The Myth of *Morrison*: Securities Fraud Litigation Against Foreign Issuers

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Using a sample of 388 securities fraud lawsuits filed between 2002 and 2017 against foreign issuers, we examine the effect of the Supreme Court's decision in Morrison v. National Australia Bank Ltd. *We find that the description of* Morrison *as a steamroller, substantially ending litigation against foreign issuers, is a myth. Instead, we find that* Morrison *did not significantly change the type of litigation brought against foreign issuers, which, both before and after this case, focused on foreign issuers with a U.S. listing and substantial U.S. trading volume. Although dismissal rates rose post-*Morrison, *we find no evidence that this was related to the decision. Settlement amounts and attorneys' fees remained unchanged post-*Morrison. *We use these findings to theorize that* Morrison *was primarily a preemptive decision about standing that firmly delineated the exposure of foreign issuers to U.S. liability in response to the* Vivendi *case, which sought to expand the scope of liability for foreign issuers whose shares traded primarily in non-U.S. venues. When* Morrison *is placed in its true context, it is justified as a decision in line with administrative and court actions that have historically aligned firms' U.S. liability to be proportional to their U.S. presence. Although* Morrison *had this defining effect, it did not change the litigation environment for foreign issuers, which was the oft-cited import of the decision. More generally, our analysis of* Morrison *underscores how the decision has been mistakenly characterized as a case primarily about extraterritoriality rather than standing.*

Introduction

Morrison v. National Australia Bank, Ltd.[1] has been described as a "steamroller," substantially paring back the ability of private litigants to sue foreign companies for securities fraud.[2] In *Morrison*, the U.S. Supreme Court held that section 10(b),

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1. 561 U.S. 247 (2010).
2. *See* Steven Davidoff Solomon, *Securities Law Ruling Creates Unintended Problems*, N.Y. Times: DealBook (June 1, 2012, 12:25 PM), https://dealbook.nytimes.com/2012/06/01/securities-law-

the general antifraud provision of the Securities Exchange Act of 1934, does not apply extraterritorially in a private cause of action brought under Rule 10b-5. Rather, the Court stated 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]

The *Morrison* decision circumscribed the scope of liability under Rule 10b-5. Under prior case law, a private cause of action under Rule 10b-5 in connection with securities purchased abroad was possible, provided the plaintiff satisfied the "conduct" or "effects" tests.[4] *Morrison* rejected this standard and eliminated the ability of investors who purchased securities outside the United States to bring a private claim under Rule 10b-5.[5] More important, even for U.S. investors, *Morrison* eliminated their ability to be part of a global class action suit brought under Rule 10b-5 against non-U.S. firms to the extent that these investors acquired their securities abroad.

Commentators have argued that *Morrison* was necessary to reduce the exposure of foreign issuers to costly and burdensome private securities litigation in the United States.[6] Some argued that this exposure was causing foreign issuers to delist their securities in the United States.[7] As one commentator explained, "non-U.S. issuers were leaving U.S. capital markets, in large part because of fear of private securities litigation in the United States."[8]

In the wake of *Morrison*, defense attorneys and companies crowed as investors holding billions of dollars of securities were dismissed from Rule 10b-5 class action suits pending against non-U.S. issuers.[9] *Morrison* is widely understood to have reduced the litigation risk for foreign issuers, and the decision has been characterized as potentially "encourag[ing] non-U.S. issuers to continue to list

ruling-created-more-problems-than-it-solved; *see also* Joseph Grundfest, Morrison, *the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. Corp. L. 1, 20 (2015) ("In [*Morrison*] the Supreme Court revolutionized the application of U.S. securities laws to international transactions.").

3. *Morrison*, 561 U.S. at 273.

4. See *infra* notes 35–39 and accompanying text for a discussion of the previous conduct and effects tests.

5. *Morrison*, 561 U.S. at 273.

6. The percentage of securities fraud suits against foreign-headquartered companies grew in the years prior to *Morrison*. *See, e.g.*, Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 Stan. L. Rev. 1173, 1177 n.2 (2012) ("Federal securities class actions against foreign issuers represented 17% of all actions filed in both 2007 and 2008.").

7. *See, e.g.*, Robert J. Giuffra, *The Territorial Reach of U.S. Securities Laws After* Morrison v. National Australia Bank, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (Oct. 13, 2011, 11:58 AM), https://corpgov.law.harvard.edu/2011/10/13/the-territorial-reach-of-u-s-securities-laws-after-morrison-v-national-australia-bank (citing a substantial number of issuers delisting from the U.S. markets from 2007–09); Joshua L. Boehm, *Private Securities Fraud Litigation After* Morrison v. National Australia Bank*: Reconsidering a Reliance-based Approach to Extraterritoriality*, 53 Harv. Int'l L.J. 502, 536 (2012) (reporting that "a 2007 survey conducted by the Financial Services Forum found that senior executives from nine of ten foreign companies who delisted from the United States between 2003 and 2007 said that litigation risk was a factor in their delisting").

8. Giuffra, *supra* note 7.

9. Michael D. Goldhaber, *The Short Arm of the (U.S.) Law*, Corp. Couns., Mar. 2012, at 28.

their shares on U.S. exchanges and strengthen[ing] US capital markets."[10] The *Morrison* decision has been credited with transforming "the way the federal courts look at transnational securities litigation"[11] and with adopting a more restrained approach to the exercise of extraterritorial jurisdiction.

But is this true?

In this article, we examine the effect of *Morrison* eight years after its publication, taking stock of both its practical implications for issuers and investors and what it tells us about the proper role of U.S. federal courts in exercising extraterritorial jurisdiction. We analyze pre- and post-*Morrison* litigation empirically and find that dramatic claims about *Morrison*'s impact are largely a myth. *Morrison* did not substantially change the exposure of foreign issuers to federal securities fraud litigation or change the types of issuers that faced U.S. litigation, nor were settlement amounts significantly different after *Morrison* in Rule 10b-5 cases brought against foreign issuers. Even where the decision had its greatest impact—the composition of the plaintiff class—we find that U.S. exchange trading in defendant firms before *Morrison* was sufficiently robust that pre-*Morrison* cases could have pled an investor class that would have satisfied its transactional test.[12] Although *Morrison* may have put an end to the "global class action," prior to *Morrison*, such cases were a rarity.

In Part I, we briefly describe the institutional context in which *Morrison* arose—the increasing globalization of the capital markets and its implications for securities fraud class actions. We then discuss the *Morrison* decision and the divergent commentary describing its impact. Some commentators have defended *Morrison* as halting a new wave of securities fraud litigation against foreign issuers that seemingly imposed U.S. federal law on foreign capital markets. Other have faulted *Morrison* for reducing the scope of securities law protections for U.S. investors.

In Part II, we seek to evaluate empirically the effect of *Morrison* on federal securities fraud litigation involving foreign issuers. We examine a sample of 388 lawsuits alleging a violation of Rule 10b-5 filed between 2002 and 2017 against foreign issuers headquartered outside the United States.[13] We observe that many

10. Giuffra, *supra* note 7. As developed below, our view is that *Morrison* did not substantially change the landscape for the liability of foreign firms listing their securities in the United States but rather defined the scope of liability with more circumspection, allowing for a more precise listing decision.

11. George T. Conway, III, *Morrison at Four: A Survey of Its Impact on Securities Litigation* 15 (2014).

12. Throughout this article, we use the term "pre-*Morrison*" to describe cases in which the complaint was filed prior to June 24, 2010—the date of the Supreme Court's decision in *Morrison*—and "post-*Morrison*" to describe cases filed subsequent to this date.

13. We note that our definition of "foreign issuer" differs from the concept of a "foreign private issuer," which is a defined term under Rule 405 of Regulation C under the Securities Act of 1933 and Rule 3b-4 under the Securities Exchange Act of 1934. Foreign private issuer status is determined by the relative degree to which a company's voting securities are held by U.S. investors and the extent of its U.S. business contacts. The U.S. Securities and Exchange Commission ("SEC") has adopted a variety of rules designed to reduce the U.S. regulatory burden on foreign private issuers. *See, e.g.*, *Accessing the U.S. Capital Markets—A Brief Overview of Foreign Private Issuers*, U.S. Sec. & Exchange Commission (Feb. 13, 2013), https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml. Notably, the SEC has been careful to ensure that none of these rules limits the

suits filed in the United States involve foreign issuers whose securities trade exclusively on U.S. stock exchanges.[14] As we explain below, previous commentators have not focused on these cases. However, because of the jurisdictional rule adopted by the Court, the *Morrison* decision should not affect them.[15] For this reason, in our core analyses, we examine the sample of cases brought against foreign firms whose securities traded on at least one non-U.S. exchange. We refer to those firms in this paper as "Foreign Listed Firms." We focus our attention on them with the theory that this is where *Morrison*'s transactional test is likely to have the most impact.[16]

We explore several questions. Did *Morrison* reduce the likelihood that a Foreign Listed Firm would face a securities fraud class action in the United States? Did *Morrison* change the type of Foreign Listed Firm sued in U.S. courts? Were post-*Morrison* cases associated with a reduction in the size of litigation settlements or lower fee awards for class counsel—reductions that would reduce the incentives for plaintiffs to bring future cases? By determining the extent of these effects, if any, we evaluate *Morrison*'s impact.

We note at the outset that, as with any study examining the effect of *Morrison* on securities litigation, we face an important obstacle in that we lack a counterfactual reality in which *Morrison* never occurred.[17] As such, we lack a means to determine whether the cases against Foreign Listed Firms that we observe after *Morrison* would have looked any different in the absence of the decision. To overcome this challenge, we exploit the bright-line character of *Morrison*'s ruling and initially focus on the pre-*Morrison* period to identify the consequences of *Morrison*'s transactional test on those Rule 10b-5 cases that were brought against Foreign Listed Firms. In particular, because it was arguably easier for plaintiffs to bring transnational cases in U.S. courts before *Morrison*, the pre-*Morrison* period

scope of liability for foreign issuers under section 10(b) and Rule 10b-5. *See* Brett Carron & Steven Davidoff, *Getting U.S. Security Holders to the Party: The SEC's Cross-Border Release Five Years On*, 12 U. PENN J. INT'L ECON. L. 455, 480 (2005).

14. Notably, these issuers are unlikely to qualify as foreign private issuers and will typically be subject to the same U.S. periodic reporting requirements as other U.S. firms whose securities are registered under section 12 of the Securities Exchange Act.

15. *Morrison* should not affect litigation against issuers whose securities trade exclusively in the United States because investors would, by necessity, have purchased those securities in what *Morrison* defines as domestic transactions. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273 (2010) (holding that a cause of action may be brought under section 10(b) "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").

16. Our choice to focus on foreign firms that have their securities traded on at least one non-U.S. exchange has the effect of excluding from our core analyses those Rule 10b-5 suits commenced against non-U.S. issuers whose sole trading venue was either a U.S. exchange or the over-the-counter ("OTC") market. We exclude these firms from our core analyses because *Morrison* did not change their overall exposure to a Rule 10b-5 class-action suit. For instance, in the case of foreign firms that traded solely on a U.S. exchange, all investors would satisfy *Morrison*'s transactional test, and in the case of foreign firms that traded only on the OTC market, investors would have difficulty bringing a fraud-on-the-market claim either before or after *Morrison*.

17. In addition, various factors unrelated to *Morrison* may have affected the litigation environment subsequent to 2010—perhaps most notably the lingering effects of the 2008 financial crisis. Although we cannot control for these changes, we report general descriptive statistics of overall securities litigation in an effort to identify *Morrison*'s potential impact.

functions as our "control" setting for instances in which *Morrison* does not apply. Additionally, the bright-line character of the *Morrison* rule allows us to estimate which pre-*Morrison* plaintiffs would have failed this test, thus enabling us to ask how cases brought before *Morrison* would have fared when "treated" with the *Morrison* rule.

Using this approach, we analyze the extent to which *Morrison* changed the types of non-U.S. firms who face exposure to a class action suit under Rule 10b-5. Our findings are perhaps surprising.[18]

The first question we analyze is the impact of *Morrison* on overall litigation risk against Foreign Listed Firms. If *Morrison* was supposed to address the concern that foreign issuers were being targeted too frequently, it should have reduced their litigation exposure. One of the driving forces behind *Morrison* was the idea that foreign firms with no connection to the United States were being targeted with burdensome U.S. litigation. We thus theorize that prior to *Morrison*, plaintiffs did not focus on whether an issuer had a U.S. listing but that *Morrison*'s requirement that Rule 10b-5 actions be limited to "transactions in securities listed on domestic exchanges and domestic transactions in other securities" should have caused plaintiffs to focus their efforts on foreign firms with securities listed on a U.S. exchange.

Consistent with this position, we confirm that class action suits against foreign issuers after *Morrison* were almost entirely confined to those issuers having a U.S. exchange listing at some point during the class period. Moreover, conditional on a firm having a U.S. exchange listing, Rule 10b-5 cases brought after *Morrison* consistently defined a class period that fully coincided with the period during which the issuer maintained its U.S. listing. However, surprisingly, the focus of filed cases on firms with a U.S. listing did not represent a significant shift from the pre-*Morrison* era. Ninety percent of pre-*Morrison* cases were filed against Foreign Listed Firms with a U.S. exchange listing, and nearly all of them alleged a class period fully coinciding with the period when the issuer maintained its U.S. listing. Moreover, although roughly 10 percent of pre-*Morrison* cases against Foreign Listed Firms were against firms that lacked any U.S. exchange listing, that percentage is statistically indistinguishable from the fraction of post-*Morrison* defendants in our sample that lacked any U.S exchange listing during the class period.[19] Thus, we find no change after *Morrison* in the type of Foreign Listed Firm targeted in a Rule 10b-5 private action.

18. At least, they may be surprising for those who subscribe to the conventional wisdom regarding *Morrison*. We note that other commentators have observed that despite *Morrison*'s hype, it does not appear to have reduced securities fraud litigation against foreign issuers. *See, e.g.*, David Topol & Margaret Thomas, *Post-*Morrison *Application of U.S. Securities Laws to Foreign Issuers*, D&O Diary (Mar. 6, 2017), https://www.dandodiary.com/2017/03/articles/securities-litigation/guest-post-post-morrison-application-u-s-securities-laws-foreign-issuers (observing that despite *Morrison*, "filings against foreign issuers continue to increase each year").

19. In both the pre-*Morrison* and post-*Morrison* periods, defendants in our sample that lacked any U.S. exchange listing during the class period nevertheless had securities that traded on the U.S. OTC market.

For Foreign Listed Firms having a U.S. exchange listing, we further examine the dollar volume of trading on U.S. exchanges relative to their home-country exchanges during the class period. Because *Morrison* limits the class of Rule 10b-5 plaintiffs to those who acquired securities on a U.S. exchange or other domestic transactions, the decision should have reduced the risk of Rule 10b-5 litigation for Foreign Listed Firms with low volumes of U.S. exchange trading because it reduced the level of recoverable Rule 10b-5 damages. For similar reasons, Foreign Listed Firms with higher levels of U.S. trading volume should be more attractive Rule 10b-5 defendants, all else being equal.

Within our sample, there does appear to be some evidence of this dynamic. The median volume of U.S. exchange trading among these firms during the class period in post-*Morrison* cases was $11.8 billion, compared to $4.95 billion before it.[20] Yet our data also reveal that both before and after *Morrison*, cases were routinely brought against Foreign Listed Firms whose U.S. trading volume was substantially less than these amounts. For instance, following *Morrison*, Rule 10b-5 actions were filed against Foreign Listed Firms with a U.S. exchange trading volume of just $1.8 million over the entire class period—an amount that was less than the U.S. dollar volume of trading for the class period of *every* pre-*Morrison* Rule 10b-5 defendant that maintained a U.S. exchange listing. In combination, these findings undermine claims that Rule 10b-5 cases prior to *Morrison* focused on Foreign Listed Firms with little or no connection to the U.S. capital markets or that *Morrison* substantially changed the composition of Rule 10b-5 defendants.

Finally, we assess overall trends with respect to case outcomes and attorneys' fees during our sample period. Overall, we find limited evidence of differences in settlement and dismissal rates. Dismissal rates increased slightly after *Morrison*, but the dismissals do not appear to be predicated on the *Morrison* issue. The median settlement amount actually increased from $13 million to more than $15 million. These results contrast with prior research, which found a decline in both mean and median settlement amounts following *Morrison*.[21] Among Rule 10b-5 suits against Foreign Listed Firms, we also find that overall attorneys' fees awarded to plaintiffs' counsel increased in cases following *Morrison* (at least in cases in which fees had been awarded through the date of this study). In particular, mean (median) fee awards increased from approximately $11 million ($2.8 million) in our pre-*Morrison* cases to $26 million ($4.4 million) in our post-*Morrison* cases.

In Part III, we identify the general implications of our research for securities litigation. We also discuss Congress' rushed legislative response to *Morrison* in

20. Dollar figures throughout this article have been inflation adjusted using the Consumer Price Index ("CPI") to reflect 2018 prices.

