February 18, 2011

via e-mail to rules-comments@sec.gov

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. 4-617
Release No. 34-63174
Study on Extraterritorial Private Rights of Action

Comments by Forty-Two Law Professors, submitted jointly by:

Robert P. Bartlett, III
Assistant Professor of Law
UC Berkeley School of Law

Barbara Black
Charles Hartsock Professor of Law and Director, Corporate Law Center
University of Cincinnati College of Law

Douglas M. Branson
W. Edward Sell Chair in Business Law
University of Pittsburgh

Lawrence A. Cunningham
Henry St. George Tucker III Research Professor
George Washington University

James D. Cox
Brainerd Currie Professor of Law
Duke University School of Law

James Fanto
Professor of Law
Brooklyn Law School

Jill E. Fisch
Perry Golkin Professor of Law
University of Pennsylvania Law School

Tamar Frankel
Professor of Law, Michaels Faculty Research Scholar
Boston University School of Law

Theresa A. Gabaldon
Lyle T. Alverson Professor of Law
The George Washington University Law School

José Gabilondo
Associate Dean for Academic Affairs, Associate Professor of Law
Florida International University College of Law

Jeffrey N. Gordon
Alfred W. Bressler Professor of Law; Co-director, Center for Law and Economic Studies
Columbia Law School

Michael Greenberger
Law School Professor
The University of Maryland School of Law

Kent Greenfield
Professor of Law and Law Fund Research Scholar
Boston College Law School

Daniel J.H. Greenwood
Professor of Law
Hofstra University School of Law

Thomas Lee Hazen
Cary C. Boshamer Distinguished Professor
The University of North Carolina at Chapel Hill School of Law

M. Todd Henderson
Professor of Law
The University of Chicago Law School

Peter H. Huang
Harold E. Kohn Chair Professor of Law
Temple University Law School

Kristin N. Johnson
Associate Professor of Law
Seton Hall University School of Law

Thomas W. Joo
Professor of Law
University of California, Davis, School of Law

Roberta Karmel
Centennial Professor of Law
Brooklyn Law School

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law
Georgetown University Law Center

Ralf Michaels
Professor of Law
Duke University School of Law

Lawrence E. Mitchell
Theodore Rinehart Professor of Business Law
The George Washington University Law School

Charles R.T. O'Kelley
Professor and Director, Berle Center on Corporations, Law and Society
Seattle University School of Law

Donna M. Nagy
C. Ben Dutton Professor of Law
Indiana University Maurer School of Law

Elizabeth Nowicki
Associate Professor of Law
Tulane Law School

Alan R. Palmiter
Professor of Law
Wake Forest University School of Law

Frank Partnoy
George E. Barrett Professor Law and Finance
University of San Diego School of Law

Margaret V. Sachs
Robert Cotten Alston Professor of Law
University of Georgia School of Law

Hillary A. Sale
Walter D. Coles Professor of Law and Professor of Management
Washington University at St. Louis

Marc I. Steinberg
Senior Associate Dean for Research and Rupert and Lillian Radford Professor of Law
SMU Dedman School of Law

Faith Stevelman
Professor of Law; Director, Center for Business Law & Policy
New York Law School

Lynn A. Stout
Paul Hastings Professor of Corporate and Securities Law
UCLA School of Law

Eric Talley
Rosalinde and Arthur Gilbert Professor of Law
UC Berkeley School of Law

Kellye Y. Testy
Dean and James W. Mifflin University Professor
University of Washington School of Law

Randall S. Thomas
John S. Beasley II Professor of Law and Business, Professor of Management
Vanderbilt University

Frederick Tung
Howard Zhang Faculty Research Scholar and Professor of Law
Boston University School of Law

William K. Wang
Professor of Law
University of California, Hastings College of Law

David A. Westbrook
Professor, Floyd H. and Hilda Hurst Faculty Scholar
University at Buffalo Law School

Charles K. Whitehead
Associate Professor of Law
Cornell Law School

Cynthia A. Williams
Professor of Law
University of Illinois College of Law

Arthur E. Wilmarth, Jr.
Professor of Law
The George Washington University Law School

We submit this comment in response to Release No. 34-63174; File No. 4-617, Study on Extraterritorial Private Rights of Action. We are law professors who teach and write in the areas of securities and financial market regulation.

We differ in our views of private rights of action: some of us have significant doubts about the efficacy of securities class actions, while others believe shareholder litigation rights should be strengthened. Nevertheless, as a group we believe reform efforts should be applied consistently and logically to both domestic and affected foreign issuers, and we therefore support extending the test set forth in Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to private plaintiffs. We write to explain briefly the reasons supporting our belief, and to set forth facts we believe are relevant to questions the Commission is asking about the Supreme Court's decision in *Morrison v. National Australia Bank Ltd*.[1]

In *Morrison,* the Supreme Court limited the scope of liability for transnational securities fraud. Earlier decisions had focused on "whether the wrongful conduct occurred in the United States," and "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens."[2] But in *Morrison*, the Court rejected this conduct-effects approach and instead held that "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[3] In response to *Morrison*, Congress in the Dodd-Frank legislation reinstated the conduct-effects test for actions brought by the Commission or the United States, and directed the Commission to study whether private rights of action should similarly be restored.[4]

A compelling example supporting our view that the answer to this question should be yes was the announcement this week of an exchange merger between Deutsche Börse and NYSE

---

1 130 S. Ct. 2869 (2010).

