SEC or the DOJ.

The SEC agrees with former Representative Kanjorski's statements about how Dodd-Frank rebuts the presumption against extraterritoriality. The SEC further argues that Section 929P(b) of Dodd-Frank overturns *Morrison* in cases brought by the SEC or the DOJ. In a memorandum for a case brought under Section 10(b) of the Exchange Act, the SEC stated, "in [Dodd-Frank], Congress effectively overrules *Morrison* by codifying the Second Circuit's long-standing conduct and effects test[s] (which *Morrison* has repudiated) for civil enforcement actions brought by the SEC."[84] Along with discarding the transactional test and reviving the conduct and effects

79. Study on Extraterritorial Private Rights of Action, SEC Release No. 34-63174, 2010 WL 4196006 (Oct. 25, 2010) [hereinafter SEC Study].

80. Smerek & Hamilton, *supra* note 5, at 5.

81. 156 CONG. REC. H5233 (June 30, 2010) (statement of Rep. Paul Kanjorski).

82. *Id.*

83. "This bill's provisions concerning extraterritoriality . . . are intended to rebut [the] presumption [against extraterritoriality] by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department." *Id.*

84. SEC's Memorandum of Law in Opposition to Defendant Tourre's Motion to Dismiss the Amended Complaint at 10 n.1, Sec. and Exch. Comm'n v. Tourre, No. 10 Civ. 3229, 2011 WL 350286 (S.D.N.Y. Dec. 21, 2010).

tests in cases brought by the SEC or the DOJ, the SEC also claims that Dodd-Frank "codified the long-standing appellate court interpretation of the law . . . by . . . providing that the inquiry is one of subject matter jurisdiction."[85] In light of these statements, not only does the SEC disregard the transactional test developed by the Supreme Court, but it also disregards the entire shift in perspective regarding whether the issue is about jurisdiction or geographic reach in cases brought by the SEC or the DOJ.

Despite some evidence of Congress's intent, it is still unclear how Section 929P(b) of Dodd-Frank actually impacts the application of *Morrison* in cases brought by the SEC or the DOJ. The provision was drafted based on the approach of the Second Circuit, which was the leading approach for forty years until the day before Congress passed Dodd-Frank. The Supreme Court changed the approach when it was too late for Congress to alter the provision. Even though the language of Section 929P(b) does not necessarily address the substantive reach of Section 10(b), there is now some evidence of congressional intent for Section 10(b) to apply extraterritorially in cases brought by the SEC or the DOJ.

Now that Congress has attempted to establish that Section 10(b) should apply extraterritorially, should *Morrison* be disregarded in cases involving the SEC or the DOJ? Even if Congress's intent is clear, does the jurisdictional focus of Section 929P(b) render the intent ineffectual? These questions have yet to be answered. At this point, the only inference that can be drawn from Section 929P(b) is that it was intended to codify and solidify the Second Circuit approach to Section 10(b) litigation in cases brought by the SEC or the DOJ.[86]

V. Cases Since *Morrison* and Dodd-Frank

Since the Supreme Court decided *Morrison* and Dodd-Frank became a law, courts have ruled on when and how *Morrison* governs and have also refined the transactional test. Most cases involving *Morrison* in the context of the Exchange Act have been decided by the Southern District of New York. This court, and others, apply *Morrison* broadly and, with very few exceptions, have not addressed Section 929P(b) of Dodd-Frank or its potential effect. Since there have not been many cases brought by the SEC or the DOJ since Dodd-Frank was enacted, few courts have addressed how Dodd-Frank affects *Morrison*. This section begins with a discussion of how federal district courts have interpreted and applied *Morrison*. It ends with a discussion of the cases that mention the potential conflict between *Morrison* and Dodd-Frank.

85. SEC Study, *supra* note 79, at 4 n.1.

86. Painter et al., *supra* note 5, at 21.

A. Interpretation of Morrison

Courts interpreting *Morrison* have narrowly defined what qualifies as a "domestic transaction." These courts are refining the transactional test and clarifying the meaning of *Morrison*. In some situations, it is easy to determine whether a transaction is domestic. For example, a transaction is domestic if shares are issued in the United States.[87] Also, a transaction is domestic where the "manipulative and deceptive devices" are organized in the United States and the money is controlled in the United States.[88] Most situations, however, are less clear-cut.