21. Our settlement findings may appear hard to reconcile with the fact that a number of courts relied on *Morrison* to grant partial dismissals, thereby reducing the class size by dismissing the claims brought by foreign investors. The explanation for this result is that even prior to *Morrison*, the number of global class actions filed was relatively small, and some of those cases were dismissed based on the conduct and effects tests that were then in use. As a result, global class actions were not common before *Morrison*.

the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[22] Our results are, at first glance, counterintuitive. *Morrison* was widely reported to foreclose an important class of Rule 10b-5 cases against foreign issuers. However, our findings show that there is little evidence either that the "problem" *Morrison* was meant to target existed or that *Morrison* effected a material change in the types of issuers targeted or cases brought. Litigation appears to have continued at the same rates pre- and post-*Morrison* with similar settlement amounts, dismissal rates, and attorneys' fees.

What then explains the *Morrison* decision and the surrounding hype? We believe the most straightforward explanation is that, despite contemporary characterizations of the case as responding to a "burgeoning" area of Rule 10b-5 litigation against foreign issuers lacking any meaningful U.S. presence, *Morrison* was effectively a preemptive ruling. *Morrison* responded to a handful of cases and the potential expansion of Rule 10b-5 liability they represented.

In the years preceding *Morrison*, there were a small number of Rule 10b-5 cases in which plaintiffs' counsel used the presence of U.S. transactions as a jurisdictional hook to bring so-called global class actions in the United States that asserted claims on behalf of both U.S. investors and foreign investors worldwide. The most prominent of these cases was *Vivendi*.[23] The class in *Vivendi*, which consisted primarily of foreign investors, was successful in establishing liability and creating a potential $9 billion judgment against Vivendi.[24] The rise of *Vivendi*-type cases raised the real specter, not just of massive liability exposure for foreign firms in the U.S. courts, but also of granting all investors worldwide the right to pursue a private claim for damages under the U.S. securities laws. *Morrison* appears to have been addressed to this potential expansion of Rule 10b-5 to foreign investors. Indeed, a major portion of the *Vivendi* verdict—over $7 billion—was ultimately dismissed on *Morrison* grounds. The eventual plaintiff class, which consisted only of investors who purchased Vivendi securities in the United States, settled their claims for approximately $78 million.[25]

Although *Morrison* makes it difficult to bring a Rule 10b-5 action against a foreign issuer with no U.S. exchange listing, our analysis suggests these cases were extraordinarily unlikely before *Morrison*. The typical foreign firm defendant prior to *Morrison* had a U.S. exchange listing, and *Morrison* did not eliminate or even reduce litigation against these types of foreign issuers. On the contrary, the

22. Because *Morrison* was decided only weeks before the Dodd-Frank Act became law, Congress responded at the last minute by inserting section 929P into the Act, which attempted to reverse the effects of the *Morrison* decision. Richard Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 Harv. Bus. L. Rev. 195, 199 (2011). See *infra* notes 76–82 and accompanying text for a discussion of this congressional action.

23. See *infra* notes 45–51 and accompanying text for a discussion of the two other significant outlier settlements involving Royal Dutch Ahold and Nortel.

24. *See* Angelo G. Savino & Abby J. Sher, Vivendi—*The Multi-Billion Dollar Impact of* Morrison *on Foreign-Cubed Securities Litigation*, Mondaq (Mar. 30, 2011), http://www.mondaq.com/unitedstates/x/127648/Insurance/Vivendi+The+MultiBillion+Dollar+Impact+Of+Morrison+On+ForeignCubed+Securities+Litigation+.

25. Jonathan Stempel, *Vivendi Ends 15-Year U.S. Lawsuit over Big Merger, to Pay $26.4 Million*, Reuters (Apr. 6, 2017), https://www.reuters.com/article/us-vivendi-settlement-idUSKBN1782RQ.

transaction-based approach articulated by the *Morrison* Court continues to subject such issuers to potential liability, including liability for fraudulent statements and activities conducted abroad. The description of *Morrison* as a "steamroller" of litigation against foreign issuers is simply a myth.

How then should we understand *Morrison*? We argue here that *Morrison* is better understood as reflecting a proportionality approach in which a foreign issuer's liability exposure is proportional to the extent of its presence in the U.S. capital markets rather than a decision about extraterritoriality. We demonstrate that this reasoning is consistent with the SEC's regulatory approach to foreign private issuers, as well as with statutory limitations on the scope of the analogous liability provisions of the Securities Act of 1933.

Ultimately, our analysis and findings suggest that the rhetoric surrounding *Morrison*'s analysis of extraterritoriality may be overstated. At its core, *Morrison* is not about which issuers are subject to the antifraud provisions of the federal securities laws, but about the universe of investors who have standing to advance an antifraud claim. To the extent that commentators and subsequent courts have relied on *Morrison* as authority for foreclosing the extraterritorial application of U.S. law, that reliance is misplaced.

I. Background

A. The Global Listings Market

The globalization of the securities markets has led to dramatic growth in cross-border investing. U.S. investors increasingly purchase the securities of foreign issuers for a variety of reasons, such as obtaining greater diversification, investing in prominent multinational companies headquartered abroad, and investing in businesses and industries located primarily outside the United States.[26]

U.S. investors can purchase the securities of foreign issuers in several ways.[27] First, for foreign firms without a U.S. exchange listing, investors can buy the shares directly on a foreign exchange where the firm's shares are traded. Second, in some cases, a foreign issuer may have shares listed on a U.S. exchange. The U.S. listing might represent an issuer's exclusive exchange listing or a cross-listing in addition to an exchange listing in another jurisdiction.[28] The U.S.-listed securities may be ordinary shares,[29] but more commonly they are American Depositary Receipts

26. For purposes of this article, we consider foreign issuers to be those headquartered outside the United States. The ordinary shares of most publicly traded foreign issuers, including the foreign issuers on which we will focus most of our analysis, are traded on a primary exchange outside the United States such as the London Stock Exchange.

27. *See* Schwab Ctr. for Fin. Res., *Cross-Listed International Stocks: Another Investing Alternative*, Charles Schwab (May 23, 2014), https://perma.cc/NTJ7-MEM6 (describing options for U.S. investors who want to invest in international stocks).

28. The terms dual-listing, cross-listing, and multiple listing are often used interchangeably. Technically, the term cross-listing refers to circumstances in which a single issuer lists its shares on more than one exchange. In such cases, the exchange on which most of the issuer's securities are traded is known as the primary exchange, and any other exchange is referred to as a secondary exchange.

29. Most cross-listed ordinary shares are securities of Canadian issuers. *See* Schwab Ctr. for Fin. Res., *supra* note 27. In a small number of cases, foreign issuers create global registered shares

("ADRs").[30] Finally, in some cases, U.S. investors can purchase a foreign firm's ordinary shares or ADRs that are not listed on a U.S. exchange through the OTC market.[31]

In reality, this trading is bifurcated depending on the type of purchaser. For the most part, retail investors are foreclosed from purchasing shares on a foreign exchange, due to limitations on foreign trading through U.S. broker/dealers.[32] Thus, retail investors almost exclusively buy shares of foreign issuers in the United States on U.S. exchanges and do not purchase shares of companies not listed or traded in the United States.[33] Conversely, institutional and other sophisticated investors are able to purchase shares abroad, an option that these investors often prefer, due to the lower trading costs and greater liquidity on these foreign exchanges.[34]

B. Securities Fraud, Foreign Issuers, and the *Morrison* Decision

Securities fraud by foreign issuers may involve fraudulent conduct that occurs in the United States, overseas, or both, raising a question about the circumstances under which such transnational cases fall within the scope of section 10(b). For

("GRSs"). GRSs are ordinary shares that can be traded in multiple jurisdictions without the need for currency conversion. *See, e.g.*, *Share Information: Frequently Asked Questions*, UBS, https://www.ubs.com/global/en/about_ubs/investor_relations/faq/share.html (last visited June 26, 2019) (explaining GRSs). DaimlerChrysler AG ("DaimlerChrysler"), now called Daimer AG ("Daimler"), and UBS Group AG ("UBS") are among the foreign issuers that have issued GRSs. *See* G. Andrew Karolyi, *DaimlerChrysler AG, The First Truly Global Share* (Dice Ctr. Working Paper No. 99-13, Sept. 1999), https://ssrn.com/abstract=185133 (describing DaimlerChrysler's creation of the GRS and exploring reasons why the GRS experienced poor share price performance and substantial flowback to the Frankfurt Stock Exchange).

30. The terms "ADR" and "American Depositary Share ('ADS')" are often used interchangeably. *See Investor Bulletin: American Depositary Receipts*, U.S. Sec. & Exchange Commission (Aug. 2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf. ADRs are created when a bank custodian holds foreign shares for the benefit of U.S. investors. The ordinary shares, which are on deposit with the bank, are ADSs. The bank issues certificates, priced in dollars, representing an interest in those ADSs, which may or may not have a one-to-one correspondence with the ordinary shares. Those certificates are ADRs and may be listed on a U.S. exchange and traded by U.S. investors. Technically, an ADR investor does not own the underlying ordinary shares represented by the ADRs, and that investor's rights are determined in part by the contractual terms of the ADRs. ADRs can be sponsored or unsponsored by the issuer, and some but not all issuers raise capital through cross-listings using ADRs. *See, e.g.*, Tom Zanki, *DualListed IPOs Carve a Small but Steady Niche*, Law360 (Aug. 4, 2016), https://perma.cc/FNC5-P7W5 (discussing and citing recent examples of dual-listed initial public offerings ("IPOs")).

31. The "OTC market" is a general term used to refer to trading in equity securities that are not listed on an exchange. *See generally* Michael J. Simon & Robert L.D. Colby, *The National Market System for Over-the-Counter Stocks*, 55 Geo. Wash. L. Rev. 17, 19 (1986).

32. *See generally* Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 Harv. Int'l L.J. 31, 47–49 (2007) (describing the barriers to foreign securities investment by retail investors located in the United States).

33. *Id.* at 48.

34. *See, e.g.*, Robert P. Bartlett III, *Do Institutional Investors Value the 10b-5 Private Right of Action? Evidence from Investor Trading Behavior Following* Morrison v. National Australia Bank Ltd., 44 J. Legal Stud. 183, 196 (2015) (finding in a sample of 420 cross-listed firms that "overall, just 35% of the $656 billion of cross-listed trades within the sample were executed on U.S. exchanges, as might be expected given the historically lower trading costs and higher trading liquidity available in local trading markets").

many years, the ability of plaintiffs to bring securities fraud class actions against foreign issuers was governed by two legal standards set out by the U.S. Court of Appeals for the Second Circuit.[35] In *Leasco* and *Bertch*, the court held that a foreign issuer could be subject to section 10(b) if it engaged in sufficient fraudulent conduct in the United States.[36] In *Schoenbaum*, the court held that section 10(b) could be applied if the fraudulent transaction had substantial effects in the United States.[37] Courts described the so-called conduct and effects tests as delineating the "extraterritorial reach of the antifraud provisions."[38] Although the conduct and effects tests were widely followed by other federal courts, a number of commentators criticized the resulting expansive scope of jurisdiction as both unprincipled[39] and responsible for opening the U.S. courts to cases that had limited ties to the United States.[40]

In *Morrison*, the Supreme Court responded to these concerns by replacing the conduct and effects tests.[41] The *Morrison* case was publicized in the press as a so-called F-cubed case,[42] meaning it was brought by foreign shareholders who bought their shares on a foreign exchange against a foreign issuer.[43] Also known as global class actions, F-cubed lawsuits were of particular concern because they sought to hold liable foreign issuers with little connection to the United States and because they had the potential to increase the size and scope of U.S. litigation against foreign issuers.[44]

35. *See, e.g.*, Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, 542–43 (1993) (describing the conduct and effects tests).

36. Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

37. Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

38. *See* Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 469.

39. *See, e.g.*, Gregory K. Matson, Note, *Restricting the Jurisdiction of American Courts over Transnational Securities Fraud*, 79 Geo. L.J. 141, 148 (1990) (describing the conduct and effects tests as "'startling in light of both the drafters' express purpose of perfecting domestic securities markets and the Supreme Court's 'historical approach' to statutory construction").

40. *See, e.g.*, Ashby Jones, *The Whole World Is Watching: "F-Cubed" Case Moves to High Court*, Wall St. J.: L. Blog (Mar. 29, 2010, 9:06 AM), https://blogs.wsj.com/law/2010/03/29/the-whole-world-is-watching-f-cubed-case-moves-to-high-court/ (quoting a claim that "exposing foreign companies to class actions in the United States based merely on the existence of an American subsidiary or listing on a U.S. exchange will discourage foreign investment here").

41. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 267 (2010).

42. Before *Morrison*, commentators identified three categories of cases against foreign issuers. The first category included cases against foreign domiciled issuers involving U.S. investors who purchased on U.S. exchanges. "F-squared" cases were those brought by American investors against foreign issuers involving securities traded on a foreign exchange. F-cubed cases were cases brought by foreign investors against foreign issuers involving securities traded on a foreign exchange. *See* Kevin LaCroix, *O.K., F-Cubed Claims Are Out, but What About F-Squared Claims?*, D&O Diary (July 21, 2010), https://www.dandodiary.com/2010/07/articles/securities-litigation/o-k-f-cubed-claims-are-out-but-what-about-f-squared-claims (explaining F-squared and F-cubed cases in the context of *Morrison*). In fact, the original complaint in *Morrison* asserted claims on behalf of U.S. purchasers of ADRs. *See infra* notes 55–56 and accompanying text.

43. *See, e.g.*, Joseph M. McLaughlin, *Directors' and Officers' Liability: Foreign Investors & Securities Class Actions*, N.Y.L.J. (Online). (Apr. 10, 2008).

44. For a discussion of this issue, see Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 68 (2007).

The most dramatic example of the global class action was the *Vivendi* case, which was pending at the time of the *Morrison* decision. The trial court in *Vivendi* certified a plaintiff class that included "all persons from the United States, France, England, and the Netherlands who purchased or otherwise acquired ordinary shares or American Depositary Shares of Vivendi."[45] The case was tried before a jury, which found for the plaintiffs, leading the court to enter a preliminary judgment that would have exceeded $9 billion.[46] Prior to *Vivendi*, two other cases against foreign issuers also resulted in very high settlements, *Royal Dutch Ahold* and *Nortel*.[47] In *Royal Dutch Ahold*, the court certified a settlement class consisting of "all persons and entities who purchased and/or received as a dividend Royal Ahold N.V. common shares and/or ADRs from July 30, 1999, through Feb. 23, 2003, regardless of where they live or where they purchased their Ahold shares"[48] and approved a settlement of $1.1 billion.[49] *Nortel* involved a plaintiff class that included both U.S. and Canadian investors and settled for more than $2.9 billion.[50]

Yet even under the conduct and effects tests, it was far from clear whether a court could properly exercise jurisdiction in global class actions. The court identified the potential jurisdictional issue in *Royal Ahold*, deciding that jurisdiction existed because the bulk of the fraud occurred in the United States, a finding that was not reviewed by a federal appellate court when the case was settled.[51] *Morrison* eliminated the jurisdictional issue in *Vivendi* before the Second Circuit could consider whether the lower court judge had correctly applied the conduct and effects tests. Other courts addressed the question of jurisdiction more directly and, in some cases, declined to exercise jurisdiction over transactions occurring abroad.[52] As we show in Part II.C, courts routinely used the conduct and effects tests to limit the class of investors to those having a meaningful nexus to the United States.

45. *In re* Vivendi Universal, S.A., 242 F.R.D. 76, 109 (S.D.N.Y. 2007).

46. *See* Savino & Sher, *supra* note 24 ("the effect of [*Morrison*] will be to reduce what was projected to be a $9.0 billion recovery by as much as 80 percent or more").

47. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, SECURITIES CLASS ACTION LITIGATION 8 (July 2008), https://www.instituteforlegalreform.com/uploads/sites/1/SecuritiesBooklet.pdf (observing that Royal Ahold and Nortel were "two of the top ten largest settlements of all time").

48. *In re* Royal Ahold N.V. Sec. & ERISA Litig., No. 1:03-MDL-01539, 2006 U.S. Dist. LEXIS 1928, at *16 (D. Md. Jan. 9, 2006).

49. *Id.* at *48.

50. *See Nortel Networks Corp. (Nortel I & II) Securities Litigation*, STAN. L. SCH. SEC. CLASS ACTION CLEARINGHOUSE, http://securities.stanford.edu/filings-case.html?id=101707 (last visited June 26, 2019). The first complaint in the *Nortel* case was filed on Feb. 16, 2001, so it is not in our data set. *Id. See generally In re* Nortel Networks Corp. Sec. Litig., No. 01-Civ.-1855, 2003 U.S. Dist. LEXIS 15702 (S.D.N.Y. Sept. 5, 2003) (certifying the class).

51. *In re* Royal Ahold N.V. Secs. & ERISA Litig., 351 F. Supp. 2d 334, 355–64 (D. Md. 2006); *see also* Martha Graybow, *Judge OKs $2.4 Billion Settlement in* Nortel *Case*, WASH. POST (Dec. 26, 2006).

