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The Myth of Morrison: Securities Fraud Litigation Against Foreign Issuers

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Abstract

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.* 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 substantially change the type of litigation brought against foreign issuers, which both before and after *Morrison* focused on foreign issuers with a U.S. listing and substantial U.S. trading volume. While dismissal rates rose post-*Morrison* we find no evidence that this is related to the decision. Settlement amounts and attorneys' fees actually rose 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 to include those that traded primarily on non-U.S. venues. When *Morrison* is placed in its true context it is justified as a decision in-line with prior administrative and court actions which have historically aligned firms' U.S. liability to be proportional with their U.S. presence. While *Morrison* had this defining effect it did not change the litigation environment for foreign issuers, the oft-cited import of the decision. More generally, our analysis of *Morrison* also underscores how the decision has been mistakenly interpreted as a case primarily about extraterritoriality rather than about 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 Supreme Court held that Section 10(b), the general antifraud provision

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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, available at https://dealbook.nytimes.com/2012/06/01/securities-law-ruling-created-more-problems-than-it-solved/. *See also* Joseph Grundfest, Morrison*, the Restricted Scope of Securities Act Section 11 Liability, and*

of the Securities 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" test.[4] *Morrison* rejected this standard and eliminated the ability for investors who purchased securities outside the United States to bring a private claim under Rule 10b-5.[5] More importantly, even for U.S. investors, *Morrison* eliminated their ability to be a part of a global class action suit brought under Rule 10b-5 against non-U.S. firms to the extent these investors acquired their securities abroad.

Commentators 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 U.S.[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 as reducing the litigation risk for foreign issuers, and the decision has been characterized as potentially "encourage[ing] non-U.S. issuers to continue to list their shares on U.S. exchanges and strengthen U.S. capital markets."[10] The *Morrison* decision has been credited with transforming "the way the federal courts look at

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Prospects for Regulatory Reform, 41 IOWA 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] We discuss the previous "conduct" and "effects" test *infra* at notes 33-37 and accompanying text.

[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*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, Oct. 13, 2011, available at https://corpgov.law.harvard.edu/2011/10/13/the-territorial-reach-of-u-s-securities-laws-after-morrison-v-national-australia-bank/ (citing substantial number of issuers delisting from the U.S. markets between 2007 and 2009); Joshua L. Boehm, *Private Securities Fraud Litigation after Morrison v. National Australia Bank: Reconsidering a Reliance-based Approach to Extraterritoriality*, 53 Harv. Int. L.J. 502, 536 (2012) (reporting "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] *Id.*

[9] Michael D. Goldhaber, *The Short Arm of the (U.S.) Law*, CORP. COUNS., Mar. 2012, at 28.

[10] Giuffra, *supra* note 7. Our view, as developed below, is that *Morrison* did not substantially change the landscape for 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.

transnational securities litigation"[11] and with adopting a more restrained approach to the exercise of extraterritorial jurisdiction.

But is this true?

In this paper, 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 who faced U.S. litigation. Nor were settlement amounts significantly different after *Morrison* in 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. While *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 the effect of *Morrison* empirically on federal securities fraud litigation involving foreign issuers. We examine a sample of 388 lawsuits alleging a violation of Rule 10b-5 that were filed between 2002 and 2017 against foreign issuers – issuers that are headquartered outside the United States.[12] We observe that many suits filed in the U.S. involve foreign issuers whose securities trade exclusively on U.S. stock exchanges.[13] As we explain below, previous commentators have not focused on these cases. Importantly, however, because of the jurisdictional rule adopted by the Court, the *Morrison* decision should not affect them. For this reason, our core analyses 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

[11] George T. Conway, *Morrison at Four: A Survey of Its Impact on Securities Litigation*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, at 15 (2014).

[12] We note that our definition of foreign issuer differs from "foreign private issuer" which is a defined term under the federal securities laws - Rule 405 of Regulation C under the Securities Act and Rule 3b-4 under the Exchange Act. 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 SEC has adopted a variety of rules designed to reduce the U.S. regulatory burden on foreign private issuers. *See, e.g.,* SEC, *Accessing the U.S. Capital Markets -- A Brief Overview of Foreign Private Issuers*, dated Feb. 13, 2013, available at 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 limit the 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).

[13] Notably, these issuers are unlikely to qualify under the SEC's definition as foreign private issuers, as well.

paper as "Foreign Listed Firms." We focus our attention on them on the theory that this is where *Morrison's* transactional test is likely to have the most impact.[14]

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 that was sued in U.S. courts? Did *Morrison* reduce the size or scope of litigation against Foreign Listed Firms through smaller settlements and 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 counter-factual reality in which *Morrison* never occurred.[15] 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 absent 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 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 functions as our "control" setting for where *Morrison* does not apply. Additionally, the bright-line character of the *Morrison* rule permits 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 type of non-U.S. firms subjected to a class action suit under Rule 10b-5. Our findings are perhaps surprising.[16]

The first question we analyze is the impact of *Morrison* on overall litigation risk against Foreign Listed Firms. For *Morrison* to address the concern that foreign issuers were being targeted too frequently, it should have reduced their litigation exposure. One of the driving

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[14] 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 10b-5 suits commenced against non-U.S. issuers whose sole trading venue was either a U.S. exchange or the over-the-counter 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 over-the-counter market, investors would be unable to bring a fraud-on-the-market claim either before or after *Morrison.*

[15] 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 their potential impact.

[16] [This sentence seems to be missing something…]Although 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*, THE D&O DIARY, Mar. 6, 2017, available at 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").

forces behind *Morrison* was the idea that foreign firms with no connection to the U.S. 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 that had 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 when 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 that fully coincided with the period when the issuer maintained its U.S. listing. Moreover, although roughly 10% 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.[17] Thus, we find that *Morrison* did not change the type of firm likely to be sued.

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 domestic, local 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, the decision should have reduced the risk of Rule 10b-5 litigation for Foreign Listed Firms having low volumes of U.S-exchange trading because it reduced the level of recoverable Rule 10b-5 damages. For similar reasons, Foreign Listed Firms having higher levels of U.S. trading volume should be more attractive Rule 10b-5 defendants, all else 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.[18] 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,* there were Rule 10b-5 actions filed against Foreign Listed Firms with a U.S. exchange trading volume of just $1.8 million over the entire the 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 10b-5 cases prior to *Morrison* focused on Foreign Listed Firms having 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

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[17] In both cases, the defendants' securities traded in the U.S. over-the-counter market.

[18] Dollar figures throughout this paper have been inflation-adjusted using the CPI index to reflect 2018 prices.

predicated on the *Morrison* issue. The median settlement amount actually increased from $13 million to over $15 million. This latter result contrasts with prior work which found a decline in both mean and median settlement amounts following *Morrison*.[19] Among 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 where 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 implications of our research for securities litigation generally as well as Congress' rushed response to *Morrison*.[20] Our results are at first blush counter-intuitive. *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 size settlements, dismissal rates and attorneys' fees.

What then explains the *Morrison* decision and the surrounding hype? We believe the most straight-forward 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 that they represented.

In the years preceding *Morrison*, there were a small number of global class actions litigated in the U.S., in which plaintiffs' counsel used the presence of U.S. transactions as a jurisdictional hook to bring so-called global class actions that asserted claims on behalf of both U.S. investors and foreign investors worldwide. The most prominent of these cases was *Vivendi*.[21] The class in *Vivendi*, a class that consisted primarily of foreign investors, was successful in establishing liability, creating a potential $9 billion judgment against Vivendi.[22] 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 the grant to all investors worldwide of the right to pursue a private claim for damages under the U.S. securities laws. It was this potential expansion to which *Morrison* appears to have been addressed. Indeed, a major portion of the *Vivendi* verdict – over

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[19] Our settlement findings may appear hard to reconcile with the fact that, following the *Morrison* decision, a number of courts relied on it to grant partial dismissals – reducing the class size by dismissing the claims brought by foreign investors. The explanation for this result is that, even prior to the *Morrison* decision, 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 prior to *Morrison*.

[20] Because Morrison was decided only weeks before Dodd-Frank became law, Congress responded by inserting a provision into the statute at the last minute. Richard Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed or Sufficient*, 1 HARV. BUS. L. REV. 195, 199 (2011). We discuss this *infra* at notes 73-79 and accompanying text.

[21] We discuss the two other significant outlier settlements Royal Dutch Ahold and Nortel *infra* at notes 46–51 and accompanying text.

[22] *See* Angelo G. Savino & Abby J. Sher, *Vivendi – The Multi-Billion Dollar Impact Of Morrison On Foreign-Cubed Securities Litigation*, MONDAQ, Mar. 30, 2011, available at http://www.mondaq.com/unitedstates/x/127648/Insurance/Vivendi+The+MultiBillion+Dollar+Impact+Of+Morrison+On+ForeignCubed+Securities+Litigation+

$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.[23]

While *Morrison* makes it difficult to bring a 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* was one that had a U.S. exchange listing, and *Morrison* did not eliminate or even reduce litigation against these types of foreign issuers. To the contrary, the 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. To the extent *Morrison* is described as a "steamroller" of litigation against foreign issuers, it is simply a myth.