As a general matter, courts are narrowly interpreting what qualifies as a "domestic transaction." Several courts have held that even if a resident of the United States purchases stock on a foreign exchange from within the United States (where the transaction originates in the United States with a buy order or other method), the transaction still takes place on a foreign exchange; therefore, it does not qualify as a domestic transaction and cannot be brought under Section 10(b).[89] This issue arises when plaintiffs argue, for example, that *Morrison* does not illuminate what should happen when there is a purchase or sale with both foreign and domestic "aspects."[90] Where this issue has been raised, courts refuse to limit *Morrison* to f-cubed cases. They apply *Morrison* and the transactional test to cases where United States residents are either plaintiffs or defendants.[91] One court colorfully stated that it was "not convinced that the Supreme Court designed *Morrison* to be squeezed, as in spandex, only into the factual strait jacket of its holding."[92]

Determining whether a transaction is domestic requires a determination of where the transaction took place. At least one plaintiff has argued that even though a transaction is recorded on a foreign exchange, it is a "domestic transaction" because it was initiated in the United States.[93]

87. *In re* Optimal U.S. Litig., No. 10 Civ. 4095 (SAS), 2011 WL 1676067, at *50–51 (S.D.N.Y. May 2, 2011).

88. United States v. Mandell, No. (S1) 09 CR. 0662 (PAC), 2011 WL 924891, at *4 (S.D.N.Y. Mar. 16, 2011).

89. *See infra* notes 90–107.

90. Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010).

91. *See id.* at 628 ("*Morrison* foreclosed the application of [Section] 10(b) to any claims related to foreign securities trades executed on foreign exchanges even if purchased by American investors."); *In re* Societe Generale Sec. Litig., No. 08 Civ. 2495, 2010 WL 3910286, at *5 (S.D.N.Y. Sep. 29, 2010) ("Where . . . domestic plaintiffs purchased shares of a foreign bank traded on a foreign exchange, the Exchange Act is inapplicable."); Terra Sec. ASA Konkursbo v. Citigroup, Inc., 740 F. Supp. 2d 441, 447 (S.D.N.Y. 2010) (dismissing a Section 10(b) claim by Norwegian plaintiffs against United States defendants because fund-linked notes were purchased on a European stock exchange and the Total Return Swap was sold in Europe); Absolute Activist Value Master Fund Ltd. v. Homm, No. 09 Civ. 08862, 2010 WL 5415885, at *5 (S.D.N.Y. Dec. 22, 2010) (dismissing a suit where foreign investors sued foreign and domestic defendants for private transactions in securities not listed on any United States exchange).

92. *Cornwell*, 729 F. Supp. 2d at 625.

93. *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469, 471 (S.D.N.Y. 2010).

Courts have not found this argument persuasive and have held that where a transaction is completed on a foreign exchange (regardless of where it was initiated), it is a foreign transaction.[94] The Central District of California most clearly stated this by holding that such a transaction takes place on the foreign exchange as if "the purchaser or seller has figuratively traveled to that foreign exchange—presumably via a foreign broker—to complete the transaction."[95]

In one heavily cited case regarding this issue, the court stated that if it carved out a rule for a plaintiff's "purchase or sale of securities on a foreign exchange because *some* acts that ultimately result[ed] in the execution of the transaction abroad [took] place in the United States," it would simply be reinstating the conduct test.[96] In another case, the same court stated that "the most natural and elementary reading of *Morrison*" is "that the transactions . . . must occur on a domestic exchange to trigger application of Section 10(b)."[97] The assertion that this is "natural and elementary" may be an overstatement, however, because some of the language in *Morrison*, if taken in isolation, could give rise to the idea that Section 10(b) reaches all transactions where stock is listed on a domestic exchange.[98] This approach, though, has been taken by several courts.

A party's "intent" that a transaction occur in the United States or the fact that a decision to purchase stock is made in the United States also do not make a transaction "domestic."[99] In one case, a plaintiff alleged that a transaction was domestic because the stock transfer was made pursuant to an agreement subject to Florida law and the paperwork was sent through the United States mail, which demonstrated that the plaintiff intended for the transaction to take place in the United States.[100] The court determined that the plaintiff's intent did not change the location of the transaction—which in this case was outside the United States—and since the claim failed the transactional test, Section 10(b) and Rule 10b-5 did not apply.[101] Just as "intent" does not make a transaction domestic, the fact that a plaintiff was in the United States when he or she made a decision to buy foreign shares on a foreign exchange also does not make a transaction domestic.[102]

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94. *See* Stackhouse v. Toyota Motor Co., No. CV 10-0922, 2010 WL 3377409, at *1 (C.D. Cal. July 16, 2010); *Cornwell*, 729 F. Supp. 2d at 625–27.