2 *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003). Over the decades, the precedents concluded with respect to conduct and effects that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Itoba Ltd. v. LEP Grp.,* 54 F.3d 118, 122 (2d Cir. 1995).

3 *Morrison*, 130 S. Ct. at 2888.

4 Pub. L. 111-203, §929P (codified as Securities Exchange Act of 1934 §27(b), 15 U.S.C. §78aa(b)).

Euronext.[5] Assuming that merger happens, there is the potential for most trades between U.S. buyers and sellers to occur offshore, likely in London. Even those of us who are deeply skeptical about extending U.S. securities law to its fullest reach agree that it would make little sense to apply the approach in *Morrison* to preclude application of the securities laws to those trades.

Many of us have found persuasive an example Justice Stevens set forth in his concurrence in *Morrison*. It illustrates the illogic of applying Section 10(b) only when there is a trade on a U.S. exchange or a U.S. purchase:

> Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price – and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under § 10(b).
>
> The oddity of that result should give pause. For in walling off such individuals from § 10(b), the Court narrows the provision's reach to a degree that would surprise and alarm generations of American investors – and, I am convinced, the Congress that passed the Exchange Act. Indeed, the Court's rule turns § 10(b) jurisprudence (and the presumption against extraterritoriality) on its head, by withdrawing the statute's application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens.[6]

We believe this example, and our views, are consistent with the Commission's recent comments about the fluid nature of modern markets, including the equity market structure concept release documenting the fragmented nature of trading. We agree with the Commission's approach in that release to "facilitate an appropriately balanced market structure that promotes competition among markets, while minimizing the potentially adverse effects of fragmentation on efficiency, price transparency, best execution of investor orders, and order interaction. An appropriately balanced market structure also must provide for strong investor protection and enable businesses to raise the capital they need to grow and to benefit the overall economy."[7] This wisdom applies equally to this release.

---

5 *See* Jeremy Grant et al., *D Börse and NYSE set out deal terms*, Fin. Times, Feb. 16, 2011, at 1; Michael J. de la Merced, *NYSE Euronext and Deutsche Börse to Merge in $10 Billion Deal*, N.Y. Times, Feb. 16, 2011, at B3.

6 *Morrison*, 130 S. Ct. at 2895 (emphasis in original).

7 Securities and Exchange Commission Concept Release on Equity Market Structure, Release No. 34-61358; File No. S7-02-10, Jan. 14, 2010, at 12.

Below we set forth some arguments and evidence on four points we believe the Commission should examine as part of its study. First, we describe how the *Morrison* approach does not comport with the fluid, international nature of modern financial markets. Second, we discuss the importance of cross-listing of shares in multiple markets, including the signaling benefit that arises when a foreign issuer subjects itself to U.S. securities law, a factor that the *Morrison* approach largely ignores. Third, we point to evidence that the securities at issue in *Morrison* were registered and listed on a U.S. exchange, contrary to language in the opinion, which suggests that *Morrison* cannot be applied in a cogent manner even to its own facts. Fourth, we set forth the relevant details in several recent post-*Morrison* decisions, which illustrate drawbacks of the *Morrison* approach.

I. The Fluid, International Character of Modern Financial Markets

The fluid, international character of modern markets makes the application of *Morrison* to private plaintiffs both unworkable and unwise. Markets are moving to a point where the "site" of a trade is happenstance. With the fragmentation of trading, the connection between the place of trade and the injury is becoming arbitrary, with the Deutsche Börse-NYSE Euronext merger being the latest example. We believe it is particularly important for the Commission to focus in its study on the international character of modern financial markets, and in doing so to recognize that where an investor is induced to trade should matter more than where the trade ultimately occurs.

For example, a defrauded U.S. investor might purchase a company's issued securities (or instruments based on those securities) that are listed on a U.S. exchange, a foreign exchange, both, or neither. With respect to the defendant in *Morrison*, National Australia Bank (NAB), a defrauded U.S. investor might have purchased (1) shares traded on an exchange outside the U.S.; (2) American Depositary Receipts (ADRs) traded on a U.S. exchange; and/or (3) other instruments, such as swaps, "contracts for differences," or other equity derivatives, which represent the same economic exposure as shares – and, like ADRs, are frequently backed by shares held by a bank counterparty – but typically are not listed on a U.S. exchange.

The *Morrison* approach purports to permit a U.S. investor to sue under Section 10(b) only if the purchase were made on a U.S. exchange or in the U.S., *i.e.*, only for category (2). Yet a defrauded U.S. investor in categories (1) and (3) would suffer the same injury as a U.S. investor in category (2). Ironically, Robert Morrison, the named plaintiff in *Morrison* and a U.S. investor in ADRs of NAB, who previously was dismissed from the securities class action against NAB, would have been able to sue based on the Supreme Court's reasoning (had he been able to prove damages), whereas other U.S. investors who bought in categories (1) and (3) could not. These categories are economically equivalent, yet the *Morrison* approach treats them differently.