How then should we understand *Morrison*? We argue here that, rather than a decision about the extraterritorial application of Rule 10b-5, *Morrison* can be better understood as implementing a proportionality approach in which a foreign issuer's liability exposure is proportionate to the extent of its presence in the U.S. capital markets. We demonstrate that this reasoning is consistent with the SEC's regulatory approach to foreign private issuers, as well as 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 fundamentally about which issuers are subject to the antifraud provision 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 multi-national companies that are headquartered abroad, and investing in businesses and industries that are located primarily outside the United States.[24]

[23] Jonathan Stempel, *Vivendi ends 15-year U.S. lawsuit over big merger, to pay $26.4 million*, Reuters, Apr. 6, 2017, available at https://www.reuters.com/article/us-vivendi-settlement-idUSKBN1782RQ.

[24] For purposes of this Article, we consider foreign issuers to be issuers that are headquartered outside of the United States. The ordinary shares of most 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.

U.S. investors can purchase the securities of foreign issuers in several ways.[25] First, for foreign firms without a U.S. exchange listing, investors can buy the shares directly on the foreign exchange. Second, in some cases, a foreign issuer may have shares that are 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.[26] The U.S.-listed securities may be ordinary shares,[27] but more commonly are American Depository Receipts (ADRs).[28] 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 over-the-counter market.[29]

In reality, this trading is bifurcated depending upon 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 in the United States through U.S. broker/dealers.[30] 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 that are not listed or traded in the United States.[31] Conversely, institutional and other sophisticated investors are able to purchase shares abroad,

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[25] *See also* Schwab Center for Financial Research, *Cross-Listed International Stocks: Another Investing Alternative*, May 23, 2014, available at https://perma.cc/NTJ7-MEM6 (describing options for U.S. investors who want to invest in international stocks).

[26] 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 issuers' securities are traded is known as the primary exchange, and any other exchange is referred to as a secondary exchange.

[27] Most cross-listed ordinary shares are securities of Canadian issuers. See https://perma.cc/NTJ7-MEM6 In a small number of cases, foreign issuers create global registered shares. Global shares or GRSs are ordinary shares that can be traded in multiple jurisdictions without the need for currency conversion. *See, e.g.,* UBS Investor Relations, *Frequently asked questions UBS share*, https://www.ubs.com/global/en/about_ubs/investor_relations/faq/share.html (explaining GRSs). Daimler Chrysler and UBS are among the foreign issuers that have issued GRSs. *See* G. Andrew Karolyi, *DaimlerChrysler AG, The First Truly Global Share*, https://poseidon01.ssrn.com/delivery.php?ID=974110106091096105016111088087021090090078057047002065122084021068107025013031073125095112030073017008058052057122008112096007078103003066012099124031070105029071110001115092030023067008067&EXT=pdf (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).

[28] The terms ADR and ADS (American Depository Shares) are often used interchangeably. *See* SEC Office of Investor Education and Advocacy, *Investor Bulletin: American Depositary Receipts,* available at 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 ADR, and that shareholders' rights are determined in part by the contractual terms of the ADR. ADRs can be sponsored or unsponsored by the issuer, and some, but not all, issuers raise capital through cross-listings. *See, e.g.*, Tom Zanki, *Dual-Listed IPOs Carve A Small But Steady Niche*, LAW 360, Aug. 4, 2016, available at https://perma.cc/FNC5-P7W5 (discussing and citing recent examples of dual-listed IPOs).

[29] The over-the-counter market is a general term used to refer to the 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).

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

[31] *Id.* at 48.

something that these investors often prefer due to the lower trading costs and greater liquidity on these foreign exchanges.[32]

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 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 Second Circuit.[33] 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.[34] In *Schoenbaum*, the court held that Section 10(b) could be applied if the fraudulent transaction had substantial effects in the United States.[35] Courts described the so-called "conduct" and "effects" tests as delineating the "extraterritorial reach of the antifraud provisions."[36] Although the conduct and effects tests were widely followed by other federal courts, a number of commentators criticized the resulting expansive scope of jurisdiction both as unprincipled[37] and for opening the U.S. courts to cases that had limited ties to the United States.[38]

The Supreme Court responded to these concerns by replacing the conduct and effects tests in *Morrison*.[39] The *Morrison* case was publicized in the press as a so-called "F-cubed" case,[40] in that it was brought by foreign shareholders who bought their shares on a foreign

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[32] *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 "[o]verall, 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.")

[33] *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).

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

[35] 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).

[36] *See* Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 469 (2009).

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

[38] *See, e.g.,* Ashby Jones, *The Whole World is Watching: 'F-Cubed' Case Moves to High Court*, The Wall St. J., Mar. 29, 2010 (quoting claim that "[e]xposing 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.").

[39] *Morrison*, 561 U.S. at 267 (2010).

[40] Prior to *Morrison*, commentators identified three categories of cases against foreign issuers. The first category was 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?*, The D&O Diary, Jul. 21, 2010, available at 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 the *Morrison* decision).

exchange, against foreign issuers.[41] Also known as global class actions, F-cubed lawsuits were a 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.[42]

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 Depository Shares of Vivendi."[43] The case was tried before a jury which found for the plaintiffs, leading the Court to enter a preliminary judgment which would have exceeded $9 billion.[44] Prior to *Vivendi*, two other cases against foreign issuers resulted in very high settlements – *Royal Dutch Ahold* and *Nortel*.[45] 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 American Depository Receipts from July 30, 1999 through February 23, 2003, regardless of where they live or where they purchased their Ahold shares"[46] and approved a settlement of $1.1 billion.[47] *Nortel* involved a plaintiff class included both U.S. and Canadian investors and settled for over $2.9 billion.[48]

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 which was not reviewed by a federal appellate court when the case was settled.[49] Other courts addressed the question of jurisdiction more directly and, in some cases, declined to exercise jurisdiction over transactions occurring abroad.[50] As we show in Section 2(c), courts routinely used the conduct and effects test to limit the class of investors to those having a meaningful nexus to the United States.

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[41] *See, e.g.* Gary L. Gassman, *Foreign Issuers, Foreign Exchanges: The Current State of Foreign-Cubed U.S. Securities Litigation*, 41 THE BRIEF 10, 11 (2012).
[42] For a discussion of this issue *see* Buxbaum, *supra* note 59.
[43] In re Vivendi Universal, S.A., 242 F.R.D. 76, 109 (S.D.N.Y. 2007).
[44] *See* Savino & Sher, *supra* note 22 ("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").
[45] *See* U.S. Chamber Institute for Legal Reform, *Securities Class Action Litigation*, Jul. 2008, at 8, available at 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.")
[46] In re Royal Ahold N.V. Sec. & ERISA Litig., 2006 U.S. Dist. LEXIS 1928, *16 (D. Md. 2006).
[47] *Id.* at *48.
[48] *See* Nortel Networks Corporation (Nortel I & II) Securities Litigation, Stanford Law School Securities Class Action Clearinghouse, available at http://securities.stanford.edu/filings-case.html?id=101707. The first complaint in the Nortel case was filed on February 16, 2001 so is not in our dataset. *Id. See generally* In re Nortel Networks Corp. Secs. Litig., 2003 U.S. Dist. LEXIS 15702 (S.D.N.Y., Sept. 5, 2003) (certifying class).
[49] In re Royal Ahold N.V. Sec. & ERISA Litig., 351 F.Supp. 334 (D. Md. 2006). *See also* Martha Graybow, *Judge Oks $2.4 billion settlement in Nortel Case*, THE WASHINGTON POST, Dec. 26, 2006.
[50] *See, e.g.*, 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) In re European Aeronautic Defence & Space Co. Sec. Litig., 703 F. Supp. 2d 348 (S.D.N.Y. 2010) (applying conduct and effects test to dismiss F-cubed lawsuit by European investors against European issuer for filings within the European Union).

Indeed in *Morrison* itself, the lower courts had dismissed the complaint as falling outside the scope of the existing Second Circuit standard.[51] 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."[52] In this vein, it was hardly obvious that *Morrison* would become the test case for whether F-cubed cases could proceed under Section 10b-5.

