William & Mary Law Review

Volume *54 (2012-2013)*
Issue 1

Article 6

November 2012

Beyond Morrison: The Effect of the "Presumption Against Extraterritoriality" and the Transactional Test on Foreign Tender Offers

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NOTES

BEYOND *MORRISON*: THE EFFECT OF THE "PRESUMPTION AGAINST EXTRATERRITORIALITY" AND THE TRANSACTIONAL TEST ON FOREIGN TENDER OFFERS

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INTRODUCTION

The world of securities fraud litigation was irrevocably altered on June 24, 2010. On that day, the Supreme Court decided *Morrison v. National Australia Bank Ltd.* and determined that no cause of action exists for f-cubed transactions—transactions with securities of a foreign company, on a foreign exchange, brought by foreign claimants—under section 10(b) of the Securities and Exchange Act of 1934 (Exchange Act) or its related regulations, namely Rule 10b-5.[1]

The intervening year witnessed an exploration of the boundaries imposed by this new *Morrison* doctrine, and thus far the courts have not imposed any significant limitations on the "presumption against extraterritoriality" espoused in Justice Scalia's *Morrison* majority opinion.[2] Although the courts, shareholders, and corporate insiders —both foreign and domestic—have remained focused on *Morrison*'s repercussions for on-exchange securities fraud cases, few have analyzed the potential repercussions the *Morrison* doctrine holds for extra-exchange transactions, such as tender offers.[3]

Tender offers are public offerings made by an individual, group, or corporation to purchase shares of another target company.[4] Over the last three decades, the number of securities-based cross-border transactions has skyrocketed.[5] In fact, as of 2010, over 33 percent of "agreed transactions" involving U.S. public companies were structured as tender offers.[6] In order to continue the success of the U.S.

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1. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884, 2894 n.11 (2010); *see also* Securities and Exchange Act of 1934, 15 U.S.C. § 78j-1(b) (2006); 17 C.F.R. § 240.10b-5 (2011).

2. *Morrison*, 130 S. Ct. at 2878; *see, e.g.*, *In re* Toyota Motor Corp. Sec. Litig., No. CV-10-922-DSF, 2011 WL 2675395, at *7 (C.D. Cal. July 7, 2011).

3. The term "on-exchange" is used in this Note to refer to transactions that occur on a stock exchange, such as the New York Stock Exchange or the NASDAQ. The term "extra-exchange" refers to purchases and sales that occur outside of an exchange, and can occur directly between parties, for instance between a purchaser and a company issuing shares.

4. THOMAS LEE HAZEN, FED. JUDICIAL CTR., FEDERAL SECURITIES LAW 98 (2d ed. 2003).

5. Ross A. Albert & Heath D. Linsky, *The Securities and Exchange Commission's Approach to Cross-Border Transactions*, *in* COMMON ISSUES IN SECURITIES LAW 41, 42-43 (Michela Falls ed., 2008).

6. *See* Jim Mallea, *Timing to Close: Tender Offers vs. Mergers,* FACTSET MERGERS (Feb. 24, 2010), https://www.factsetmergers.com/marequest?an=dt.getPage&st=1&pg=/pub/rs_20100224.html; *see also* Steven M. Davidoff, *Behind the Growing Number of Tender Offers*,

capital markets and promote foreign interest in U.S. companies and shareholders, the Securities and Exchange Commission (SEC) has, since the 1980s, made a concerted effort to make the United States an attractive market for foreign investors, buyers, and traders.[7] To achieve this goal, the SEC has focused on lowering the transaction costs of doing business in the United States and with U.S. shareholders.[8] The SEC's primary method for lowering transaction costs is a tiered exemption system.[9] This system permits parties defined as "foreign private issuers" to avoid some of the most costly registration requirements under the Exchange Act.[10]

In cases related to foreign securities before *Morrison*, U.S. courts generally applied either a "conducts" test, an "effects" test, or an amalgamated "conducts and effects" test to determine whether they possessed subject-matter jurisdiction over a securities violation.[11] *Morrison* overturned decades of precedent, established mostly by the Second Circuit, and installed a "transactional" test to determine whether a cause of action existed under section 10(b) and Rule 10b-5.[12] Although the analysis in *Morrison* was directed to fraud cases arising under section 10(b) of the Exchange Act, the language Justice Scalia employed in his majority opinion lends itself to a general application and theory of securities law.

N.Y. TIMES (Oct. 14, 2010 3:16 PM), http://dealbook.nytimes.com/2010/10/14/behind-the-growing-number-of-tender-offers.

7. *See* Albert & Linsky, *supra* note 5, at 46-47; *see also* Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Act Release No. 34-58597, 94 SEC Docket 339 (Sept. 19, 2008) [hereinafter 2008 Revisions]; Barbara S. Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy*, 7 J. CORP. L. 189, 191, 194-97 (1982). *See generally* Cross-Border Tender and Exchange Offers, Exchange Act Release No. 33-7759, 70 SEC Docket 2191 (Oct. 22, 1999) [hereinafter Cross-Border Tenders].

8. *See* 2008 Revisions, *supra* note 7, at 384, 430; Cross-Border Tenders, *supra* note 7, at 2192-93; George A. Casey, *U.S. Securities Law Issues in Tender Offers for Foreign Companies That Are Not "Foreign Private Issuers*," M&A FOCUS (Shearman & Sterling LLP), Winter 2006, at 2.

9. *See* 2008 Revisions, *supra* note 7, at 384, 430; Cross-Border Tenders, *supra* note 7, at 2192-93.

10. *See infra* Part I.C.-D.

11. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2879, 2886 (2010) (discussing the Second Circuit's "threshold error" in considering the existence of subject-matter jurisdiction).

12. *Id.* at 2886

This Note considers the implications of the *Morrison* doctrine and the "presumption against extraterritoriality" on cases arising under section 14(e) of the Exchange Act.[13] It argues that the language in *Morrison* naturally extends to limiting the extraterritorial application of section 14(e) by exploring the definition of "transaction" as it applies to the tender offer context. This Note also argues that a failure to extend *Morrison* to tender offers will run contrary to the SEC's expressed intent to increase the appeal of U.S. markets for foreign private issuers. Further, this Note explores congressional intent as evidenced by Congress's limited amendments to the Dodd-Frank Act regarding extraterritorial application of the Exchange Act. This Note concludes that applying *Morrison* to tender offers will eliminate causes of actions under section 14(e) of the Exchange Act against foreign private issuers for tender offers that fall under the SEC Tier I and Tier II exemptions.

I. BACKGROUND: TENDER OFFERS

A. The Basics

The term "tender offer" is difficult to define in the context of U.S. securities law. At best, it may be described as "a public announcement by an offeror to buy securities—most typically common stock—of a publicly-traded company at either a set cash price and/or in exchange for a set value of the offeror's securities."[14] Tender offers generally commence when one company, the bidder, mails offers to the shareholders of another company, the target, and publishes a summary advertisement of the offer in a reputable and accessible publication, usually the *Wall Street Journal*.[15] Although they may be offered at any available price, tender offers are generally made

13. 15 U.S.C. § 78n(e) (2006).