We believe a better approach would be to focus on reliance, the key factor in discerning injury from fraud. The term is called "fraud in the inducement" for good reason – fraud induces a misguided transaction. It makes little sense to apply a presumption against extraterritoriality to an inducement that occurs in the U.S. Yet the test in *Morrison* does just that. If a person in the U.S. is approached by brokers in the U.S. and is led to execute a trade on a foreign exchange, surely that trade is territorial, not extraterritorial. It is arbitrary to afford a remedy based on whether the person bought in category (1), (2), or (3) above, when, because of the fluid nature of markets and the presence of international arbitrage, the person pays the same amount and takes on the same risk regardless of the transaction's form and location. This conclusion is particularly

compelling in cases like the example in Justice Stevens's concurrence, where the deception of an unsophisticated retiree occurred in New York.

We believe the Commission should examine the benefits of a test based on conduct and effects, the factors that applied historically before *Morrison*, and that now apply to cases brought by the Commission. In studying this aspect of the problem, the Commission might consider analogies to Regulation S's "directed selling efforts," where the Commission has reached a widely accepted accommodation based on considerations of investor inducement consistent with the view we express here. The Commission also might consider the extent of trading in categories of economically equivalent instruments, and how the application of *Morrison* might lead to regulatory arbitrage transactions designed to avoid private rights of action even when there is substantial conduct and effects in the U.S. In general, dual standards in a single market produce significant disequilibrium pricing effects that potentially harm many of the Commission's missions.[8]

There is a long-standing legislative emphasis on the fluid international nature of capital markets, dating back to 1934. The Exchange Act §2(2) states that "[t]he prices established and offered in such transactions are generally disseminated and quoted *throughout the United States and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold."[9] Exchange Act §2(3) provides that "[f]requently the prices of securities on such exchanges and markets are susceptible to manipulation and control."[10] When actively traded securities are listed internationally on more than one exchange, it makes little sense to deny a private remedy based on the location of the exchange that happened to record a given transaction when the fraudulent inducement clearly occurred in the U.S.

In general, inducement and reliance are central issues in modern securities class actions. In order for the signaling function of an issuer's listing decision to matter, investors who are induced by acts within the U.S. or that have significant linkages to the U.S. should have a private right of action to recover against that issuer under U.S. law. Accordingly, consistent with the credentialing function of the decision about where a company lists its securities, the focus in securities cases should be on the location of the inducement and reliance.

II. The Importance of Cross-Listing in the U.S.

The case for a private right of action is stronger when an issuer lists some of its securities in the U.S. and subjects itself to U.S. regulation of its disclosures, as NAB did. In *Morrison*, NAB attempted to downplay the significance of its decision to list securities on a U.S. stock exchange and to file financial reports with the Commission, noting to the Supreme Court that the equity securities "held by Americans represented only a tiny fraction of NAB's equity

---

8 *See* James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 Colum. L. Rev. 1200 (1999); James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC*, 95 Va. L. Rev. 941 (2009).

9 Exchange Act §2(2), 15 U.S.C. §78b(2) (emphasis added).

10 Exchange Act §2(3), 15 U.S.C. §78b(3).

capitalization," with U.S. residents' ADR holdings valued at "only *1.1* percent of the company's ordinary shares."[11]

Yet a compelling reason why issuers such as NAB list securities on a U.S. exchange, and voluntarily subject themselves to filing periodic reports with the Commission, is that they increase the value of their securities globally by doing so. Issuers benefit by signaling their intention to comply with, and be subject to, U.S. securities laws.[12] As one commentator has observed:

> The United States is often viewed as a gold standard for purposes of accurate and complete disclosure, and foreign markets reward companies that meet these standards. As a result, foreign companies often list in the United States not because they want to raise capital but because of the resulting increase in share prices that comes with increased investor confidence.[13]

"Many foreign companies have elected to list on U.S. exchanges in part because of the positive signal conveyed to investors by the issuer's willingness to comply with fuller disclosure requirements and greater protection for minority investors."[14] Prior to the Supreme Court's decision in *Morrison,* the very act of cross-listing may thus have amounted to "a form of bonding . . . because the firm's managers have subjected themselves to SEC scrutiny and private and public enforcement systems that are unique to the United States."[15]

NAB reported that its ordinary shares traded on the "• Australian Stock Exchange Limited; • London Stock Exchange PLC; • Stock Exchange, New Zealand; • Tokyo Stock

---

[11] *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (U.S.), Brief for Respondents in Opposition (to Petition for a Writ of Certiorari), at 2 (emphasis in original), available at 2009 WL 1245188.

[12] On the significant premium realized from cross-listing on U.S. exchanges, *see* Stephen R. Foerster & G. Andrew Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. Fin. 981 (1999); Darius P. Miller, *The Market Reaction to International Cross-Listings: Evidence from Depositary Receipts*, 51 J. Fin. Econ. 103 (1999).