52. *See, e.g.*, *In re* Eur. Aeronautic Def. & Space Co. Sec. Litig., 703 F. Supp. 2d 348 (S.D.N.Y. 2010) (applying the conduct and effects tests to dismiss an F-cubed lawsuit by European investors against European issuer for disclosures made in filings within the European Union); Blechner v. Daimler-Benz Ag, 410 F. Supp. 2d 366 (D. Del. 2006) (declining to exercise jurisdiction where the conduct did not occur primarily in the United States and the plaintiff class consisted of foreign investors).

Indeed, in *Morrison* itself, the lower courts had dismissed the complaint as falling outside the scope of the existing Second Circuit standard.[53] In his concurrence, Justice Stevens recognized this point, writing that he would maintain the conduct and effects tests and uphold the Second Circuit's ruling on the grounds that "this case has Australia written all over it."[54] In this vein, it was hardly obvious that *Morrison* would become the test case for whether F-cubed cases could proceed under Rule 10b-5.

In addition, the characterization of *Morrison* as an F-cubed lawsuit is questionable. National Australia Bank ("NAB"), the defendant in the case, had ADRs listed on the New York Stock Exchange ("NYSE") for the duration of the class period, as well as at the time the underlying complaint was brought, and the original class of plaintiffs included investors who acquired U.S. ADRs.[55] The trial court, however, dismissed this class of plaintiffs for failing to allege any quantifiable damages.[56] Thus, by the time the case was heard by the Supreme Court, the plaintiff class consisted entirely of investors in NAB's ordinary shares, purchased abroad, who lacked any obvious connection to the United States. In addition, NAB delisted its ADRs shortly after the suit was filed. It was for these reasons that counsel for NAB and multiple *amica* were able to use *Morrison* not only to challenge the lower court's interpretation of the conduct and effects tests—the approach advanced by plaintiffs in their petition for certiorari—but also as a vehicle to attack the use of Rule 10b-5 in F-cubed cases.[57]

Morrison reflected a concerted effort by George Conway III, a partner at the law firm of Wachtell, Lipton, Rosen & Katz, to push the Supreme Court to replace the Second Circuit test.[58] This effort was supported by an array of business-friendly

53. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 253 (2010).

54. *Id.* at 286.

55. *See In re* Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 U.S. Dist. LEXIS 94162, at *7 (S.D.N.Y. Oct. 25, 2006) ("The Lead Domestic Plaintiff is a United States resident who purchased the Bank's ADRs on the NYSE.").

56. *Id.* at *27–28.

57. Notably, because of the dismissal of the ADR holders, *Morrison* was debated at the Supreme Court largely in the context of whether section 10(b) extended to claims by investors who purchased securities abroad. *See, e.g.*, Brief for Amici Curiae Alecta Pensionforskring et al., Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 242027, https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1191_PetitionerAmCuAlectaetal.authcheckdam.pdf (defending the application of section 10(b) to claims by foreign investors who traded abroad); Brief of Amici Curiae The Australian Shareholders' Association and The Australian Council of Super Investors, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 342028, https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1191_PetitionerAmCuASAandACSI.authcheckdam.pdf (arguing that the Court should not allow the United States to be used as a base for fraudulent conduct affecting the interests of foreign investors).

58. Conway argued the case for NAB and in the wake of *Morrison* argued for its extended application in other securities law areas. *See* Ross Todd, *Architect of* Morrison v. NAB *Takes on Feds in Amicus Brief for NYC Bar*, AM. LAW.: LITIG. DAILY (Sept. 12, 2012, 12:00 AM), https://www.law.com/litigationdaily/almID/1202572772363 (detailing Conway's efforts to argue that *Morrison*'s holding also applied in the case of criminal securities fraud claims). To be sure, there was also academic criticism of the Second Circuit test beforehand. Choi & Silberman, *supra* note 38, at 467–68; Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 106–08, 115–16 (2004);

interests. Critics of the application of section 10(b) to F-cubed claims in particular argued that burdensome U.S. securities fraud litigation deterred foreign issuers from issuing securities to U.S. residents.[59] They also claimed that the Second Circuit test violated other nations' sovereignty[60] and conflicted with the laws of other jurisdictions.[61] Mixed with these arguments were notions of judicial economy that the U.S. courts should not be burdened with suits based upon the foreign purchase of securities.[62]

These arguments worked. In *Morrison*, the U.S. Supreme Court rejected the conduct and effects tests as improperly giving section 10(b) extraterritorial application. Instead the Court set forth a bright-line test limiting private securities litigation to domestic transactions. Justice Scalia, writing for the majority, held that a cause of action could be brought 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."[63] The test thus purported to eliminate shareholder private causes of actions under Rule 10b-5 brought with respect to any foreign purchases.

C. The *Morrison* Case and Public Reaction

The *Morrison* decision was a controversial one. First, it overruled longstanding Second Circuit precedent. Second, the repudiation of this Second Circuit test was vigorously opposed by many institutional investors and shareholder advocates.[64] Among the reasons for this opposition was that the ruling eliminated

Donald Langevoort, *Schoenbaum Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 Law & Contemp. Probs. 241, 244–48 (1992).

59. *See* Brief of Amicus Curiae NYSE Euronext at 3, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723008, http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.NYSE-Euronext-in-Support-of-Resp.pdf ("Issuers worldwide have repeatedly expressed concern to NYSE Euronext that the risk of U.S. litigation has deterred them from raising capital in the U.S.").

60. *See, e.g.*, Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae at 2, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723009, https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1191_RespondentAmCuUnitedKingdom.authcheckdam.pdf (arguing that "the broad assertion of extraterritorial jurisdiction by United States courts implicates the legitimate sovereign interests and policy choices of the United Kingdom").

61. *See* Brief for the Republic of France as Amicus Curiae at 4, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723010, http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.Republic-of-France-in-Support-of-REsp.pdf (explaining that "certain aspects of the U.S. approach conflict with specific legal rules of foreign nations").

62. *See* Brief of Amici Curiae Law Professors, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 740747, https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1191_RespondentAmCuLawProfs.authcheckdam.pdf, at 28 (arguing that "allowing traders in foreign markets to sue under section 10(b) will burden United States courts and make the United States a venue for global securities litigation").

63. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273 (2010). Hannah Buxbaum had previously advocated the approach adopted by the *Morrison* Court. *See* Buxbaum, *supra* note 44, at 68 ("[T]he best alternative may be to adopt a rule that simply limits subject-matter jurisdiction under the anti-fraud provisions to claims arising out of transactions on U.S. markets.").

64. *See, e.g.*, Christian J. Ward & J. Campbell Barker, *Morrison v. National Australia Bank*: The Impact on Institutional Investors 7 (Feb. 2012), https://www.cii.org/files/publications/white_papers/

not only F-cubed cases but also F-squared cases (i.e., cases brought by U.S.-domiciled investors who bought their shares in foreign companies on foreign exchanges).[65] As a result, *Morrison* deprived U.S. investors of a Rule 10b-5 antifraud remedy in circumstances in which they purchased their securities abroad. Shareholder advocates argued that U.S. institutional investors commonly acquire securities in foreign markets, either because these are the only markets where they can seek international diversification or because these markets are generally more liquid than the U.S. ADR market (where foreign firms often cross-list their shares).[66] Accordingly, these investors claimed that *Morrison* deprived them of their ability to use Rule 10b-5 to combat fraud.[67] For similar reasons, these investors claimed the decision could incentivize foreign issuers to adjust their conduct to ensure that security issuances occurred abroad, in order to deprive U.S. holders of the protections of section 10(b) and Rule 10b-5.[68]

In the months following the decision, there was almost uniform agreement that *Morrison* marked a sea change in securities litigation; one author wrote that the "world of securities fraud litigation was irrevocably altered."[69] In *Morrison's* wake, law firm memos and other writings appeared to hail the decision as an end to foreign securities litigation. A memo published by Cravath, Swaine & Moore described *Morrison* as "dramatically" changing the litigation landscape for foreign issuers.[70] Most notably, the *Morrison* decision resulted in the dismissal of

02_02_12_morrison_v_national_australia_bank.pdf ("[T]he limitation on [*Morrison*'s] reach seriously affects investors' remedies for fraud.").

65. *See, e.g.*, Marco Ventoruzzo, *Like Moths to a Flame—International Securities Litigation After* Morrison*: Correcting the Supreme Court's Transactional Test*, 52 VA. J. INT'L L. 405, 408 (2012) (observing that "*Morrison* can deprive American investors who buy securities from an American issuer of the protections of the securities laws merely because the transaction occurs abroad").

66. WARD & BARKER, *supra* note 64, at 10.

67. *See id.* at 7. Additionally, while *Morrison* did not involve an SEC enforcement action, investor advocates expressed concern that the case limited the SEC's authority to bring cases against foreign issuers. *See, e.g.*, Sarah S. Gold & Richard L. Spinogatti, *Applicability to SEC of Private Action Requirements in § 10(b) Cases*, N.Y.L.J., Aug. 11, 2010, at 3 ("In light of the Court's rationale and its holding . . . it is difficult to see how the SEC would not [be] subject to the *Morrison* analysis."). While the justices themselves appeared to signal in *Morrison* that the case applied only to private rights of actions, *see Morrison*, 561 U.S. at 284 n.12 (Stevens, J., concurring) ("The Court's opinion does not, however, foreclose the [SEC] from bringing enforcement actions in additional circumstances, as no issue concerning the [SEC's] authority is presented by this case."), this concern was sufficient to prompt Congress to clarify in section 929P of Dodd-Frank that the SEC maintained the ability to rely on the conduct and effects tests. *See infra* notes 76–82 and accompanying text; *see also* Nidhi M. Geevarghese, *A Shocking Loss of Investor Protection: The Implications of* Morrison v. National Australia Bank, 6 BROOK. J. CORP. FIN. & COM. L. 235, 249–50 (2011) (exploring the congressional response).

68. WARD & BARKER, *supra* note 64, at 11 ("*Morrison*'s transactional test, however, creates new incentives for issuers to withdraw from American stock markets.").

69. *See* Vladislava Soshkina, *Beyond* Morrison*: The Effect of the "Presumption Against Extraterritoriality" and the Transactional Test on Foreign Tender Offers*, 54 WM. & MARY L. REV. 263, 281 (2012).

70. *See* Morrison v. Nat'l Austl. Bank Ltd.—*The U.S. Supreme Court Confirms that Section 10(b) of the Securities Exchange Act Does Not Apply Extraterritorially & Dismisses the Claims of "F-Cubed" Plaintiffs*, CRAVATH, SWAINE & MOORE LLP (July 6, 2010), https://www.cravath.com/files/Uploads/Documents/Publications/3225362_1.pdf [hereinafter Cravath] ("The Supreme Court's June 24, 2010, opinion in *Morrison v. National Australia Bank Ltd.*, . . . has narrowed dramatically the scope of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder."); *Update: U.S. Supreme Court Limits Extraterritorial Application of U.S. Securities Laws*—Morrison v. National Australia Bank, DAVIS POLK & WARDWELL LLP (June 28, 2010), https://www.davispolk.com/files/files/

investors who purchased their securities abroad from the *Vivendi* case, which was pending at the time of *Morrison* and which had the potential to result in the largest-ever private securities fraud judgment.[71] Marc I. Steinberg and Kelly Flanagan wrote that *Morrison* "drastically altered the landscape for transnational securities litigation and the way that courts determine proper application of a statute concerning a transnational claim."[72]

Morrison's broad language about extraterritoriality also had effects that have extended well beyond private securities fraud litigation. The *Morrison* decision has influenced the interpretation of statutes in a wide range of contexts, from the Alien Tort Statute ("ATS")[73] to the Racketeer Influenced and Corrupt Organizations Act ("RICO").[74] In each of these cases, the courts applied the *Morrison* holding to consider whether a federal statute should have extraterritorial application. The results have limited the scope of U.S. jurisdiction. Indeed, in one particularly controversial decision, the Second Circuit applied the *Morrison* decision to hold that a criminal conviction for securities fraud under section 10(b) can only be sustained if the person "engaged in fraud in connection with (1) a security listed on a U.S. exchange, or (2) a security purchased or sold in the United States."[75]

The significance of the *Morrison* decision was quickly highlighted when, only a few months later, Congress, in section 929P of Dodd-Frank, sought to restore the SEC's authority to bring suit to enforce section 10(b) and Rule 10b-5 under the conduct and effects tests, subject only to constitutional limitations on the exercise of jurisdiction.[76] Although it was not clear that the provision in Dodd-Frank was either necessary or that it was drafted appropriately to resolve any ambiguity about

Publication/b8410ed8-13e1-40b0-8f12-033b6ea69c83/Preview/PublicationAttachment/450c2bc3-1d4e-4440-9cd5-a3eff5e1dd2e/062510_morrison_v_nab.html ("The Court's decision should be a positive development for non-U.S. issuers because it precludes plaintiffs from bringing federal securities fraud claims with respect to the purchase or sale of their securities on foreign exchanges or otherwise outside the United States."); *see also* David He, *Beyond Securities Fraud: The Territorial Reach of the U.S. Laws after* Morrison v. N.A.B., 2013 COLUM. BUS. L. REV. 148, 169 ("The majority in *Morrison* undertook an analysis that went far beyond the circumstances of the case and severely limited the ability of plaintiffs to seek recourse through private securities fraud litigation.").

71. *See Court Finds Vivendi Liable for Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B3 (reporting that the potential judgment in Vivendi of $9.3 billion was potentially "the largest securities class-action jury verdict in history").

72. Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings*—Morrison *Continues to Make Waves*, 46 INT'L LAW 829, 829 (2012).

73. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

74. Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543 (2013); *see also* Daimler AG v. Bauman, 571 U.S. 117 (2014) (relying on *Morrison* to reach a restrictive view of California's power to exercise jurisdiction over a foreign company).

75. United States v. Vilar, 729 F.3d 62, 67 (2d Cir. 2013).

76. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1871 (2010) (codified in various sections of 15 U.S.C. § 78aa). As one commentator has noted, this Dodd–Frank Act provision was "hastily drafted" because "*Morrison* was decided only weeks before the Act became law." Painter, *supra* note 22, at 199. Immediately after passage of the bill, George Conway issued a client note from his law firm, Wachtell, Lipton, Rosen & Katz, arguing that the provision did not overturn *Morrison* due to a drafting error amounting to a "fatal omission." *See* George T. Conway III, *Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged*, WACHTELL, LIPTON, ROSEN & KATZ (June 21, 2010), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf.

regulators' enforcement authority,[77] Congress appears to have taken the view that *Morrison* threatened such authority.[78]

In Dodd-Frank, Congress also ordered the SEC to conduct a study to determine the extent to which private rights of action should be extended to the same conduct for which section 929P authorized government enforcement actions.[79] The SEC performed this study, and the results confirmed the continued dispute over the scope and desirability of the *Morrison* rule.[80] In that study, the SEC received seventy-two comment letters, forty-four of which supported the old Second Circuit test or a modified version thereof and twenty-three of which supported the *Morrison* test.[81] The study did not reach a conclusion as to whether private litigation should be expanded, explaining that "the conflicting evidence in the academic literature and the results of our event study on the *Morrison* decision are inconclusive as to the net benefits or costs of a cross-border extension of private rights of action."[82]

D. *Morrison* and Academic Study

Academic commentary regarding the effects of *Morrison* has been similarly mixed. Several studies have examined the impact of *Morrison* on asset prices and investor trading behavior. Positing that *Morrison*'s wholesale rejection of the conduct and effects tests was largely unexpected, Professors Louis Gagnon and George Karolyi examined stock price reactions surrounding the publication of the *Morrison* decision to gauge investors' reactions to the new rule.[83] Focusing on nearly 1,000 foreign firms listed on both a U.S. exchange and a domestic venue, they found that publication of the decision was associated with a positive return of forty-four basis points for firms' U.S.-listed securities relative to their locally traded securities.[84] They interpreted these results as evidence that market participants revalued the newly differentiated application of the anti-fraud provisions of Rule 10b-5 to investors in a firm's ADRs relative to its home-market shares.[85]

Using a similar research design, Professors Licht, Poliquin, Siegel, and Li ("LPSL") likewise examined stock price reactions to cross-listed firms but focused on stock price movements surrounding the time of the oral arguments

77. *See* Painter, *supra* note 22, at 229 (concluding that "Congress passed a poorly drafted provision that may not do anything other than confer jurisdiction that courts already have, although Congress probably intended for it to do more").

78. *See, e.g.*, SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1292 (D. Utah 2017) (recounting the legislative history of section 929(P)(b) of Dodd-Frank).

79. *See* Dodd-Frank, *supra* note 76, § 929Y.

80. *See* U.S. Sec. & Exch. Comm'n Staff, Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 (Apr. 2012).

81. *Id.* at 38.

82. *Id.* at B13.

83. *See* Louis Gagnon & George Andrew Karolyi, *An Unexpected Test of the Bonding Hypothesis*, 7 Rev. Corp. Fin. Stud. 101 (2017).

84. *Id.* at 104.