14. JEFFREY J. HAAS, CORPORATE FINANCE 422 (2004); *see* HAZEN, *supra* note 4, at 98.

15. CHARLES J. JOHNSON, JR. & JOSEPH MCLAUGHLIN, CORPORATE FINANCE AND THE SECURITIES LAWS 929-30 (3d ed. 2004); *see also* John M. Basnage et al., *Cross-Border Tender Offers and Other Business Combination Transactions and the U.S. Federal Securities Laws: An Overview*, 61 BUS. LAW. 1071, 1096 (2006). There may also be instances in which a company issues a tender offer for its own shares. More leeway is provided for such cases. *See* JOHNSON & MCLAUGHLIN, *supra*, at 930.

at a price well above a share's market price.[16] Tender offers in the United States must also be open to all security holders of the class of securities targeted by the offer.[17] The price offered to one shareholder must be "the highest consideration paid to any other security holder during such tender offer."[18] Generally, bidders must also specify the minimum and/or maximum number of shares they will accept in order to effectuate a purchase.[19]

Tender offers first gained popularity in the 1960s as the principal means by which to acquire companies.[20] As the popularity of the practice grew, so did instances of corruption.[21] In order to ensure fair dealing and proper accountability, Congress passed the Williams Act in 1968, which provided for more detailed registration requirements and more explicit fraud provisions.[22] Specifically, the Williams Act amended portions of sections 13 and 14 of the Exchange Act. The section 14 amendments expressly dealt with tender offers.[23] Like the original Exchange Act, the Williams Act also failed to define the term "tender offer." This, however, was a calculated move by Congress because "[i]t feared enterprising parties would structure significant stock purchases so as to fall outside of any static statutory definition."[24] To account for this deficiency, courts and the SEC promulgated an eight-factor test to determine whether a tender offer exists. The test was officially adopted by the court in *Wellman v. Dickinson*.[25] The factors are:

> 1) Whether there is active and widespread solicitation of public shareholders, 2) Whether there is solicitation for a substantial percentage of the issuer's stock, 3) Whether the offer to purchase is made at a premium over prevailing market price, 4) Whether the terms of the offer are firm rather than negotiable,

16. *See* ARNOLD S. JACOBS, THE WILLIAMS ACT—TENDER OFFERS AND STOCK ACCUMULATIONS § 4:2 (2012).

17. *See* Rusty A. Fleming, *A Case of "When" Rather than "What": Tender Offers Under the Williams Act and the All Holders and Best Price Rules*, 27 S. ILL. U. L.J. 263, 265 (2003).

18. *Id.*

19. *See* HAZEN, *supra* note 4, at 101.

20. *See id.* at 98; JACOBS, *supra* note 16, § 4:2.

21. *See* HAZEN, *supra* note 4, at 98.

22. 15 U.S.C. §§ 78m-78n (2006).

23. *Id.* § 78n.

24. HAAS, *supra* note 14, at 423.

25. 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979), *aff'd*, 82 F.2d 355 (2d Cir. 1982).

> 5) Whether the offer is contingent on the tender of a fixed minimum number of shares, 6) Whether the offer is open only for a limited period of time, 7) Whether the offerees are subject to pressure to sell their stock, and 8) Whether the public announcement of a purchasing program precedes or accompanies rapid accumulation of stock.[26]

These factors, as Congress wished, provide sufficient flexibility and generality to reach the majority of tender offer transactions.

B. Section 14(e) of the Exchange Act and Regulation 14E

In relevant part, section 14(e) of the Exchange Act states:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders.[27]

Regulation 14E includes the eight rules promulgated under section 14(e).[28] The rules under Regulation 14E run the gamut from basic administrative requirements to avoid fraud,[29] to regulations addressing indirect fraudulent activities,[30] to regulations addressing direct market manipulation through inaccurate or premature announcements of tender offers.[31] These rules, although illustrative, are not exhaustive of potential violations of section 14(e).[32]

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26. HAAS, *supra* note 14, at 424; *see* Basnage et al., *supra* note 15, at 1079.

27. 15 U.S.C. § 78n(e).

28. 17 C.F.R. §§ 240.14e-1 to -8 (2011).

29. *See id.* § 240.14e-1.

30. Indirect fraud may consist of unconventional tender offers or share purchases by insiders. *See id.* § 240.14e-3,-5; Letter from Wachtell, Lipton, Rosen & Katz, to Nancy M. Morris, Sec. & Exch. Comm'n (July 24, 2008), *in* EIGHTH ANNUAL INSTITUTE ON SEC. REGULATION IN EUROPE: A CONTRAST IN EU & U.S. PROVISIONS 855, 859 (2009) [hereinafter Letter to Nancy Morris].

31. *See* 17 C.F.R. § 240.14e-8.

32. *See* HAAS, *supra* note 14, at 428, 438 (noting that a tender offer has to comply with the general "antifraud requirements of Section 14(e) of the Exchange Act and Regulation 14E promulgated thereunder").

Generally, section 14(e) and Regulation 14E apply to any and all bidders who choose to include U.S. shareholders in their tender offers.

C. Foreign Companies and Tender Offers to the United States

In addition to the limitations on fraudulent activity, the Williams Act created fairly stringent tender offer filing requirements under sections 13(d) and 14(d) of the Exchange Act.[33] Originally, a tender offer served as an automatic trigger for these filing requirements regardless of a bidder's domestic or foreign identity. Foreign private issuers—a majority of existing foreign corporations—are defined as

> any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: 1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and 2) Any of the following: i) The majority of the executive officers or directors are United States citizens or residents; ii) More than 50 percent of the assets of the issuer are located in the United States; or iii) The business of the issuer is administered principally in the United States.[34]

Such companies have limited contact with the United States outside of general business dealings and are inherently foreign entities. For these corporations, the strict filing requirements created by the Williams Act imposed high costs—especially for those companies that did not have easy access to SEC filing offices and registration materials—and provided a disincentive for contact with U.S. shareholders during tender offer transactions.[35] Foreign corporations incurred further costs when their domestic regulations conflicted with the U.S. registration requirements, and they were forced to comply with both legal schemes.[36] The aggregate effects of these difficulties slowly began to create foreign disinterest in U.S. shareholders of foreign targets.

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33. *See* 15 U.S.C. §§ 78m-78n (2006).
34. 17 C.F.R. § 240.3b-4.
35. *See* Casey, *supra* note 8, at 2.
36. *Id.*

D. SEC Response to Foreign Disinterest

The willful disinterest exhibited by many foreign corporations eventually caught the attention of the SEC, particularly as the number of foreign transactions and tender offers continued to grow and disinterest in U.S. shareholders resulted in economic harm.[37] In 1999, the SEC promulgated a two-tier exemption scheme for foreign private issuers.[38] In its 1999 release, the SEC expressly noted that the alterations were meant to increase the interest of foreign bidders in U.S. shareholders.[39] The exemptions served to weaken many of the most stifling registration requirements found in sections 13(d) and 14(d) of the Exchange Act.[40]

The Tier I exceptions apply to tender offers between foreign private issuers when U.S. shareholders only have beneficial ownership of 10 percent or less of the target's securities.[41] Tier I exceptions lift the majority of the Exchange Act's registration requirements and companies covered under Tier I exemptions become immune to Rules 13e-3, 13e-4, Regulation 14D, and Rules 14e-1 and 14e-2.[42] Tier II exceptions also apply to tender offers between private issuers, but this exception applies when U.S. shareholders have beneficial ownership of 40 percent or less of a target class of securities.[43] This exception is much less lenient than its Tier I counterpart, but still serves to decrease some costs associated with the inclusion of U.S. shareholders in an offer.[44]

In 2008, the SEC revised the existing two-tier scheme, extended its scope, and simplified its application.[45] Despite the purpose and beneficial effect of these exceptions, the SEC failed—or refused—to eliminate liability for foreign private issuers under section 14(e) and

37. *See* Cross-Border Tenders, *supra* note 7, at 2192-93.

38. *See id.* at 2191.

39. *Id.* at 2193.

40. *See id.* at 2192-93 (noting that foreign parties often sought "to avoid the application of U.S. securities laws" and that the new rules were "intended to encourage issuers and bidders to extend tender and exchange offers, rights offerings and business combinations to the U.S. security holders of foreign private issuers").

41. *Id.* at 2195; *see* Basnage et al., *supra* note 15, at 1087.

42. *See* Cross-Border Tenders, *supra* note 7, at 2195.

43. *Id.* at 2198.

44. *Id.* at 2214; *see* Basnage et al., *supra* note 15, at 1091.

45. *See* 2008 Revisions, *supra* note 7.

the majority of Regulation 14E.[46] In fact, some commentators argue that the SEC simply "wasted an opportunity" and did not take the necessary measures to ensure consistent use of the U.S. shareholder market by foreign private bidders.[47] Those same commentators note the immense trepidation with which foreign private issuers face the prospect of U.S. securities litigation.[48] The exemption scheme, however, still leaves these parties open to litigation in U.S. courts for fraud in relation to the tender offers.[49] The *Morrison* doctrine stands to remedy this missed opportunity.