[13] J. Robert Brown, Jr., *Criticizing the Critics: Sarbanes-Oxley and Quack Corporate Governance*, 90 Marq. L. Rev. 309, 327 (2006).

[14] Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. Rich. L. Rev. 1069, 1129 (2005).

[15] John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 230 n.2 (2007); *see also* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications,* 93 Nw. U. L. Rev. 641, 691-92 (1999) ("The simplest explanation for the migration of foreign issuers to U.S. exchanges and NASDAQ is that such a listing is a form of bonding . . . ."); John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 Colum. L. Rev. 1757, 1830 (2002) ("Cross-listing may in part be . . . a bonding mechanism to assure public investors that they will not be exploited . . . .").

Exchange; and • New York Stock Exchange, Inc."[16] The fact that purchasers bought ADRs instead of shares was a function of convenience and trading mechanics, not economics. Any fraudulent inducement to purchase NAB shares in any of these forms, on any of these exchanges, would cause similar damage.

Whether conduct is deemed to violate the Exchange Act's antifraud provisions ought not, as a general rule, depend upon who the plaintiff happens to be. The Supreme Court has held that fraudulent intent or "scienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought," whether it be a private party seeking damages or the SEC seeking injunctive relief.[17] Whether statements are materially misleading similarly does not vary according to who the plaintiff is, but is determined by an objective test asking whether information would be considered important by the reasonable investor.[18]

Moreover, international comity concerns are minimized when companies choose to subject themselves to U.S. law. Concerns about comity also are mitigated by the scienter requirement in Section 10(b) suits. Comity does not require that the U.S. tolerate or protect fraudulent conduct that emanates from or has significant effects within its borders. Instead, *Morrison* generates comity concerns, by denying relief to foreign victims of fraud on the basis of their nationality.

Foreign nationals who enter U.S. markets to trade here should be protected to the same extent as U.S. nationals. Likewise, foreign issuers that list on U.S. exchanges should be subject to the same regulatory environment as U.S. issuers. Otherwise, the signaling benefit of cross-listing in the U.S. would be eroded, and the U.S. would find it more difficult to attract foreign issuers to list on U.S. exchanges. These listings produce real benefits to foreign and domestic issuers by lowering their cost of capital.

Moreover, why should we distinguish the foreign investor who is defrauded by a trade on a U.S. exchange from a foreign tourist who on Wall Street is defrauded by a corner vendor? Each should have standing to sue. The Restatement on Foreign Relations Law supports this view.[19] Therefore, a securities transaction that occurs through a U.S. exchange should enjoy the

---

16 NAB 2002 Form 20-F for the fiscal year ended September 30, 2002 ("2002 Form 20-F), at 293, available at http://www.sec.gov/Archives/edgar/data/833029/000104746902004428/a2094038z20-f.htm.

17 *Aaron v. SEC*, 446 U.S. 680, 691 (1980); *accord Basic Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) (quoting *Aaron*).

18 *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (private litigant pursuing relief under Exchange Act §14); *Basic*, 485 U.S. 224 (*TSC* standard applies to private litigant pursuing relief under Exchange Act §10(b)); *Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083, 1090-91 (1991) (applying *TSC* standard to §14(a) claims); *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (applying standard to affirm criminal conviction for conspiracy to commit securities fraud), cert. denied, No. 10-7806, 2011 WL 55793 (U.S. Jan. 10, 2011); *United States v. Anderson*, 533 F.3d 623, 629 (8th Cir. 2008) (applying standard to affirm criminal conviction for insider trading); *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004) (criminal prosecution); *SEC v. Pirate Investor LLC*, 580 F.3d 233, 240 (4th Cir. 2009) (applying *TSC* standard in SEC enforcement action under §10(b)), cert. denied, 130 S. Ct. 3506 (2010); *SEC v. Ficken*, 546 F.3d 45, 47 (1st Cir. 2008) (same); *SEC v. Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008) (same).

19 *See* Restatement (Third) of Foreign Relations Law §416 (1987).

full protections of the securities laws regardless of who the trading parties are or the issuer whose securities are being traded.

The beauty of the conduct-effects test is that it captures the potential complexity of the relationships among investors and issuers. If there are observable market effects within the U.S., such as a large number of duped U.S. investors, then there is sound reason to believe the U.S. interest is being affected. The impact and harm are domestic, not extraterritorial.

If substantial fraudulent acts occurred in the U.S., this fact should easily place the cause of action in the U.S. Not to do so relegates the investors not just to a different set of laws (substantively and procedurally) but also the substantial risk that their case would be a suit without a country. That is, the foreign tribunal may well conclude that the doctrine of *forum non conveniens* compels dismissing the case filed in the foreign land because the core facts are in the U.S. and to try the case in the foreign land would introduce a host of inconveniences and prejudicial outcomes. Indeed, the locus of the trade, particularly for a U.S.-based investor, is not at the heart of the dispute before the court. Rather the issue is the misrepresentation, and whether the facts support the claim there was a misrepresentation committed with scienter. These, under the scenario of important fraudulent conduct in the U.S., are facts that are resident in the U.S., not the foreign land where the trade was technically executed.