95. *Stackhouse*, 2010 WL 3377409, at *1.

96. *Cornwell*, 729 F. Supp. 2d at 624 (italics added for emphasis).

97. *Alstom*, 741 F. Supp. 2d at 473.

98. *See infra* notes 108–118 and accompanying text.

99. *See* Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC TurLimitada, 645 F.3d 1307 (11th Cir. 2011); *In re* Banco Santander Sec.-Optimal Litig., 732 F. Supp. 2d 1305, 1317–18 (S.D. Fla. 2010).

100. Amended Complaint at 3, Quail Cruise Ship Mgmt. Ltd. v. Agencia de Viagens CVC TurLimitada, 732 F. Supp. 2d 1345 (S.D. Fla. 2010), *vacated and remanded on other grounds*.

101. *See id.* at 1350.

102. *In re* Royal Bank of Scot. Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 337 (S.D.N.Y. 2011) ("Plaintiffs approach—that it is enough to allege that [p]laintiffs are U.S. residents who

Courts have also addressed specific actions and agreements that do not qualify as domestic transactions even if they occur in the United States, such as initiation of a transaction in the United States and swap agreements. The court of the Southern District of New York held that "a purchase order in the United States for a security that is sold on a foreign exchange is insufficient to subject the purchase to the coverage of [S]ection 10(b) of the Exchange Act."[103] Mere initiation of a transaction in the United States is not enough for the transaction to be considered domestic. In *Elliot Associates v. Porsche Automobil Holding SE*, the court faced the issue of swap agreements. When it was asked to decide whether "domestic transactions" included swap agreements with undisclosed counterparties who may or may not have been foreign.[104] The court held that this kind of agreement failed the transactional test developed in *Morrison*; therefore, Section 10(b) and Rule 10b-5 did not apply.[105] The swap agreement at issue did not qualify as a domestic transaction because allowing otherwise "would extend extraterritorial application of the Exchange Act's antifraud provisions to virtually any situation in which one party to a swap agreement is located in the United States."[106] The court considered swap agreements to be the equivalent of "a buy order in the United States for a security traded abroad."[107] Overall, courts have been narrowing the types of transactions that qualify as "domestic."

The second major issue courts have decided is that Section 10(b) and Rule 10b-5 do not apply to securities listed on a domestic exchange but sold on a foreign exchange. According to one court, it would be "contrary to the spirit of *Morrison*" to hold otherwise.[108] *In re Vivendi Universal, S.A. Securities Litigation* exemplifies this idea.[109] In *Vivendi*, foreign and domestic purchasers of foreign securities on a foreign exchange claimed the transactional test was satisfied because the securities were also listed on a domestic exchange.[110] The court did not find the argument persuasive and stated that there was "no indication that the *Morrison* majority read Section 10(b) as applying to securities that may be cross-listed on domestic and foreign exchanges, but where the purchase and sale [did] not arise from the domestic

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were in the country when they decided to buy RBS shares—is exactly the type of analysis that *Morrison* seeks to prevent.").

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

104. *See* 759 F. Supp. 2d 469 (S.D.N.Y. 2010).

105. *Id.* at 476.

106. *Id.* at 474.

107. 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, 254 (2011).

108. *Royal Bank of Scot.*, 765 F. Supp. 2d at 336.

109. *See* 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

110. *Id.* at 527.

listing."[111] The court threw out a jury verdict worth over nine billion dollars because the transactional test was not satisfied.[112]

In *Sgalambo v. McKenzie*, stock of a company, Canadian Superior, was traded on both the Toronto Stock Exchange and the American Stock Exchange.[113] When a class action was filed, the plaintiffs argued that since the stock was listed on the American Stock Exchange, the transactional test was satisfied even though the actual purchase occurred on the Toronto Stock Exchange.[114] The court disagreed, finding instead that *Morrison* and the transactional test foreclosed "any potential class members who purchased Canadian Superior common stock on a foreign exchange."[115] In a similar case, the court stated that "the idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States" is against what *Morrison* represents.[116] The court emphasized that the focus must be on the "territorial location where the purchase or sale was executed" instead of where the stock was listed.[117] This issue arose in *Morrison* as well where National's ADRs, which were listed on a United States exchange, did not satisfy the transactional test.[118] These cases reflect a narrow interpretation of what qualifies as a "domestic transaction."

