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District Court of New Mexico

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**THE EXTRATERRITORIAL REACH OF
UNITED STATES SECURITIES ACTIONS AFTER
MORRISON V. NATIONAL AUSTRALIAN BANK**

*Nathan Lee**

INTRODUCTION

In the aftermath of Black Tuesday, the infamous Wall Street crash of 1929, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934.¹ These two Acts sought to ensure legitimacy in the securities market by, among other things, regulating and preventing deceptive conduct in securities transactions.² As the business world expanded, technology improved, and the world became smaller (so to speak), many securities transactions took on a transnational character involving parties from around the globe.³ To ensure the legitimacy of these transactions and to protect the American public, courts expanded the scope of the antifraud provisions of the Securities Exchange Act to cover these transactions.⁴ Courts began to apply the Securities Acts to conduct that occurred extraterritorially, or outside the U.S.⁵ This extraterritorial application continued for over forty years⁶ until the Supreme Court abruptly put an end to that extraterritoriality in 2010.⁷

In *Morrison v. National Australian Bank*, the Supreme Court held that the presumption against the extraterritorial application of U.S. law prevented the Securities Exchange Act from being applied to

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¹ Rosemary J. Thomas, Note, *The Fraud-on-the-Market Theory: A "Basic"ally Good Idea Whose Time Has Arrive*, *Basic, Inc. v. Levinson*, 22 IND. L. REV. 1061, 1062-64 (1989).

² *Id.*

³ See Eric D. Peterson, *Transnational Securities Fraud Jurisdiction Under Section 10(b): The Case for a Flexible and Expansive Approach*, 47 WASH. & LEE L. REV. 637 (1990).

⁴ See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968), *overruled by Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

⁵ See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1026 (2011).

⁶ See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247.

⁷ See *id.* at 273.

foreign conduct regardless of the effects within the United States.⁸ The presumption against extraterritoriality is a canon of statutory construction that presumes acts of Congress only apply domestically, unless Congress gives a clear indication that they should apply abroad.⁹ Despite this bar on the extraterritorial application of the Securities Acts, the Court's analysis and subsequent acts of Congress create the possibility that some antifraud provisions may still apply abroad. This article focuses on those provisions and under what circumstances they may apply extraterritorially.¹⁰

I. HISTORICAL DEVELOPMENT OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The presumption against extraterritoriality made its first appearance in 1818.¹¹ In *United States v. Palmer*, the U.S. government brought a criminal piracy charge against three foreigners for robbing a Spanish ship on the high seas.¹² The government argued that the piracy statute's broad terms—applying to “any person or persons”—meant that it applied against the defendants even though the crime took place on the high seas and involved a Spanish ship.¹³ Writing for the Court, Justice Marshall held that the statute did not apply to the foreign conduct because the legislature did not intend the statute to apply so broadly and “the intent of the legislature determine[s] the” scope of the statute.¹⁴

The Court soon showed its amicability to the extraterritorial application of U.S. law by applying the same statute against a U.S. citizen for piracy against a stateless vessel.¹⁵ Writing for the Court again, Justice Marshall distinguished *Palmer* on the grounds that the

⁸ See *id.* at 265. Other courts soon applied the presumption to the 1933 Securities Act as well. See, e.g., *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012).

⁹ *Morrison*, 561 U.S. at 255.

¹⁰ This Article focuses only on the antifraud provisions of the Acts and not other provisions, such as ones that regulate filings or administrative functions. See, e.g., 15 U.S.C. § 77e (2012) (filing statements); 15 U.S.C. § 78(e) (selling unregistered securities); 15 U.S.C. § 78m (filing reports by issuers); 15 U.S.C. § 78o (registration of brokers and dealers).

¹¹ See *United States v. Palmer*, 16 U.S. 610, 611 (1818); see also Colangelo, *supra* note 5, at 1033.

¹² *Palmer*, 16 U.S. at 611.

¹³ *Id.* at 631.

¹⁴ *Id.* at 631–32; see also Colangelo, *supra* note 5, at 1061. Justice Marshall also rested the holding on international law limitations. See *Palmer*, 16 U.S. at 631–32. Since *Palmer*, international law has transformed to permit broader extraterritorial application of a nation's laws; Colangelo, *supra* note 5, at 1023–24.

¹⁵ *United States v. Klinton*, 18 U.S. 144, 151–52 (1920).

defendant was a U.S. citizen and the ship was a stateless vessel—compared to the Spanish vessel in *Palmer*.¹⁶ These two considerations led Justice Marshall to conclude that the defendant's conduct came squarely within Congress's intended reach of the statute.¹⁷

It was not until 1909 that the Supreme Court first applied the presumption against extraterritoriality outside the high seas context in *American Banana v. United Fruit*.¹⁸ There, the Court refused to apply the Sherman Act against a U.S. company that was operating abroad.¹⁹ Justice Holmes, writing for the Court, reasoned that the Court should construe the "statute as intended to be confined . . . to the territorial limits over which the lawmaker has general and legitimate power."²⁰ This reasoning created a strict territorial approach to the presumption.²¹ However, the Court soon abandoned this approach.²²

In *United States v. Bowman*, the Court held that a statute criminalizing fraud against government-owned corporations applied to conduct in Brazil.²³ The Court distinguished *American Banana* on the grounds that it "was a civil case" and "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated."²⁴ Thus, the criminal nature of the case permitted the statute's extraterritorial application even though the result would have been different if it were a civil statute.²⁵

In 1991, the Supreme Court applied the presumption against extraterritoriality to Title VII of the Civil Rights Act.²⁶ The Court held that Congress's intent governed Title VII's extraterritorial scope.²⁷ To discern this intent, the Court focused on the text of the statute.²⁸ To apply extraterritorially, the Court held that Congress "need[ed] to

¹⁶ Colangelo, *supra* note 5, at 1064–65.

¹⁷ *See id.* at 1065.

¹⁸ *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 357 (1909).

¹⁹ *See id.* at 359.

²⁰ *Id.* at 357.

²¹ *See id.*

²² *See generally* *United States v. Bowman*, 260 U.S. 94, 103 (1922) (applying the U.S. Criminal Code extraterritorially to acts that defrauded the U.S. government).

²³ *See id.* at 102.

²⁴ *Id.* at 98.

²⁵ *See id.* at 98, 102–103.

²⁶ *Equal Emp't Opportunity Comm'n. v. Arabian Am. Oil Co.*, 499 U.S. 246, 246–47 (1991).

²⁷ *See id.* at 248.

²⁸ *See id.* at 248.

make a clear statement that [the] statute applies overseas.”²⁹ This “clear statement” rule, however, was discarded in *Morrison v. National Australian Bank*.³⁰ In applying the presumption to Section 10(b) of the 1934 Securities Exchange Act, the Court did not require a “clear statement” for extraterritoriality since “context can be consulted as well.”³¹ Instead, the Court required a “clear indication” that Congress intended the Act to apply extraterritorially.³²

In its latest articulation of the presumption, the Supreme Court held that the Alien Tort Statute (“ATS”) does not apply extraterritorially.³³ In determining the extraterritorial reach of the ATS, the Court examined both the text of the statute as well as the historical context surrounding its enactment.³⁴ Specifically, the Court focused on two historical events—the harassment of a French ambassador and seizure of slaves from a ship at port—to conclude that Congress did not intend the ATS to apply extraterritorially.³⁵

II. EXTRATERRITORIAL DEVELOPMENT OF SECURITIES LAWS

The 1933 and 1934 Securities Acts are generally silent in regards to their extraterritorial reach. Section 30 of the 1934 Act seems to prohibit its extraterritorial application while providing narrow exceptions.³⁶ Section 30(b) precludes the extraterritoriality of the Act stating that “[t]he provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States.”³⁷ Section 30(b) then provides a narrow exception by stating that the prohibition does not apply to regulations “the Commission may” enact to “prevent the evasion” of the Act.³⁸ Section 30(a) also provides an additional exception.³⁹ Section 30(a) explicitly permits extraterritorial application against brokers or dealers for transactions on foreign exchanges when the issuer is an U.S. company.⁴⁰ The exceptions in Sections 30(a) and 30(b) are fairly narrow in light of the general prohi-

²⁹ *See id.* at 258.