II. BACKGROUND: *MORRISON*

A. The Exchange Act, Section 10(b) and Rule 10b-5, and the "Conducts and Effects" Test

The express purpose of the Exchange Act is to regulate the securities exchanges and over-the-counter securities markets.[50] Section 10(b) of the Exchange Act serves as the main protection against fraudulent activities on and in relation to such markets.[51] In relevant part, section 10(b) states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any securities exchange ... [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement ... any manipulative or deceptive device or contrivance in

46. *See* Basnage et al., *supra* note 15, at 1079-80, 1092.

47. *See* David A. Katz, *SEC Adopts Revisions to Cross-Border Transaction Exemptions: A Missed Opportunity Including Comment Letter Re: Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, *in* EIGHTH ANNUAL INSTITUTE ON SEC. REGULATION IN EUROPE: A CONTRAST IN EU AND U.S. PROVISIONS 855, 857 (2009).

48. *See id.* at 857-58.

49. *Id.* at 858 (stating that the 2008 reforms failed to "limit[ ] the potential exposure of foreign issuers ... to the full panoply of U.S. anti-fraud, anti-manipulation and civil liability provisions").

50. 15 U.S.C. § 78b (2006).

51. *See* Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 541 (2011) (noting references to section 10(b) as a "catch all" provision).

> contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[52]

The rules promulgated under section 10(b) further outline potential violations of the provision. Historically, Rule 10b-5 has proven the most significant rule within the section 10(b) regulations.[53] Together, section 10(b) and Rule 10b-5 work to "make unlawful the use of manipulative or deceptive devices in connection with the purchase or sale of any security."[54] The strength of these combined regulations has proven an attractive lure for "investors around the world who are harmed by transnational securities fraud" and has historically been used prodigiously against both foreign and domestic corporations.[55] Generally courts considered the applicability of the U.S. securities law under section 10(b) and Rule 10b-5 to be a question of subject matter jurisdiction.[56] Section 10(b) and Rule 10b-5 most frequently apply when shareholders have lost their investments because of a manipulation of stock or security value that eventually resulted in a sharp drop in prices.[57]

Before the 1960s, prior to the exponential growth of international securities transactions, the district courts typically held that cases related to foreign securities transactions could not be brought under section 10(b) and Rule 10b-5.[58] Beginning with the 1968 case of *Shoenbaum v. Firstbrook*, the Second Circuit, one of the most influential circuits in securities litigation,[59] began to develop what would

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52. 15 U.S.C. § 78j.

53. Rule 10b-5 outlines several of the "instrumentalities" under section 10(b) and provides a clear outline of what actions may violate section 10(b). 17 C.F.R. § 240.10b-5 (2011); *see* Lauren Macias, Note, *The "Transactional Test" Replaces the "Conduct and Effects Test" When Determining the Extraterritorial Reach of Private Rights of Action Pursuant to Section 10(b) of the Securities Exchange Act of 1934:* Robert Morrison, et al. v. National Australia Bank Ltd., 13 DUQ. BUS. L.J. 75, 83 (2011).

54. Macias, *supra* note 53, at 83.

55. Beyea, *supra* note 51, at 537.

56. *See id.* at 546-47; Macias, *supra* note 53, at 79-80.

57. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); *In re* Alstom S.A. Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010).

58. *See Morrison*, 130 S. Ct. at 2878; Shoenbaum v. Firstbrook, 268 F. Supp. 385, 392 (S.D.N.Y. 1968), *rev'd*, 405 F.2d 215 (2d Cir. 1968).

59. *See* Beyea, *supra* note 51, at 542 (noting that "the Second Circuit has been the most influential court" in the securities field).

later be known as the "conducts and effects" test to determine whether U.S. courts possessed jurisdiction over a given case.[60]

In *Shoenbaum*, the court first outlined the "effects" test, which focused on "whether there was a substantial effect in the United States or on a citizen of the United States because of the alleged wrongful conduct."[61] In *Shoenbaum,* shareholders of Baniff Oil Ltd. brought a stockholder's derivative suit against several directors and Aquitaine, a wholly owned subsidiary of a French corporation and the majority shareholder of Baniff stock.[62] The shareholders alleged that the directors and Aquitaine used inside information and their control of the company to sell Aquitaine 500,000 shares of Baniff stock at a highly undervalued price right before the company publicly announced a major oil discovery.[63] Baniff was a Canadian corporation. The court in *Shoenbaum* held that the effect of the Canadian sales was felt in the United States, and that such an effect was enough to find subject matter jurisdiction under section 10(b) and Rule 10b-5.[64]

The "conducts" test was then established in *Leasco Data Processing Equipment Corp. v. Maxwell*.[65] It focused on "[d]etermining whether the wrongful conduct had occurred within the United States to trigger the extraterritorial application of section 10(b)."[66] In *Leasco*, the plaintiffs alleged that Robert Maxwell, a British citizen, induced Leasco, an American company, to purchase shares of his British company by fraudulent means.[67] The court found that some of the deceptive conduct employed by Maxwell occurred in the United States, and stated that such domestic conduct was sufficient to provide subject matter jurisdiction.[68] Both the "conducts" and the "effects" tests focused on whether the court had the power to hear a given case and not on the actual merits of the litigation or even

60. 405 F.2d 200 (2d Cir. 1968).

61. Macias, *supra* note 53, at 85; *see Shoenbaum*, 405 F.2d at 208-09; Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 95 (2003).

62. *Shoenbaum*, 405 F.2d at 204.

63. *Id.* at 204-05.

64. *Id.* at 206.

65. 468 F.2d 1326 (2d Cir. 1972).

66. Macias, *supra* note 53, at 86; *see* Chang, *supra* note 61, at 96.

67. *Leasco*, 468 F.2d at 1330.

68. *Id.* at 1334.

whether a claim existed under the relevant securities law provisions.[69]

Beginning life as two separate analyses, the "conducts" and "effects" tests eventually merged into the "conducts and effects" test.[70] Courts utilized the concepts interchangeably when considering jurisdiction under section 10(b) cases.[71] In practice, the "conducts and effects" test implicitly raised issues of reasonableness as the underlying logic suggested that if either the conduct of a foreign party resulted in negative effects in the United States, or the fraudulent conduct itself was located in the United States, then a foreign corporation could reasonably foresee being within the purview of the U.S. securities laws and U.S. courts.[72] The reasonableness of a foreign company being brought into U.S. courts seemed inextricably linked with subjugation to U.S. securities laws.

Although the scope of the joint "conducts and effects" test grew, its application was inconsistent at best, as the national identity of the harmed investors in a given case weighed heavily on the stringency with which courts applied the test.[73] In cases in which the harmed investors were foreign, the "acts 'of material performance' performed in the United States ... must have 'directly caused' the result[ing harm]."[74] In cases with domestic investors, "it was enough that acts 'of material importance' performed in the United States 'significantly contributed' to that result."[75] Under the "conducts and effects" test, courts continued to acknowledge the existence of a "presumption against extraterritoriality," but despite the acknowledgment, they permitted foreign defendants to be tried under U.S. securities law based on the outcome of the case-by-case

69. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010).

70. *Id.* at 2879.

71. *Id.* (noting that the Second Circuit found a combination of the tests was more useful in determining whether there was enough U.S. involvement to merit jurisdiction in U.S. courts).

72. *Id.*

73. *See id.*; Chang, *supra* note 61, at 92 ("The scope of federal jurisdiction is inconsistent and expansive, and this results in conflicts with other countries and the potential for redundant and unnecessarily costly systems of overlapping regulations. Given the possibility of being sued based on the extraterritorial application of the U.S. antifraud provisions, participants in cross-border transactions need an identifiable standard to guide their actions.").

74. *Morrison*, 130 S. Ct. at 2879 (citations omitted).

75. *Id.* (citations omitted).

analysis.[76] The disparate and uncertain application of the "conducts and effects" test was thus criticized by foreign and domestic companies alike.[77]

B. Morrison v. National Australia Bank Ltd.

Morrison centered around a suit brought by foreign shareholders against National Australia Bank.[78] The Bank's shareholders alleged that the Bank manipulated financial models to cause a recent acquisition, a Florida-based mortgage-servicing company named HomeSide Lending Inc., to appear more valuable than it was.[79] Eventually, the value of the mortgage servicing company fell and the Bank was forced to write down the value, causing a decrease in the Bank's stock prices.[80] The Bank's shares were always traded on the Australian Exchange, and only a small number of American Depository Receipts[81] were present on either U.S. exchange.[82] This drop in the share price resulted in litigation when foreign claimants brought the case against the Bank in the U.S. District Court for the Southern District of New York.[83] The Bank moved to dismiss the case for want of subject matter jurisdiction, and the district court granted the motion. The Second Circuit Court of Appeals affirmed the decision, and the claimants appealed.