In addition, the characterization of *Morrison* as an F-cubed lawsuit is questionable. National Australia Bank, the defendant in the case, had ADRs listed on the New York Stock Exchange 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. The trial court, however, dismissed this class of plaintiffs for failing to allege any quantifiable damages. Thus, by the time the case was heard by the Supreme Court, the plaintiff class consisted entirely of investors in National Australia Bank's ordinary shares purchased abroad and who lacked any obvious connection to the U.S. In addition, NAB delisted its ADRs shortly after the suit was filed. It was for these reasons that counsel for National Australia Bank and multiple *amica* were able to use *Morrison* not just 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.[53]

Morrison reflected a concerted effort by William Conway, III, a partner at the law firm of Wachtell, Lipton Rosen & Katz, to push the Supreme Court to replace the Second Circuit test.[54] This effort was supported by an array of business-friendly interests. Critics of the application of Section 10(b) to F-cubed claims in particular argued that burdensome U.S. securities fraud

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[51] Morrison, 561 U.S. at 253.
[52] *Id.* at 286.
[53] 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.*, Amicus Brief for Alecta Pensionforskring, et al., available at https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1191_PetitionerAmCuAlectaetal.authcheckdam.pdf (defending application of 10(b) to claims by foreign investors who traded abroad); Amicus Brief for the Australian Shareholders' Assn, available at 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 U.S. to be used as a base for fraudulent conduct affecting the interests of foreign investors).
[54] Mr. 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*, THE AMLAW LITIGATION DAILY, Sept. 12, 2012, available at https://www.law.com/litigationdaily/almID/1202572772363/ (detailing Mr. Conway's efforts to argue that Morrison's holding also applied in the case of criminal securities fraud claims). To be sure, there was academic criticism of the Second Circuit test beforehand. Choi & Silberman, *Transnational Litigation and Global Securities Class–Action Lawsuits*, 2009 WIS. L. REV. 465, 467–468; 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, 106–108, 115–116 (2004); Donald Langevoort, *Schoenbaum Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 LAW & CONTEMP. PROBS. 241, 244–248 (1992).

litigation deterred foreign issuers from issuing securities to U.S. residents.[55] They also claimed that the Second Circuit test violated other nations' sovereignty[56] and conflicted with the laws of other jurisdictions.[57] Mixed in 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.[58]

These arguments worked. In *Morrison*, the U.S. Supreme Court rejected the conduct and effects tests as improperly giving Section 10(b) extraterritorial application and 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 if "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."[59] 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.[60] Among the reasons for this opposition was that the ruling eliminated not only "F-cubed" cases but also "F-squared" cases—that is, cases brought by U.S. domiciled investors who bought their shares in the foreign companies on foreign exchanges.[61] As a result, *Morrison* deprived U.S. investors of the antifraud remedy in

[55] *See* Amicus Brief of NYSE Euronext at 3, available at 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.").

[56] *See, e.g.,* Amicus Brief of the United Kingdom of Great Britain and Northern Ireland, https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1191_RespondentAmCuUnitedKingdom.authcheckdam.pdf, at 2 (arguing that "the broad assertion of extraterritorial jurisdiction by United States courts implicates the legitimate sovereign interests and policy choices of the United Kingdom.").

[57] *See* Amicus Brief of the Republic of France, available at http://www.scotusblog.com/wp-content/uploads/2010/02/Morrison.Republic-of-France-in-Support-of-REsp.pdf, at 4 (explaining that "certain aspects of the U.S. approach conflict with specific legal rules of foreign nations.").

[58] *See* Amicus Brief for Law Professors, available at 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")

[59] Morrison, 561 U.S at 273. Hannah Buxbaum had previously advocated the approach adopted by *Morrison* Court. *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 68 (2007) ("the 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").

[60] *See, e.g.,* Christian J. Ward, et al., *Council for Institutional Investors, Morrison v. National Australia Bank The Impact on Institutional Investors* (Feb. 2012), 7 (("the limitation on [Morrison's] reach seriously affects investors' remedies for fraud.") available at https://www.cii.org/files/publications/white_papers/02_02_12_morrison_v_national_australia_bank.pdf.

[61] *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. 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.")

circumstances in which they purchased their securities abroad. Shareholder advocates argued 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).[62] Accordingly, these investors claimed that *Morrison* deprived them of their ability to use Rule 10b-5 to combat fraud.[63] 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 10b and Rule 10b-5.[64]

In the months following the decision, there was almost uniform agreement that *Morrison* marked a sea-change in securities litigation with one author writing that the "world of securities fraud litigation was irrevocably altered . . . ."[65] In *Morrison's* wake, memos and other writings appeared to hail the decision as an end to foreign securities litigation. *Morrison* was also described as "dramatically" changing the litigation landscape for foreign issuers.[66] Most notably, the *Morrison* decision resulted in the dismissal of 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.[67] Marc I. Steinberg and Kelly Flanagan wrote to say that *Morrison* "drastically altered the landscape for transnational

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[62] Ward et al., *supra* note 60, at 10.

[63] *Id.* at 11 ("Morrison's transactional test, however, creates new incentives for issuers to withdraw from American stock markets.").

[64] *Morrison* did not involve an SEC enforcement action. See Morrison, 130 S. Ct. at 2894 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."). Nonetheless, a variety of commentators argued that the Court's analysis implicated the scope of the SEC's regulatory authority. *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."). Congress responded to this concern in the Dodd-Frank Wall Street Consumer Protection Act of 2010. *See infra* notes 76-79 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 congressional response).

[65] *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).

[66] *See* Cravath, Swaine & Moore, *Morrison v. National Australia 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*, Jul. 6, 2010 ("The Supreme Court's June 24, 2010, opinion in Morrison v. National Australia Bank Ltd., 561 U.S. __ (2010), has narrowed dramatically the scope of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder"), available at https://www.cravath.com/files/Uploads/Documents/Publications/3225362_1.pdf; Davis Polk Client Newsflash, *Update: U.S. Supreme Court Limits Extraterritorial Application of U.S. Securities Laws— Morrison v. National Australia Bank*, Jun. 28, 2010, available at https://www.davispolk.com/files/files/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 COLUMBIA 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")

[67] *See Court Finds Vivendi Liable for Misleading Investors*, THE 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").

securities litigation and the way that courts determine proper application of a statute concerning a transnational claim."[68]

Morrison's broad language about extraterritoriality also had broad effects, effects that extend well beyond private securities fraud litigation. The *Morrison* decision has influenced the interpretation of statutes in a wide range of contexts,[69] from the alien tort statute[70] to the Racketeer Influenced and Corrupt Organizations Act (RICO).[71] In each of these cases the courts applied the *Morrison* holding to consider whether a federal statute should have extraterritorial application. The results have been to limit 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 10b 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."[72]

The controversial nature of the *Morrison* decision was quickly highlighted when only a few months later Congress in the Dodd-Frank Act sought to restore the SEC's authority to bring suit to enforce Section 10b and Rule 10b-5 subject only to constitutional limitations on the exercise of jurisdiction.[73] 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 regulators' enforcement authority,[74] Congress appears to have taken the view that *Morrison* threatened such authority.[75]

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.[76] The SEC performed this study, and the results

[68] Marc I. Steinberg & Kelly Flanagan, *Transnational Dealings – Morrison Continues to Make Waves*, 46 MORRISON 829, 829 (Fall 2012).
[69] *See also* Daimler AG v. Bauman, 571 U.S. 117 (relying on Morrison to reach a restrictive view of California's power to exercise jurisdiction over a foreign company).
[70] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).
[71] Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543 (2013).
[72] United States v. Vilar, 2013 WL 4608948 (2d Cir. Aug. 30, 2013).
[73] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1871 (2010) [hereinafter Dodd -Frank Act]. As one commentator has noted, the Dodd-Frank provision was "hastily drafted" because "Morrison was decided only weeks before the Act became law." Painter, *supra* note 20, at 199. Immediately after passage of the bill, Mr. 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) available at http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf
[74] *See* Painter, *supra* note 20, 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")
[75] *See, e.g.,* SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1292 (D. Utah 2017) (recounting legislation history of Section 929(P)(b) of Dodd-Frank).
[76] *See* Dodd-Frank Act, *supra* note 73, at 929P.

seemed to confirm the continued dispute over the scope and desirability of the *Morrison* rule.[77] In that study the SEC received 72 comment letters, 44 of which supported the old Second Circuit test or a modified version thereof, and 23 which supported the *Morrison* test.[78] The study did not reach a conclusion as to whether private litigation should be expanded, explaining: "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."[79]

D. *Morrison* and Academic Study

Academic commentary regarding the effects of *Morrison* has similarly been 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 test was largely unexpected, Professors Gagnon and Karolyi examine stock price reactions surrounding the publication of the *Morrison* decision to gauge investors' reactions to the new rule.[80] Focusing on nearly 1,000 foreign firms that were listed on both a U.S. exchange and a domestic venue, they find that publication of the decision was associated with a positive return of 44 basis points for firms' U.S.-listed securities relative to their locally-traded securities.[81] They interpret 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.[82]

Using a similar research design, Professors Licht, Poliquin, Siegel & Li (LPSL) likewise examine stock price reactions to cross-listed firms but focus on stock price movements surrounding the time of the oral arguments for *Morrison* when they posit the Court signaled its willingness to discard the conduct and effects test.[83] Overall, LPSL fail to find any negative market reaction to this event in either the U.S. or local markets. On the contrary, they find that U.S.-listed foreign firms experienced insignificant or even positive abnormal returns in both markets, particularly among firms having most of their equity traded outside the U.S. The authors conclude that these findings are consistent with the idea that a "U.S.-style securities-fraud class action regime could be viewed as a regulatory burden for firms. "[84] These results are also consistent with the findings of Professor Robert Bartlett who, using a proprietary dataset of 378 institutional investor trades, examines 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,

[77] *See* Securities and Exchange Commission Staff, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934* (April 2012).
[78] *Id.* at 38.
[79] *Id.* at B13.
[80] *See* Louis Gagnon and George Andrew Karolyi, *An Unexpected Test of the Bonding Hypothesis* (October 20, 2017). Johnson School Research Paper Series No. 50-2011. Available at SSRN: https://ssrn.com/abstract=1961178 or http://dx.doi.org/10.2139/ssrn.1961178
[81] *Id.* at 3.
[82] *Id.* at 5-8.
[83] 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 firm*, 129(2) J. FIN. ECON. 329 (2018).
[84] *Id.* at 330.