85. *Id.* at 105–06.

for *Morrison* when they posited that the Court signaled its willingness to discard the conduct and effects tests.[86] Overall, LPSL failed to find any negative market reaction to this event in either the U.S. or local markets. On the contrary, they found that U.S.-listed foreign firms experienced insignificant or even positive abnormal returns in both markets, particularly among firms with most of their equity traded outside the United States. The authors concluded that these findings were consistent with the idea that a "U.S.-style securities-fraud class action regime could be viewed as a regulatory burden for firms."[87] These results were also consistent with the findings of Professor Robert Bartlett, who, using a proprietary data set of 378 institutional investor trades, examined institutional investor trading during the thirty-month period surrounding *Morrison*. Despite the fact that *Morrison* made clear that trades in U.S. exchange-listed securities now come with the right to pursue a private Rule 10b-5 action, Bartlett found investors in his sample did not reallocate trades to the U.S.-listed securities of cross-listed foreign firms following the decision.[88]

Professor Yuliya Guseva took a different approach in assessing the practical effect of *Morrison* on Rule 10b-5 litigation. Guseva cogently analyzed 222 Rule 10b-5 cases brought against foreign private issuers in the five years before and five years after *Morrison* was decided.[89] While Guseva found that F-cubed cases were "rare" prior to the *Morrison* case,[90] she also found that settlement amounts within her sample declined in the wake of *Morrison* and that the number of dismissals rose. Because damages arising from share acquisitions on non-U.S. venues are no longer recoverable after *Morrison*, these latter findings are consistent with *Morrison*'s placing plaintiffs in a weaker negotiating position, perhaps because pre-*Morrison* cases commonly included a worldwide class of shareholders who acquired most of their shares on non-U.S. venues. Guseva also found that the liability exposure of foreign issuers became more "ascertainable" post-*Morrison*, given that it was capped by the extent to which they had accessed the U.S. capital markets.[91] To the extent that this was the case, the limitation of Rule 10b-5 protection to shares acquired on a U.S. exchange would constitute a clear change in the way Rule 10b-5 had been used prior to *Morrison*, consistent with the conventional wisdom.

Guseva's article is perceptive and informed, but her data set lacks information concerning the relative levels of U.S. and foreign trading volume among cross-

86. Amir N. Licht, Christopher Poliquin, Jordan I. Siege, & Li Xi, *What Makes the Bonding Stick? A Natural Experiment Involving the U.S. Supreme Court and Cross-listed Firms*, 129 J. Fin. Econ. 329 (2018).

87. *Id.* at 330.

88. Bartlett, *supra* note 34, at 186–87.

89. Yuliya Guseva, *Extraterritoriality of Securities Law Redux: Litigation Five Years After* Morrison v. National Australia Bank, 2017 Colum. Bus. L. Rev. 199.

90. *Id.* at 261.

91. *Id.* at 279. Guseva analyzed a sample of seventy-five cases from an earlier period in another article and concluded that foreign private issuers were subject to considerable uncertainty as to the extent of their potential liability exposure. *See* Yuliya Guseva, *Cross-Listings and the New World of International Capital: Another Look at the Efficiency and Extraterritoriality of Securities Law*, 44 Geo. J. Int'l L. 411 (2013).

listed firms, making it impossible to discern whether pre-*Morrison* cases commonly consisted of foreign firms with de minimis U.S. exchange trading. Guseva's data set also includes defendants headquartered in China.[92] However, the litigation involving Chinese firms during this time period is distinctive. Most notably, the post-*Morrison* era coincided with a wave of Rule 10b-5 claims against small U.S. exchange–traded Chinese firms that often obtained their exchange listing through a reverse merger with a nonoperating shell corporation using allegedly misleading disclosures. The presence of these small reverse-merger cases potentially confounds Guseva's settlement analysis and highlights the challenge of simply comparing the pre- and post-*Morrison* litigation environments. Guseva also did not distinguish between firms listed exclusively on a U.S. exchange and firms with cross-listed securities. As we explain below, the *Morrison* decision should have had no impact on the former set of firms.

The gaps in Guseva's analysis and the conflicting findings of the finance studies suggest that it would be beneficial to examine Rule 10b-5 litigation filed against foreign issuers in the years surrounding *Morrison* to understand more precisely how the case transformed transnational securities litigation. Significantly, the foregoing research designs do not distinguish the effect of *Morrison* in eliminating an existing practice of bringing Rule 10b-5 suits that focused on the acquisition of a foreign issuer's non-U.S. securities (as in an F-cubed or F-squared lawsuit) from the possibility that *Morrison* eliminated the potential for global class actions to become widespread in the future.[93]

II. Data and Empirical Analysis

To assess the effect of *Morrison* on Rule 10b-5 litigation practices, we follow Guseva in examining Rule 10b-5 cases in the years surrounding *Morrison*, although our methodology differs in several respects. First, we focus primarily on foreign issuers that were subject to U.S. litigation pre- and post-*Morrison* to interrogate the extent to which *Morrison* reduced the litigation burden on this set of issuers. Second, in examining case outcomes surrounding *Morrison*, we expressly account for the large number of Rule 10b-5 cases brought during the post-*Morrison* time period against small Chinese firms whose shares were listed exclusively on U.S. venues. Third, and most important, we distinguish between foreign firms whose securities are listed exclusively on a U.S. exchange and those that meet our definition of a Foreign Listed Firm.

92. *See* Guseva, *supra* note 89, at 256.

93. Likewise, while LPSL suggest that foreign firms having little U.S. trading volume experienced positive abnormal returns due to their reduced risk of Rule 10b-5 exposure following *Morrison*, their research design cannot speak to whether the market reaction was due to existing Rule 10b-5 practices. For instance, was their finding due to the fact that these firms were subject to large levels of Rule 10b-5 exposure before *Morrison* but would no longer bear such risks because of the lower settlement value these cases offered to plaintiffs and their counsel? Or was it the case that these firms were never the subject of meaningful levels of Rule 10b-5 litigation, suggesting that the market's reaction was primarily driven by the reduced possibility that these firms would be subject to Rule 10b-5 litigation in the future?

A. Data

Our sample of Rule 10b-5 cases comes from the Stanford Securities Litigation Clearinghouse, which tracks all securities class action lawsuits filed in federal court since January 1, 1996. We collect all cases filed between January 2002, and December 2017, dropping all cases that did not involve securities fraud, and, more specifically, did not plead section 10(b) allegations. We further filter cases to identify those filed against a corporate issuer with a headquarters located outside the United States. Our final sample consists of 388 suits filed between 2002 and 2017.

We hand-collect information from the Clearinghouse and court dockets on a variety of metrics surrounding each case. In particular, we obtain information from Bloomberg and the Center for Research in Security Prices ("CRSP") about whether a defendant firm's shares were traded on any U.S. or non-U.S. exchanges and the dollar volume of trading on each trading venue during the class period specified in the complaint. We obtain data regarding the characteristics of the defendant firm and the lawsuit directly from court filings and Edgar.

In Table 1, we summarize the distribution of our sample cases by year of filing.

The first column presents the number of cases in our sample, regardless of whether the defendant had a trading venue outside the United States. Even if a firm is headquartered outside the United States, it is possible for the issuer's securities to trade principally or exclusively on a U.S. trading venue or exchange. This practice is commonly observed among technology firms based in China and Israel that often incorporate in the United States and arrange to have their ordinary shares traded exclusively on a U.S. stock exchange. Data in the first column thus commingle foreign-based firms whose equity can be acquired on non-U.S. venues with foreign-based firms whose equity can only be acquired on a U.S. exchange or on the U.S. OTC market.[94]

Firms whose equity can only be acquired on a U.S. exchange should not have been affected by the *Morrison* decision because investors in these firms necessarily satisfy the *Morrison* test by acquiring their shares on a U.S. exchange.[95] We confirm this conclusion in Part II.C, when we examine case outcomes. Columns 3 and 4 therefore summarize all lawsuits for the subset of foreign defendant firms whose equity traded on at least one non-U.S. venue. These firms, which we refer to as Foreign Listed Firms, were most directly affected by the *Morrison* rule insofar as investors in these firms could have acquired their securities on a non-U.S. exchange and would therefore fail the first prong of *Morrison*'s transaction test. Accordingly, we focus much of our analysis on this group of companies.

94. Among the 205 foreign firms in our sample that did not have a local trading market, only three traded exclusively on the U.S. OTC market.

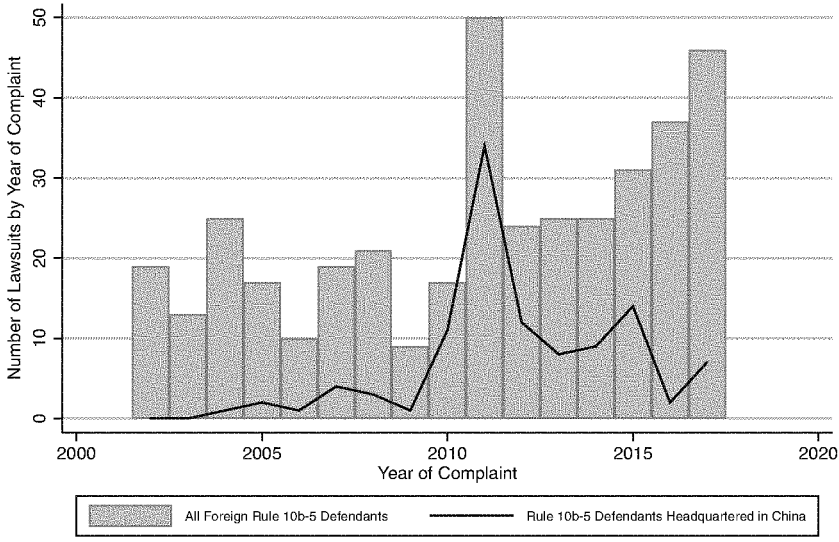
95. Where a foreign firm's securities trade exclusively on the U.S. OTC market, we surmise that investors in these firms would most likely satisfy the second prong of *Morrison*. Consistent with this conclusion, all three of these cases noted at *supra* note 94 were commenced following *Morrison*'s publication; however, *Morrison* was raised in only one of these cases in an effort by the defendant issuer to dismiss investors who acquired their shares in an offshore, Regulation S offering of the company's securities.

Table 1:
Sample Cases by Year of Filing

	All Cases in Sample		All Cases in Sample with Non-U.S. Listing		All Cases in Stanford Litigation Clearinghouse	
	(1)	(2)	(3)	(4)	(5)	(6)
Year	*N*	*%*	*N*	*%*	*N*	*%*
2002	19	4.90%	12	6.56%	265	7.94%
2003	13	3.35%	9	4.92%	228	6.83%
2004	25	6.44%	15	8.20%	239	7.16%
2005	17	4.38%	10	5.46%	182	5.45%
2006	10	2.58%	2	1.09%	121	3.62%
2007	19	4.90%	11	6.01%	177	5.30%
2008	21	5.41%	18	9.84%	223	6.68%
2009	9	2.32%	7	3.83%	165	4.94%
2010	17	4.38%	3	1.64%	175	5.24%
2011	50	12.89%	11	6.01%	188	5.63%
2012	24	6.19%	11	6.01%	151	4.52%
2013	25	6.44%	14	7.65%	165	4.94%
2014	25	6.44%	8	4.37%	168	5.03%
2015	31	7.99%	8	4.37%	208	6.23%
2016	37	9.54%	21	11.48%	271	8.12%
2017	46	11.86%	23	12.57%	412	12.34%
Total:	388	100%	183	100%	3,338	100%
Total Pre-*Morrison*:	141	36.34%	87	47.54%	1,663	49.82%
Total Post-*Morrison*:	247	63.66%	96	52.46%	1,675	50.18%

Finally, in Columns 5 and 6, we examine overall litigation rates to explore whether the general litigation environment changed both pre- and post-*Morrison*. We find that the litigation rates for all securities litigation as recorded by the Stanford Litigation Clearinghouse are roughly similar to those for Foreign Listed Firms. For example, across all cases recorded by the Stanford Litigation Clearinghouse during our sample period, 49.82% were brought during the pre-*Morrison* period, while 50.18% were brought during the post-*Morrison* period. In comparison, 47.54% of cases in our sample against Foreign Listed Firms were brought during the pre-*Morrison* period, while 52.46% of these cases were brought in the post-*Morrison* period. In unreported tests, we find the pre- and post-*Morrison* litigation rates against Foreign Listed Firms to be indistinguishable from the pre- and post-*Morrison* litigation rates of securities litigation recorded by the Stanford Litigation Clearinghouse.

Figure 1
Proportion of Chinese Headquartered Firms Within Sample of 10b-5 Actions Against Non-U.S. Firms



Finally, in Figure 1, we examine the proportion of lawsuits within our full sample that named a firm headquartered in China as a defendant. As noted previously, a large number of Rule 10b-5 cases were brought against Chinese-based firms following *Morrison*, stemming in part from a wave of reverse mergers involving these companies in the years surrounding the decision.[96] As highlighted in Figure 1, cases involving Chinese firms were especially prominent in 2011, representing nearly 70 percent of all private Rule 10b-5 cases brought against non-U.S firms that year. Notably, as we show below, these firms had market capitalizations that were generally smaller than other firms within our sample, suggesting that recoverable Rule 10b-5 damages would also be lower than in Rule 10b-5 cases against larger firms. At the same time, nearly all of these defendant firms' securities traded exclusively on a U.S. stock exchange, and consequently, their exposure to a Rule 10b-5 lawsuit was unlikely to have been reduced by *Morrison*. These cases thus represent a potentially confounding factor in prior studies of *Morrison* that do not expressly grapple with the fact that foreign firms trading exclusively on U.S. exchanges were largely unaffected by the decision. We return to this topic again in Part II.C.

96. Among cases involving a defendant with a Chinese headquarters, we classify fifty-two as involving reverse mergers.

B. *Morrison* and the Risk of a Rule 10b-5 Lawsuit for Foreign Issuers

We first examine the extent to which *Morrison* changed the risk of facing a Rule 10b-5 class action lawsuit for non-U.S. issuers. As a general matter, *Morrison* should have reduced the viability of a Rule 10b-5 lawsuit by U.S. and foreign investors who acquired their securities outside the United States (i.e., F-squared and F-cubed cases), given that, as discussed previously, the *Morrison* ruling was designed to exclude these investors from the protections of Rule 10b-5. Nonetheless, *Morrison* did not prevent foreign issuers from being sued in connection with transactions that occurred in the United States. Accordingly, the question after *Morrison* was the extent to which foreign purchasers were a meaningful part of Rule 10b-5 litigation prior to *Morrison* or whether *Morrison* was responsive to a possible, but as yet unrealized, risk.

At the same time, *Morrison* purports to be about the likelihood that a foreign issuer would be subject to suit in the United States for federal securities fraud. The data in Columns 3 and 4 of Table 1 reveal no clear decline in the total number of suits against Foreign Listed Firms. However, we lack information on whether the baseline level of fraudulent conduct remained constant over our sample period. Therefore, these overall data leave open the possibility that F-squared and F-cubed cases were common before *Morrison* and simply that more cases would have been brought after 2010, had *Morrison* not been decided.

We hypothesize that *Morrison* should not have affected litigation against foreign issuers whose securities traded exclusively on a U.S. exchange and that its impact should be limited to Foreign Listed Firms.[97] We therefore begin our analysis by examining the exchange listings of the 183 Foreign Listed Firms in our sample. Among these firms, we classify a firm as "Cross-Listed" if shares of its common stock or its ADRs were also listed for trading on either the NYSE, Nasdaq, or NYSE MKT (formally the American Stock Exchange) at any time during the class period alleged in the class action complaint. Among the 183 Foreign Listed Firms, eighty-seven were sued in our pre-*Morrison* sample period, of which seventy-seven (88.5%) met this definition of Cross-Listed. These numbers compare to eighty-four of the ninety-six (87.5%) Foreign Listed Firms sued in our post-*Morrison* sample, which was statistically indistinguishable from the pre-*Morrison* sample ($\chi^2(1) = 0.044$, *ns*). Those issuers that were not Cross-Listed did not have securities listed on a U.S. exchange, and to the extent their securities were held by U.S. investors, they were presumably either purchased abroad, in private transactions, or in the OTC market.[98]

97. Because *Morrison* would not have affected foreign issuers that were listed exclusively in the United States, we exclude these issuers as discussed at *supra* note 16 and text accompanying note 95.