III. The Ordinary Shares of NAB *Were* Registered and Listed on a U.S. Exchange

Morrison focused on where NAB's shares were listed, but it did not carefully consider the facts of NAB's share listing. As a result, *Morrison* creates ambiguity and unanticipated results, problems the Supreme Court apparently did not consider.

The majority decision in *Morrison* was based on an assumption that NAB's Ordinary Shares were not "registered" or "listed" to trade on any U.S. exchange.[20] Yet NAB's annual reports and filings with the Commission indicate that its Ordinary Shares were, in fact, registered and listed on the New York Stock Exchange, where its American Depositary Shares – each representing five ordinary shares – traded. Simply put, at the relevant times NAB's Ordinary Shares *were* registered and listed on a U.S. exchange.

It is true that NAB delisted its Ordinary Shares in 2007, and they were not listed when the Supreme Court heard the case.[21] However, NAB's earlier annual reports, filed with the Commission on Form 20-F, state that before 2007 – and at all times relevant to the case against it – NAB's Ordinary Shares were registered and listed on the New York Stock Exchange, in order to permit trading on that exchange of NAB's "American Depositary Shares, each representing

---

[20] The Court stated that NAB Ordinary Shares "are traded on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any exchange in the United States." *Morrison,* 130 S. Ct. at 2875. The Court recognized that "[t]here are listed on the New York Stock Exchange, however, National's American Depositary Receipts (ADRs), which represent the right to receive a specified number of National's Ordinary Shares." *Id.* However, the Court concluded that "it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which §10(b) applies." *Id.* at 2884.

[21] *See* NAB Press Release, *ASX Announcement - NAB to Delist From the New York Stock Exchange - 8 June 2007*, available online at http://www.nabgroup.com/0,,87521,00.html.

five Ordinary Shares."[22] Under the heading "**American depositary shares representing ordinary shares (ADSs)**," NAB's 2002 Form 20-F stated that "[t]he Company's fully paid ordinary shares are traded in the US in the form of ADSs."[23] Under the heading "**Share rights—American depositary shares representing ordinary shares (ADSs)**," NAB's 2002 Form 20-F explained that "[e]ach ADS is comprised of five fully paid ordinary shares in the Company which have been deposited with a depositary or custodian," and that "[t]he rights attaching to each fully paid ordinary share comprised in an ADS are the same as the rights attaching to fully paid ordinary shares as described above."[24] Under the heading "**Official quotation**," NAB's 2002 Form 20-F stated that NAB's Ordinary Shares traded on the New York Stock Exchange:

> Fully paid ordinary shares of the Company are quoted on the following stock exchanges:
>
> • Australian Stock Exchange Limited;
> • London Stock Exchange PLC;
> • Stock Exchange, New Zealand;
> • Tokyo Stock Exchange; and
> • New York Stock Exchange, Inc.
>
> In the US, the Company's ordinary shares are traded in the form of American depositary shares evidenced by American depositary receipts issued by The Bank of New York Company, Inc.[25]

---

[22] See 2002 Form 20-F. Electronic filing became mandatory for foreign issuers as of 2002. NAB's annual reports for the years 2000 and 2001 contained substantially similar disclosures. *See* NAB Annual Financial Report 2001, available at http://www.nabgroup.com/vgnmedia/downld/Annual_Financial_Report_2001.pdf; NAB Financial Report 2000, available online at http://www.nabgroup.com/vgnmedia/downld/0,,1347,00.pdf.

[23] The 2002 Form 20-F explained:

> ***The Company's fully paid ordinary shares are traded in the US in the form of ADSs***. ADSs are evidenced by American depositary receipts issued by The Bank of New York Company, Inc., as depositary, pursuant to an amended and restated deposit agreement dated as of November 14, 1997, or Morgan Guaranty Trust Company of New York, its predecessor depositary, pursuant to a deposit agreement dated January 16, 1987, as amended as of June 24, 1988. Each ADS represents five fully paid ordinary shares. The ADSs are quoted on the stock market of New York Stock Exchange, Inc. (NYSE), which is the principal market in the US for the trading of the ADSs. The ADSs trade on the NYSE under the symbol "NAB". At October 18, 2002, 3,353,041 ADSs representing 16,765,205 fully paid ordinary shares, or approximately 1.09% of the fully paid ordinary shares outstanding on such date, were held by 243 holders with registered addresses in the US.

2002 Form 20-F at 273 (emphasis added).

[24] 2002 Form 20-F at 278.

[25] 2002 Form 20-F at 293.

NAB voluntarily subjected itself to the U.S. securities laws and filed required periodic financial reports with the Commission. However, the plaintiffs in *Morrison* did not emphasize these facts. Nor did they highlight the fact that false accounting for NAB's Florida subsidiary affected the price of NAB securities both abroad and in the U.S. These details apparently were not before the Supreme Court in any robust way.

One might argue that the Australian plaintiffs in *Morrison* nevertheless should not be permitted to bring a private suit, because the *particular* Ordinary Shares they purchased in Australia were not registered and listed in the U.S. But NAB's Ordinary Shares were fungible. They were economically equivalent, whether they were traded in Australia or held by a U.S. bank (which then issued ADRs representing claims on the Ordinary Shares). All of the Ordinary Shares bore the same risks.