B. Post-Morrison Cases Discussing Dodd-Frank

There have been very few cases brought by the SEC or the DOJ since *Morrison* that raise the applicability of Section 929P(b) of Dodd-Frank at this time. For this reason, courts have not directly addressed the intersection of *Morrison* and Dodd-Frank. There have, however, been a few cases that mention Dodd-Frank, but none of them explain how Dodd-Frank applies in cases brought by the SEC or the DOJ. In one case brought by the SEC, the relevant transactions qualified as domestic transactions so the SEC did not need to raise the issue of whether Section 929P(b) of Dodd-Frank applied.[119] The same situation occurred in a case brought by the DOJ. Since the transactions were considered domestic, the court did not need to determine "the applicability of the recent Congressional amendment to the Securities Exchange Act, made in the wake of the *Morrison* decision."[120] In

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111. *Id.* at 531.
112. *Id.* at 587.
113. 739 F. Supp. 2d 453, 464 (S.D.N.Y. 2010).
114. *Id.*
115. *Id.* at 487.
116. *In re* Royal Bank of Scot. Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011).
117. *Id.*
118. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).
119. *See* Sec. and Exch. Comm'n v. Credit Bancorp, Ltd., 738 F. Supp. 2d 376 (S.D.N.Y. 2010).
120. United States v. Mandell, No. (S1) 09 CR. 0662 (PAC), 2011 WL 924891, at *6 (S.D.N.Y. Mar. 16, 2011).

both of these cases there was no need to address whether Section 10(b) applied extraterritorially because the transactions satisfied the transactional test.

In another case, the District Court for the Southern District of New York stated: "[I]n legislation recently enacted, Congress explicitly granted federal courts extraterritorial jurisdiction under the conduct [and] effect[s] test[s] for proceedings brought by the SEC, and called for further SEC study and report on the issue in regard to extraterritorial private rights of action."[121] The court, however, did not delve further into the impact of the provision on the case, nor did it analyze whether courts should take the provision into consideration before applying the transactional test in cases brought by the SEC or the DOJ.

In a Florida case, the court distinguished *Morrison* from the SEC case at issue and assumed that "[*Morrison's*] holding [was] still good law after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act."[122] The court, however, did not discuss how the two apply together or what it meant by "still good law."

In a case brought by the DOJ in Kentucky, the court refused to dismiss the case based on *Morrison* until after the government could present its case-in-chief regarding whether the transactions at issue were domestic as well as "the possible application of [Dodd-Frank], which extends the reach of the jurisdiction of the antifraud provisions of the securities laws with respect to actions brought by the United States."[123] With this statement the court acknowledged that *Morrison* did not necessarily require dismissal if the transactions were not domestic and the court recognized that it needed to consider Dodd-Frank.

As discussed above, courts have not determined how *Morrison* and Dodd-Frank interact because they have not needed to do so. There have been few cases filed by the SEC or the DOJ involving this issue since *Morrison*, and the few cases that were filed involved domestic transactions. Because of this, courts have not needed to consider the extraterritorial reach of Section 10(b) or Rule 10b-5. As the SEC and the DOJ bring more cases where the relevant transactions are not clearly domestic, courts will have to address how *Morrison* and Dodd-Frank interact. There is, however, at least some acknowledgement that neither *Morrison* nor Dodd-Frank can be wholly disregarded in cases brought by the SEC or the DOJ.