98. Consistent with our central thesis, *Morrison* appears to have had relatively little effect even on these cases, despite the total absence of a U.S. exchange listing for the companies' securities. In particular, *Morrison* was cited as the basis for dismissal in only two cases, both of which were filed prior to the decision. One was an "F-squared" case brought against Swiss Re in 2008 and included in the class all U.S. residents who had acquired any securities of Swiss Re during the class period. The district court dismissed the case in October 2010, citing *Morrison* and noting that "a security that is sold

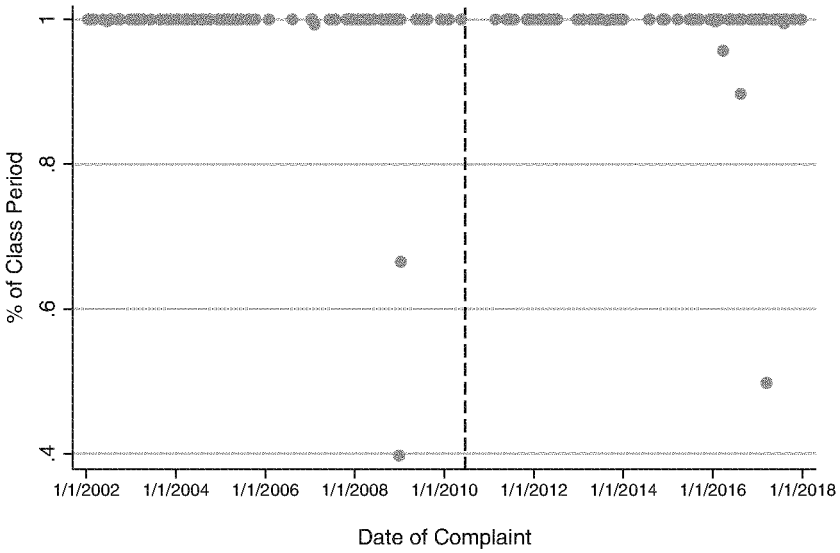
We also examine the time period for which all Cross-Limited defendants had their securities listed on a U.S. exchange. Issuers whose securities are listed for trading on a U.S. exchange can have their shares delisted for any number of reasons, including failure to meet an exchange listing requirement or simply because a firm voluntarily chooses to discontinue its exchange listing. Under *Morrison*, investors who acquire shares of a firm following its delisting are likely to be excluded from any Rule 10b-5 class action. Despite the fact that the vast majority of pre-*Morrison* Foreign Listed Firms had a U.S. exchange listing at some point during the class period, the possibility therefore exists that the securities of some of these defendants were not traded on a U.S. exchange for the duration of the alleged class period.

We formally examine this issue in Figure 2, where we present for each of the Cross-Listed defendants (N = 161) the percentage of the class period during which the issuer had a U.S. exchange listing. To facilitate the analysis of how these percentages relate to the date of *Morrison*, we impose a dashed-vertical line at June 24, 2010, the date the case was decided. As expected, conditional on a defendant having a U.S. exchange listing, cases after *Morrison* reflected the new standard and generally alleged a class period that fully coincided with the period during which the defendant had such a listing. Yet even before *Morrison*, Rule 10b-5 lawsuits almost always alleged a class period that coincided with the period during which the defendant had its securities listed on a U.S. exchange. Indeed, in only two cases was this percentage substantially less than 100%—roughly equivalent to the post-*Morrison* period during which three cases had percentages that were meaningfully less than 100%.

These findings significantly undermine claims that *Morrison* was used "to extinguish" F-cubed and F-squared "claims that had proliferated in the years preceding

on a foreign exchange is insufficient to subject the purchase to the coverage of section 10(b) of the Exchange Act." Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010). The second case was filed against Société Générale in 2008, and the plaintiff class included all holders of Société Générale's securities that were purchased during the class period, including purchasers of its ADRs that traded solely in the United States on the OTC market. In dismissing the case (including all claims by holders of its ADRs), the district court found that because "trade in ADRs is considered to be a 'predominantly foreign securities transaction,'" Rule 10b-5 was inapplicable after *Morrison*. *In re* Société Générale Sec. Litig., No. 18-CR-000274, 2010 WL 3910286, at *4 (S.D.N.Y. Sept. 29, 2010). While the case has commonly been cited as an example of *Morrison*'s reach, the court's conclusion that transactions in ADRs of foreign firms that traded on the OTC market were "foreign transactions" was based on a prior decision decided under the conduct and effects tests that had dismissed a similar set of claims against Fortis, holding that OTC transactions in ADRs are "predominantly foreign securities transaction[s]." *See* Copeland v. Fortis, 685 F. Supp. 2d 498, 502 (S.D.N.Y. 2010). As the *Fortis* case suggests, even under the conduct and effects tests, cases against foreign issuers without a U.S. exchange listing tended to fare poorly. For instance, among the ten cases in our sample filed before *Morrison* against firms lacking a U.S. exchange listing, eight were dismissed (including the two noted previously), and just two settled. Of the twelve cases filed after *Morrison* against firms lacking a U.S. exchange listing, five remained pending at the time of our research, and four had been dismissed. Notably, three of these post-*Morrison* cases settled despite the absence of any U.S. exchange listing, including two involving the ADRs of Tesco PLC and Olympus Corporation, both of which traded in the U.S. OTC market.

Figure 2
Percent of the Class Period Covering a U.S. Exchange Listing



Morrison."[99] Among the 183 defendants in our sample that were Foreign Listed Firms, nearly 90 percent of the cases both before and after *Morrison* were filed against firms that maintained a U.S. exchange listing. Whether or not *Morrison* technically foreclosed investors "from accessing American courts to litigate claims against foreign issuers whose shares do not trade on a U.S. exchange,"[100] our data do not indicate that investors were doing so prior to the *Morrison* decision. Moreover, among these 161 Cross-Listed firms, almost all the complaints alleged that the stock price was affected by fraudulent conduct during the time period when the firm maintained a U.S. exchange listing. As a result, even where a pre-*Morrison* complaint included in the class those investors who acquired their securities in a non-U.S. venue, a plaintiff class could still be named that would have complied with *Morrison*, had the decision applied to these cases.

We also examine the dollar volume of U.S. exchange trading during the alleged class period among the 161 Cross-Listed defendants. There are two reasons to analyze this. First, prior to *Morrison*, critics asserted that foreign issuers were subject to suit despite having a limited presence in the U.S. capital markets.[101] Therefore, it is useful to determine whether *Morrison* had the effect of

99. Conway, *supra* note 11, at 4.

100. David H. Kistenbroker, Joni S. Jacobsen & Angela M. Liu, Developments in Global Securities Litigation 4 (2017), https://www.dechert.com/content/dam/dechert%20files/onpoint/2017/11/White_paper_Global_Securities_Litigation_FINAL_0218.pdf.

101. Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 PLI/Corp. 1243, 1253–54 (2009).

limiting U.S. litigation to foreign issuers that had a larger capital markets footprint in terms of dollar volume or the relative percentage of their securities that were traded in the U.S. markets as opposed to foreign markets.

Second, despite the presence of a U.S. exchange listing, a foreign issuer will face a diminished risk of a Rule 10b-5 private suit if the vast majority of its trading volume occurs in non-U.S. venues where securities purchases will not satisfy *Morrison*. Thus, *Morrison* could have raised the threshold amount of U.S. trading volume before plaintiffs or their counsel would have found it valuable to bring a case. Assessing the level of U.S. exchange trading among pre-*Morrison* defendants thus provides a means to assess the extent to which the *Morrison* rule would have altered the risk of a Rule 10b-5 suit for these firms, notwithstanding the fact that a pre-*Morrison* defendant met the definition of a Cross-Listed Firm.

In Table 2, we present summary statistics of the level of U.S. exchange trading among the 161 Cross-Listed defendants. For each year in which a complaint was filed, the table lists the number of complaints filed during the year, the mean percentage of global trading (by dollar volume) that occurred on U.S. exchanges during the class period, and the mean dollar volume of U.S. exchange trading that occurred in defendants' securities during the class period.

As shown in the table, U.S. exchange trading constituted a nontrivial fraction of trading in these firms' securities both before and after *Morrison*. Among the seventy-seven pre-*Morrison* cases against Cross-Listed defendants, the mean percentage of global trading occurring on U.S. exchanges during the class period was 38.5%, while the mean dollar volume of U.S. exchange trading was nearly $17.5 billion. These figures suggest that, even had *Morrison* applied to these pre-*Morrison* cases, damage awards for U.S. exchange trades could have been substantial in magnitude. However, consistent with claims that *Morrison* might have shifted plaintiffs' counsel to focus on firms having greater levels of U.S. exchange trading, the overall post-*Morrison* mean percentage of U.S. exchange trading and the dollar volume of U.S. exchange trading were higher than during the pre-*Morrison* period. At the same time, visual inspection of the data reveals a significant positive skew in U.S. trading volume during both periods, which cautions against relying on these overall means to make inferences regarding the relative level of U.S. exchange trading before and after the decision's publication.

To assess this issue more accurately, we turn to a time series analysis that permits an assessment of the level of U.S. exchange trading among Cross-Listed firms during our sample period. We present the analysis in Figure 3, which plots for each lawsuit (by date of filing) the natural log of the dollar volume of the firm's shares traded on a U.S. exchange (plotted as hollow circles) as well as the natural log of the total dollar volume traded on the U.S. exchange and its primary non-U.S. venue (plotted as solid circles). Each lawsuit thus has two data points: a plot of its U.S. exchange dollar volume over the class period (a hollow circle) and a plot of its total dollar volume over the class period (a solid circle). As we did before, we include a vertical line reflecting the publication of *Morrison*. Finally, using these data, we estimate a local linear regression line for the level of U.S. exchange trading before and after *Morrison*, which we

Table 2
U.S. Exchange Trading During Class Period

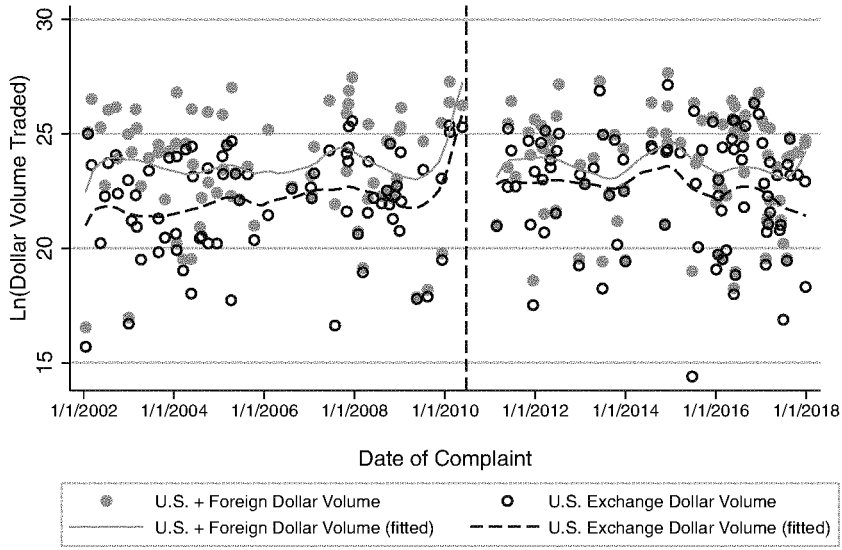
Year of Filing	Number of Actions	Median Percentage of Global Trading (by dollar volume) Occurring on U.S. Exchanges During Class Period	Median Dollar Volume of U.S. Exchange Trading During Class Period
Pre-*Morrison*			
2002	10	34.0%	$15,949,214,351
2003	9	18.9%	$5,670,880,659
2004	13	33.0%	$10,492,435,428
2005	9	57.7%	$18,370,818,888
2006	2	46.9%	$4,326,403,591
2007	11	25.9%	$34,458,485,327
2008	13	55.7%	$7,996,092,252
2009	7	44.9%	$8,822,478,039
2010[102]	3	28.8%	$93,065,419,489
Post-*Morrison*			
2011	9	45.8%	$23,262,726,116
2012	11	52.3%	$27,582,826,053
2013	11	73.6%	$60,035,049,957
2014	7	50.3%	$114,094,202,060
2015	7	41.3%	$56,325,314,735
2016	20	56.5%	$51,426,601,031
2017	19	47.3%	$11,165,601,671
Total Pre-*Morrison*:	77	38.5%	$17,465,819,136
Total Post-*Morrison*:	84	53.2%	$42,937,810,944

plot as a dashed horizontal line on either side of *Morrison*'s publication date. A solid horizontal line reflects the same estimate for a defendant's total dollar volume of trading. To estimate these local linear regression lines, we use the triangle kernel and a bandwidth of 400 days.

Overall, Figure 3 provides little evidence that the composition of pre-*Morrison* lawsuits would have looked substantially different had *Morrison* applied during this time period. As reflected by the gap between the two fitted regression lines, the difference between a firm's total dollar volume of trading and its U.S. dollar volume of trading narrowed slightly after *Morrison*. In theory, such a development might reflect a greater emphasis after *Morrison* on foreign issuers whose

102. All three cases were filed before *Morrison*'s publication.

Figure 3
$ Volume Traded During Class Period: Global Trades vs. U.S. Exchange Trades



equity traded primarily on a U.S. exchange, although the narrowing of this gap was also evident in the months prior to *Morrison*. More important, it is the aggregate dollar volume of U.S. exchange trading, as opposed to the percentage of U.S. exchange trading, that determines potential damages. However, the overall level of U.S. exchange trading (reflected by the dashed horizontal lines) reveals no notable difference before and after *Morrison* was decided.

We test formally whether the total level of U.S. exchange trading differed between pre- and post-*Morrison* defendants by conducting an interrupted time series analysis. For this analysis, our unit of observation is the mean dollar volume of U.S. exchange trading each calendar quarter across the 161 Cross-Listed defendants in our sample. To account for autocorrelation in the time series, our regression model takes the following form:

$$Y_t = \beta_0 + \beta_1\ POST_t + \beta_2 Quarter_t + \beta_3 POST_t \times Quarter_t + \epsilon_t \qquad (1)$$

where Y_t is the natural log of the mean quarterly dollar volume of U.S. exchange trading for quarter t, *POST* is an indicator variable set to one for each calendar quarter following June 2010, *Quarter* is a quarter trend, and *POST x Quarter* is an interaction term. The parameter β_1, our main parameter of interest, estimates the change in the level of U.S. exchange trading that occurs in the period immediately following *Morrison*, while β_2 estimates a quarterly time trend and β_3 estimates any difference in the slope of the time trend following June 2010. Standard

Table 3

	U.S. $ Volume
Post	1.03
	(0.98)
Quarter	0.001
	(0.04)
Post x Quarter	0.0003
	(0.05)
Constant	22.45***
	(0.58)
N	58

Standard errors are in parentheses.
***p < 0.01, **p < 0.05, *p < 0.1

errors are calculated using the Newey-West procedure with one lag based on Cumby-Huizinga tests for autocorrelation.

Table 3 presents the results.

Both the coefficient on *Post* and *Post* x *Quarter* are positive, suggesting that following *Morrison*, Cross-Listed defendants generally had a larger level of trading volume on U.S. exchanges than during the pre-*Morrison* period. These results are consistent with Table 2, which revealed an overall increase in the mean level of U.S. exchange trading. However, once we account for the positive skew in the data (through the log transformation) as well as any time trends, Table 3 indicates that any pre/post differences are statistically insignificant. Overall, these results are consistent with the fitted regression estimates in Figure 3, which revealed no clear evidence that the dollar volume of U.S. exchange trading during the class period was greater following *Morrison*. Assuming the dollar volume of U.S. exchange trading among post-*Morrison* defendants was necessary to incentivize a Rule 10b-5 case after *Morrison*, the data accordingly suggest there would have been sufficient incentive to bring these pre-*Morrison* cases, even if *Morrison* had applied throughout our sample period.

C. How Did Dismissals and Settlements Change Post-*Morrison*?

Even if *Morrison* did not affect the type of transnational cases previously brought under Rule 10b-5, it may have affected case outcomes. For instance, cases after *Morrison* should generally exclude from the plaintiff class any investors who acquired their shares on a non-U.S. venue. Such plaintiffs may have been included as part of a Rule 10b-5 class prior to *Morrison*. As such, it would be unsurprising if overall settlement amounts declined as issuers faced Rule 10b-5 actions that posed lower amounts of prospective damages. At the same time, the evidence presented in Part II.B indicates that plaintiffs' attorneys and investors were already targeting

foreign issuers that had either an exclusive U.S. listing or whose U.S. exchange trading was otherwise significant. To the extent foreign issuers faced a substantially similar Rule 10b-5 risk before and after *Morrison*, it is also possible that both settlement amounts and rates would remain the same. Likewise, while *Morrison* provides a technical means to dismiss a case in which *no* class members acquired any securities on a U.S. exchange, during both the pre- and post-*Morrison* periods, nearly 90 percent of the cases in our sample filed against a Foreign Listed Firm involved a Cross-Listed defendant. This fact suggests that, whether applying the transactional test to cases filed before the decision or to those filed after it, outright dismissals under *Morrison* should be uncommon.

To be sure, the number of observable and unobservable factors that contribute to case outcomes naturally raise a variety of challenges for empirical identification of the effect of *Morrison*. However, we nevertheless present here descriptive statistics of case outcomes to provide an initial window into how Rule 10b-5 dismissals and settlements may have appeared to issuers and investors, acknowledging that our analysis does not seek to identify the precise effect of *Morrison*.