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76. *See* Sarah S. Gold & Richard L. Spinogatti, *Extraterritorial Application of U.S. Securities Laws*, N.Y. L.J., Aug. 13, 2008, at 1 ("[I]ncreasing transnational businesses and an increasing number of transnational securities fraud cases have brought application of the U.S. securities laws to foreign persons, corporations, and transactions to the fore of federal securities law issues.").

77. *Id.* at 2 (noting that the piecemeal treatment afforded to matters of extraterritoriality by the Second Circuit did not live up to the legal needs of corporations, shareholders, or investors).

78. *Morrison*, 130 S. Ct. at 2875-76.

79. *Id.*

80. *Id.*

81. American Depository Receipts, also known as ADRs, are "negotiable receipt[s], resembling ... stock certificate[s], that [are] issued by a U.S. bank to evidence 'ordinary' shares of a foreign company that have been deposited with it and that are held at or by its branch office in the country of origin." JOHNSON & MCLAUGHLIN, *supra* note 15, at 713.

82. The claims related to the ADRs were eventually dropped. As a result, the claim before the *Morrison* Court was solely related to shares traded on a foreign exchange. *Morrison*, 130 S. Ct. at 2875-76.

83. *See id.*

In *Morrison*, Justice Scalia, writing for the majority, first addressed a "threshold" issue in the Second Circuit decision and decisively concluded that the appropriate question in cases brought under section 10(b) is not whether the court has the power to review the case, but whether a claim even exists under U.S. securities law.[84] After establishing this threshold, the Court also noted the evident need for a uniform understanding of the potential applications of U.S. securities laws.[85] According to Justice Scalia, the Second Circuit's efforts "produced a proliferation of vaguely related variations on the 'conduct' and 'effects' tests" that provided little consistency and much confusion.[86] In order to replace the "conducts and effects" test, the Court presented two concepts: the existing presumption against extraterritoriality and the transactional test.[87]

1. The Presumption Against Extraterritoriality

The presumption against extraterritoriality simply assumes, barring a specific statement to the contrary, that all of the laws issued by Congress are intended to refer solely to U.S. actors, or actions by foreign actors within the United States.[88] In short, actors should not assume that any U.S. laws are intended to reach beyond the country's territorial jurisdiction.[89] Justice Scalia found that there was "no affirmative indication in the Exchange Act that section 10(b) applies extraterritorially, and ... therefore conclude[d] that it does not."[90] He further noted that, because Rule 10b-5 was

84. *Id.* at 2876-77 ("[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." (internal quotation marks omitted)).

85. *Id.* at 2877-78 (finding that the uniform application of this law should be based on the language and nature of the Exchange Act and stating that the Second Circuit's belief that congressional silence called for judicial interpretation was unfounded).

86. *Id.* at 2880.

87. *Id.* at 2877-78, 2884.

88. *Id.* at 2877 ("It is a 'long standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting EEOC v. Arabian Am. Oil Co., 49 U.S. 281, 285 (1949))).

89. *Id.*

90. *Id.* at 2883.

promulgated under section 10(b), the rule also possessed no extraterritorial application.[91]

2. The Transactional Test

In place of the discarded "conducts and effects" test, Justice Scalia established a merits-based test focused on the location of the relevant transaction.[92] Specifically, the Court stated, "it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."[93] The Court found justification for this test in the seemingly express domestic purpose of the Exchange Act and in the purely domestic application of several of the Act's registration requirements.[94]

Justice Scalia also found that sections 30(a) and (b) of the Exchange Act provided definitive support for the transaction test, as both provisions based their applicability on the "location of the *transaction*."[95] Namely, he noted that section 30(a) expressly applied its provisions to "a 'transaction' in a United States security 'on an exchange not within or subject to the jurisdiction of the United States.'" Section 30(b) likewise banned such application against "any person insofar as he transacts a business in securities without the jurisdiction of the United States" unless he did so against SEC regulations designed to prevent evasion of the Act.[96] Scalia noted that this created an express relationship between congressional intent and a transaction-based application of U.S. securities laws.

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91. *Id.* at 2881. One post-*Morrison* article has explored the idea that the lawmaking authority upon which a statute is based in fact defines the scope and geographic reach of the statute. *See* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011). Although the article barely skims the extraterritorial reach of U.S. securities law, it does bring up the concern that extending U.S. laws beyond domestic jurisdictional bounds raises an issue of due process for those parties unwittingly brought into U.S. courts. *Id.* at 1103-09. This fear is analogous to the concerns espoused by Justice Scalia in the majority opinion. *See Morrison*, 130 S. Ct. at 2880-83.

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

93. *Id.*

94. *Id.* at 2884-85 ("The Act's registration requirements apply only to securities listed on national securities exchanges." (citing 15 U.S.C. § 78*l*(a) (2006))).

95. *Id.* at 2885.

96. *Id.*; *see also* 15 U.S.C. § 78dd(a)-(b).

*3. Post-*Morrison *Decisions*

Many cases decided since *Morrison* have featured plaintiffs attempting to challenge the confines and application of the presumption against extraterritoriality and the transactional test. The majority of these decisions continued to limit the reach of the Exchange Act.

In *In re Alstom*, a class of domestic and foreign plaintiffs brought suit against Alstom, a French corporation, under section 10(b).[97] In *Alstom*, the district court extended the domestic transaction requirement to U.S. residents and noted that domestic claimants did not possess a cause of action under section 10(b) if they purchased shares of a foreign company on a foreign exchange.[98] In *In re Vivendi*, the district court further limited potential claims under section 10(b) and held that the sale and existence of ADRs was not sufficient to permit fraud litigation based on the underlying class of stock.[99]

The Second Circuit went even further in *SEC v. Goldman Sachs & Co.* and reexamined the definition of "purchase and sale"—the *Morrison* definition of transaction—in order to extend the application of the *Morrison* doctrine to other components of U.S. securities law.[100] In *Goldman*, the SEC brought suit against Goldman Sachs and one of its vice presidents, Fabrice Tourre, alleging fraud concerning ABACUS, a collateralized debt obligation whose performance was tied to securities backed by subprime mortgages.[101] The court in *Goldman* found that the terms "purchase" and "sale" were linked to the concept of irrevocable liability and that a purchase and sale occurred when a purchaser incurred an "*irrevocable* liability to take or pay for" a security, and a seller incurred an "irrevocable liability to" provide that security to the purchaser.[102] The court further found that application of the *Morrison* doctrine to the Securities Act

97. 741 F. Supp. 2d 469, 471 (S.D.N.Y. 2010).

98. *Id.* at 471-73.

99. *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 530-31 (S.D.N.Y. 2011) (noting that claims had to be limited to ADRs and their holders).

100. SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147 (S.D.N.Y. 2011).

101. *Id.* at 149-50.

102. *Id.* at 157-58 (internal quotation marks omitted). The court did not, however, choose to address whether the terms "purchase" and "sale" could be properly separated. *See generally id.*

of 1933[103] was warranted and that the transactional test also applied to considerations of the extraterritorial reach of the Securities Act.[104]

Post-*Morrison* litigation continues to flood the courts but there are currently no limitations on the presumption against extraterritoriality or the transactional test.[105] Thus far, the *Morrison* doctrine has succeeded in blocking many large securities class actions from U.S. courts.[106] Such an effect, evidenced by cases such as *In re Alstom* and *In re Toyota Motor Corp.*, has the potential to increase the lure of U.S. markets for foreign private issuers, particularly if the effect is expanded beyond the scope of section 10(b) and Rule 10b-5.[107]

III. APPLICATION OF *MORRISON*

A. Extension to the Exchange Act at Large

Before it can be determined that the *Morrison* doctrine will operate to eliminate causes of action for American shareholders under tender offer regulations, it must first be established that the holding in *Morrison*—and its underlying reasoning—can reasonably be extended to other provisions of the Exchange Act. This task, however, does not prove too daunting. Although the final holding in *Morrison* applied directly to claims and cases arising under section 10(b) and Rule 10b-5,[108] the language and analysis that Justice

103. 15 U.S.C. § 77 (2006).