³⁰ *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247, 265 (2010).

³¹ *Id.* (*Morrison* is addressed in-depth below. *See infra* Part II.B.)

³² *Id.* at 255.

³³ *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013).

³⁴ *See id.* at 1665–69.

³⁵ *See id.* at 1666–69.

³⁶ *See* 15 U.S.C. § 78dd(b) (2012).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 15 U.S.C. § 78dd(a) (2012).

⁴⁰ *Id.*

bition in Section 30(b). Yet, despite Section 30(b), courts began to apply the 1934 Act in an extraterritorial manner.⁴¹

A. Schoenbaum and Its Progeny

Section 10(b) of the 1934 Act⁴² and SEC rule 10b-5, which Congress promulgated under Section 10(b),⁴³ are the most frequently litigated securities laws.⁴⁴ The Second Circuit first applied Section 10(b) extraterritorially in *Schoenbaum v. Firstbrook*.⁴⁵ The court held that Section 10(b) applied extraterritorially despite the lack of affirmative language in the Act and despite “the specific language of Section 30(b).”⁴⁶ The importance of Section 10(b) and the effect that foreign transactions have on domestic investors led the court to hold that Section 10(b) and Rule 10b-5 apply extraterritorially.⁴⁷ Four years later, in *Leasco Data Processing Equipment v. Maxwell*, the Second Circuit expanded the extraterritorial reach of Section 10(b) to cover claims where deceptive conduct occurred in the U.S., even though the actual sale of securities took place abroad.⁴⁸ The court in *Leasco* held that when deceptive conduct occurred domestically, the presumption should not apply because the statute’s application is domestic not foreign since it is being used to regulate the domestic deceitful conduct.⁴⁹ The court reasoned that, even though the statute is silent on the issue, “if Congress had thought about the point,” it would have wanted Section 10(b) to apply in that case.⁵⁰

Subsequent courts used *Schoenbaum* and *Leasco* to formalize two tests that determined Section 10(b)’s extraterritorial reach.⁵¹ These two tests are (1) the “effects test”—“whether the wrongful conduct had a substantial effect in the United States or upon United States citizens” and (2) the “conduct test”—“whether the wrongful conduct occurred in the United States.”⁵² Other Circuits soon adopted

⁴¹ See *infra* Part III.A.

⁴² 15 U.S.C. § 78j (2012).

⁴³ 17 C.F.R. § 240.10b-5 (2009).

⁴⁴ See Robert Anderson IV, *Employee Incentives and the Federal Securities Laws*, 57 U. MIAMI L. REV. 1195, 1256–57 (2003) (quoting SEC v. Nat’l Sec., Inc., 393 U.S. 453, 465 (1969)).

⁴⁵ *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) *overruled by* *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

⁴⁶ *Id.* at 206.

⁴⁷ *Id.*

⁴⁸ *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) *overruled by* *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247 (2010).

⁴⁹ See *id.* at 1334.

⁵⁰ *Id.* at 1337.

⁵¹ *Morrison*, 561 U.S. at 257.

⁵² See *S.E.C. v. Burger*, 322 F.3d 187, 192 (2d Cir. 2003).

these two tests⁵³ until almost every circuit used some form of the two tests and applied Section 10(b) extraterritorially.⁵⁴

B. *Morrison v. Australian National Bank*

Due to *Schoenbaum* and *Leasco*, before 2010, it was generally accepted that the Section 10(b) applied extraterritorially.⁵⁵ *Morrison* abruptly reversed this thinking and forty years of precedent. Writing for the Court, Justice Scalia criticized *Schoenbaum* and *Leasco*.⁵⁶ He rejected the Second Circuit's case-by-case analysis and held that the presumption applies "in all cases."⁵⁷ He then took it upon himself to determine, anew, whether the presumption precludes extraterritorial application of Section 10(b).⁵⁸ The Court held that there must be a "clear indication" showing Congress's affirmative intent that Section 10(b) applies extraterritorially.⁵⁹ While the Court noted that the context surrounding the Act's passage may be considered,⁶⁰ the Court relied heavily on the text of the 1934 Act in determining its inapplicability to extraterritorial conduct.⁶¹

1. Extraterritoriality of Section 10(b)

In determining the extraterritoriality of Section 10(b), the Court first looked to the text of the statute.⁶² The Court noted that the text was silent on the issue.⁶³ Section 10(b) refers to "interstate commerce," which is defined in Section 3 as "trade, commerce, transportation, or communication among the several States, or *between any foreign country*."⁶⁴ However, the Court believed that this "general reference to foreign commerce" was insufficient to provide a clear indication.⁶⁵ The Act's reference to "foreign countries" in Section 2, which sets out the Act's purpose,⁶⁶ was also too general to create a clear indi-

⁵³ See *Morrison*, 130 S. Ct. at 2880; see also *Kauthar SDN BHD v. Steinberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–25 (9th Cir. 1983).

⁵⁴ *Morrison*, 561 U.S. at 274, n.2 (Stevens, J. concurring in judgment).

⁵⁵ See *id.* at 256.

⁵⁶ See *id.* at 261.

⁵⁷ See *id.*

⁵⁸ *Id.* at 262.

⁵⁹ See *id.* at 255.

⁶⁰ *Id.* at 265.

⁶¹ See *id.* at 275 (Stevens, J. concurring in the judgment).

⁶² See *id.* at 262.

⁶³ *Id.*

⁶⁴ See 15 U.S.C. § 78c(17) (2012) (emphasis added).

⁶⁵ See *Morrison*, 561 U.S. at 262–63.

⁶⁶ 15 U.S.C. § 78b(2) (2012).

cation of the legislative intent.⁶⁷ Bolstering its argument against extraterritoriality, the Court noted that Section 30(b) generally prohibited extraterritoriality while permitting two narrow exceptions.⁶⁸ This general prohibition with narrow exceptions indicates that the remainder of the Act—everything other than Section 30—does not apply extraterritorially.⁶⁹ Therefore, Section 10(b) not only lacks a clear indication of extraterritoriality, Section 30 indicates that it applies solely domestically.⁷⁰

2. Scope of the Act (Transactional Test)

Determining that Section 10(b) does not apply extraterritorially was not enough to settle the matter in *Morrison*. Some of the deceptive conduct occurred in Florida even though the securities were eventually purchased abroad.⁷¹ One party argued that because the conduct was domestic the presumption did not apply.⁷² Justice Scalia dismissed this argument by holding that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”⁷³ He then formulated a new test for domesticity by looking to the “focus” of the Act.⁷⁴ The Court held that the “focus” of the Securities Exchange Act is the “purchase and sale” of securities.⁷⁵ If the purchase and sale of the security occurs in the U.S., the transaction is domestic, but if the sale takes place abroad, which happened in *Morrison*, the transaction is foreign even though there may be some domestic conduct.⁷⁶ This “focus” test has become known as the “transactional test.”⁷⁷

Under the transactional test, a court must first determine the focus of the statute.⁷⁸ The court will then determine where the conduct

⁶⁷ *Morrison*, 561 U.S. at 261.

