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# Extraterritoriality of the Federal Securities Laws After Dodd-Frank: Partly Because of a Drafting Error, the Status Quo Should Remain Unchanged

As our memo of June 24 reported, the Supreme Court in *Morrison* v. *National Australia Bank Ltd.*, No. 08-1191 (U.S. June 24, 2010), held that Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 do not apply to securities transactions that take place outside the United States. The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama today, contains two provisions, Sections 929P(b) and 929Y, that concern the territorial scope of the federal securities laws. But neither provision overturns *National Australia Bank*, and neither should extend the substantive reach of the securities laws extraterritorially at all.

It has been widely assumed that, as its principal draftsman asserted on the House floor, Section 929P(b) "make[s] clear that in actions and proceedings brought by the SEC or the Justice Department, … provisions of the Securities Act, the Exchange Act, and the Investment Advisers Act may have extraterritorial application." As actually worded, however, Section 929P(b) does no such thing. The provision unambiguously addresses only the "*jurisdiction*" of the "district courts of the United States" to hear cases involving extraterritorial elements; its language clearly does not expand the geographic scope of any substantive regulatory provision. That is a crucial, and likely fatal, omission. In *National Australia Bank*, the Supreme Court reiterated the longstanding principle that the territorial scope of a federal law presents not a question of "jurisdiction," of a "tribunal's power to hear a case," but rather a question of substance—of "what conduct" does the law "prohibit"? The new law does not address that issue, and accordingly does not expand the territorial scope of the government's enforcement powers at all. To be sure, given the drafters' extra-statutory statements, some judges may be tempted to find substantive extraterritorial reach in Section 929P(b). But as the Supreme Court has made clear, it is "beyond [the courts'] province to rescue Congress from its drafting errors," and so "if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." Congress will probably have to do that here.

Section 929Y addresses private litigation, but refrains from changing the extraterritoriality standards set out in *National Australia*. The new provision merely directs the SEC to "solicit public comment" and to "conduct a *study* to determine the extent to which private rights of action" under the Exchange Act should extend extraterritorially. The SEC must then report the results of its study to Congress within 18 months. As *Le Monde* reported this morning, the prospect of this study "scares a … number of foreign capitals," which "fear seeing the United States become" a global "financial policeman" through class-action lawsuits. But of course there is no way to know what the agency will recommend, let alone whether Congress, in whatever political environment may prevail in 2011 or 2012, will change the law. One thing, though, *is* certain now: It behooves interested parties—such as the many *amici curiae*, including foreign governments, who so emphatically urged the Supreme Court to reject extraterritoriality in *National Australia*—to make their views known once again, this time to the SEC.

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