104. *Goldman*, 790 F. Supp. 2d at 163-64.

105. *See, e.g.*, SEC v. Compania Internacional Financiera S.A., No. 11 Civ. 4904, 2011 WL 3251813 (S.D.N.Y. July 29, 2011); Basis Yield Alpha Fund v. Goldman Sachs Grp., Inc., 798 F. Supp. 2d 533 (S.D.N.Y. 2011); *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2011); Lapiner v. Camtek, Ltd., No. C08-01327, 2011 WL 445849 (S.D.N.Y. Feb. 2, 2011).

106. *See supra* text accompanying notes 97-105. Some commentators believe that such effects are detrimental to the court system and that the Supreme Court's decision in *Morrison* was unwarranted and will serve only to increase judicial lawmaking in the securities field. *See, e.g.*, Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. U. L. REV. 655, 664-65 (2011).

107. *See infra* Part III.

108. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) ("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

Scalia used in the majority opinion easily encompasses the other provisions of the Exchange Act. Not only does the logic extend to all provisions, but in many instances Justice Scalia's language focuses beyond section 10(b) to the extraterritorial application of the general body of American securities law.

1. Morrison*'s Expansive Language*

Within the first pages of the opinion, before even discussing whether a section 10(b) claim could be used for the case at bar, Justice Scalia stated that "[i]t is a longstanding principle of American law that legislation is meant to apply only within the territorial jurisdiction of the United States."[109] Justice Scalia further noted that without an express indication of extraterritorial reach, a statute simply has none.[110] He also found merit in applying a general "presumption against extraterritoriality" that eliminates the need for a case-by-case evaluation that inhibits the application of a stable and predictable legislative scheme.[111] Furthermore, Justice Scalia noted that the Second Circuit was mistaken in finding that congressional silence indicates a need for judicial deduction to "'discern' whether Congress would have wanted the statute to apply."[112]

It would be shortsighted to find that such broad language was intended to apply only to the section 10(b) provisions of the Exchange Act.[113] As the Court noted, the statute *at large* is silent,[114] and therefore Congress must not have intended for any of the provisions therein to apply extraterritorially. In order for the *Morrison* ruling to ensure the stability for which it was intended, the "presumption against extraterritoriality" must apply to all sections of the statute.

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sale of any other security in the United States.").

109. *Id.* at 2877 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)) (internal quotation marks omitted).

110. *Id.* at 2881.

111. *Id.*

112. *Id.* at 2878.

113. *See* Brilmayer, *supra* note 106, at 671 ("The changes that *Morrison* might potentially bring about are not limited to its original context.").

114. *See Morrison*, 130 S. Ct. at 2877.

The Williams Act, which amended the Exchange Act and improved the tender offer provisions, further remained silent on any extraterritorial application and simply inserted the tender offer regulations into the larger Exchange Act scheme.[115] Without any additional indication of extraterritorial intent on the part of Congress, a failure to apply the *Morrison* doctrine and the presumption against extraterritoriality to every provision under the Exchange Act would again give rise to unnecessary judicial interpretation in the face of congressional silence. As the Court noted, this was an issue "repeated over many decades by various courts of appeals in determining the application of the Exchange Act" and an issue meant to be nullified by *Morrison*'s championing of the "presumption against extraterritoriality" for all legislation.[116]

Further support for this application may be found in the Court's analysis of sections 30(a) and (b) of the Exchange Act, both of which include specific clauses referencing the extraterritorial reach of the provisions. The Court found that section 30(b)'s "provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges—and its limitation of that application to securities of domestic issuers would be inoperative."[117] In the same sense, the presumption against extraterritoriality must apply to all provisions of the Exchange Act and may then be rebutted by either context or specific provisions to the contrary.[118]

2. Applying the Transactional Test

In addition to extending, or rather renewing, the presumption against extraterritoriality, the *Morrison* doctrine also imposes a transactional test on the section 10(b) and Rule 10b-5 context. Extension of this test to cases arising under the other provisions of the Exchange Act is also appropriate. As Justice Scalia noted, the interest meant to be protected by U.S. securities law is the "national

115. *See generally* Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78*l*-78n (1968)).

116. *See Morrison*, 130 S. Ct. at 2878.

117. *Id.* at 2883.

118. *Id.* ("Assuredly context can be consulted as well.").

public interest."[119] That interest is invoked by domestic transactions that affect the United States at large and not simply a small class of domestic shareholders or investors. Justice Scalia further discussed that the focus of the Exchange Act is not on the location of a given act of fraud, but rather on the location of the "purchases and sales" affected by that fraud.[120] As the Court elaborated, the Exchange Act does not simply focus on a fraudulent or deceptive act, but rather on a fraudulent or deceptive act in relation to a regulated activity.[121] This same analysis may be applied to any of the other provisions of the Exchange Act, and specifically to section 14(e).

All of the provisions of the Exchange Act regulate conduct related to or associated with securities and their issuance or sale.[122] The conduct in itself, although fraudulent or questionable, would not be regulated by the statute unless it involved a given act in the securities context.[123] In the section 10(b) scheme, that activity is a purchase and sale of a security on an exchange; in the section 14(e) scheme, that activity is a tender offer.[124]

The "purchase-and-sale" in the section 10(b) context may be analogized to the tender offer in the section 14(e) context. The Court rather scathingly noted that it "know[s] of no one who thought that the Act was intended" to regulate foreign exchanges "or indeed who even believed that under established principles of international law Congress had the power to do so."[125] The same may be said for the power of Congress to control foreign private issuers who include U.S. shareholders in a tender offer bid.[126] As discussed below, in the

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119. *Id.* at 2882 (quoting 15 U.S.C. § 78b (2006)).

120. *Id.* at 2884.

121. *Id.* ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered....' Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate.'").

122. *See generally* 15 U.S.C. § 78.

123. *See supra* note 52 and accompanying text.

124. *Compare* 15 U.S.C. § 78j(b), *with id.* § 78n(e).

125. *See Morrison*, 130 S. Ct. at 2884.

126. This is a particularly relevant consideration given the SEC's push to make U.S. shareholders easily accessible to foreign bidders during cross-national tenders by limiting the regulations and requirements that apply to such foreign bidders. *See supra* notes 35-40 and accompanying text. The SEC's intentions also provide a strong reason for the *Morrison* doctrine to bar claims under section 14(e) against foreign private issuers. *See infra* notes 172-73 and accompanying text.

tender offer context, it is even clearer that Congress and the SEC wish to minimize the extraterritorial reach of the tender offer provisions as a general rule.[127]

The Court further made a broad statement regarding the extraterritorial application of the whole Exchange Act to any transaction occurring abroad:

> [W]e reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad for the same reason that *Aramco* rejected overseas application of Title VII to all domestically concluded employment contracts or all employment contracts with American employers: The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures."[128]

Instead of specifically referring only to section 10(b), the Court discussed the applicability of this concern to the extraterritorial scope of the Exchange Act at large.[129] It follows that such a general reference was meant to require a relevant transaction be domestic in order to result in a claim under the Exchange Act.[130] Such an application would also protect the autonomy of foreign governments that possess the rights to regulate securities and transactions that occur in their "territorial jurisdiction" and would prevent avoidable clashes between U.S. and foreign securities law.[131]

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127. *See infra* Part III.C.

128. *Morrison*, 130 S. Ct. at 2885 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

129. *Id.* This fact is particularly noteworthy as the opinion was written by Justice Scalia, who is known for narrow categorizations and neat tailoring to the issue at hand. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586-605 (2003) (Scalia, J., dissenting). Even hints of such broad language in *Morrison* suggest that, although the central holding referred to section 10(b) and Rule 10b-5, this reasoning is intended to expand to the whole of U.S. securities law under the Securities Act of 1933 and the Exchange Act.

130. The Court goes on to note the concerns and fears expressed by foreign parties in relation to the extraterritorial application of section 10(b). *Morrison,* 130 S. Ct. at 2885. This illustrates the parallel between the concerns behind limiting the extraterritorial scope of sections 14(e) and 10(b) and is additional proof that the application of *Morrison*'s transactional test is appropriate for the tender offer context. *See infra* Part III.C.1.