⁶⁸ *Id.* at 263; see 15 U.S.C. § 78dd(b) (2012).

⁶⁹ See *Morrison*, 561 U.S. at 264–65

⁷⁰ See *id.*

⁷¹ See *id.* at 253

⁷² See *id.* at 265–66.

⁷³ See *id.* at 266 (emphasis in original).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ Vladislava Soshkina, Note, *Beyond Morrison: The Effect of the “Presumption Against Extraterritoriality” and the Transactional Test on Foreign Tender Offers*, 54 WM. & MARY L. REV. 263, 277 (2012).

⁷⁸ See *Morrison*, 561 U.S. at 266; see also Marc I. Steinberg & Kelly Flanagan, *Transactional Dealings—Morrison Continues to Make Waves*, 46 INT’L LAW. 829, 845 (2012).

occurred that is at the focus of the statute.⁷⁹ The transaction is localized at the focus.⁸⁰ This localization of the entire transaction to a single point is similar to the “traditional approach to conflict of laws.”⁸¹ If the localized point occurred abroad, then the transaction is foreign and the presumption applies.⁸² But if the localized point occurred in the U.S., then the transaction is domestic and the presumption does not apply even though some of the conduct may have taken place abroad.⁸³

C. *Dodd-Frank*

In response to *Morrison*, Congress amended the Securities Acts with the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁸⁴ Dodd-Frank specifically permitted extraterritorial jurisdiction for fraud cases brought by the SEC.⁸⁵ The amendments sought to reverse *Morrison* by reinstating the conduct and effects tests for SEC actions.⁸⁶ They provide that:

The district courts of the United States . . . shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving:

- (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
- (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.⁸⁷

⁷⁹ See *Morrison*, 561 U.S. at 266; see also, Marc I. Steinberg & Kelly Flanagan, *supra* note 78, at 845.

⁸⁰ Colangelo, *supra* note 5, at 1080.

⁸¹ *Id.*

⁸² See Soshkina, *supra* note 77, at 284.

⁸³ See *id.*

⁸⁴ Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transaction*, 60 AM. U. L. REV. 1431, 1448 (2011); see 15 U.S.C. § 78 aa(b) (2012) (1934 Act); 15 U.S.C. § 77v(c) (1933 Act).

⁸⁵ 15 U.S.C. §§ 77v(c), 78aa(b) (2012).

⁸⁶ Steinberg & Flanagan, *supra* note 78, at 836–38.

⁸⁷ 15 U.S.C. § 78 aa (b) (2012). The amendment to the 1933 Act is identical to the 1934 Act, except that it only applies to actions brought under Section 17 (a) rather than all antifraud provisions. Compare 15 U.S.C. § 78aa(b) (“antifraud provisions”) with 15 U.S.C. § 77v(c) (“alleging violation of [Section 17(a)]”).

This language from Dodd-Frank is problematic because it concerns jurisdiction.⁸⁸ Before and after *Morrison*, courts had jurisdiction to hear extraterritorial cases involving securities laws.⁸⁹ *Morrison* held that Section 10(b) did not *apply* extraterritorially, not that the Court lacked *jurisdiction* to hear the case.⁹⁰ Thus, based solely on its language, the Dodd-Frank amendment is essentially meaningless and creates no change.⁹¹

Despite the inadequate language, the legislative history clearly shows Congress's intent to reverse *Morrison*.⁹² The contradiction between the text and the legislative history created confusion about whether Dodd-Frank is jurisdictional (thus mere surplusage) or substantive (applying SEC fraud actions extraterritorially).⁹³ Two courts noted in dicta that Dodd-Frank does remedy *Morrison*'s anti-extraterritorial holding for SEC fraud actions.⁹⁴ However, the only court to take the issue head-on discussed the tension between the text of the statute and the apparent legislative intent.⁹⁵ In the end, the court was unable to determine if Dodd-Frank was jurisdictional or substantive.⁹⁶ Thus, it is unclear whether Dodd-Frank has any substantive effect on the SEC's ability to bring fraud actions for extraterritorial violations.⁹⁷

III. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS

Whether a private party or government entity brings an action may affect whether the action applies extraterritorially. If a private party brings an action, then the extraterritoriality analysis is unaffected by Dodd-Frank and by the underlying rationale for the presumption. Private actions are controlled by *Morrison*. However, suits by a government entity may be affected by Dodd-Frank and by the

⁸⁸ Richard Painter, Douglas Dunham, & Hellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australian Bank and to the Extraterritorial Jurisdiction Provision of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 4 (2011).

⁸⁹ *Id.*

⁹⁰ See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

⁹¹ Painter, Dunham, & Quackenbos, *supra* note 88, at 4.

⁹² Steinberg & Flanagan, *supra* note 78, at 837.

⁹³ U.S. SEC v. Chi. Convention Ctr. L.L.C., 961 F. Supp. 2d 905, 916–17 (N.D. Ill. 2013) (failing to conclude whether Dodd-Frank Amendment is merely jurisdictional or substantive).

⁹⁴ See SEC v. Tourre, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 n.4 (S.D.N.Y. June 4, 2013); *In re Optimal U.S. Litig.*, 865 F. Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012).

⁹⁵ See *Chi. Convention Ctr. L.L.C.*, 961 F. Supp. 2d 905 at 916–17.

⁹⁶ *Id.*

⁹⁷ Dodd-Frank will be discussed more in-depth later on. See *infra* Part III.B.2.

underlying rationale for the presumption. Therefore, private actions and government actions will be considered separately.

A. *Private Actions*

All private actions are subject to *Morrison*.⁹⁸ As the Court in *Morrison* held, every case under the securities statutes, other than under Section 30, is subject to the presumption against extraterritoriality.⁹⁹ Thus, the only question is whether the action is domestic or foreign. This inquiry will depend on the focus of the statute.¹⁰⁰ *Morrison* made the sweeping pronouncement “that the focus of the Exchange Act is . . . upon purchases and sales of securities in the United States” and that “the same focus on domestic transactions is evident in the Securities Act of 1933.”¹⁰¹ Yet, not every provision of the Securities Acts is focused on the purchase and sale of securities.¹⁰² Several courts ruled that different provisions within the Securities Acts have different focuses.¹⁰³ In *SEC v. Goldman Sachs & Co.*, the Southern District of New York ruled that the focus of Section 17(a) of the Securities Act is different than the focus of Section 10(b) of the Securities Exchange Act.¹⁰⁴ The court ruled that a transaction may be domestic for Section 17(a) purposes even though it is foreign for Section 10(b) purposes.¹⁰⁵ Therefore, each provision will be considered separately to determine its focus and what constitutes domestic conduct.

A final consideration that will affect all private actions is found in the last paragraph of *Kiobel*.¹⁰⁶ In *Kiobel*, the Court held that “claims [may sufficiently] touch and concern the territory of the United States . . . to displace the presumption against extraterritorial application.”¹⁰⁷ This language seems to indicate that the facts of a case may “touch and concern” U.S. territory to such an extent that the presumption will be overcome.¹⁰⁸ Several courts latched onto this language to hold that the facts in a particular case were sufficient to overcome the

⁹⁸ See, e.g., *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010).

⁹⁹ *Id.* at 265.

¹⁰⁰ *Id.* at 266–67.

¹⁰¹ *Id.*

¹⁰² See, e.g., 15 U.S.C. § 77q(a) (2012) (regulating both the “sale” and “offer” of a security).

¹⁰³ See *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164 (S.D.N.Y. 2011) (finding that Section 17(a) of the 1933 Act is focused on both the offer and sale of securities while Section 10(b) is focused only on the sale).

¹⁰⁴ *Id.* at 164–65.