Professor Bartlett finds investors in his sample did not reallocate trades to the U.S.-listed securities of cross-listed foreign firms following the decision.[85]

Professor Yuliya Guseva takes a different approach in assessing the practical effect of *Morrison* on 10b-5 litigation. Professor Guseva analyzes 222 10b-5 cases brought against foreign private issuers in the five years before and five years after *Morrison* was decided.[86] While Professor Guseva finds that F-cubed cases were "rare" prior to the *Morrison* case,[87] she also finds that settlement amounts within her sample declined in the wake of *Morrison* and that 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* 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. Professor Guseva also finds that the liability exposure of foreign issuers became more "ascertainable" post-*Morrison*, as it was capped by the extent to which they have accessed the U.S. capital markets.[88] To the extent this was the case, the limitation of Rule 10b-5 protection to shares acquired on a U.S.-exchange would constitute a clear reduction in the way in which Rule 10b-5 was used prior to *Morrison*, consistent with the conventional wisdom.

However, Guseva's dataset lacks information concerning the relative levels of U.S. and foreign trading volume among cross-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 dataset also includes defendants headquartered in China.[89] Yet, the litigation involving Chinese firms 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 non-operating shell corporation utilizing 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. Professor Guseva also does not distinguish between firms that are 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 latter set of firms.

The gaps in Professor 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 between 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-US securities (such as

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[85] Bartlett, *supra* note 32, at 186-187.
[86] Yuliya Guseva, *Extraterritoriality of Securities Law Redux: Litigation Five Years after Morrison v. National Australia Bank*, 2017 Colum. Bus. L. Rev. 199.
[87] *Id.* at 261.
[88] *Id.* at 279. Professor Guseva analyzed a sample of 75 cases from an earlier time period in another paper 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. 411 (2013).
[89] *See* Yuseva, *supra* note 86, at 256.

in an F-cubed or F-squared lawsuit) from the possibility that *Morrison* eliminated the *prospect* that global class actions would become widespread in the future.[90]

II. Data and Empirical Analysis

To assess the effect of *Morrison* on Rule 10b-5 litigation practices, we follow Professor Guseva in examining Rule 10b-5 cases in the years surrounding *Morrison*, though our methodology differs in several respects. First, we focus primarily on foreign issuers that were subject to U.S. litigation pre- and post-*Morrison*, in order 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 importantly, we distinguish between foreign firms whose securities are listed exclusively on a U.S. exchange and those that met our definition of a Foreign Listed Firm.

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 do not involve securities fraud, and more specifically, do not plead Section 10(b) allegations. We further filter cases to identify those cases that were filed against a corporate issuer having its headquarters located outside of 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 CRSP regarding 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.

Table 1: Sample Cases by Year of Filing

	All Cases in Sample		All Cases in Sample with Non-US Listing		All Cases in Stanford Litigation Clearinghouse	
Year	*N*	*%*	*N*	*%*	*N*	*%*
2002	19	4.90%	12	6.56%	265	7.94%

[90] 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 10b-5 litigation, suggesting that the market's reaction was primarily driven by the reduced possibility that these firms would be subject to 10b-5 litigation in the future?

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	53.18%
Total Post-*Morrison:*	246	63.66%	93	52.46%	1,675	46.82%

The first column presents the number of cases in our sample, regardless of whether the defendant had a trading venue outside of the U.S. Importantly, even if a firm is headquartered outside of the U.S., it is possible for the issuer to trade principally or even 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 trade exclusively on a U.S. stock exchange. Data in the first column thus commingles 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 in the U.S. OTC market.[91]

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.[92] We confirm this conclusion in Section 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 that 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.

Finally, in Columns 5 and 6 we examine overall litigation rates in order to explore if 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 related to foreign firms. 53.18% of all securities cases were brought pre-Morrison while 46.82% were brought post-Morrison. In unreported tests we compare the

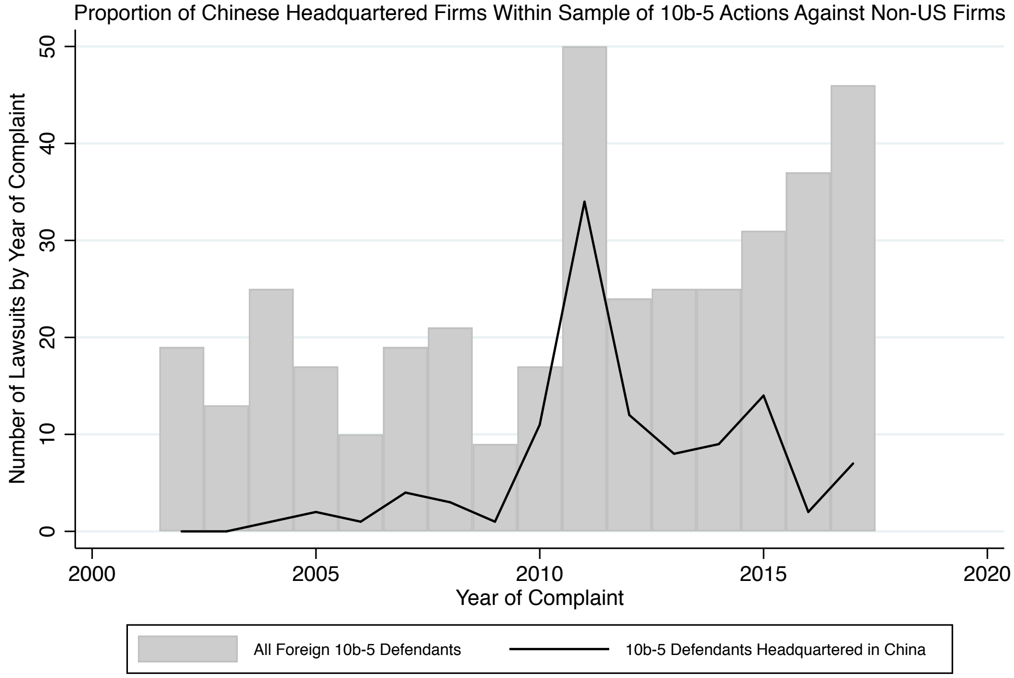
[91] Among the 205 foreign firms in our sample that did not have a local trading market, only three traded exclusively in the U.S. over-the-counter market.

[92] Where a foreign firm's securities trade exclusive in 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 in n. 91 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

percentage of foreign securities litigation to all litigation and find no statistical change in percentages or comparative rates of litigation over the sample time period.

Finally, in Figure 1 we examine the proportion of lawsuits within our full sample that named as a defendant a firm headquartered in China. As noted previously, a large number of 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. As highlighted in Figure 1, cases involving Chinese firms were especially prominent in 2010 and 2011, representing over 60% of all private 10b-5 cases brought against non-U.S. firms in those years.[93] Notably, as we show below, these firms had market capitalizations that were generally smaller than other firms within our sample, suggesting that recoverable 10b-5 damages would also be lower than in 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 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 that trade exclusively on U.S. exchanges were largely unaffected by the decision. We return to this topic again in Section II(c).

Figure 1:
Proportion of Chinese Headquartered Firms Within Sample of 10b-5 Actions Against Non-US Firms



b. *Morrison* and the Risk of a 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

[93] Of these cases, we classify fifty-two as involving reverse mergers.

outside the United States (i.e., so called "F-squared" and "F-cubed" cases) given, 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 that simply 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.[94] 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 New York Stock Exchange, 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, 87 were sued in in our pre-*Morrison* sample period, of which 77 (88.5%) met this definition of Cross-Listed. These numbers compare to 84 of the 96 (87.5%) of Foreign Listed Firms sued in our post-*Morrison* sample, which was statistically indistinguishable from the pre-*Morrison* sample ($\chi^2(1) = 0.044$, *ns*). The remainder of firms did not have securities listed on a U.S. exchange and, to the extent they were held by U.S. investors, they were presumably either purchased abroad, in private transactions or in the over-the-counter market[95]

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[94] Because Morrison would not have affected foreign issuers with their sole listing in the United States, we exclude these issuers as discussed *supra.*

[95] 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, the case 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 on a foreign exchange is insufficient to subject the purchase to the coverage of section 10(b) of the Exchange Act." 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 US in the OTC market. In dismissing the case (including all claims by holders of its ADRs), the district court found that, because "[t]rade in ADRs is considered to be a 'predominantly foreign securities transaction,'" 10b-5 was inapplicable after *Morrison.* 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 in the OTC market were "foreign transactions" was based on a prior decision decided under the conducts and effects test that had dismissed a similar set of claims against Fortis, holding that OTC transactions in ADRs are "predominantly foreign securities transaction[s]." Copeland v. Fortis, 685 F. Supp.2d 498 (SDNY 2010). As this case suggests, even under the conduct and effects test, cases against foreign issuers without a U.S. exchange listing tended to fare poorly. For instance, among the ten cases filed before *Morrison*, eight were dismissed (including the two noted previously), while just two settled. Of the twelve cases filed after *Morrison*, five remained pending at the time of

We also examine for all Cross-Listed defendants the time period for which the firm had its 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 an involuntary delisting for failure to meet an exchange listing condition or simply because a firm chooses to discontinue an exchange listing. However, 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 percent of the class period during which the issuer had a U.S. exchange listing. To facilitate 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 where three cases had percentages that were meaningfully less than 100%.