Morrison stated that whether a private plaintiff can recover for fraud depends on where the securities at issue are listed. But the Supreme Court apparently did not mean exactly that. As applied, *Morrison* meant something more narrow: that a private plaintiff trading outside the U.S. cannot recover for fraud even if the securities at issue were registered and listed on a U.S. exchange unless it also can establish that the *particular* shares it traded were registered and listed on a U.S. exchange. As noted in Section I above, that approach is unworkable, given the fluid, international nature of modern markets.

IV. Post-*Morrison* Decisions

Morrison already has resulted in the dismissal of several significant securities fraud class actions. We document the details of some of these decisions below. These dismissals illustrate the problems associated with applying *Morrison*, instead of the conduct-effects test, to private securities cases. These decisions already are creating confusion and ambiguity, even when the defendant – like NAB – had registered and listed securities on a U.S. exchange. The results of these decisions are depriving investors, particularly pension funds, of the ability to enforce their claims.

These decisions all involved serious allegations of fraud in connection with the purchase and sale of securities. The Commission has long recognized that private rights of action are a useful, if not necessary, supplement to its efforts. Yet in the absence of private claims in the U.S., these cases will not be pursued. Given the demands currently placed on the Commission, it cannot possibly prosecute all of these cases, and it has not done so. Nor have private or government prosecutions outside the U.S. filled the gaps.

We expect that additional cases will be decided following *Morrison* in the upcoming months, and we encourage the Commission to consider those decisions in its study as well.

- *In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, No. 09 Civ. 300 (DAB), 2011 WL 167749 (S.D.N.Y. Jan. 11, 2011)
  - Plaintiffs brought a securities class action against The Royal Bank of Scotland ("RBS"), alleging RBS's actions (or inaction) in connection with its substantial holdings in subprime and other mortgage-related assets ultimately resulted in a series of write-downs by the company, and massive losses in shareholder value.
  - After motion to dismiss briefing was completed, *Morrison* was decided and the district court, Judge Batts, directed the parties to supplement briefing on the impact of *Morrison* as to plaintiffs' common share claims.

- Defendants asserted that under *Morrison*, plaintiffs' claims must be dismissed because RBS is a British company whose common shares are listed on the London Stock Exchange and Euronext Amsterdam stock exchange, and the complaint failed to allege that RBS common shares were purchased or sold on an American stock exchange or otherwise in the United States. *Id.* at *6.
- Plaintiffs asserted that *Morrison* does not apply because RBS lists its securities on an American stock exchange, and under a plain reading of *Morrison*, when a security is "listed" on an American stock exchange, Section 10(b) applies, regardless of whether the security is purchased in the U.S. or through the American exchange. *Id.*
- The court rejected this argument and granted defendants' motion to dismiss, holding 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 simply contrary to the spirit of *Morrison*" and "Plaintiffs interpretation would be utterly inconsistent with the notion of avoiding the regulation of foreign exchanges." *Id*. at *7.

o *Elliott Assocs. v. Porsche Automobil Holding SE*, No. 10 Civ. 0532 (HB), 2010 WL 5463846 (S.D.N.Y. Dec. 30, 2010)

- Hedge fund investors, who entered into security-based swap agreements that generated gains for plaintiffs as the price of Volkswagen ("VW") shares fell, brought suit against defendant Porsche – a German company – for violation of federal securities laws for allegedly hiding its intent to take over VW and causing VW stock prices to rise by buying nearly all of VW's voting shares. *Id.* at *1-*2.
- Defendants moved to dismiss, asserting that under *Morrison*, plaintiffs' claims were barred because plaintiffs transacted on a foreign exchange when they took short positions through the swap agreements. *Id*. at *6.
- Noting *Morrison*'s "transactional test," the district court, Judge Baer, rejected plaintiffs' assertion that the swap agreements at issue were "domestic transactions" because plaintiffs signed confirmations for the swaps in New York, stating that this "narrow reading of *Morrison* is inconsistent with the Supreme Court's intention . . . to curtail the extraterritorial application of § 10(b)." *Id.* at *5 (citation omitted). The court held:

> In light of *Morrison*'s strong pronouncement that U.S. courts ought not to interfere with foreign securities regulation without a clear Congressional mandate, I am loathe to create a rule that would make foreign issuers with little relationship to the U.S. subject to suits here simply because a private party in this country entered into a derivatives contract that references the foreign issuer's stock. Such a holding would turn *Morrison*'s presumption against extraterritoriality on its head.

Id. at *7 (citation omitted).