¹⁰⁵ See *id.* at 160, 165.

¹⁰⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹⁰⁷ *Id.*

¹⁰⁸ See *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d. 304, 323–24 (D. Mass. 2013).

presumption.¹⁰⁹ Other courts, however, hold that only an affirmative indication from Congress may overcome the presumption.¹¹⁰ Thus, the specific facts of a case have no bearing on whether the presumption is overcome.¹¹¹

So far, the “touch and concern” analysis has not been applied in the securities context. But, if *Kiobel*’s touch and concern language does permit the facts in a case to overcome the presumption, then private securities actions, which would normally be barred by *Morrison*, may survive despite the presumption’s application.¹¹² Therefore, in every case, regardless of the provision’s focus, a plaintiff may argue that the specific facts of the case sufficiently “touch and concern” U.S. territory to overcome the presumption.¹¹³

1. Section 10(b) of the 1934 Act¹¹⁴

Morrison explicitly bars the extraterritorial application of Section 10(b).¹¹⁵ If the sale of a security takes place abroad, even though deceptive conduct occurs in the U.S., Section 10(b) does not apply.¹¹⁶ The place of the actual sale controls whether the transaction is foreign or domestic.¹¹⁷ So, even if a security is listed on a U.S. exchange, if the actual sale takes place abroad—such as securities listed on multiple exchanges—then the transaction is foreign.¹¹⁸ Section 10(b) does not apply to foreign sales.¹¹⁹

Courts may technically apply Section 10(b) extraterritorially in certain cases. *Morrison*’s focus analysis localizes a transaction to a single point—the location of the sale.¹²⁰ In *Morrison*, some of the deceptive conduct occurred domestically while the sale occurred abroad.¹²¹ If the facts had been flipped—foreign deceptive conduct but domestic sale—then the transaction would have been localized at a domestic

¹⁰⁹ See, e.g., *id.*

¹¹⁰ See *Balintuno v. Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013).

¹¹¹ *Id.*

¹¹² See, e.g., *Lively*, 960 F. Supp. 2d at 323-24.

¹¹³ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

¹¹⁴ 15 U.S.C. § 78j(b) (2012).

¹¹⁵ See *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 267 (2010).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See, e.g., *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 532 (S.D.N.Y. 2011); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472–73 (S.D.N.Y. 2010); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011).

¹¹⁹ See, e.g., *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011).

¹²⁰ Colangelo, *supra* note 5, at 1080.

¹²¹ See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 252 (2010).

point and the presumption would not apply.¹²² According to *Morrison*, deceptive foreign conduct that results in a domestic sale is a domestic transaction.¹²³ Even though the deceptive conduct occurred abroad, U.S. law is applied under the fiction that the entire transaction occurred domestically.¹²⁴ Even though the transaction is classified as domestic, U.S. law is still regulating foreign conduct.¹²⁵ So, technically Section 10(b) can be applied extraterritorially even though the Court would classify its application as domestic.¹²⁶

2. Section 11 of the 1933 Act

Section 11 of the 1933 Act prohibits “untrue statement[s]” within a registration statement.¹²⁷ Even though *Morrison* focused on the 1934 Act, the Court held that the “same *focus on domestic transactions* is evident in the Securities Act of 1933.”¹²⁸ Thus, the same focus analysis is used for both Acts.¹²⁹ Section 11 only provides a cause of action to persons who acquired a security.¹³⁰ This acquisition requirement is similar to the sale or purchase requirement in Section 10(b) of the 1934 Act.¹³¹ So, the focus of Section 11 is on the acquisition, or purchase, of the security.¹³² Thus, its extraterritorial reach is the same as Section 10(b).¹³³ Section 11 applies extraterritorially in the same manner as Section 10(b)—when deceptive conduct (misleading statements or omissions) takes place abroad but the actual purchase occurs domestically.¹³⁴

¹²² See *id.* at 266–67.

¹²³ See *id.* at 266, 268; see also *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69–70 (2d Cir. 2012) (holding that the transaction was domestic though some deceptive conduct occurred abroad).

¹²⁴ See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266–68 (2010).

¹²⁵ But see *id.* at 266, 269.

¹²⁶ But see *id.* at 267.

¹²⁷ 15 U.S.C. § 77k(a) (2012).

¹²⁸ *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 268 (2010) (emphasis added).

¹²⁹ See, e.g., *In re Smart Technologies, Inc. S’holder Litig.*, 295 F.R.D. 50, 55–56 (S.D.N.Y. Jan. 11, 2013); *In re Vivendi Universal, S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012).

¹³⁰ See 15 U.S.C. § 77k(a) (“any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue.”).

¹³¹ See *In re Smart Technologies, Inc. S’holder Litig.*, 295 F.R.D. 50, 56–57 (S.D.N.Y. Jan. 11, 2013).

¹³² See *id.*

¹³³ See *id.* at 56.

¹³⁴ See *id.* at 56.

3. Section 12(a) of the 1933 Act

Section 12(a) of the 1933 Act creates two causes of action.¹³⁵ First, Section 12(a)(1) provides a cause of action against “any person who . . . offers or sells a security in violation of” Section 5 of the Act,¹³⁶ which requires certain securities to have a registration statement.¹³⁷ Second, Section 12(a)(2) provides a cause of action against “any person who . . . offers or sells a security” with a prospectus that contains a misleading statement or omission.¹³⁸ A cause of action under Section 12(a)(2) is similar to Section 11,¹³⁹ except that Section 12(a)(2) only applies to misstatements contained in a prospectus rather than the entire registration statement.¹⁴⁰

On its face, Section 12(a) provides causes of action against two classes of defendants: offerors and sellers.¹⁴¹ However, in *Pinter v. Dahl*, the Supreme Court narrowed the class of potential defendants to actual “sellers.”¹⁴² Section 12(a) states that an offeror or seller may be liable “to the person purchasing such security from him.”¹⁴³ The Court reasoned that since Section 12(a) only provides a cause of action to those who have purchased a security, only actual “seller[s]” of securities can be liable under Section 12(a).¹⁴⁴ So, like Section 10(b) of the 1934 Act, Section 12(a) is focused on the sale of the security.¹⁴⁵ Thus, Section 12(a) only applies if the sale is domestic.¹⁴⁶ Section 12(a), like

¹³⁵ See 15 U.S.C. § 77l(a) (2012).

¹³⁶ *Id.* § 77l(a)(1).

¹³⁷ See 15 U.S.C. § 77e (2012).

¹³⁸ 15 U.S.C. § 77l(a)(2).

¹³⁹ See *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 109 (2d Cir. 2011).

¹⁴⁰ See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 576–77 (1995).

¹⁴¹ See 15 U.S.C. § 77l(a) (2012).

¹⁴² See *Pinter v. Dahl*, 486 U.S. 622, 647 (1988).

¹⁴³ See 15 U.S.C. § 77l(a) (2012).

¹⁴⁴ See *Pinter*, 486 U.S. at 647.

¹⁴⁵ See *In re Smart Techs., Inc. S’holder Litig.*, No. 11 Civ. 7673(KBF), 295 F.R.D. 50, at 55–56 (S.D.N.Y. Jan. 11, 2013); *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 527–29 (S.D.N.Y. 2012). Some have argued that the focus of Section 12 may be on the offer or the sale—in accordance with the actual text of the Statute. See Richard A. Grossman, *The Trouble with Dicta: Morrison v. National Australian Bank and the Securities Act*, 41 SEC. REG. L.J. 1, 6–7 (2013). However, this analysis ignores *Pinter*, which narrowed the class of defendants to actual “sellers.” See *Pinter*, 486 U.S. at 647. Moreover, every court that has addressed the extraterritoriality of Section 12 has focused on the place of the sale. See *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d at 528–29.