131. *See Morrison*, 130 S. Ct. at 2885-86.

Several post-*Morrison* cases, some noted above, have already found it appropriate to extend the *Morrison* analysis and doctrine to other Exchange Act provisions and even general provisions of U.S. law, such as a court's discretion to utilize supplemental jurisdiction. For instance, in the case of *In re Toyota Motors Corp.*, a class of domestic and foreign claimants brought a claim alleging fraud on the part of Toyota Motors in relation to its stock traded on the NYSE.[132]

In addressing this claim, the court refused to extend supplemental jurisdiction—which it was entitled to do—to the Japanese law claims that were closely related to the securities action under section 10(b).[133] The court found that extension of supplemental jurisdiction in this context would be a clear violation of *Morrison*. It also found that there may be "instances where it is appropriate to exercise supplemental jurisdiction over foreign securities fraud claims" but "any reasonable reading of *Morrison* suggests that those instances will be rare."[134] The court's discussion of supplemental jurisdiction did not explicitly connote section 10(b) issues, but simply related to the general reach of U.S. courts into the matters of foreign securities law. However, the court still found the reasoning of *Morrison* and the clear intentions of the Supreme Court as expressed therein sufficient to render unnecessary the reach of the U.S. courts into foreign transactions.

Furthermore, in *SEC v. Goldman Sachs & Co.*,[135] the district court did not even question the application of the transaction test and the *Morrison* doctrine to a claim arising under section 17(a) of the Securities Act of 1933;[136] the court took the application of the test to all securities law provisions as a given.[137] In *Goldman*, the court simply discussed the application of the term "transaction" to the underlying activities covered by section 17(a) of the Securities

132. *In re* Toyota Motor Corp. Sec. Litig., No. CV-10-922-DSF, 2011 WL 2675395 (C.D. Cal. July 7, 2011).

133. *Id.* at *6.

134. *Id.* at *7.

135. 790 F. Supp. 2d 147 (S.D.N.Y. 2011).

136. 15 U.S.C. § 77q(a) (2006).

137. *See Goldman*, 790 F. Supp. 2d at 164 ("Although *Morrison* did not involve or consider Section 17(a) of the Securities Act, and although neither party cites any cases that apply *Morrison* to Section 17(a), the court agrees that *Morrison* applies to Section 17(a) of the Securities Act.").

Act and dissected the underlying activity to determine what must occur domestically in order for the U.S. law provisions to apply.[138] This facile extension of *Morrison* to not only additional Exchange Act provisions but all securities provisions shows the *Morrison* doctrine should and could be extended to the entire Exchange Act. That courts have affirmatively completed such an extension suggests that they will likely continue to do so in other securities contexts, and perhaps even in the tender offer context.

B. Defining Transaction and Determining Domesticity

The probable application of the *Morrison* "presumption against extraterritoriality" and the *Morrison* transactional test to section 14(e) of the Exchange Act will bring special attention to the definition of transaction in the tender offer context. As noted, in the section 10(b) context, a transaction is a "purchase-and-sale,"[139] but that definition will not necessarily apply to all transactions in the Exchange Act. For instance, in the context of section 17(a) of the Securities Act of 1933, the transaction is an offer *or* sale.[140] In the same vein, any claim under section 14(e) must be evaluated based on the definition of the relevant transaction.

Although the language of sections 17(a) and 10(b) provides clear guidance through which a court could determine the definition of transaction,[141] section 14(e) is not so clear. Section 14(e) simply states that it is unlawful to make untrue or otherwise misleading statements, and to commit fraudulent, manipulative, or other deceptive acts in relation to "any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."[142] This lack of clarity

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138. *See id.* (stating that "[t]he Court's analysis as to IKB and ABN is not complete, however, as Section 17(a), unlike Section 10(b), applies not only to the 'sale' but also to the '*offer* of any securities or security-based swap agreement,'" and finding that a domestic offer would be sufficient as a transaction under section 17(a)).

139. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010).

140. *See Goldman*, 790 F. Supp. 2d at 164.

141. *See* 15 U.S.C. § 77q(a) (limiting the unlawful activity controlled by § 17(A) "offer[s] or sale[s] of any ... security-based swap agreement").

142. *Id.* § 78n(e); *see id.* § 78j(b) (stating that it is unlawful to "employ ... [a] manipulative or deceptive device or contrivance" in connection with "the purchase or sale of any security registered on a national securities exchange").

requires that the definition of transaction in the tender offer context be evaluated based on the nature of the tender offer transaction and how it affects the "location" of the tender offer transaction.

As mentioned above, a tender offer is generally defined as "a public announcement by an offeror to buy securities (most typically common stock) of a publicly-traded company at either a set cash price or in exchange for a set value of the offeror's securities."[143] The occurrence of a tender offer does not require that any actual sales be made.[144] Accepting the above cited definition, the most basic "transaction" constituting a tender offer is the public announcement: the general offer to buy existing shares.

At first glance, the public announcement may seem as if it is, in fact, domestic. In most instances, to reach domestic shareholders, foreign private issuers must provide for a summary advertisement in the *Wall Street Journal* or a similarly situated publication.[145] Looking at this requirement in isolation may lead one to believe that the transaction, as related to U.S. shareholders, is firmly rooted in the United States and provides a sufficient hook for a finding of domesticity. Such a view, however, ignores the reality of the situation.

Tier I and Tier II exceptions apply solely to tender offers between two companies that are foreign private issuers.[146] A foreign private issuer, by definition, cannot have a majority of its voting securities owned by U.S. residents.[147] In most tender offer scenarios, bidders will seek to reach the whole existing class of a relevant stock.[148] In order to do so, companies will request tenders from all existing shareholders of the target class, which means that the offer is not simply directed toward shareholders within the domestic confines

143. HAAS, *supra* note 14, at 422.

144. A tender offer is made to purchase a minimum/maximum number of stocks. If the required number is not met, then the offer may not succeed and the offering company will not choose to purchase any shares. *See id.* at 424.

145. JOHNSON & MCLAUGHLIN, *supra* note 15, at 929-30.

146. *See supra* Part I.D.

147. *See* 17 C.F.R. § 240.3b-4 (2011). To fit under the Tier I and Tier II exemptions, the target company must have below 10 percent or 40 percent, respectively, of shares beneficially owned by U.S. private equity investors. *See* 2008 Revisions, *supra* note 7, at 397; Cross-Border Tenders, *supra* note 7, at 2195, 2198.

148. One of the eight factors in determining whether a tender offer exists explicitly requires that there be "active and widespread solicitation of public stockholders." HAAS, *supra* note 14, at 424.

of the United States, but rather to all known target shareholders regardless of location.[149] A finding of U.S. domesticity would require an isolation of one facet of the complete transaction in order to establish a sufficient "domestic" foothold for section 14(e) to satisfy the "presumption of extraterritoriality." Such a separation would run contrary to recent post-*Morrison* holdings that have found the separation of transactional components unwarranted.[150] Furthermore, defining the tender offer by an isolated group of shareholders assumes that such a group of shareholders is an integral target of the bidder, important enough to bring the whole transaction under U.S. law. This assumption, however, is unlikely to be true because of the relatively low level of U.S.-held shares permitted under the Tier I and Tier II exception criteria.[151] Given that the levels of U.S.-held shares may be so low as to be negligible, such a soft hook for a section 14(e) claim is likely to deter bidders from including U.S. shareholders in the original offer.[152]

Furthermore, isolation of the tender offer to U.S. shareholders to serve as the necessary "transaction" would provide for disparate treatment within a single class of securities.[153] Such treatment was one of the key complaints underlying the overturn of the pre-*Morrison* "conducts and effects" test.[154] A purpose of the *Morrison* decision was to ensure equal and predictable treatment for *both* foreign and domestic claimants,[155] as the presumption against

149. In fact, as noted above, many foreign companies tend to avoid even including the United States in their tender offers to avoid incurring any potential liability under U.S. securities laws. *See supra* notes 33-36, 45-49 and accompanying text.