- *Absolute Activist Value Master Fund Ltd. v. Homm*, No. 09 CV 08862 (GBD), 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010)
  - Plaintiffs, a group of Cayman Island hedge funds, brought suit against defendants for allegedly inducing plaintiffs to purchase shares of "Penny Stock Companies" at artificially inflated prices.
  - The district court, Judge Daniels, held that "[t]he plain language of the 'transaction test' established in *Morrison* precludes this action from moving forward," because even though the corporations that issued the Penny Stocks were registered with the Securities and Exchange Commission, their shares were not traded on a domestic exchange and instead involved private offerings in which the funds were caused to purchase the illiquid shares directly from the companies through private placements. *Id*. at *5. "Permitting this case to move forward on the theory that any trade routed through the United States meets the *Morrison* standard would be the functional antithesis of *Morrison*'s directive." *Id*.

- *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, No. 08 Civ. 1958 (JGK), 2010 WL 3860397 (S.D.N.Y. Oct. 4, 2010)
  - A class of investors in Swiss Reinsurance ("Swiss Re") alleged defendants violated federal securities laws by making false or materially misleading disclosures about Swiss Re's risk management and exposure to mortgage-related securities. *Id*. at *1.
  - Defendants filed motion to dismiss in light of *Morrison*, arguing that Section 10(b) and Rule 10b-5 did not apply to the securities issued by Swiss Re, which is headquartered in Switzerland and whose stock is traded on the Swiss stock exchange. *Id*. at *1-*2.
  - The district court, Judge Koeltl, granted defendants' motion to dismiss, holding that under *Morrison*, "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 section 10(b) of the Exchange Act." *Id.* at *9.
  - The court stated: "As the Supreme Court emphasized in *Morrison*, where a security is traded only on a foreign exchange, 'the adoption of a clear test that will avoid' 'interference with foreign securities regulation' is of paramount concern." *Id*. at *8 (citing *Morrison*, 130 S. Ct. at 2886). "This could not be accomplished if every security traded on a foreign exchange were subject to section 10(b) whenever an investor located in the United States placed an electronic order." *Id*.

- *In re Alstom SA Securities Litigation*, No. 03 Civ. 6595 (VM), 2010 WL 3718863 (S.D.N.Y. Sep. 14, 2010)
  - Investors brought a class action for violation of federal securities law arising out of a secondary offering of a French company's stock.
  - On the "eve of summary judgment," the district court, Judge Marrero, directed plaintiffs to show cause why their claims should not be dismissed in light of *Morrison*. *Id*. at *1.
  - The district court dismissed the claims of plaintiffs who bought securities on French stock exchange, despite the fact that purchases were initiated in the U.S. and the company's common shares were registered and listed on the New York

Stock Exchange, though not actually purchased there. *Id*. at *2. According to the district court, *Morrison* "was concerned with the territorial location where the purchase or sale was executed" and "[t]hat the transactions themselves must occur on a domestic exchange to trigger application of § 10(b) reflects the most natural and elementary reading of *Morrison*." *Id*. at *3.

- *In re Societe Generale Sec. Litig*., No. 08 Civ. 2495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sep. 29, 2010)
  - Investors brought suit against Société Générale ("SocGen"), a French company whose stock is traded on the Euronext Paris stock exchange, for allegedly failing to put in place adequate internal risk controls, concealing the extent and nature of SocGen's exposure to the U.S. subprime mortgage market, and making false financial statements.
  - Plaintiffs included both those who purchased SocGen shares on Euronext and those who purchased SocGen ADRs in the U.S. over-the-counter market.
  - The district court, Judge Berman, granted defendants' motion to dismiss, rejecting plaintiffs' assertion that *Morrison*'s concept of "domestic purchases" does not encompass U.S. investors who purchase foreign securities in the U.S., even if the securities happen to be listed on a foreign exchange. *Id*. at *5 (citation omitted). "By asking the Court to look to the location of the 'act of placing a buy order' and to . . . 'the place of the wrong,' Plaintiffs are asking the Court to apply the conduct test specifically rejected by *Morrison*." *Id*. at *6 (citation omitted).

- *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d. 620 (S.D.N.Y. 2010)
  - Investors alleged defendants Credit Suisse Global ("CSG") made material misrepresentations concerning its risk-management practices and the extent to which its financials were impacted by the implosion of the American housing market, in violation of federal securities laws.
  - Invoking *Morrison*, defendant moved for partial summary judgment, arguing the claims of certain plaintiffs, who purchased shares of CSG on the Swiss stock exchange, must be dismissed. *Id*. at 621.
  - Plaintiffs asserted that their Section 10(b) claims survive *Morrison* because they are American citizens, and some aspects of the foreign securities transactions occurred in the United States. *Id*. at 622.
  - The district court, Judge Marrero, rejected plaintiffs' argument, holding that, "read as a whole, the *Morrison* opinions indicate that the Court considered that under its new test § 10(b) would not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States." *Id*. at 625-26. The court explained:

    > As this Court reads *Morrison*, the conduct and effect analysis as applied to § 10(b) extraterritoriality disputes is now dead letter. Plaintiffs' cosmetic touch-ups will not give the corpse new life. The standard the *Morrison* court promulgated to govern the application of § 10(b) in transnational securities purchases and sales does not leave open any of the back doors,

> loopholes or wiggle room to accommodate the distinctions Plaintiffs urge to overcome the decisive force of that ruling on their § 10(b) claims here.

Id. at 622-23.