¹⁴⁶ See *In re Smart Techs., Inc. S’holder Litig.*, No. 11 Civ. 7673(KBF), at 55–56 (S.D.N.Y. Jan. 11, 2013); *In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d at 527–30.

Section 11, can apply extraterritorially to deceptive conduct abroad as long as the sale occurs domestically.

4. Section 9(f) of the 1934 Act

Section 9(f) provides a cause of action to persons who purchased or sold securities with unlawfully manipulated prices.¹⁴⁷ Specifically, a person who manipulates the price of a security through deceitful conduct;¹⁴⁸ affects the value of a put, call, straddle, or option in violation of SEC rules;¹⁴⁹ or endorses a put, call, straddle, or option in violation of SEC rules,¹⁵⁰ may be liable to anyone who purchased or sold a security and was injured by the manipulative conduct.¹⁵¹ Similar to Section 12(a) of the 1933 Act, Section 9(f) only provides a cause of action to a person who actually purchased or sold a security.¹⁵² Thus, the focus of Section 9(f) is the same as Section 12(a) of the 1933 Act—the purchase or sale of the security.¹⁵³ Section 9(f) applies only if the purchase or sale takes place domestically, but it can be used to regulate foreign deceptive conduct that results in a domestic sale.¹⁵⁴

5. Section 14(a) of the 1934 Act

Section 14(a) of the 1934 Act prohibits the solicitation of a proxy in a manner that violates the 1934 Act or SEC regulations.¹⁵⁵ The SEC promulgated Rule 14(a)(9) under its Section 14(a) authority.¹⁵⁶ Rule 14(a)(9) prohibits the use of “false or misleading statements” in the solicitation of a proxy statement.¹⁵⁷

So far, no court has construed the extraterritorial reach of Section 14(a). Under *Morrison*, the focus of Section 14(a) appears to be the actual voting, which is the subject of the proxy. In *Morrison*, to ascertain the focus of Section 10(b), the Court disregarded the deceptive conduct and fixated solely on the purpose of that conduct: the sale.¹⁵⁸ The Court looked to the end result of the transaction—the culmination

¹⁴⁷ See 15 U.S.C. § 78i(f) (2012).

¹⁴⁸ See *id.* § 78i(a).

¹⁴⁹ See *id.* § 78i(b).

¹⁵⁰ See *id.* § 78i(c).

¹⁵¹ *Id.* § 78i(f).

¹⁵² Compare *id.* § 77l(a) (“the person purchasing such security”) with *id.* § 78i(f) (“any person who shall purchase or sell any security”).

¹⁵³ See *supra* text accompanying notes 135–46.

¹⁵⁴ Its extraterritorial application is the same as Section 12(a) of the 1933 Act, which is to foreign deceptive conduct as long as the actual purchase or sale occurs domestically. See *supra* text accompanying notes 135–46.

¹⁵⁵ See 15 U.S.C. § 78n(a) (2012).

¹⁵⁶ See 17 C.F.R. § 240.14a-9 (2011).

¹⁵⁷ See *id.*

¹⁵⁸ See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883–84 (2010).

of the deceptive conduct.¹⁵⁹ This end result, the sale, was the focus of the statute.¹⁶⁰ In the same way, the end result of a proxy—its purpose—is the shareholder’s vote.¹⁶¹ Any misleading statement in the proxy culminates in affecting the vote. The focus of Section 14(a) is thus the vote.¹⁶²

Yet, regardless of the location of the vote, if the proxy concerns securities of a “foreign private issuer,” Section 14(a) does not apply.¹⁶³ SEC Rule 3a12-3 expressly exempts “foreign private issuer[s]” from Section 14(a) liability.¹⁶⁴ “[F]oreign private issuer[s]” are defined as “any private issuer” that has more than fifty percent of its outstanding voting shares held by foreign residents, or the majority of its “executive officers or directors” are not U.S. citizens or residents; less than fifty percent of its assets are not located in the U.S.; and its business is not “administered principally in the United States.”¹⁶⁵ If a company is a “foreign private issuer,” Section 14(a) does not apply.¹⁶⁶

Therefore, if a company is not a foreign private issuer, the place of the annual meeting, or where the actual voting occurs, determines if the transaction is foreign or domestic.¹⁶⁷ If the meeting and voting take place domestically, then Section 14(a) applies even if the solicitation of the proxy, recipients of the proxy, and making of the proxy occurred abroad. On the other hand, if the voting takes place abroad, then the presumption applies and the conduct is beyond Section 14(a)’s reach.¹⁶⁸

6. Section 16(b) of 1934 Act

Section 16(b) allows an issuer to recover an insider’s short-selling profits due to the purchase and sale of the issuer’s securities.¹⁶⁹ This is a strict liability statute that merely requires the issuer to show

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See Marlene Martin, Comment, *Can Shareholders “Bring the Sun” To Climate Change Disclosure?—Reflections on Shareholders’ Power To Fix Environmental Problems Through Proposals on Climate Change*, 14 WYO. L. REV. 289, 294–95 (2014).

¹⁶² See *Morrison*, 130 S. Ct. 6-6 at 2884.

¹⁶³ See 17 C.F.R. § 240.3a12-3 (2013).

¹⁶⁴ See *id.*

¹⁶⁵ 17 C.F.R. § 240.3b-4(c) (2008).

¹⁶⁶ 17 C.F.R. § 240.3a12-3(b) (2013).

¹⁶⁷ See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883–86 (2010).

¹⁶⁸ See *id.*

¹⁶⁹ See 15 U.S.C. § 78p(b) (2012); see also James D. Gordon III, *Acorns and Oaks: Implied Rights of Action Under the Securities Acts*, 10 STAN. J.L. BUS. & FIN. 62, 78 (2004) (explaining that while not an explicit antifraud provision, Section 16(b) was enacted to address insider trading); Alex Raskolnikov, *Irredeemably Ineffi-*

“that there was (1) a purchase and (2) a sale of securities (3) by an [insider] . . . (4) within a six-month period.”¹⁷⁰ Similar to Section 10(b), Section 16(b) is predicated on the purchase and sale of a security.¹⁷¹ Because the sale of the security creates the cause of action, the place of the sale determines if the action is domestic or foreign.¹⁷² Thus, Section 16(b) will only apply if the sale is domestic. Also, like Section 14(a), foreign private issuers are exempt from Section 16.¹⁷³ So, regardless of where the sale occurs, if the company is a foreign private issuer, Section 16(b) will not apply.¹⁷⁴

7. Section 18(a) of the 1934 Act

Section 18(a) of the 1934 Act provides a private right of action to a person who relied on a false or misleading statement that was filed with the SEC.¹⁷⁵ Section 18(a) allows a person who “purchased or sold a security at a price which was affected by” a false SEC filing to recover their losses.¹⁷⁶ Section 18(a) is “the most analogous express private right of action” to Section 10(b).¹⁷⁷ Since *Morrison*, no court has construed the extraterritorial reach Section 18(a), and its focus is unclear. Section 18(a) only provides a right of action to persons who “purchased or sold a security,”¹⁷⁸ making it similar to Sections 11 and 12(a) of the 1933 Act.¹⁷⁹ The focus of those Sections is on the sale of the securities.¹⁸⁰

Some scholars, however, believe that the focus of Section 18(a) is on the filing of the statements with the SEC and not on the sale.¹⁸¹ Because SEC filings occur domestically, if the focus is on the filing,

cient Acts: A Threat to Markets, Firms, and the Fisc, 102 GEO. L.J. 1133, 1173 (2014).