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

122. Sec. and Exch. Comm'n v. Lauer, No. 03-80612, 2010 U.S. Dist. LEXIS 141441, at *9 (S.D. Fla. Nov. 23, 2010).

123. United States v. Coffman, 771 F. Supp. 2d 735, 737–38 (E.D. Ky. 2011).

VI. What the Future Holds

At this point, there is no consensus about how Dodd-Frank affects *Morrison* or the transactional test. Courts thus far have not explicitly held that Section 929P(b) of Dodd-Frank overrules *Morrison* in cases brought by the SEC or the DOJ nor have courts reached a decision about how to apply the two together.[124] The issue that will arise in the near future is how to address *Morrison* in light of Dodd-Frank in cases brought by the SEC or the DOJ. Lower courts will be faced with such cases where the transactions will not be considered "domestic" and will therefore need to determine whether to follow the *Morrison* transactional test or whether to follow the congressional intent reflected in Section 929P(b) of Dodd-Frank. There are a few arguments that the SEC and the DOJ can raise and several ways the issue could be resolved, but the best method for a definitive resolution is for Congress to amend Dodd-Frank.

First, the SEC or the DOJ could argue that courts are misinterpreting *Morrison*. Some of the arguments plaintiffs are making (specifically regarding transactions in securities listed on domestic exchanges but sold elsewhere) are not so implausible.[125] The language of *Morrison* explicitly states that Section 10(b) extends to any transaction that "involves a security listed on a domestic exchange."[126] This was repeated several times in the *Morrison* opinion. If courts disagree with what some district courts have said thus far and determine that listing on a domestic exchange satisfies the transactional test, it would open up a path, albeit slight, for SEC and DOJ actions where a security is listed on both a foreign exchange and a domestic exchange.

Judges have explained, and scholars agree, however, that the transactional test developed in *Morrison* focuses on the location of the transaction at issue, not where the stock is listed.[127] Richard Painter and his colleagues argue that the Supreme Court unequivocally held that Section 10(b) does not apply extraterritorially and listing stock on a domestic exchange was clearly not what the Court envisioned falling under Section 10(b) and Rule 10b-5.[128] Several courts agree with this assertion, and it is unlikely that other district courts or appellate courts will assert that foreign securities listed on domestic exchanges but sold on foreign exchanges satisfy the transactional test. Lower courts are probably interpreting *Morrison* in the way the Supreme Court intended.

A more interesting issue is what will happen if a case involving the extraterritorial application of Section 10(b) and Rule 10b-5 gets back to the

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124. *See supra* Part V.

125. *Id.*

126. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010).

127. *See supra* Part V.

128. Painter et al., *supra* note 5, at 10.

Supreme Court. The Supreme Court's reasoning in *Morrison* regarding why Section 10(b) should not apply extraterritorially focused on the lack of congressional intent that it *should* apply extraterritorially—the lack of an indication of extraterritorial application meant there was none.[129] Now plaintiffs can argue—and the SEC and the DOJ will argue—that there *is* congressional intent reflecting a desire for Section 10(b) to apply extraterritorially in cases brought by the SEC or the DOJ.

If this issue makes it in front of the Supreme Court again, there are two ways the Court could address it. First, the Court could acknowledge Section 929P(b) of Dodd-Frank, including the intent behind it, and apply Section 10(b) and Rule 10b-5 extraterritorially in SEC or DOJ enforcement actions. The Court may determine that even though the language specifically refers to jurisdiction, it still clearly reflects congressional intent to allow Section 10(b) suits in SEC or DOJ actions involving foreign transactions in foreign securities.[130] The Court may find that former Representative Kanjorski's statements in the congressional debate demonstrate that Section 929P(b) was created to rebut the presumption against extraterritoriality in transnational securities fraud cases brought by the SEC or the DOJ.[131] Elizabeth Jacobs, the Deputy Director of the Securities and Exchange Commission Office of International Affairs, expressed this idea by stating: "Congress has now spoken. . . . [I]f Congress's intention was one factor—at least that has been answered."[132] This means that the "legal presumption" the Court relied on in *Morrison* can no longer uphold the decision.[133] If the Court agrees that congressional intent requires reconsideration of *Morrison* in cases brought by the SEC or the DOJ, it may eliminate the transactional test and return to the conduct and effects tests in such cases (since the transactional test would continue to preclude suits that should be permitted). Depending on the results of the survey required by Section 929Y of Dodd-Frank, this approach could eventually extend to private actions as well.