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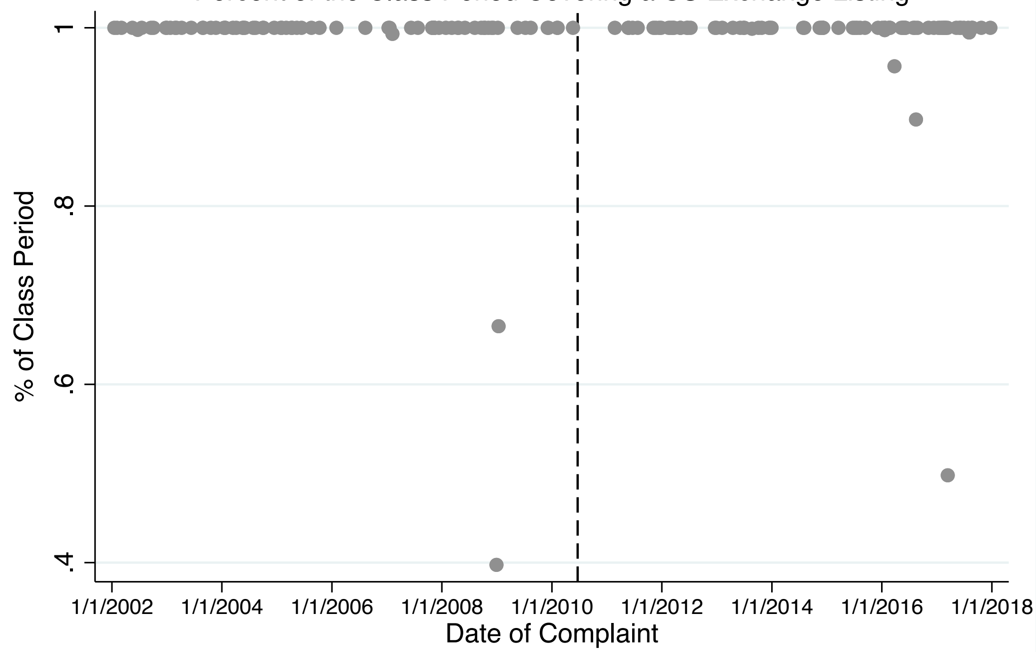
our research, while four had been dismissed. Notably, three of these post-*Morrison* cases had settled despite the absence of any U.S. exchange listing, including two involving the ADRs of Tesco PLC and Olympus Corporation, both of which traded in the U.S. OTC market.

Figure 2:
Percent of the Class Period Covering a US Exchange Listing



These findings significantly undermine claims that *Morrison* was used "to extinguish" F-cubed and F-squared "claims that had proliferated in the years preceding *Morrison*…"[96] Among the 183 defendants in our sample that were Foreign Listed Firms, nearly 90% 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,"[97] our data does not indicate that investors were doing so prior to the Morrison decision. Moreover, among these 161 Cross-Listed firms, almost all of the complaints alleged that the stock price was allegedly 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. Therefore, it is useful to determine whether *Morrison* had the effect of 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 abroad.

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[96] Conway, *supra* note 11, at 4.
[97] David H. Kistenbroker, Joni S. Jacobsen, & Angela M. Liu, *Dechert, 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.

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 on 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 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 defendant's securities during the class period. All dollar figures have been inflation adjusted to reflect 2018 prices.

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 77 pre-*Morrison* cases, the mean percentage of global trading occurring on U.S. Exchanges during the class period was 38.5%, while the mean dollar volume of 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 in the pre-*Morrison* period. At the same time, visual inspection of the data reveals 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.

Table 2: U.S. Exchange Trading During Class Period

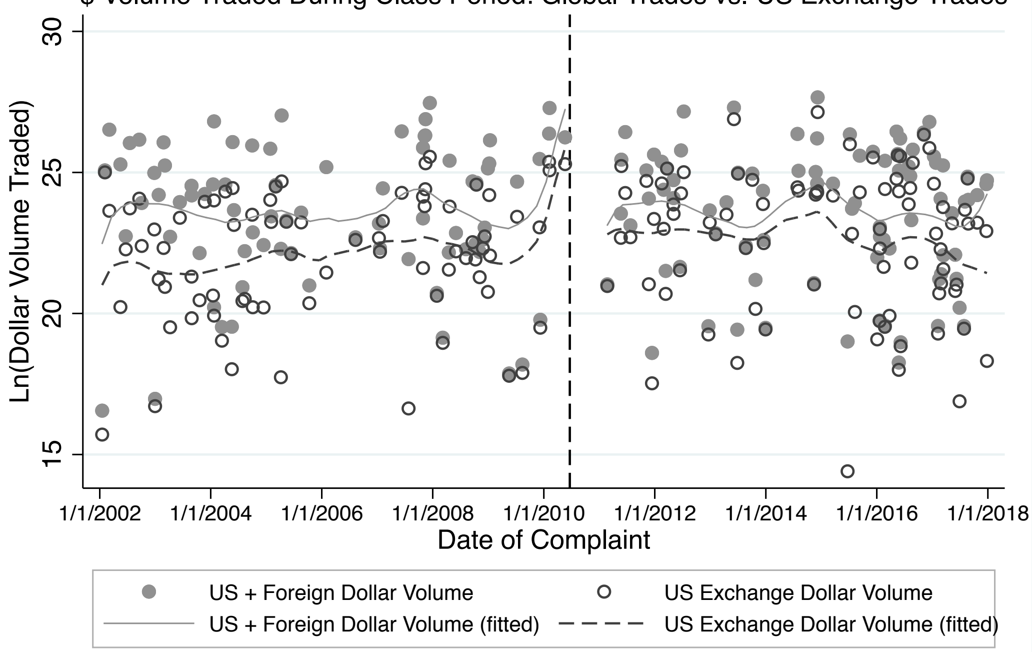
Year of Filing	Number of Actions	Median % of Global Trading (by dollar volume) Occurring on U.S. Exchanges During Class Period	Median Dollar Volume of U.S. Exchange Trading During Class Period
Pre-*Morrison*			
2002	10	34.0%	$15,949,214,351
2003	9	18.9%	$5,670,880,659
2004	13	33.0%	$10,492,435,428
2005	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[98]	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

[98] All three cases were filed prior to *Morrison's* publication.

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

To more accurately assess this issue, we turn to a time series analysis that permits a more precise 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 before, we also impose a vertical line that signifies 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 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.

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



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 equity traded primarily on a U.S. exchange, although the narrowing of this gap was also evident in the months prior to *Morrison*. More importantly, it is the aggregate dollar volume of U.S. exchange trading, as opposed to the percent 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-*Morrison* defendants 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:

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

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

Table 3 presents the results.

Table 3

	US $ 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

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*, these data accordingly suggest there would have been sufficient incentive to bring these pre-*Morrison* cases even had *Morrison* 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 that had previously been brought under Rule 10b-5, it may have had an effect on 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 who were often included as part of a Rule 10b-5 class prior to *Morrison.* As such, it would be unsurprising if overall settlements declined as issuers faced Rule 10b-5 actions that posed lower amounts of prospective damages. At the same time, the evidence presented in Section 2(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 overall settlement 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% 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 empirically identifying 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 into whether they were filed before or after *Morrison.* Overall, approximately 49% of the pre-*Morrison* cases against Foreign Listed Firms had been dismissed by the time we collected our sample, compared to 68% of the post-*Morrison* cases, a difference that is statistically significant at the 5% threshold ($\chi^2(1) = 4.68$, p=0.03). It is important to note, however, that of the 73 lawsuits that remained pending at the time of our data collection, sixty-five (90%) were filed after 2014. To the extent weaker cases are dismissed earlier than stronger cases, the post-*Morrison* dismissal rate may ultimately reflect a lower rate than we currently observe.

Table 4: Settlement Rates – Firms with a Non-U.S. Listing		
	# Dismissed	# Settle/Judgment
Pre-*Morrison*	42	43

	(49%)	(51%)
Post-*Morrison*	38 (68%)	18 (32%)

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. Case 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%), compared with six of the forty-two dismissals (14%) 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 applying *Morrison* retroactively to cases that were presumably structured to satisfy the more expansive conduct and effects test. 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 that could satisfy its transactional test.

While not appearing to affect outright dismissal rates, the *Morrison* decision does appear to have been actively deployed 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 on non-US venues. Following *Morrison*, such cases could have been subject to a partial motion to dismiss that, if granted, had the effect of limiting the plaintiff class to investors who purchased their securities in the United States. Among the 87 pre-*Morrison* cases against a Foreign Listed Firm, we observe 15 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 96 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*.