¹⁷⁰ *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

¹⁷¹ 15 U.S.C. § 78p(b) (2012).

¹⁷² *See Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

¹⁷³ *See* 17 C.F.R. 240.3a12-3(b) (2013).

¹⁷⁴ *See id.*

¹⁷⁵ 15 U.S.C. § 78r(a) (2012).

¹⁷⁶ *See id.*

¹⁷⁷ Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 313 (2014).

¹⁷⁸ *See id.* at 340.

¹⁷⁹ *Compare id.*, with 15 U.S.C. § 77k(a) and 15 U.S.C. § 77l(a).

¹⁸⁰ *See In re Smart Techs., Inc. S’holder Litig.*, No. 11 Civ. 7673(KBF), 295 F.R.D. 50, 55–56 (S.D.N.Y. 2013); *see also In re Vivendi Universal S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012).

¹⁸¹ *See Steinberg & Flanagan, supra* note 77, at 852 n.204. *See also* Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd.*, 7 HASTINGS BUS. L.J. 223, 262 (2011).

Section 18(a) actions will always be domestic, and the presumption will never apply.¹⁸² This is especially useful for plaintiffs who purchase securities on a foreign exchange that are also listed on a domestic exchange.¹⁸³ Section 10(b) focuses on the location of the actual purchase, regardless of whether the security is listed on a domestic exchange.¹⁸⁴ For people who purchase foreign securities that are also listed on a domestic exchange, Section 18(a) may provide a cause of action in spite of Section 10(b)'s inapplicability.¹⁸⁵

Despite some scholars' belief that the focus of Section 18(a) is on the filing and not the purchase, *Morrison* seems to indicate that, like Section 10(b), the focus is on the sale. Section 10(b) requires deceptive conduct.¹⁸⁶ Section 10(b) regulates not only the purchase or sale of the securities, but also the deceptive conduct that affects the purchase or sale.¹⁸⁷ In *Morrison*, however, the Court ignored the predicate deceptive conduct in determining the focus of Section 10(b) by narrowing in on the end result that was the culmination of that deceptive conduct—the purchase or sale.¹⁸⁸ In the same way, Section 18(a) requires deceptive conduct through a misleading statement in an SEC filing.¹⁸⁹ Section 18(a) regulates not only the sale of the securities, but also the statements that go into the SEC filing.¹⁹⁰ The Supreme Court would likely interpret Section 18(a) in the same way as Section 10(b): by ignoring the predicate deceptive conduct (SEC filings) and zeroing-in on the end result of that conduct—the sale.¹⁹¹ Thus, the focus of Section 18(a) is likely the sale of the securities and not the SEC filing. So, Section 18(a) extraterritorial reach will be the same as Section 10(b). If a sale occurs domestically, Section 18(a) applies even if the filings were prepared abroad, but if a sale occurs abroad, the presumption bars Section 18(a) application.¹⁹²

¹⁸² See Kirby, *supra* note 181, at 262.

¹⁸³ See *id.* See also Steinberg & Flanagan, *supra* note 77, at 852 n.204.

¹⁸⁴ See *In re Vivendi Universal S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 532–33 (S.D.N.Y. 2011). See also *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 472–73 (S.D.N.Y. 2010); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 335–36 (S.D.N.Y. 2011).

¹⁸⁵ See Kirby, *supra* note 181, at 262–63.

¹⁸⁶ See 15 U.S.C. § 78j(b) (2012).

¹⁸⁷ See *id.*

¹⁸⁸ See *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2883–84 (2010).

¹⁸⁹ See 15 U.S.C. § 78r(a).

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *supra* text accompanying notes 120–23.

8. Section 29(b) of the 1934 Act

Section 29(b) allows contracts to be voided that are made in violation of the 1934 Act or in violation of SEC regulations.¹⁹³ “Section 29(b) itself does not define a substantive violation of the securities laws; rather, it is the vehicle through which private parties may rescind contracts that were made or performed in violation of other substantive provisions.”¹⁹⁴ Courts are split on whether a contract must violate the Act on its face or whether the contract may violate the Act in its performance to be voidable under Section 29(b).¹⁹⁵ Yet, regardless of how the violation occurs, courts agree that the contract must violate a different provision of the Act to be voided.¹⁹⁶

The question then is whether the focus of Section 29(b) is on the contract (i.e. the making of the contract) or on the violated provision. From a logistical standpoint, the focus of Section 29(b) should be on the actual violation—the other provisions of the Securities Exchange Act. If the focus is on the contract, such as the place where it was made, then parties could contract abroad to violate the securities laws in order to avoid Section 29(b)’s application. Parties could form a contract abroad that requires violating the Securities Exchange Act, and when a party pursues rescission under Section 29(b), the presumption precludes application since the focus occurred abroad. It only makes sense for the focus of Section 29(b) to be on the violated provision. So, whether courts apply Section 29(b) domestically depends on which provision is violated. If Section 10(b) is violated, the location of the sale will determine Section 29(b)’s application.¹⁹⁷ But, if Section 14(a) is violated, the location of the vote will determine the application of Section 29(b).¹⁹⁸

B. Criminal or SEC Actions

Unlike private actions, extraterritorial actions by the SEC or another government agency may have survived *Morrison*. Whether the SEC can maintain an action for extraterritorial conduct will depend on a court’s understanding of the presumption’s purpose and its interpretation of the Dodd-Frank amendments. Both the Supreme Court’s de-

¹⁹³ 15 U.S.C. § 78cc(b) (2012).

¹⁹⁴ *Berkeley Inv. Grp. v. Colkitt*, 455 F.3d 195, 205 (3d Cir. 2006) (citing *Nat’l Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 206 n.4 (2d Cir. 1989)).

¹⁹⁵ *Compare* *Drasner v. Thomson McKinnon Sec., Inc.*, 433 F. Supp. 485, 501–02 (S.D.N.Y. 1977) (concerning a violation of the Act on its face) *with* *Reg’l Prop., Inc. v. Fin. & Real Estate Consulting Co.*, 678 F.2d 552, 560 (5th Cir. 1982) (concerning a violation of the Act on its face or as performed).

¹⁹⁶ *See Colkitt*, 455 F.3d at 205.

¹⁹⁷ *See supra* text accompanying notes 120–23.

¹⁹⁸ *See supra* text accompanying notes 154–68.

cision in *United States v. Bowman*¹⁹⁹ and the Dodd-Frank amendments²⁰⁰ provide the potential for extraterritoriality. Furthermore, even if a court were to hold that *Bowman* and Dodd-Frank do not apply, government agencies can still bring securities actions for extraterritorial conduct in the same way as private litigants if the focus of the statute occurs domestically.

1. *United States v. Bowman*

In *Bowman*, the Supreme Court applied a criminal antifraud statute extraterritorially despite applying the presumption to a similar civil statute thirteen years earlier.²⁰¹ The Court differentiated the two statutes on the grounds that one was criminal and the other civil.²⁰² The Court reasoned that “the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated.”²⁰³ Many courts use this reasoning to apply a number of criminal statutes extraterritorially.²⁰⁴ Some courts interpret *Bowman* narrowly and hold that it only permits extraterritorial application to criminal conduct that is committed against the U.S. government.²⁰⁵ Other courts interpret *Bowman* more broadly and consider governmental interests, the nature of the offense, and policy considerations to determine extraterritoriality.²⁰⁶ Yet, the underlying rationale for the presumption leads to an even broader interpretation of *Bowman*.

¹⁹⁹ See *United States v. Bowman*, 260 U.S. 94 (1922).

²⁰⁰ 15 U.S.C. § 77v(c) (2012); 15 U.S.C. § 78aa(b).