We first present overall dismissal rates for defendant firms within our sample that were Foreign Listed Firms. Among these 183 lawsuits, 141 had been dismissed, settled, or received a favorable judgment by the time of our data collection. Table 4 presents the overall distribution between cases that were dismissed and those that were settled or received a favorable judgment. Cases are also divided according to whether they were filed before or after *Morrison*. Overall, approximately 49 percent of the pre-*Morrison* cases against Foreign Listed Firms had been dismissed by the time we collected our sample, compared to 68 percent of the post-*Morrison* cases, a difference that is statistically significant at the 5 percent threshold ($\chi^2(1) = 4.68$, $p = 0.03$). It is important to note, however, that of the seventy-three lawsuits that remained pending at the time of our data collection, sixty-five (90 percent) were filed after 2014. To the extent that weaker cases are dismissed earlier than stronger cases, the post-*Morrison* dismissal rate may ultimately reflect a lower rate than we currently observe.

To explore whether these differential dismissal rates might be attributable to *Morrison*, we examined all motions made by the defendant firms either to dismiss the case or to limit the class of investors. Dismissals in which a court cited *Morrison* were unusual. Among the thirty-eight post-*Morrison* cases that were dismissed, *Morrison* was cited in just three cases (8 percent), compared with six of the forty-two dismissals (14 percent) of cases that were commenced during the pre-*Morrison* period. The lower incidence of dismissals citing *Morrison* within the post-*Morrison* cases is, in many respects, to be expected, given that plaintiffs' counsel would be aware of the case and should accordingly bring cases that would satisfy its transactional test. Likewise, the higher incidence of *Morrison*-related dismissals of cases filed before *Morrison* was decided is consistent with courts' application of *Morrison* retroactively to cases that were presumably structured to satisfy the more expansive conduct and effects tests. In any event, the higher dismissal rate among post-*Morrison* cases does not appear to reflect the failure of these cases to include at least some investors who could satisfy its transactional test.

Table 4
Settlement Rates—Firms with a Non-U.S. Listing

	Number Dismissed	Number Settlements/Judgments
Pre-*Morrison*	42 (49%)	43 (51%)
Post-*Morrison*	38 (68%)	18 (32%)

The *Morrison* decision does appear to have been used to dismiss class members who could not demonstrate that they acquired their securities on a U.S. exchange. This was particularly true for pre-*Morrison* cases involving a global class of investors, many of whom purchased securities in the defendant firm in non-U.S. venues. Following *Morrison*, such cases could have been subject to a partial motion to dismiss that, if granted, would limit the plaintiff class to investors who purchased their securities in the United States. Among the eighty-seven pre-*Morrison* cases against a Foreign Listed Firm, we observe fourteen motions to limit the class on this basis. All were granted by the court, citing *Morrison*. This compares to just three such motions among the ninety-six cases against a Foreign Listed Firm in our post-*Morrison* sample, no doubt reflecting efforts by plaintiffs' counsel to define an investor class that satisfied *Morrison*.

Used in this fashion, *Morrison* could accordingly affect settlement outcomes even for those cases that survived a motion to dismiss. As noted previously, the *Vivendi* case presented a particularly striking example of this scenario. The lawsuit, which had the potential to be the largest securities fraud class action ever, was partially dismissed after the *Morrison* decision, a decision that limited the class to holders of U.S. ADRs acquired on the NYSE. However, less than 10 percent of Vivendi's global trading volume was on the U.S. ADR market. Although original damages in *Vivendi* were estimated at $9 billion, following dismissal of the investors who acquired Vivendi securities outside the United States, the case settled for just $76 million in total.

It is important to note that the success of these motions after *Morrison* does not necessarily signal a more hostile environment for class action suits against foreign firms. As noted previously, global class actions were relatively rare before *Morrison*, and courts frequently dismissed claims based on foreign transactions even under the prior conduct and effects tests. For example, Hannah Buxbaum studied a ten-year sample of multinational class actions between 1996 and 2005 and found that fewer than 40 percent of the cases encompassed claims based on foreign transactions.[103] Moreover, of those cases, only a third were allowed to proceed with a class that included any claims based on non-U.S. market trans-

103. Buxbaum, *supra* note 44, at 39.

actions.[104] These findings underscore a more general observation that, compared to *Morrison*'s transactional test, the judicial discretion created by the conduct and effects tests gave defense counsel broad scope for challenging the composition of an investor class on the basis that the court lacked subject matter jurisdiction over non-U.S. defendants.[105] Indeed among the eighty-seven pre-*Morrison* cases against a Foreign Listed Firm, courts granted motions to limit the class in eighteen under the conduct and effects tests. (These eighteen motions were in addition to the fourteen motions noted above where the court cited *Morrison* in limiting the class of a pre-*Morrison* case.) Thus, even before *Morrison*, the conduct and effects tests provided defense counsel with an opportunity to limit the size of a global class action.

To examine more closely the extent to which *Morrison* may have been associated with a secular decline in settlement amounts, we analyze settlement proceeds for all lawsuits within our sample for which we were able to obtain data. In Figure 4, we present a scatter plot of the natural log of settlements paid (in thousands of dollars) per settled case, sorted by the date of the complaint. As with Figure 3, we supplement this scatter plot with local linear regression lines to highlight any pre-*Morrison* and post-*Morrison* trends.[106] Consistent with our prior analyses, we limit settlements in Figure 4 to those against Foreign Listed Firms.

As shown in Figure 4, aggregate settlement payments varied widely across cases in both pre- and post-*Morrison* periods. Prior to *Morrison*, settlement proceeds (in 2018 dollars) ranged from a low of $749,000 in a 2002 suit commenced against Synsorb Biotech, Inc. to a high of $1.4 billion in a 2003 suit against Royal Ahold Corp. The years after *Morrison* witnessed settlement payments that were similarly varied. Overall, settlement payments in our post-*Morrison* sample ranged from a low of approximately $1 million paid by the Liberty Silver Corp. to a high of $3 billion paid by Petrobras Brasileiro S.A. The median settlement payment in the pre-*Morrison* sample was $13.25 million, compared to a statistically indistinguishably different amount of $15.16 million in the post-*Morrison* sample.[107] Visual inspection of Figure 4 likewise reveals no evident change in settlement proceeds following *Morrison*.

The absence of any significant difference in overall settlement amounts for pre- and post-*Morrison* cases distinguishes our findings from those of Guseva, who found a statistically significant decline in settlement proceeds following *Morrison*. We attribute this difference to the fact that our analyses have focused on Foreign Listed Firms, given that these firms were most directly affected by *Morrison*. In contrast, the Guseva sample also includes firms that, while headquartered overseas, have their securities solely listed on a U.S. exchange. This

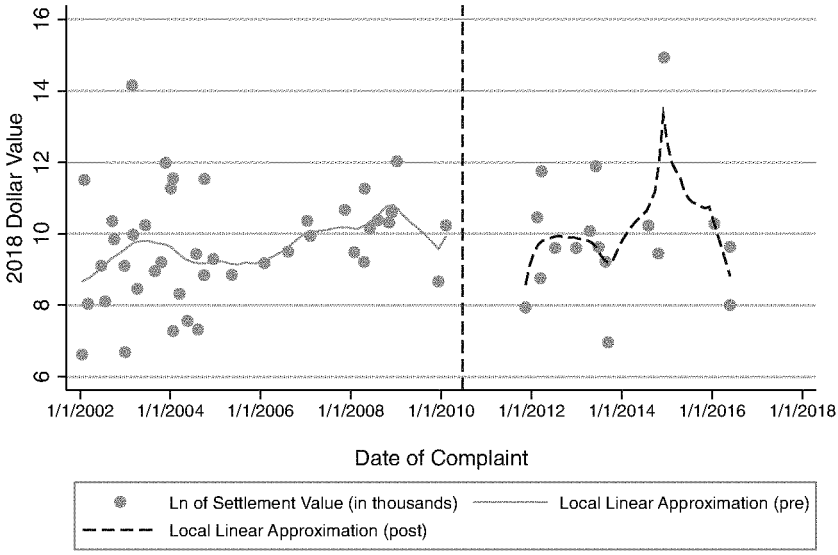
104. *Id.* at 40.

105. *See, e.g.*, *In re* China Life Sec. Litig., No. 04-CV-0212 (TPG) 2008 WL 4066919, at *9 (S.D.N.Y. Sept. 3, 2008) (finding subject matter jurisdiction under the "effects" test for U.S. residents acquiring shares of China Life stock on the Hong Kong Stock Exchange but declining to find subject matter jurisdiction under either the conduct or effects test for non-U.S. purchasers).

106. In estimating these models, we use the same regression specification used in Figure 3.

107. A Wilcoxon rank-sum test of medians yields a test statistic of -0.368, $p = 0.7127$.

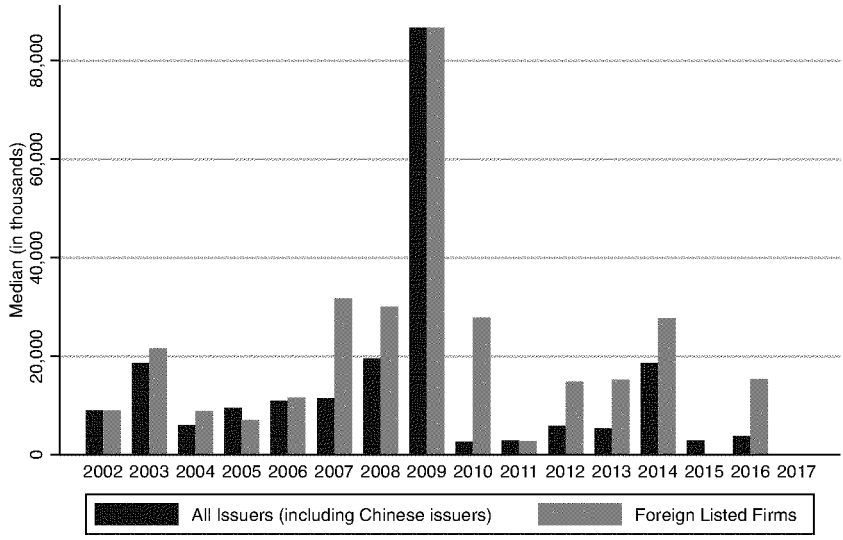
Figure 4
Among Settled Cases, Amount of Settlement Paid



selection choice, however, has the potential to confound a post-*Morrison* analysis of settlement proceeds for several reasons. First, as noted previously, the years following 2005 witnessed a steady increase in the number of Rule 10b-5 actions against firms headquartered in China, with these suits constituting nearly 70 percent of Rule 10b-5 lawsuits against foreign firms in 2011. Second, these firms generally traded exclusively on U.S. exchanges, meaning that investors in these cases would satisfy *Morrison*. Consistent with this claim, none of the ninety-four post-*Morrison* cases in our sample involving a defendant headquartered in China was subject to either a motion to limit the class or a motion to dismiss based on *Morrison*. Finally, trading volume in these firms was generally low relative to Foreign Listed Firms, given that they generally had lower market capitalizations. For instance, the mean U.S. dollar volume of trading among these firms across the sample period was approximately $12.8 million, compared with $24.7 million for Foreign Listed Firms. As a result, settlement amounts in these cases should be expected to be lower, causing their large representation within the post-*Morrison* sample to drive down mean settlement proceeds following the decision.

To highlight the potential for these firms to bias the analysis of post-*Morrison* settlement proceeds, we present in Figure 5 the median settlement value by year of complaint, both for the full sample of defendant issuers (including all Chinese issuers) as well as for all issuers that met our definition of a Foreign Listed Firm. As shown in the figure, median settlement amounts for the full sample spiked

Figure 5
Median Settlement Amounts by Year of Complaint



sharply in 2009[108] and declined considerably for cases filed between 2010–16. However, for Rule 10b-5 suits involving Foreign Listed Firms, median settlement values for cases filed between 2010 and 2014 generally resembled those for cases filed between 2004 and 2008, with overall median settlement amounts showing no statistically significant difference between the pre- and post-*Morrison* periods. By contrast, median settlement amounts for all firms in the sample decreased from $11 million for cases filed prior to *Morrison* to $3.2 million for those filed after it, with a Wilcoxon rank-sum test rejecting the hypothesis of equal medians ($z = 3.301$, $p < .01$). Overall, these results suggest that Guseva's finding that settlement amounts declined following *Morrison* may have been driven by the inclusion in her sample of the large number of Rule 10b-5 cases commenced against China-based issuers in the period following *Morrison*.

D. *Morrison* and Attorneys' Fees

Finally, we collect, where possible, data concerning the payment of fees to class counsel to identify any general payment patterns for cases within our sample. In total, we find data concerning fee awards in 149 of our cases, of which

108. The spike in median settlement amounts in 2009 reflects the fact that 2009 cases resulted in just two settlements, one of which was a $150 million settlement in the Satyam Computer Services litigation.

fifty-five were filed against Foreign Listed Firms. As with our analysis of settlement data, we present here only descriptive statistics of fee awards during our sample period.

In Figure 6, we present a scatter plot of fees paid per settled case, based on the date of the complaint. As in Figure 3, we present dollar values (in thousands of dollars) in logs. Consistent with our prior analyses, we limit our analysis of fees to those involving Foreign Listed Firms. As with Figure 3, we supplement this scatter plot with local linear regression lines to highlight any pre- and post-*Morrison* trends, using the same specification discussed there.

In general, the data regarding fee awards generally track that of settlement amounts: Fee awards during our sample period are highly varied by case, with the local linear estimates showing no evidence of an increase or decrease in fees following *Morrison*. Not surprisingly, the large settlements related to the Royal Ahold NV litigation (commenced in February 2003) and the Petroleo Brasileiro litigation (commenced in December 2014) resulted in unusually large fee awards of nearly $130 million and $285 million, respectively, to class counsel.

Following our analysis of settlement amounts, we also separately assess median fee awards by year, calculating medians separately for Foreign Listed Firms, as well as for all non-U.S. defendants, including those that trade exclusively in a U.S. venue. Figure 7 presents the results.

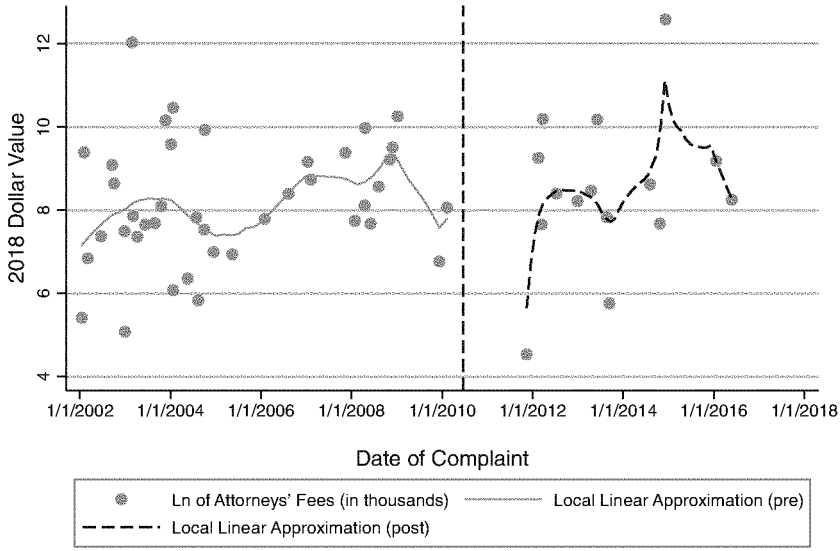
Again, the results resemble those presented for settlement amounts in the sample. Aggregating all cases, median fees generally declined in the years following *Morrison*. Specifically, among all lawsuits (including those filed against Chinese issuers), median fee awards in our sample of cases decreased from $2.3 million for cases filed prior to *Morrison* to $882,000 for those filed after it (Wilcoxon rank-sum test: $z = 2.58$, $p < .01$). This decline, however, was driven primarily by lower fee awards in cases filed against firms headquartered in China. For instance, among cases filed after *Morrison*, the median fee award for cases filed against firms headquartered in China was $570,000. Overall, focused attention on Foreign Listed Firms reveals that the median fee award actually increased from $2.8 million for cases filed prior to *Morrison* to $4.4 million for cases filed after it, although the difference was statistically insignificant (Wilcoxon rank-sum test: $z = -0.794$, *ns*). As with our findings regarding settlement amounts, these results provide little evidence to suggest that *Morrison* is associated with a change in fees awarded to class counsel. Our findings further underscore the need to account for the large number of Chinese defendant issuers in Rule 10b-5 cases in the years following *Morrison*.