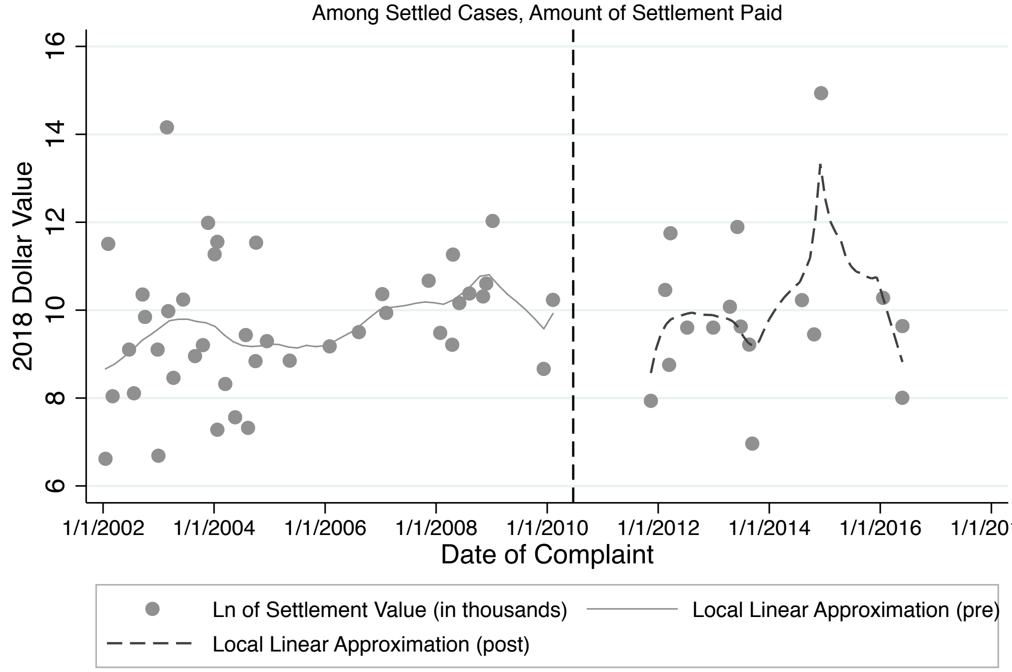
Used in this fashion, *Morrison* could accordingly affect settlement outcomes even for those cases that survived a motion to dismiss. As noted previously, the Vivendi case presented a particularly striking example of this scenario. The lawsuit, which had the prospect of being the largest securities fraud class action ever, resulted in a partial dismissal after the *Morrison* decision, limiting the class to holders of U.S. ADRs acquired on the New York Stock Exchange. However, less than 10% of Vivendi's global trading volume was in the U.S. ADR market. While original damages in Vivendi were estimated at $9 billion, following dismissal of investors who acquired Vivendi securities outside the U.S., the case settled for just $76 million in total.

Yet, it is also 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 even prior to *Morrison*, and courts frequently dismissed claims based on foreign transactions even under the prior conduct and effects test. For example, Hannah Buxbaum studied a ten-year sample of multinational class actions between 1996 and 2005 and found that less than 40% of the cases encompassed claims based on foreign transactions.[99] Moreover, of those cases (45), only a third were allowed to proceed with a class that included any claims based on non-U.S. market transactions.[100] These findings underscore a more general observation that, compared to *Morrison's* transactional test, the judicial discretion created by the conduct and effects test 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-US defendants.[101] For instance, among the 87 pre-*Morrison* cases against a Foreign Listed Firm, courts granted motions to limit the case in twenty-two (excluding the fifteen noted previously where the courts cited *Morrison*). Thus, even before *Morrison*, the conduct and effects test provided defense counsel with an opportunity to limit the size of a global class action.

To examine more precisely 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) 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.[102] Consistent with our prior analyses, we limit settlements in Figure 4 to those against Foreign Listed Firms, and all dollar figures have been inflation adjusted to reflect 2018 prices.

[99] Buxbaum, *supra* note 59, at 39.
[100] *Id.* at 40.
[101] *See, e.g.*, In re: China Life Securities Litigation, 04 Civ 2112, Sept. 3, 2008 (SDNY) (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-US purchasers).
[102] In estimating these models, we use the same regression specification utilized in Figure 2.

Figure 4:
Among Settled Cases, Amount of Settlement Paid



As shown in Figure 4, aggregate settlement payments varied widely across cases both before and after *Morrison.* 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 Corporation. 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 Corporation to a high of $3 billion paid by Petrobras Brasileiro S.A. Overall, 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.[103] Visual inspection of Figure 4 likewise reveals no evident change in settlement proceeds following *Morrison.*

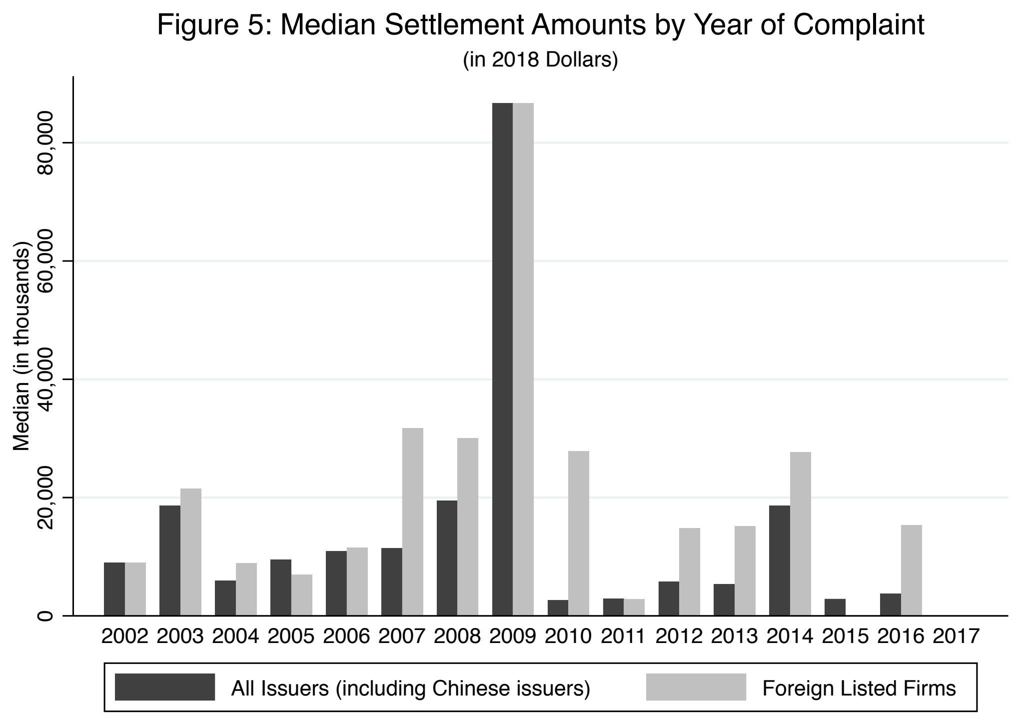
The absence of any significant difference in overall settlement amounts for pre- and post-*Morrison* cases distinguishes our findings from those of Professor Guseva who found a statistically significant decline in settlement proceeds following *Morrison.* We attribute this difference to the fact that 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 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 10b-5 actions against firms headquartered in China, with these suits constituting over 60% of 10b-5 lawsuits against foreign firms in 2010 and 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 94 post-*Morrison*

[103] A Wilcoxon rank-sum test of medians yields a test statistic of -0.368, p=0.7127.

cases in our sample that involved a defendant headquartered in China was subject to either a motion to limit the class or a motion to dismiss that was 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 to $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 spike sharply in 2009[104] and decline considerably for cases filed in 2010-2016. However, for Rule 10b-5 suits involving Foreign Listed Firms, median settlement values for cases filed between 2010 and 2014 generally resemble those for cases filed between 2004-2008, with overall median settlement amounts showing no statistically significant difference between the pre- and post-*Morrison* periods. In 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 Professor Guseva's finding that settlement amounts declined following *Morrison* may have been driven by the inclusion in her sample of the large number of 10b-5 cases commenced against Chinese based issuers in the time period following *Morrison*.

[104] 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.

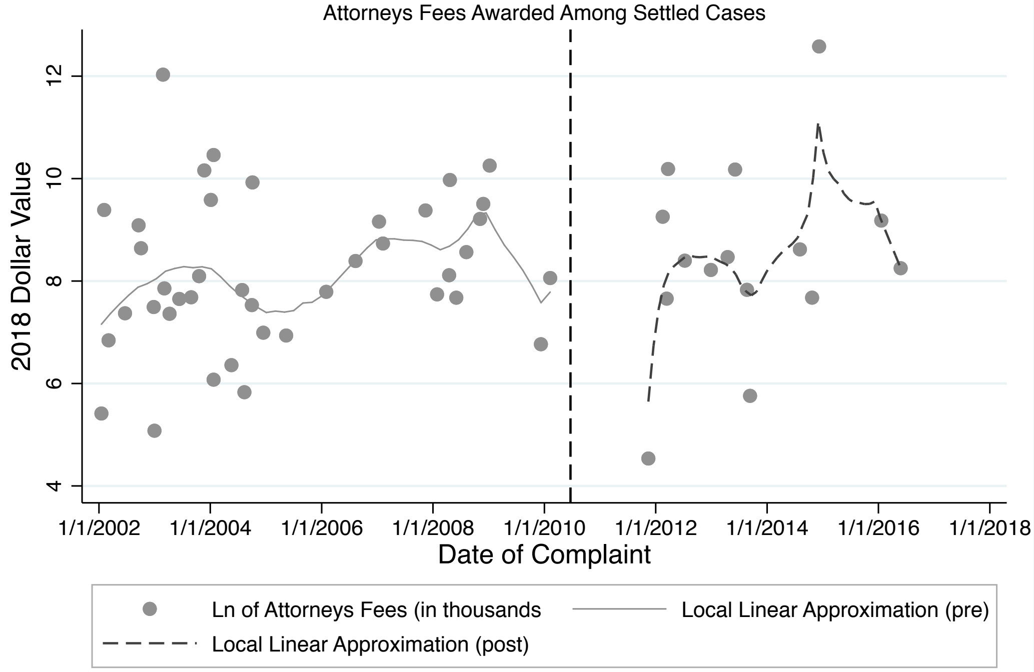


d. Morrison and Attorneys' Fees

Finally, we also collect where possible data concerning the payment of fees paid to class counsel to identify any general patterns in the payment of fees for cases within our sample. In total, we find data concerning these fee awards in 149 of our cases, of which 55 were filed against Foreign Listed Firms. As with our analysis of settlement data, we present here only descriptive statistics of fee awards to enable a better understanding of how fee payments may have appeared to plaintiffs' attorneys 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) in logs, sorted by the date of the complaint, and all dollar figures have been inflation adjusted to reflect 2018 prices. Consistent with our prior analyses, we limit our analysis of fees to those against Foreign Listed Firms.