²⁰¹ Compare *Bowman*, 260 U.S. at 102–03 with *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 514 (1909).

²⁰² *Bowman*, 260 U.S. at 98.

²⁰³ *Id.*

²⁰⁴ Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. Nat’l Austl. Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137, 165 (2011); see, e.g., *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) overruled by *United States v. George*, 960 F.2d 97 (9th Cir. 1992) overruled recognized by *United States v. Pace*, 65 F. App’x 615, 617 (9th Cir. 2003).

²⁰⁵ See Clopton, *supra* note 204, at 165; see, e.g., *Layton*, 855 F.2d at 1395.

²⁰⁶ See Clopton, *supra* note 204, at 165; *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970) (government interests); *United States v. Belfast*, 611 F.3d 783, 811 (11th Cir. 2010) (discussing the nature of the offense); *United States v. Wright-Barker*, 784 F.2d 161, 167 (3d Cir. 1986) superseded by statute as recognized in *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (discussing policy considerations).

Courts have not been consistent in stating the true rationale behind the presumption.²⁰⁷ Professor William Dodge has identified six potential rationales for the presumption.²⁰⁸ These rationales include: (1) “international law limitations on extraterritoriality;”²⁰⁹ (2) “consistency with domestic conflict-of-laws rules;”²¹⁰ (3) preventing “international discord” due to conflicting U.S. and foreign laws;²¹¹ (4) “the notion that Congress generally legislates with domestic concerns in mind;”²¹² (5) “separation-of-powers concerns;”²¹³ and (6) to “provide[] legislators with a clear background rule which allows them to predict the application of their statutes.”²¹⁴

Courts have soundly rejected the first two rationales since they were first articulated, and the sixth rationale does not hold much weight since the Supreme Court has not consistently applied the presumption in a manner that provides predictability.²¹⁵ Thus, the only remaining rationales are preventing international discord, Congress legislating with domestic concerns in mind, and separation-of-powers.²¹⁶ Of these three, if courts were to universally adopt the separation-of-powers rationale, then the presumption should not apply to actions brought by certain government agencies.

The separation-of-powers rationale is closely related to the prevention of international discord rationale, but it is more narrowed.²¹⁷ As Professor Curtis Bradley noted, “the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”²¹⁸ The political branches—i.e. Legislative and Executive—are authorized to set foreign policy and may create international discord if they so

²⁰⁷ See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 513–14 (1997).

²⁰⁸ See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 112–13 (1998).

²⁰⁹ *Id.* at 112.

²¹⁰ *Id.*

²¹¹ See *id.* (citing Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

²¹² Dodge, *supra* note 208, at 112–13 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)).

²¹³ *Id.* at 113.

²¹⁴ *Id.* at 90 (citing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 277 (Harvard University Press 1994)).

²¹⁵ See Dodge, *supra* note 208, at 113, 122.

²¹⁶ See *id.* at 112–13.

²¹⁷ See *id.* at 120.

²¹⁸ Bradley, *supra* note 207, at 516.

please.²¹⁹ The Judiciary may not.²²⁰ Justice Roberts expressed this concern in *Kiobel*, where he wrote that the presumption “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”²²¹ Thus, while the political branches are free to create international discord and affect foreign relations, the presumption ensures that the Judicial Branch does not do the same.²²²

Government agencies, such as the SEC, are arms of the Executive branch,²²³ which is authorized to create international discord.²²⁴ Thus, the presumption should not apply to actions brought by government agencies such as the SEC or Department of Justice.²²⁵ Several courts have relied on this rationale and *Bowman* to hold that “[t]he presumption that ordinary acts of Congress do not apply extraterritorially . . . does not apply to criminal statutes.”²²⁶

Despite the separation-of-powers rationale and *Bowman*, the Second Circuit recently held that criminal actions for Section 10(b) violations were subject to the presumption against extraterritoriality.²²⁷ The court limited the holding in *Bowman* solely to cases in which the government defends its own rights, such as preventing fraud against itself.²²⁸ The Court relied on the text of *Bowman* and did not consider the underlying rationale behind the presumption.²²⁹ So, while the argument that the presumption does not apply to actions by government

²¹⁹ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997).

²²⁰ See *id.*

²²¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (“[The] presumption has special force when . . . construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”).

²²² See David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After Morrison and Kiobel*, 45 LOY. U. CHI. L.J. 71, 89 (2013).

²²³ See Joan M. Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225, 278–81 (2005) (noting that while an independent agency, the SEC is a part of the Executive Branch with some legislative oversight).

²²⁴ See Bradley & Goldsmith, *supra* note 219, at 861.

²²⁵ See Keenan & Shroff, *supra* note 222, at 90–91.

²²⁶ *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); see *United States v. Siddiqui*, 699 F.3d 690, 700 (2d Cir. 2012) (“The ordinary presumption that laws do not apply extraterritorially has no application to criminal statutes.”).

²²⁷ See *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013).

²²⁸ See *id.* at 73.

²²⁹ See *id.*

agencies is theoretically sound, it will likely fail due to courts' narrowing of *Bowman* and the refusal to consider the underlying purpose for the presumption.²³⁰

2. Dodd-Frank

Shortly after the Supreme Court decided *Morrison*, Congress passed the Dodd-Frank Act, which addresses the extraterritorial reach of antifraud securities actions brought by the SEC.²³¹ As noted above, Dodd-Frank only addresses the extraterritorial *jurisdiction* of SEC actions and not the actual *application* of the antifraud provisions.²³² This has created confusion as to whether Dodd-Frank effectuated any change after *Morrison* regarding the extraterritorial reach of SEC fraud actions.²³³ The only court to consider the issue could not determine whether Dodd-Frank had any effect, so it passed on the issue and decided the case on other grounds.²³⁴

Despite the uncertainty caused by the text of Dodd-Frank, the Supreme Court's analysis in *Kiobel* suggests that Dodd-Frank permits extraterritorial application for SEC fraud actions. In *Morrison*, the Court held that a "clear statement" in the text of the statute is not needed to overcome the presumption, but instead, "context can be consulted as well."²³⁵ In *Kiobel*, the Court indicated what context it is concerned with. The Court in *Kiobel* examined the historical circumstances surrounding the passage of the ATS to determine if it was intended to apply extraterritorially.²³⁶ The Court specifically focused on the "[t]wo notorious episodes involving violations of the law of

²³⁰ See *id.*; Clopton, *supra* note 204, at 165. *Vilar* was a criminal action brought by the Department of Justice, not an SEC action. See *Vilar*, 729 F.3d at 67. However, the courts' dismissal of the DOJ criminal action would apply with even more force against SEC actions. The SEC is an independent agency with less political oversight than purely executive agencies, such as the DOJ. See *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) *overruled by* *United States v. George*, 960 F.2d 97 (9th Cir. 1992); *Heminway*, *supra* note 223, at 278–81. Thus, under the separation-of-powers rationale, there is a much stronger argument that the presumption does not apply to criminal actions by the DOJ, such as in *Vilar*, than actions by an independent agency, such as the SEC. See Keenan & Shroff, *supra* note 222, at 89–90. Therefore, the Second Circuit's application to a DOJ, criminal action indicates that it would almost certainly apply the presumption to SEC actions as well.

²³¹ Painter et al., *supra* note 88, at 2–3.

²³² See *supra* text accompanying notes 88–91.

²³³ Painter et al., *supra* note 88, at 25.

²³⁴ *U.S. S.E.C. v. Chi. Convention Ctr. L.L.C.*, 961 F. Supp. 2d 905, 916–18 (N.D. Ill. 2013).