150. *See* SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 157 (S.D.N.Y. 2011) ("[T]he SEC alleges solely that there was a 'sale' without discussing the 'purchase' component of the alleged transactions. At oral argument, the SEC was unable to provide any basis for separating or distinguishing the 'sale' from the 'purchase' of any of the transactions alleged.").

151. *See* Cross-Border Tenders, *supra* note 7, at 2193.

152. As discussed below, such an effect is quite likely given the existing liability-based hesitancy of foreign companies to engage U.S. shareholders in tender offers. *See* Basnage et al., *supra* note 15, at 1120; Casey, *supra* note 8, at 2; Chang, *supra* note 61, at 92; Thomas, *supra* note 7, at 192-93; *see also supra* notes 45-49.

153. Namely, foreign parties could be held liable for the U.S.-focused portion of their tender offer, but have absolutely no liability for identical offers to foreign parties.

154. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

155. Companies value certainty, and the Court, in *Morrison*, intended to provide that certainty. *See id.* at 2881. Bidders would not care for the added burden of considering liability based on the identity of a claimant. For instance, consider this scenario: foreign company *A* issues a tender offer for shares of foreign company *B*. Both companies are foreign private

extraterritoriality and the transactional test were meant to eliminate the significance of the claimant's identity.[156]

Alternatively, and more convincingly, the location of the transaction, or rather public announcement, under section 14(e) will likely be determined by the country from which it is issued. The many aspects of a tender offer—the publications, prices, mailings, advertisements, etc.—are likely to be coordinated from a company's principal business headquarters.[157] Even if the foreign company possessed a satellite office in the United States, final decisions regarding acceptance of tenders or price changes would, in general corporate practice, have to be approved by headquarters.[158] As all relevant decisions must be made through a foreign company's domestic seat, it is appropriate that the location of the bidder—the same place from which the "public announcement" was issued—should serve as the location of the transaction. After all, given that cross-country tender offers may span dozens of jurisdictions, the location of the bidder stands as the only common geographical link.

Support for using the public announcement's locus is also found in existing post-*Morrison* decisions. For instance, in *Goldman*, the court found the location from which the offer e-mail was issued, and not where it was received, to be central in determining whether the offer was a domestic transaction.[159] Although the Securities Act of 1933 provides a clear definition of "offer," the Exchange Act does not

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issuers, and subject to the Tier I or Tier II exceptions. Company *A* publicly announces the offer to all holders of the target security class, including U.S. shareholders. If the domesticity of the transaction was decided by the class of U.S. shareholders, then those holders would be the only ones who could bring a claim under section 14(e), as foreign shareholders would not be found to participate in a domestic transaction. Given the current undeveloped status of *Morrison*'s impact in relation to section 14(e), or generally with regard to supplemental jurisdiction, a foreign company would have absolutely no certainty of the potential scope of its liability. As noted above, such uncertainty and exposure to such a high level of liability would likely result in the existing group of U.S. securities holders in the target class completely ignoring foreign bidders. *See supra* notes 33-37 and accompanying text.

156. *Morrison,* 130 S. Ct. at 2881, 2884-86 (discussing the benefits of eschewing a case-by-case analysis, and instead arguing for equal application of the presumption against extraterritoriality and the transactional test).

157. *See* E.ON AG v. Acciona, S.A., 468 F. Supp. 2d 559, 574 (S.D.N.Y. 2007) ("The Acciona buying program was 'predominantly foreign.' Acciona, a foreign company, made the critical decisions at issue here in Spain, directed the buying campaign from Spain, and acquired the shares of a Spanish issuer through trades executed on the Madrid stock exchange.").

158. *See id.*

159. SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 165 (S.D.N.Y. 2011)

provide a clear definition of the term "tender offer." However, given the close relationship between the two statutes and the recurring reference to the Securities Act in the Exchange Act,[160] some parallels can be drawn. For instance, the section 17(a) definition of "offer" states that an offer includes any attempt to dispose of or solicit an offer to buy a security.[161] The court in *Goldman*, applying the analysis in *Morrison*, developed a transaction test for the section 17(a) offer context and found that "[i]n order for an 'offer' to be domestic, a person or entity must (1) 'attempt or offer[,]' in the United States, 'to dispose of' securities or security-based swaps or (2) 'solicit[,]' in the United States, 'an offer to buy' securities or security-based swaps."[162] Neither possibility allows for the location of the offer recipient to be determinative of domesticity. It follows from the *Goldman* court's reasoning that if an offer issued from the United States to a foreign company is not foreign, then an offer issued from a foreign company to the United States is not domestic.[163] Additionally, several other post-*Morrison* decisions have clarified that the location of a transaction is not, by definition, the location of the purchaser but rather where the transaction itself is completed.[164]

As discussed above, the tender offer transaction should be defined as the offer itself and not any eventual purchase, and the offer is completed once a public announcement is made by the bidder.[165] Since a public announcement is presumably directed from and

160. *See, e.g.*, 15 U.S.C. § 78c(a)(4)(B)(vii)(I) (2006).

161. *Id.* § 78a.

162. *Goldman*, 790 F. Supp. 2d at 165 (alteration in original) (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010).

163. *Id.*

164. *See In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 532 (S.D.N.Y. 2011) ("Though the Supreme Court in *Morrison* did not explicitly define the phrase 'domestic transactions,' there can be little doubt that the phrase was intended to be a reference to the location *of the transaction*, not to the location of the purchaser .... As Judge Marrero has pointed out, reading *Morrison* to permit Section 10(b) claims 'based strictly on the American connection of the purchaser or seller ... simply amounts to a restoration of the core element of the effects test.'" (quoting Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010))).

165. *See supra* notes 143-45 and accompanying text.

issued by the central headquarters of a company,[166] the offer should be viewed as arising from the location of the bidder's headquarters.

C. Policy: Respect for Foreign Legal Systems, SEC, and Congressional Intent

Apart from the practical realities of (a) finding the transaction to be composed of the public announcement and (b) defining the location of the transaction as the location of the bidder, there are also several policy justifications for such a determination. First, such an application will minimize potential clashes between foreign and U.S. laws and serve to support the SEC in making U.S. shareholders attractive to foreign companies. Additionally, such an application would support congressional intent regarding the proper application of securities antifraud provisions, as evidenced by the silence of the Exchange Act and Congress's failure to act after *Morrison*.

1. Minimizing Foreign Law Conflicts and Supporting the SEC

As noted above, one of the main reasons for foreign bidder disinterest in U.S. shareholders is the threat of antifraud and manipulation litigation in the U.S. courts.[167] Foreign bidders, however, are not only concerned that they will be brought into U.S. courts for clearly fraudulent or manipulative activities, but also that they will be sued for activities that are perfectly legal and legitimate in their own nations.[168] One of the starkest examples of such situations may be found in the "unconventional" tender offer scenario, whereby a company makes extra-tender offer sales and purchases in its home country that are perfectly legal under its regime.[169] Apart from the possible incongruity in registration requirements, incongruity in the

166. This presumption, of course, is rebuttable. As in *E.ON AG v. Acciona*, there must be sufficient proof that the company directed the tender offer efforts from a non-U.S. location. 468 F. Supp. 2d 559, 574 (S.D.N.Y. 2007). Should evidence in a given securities case show that a foreign private issuer did in fact choose to regulate a tender offer from a U.S. location, then there may be a much stronger case for the U.S. domesticity of a tender offer, as the location of the public announcement has arguably become domestic.

167. *See supra* notes 46-48 and accompanying text.

168. *See* Letter to Nancy Morris, *supra* note 30, at 865.

169. *Id.*

definition and scope of fraudulent activity may impose significant costs that companies simply are unwilling to bear.[170]

The extension of *Morrison* to the tender offer context will help remove this discrepancy between a bidder's domestic laws and U.S. laws. Providing a cure for such troublesome incongruity was also a concern of the *Morrison* Court, which noted that:

> Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud ... [and t]hey all complain of the interference with foreign securities regulation that application of section 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence.[171]

The concern for foreign laws in the section 10(b) context is nearly identical to the concern in the section 14(e) context. Applying the "presumption against extraterritoriality" to tender offers and defining the location of a tender offer as the location of the bidder will limit the possibility of claims against foreign private issuers in the U.S. courts and stall the extension of U.S. tender offer laws to foreign parties. Additionally, such an application would minimize the clash between foreign and domestic fraud definitions, alleviate the high costs associated with including U.S. shareholders in tender offers, and thus appease foreign governments by ensuring proper respect for their rights to regulate their national corporations.