III. Implications

A. *Morrison*'s True Effect

Our empirical analysis shows that *Morrison* did not dramatically change litigation against foreign issuers from the pre-*Morrison* period. The same types of foreign issuers were sued both before and after *Morrison* with roughly the same frequency. Nor did *Morrison* appear to change the overall results in those cases—

Figure 6
Attorneys' Fees Awarded Among Settled Cases

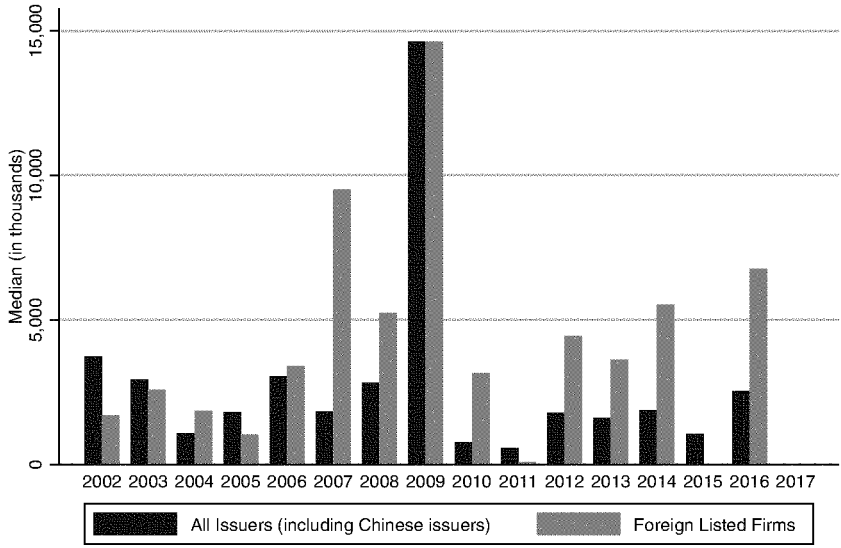


although post-*Morrison* foreign plaintiffs were more systematically excluded from plaintiff classes, settlement rates and amounts remained largely unchanged, as did attorneys' fee awards.[109] In sum, *Morrison* did not transform securities fraud litigation as it existed in 2010.[110]

109. Our data on both filings and fee awards suggest that *Morrison* did not affect the incentives for plaintiffs' lawyers to bring litigation against foreign issuers. Instead, plaintiffs' law firms continued their old practices as *Morrison* walled off a section of litigation they had not been targeting beforehand. In Appendix A, we examine the composition of plaintiffs' firms that litigated cases involving foreign issuers both pre- and post-*Morrison*. That composition does not appear to change significantly with four firms remaining in the top ten in both periods. For example, Robbins Geller maintained a high-volume securities fraud practice against foreign issuers post-*Morrison* with twelve cases filed in the pre-*Morrison* period and ten cases filed in the post-*Morrison* period. There are also a number of smaller firms in these tables, highlighting that this is a diverse practice with likely low barriers to entry. We note that Milberg Weiss Bershad & Schulman later changed its name to Milberg Weiss and disappeared from the top-five rankings post-*Morrison*. Milberg was the lead plaintiffs' lawyers in the securities fraud action against Vivendi. Milberg's practice was affected by the criminal convictions of its founders Melvyn Weiss and William Lerach. *See* Jonathan D. Glater, *Class-Action Lawyer Gets 30 Months in Prison*, N.Y. TIMES (June 3, 2008), https://www.nytimes.com/2008/06/03/business/03legal.html (describing Weiss's and Lerach's convictions).

110. We do not examine here the effect of *Morrison* on securities litigation involving debt of non-U.S. issuers. This issue was raised post-*Morrison* in the litigation over Petrobras. Petrobras's ADRs were traded on the NYSE and the lead plaintiff was a British pension fund, Universities Superannuation Fund. The NYSE was also the primary trading market for Petrobras's stock, so the trading volume was significant. However, the complaint was also brought on behalf of holders of Petrobras bonds and notes. These were not listed but were traded OTC in the United States and elsewhere. The plaintiff argued that because Petrobras bonds and notes were cleared through the Depository

Figure 7
Median Fee Award by Year of Complaint
(in 2018 Dollars)



Similarly, we find no evidence that *Morrison* changed the type of foreign issuer that has historically been subject to Rule 10b-5 litigation.[111] As our data show, both before and after *Morrison*, almost every foreign issuer that was sued had a U.S. exchange listing. Accordingly, the *Morrison* decision did not appear to reduce the prospect that a foreign issuer might be sued based on its exposure to the U.S. market through a secondary listing.

As our data show, prior to *Morrison*, plaintiffs were not using securities class actions to target issuers without a connection to the U.S. capital markets, presumably because the conduct and effects tests were generally effective at weeding out those cases and leading to outcomes similar to those after *Morrison*. Indeed, *Morrison* was itself dismissed under the old Second Circuit test. Among our pre-

Trust Co. ("DTC") 'which operates solely in the United States', such clearing was sufficient evidence of domesticity to satisfy the statute. For class certification purposes, the lower court refused to find this to satisfy the *Morrison* test, reasoning that "the entire thrust of Morrison and its progeny would be rendered negatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws." *In re* Petrobras Sec. Litig., 150 F. Supp. 3d 337, 342 (S.D.N.Y. 2015). The Second Circuit agreed. *See In re* Petrobras Sec. Litig., 862 F.3d 250, 272 n.24 (2d Cir. 2017). The Second Circuit also expressed concerns about the individualized nature of the *Morrison* inquiry concerning the domesticity of purchases of bonds and notes. *Id.*

111. *See, e.g.*, Alex Reed, *But I'm an American! A Text-Based Rationale for Dismissing F-Squared Securities Fraud Claims After* Morrison v. National Australia Bank, 14 U. PA. J. BUS. L. 515 (2012) (analyzing the *Morrison*'s effect on F-squared cases).

Morrison cases, there were nineteen motions to limit a class under this test, eighteen of which were granted.

The conclusion that *Morrison* did not critically change existing practice is, however, only part of the story. *Morrison* drastically curtailed the potential expansion of U.S. securities litigation by foreclosing the threatened global class action.[112] In particular, *Morrison* prevented plaintiffs from using the existence of a U.S. listing to bring a class action on behalf of a worldwide plaintiff class, a class that might substantially exceed the issuer's presence in the U.S. capital markets. *Vivendi* was the exemplar for this potential expansion, and to the extent that cases like *Vivendi* were the motivation for *Morrison*, *Morrison* was a success.

Putting *Morrison*'s true effect into context in part explains prior empirical tests of *Morrison*. Bartlett found that institutional investors did not initially adjust their conduct to *Morrison*, instead preferring to continue to invest abroad.[113] When the non-impact of *Morrison* is highlighted, Bartlett's results dovetail with the fact that *Morrison* appears to be largely consistent with past practices followed by the courts that had used the conduct and effects tests.[114] Instead, it appears that institutional investors may not have valued securities fraud protections both pre- and post-*Morrison*, instead preferring the lower costs and greater liquidity available by purchasing ordinary shares on the issuers' primary exchange. Moreover, to the extent that other studies found that *Morrison* had a price impact, this impact would appear to be a consequence of a reduced possibility that these firms would be subject to Rule 10b-5 litigation in the future. This is consistent with the findings of LPSL, who determined that U.S.-listed foreign firms experienced insignificant or even positive abnormal returns in both markets, particularly firms having most of their equity traded outside the United States.[115]

Notably, although *Morrison*'s effect on litigation was limited, it was significant. *Morrison* eliminated the global class action. Following *Morrison*, there were fourteen pre-*Morrison* cases that had a portion of their classes dismissed based on the transactional test. This included significant judgments such as the $9 billion Vivendi class action and class actions involving BP Plc, Sanofi-Aventis, and UBS.[116] These prior cases had been allowed to proceed under the old Second Circuit conduct and effects tests or variations thereof in other circuits or had yet to be subject to a motion to limit the class brought under the old test. Thus, *Morrison* reduced

112. *See, e.g.*, Cravath, *supra* note 70 ("By clearly barring "f-cubed" lawsuits, *Morrison* has cut short a growing trend in recent years in which plaintiffs' lawyers have attempted to use the class action mechanism to seek large recoveries on behalf of foreign plaintiffs with no connection to the United States.").

113. Bartlett, *supra* note 34, at 186–87.

114. *See supra* notes 104–06 and accompanying text. Bartlett's results are also consistent with the argument by some commentators that securities fraud litigation provides limited value to diversified institutional investors that are equally likely to lose as to gain from a successful securities fraud suit. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 304 (2007) (arguing that securities fraud litigation primarily transfers wealth among diversified investors).

115. Licht et al., *supra* note 86, at 330.

116. Conway, *supra* note 11; Edward Greene & Arpan Patel, *Consequences of* Morrison v. NAB, *Securities Litigation and Beyond*, 11 Cap. Mkt. J. 145 (2016).

the potential scope of litigation against Foreign Listed Firms. Recognizing this can help us understand *Morrison*'s true significance.

B. Toward a Better Understanding of *Morrison*

1. *Morrison*'s Place in Balancing U.S. Securities Regulation of Foreign Issuers

By requiring that plaintiffs in a suit against a Foreign Listed Firm trade their securities in the U.S. markets, *Morrison* has the effect of tying a foreign issuer's liability exposure in private litigation to the extent of its capital market presence in the United States. Under *Morrison*, if an issuer engages in securities fraud, its liability for damages under U.S. law is directly proportional to the number of shares traded in the U.S. markets. Foreign issuers that raise capital in the U.S. markets or facilitate broad secondary trading of their securities on U.S. exchanges will have greater liability exposure under Rule 10b-5.

This proportional exposure is consistent with the delicate balance that Congress and the SEC have drawn to regulate foreign issuers that participate in the U.S. capital markets while respecting the sovereign interests of their home regulators. Prior to *Morrison*, the SEC adopted several regulatory boundaries that distinguished between foreign and domestic issuers. The SEC's rules were designed to attract foreign issuers to the U.S. capital markets while limiting the regulatory burden imposed on those issuers by U.S. law.

Starting in the 1980s, the SEC adopted a rule of substituted compliance for foreign issuers whose securities traded primarily outside the United States.[117] These issuers, known as foreign private issuers, are subject to the law of their home country for the bulk of their regulation.[118] Accordingly, foreign private issuers are exempt from the obligation to file quarterly reports and proxy statements, need not comply with section 16 reporting requirements,[119] and do not need to prepare financial statements in accordance with U.S. Generally Accepted Accounting Principles ("GAAP").[120] The rule of substituted compliance allows issuers in most cases to substitute compliance with the disclosure obligations imposed by their home jurisdictions rather than comply with U.S. disclosure requirements. For periodic reporting, the SEC explicitly adopted a rule that an issuer need only furnish, rather than file, certain reports filed with home

117. *See generally* Howell E. Jackson, Jr., *Substituted Compliance: The Emergence, Challenges, and Evolution of a New Regulatory Paradigm*, 1 J. Fin. Reg. 169, 171–75 (2015) (tracing the history of the SEC's approach and implementation of a substituted compliance regime).

118. See *supra* note 13 for the definition of "foreign private issuer."

119. *See* 17 C.F.R. § 240.3a12-3 (2018) ("Exemption from sections 14(a), 14(b), 14(c), 14(f) and 16 for securities of certain foreign issuers.").

120. U.S. Sec. & Exch. Comm'n, Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Release Nos. 33-8879; 34-57026; International Series Release No. 1306; File No. S7-13-07 (Eff. Mar. 4, 2008) (adopting rules to accept from foreign private issuers in their filings with the SEC financial statements prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board without reconciliation to U.S. GAAP).

country regulators (including the home country exchange), reducing the scope of liability for these reports.[121]

The result was the creation of a parallel regime for foreign private issuers that was significantly less regulated.[122] The justification was in part the reality of the situation—foreign issuers did not prepare quarterly reports in many jurisdictions or have U.S. GAAP-compliant financials—but was also motivated by competitive reasons.[123] The SEC did not want to overburden foreign companies to the extent that they would no longer desire to list in the United States.[124] The compromise solution was substituted compliance: the notion that it was better to let the home country regulator address disclosure issues for foreign issuers.[125]

The SEC also adopted several rules that, when used by foreign issuers, provided them with a limited regulatory burden.[126] Regulation S provides safe harbor exemptive relief under section 5 of the Securities Act of 1933 for foreign firms that do not list their securities in the United States, enumerating the circumstances under which those firms will not be subject to the U.S. registration requirements when they raise capital, despite the global nature of the securities markets.[127] The SEC went even further with Rule 144A, which allows foreign issuers to issue securities to institutional investors in the United States without having to list them on a U.S. exchange or comply with the registration requirements and allows those institutions to resell the securities freely to other institutional investors.[128] Rule 144A is understood as creating a sophisticated institutional market for players

121. *See* U.S. Sec. & Exch. Comm'n, Form 6-K (last updated Aug. 30, 2019), https://www.sec.gov/about/forms/form6-k.pdf (stating that forms furnished under Form 6-K "shall not be deemed to be 'filed' for the purposes of Section 18 of the Act or otherwise subject to the liabilities of that section."); *see also* 17 *C.F.R.* § 240.13a-13 (2018) (exemption from Form 10-Q quarterly reporting requirements); *id.* §§ 243.100–.103 (providing exemption from Regulation FD).

122. *See generally* U.S. Secs. & Exch. Comm'n, Accessing the U.S. Capital Markets—A Brief Overview for Foreign Private Issuers (Feb. 13, 2013), https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml.

123. *See generally* Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. Rev. 89, 130–33 (2007) (detailing the lower regulatory regime for foreign private issuers adopted by the SEC); Edward F. Greene et al., U.S. Regulation of the International Securities and Derivatives Markets (7th ed. 2004) (delineating the regulation applicable to global issuers who raise capital in the U.S. markets).

124. *See Accessing the U.S. Capital Markets, supra* note 13 ("The Commission has adopted specific rules applicable to foreign private issuers that are designed to recognize international and home jurisdiction standards.").

125. *Id.*; *see also* Jackson, *supra* note 117.

126. U.S. issuers can also use these rules.

127. For a description of Regulation S, see Offshore Offers and Sales, Securities Act Release No. 6863, [1989–90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524 (Apr. 24, 1990). Regulation S also exempts from U.S. registration requirements securities issued by U.S. firms provided that the securities are issued to non-U.S. investors and specific precautions are taken to minimize the risk that the securities flow back into the U.S. capital markets.

128. 17 C.F.R. § 230.144A (2018); *see also* Resale of Restricted Securities, Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, Securities Act Release No. 33-6862, [1989–90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523, at 80,641–42 (Apr. 23, 1990).

that can fend for themselves both with respect to the disclosure they seek from an issuer and the extent to which they require additional regulatory protection.

These regulations incorporate several key regulatory principles. First, U.S. regulation should not interfere with the policies of a foreign issuer's primary regulator. Second, the manner and scope of U.S. regulation should be based on the extent to which the foreign issuer participates in the U.S. capital markets. Third, the need for regulatory protection is greater with respect to investors unable to fend for themselves.

Morrison takes an analogous approach. When issuers use the U.S. capital markets by selling or allowing their securities to be traded in the United States, *Morrison* dictates that investors have the benefit of U.S. law, similar to the SEC's rules regarding foreign private issuers. At the same time, *Morrison* provides a light touch—extending that protection only to U.S. transactions. The scope of liability post-*Morrison* also has the virtue of aligning with investment patterns. Retail investors—those who need the most protection—generally do not invest abroad but instead purchase securities of foreign issuers if and when those securities are sold in the U.S. markets directly or through ADRs. Meanwhile, institutional investors have the sophistication necessary to make a choice between continuing their practice of investing abroad in cases in which they do not require the direct protection of Rule 10b-5 or incurring the higher cost of trading on a U.S. exchange.

To a degree, the rule adopted in *Morrison* is even more nuanced than the general system of substituted compliance; a Foreign Listed Firm's liability exposure is directly proportional to its use of the U.S. capital markets. Post-*Morrison*, a number of lower court cases have considered the issuer's purposeful use of the U.S. markets as a key factor in determining whether a Rule 10b-5 case could be maintained. For example, in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Products Liability Litigation*,[129] the court concluded that Volkswagen's level one ADRs, which were not listed on an exchange but were traded in the OTC market, nonetheless met the definition of domestic securities transactions under *Morrison*. In so doing, the court emphasized the fact that "Volkswagen took affirmative steps to make its securities available to investors here in the United States."[130] The court in *Vancouver Alumni Asset Holdings Inc. v. Daimler AG*[131] similarly found that Daimler sought to avail itself of the American securities market where it "actively and voluntarily contracted with an American depositary bank to sell ADRs to American investors."[132]

The theory that an issuer's exposure to private liability should be proportional to the market impact of its conduct is not limited to foreign issuers. Rather, the concept has its roots in the express private liability provisions of the Securities Act of 1933—sections 11 and 12. Both provisions distinguish the impact of fraudulent misrepresentations on the direct participants in an offering from

129. No. 3:15-md-02672, 2017 WL 66281 (N.D. Cal. Jan. 4, 2017).
130. *Id.* at *6.
131. CV No. 16-02942 SSO (KSx), 2017 WL 2378369 (C.D. Cal. May 31, 2017).
132. *Id.* at *8.

the effect of those statements on the market as a whole. In both cases, only direct participants have standing to bring a claim. Section 11 imposes this limitation through the tracing requirement, which courts have interpreted to require a plaintiff to demonstrate that the securities he or she purchased can be traced directly to the fraudulent offering.[133] Section 12 does so by requiring privity—an investor can only recover from his or her direct seller and those who actively solicited the investment.[134] In addition, the 1933 Act expressly limits the exposure of underwriting participants by capping damages at the offering price.[135] As the courts have recognized, Congress' purpose in establishing these limits was to maintain proportionality between a defendant's potential liability and its role in the offering.[136]

Maintaining proportionality between liability exposure and market impact allows offering participants to evaluate the potential consequences of their behavior, to engage in an informed cost-benefit analysis about the level of care that they devote to ensuring the integrity of their disclosures, and to price their liability risk accurately. These same considerations are applicable to a foreign issuer's decision to cross-list its securities or to facilitate a sponsored or unsponsored ADR program.[137] Thus, *Morrison* enables an issuer to weigh the value from listing in the U.S. markets in terms of access to capital, increased liquidity, and potential quality signaling, against the cost of liability exposure. It also allows the issuer to avoid extensive liability exposure based on a minimal market presence.