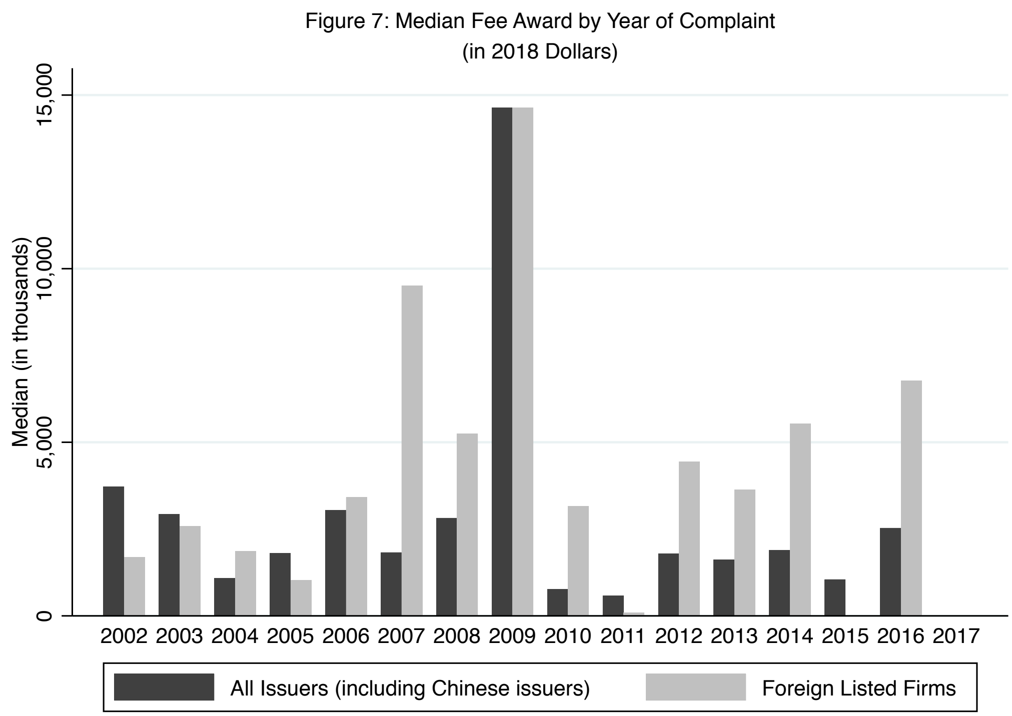
Figure 6:
Attorneys Fees Awarded Among Settled Cases



Not surprisingly, the large settlements related to the Royal Ahold NV litigation (commenced in 2003) and the Petroleo Brasileiro (commenced in 2014) also resulted in usually large fee awards of nearly $130 million and $285 million, respectively, to class counsel. As with Figure 3, we supplement this scatter plot with local linear regression lines to highlight any pre-*Morrison* and post-*Morrison* trends using the same specification discussed there.[105] In general, the data regarding fee awards generally tracks 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.*

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

[105] All dollar figures have been inflation adjusted to reflect 2018 prices.



Again, the results resemble those presented for settlement amounts in the sample. Aggregating all cases together, 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*, median fee awards for cases filed against firms headquartered in China was $570,000. Overall, focusing on Foreign Listed Firms reveals that median fee awards 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 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 from the pre-*Morrison* period. The same types of 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 – although post-*Morrison* foreign plaintiffs were more systematically excluded from plaintiff classes, settlement rates and amounts remained largely unchanged as did attorneys' fee awards.[106] In sum, *Morrison* did not transform securities fraud litigation as it existed in 2010.

Similarly, *Morrison* was not really about changing the exposure of foreign issuers to U.S. litigation.[107] 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 does not appear to reduce the prospect that a foreign issuer will 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 with no 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 that as *Morrison*. Indeed, *Morrison* was itself dismissed under the old Second Circuit test. In our data set prior to *Morrison* there were 20 motions to limit a class under this test, 19 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.[108] 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 plaintiff class that might substantially exceed the issuer's presence in the U.S. capital markets. *Vivendi* was the poster child 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*. Professor Robert Bartlett found that institutional investors did not initially adjust their conduct to *Morrison*, instead preferring to continue to invest abroad.[109] When the non-impact of *Morrison* is highlighted, Professor Bartlett's results jibe with the fact that *Morrison* appears to be largely consistent with past practices followed by the courts that had used the conduct and effects

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[106] 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 that they had not been targeting beforehand. In Appendix A we examine the composition of plaintiffs' firms that litigated cases involving foreign issues both pre-and post-Morrison. The composition of law firms involved in these cases does not appear to change significantly with four firms remaining in the top ten in both periods. Robbins Geller, for example, maintained a high-volume securities fraud practice against foreign private issuers post-Morrison with 12 cases pre-*Morrison* and 10 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. We note that Milberg Weiss Bershad & Schulman subsequently changed its name to Milberg Weiss and disappeared from the top five ranking 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 and Lerach's convictions).

[107] *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* decision's effect on F-Squared Cases)

[108] *See, e.g.*, Cravath, Swaine & Moore, *supra* note 66 ("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.")

[109] Bartlett, *supra* note 32, at 186-87.

tests.[110] Instead, it appears that institutional investors may not have valued securities fraud protections both pre- and post- *Morrison*, instead preferring the value of lower costs and greater liquidity 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 mitigates towards supporting the findings of LPSL who found that US-listed foreign firms experienced insignificant or even positive abnormal returns in both markets, particularly firms having most of their equity traded outside the U.S.[111]

This does not mean that *Morrison* had no effect in terms of litigation results. *Morrison* eliminated the global class action. In the wake of *Morrison* there were 18 cases which had a portion of their classes dismissed. This included significant judgments such as the $9 billion Vivendi class action and class actions involving BP Plc, Sanofi-Aventis and UBS.[112] 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 class brought under the old test. Thus, *Morrison* reduced 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 to the extent of its capital markets presence in the United States. Under *Morrison*, if an issuer engages in securities fraud, the size of a potential plaintiff class that can bring suit under U.S. law is directly proportional to the number of shares that are traded in the U.S. markets. Foreign issuers that raise capital in the U.S. markets or facilitate broad secondary trading of their securities will have greater liability exposure.

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 regulator. 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.

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110 *See supra* notes 83-85 and accompanying text. Professor Bartlett's results are also consistent with the argument by some commentators that securities fraud litigation provides limited value to diversified institutional investors who 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).
111 Licht, et al., *supra* note 83, at 330.
112 *See generally* Conway, *supra* note 11; Edward Greene & Arpan Patel, *Consequences of Morrison v. NAB, securities litigation and beyond*, 11(2) CAP. MARK'T J. 145 (2016).

Starting in the 1980s, the SEC adopted a rule of substituted compliance for foreign issuers whose securities traded primarily outside the United States.[113] These issuers, known as foreign private issuers, are subject to the law of their home country for the bulk of their regulation.[114] Accordingly, foreign private issuers are exempt from the obligation to file quarterly reports and proxy statements, need not comply with Section 16 reporting requirements,[115] and do not need to prepare financial statements in accordance with U.S. GAAP.[116] The rule of substituted compliance, in most cases, allows issuers in most cases to substitute compliance with the disclosure obligations imposed by their home jurisdiction 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 country regulators reducing the scope of liability for these reports.[117]

The result was to create a parallel regime for foreign private issuers that was significantly less regulated than domestic issuers.[118] The justification was in part reality – foreign issuers did not prepare quarterly reports in many jurisdictions or have US GAAP-compliant financials – but was also motivated by competitive reasons.[119] The U.S. did not want to significantly overburden these foreign companies so that they would no longer desire to list in the United States.[120] And the overarching justification for this was substituted compliance, the notion that it was better to let the home country regulator address disclosure issues for foreign issuers.[121]

The SEC also adopted Regulation S to provide safe harbor exemptive relief for foreign firms that did not list their securities in the United States, enumerating the circumstances under which those firms would not be subject to the U.S. registration requirements when they raised capital, despite the global nature of the securities markets.[122] The SEC went even further with Rule 144A, which allows foreign issuers to issue securities to institutional investors in the United

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[113] *See generally* Howell E. Jackson, Jr., *Substituted Compliance: The Emergence, Substituted Compliance: The Emergence, Challenges, and Evolution of a New Regulatory Paradigm*, 1 J. FIN. REG. 169, 171-175 (2015) (tracing the history of the SEC's approach and implementation of a substituted compliance regime).

[114] *See supra* note 12 for a discussion of the definition of "foreign private issuer".

[115] *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").