Alleviation of the high costs associated with U.S. securities fraud litigation would also make U.S. shareholders increasingly attractive to foreign bidders, a goal that the SEC has identified since the 1999 amendments.[172] Target companies that fit within the Tier I and Tier II exceptions, by definition, only have a small percentage of their shareholders located in the United States and therefore use of these shareholders in a tender offer is unlikely to provide sufficient justification for a bidder to be subjected to the burdensome U.S.

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170. *See* Katz, *supra* note 47, at 857-58.

171. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2885-86 (2010).

172. *See* 2008 Revisions, *supra* note 7, at 342-43; Cross-Border Tenders, *supra* note 7, at 2193.

fraud provisions from which *Morrison* provided an escape.[173] To ensure that domestic shareholders receive the benefit of foreign tender offers as the SEC wishes, the application of *Morrison* must extend to the tender offer context.

2. Promoting Congressional Intent

Morrison was decided just several weeks before the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[174] In response to *Morrison*, Congress inserted sections 929P and 929Y into the Dodd-Frank Act.[175] These provisions explicitly preserved the SEC and Department of Justice's (DOJ) right to bring claims under the Exchange Act in regards to f-cubed transactions, in direct contradiction of the *Morrison* holding.[176] The provision further dictates that the SEC has the duty to conduct a study in order to determine whether "extraterritorial private rights of action should be reinstated" under the Exchange Act.[177] In relevant part, section 929P states,

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.[178]

This amendment indicates two things: first, that Congress was aware of *Morrison*'s potential impact, and second, that Congress was

173. *See supra* notes 146-52 and accompanying text.

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

175. *See* Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 199 (2011); *see also* Dodd-Frank Act §§ 929P, 929Y.

176. *See* 15 U.S.C. § 78aa (2006).

177. Painter, *supra* note 175, at 199.

178. Dodd-Frank Act § 929P.

not prepared, or convinced of the need, to alter the central holding with regard to private actions.

The *Morrison* Court paid lip service to the concepts of congressional intent and purpose relating to the Exchange Act's extraterritorial scope.[179] Indeed, at certain points the opinion appears to resemble a judicial how-to book on creating an extraterritorially applicable statute. It seems quite improbable—even sloppy—that, given the decision's focus, Congress would specifically choose to address claims available to the SEC and the DOJ while remaining (relatively) silent on the notion of private actions, and yet still intend that such actions exist under the Exchange Act.

Additionally, and of particular relevance to this analysis, Congress applied this amendment to the whole of the Exchange Act, not simply to section 10(b).[180] *Morrison* clearly stated that Congress may adjust the extraterritorial reach of an individual provision of the Exchange Act even when the whole statute is under the "presumption against extraterritoriality."[181] Congress's choice to preserve generally the SEC and DOJ's right to bring an action under all of the Exchange Act's provisions indicates that Congress was aware of a need to preserve actions outside of those arising under section 10(b). By preserving only all fraud actions, including those that could arise under section 14(e) for the SEC and DOJ, Congress showed it was not yet willing to reestablish the private actions *Morrison* effectively annulled. Consequently, failing to expand *Morrison* to the section 14(e) context would establish a limitation Congress was not willing to impose.

The existence of the secondary SEC study requirement provides further support for this notion. Section 929Y states:

> The Securities and Exchange Commission of the United States shall solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 (15 U.S.C. 78u-4) should be extended to cover—(1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transac-

179. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877, 2881-83 (2010).
180. 15 U.S.C. § 78aa.
181. *Morrison*, 130 S. Ct. at 2883-84; *see* Painter, *supra* note 175, at 206-07.

> tion occurs outside the United States and involves only foreign investors; and (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.[182]

This provision specifically instructs the SEC to determine, through a public study, whether U.S. securities law should apply to foreign transactions under the standards previously applied by the "conducts and effects" test. The use of the terminology "should apply" suggests acceptance of the current inapplicability of such standards.[183] Although these provisions by no means foreclose the possibility of eventual congressional action in favor of the "conducts and effects" test for private actions, it does suggest that Congress is not yet ready or willing to discount *Morrison*'s holding, and, for now, finds the holding valid and applicable.

It remains unclear whether Congress's silence indicates approval or a willingness to give the transactional test a trial run. However, the Dodd-Frank Act amendments do reveal that Congress was simply unwilling, for now, to limit the holding in *Morrison* or refute the application of *Morrison* to the entire Exchange Act, including section 14(e) and Regulation 14E. As a result, failure to extend the *Morrison* doctrine to the tender offer context would violate congressional intent, or rather, stymie congressional curiosity, as evidenced by the Dodd-Frank Act's immediate, direct, and limited response to the *Morrison* holding.

CONCLUSION

The *Morrison* decision undoubtedly reconstructed the application of modern U.S. securities law. Through a careful examination of the language and scope of the *Morrison* decision, the propriety of a general application of its principles becomes evident.[184] Courts have already found it appropriate to apply *Morrison* to provisions in

182. Dodd-Frank Act § 929Y.

183. *See* Painter, *supra* note 175, at 202-05 (finding that a possible explanation for section 929P was that congressional members had no wish to alter the extraterritorial reach of section 10(b) after *Morrison* and only intended to overrule *Morrison* as it relates to claims by the SEC and DOJ).

184. *See supra* Part III.A.

securities statutes outside of section 10(b) and Rule 10b-5.[185] There can be little doubt that the *Morrison* Court intended for the presumption against extraterritoriality to encompass all sections of the Exchange Act, including section 14(e) and Regulation 14E.[186] An examination of the nature of tender offers under the Exchange Act further yields a convincing case for finding a "public announcement" to serve as the transactional element of a tender offer.[187]

The location of this "public announcement," a necessary step to determine the reach of U.S. securities law under *Morrison*, lends itself to definition through the location of the foreign bidder.[188] Given that control of a tender offer generally is initiated from a bidder's headquarters, and that tender offers may span dozens of jurisdictions, the location of the bidder remains the single repeating variable in the tender offer context.[189] Post-*Morrison* cases have already addressed that the location of a shareholder, offeree, or purchaser is not determinative of the location of a transaction, and thus the existence and inclusion of U.S. shareholders in a tender offer is not a sufficient hook for a finding of domesticity.[190] By definition, foreign private issuers covered by Tier I and Tier II exceptions have relatively minor interaction with the United States. As Justice Scalia noted, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."[191]

It would be a violation of *Morrison*—as properly extended—to permit claims under section 14(e) and Regulation 14E against companies that by their nature, and as recognized by lax SEC registration requirements, have a minimal relation to the United States. Permitting such claims would only promote conflict between U.S. and foreign laws and would run contrary to evident congressional intent.[192] Furthermore, an application of *Morrison*—which

185. *See supra* notes 132-38 and accompanying text.
186. *See supra* Part III.A.
187. *See supra* Part III.B.
188. *See supra* notes 145-66 and accompanying text.
189. *See supra* notes 157-66 and accompanying text.
190. *See supra* notes 159-66 and accompanying text.
191. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010).
192. *See supra* Part III.C.2.

results in a denial of potential claims under section 14(e) against foreign private issuers involved in tender offers subject to Tier I and Tier II exceptions—will fulfill the SEC's missed opportunity in the 2008 exemption scheme revisions. This extension will also work to promote the SEC's express purpose under both the 1999 and 2008 exemption schemes to ensure that U.S. shareholders are not bypassed by foreign bidders.[193]

Application of the *Morrison* doctrine to the tender offer context will have a strong positive effect on foreign bidders and their willingness to engage U.S. shareholders. Domestic shareholders are likely to find themselves in better position to receive a "premium for their securities" and to "participate in [] investment opportunit[ies]"[194] as foreign bidders come to realize the decreased costs resulting from the *Morrison* doctrine. In times when commodities and securities markets are struggling, such an increase in international transactions will prove a welcome gift, one the *Morrison* court likely intended.

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193. *See supra* Part III.C.1.

194. *See* Cross-Border Tenders, *supra* note 7, at 2192.

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