- *Quail Cruises Ship Mgt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, 732 F. Supp. 2d 1345 (S.D. Fla. 2010)
  - ➢ Plaintiff, a Bahamian corporation, brought suit against defendant, a Brazilian corporation, for fraudulently inducing it into purchasing a foreign-flagged vessel, via a stock purchase, by intentionally misrepresenting the vessel's condition and concealing its defects.
  - ➢ Plaintiff asserted the complaint's allegations satisfy *Morrison* because the stock transfer was made pursuant to an agreement that designated the Miami, Florida office of one party's counsel as the place of closing, even though the agreement itself was not signed in the United States, and the closing occurred outside the United States. *Id*. at 1349
  - ➢ The district court, Judge Huck, dismissed plaintiff's securities fraud claim, agreeing with defendant's contention that "*Morrison*'s central holding would be undermined if parties could elect United States securities law merely by designating the law offices of one of the parties' counsel, located in the United States, as the place of closing the transaction." *Id*. at 1350.

- *In re Banco Santander Securities-Optimal Litig.*, 732 F. Supp. 2d 1305 (S.D. Fla. 2010)
  - ➢ Six plaintiffs, all non-U.S. citizens, who invested in Bahamian investment funds, which in turn invested with a firm run by Bernard Madoff, brought suit against various banks and financial institutions when it was revealed that Madoff's investment firm had lost their money in a Ponzi scheme.
  - ➢ Defendants filed a motion to dismiss based on *Morrison*, arguing that plaintiffs neither purchased shares on an American stock exchange, nor did they purchase shares in the United States.
  - ➢ Plaintiffs alleged that their claims satisfy *Morrison* because plaintiffs made their purchase for the purpose of investing with Madoff's firm, and their purchase was therefore made "in connection with" Madoff's investment fund, which purported to hold securities listed on an American stock exchange. *Id*. at 1317.
  - ➢ The district court, Judge Huck, dismissed plaintiffs' securities fraud claims, holding that "the phrase 'in connection with' refers generally to the fraud that is alleged, not the purchase or sale of securities. And to conclude otherwise, in our age of global finance, would undermine *Morrison*'s central holding by subjecting many foreign transactions to United States securities laws." *Id.*

- *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, No. 09 Civ. 7058 (VM), (S.D.N.Y. Aug. 16, 2010)
  - ➢ Plaintiff, a Norwegian securities firm, and seven Norwegian municipalities brought suit against various Citigroup entities related to the sale of fund-linked notes that were issued and traded outside the U.S., but were structured, arranged, and managed in the U.S. by Citigroup's New York subsidiaries.

- In February 2010, the district court, Judge Marrero, denied defendants' motion to dismiss. Applying the conduct test, the court found that "the essential core of the alleged fraud occurred in New York." *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303, 311 (S.D.N.Y. 2010).
- Six months later, after the Supreme Court had decided *Morrison*, the district court reversed its previous decision and granted defendants' motion to dismiss, because the fund-linked notes were listed on European stock exchanges, notwithstanding the fact that the essential core of the alleged fraud occurred in New York.

- *Sgalambo v. McKenzie*, No. 09 Civ. 10087 (SAS), (S.D.N.Y. Aug. 6, 2010)
  - Where parties conceded that *Morrison* forecloses any potential class members who purchased Canadian Superior common stock on a foreign exchange from recovering, the district court, Judge Scheindlin, held: "The parties are correct that *Morrison* prevents such plaintiffs from recovering in this Court, and the claims of any potential class members who purchased Canadian Superior common stock on a foreign exchange are therefore dismissed." *Id*. at *17.

- *In re Infineon Techs. AG Sec. Litig.*, No. C-04-4156-JW (N.D. Cal.)
  - Investors who purchased Infineon's ordinary shares brought suit alleging defendants artificially inflated Dynamic Random Access Memory ("DRAM") prices by virtue of a price-fixing scheme, in violation of federal securities laws.
  - On March 6, 2009, the district court certified a class of plaintiffs-investors.
  - On March 19, 2009, the defendants filed a Fed. R. Civ. P. 23(f) petition for permission to appeal the district court's order granting certification, which the Ninth Circuit granted on May 5, 2009.
  - On August 23, 2010, the Ninth Circuit granted defendants' motion to vacate the district court's certification order in light of *Morrison*.
  - On December 10, 2010, defendants filed a motion to dismiss the complaint asserting that Infineon is a German corporation and the Frankfurt Stock Exchange was used to clear trades and therefore certain investors' Section 10(b) claims fail *Morrison*'s "transactional" test.
  - Plaintiffs filed an opposition to the motion to dismiss on January 24, 2011, asserting *Morrison* does not apply because Infineon's ordinary shares were both listed and registered on the New York Stock Exchange and therefore, *Morrison*'s requirement for a "domestic transaction" is satisfied, and that even though trades were cleared on the Frankfurt Stock Exchange, these trades were "purchased" in the United States.
  - Hearing on the motion to dismiss is set for March 7, 2011.

Please direct communications to Frank Partnoy, fpartnoy@sandiego.edu or 619-260-2352, or to any of us listed above.