²³⁵ *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

²³⁶ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013).

nations [that] occurred . . . shortly before passage of the ATS” to hold that Congress was concerned with domestic conduct when it passed the ATS.²³⁷ Because Congress passed the ATS in response to domestic incidents, the Court reasoned that Congress intended for the ATS to apply domestically.²³⁸

Congress passed Dodd-Frank shortly after *Morrison* was decided.²³⁹ The “incidents” that concerned Congress involved foreign conduct that violated the Securities Exchange Act.²⁴⁰ Under *Kiobel*’s historical context analysis, Dodd-Frank should be construed as permitting the extraterritorial application of U.S. securities laws for fraud actions brought by the SEC because Congress was addressing foreign conduct when it passed the Act.²⁴¹ The legislative history of Dodd-Frank further supports this view.

Congress drafted the Dodd-Frank amendments before the Court ultimately decided *Morrison*; however, “[m]any observers predicted that the Court in *Morrison* would bar” some of the extraterritoriality of Section 10(b) and “the SEC wanted Congress to be prepared.”²⁴² Several congressional debates that took place after the *Morrison* decision indicate that Congress intended for Dodd-Frank to reverse *Morrison*.²⁴³ Moreover, if courts treat Dodd-Frank as merely jurisdictional, it would be superfluous because it would essentially enact no change whatsoever since courts did not lack jurisdiction.²⁴⁴ The only interpretation that reconciles the congressional intent and gives effect to the provisions is one that construes Dodd-Frank as permitting the SEC to apply the antifraud provisions of the 1934 Act and Section 17(a) of the 1933 Act extraterritorially.²⁴⁵ Therefore, it is reasonable to assume that Dodd-Frank permits the SEC to bring extraterritorial fraud actions as long as the conduct or effects test is satisfied.²⁴⁶

²³⁷ *Id.*

²³⁸ *See id.* at 1666–67.

²³⁹ *See Painter et al., supra* note 88, at 2–3.

²⁴⁰ *See id.*

²⁴¹ *See Kiobel*, 133 S. Ct. at 1666–67.

²⁴² *Painter et al., supra* note 88, at 14.

²⁴³ *See U.S. S.E.C. v. Chi. Convention Ctr. L.L.C.*, 961 F. Supp. 2d 905, 914–15 (N.D. Ill. 2013).

²⁴⁴ *Id.* at 915; *see Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (holding that statutory language should not be interpreted in way that causes provisions to be mere surplusage).

²⁴⁵ *See* 15 U.S.C. § 77v(c) (2012); 15 U.S.C. § 78a(b).

²⁴⁶ *See Painter et al., supra* note 88, at 24.

3. Focus Analysis

If neither *Bowman* nor Dodd-Frank applies extraterritoriality, then SEC actions will be subject to the *Morrison* focus analysis.²⁴⁷ Whether a cause of action can be maintained depends on the focus of the specific provision. For provisions that provide a private right of action and can be enforced by the SEC, such as Section 10(b),²⁴⁸ the focus is the same. Thus, the analysis for Sections 11 and 12 of the 1933 Act and Sections 9(f), 10(b), 14(a), 16(b), 18(a), and 29(b) of the 1934 Act will be the same as above.²⁴⁹ Section 17(a) of the 1933 Act is the main antifraud provision that does not provide a private right of action.²⁵⁰

Section 17(a) provides essentially the same cause of action as Section 10(b), except there is no scienter requirement.²⁵¹ An additional difference is that Section 17(a) applies to “any person” who “offer[s]” or sells a security, while Section 10(b) only applies to a “purchase or sale of” a security.²⁵² The “offer or sale” language of Section 17(a) is similar to Section 12(a),²⁵³ which only applies to sellers.²⁵⁴ Yet, unlike Section 12(a), Section 17(a) actions are not limited solely to someone who purchased a security.²⁵⁵ Thus, *Pinter v. Dahl*, which limited Section 12(a) to sellers, does not apply.²⁵⁶ The focus of Section 17(a) is therefore not only the sale of the securities, but also the offer.²⁵⁷

The Southern District of New York considered the focus of Section 17(a) in *SEC v. Goldman Sachs & Co.*²⁵⁸ The court noted that “Section 17(a), unlike Section 10(b), applies not only to the ‘sale’ but also to the ‘offer . . . of any securities.’”²⁵⁹ To determine what constitutes an offer, the court looked to the Act’s definition section.²⁶⁰ The

²⁴⁷ See *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

²⁴⁸ See *Yates v. Mun. Mortg. & Equity, L.L.C.*, 744 F.3d 874, 884 (4th Cir. 2014) (discussing private actions); *SEC v. Pentagon Capital Mgmt.*, 725 F.3d 279, 280 (2d Cir. 2013) (discussing SEC actions).

²⁴⁹ See *supra* Section III.A.

²⁵⁰ *Touche Ros & Co. v. Redington*, 442 U.S. 560, 570 (1979) (holding no private right of action under Section 17).

²⁵¹ See 15 U.S.C. § 77q(a) (2012); see also *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).

²⁵² Compare 15 U.S.C. § 77q(a) with 15 U.S.C. § 78j(b).

²⁵³ Compare 15 U.S.C. § 77q(a) with 15 U.S.C. § 77l(a).

²⁵⁴ See *Pinter v. Dahl*, 486 U.S. 622, 647 (1988).

²⁵⁵ Compare 15 U.S.C. § 77q(a) with 15 U.S.C. § 77l(a).

²⁵⁶ Cf. *Pinter*, 486 U.S. at 657.

²⁵⁷ See *SEC v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164–65 (S.D.N.Y. 2011).

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 164 (quoting 15 U.S.C. § 77q(a)) (emphasis in original).

²⁶⁰ *Id.*

Act defines “offer” as “every attempt or offer . . . or solicitation of an offer to buy, a security . . . for value.”²⁶¹ The court believed that this language focused on the person making the offer and not the recipient of the offer.²⁶² Thus, “[i]n order for an ‘offer’ to be domestic, a person or entity must (1) ‘attempt or offer[,]’ in the United States, ‘to dispose of securities . . . or (2) ‘solicit[,]’ in the United States, ‘an offer to buy’ securities.”²⁶³ In that case, the defendant made an offer via telephone from the U.S. to someone in Germany.²⁶⁴ Because the defendant made the offer in the U.S., in spite of the fact that the recipient was abroad, the court considered the conduct domestic and did not apply the presumption.²⁶⁵ Therefore, if either the sale occurs in the U.S. or an offer is made from the U.S., the focus of Section 17(a) is domestic, and the presumption does not apply.²⁶⁶ However, if the sale occurs and the offer is made abroad, the conduct is foreign, and the presumption bars Section 17(a) application.²⁶⁷

CONCLUSION

While *Morrison* sought to cut off the extraterritorial application of the Securities Exchange Act, the Court’s focus analysis left open the possibility of extraterritoriality. The focus analysis allows for U.S. laws to be applied to foreign conduct as long as the focus occurs domestically. Congress’s attempt to remedy *Morrison* in regards to SEC fraud actions resulted in the poorly-worded and ambiguous Dodd-Frank Act. Yet, with *Kiobel*’s context analysis and the legislative history behind Dodd-Frank, it is likely that the SEC is free to bring extraterritorial antifraud actions. So, while *Morrison* may have curtailed the extraterritorial application of U.S. securities laws, their extraterritoriality is still alive and well.

²⁶¹ 15 U.S.C. § 77b(a)(3) (2012).

²⁶² *Goldman Sachs & Co.*, 790 F. Supp. 2d at 165.

²⁶³ *Id.*

²⁶⁴ *Id.* at 164–65.

²⁶⁵ *Id.* at 165.

²⁶⁶ *See id.* at 164–65.

²⁶⁷ *See Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010).