The Court, however, could instead address this issue as it already has: there is still no clear evidence of congressional intent regarding the *substantive* reach of Section 10(b) and, in turn, Rule 10b-5.[134] Section 929P(b) limits itself to establishing the jurisdiction of extraterritorial claims in SEC and DOJ actions but does not refer to the substantive or geographic reach of Section 10(b). The Court could determine that if Congress intended for this provision to overrule *Morrison* in SEC or DOJ actions, it would have altered the language to reflect the substantive reach of the antifraud provi-

129. *Morrison*, 130 S. Ct. at 2877–81.

130. Smerek & Hamilton, *supra* note 5, at 4.

131. 156 CONG. REC. H5233 (daily ed. June 30, 2010) (statement of Rep. Paul Kanjorski).

132. Yin Wilczek, *SEC Maintains Reform Act Reverses* Morrison *Ruling for Enforcement Purposes*, 43 SEC. REG. L.J. 49 (2011).

133. Smerek & Hamilton, *supra* note 5, at 4.

134. *Id.*; Painter et al., *supra* note 5, at 24.

sions. Since the language regarding jurisdiction remains, the Court may determine that Congress did not provide clear evidence of its intent to extend the substantive reach of Section 10(b) in SEC or DOJ actions. If this is the case, the Court could find that former Representative Kanjorski's statements were his personal interpretation of the provision. No other representative or senator specifically addressed this section in any debate or report, so his statements are not directly supported by anything else in the legislative history of the bill. Although the Court would not ignore clear congressional intent, the intent is not necessarily clear in this situation. If the Court ruled as it did in *Morrison* in a future case, the SEC and the DOJ would be prevented from bringing suits that fail to satisfy the transactional test.

Because there is no way to predict how the Supreme Court will resolve this conflict, Congress should amend Section 929P(b) of Dodd-Frank. If Congress chooses to amend this provision, it should use language that reaches the substance of the antifraud provisions, specifically Section 10(b) of the Exchange Act. Since the Supreme Court has already stated that Section 30(b) of the Exchange Act refers to its extraterritorial application,[135] Congress should use similar language to amend Section 929P(b) of Dodd-Frank. Congress should amend the section to say:

> *In an action or proceeding, in law or in equity, brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title*, the district courts of the United States and the United States courts of any Territory shall have jurisdiction, *and the antifraud provisions of this title shall apply, to any person insofar as it transacts a business in securities 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.[136]

This incorporates language from Section 30(b) of the Exchange Act that the Supreme Court has already determined establishes extraterritoriality and maintains the test established by Congress. If Congress amends the language of Section 929P(b) to reflect the substantive reach of the antifraud provisions, congressional intent would be clear and the Supreme Court would have to apply the conduct and effects tests (as described in this provision) in cases brought by the SEC or the DOJ.

VII. Conclusion

The extraterritorial application of Section 10(b) of the Exchange Act is in flux. Although the Supreme Court issued a decision stating that this pro-

135. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2882 (2010).
136. The italicized portions reflect the altered language.

vision does not apply extraterritorially, that decision was based on the lack of congressional intent that it should apply extraterritorially. The Court held that as a matter of the geographic reach of Section 10(b) and Rule 10b-5, a plaintiff can bring a claim under the section or rule only if the transactions at issue are "transactions in securities listed on domestic exchanges [or] domestic transactions in other securities."[137] In Dodd-Frank, however, Congress demonstrated that it intended for Section 10(b) and Rule 10b-5 to apply extraterritorially in cases brought by the SEC or the United States government. Since Congress used language regarding jurisdiction instead of language regarding the substantive reach of Section 10(b), Dodd-Frank does not definitively overrule *Morrison* in SEC or DOJ cases. Courts that have addressed transnational securities fraud issues since *Morrison* have not explicitly focused on whether Dodd-Frank affects the *Morrison* holding in cases brought by the SEC or the DOJ. Not many SEC or DOJ actions have raised this issue, but it will arise in the future.

Because Section 929P(b) of Dodd-Frank is unclear (and perhaps ineffective), there is no way to determine how the Supreme Court will address this issue when faced with it again. The best way for Congress to ensure that courts respect its intent is for Congress to amend Section 929P(b) of Dodd-Frank. It should specify that in SEC or DOJ enforcement actions involving transnational securities fraud, Section 10(b) and Rule 10b-5 geographically reach the transactions if there is relevant fraudulent conduct in the United States or there is foreseeable substantial harm to the United States. This resolution will benefit Congress and provide guidance for lower courts.

137. *Morrison*, 130 S. Ct. at 2884.