This understanding of *Morrison* bears on an issue that has received inconsistent treatment from the courts in both the pre- and post-*Morrison* periods: the ability of purchasers of a foreign firm's ADRs that trade only in the U.S. OTC market to bring antifraud claims. In contrast to cases such as *Volkswagen* and *Daimler*, cases like *Fortis* (a pre-*Morrison* case) and *Société Générale* (a post-*Morrison* case) dismissed claims made by holders of these ADRs on the basis

133. *See, e.g.*, *In re* Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1107 (9th Cir. 2013) (finding that the tracing requirement is the condition Congress has imposed for granting access to the "relaxed liability requirement [section] 11 affords"); Krim v. PCOrder.com, 402 F.3d 489, 497 (5th Cir. 2005) ("Aftermarket purchasers seeking standing must demonstrate the ability to 'trace' their shares to the faulty registration.").

134. *See* Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 Wash. L. Rev. 429, 440 (2000) ("The privity requirement limits access to section 12(a)(2)'s remedy and has allowed some courts to find that privity alone limits access to the remedy."). Some commentators have argued that courts have eroded the privity requirement. *See, e.g.*, Bryan M. Schneider, *Section 12 of the Securities Act of 1933: The Privity Requirement in the Contemporary Securities Law Perspective*, 51 Tenn. L. Rev. 235 (1984) (arguing the courts have expanded the scope of section 12(a)(2) liability beyond what the statute should cover).

135. *See* Securities Act, § 11(g), 15 U.S.C. § 77 (2018) ("In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.").

136. *See, e.g.*, Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967) (observing also that a shareholder's recovery could be diluted if the scope of potential plaintiffs was expanded).

137. Although a depository bank may formally create an unsponsored ADR program without the consent of the issuer, it will customarily obtain a letter of non-objection from the issuer before establishing such a program. *See, e.g.*, *Frequency Asked Questions*, Deutsche Bank Depository Receipt Servs., https://www.adr.db.com/drwebrebrand/resources/faqs (last visited July 18, 2019) ("Typically, the Depositary will request a letter of non-objection from the issuer before establishing the programme.").

that they were "predominantly foreign."[138] The proportionality interpretation of *Morrison* that we advance here suggests that such a cavalier assessment of whether Rule 10b-5 applies to these investors misses the key question courts should be asking. The issue in these cases is not whether an ADR transaction is predominantly foreign or domestic but whether the transactions at issue involve trading in the U.S. capital markets.[139] To the extent that investors have traded an issuer's securities in the U.S. capital markets, the antifraud provisions of section 10(b) should apply to those U.S. transactions, thus making the issuer's potential liability for fraudulent conduct proportionate to its U.S. market impact.[140]

2. *Morrison* and the Extraterritorial Application of Federal Statutes

In a series of cases after *Morrison* that addresses jurisdictional issues, the Supreme Court has drawn bright, foreclosing lines to prevent U.S. exercise of jurisdiction abroad. The cases present issues of comity and sovereignty as well as judicial resources. But they were all decided on a more doctrinal point, that the United States, as a matter of international norms and laws, should not exercise jurisdiction over foreign matters without express congressional intent.

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138. *See* Copeland v. Fortis, 685 F. Supp. 2d 498, 506 (S.D.N.Y. 2010) ("Trade in ADRs is considered to be a 'predominantly foreign securities transaction.'"); *In re* Société Générale Sec. Litig., No. 08-CV-02495 2010 WL 3910286, at *4 (S.D.N.Y. Sept. 29, 2010) ("Trade in SocGen ADRs is a 'predominantly foreign securities transaction.'").

139. ADRs can be sponsored or unsponsored by the issuer. *See supra* note 30; *see also generally* Peter Iliev et al., *Uninvited U.S. Investors? Economic Consequences of Involuntary Cross-Listings*, 52 J. Acct. Res. 473 (2014) (describing the perception of liability in case of unsponsored ADRs).

140. Note that this approach is broadly consistent with *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018), *cert. denied*, 2019 WL 2570670 (U.S. June 24, 2019). In *Stoyas*, the Ninth Circuit held that purchases of unsponsored ADRs on the OTC market, while not transactions on an exchange, could still constitute "domestic transactions in other securities," such that the Securities Exchange Act was applicable. *See id.* at 949 ("[A]n amended complaint could almost certainly allege sufficient facts to establish that AIPTF purchased its Toshiba ADRs in a domestic transaction."). The U.S. Supreme Court subsequently denied a petition for certiorari seeking to review the holding in *Stoyas* that the second prong of *Morrison* could apply even where "foreign elements" dominated. Toshiba Corp. v. Auto. Indus. Pension, 2019 WL 2570670 (U.S. June 24, 2019). The Ninth Circuit decision was arguably at odds with a decision by the U.S. Court of Appeals for the Second Circuit, which had held that even a "domestic" securities transaction fell outside the scope of section 10(b) if the alleged fraud was "so predominantly foreign as to be impermissibly extraterritorial." *See* Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 216 (2d Cir. 2014). In rejecting the *Parkcentral* approach, the Ninth Circuit underscored *Morrison*'s focus on ensuring that section 10(b) applied to "domestic" transactions regardless of where the alleged fraud may have occurred. *See Stovas*, 896 F.3d at 950 (stating that *Parkcentral* "is contrary to Section 10(b) and *Morrison* itself" because it "disregard[s] section 10(b)'s text: the domestic 'purchase or sale of any security registered on a national securities exchange or any security not so registered'"). The Ninth Circuit also noted that while section 10(b) might apply to the purchase of unsponsored ADRs, it remained to be seen whether the plaintiffs could establish that the alleged fraud was "in connection with" the ADR transactions. Noting that the "in connection with" concept requires a showing that the alleged fraud was "done to induce the purchase at issue," *id.* at 951, the court required that the plaintiffs on remand plead Toshiba's involvement in the establishment of the unsponsored ADR program. In this regard, the holding ensured that even with unsponsored ADR programs, an issuer can evaluate the potential consequences of its behavior under section 10(b).

The *Morrison* decision rests at the core of these cases. Subsequent courts have cited *Morrison* as the "leading case on extraterritoriality."[141] As the Supreme Court later explained, its holding in *Morrison*, combined with its decision in *RJR Nabisco v. European Community*,[142] produced "a two-step framework for deciding questions of extraterritoriality."[143] Step one asks "whether the presumption against extraterritoriality has been rebutted."[144] Quoting *Morrison*, the Court explained that it can be rebutted "only if the text provides a 'clear indication of an extraterritorial application.'"[145] Step two asks "whether the case involves a domestic application of the statute."[146] The Court explained the resulting framework as consistent with "the commonsense notion that Congress generally legislates with domestic concerns in mind."[147]

This rationale led the Supreme Court in *Kiobel v. Royal Dutch Shell* to conclude that the ATS does not apply extraterritorially.[148] Quoting *Morrison*, the Court explained "when a statute gives no clear indication of an extraterritorial application, it has none."[149] Similarly, although the Court in *Daimler AG v. Bauman* rejected the plaintiff's claims largely on jurisdictional grounds, concluding that Daimler's contacts with California were insufficient to subject it to general personal jurisdiction, the Court also observed, "Recent decisions of this Court, however, have rendered plaintiffs' ATS and [Trafficking Victims Protection Act] claims infirm."[150]

Lower courts have taken the Supreme Court at its word and, similarly, have applied *Morrison* to employ a restrictive test for determining whether legislation should be applied extraterritorially. For example, in *Microsoft Corp. v. United States*, the Second Circuit followed the approach in *Morrison* to conclude that the Stored Communications Act does not apply extraterritorially and, as a result, did not authorize U.S. courts to issue and enforce warrants for the seizure of electronic information stored exclusively on foreign servers.[151] In *Cedeño*, the district court extended *Morrison*'s reasoning to RICO. Judge Rakoff explained that "although *Morrison* does not address the RICO statute, its reasoning is dispositive here."[152] Similarly, the court in *Loginovskaya v. Batratchenko* concluded that *Morrison*'s transaction test applied to antifraud claims under the Commodities Exchange Act ("CEA")[153] and that "prior CEA case law addressing extrater-

141. United States v. Hussain, No. 3:16-cr-00462 2017 WL 4865562, at *2 (N.D. Cal. Oct. 27, 2017).

142. 136 S. Ct. 2090 (2016).

143. WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018).

144. *Id.* at 2136.

145. *Id.*

146. *Id.* (citing *RJR Nabisco*, 579 S. Ct. at 2090).

147. *Id.* (citing Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

148. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2012).

149. *Id.* at 115.

150. 571 U.S. 117, 141 (2014).

151. Microsoft Corp. v. United States, 829 F.3d 197 (2d Cir. 2016), *vacated & remanded by* United States v. Microsoft Corp., 138 S. Ct. 1186 (2018).

152. Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010); *see also* Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010) (holding that *Morrison*'s presumption of extraterritoriality applies to the RICO statute).

153. 936 F. Supp. 2d 357, 375 (S.D.N.Y. 2013).

ritoriality has seemingly been abrogated by *Morrison*."[154] And in *Spizz v. Goldfarb Seligman & Co.*, the court held that the avoidance provisions of the U.S. Bankruptcy Code do not apply extraterritorially and therefore could not be used to avoid an allegedly fraudulent transfer that occurred in Israel.[155]

As these cases illustrate, *Morrison* has been broadly read to endorse a restrictive test for determining whether legislation should be applied extraterritorially. The problem with this reading is that *Morrison* is not properly understood as a case about extraterritoriality, despite the Court's characterization of its holding. Although the Court in *Morrison* purported to speak about "the extraterritorial application of § 10(b),"[156] our results demonstrate that the *Morrison* rule has the effect of applying section 10(b) to fraudulent conduct both within and outside the United States, so long as the plaintiff has purchased his or her securities in the U.S. markets.

Contextualized this way, *Morrison* is not, in fact, a case about the scope of foreign conduct that can give rise to liability under U.S. law; rather, it is properly understood as a standing case.[157] Our results show that the effect of the *Morrison* rule is to allow the section 10(b) antifraud provisions to reach fraudulent conduct that takes place outside the United States. *Morrison*, however, limits those who can assert a violation to investors who have traded in the U.S. markets. *Morrison* is therefore a foreclosing case, but a case about foreclosing the scope of permissible plaintiffs, not the scope of potential defendants.[158] Whatever the Court's views about the appropriate scope of federal legislation, the *Morrison* test is inconsistent with a narrow application of that legislation to domestic conduct.

Conclusion

Morrison has been hailed as substantially changing the risk of suit for foreign issuers. This at least is the legend of *Morrison*. Our empirical analysis, however,

154. *Id.* at 368.

155. 562 B.R. 601 (Bankr. S.D.N.Y. 2017).

156. Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 254 (2010).

157. *Cf.* Grundfest, *supra* note 2.

158. This aspect of *Morrison* may be criticized to the extent that it reduces the scope of legal protection available to U.S. investors by limiting their ability to recover damages when they are defrauded in connection with securities trades that do not take place on a U.S. exchange. As Bartlett noted, after *Morrison*, the institutional investor community warned that, "to maintain global diversification while retaining the same antifraud protection existing before *Morrison*, institutional investors may seek to move their international holdings from shares purchased and sold on foreign exchanges to ADRs traded on domestic exchanges." Bartlett, *supra* note 34, at 185 (citing Ward & Barker, *supra* note 64, at 12). However, we note that commentators have questioned the extent to which private securities fraud litigation effectively compensates injured investors. *See, e.g.*, Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301, 1312–13 (2008) ("Rule 10b-5 class actions fail to provide meaningful compensation to the class members on whose behalf they are brought."). To the extent that the primary objective of private securities fraud litigation is deterrence rather than compensation, eliminating the ability of some investors to sue does not necessary undermine that goal. *See, e.g.*, Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?* 2009 Wis. L. Rev. 297; Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 243.

changes this assessment. We find that *Morrison* was not associated with a change in litigation rates, settlements, or attorneys' fees. Moreover, our empirical analysis shows that lawyers targeted the same type of foreign issuers both pre- and post-*Morrison* in terms of the overall level of trading volume occurring in U.S. trading markets.

Instead, *Morrison* is best viewed as a preemptive rule, addressing and foreclosing the possible rise of global class actions for U.S.-listed foreign issuers exemplified by *Vivendi* and providing clarity that the liability exposure for foreign issuers would be proportional to their presence in the U.S. capital markets. At the same time, *Morrison* preserved the protection of the U.S. securities laws for investors who purchase the securities of foreign investors in the U.S. capital markets, even for fraudulent conduct that arguably occurs abroad.

Ultimately, when put in its proper context based on the data, *Morrison*'s holding was consistent with longstanding SEC practices to subject foreign issuers to jurisdiction for their U.S. actions but, at the same time, to leave substantial parts of the regulation of these issuers to their home jurisdictions. *Morrison* was also consistent with the overall structure of the federal securities laws, which limits the liability exposure of market participants based on the impact of their conduct. Put in this context, *Morrison* was a case about defining permissible plaintiffs, not a case about the nationality or location of defendants. It was a case about standing and not extraterritoriality.

In other words, *Morrison* was not so much a game-changer as a simple application of longstanding principles with limited consequences. As a result, our findings that its effect was modest should not be surprising.

Appendix A
Legal Counsel Rankings

	Pre-*Morrison* Rankings	Attorneys' Fees	Settlements	# Cases
1	Entwistle & Cappucci LLP	$130,648	$1,100,000	1
2	Milberg, Weiss, Bershad & Schulman LLP	$62,466	$323,300	13
3	Bernstein, Litowitz, Berger & Grossmann LLP	$42,488	$239,350	4
4	Cohen, Milstein, Hausfeld & Toll PLLC	$38,363	$185,300	7
5	Bernstein, Liebhard & Lifshitz LLP	$49,780	$179,608	6
6	Kessler, Topaz, Meltzer & Check LLP	$25,170	$108,675	9
7	Spector, Roseman & Kodroff PC	$20,070	$95,100	2
8	Law Offices of Jan Meyer & Associates PC	$30,000	$89,508	1
9	Robbins, Geller, Rudman & Dowd LLP	$15,221	$81,605	12
10	Pomerantz, Grossman, Hufford, Dahlstrom & Gross LLP	$9,000	$75,000	1

	Post-*Morrison* Rankings	Attorneys' Fees	Settlements	# Cases
1	Labaton Sucharow LLP	$66,012	$345,500	5
2	Kessler, Topaz, Meltzer & Check LLP	$52,710	$258,200	6
3	Bernstein, Litowitz, Berger & Grossmann LLP	$35,473	$229,950	5
4	Robbins, Geller, Rudman & Dowd LLP	$51,079	$207,600	10
5	Grant & Eisenhofer P.A.	$27,450	$157,450	2
6	Bleichmar, Fonti, Tountas & Auld LLP	$25,137	$120,000	1
7	Saxena White P.A.	$29,625	$94,000	4
8	Scott & Scott LLP	$22,065	$80,235	2
9	Bernstein, Liebhard & Lifshitz LLP	$15,025	$53,500	2
10	Pomerantz, Grossman, Hufford, Dahlstrom & GrossLLP	$3,500	$37,500	2

* *Notes: Dollar amounts in thousands. All fees and settlement amounts included where available. Rankings based on settlement values. Each law firm receives full credit for fees and settlements when multiple law firms serve as lead counsel on a given case.*

The composition of law firms both pre- and post-*Morrison* does not appear to change significantly. Prior to *Morrison*, five law firms were top law firms, as defined by Krishnan, Solomon, and Thomas.[159] Post-*Morrison*, there are also five law firms in this defined ranking. Milberg, Weiss, Bershad & Schulman subsequently changed its name to Milberg Weiss and disappeared from the top-five

159. C.N.V. Krishanan, Steven Davidoff Solomon & Randall S. Thomas, *Who Are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 Am. L. & Econ. Rev. 122 (2016).

ranking post-*Morrison*. Notably, Milberg was the lead plaintiffs' lawyers in the securities fraud action against the foreign private issuer Vivendi. This case resulted in a judgement with potential liability of $9 billion, which was substantially reduced as a result of *Morrison*. This case is not included in this table; it is one of the few securities fraud litigations to ever result in a judgement after trial. Robbins Geller maintained a high-volume securities fraud practice against foreign private issuers post-*Morrison*, with twelve cases pre-*Morrison* and ten cases post-*Morrison*. There are also a number of smaller firms in these tables, highlighting that this is a diverse practice with likely low barriers to entry.