[116] Securities and Exchange Commission, *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. March 4, 2008).

[117] *See Report Of Foreign Private Issuer Pursuant To Rule 13a-16 Or 15d-16 Under The Securities Exchange Act Of 1934*, available at https://www.sec.gov/about/forms/form6-k.pdf. *See also* §240.13a-13 (exemption from Form 10-Q quarterly reporting requirements); Id. §§243.100-.103 (exemption from Regulation FD).

[118] *See generally* Securities and Exchange Commission, *Accessing the U.S. Capital Markets — A Brief Overview for Foreign Private Issuers*, Feb. 13, 2013, available at https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml.

[119] *See generally* Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. LAW REV. 89, 130-133 (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 chs. 2, 6 (7th ed. 2004) (delineating the regulation applicable to global issuers who raise capital in the U.S. markets).

[120] *See Accessing the U.S. Capital Markets, supra* note **Error! Bookmark not defined.** ("The Commission has adopted specific rules applicable to foreign private issuers that are designed to recognize international and home jurisdiction standards.")

[121] *Id.*; *see also* Jackson, *supra* note **Error! Bookmark not defined.**.

[122] 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).

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.[123] Rule 144A is understood as creating a sophisticated institutional market for players that can fend for themselves both with respect to the disclosure they seek from an issuer and the extent to which they seek 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 that are not able 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, do not extensively invest abroad. Meanwhile, institutional investors have the sophistication that enables them 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 since 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 availment of the U.S. markets as a key factor in determining whether the case could be maintained. For example, in *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*,[124] the court concluded that Volkswagen's level one ADRs, which were not listed on an exchange but traded in the over-the-counter 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."[125] The court in *Vancouver Alumni Asset Holdings Inc. v. Daimler AG*,[126] similarly found that Daimler "sought to avail itself of the American securities market [where it] actively and voluntarily contracted with an American depository bank to sell ADRs to American investors."[127]

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

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[123] 17 C.F.R. §230.144A (1991); *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).
[124] In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig. (N.D. Cal. 2017).
[125] *Id.* at *813.
[126] 2017 U.S. Dist. LEXIS 83621 (C.D. Cal. 2017).
[127] Id. at *21.

offering from the effect of those statements on the market as a whole. In both cases, only direct participants have standing to bring a private 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.[128] 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.[129] In addition, the 1933 Act expressly limits the exposure of underwriting participants by capping damages at the offering price[130] As the courts have recognized, Congress' purpose in establishing these limits was to maintain proportionality between a defendants' potential liability and its role in the offering.[131]

Maintaining a 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. 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 and, importantly, 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 firms ADRs that trade only in the U.S. OTC market to bring antifraud claims. In contrast to cases such as Volkswagen and Daimler, cases such as *Fortis* (a pre-*Morrison* case) and *Société Générale* (a post-*Morrison* case) dismissed claims made by holders of these ADRs on the basis that they were "predominantly foreign." 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. In particular, the issue in these cases is not whether an ADR transaction is predominantly foreign or domestic, but whether the existence of trading in the U.S. OTC market reflects the efforts of the issuer to obtain access to the U.S. capital markets.[132] To the extent that an issuer has purposefully availed itself of the U.S. capital markets by sponsoring or assisting in the sale of U.S. ADRs, that issuer should face antifraud liability to investors who purchase those ADRs within the United States.

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[128] *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.");

[129] *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 12(a)(2) liability beyond what the statute should cover).

[130] *See* § 11(g) ("In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public,")

[131] *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 were expanded).

[132] As discussed in note 28, ADRs can be sponsored or unsponsored by the issuer.

2. Morrison and the Extraterritorial Application of Federal Statutes

In a series of cases after *Morison* addressing jurisdictional issues, the Supreme Court has drawn bright, foreclosing lines to prevent U.S. exercise of jurisdiction abroad. These cases were put forth as an issue of comity and sovereignty as well as judicial resources. But they all were decided on a more doctrinal point: The U.S. as a matter of international norms and laws should not be exercising jurisdiction over foreign matters without express Congressional intent.

The *Morrison* decision rests at the core of these cases. Subsequent courts have cited *Morrison* as the "leading case on extraterritoriality."[133] As the Supreme Court later explained, its holding in *Morrison,* combined with its decision in *RJR Nabisco v. European Community*,[134] produced "a two-step framework for deciding questions of extraterritoriality."[135] Step one asks "whether the presumption against extraterritoriality has been rebutted."[136] Quoting *Morrison*, the Court explained that it can be rebutted "only if the text provides a 'clear indication of an extraterritorial application.'"[137] Step two asks "'whether the case involves a domestic application of the statute.'"[138] The Court explained the resulting framework as consistent with "the commonsense notion that Congress generally legislates with domestic concerns in mind."[139]

This rationale led the Supreme Court in *Kiobel v. Royal Dutch Shell*, to conclude that the Alien Tort Claim Act does not apply extraterritorially.[140] Quoting *Morrison*, the Court explained "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[141] Similarly, although the Court in *Daimler AG v. Bauman et al.* 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 TVPA claims infirm."[142]

Lower courts have taken the Supreme Court at its word and, similarly, have applied *Morrison* to endorse 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 that is stored exclusively on foreign servers.[143] In *Cedeño*, the court extended *Morrison*'s reasoning to the Racketeering Influenced and Corrupt

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[133] United States v. Hussain, 2017 U.S. Dist. LEXIS 178675, *4-6 (N.D.Cal.).
[134] RJR Nabisco, Inc. v. European Community, 579 U. S. ___, ___, 136 S. Ct. 2090 (2016).
[135] WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018).
[136] *Id.* at 2136, citing RJR Nabisco, Inc. v. European Community, 579 U. S. ___, ___, 136 S. Ct. 2090, 195 L. Ed. 2d 476, 493 (2016).
[137] *Id.* citing Morrison v. National Australia Bank Ltd., 561 U. S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010).
[138] *Id.* citing RJR Nabisco, 579 U. S., at ___, 136 S. Ct. 2090, 195 L. Ed. 2d 476, 493.
[139] *Id.* citing Smith v. United States, 507 U. S. 197, 204, n. 5, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)
[140] Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 124 (2012).
[141] *Id.* at 115.
[142] Daimler AG v. Bauman, 571 U.S. 117, 141 (2014).
[143] Microsoft Corp. v. United States, 829 F.3d 197 (2d Cir. 2016), vacated by United States v. Microsoft Corp., 2018 U.S. LEXIS 2495 (U.S., Apr. 17, 2018).

Organizations Act. Judge Rakoff explained that "[a]lthough *Morrison* does not address the RICO statute, its reasoning is dispositive here."[144] Similarly, the court in *Loginovskaya v. Batratchenko* concluded that *Morrison*'s transaction test applied to antifraud claims under the Commodities Exchange Act[145] and that "prior CEA case law addressing extraterritoriality has seemingly been abrogated by *Morrison*."[146] 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.[147]

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 "the extraterritorial application of § 10(b)," [148] our results demonstrate that the *Morrison* rule has the effect of applying § 10(b) to fraudulent conduct both within and outside the United States so long as the plaintiff purchased his or her shares in the U.S. markets.

Morrison put in context thus 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. Our results show that the effect of the *Morrison* rule is to allow the U.S. antifraud provision 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.[149] Whatever the Court's views about the appropriate scope of

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[144] Cedeño v. Intech Group, 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).

[145] Loginovskaya v. Batratchenko, 936 F. Supp. 2d 357, 375 (S.D.N.Y. 2013).

[146] *Id.* at 368.

[147] 562 B.R. 601, 2017 Bankr. LEXIS 49 (Bankr. S.D.N.Y. January 9, 2017)

[148] *Morrison* at 254.

[149] 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 Professor 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 32, at 185 citing Christian J. Ward & J. Campbell Barker, *Morrison v. National Australia Bank: The Impact on Institutional Investors*, Council of Institutional Investors, at 12 (2012), available at http://www.cii.org/files/publications/governance_ basics/Report_Morrison_v_National_Australia_Bank.pdf. *Id.* at 186-87. We note, however, 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 19n-5*, 108 COLUM. L. REV. 1301, 1312-1313 (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 WISC. L. REV. 297; Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 WISC. L. REV. 243.

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, changes this assessment. We find that *Morrison* did not change litigation rates, settlements, or attorney's fees. Moreover, our empirical analysis shows that lawyers targeted the same type of foreign issuers both pre-and post-Morrison in terms of volume.

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. 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 jurisdiction. *Morrison* was also consistent with the overall structure of the federal securities laws which limit the liability exposure of market participants based on the impact of their conduct. Put in this context *Morrison* is not a foreclosing case, but a case about defining permissible plaintiffs. It was not about the location of defendants. It was a case about standing and not extraterritoriality.

In other words, *Morrison* was not so much a game-changer but 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 & Gross, LLP	$3,500	$37,500	2

The composition of law firms both pre- and post-*Morrison* does not appear to change significantly. Prior to *Morrison,* five law firms are top law firms as defined by Professors

Krishnan, Solomon and Thomas.[150] 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 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 mostly eliminated as a result of Morrison. This case is not included in this table as 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 12 cases pre-*Morrison* and 10 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.

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[150] CNV Krishanan, Randall Thomas & Steven Davidoff Solomon, *Who are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18(1) AM. LAW AND ECON. REV. 122 (2016).