

[Securities Regulation Daily Wrap Up, SUPREME COURT DOCKET—U.S.: High Court drops Morrison question, but the issue will be back next term, \(Jun. 24, 2019\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

The Supreme Court followed the Solicitor General's recommendation to decline certiorari in two petitions, while a new petition argues that the Dodd-Frank Act did not affect *Morrison's* main holding.

As the Court's term winds down, it has declined to hear one *Morrison*-based cert petition but may hear another during the next term. In denying certiorari in a petition brought by *Toshiba Corporation*, the justices will sidestep the question of whether unsponsored ADR transactions in the U.S. were sufficiently domestic under *Morrison*. A new petition, however, raises the question of whether *Morrison's* holding on the extraterritorial reach of the securities laws was affected by jurisdictional amendments in the Dodd-Frank Act. The Court also denied certiorari in the *First Solar* case, where the petitioner asked for clarification of the proximate cause standard in securities cases ([Scoville v. SEC](#), June 21, 2019).

The AdPack scheme. The petition was brought by a Utah resident who owns an Internet traffic exchange offering internet advertising services. The company's most popular product was the Banner AdPack ("AdPack"), which sold for \$50 and provided that purchasers could share in the company's revenues by receiving credits up to a maximum of \$55. Ninety percent of the AdPack purchasers lived outside the U.S.

In 2016, the SEC brought an enforcement action against the petitioner, claiming that AdPacks were securities sold in a Ponzi scheme. The [district court](#) granted the Commission's motion for a preliminary injunction and continued a receivership put into place by an earlier TRO. The petitioner argued that the AdPack sales were foreign transactions not subject to the court's jurisdiction under *Morrison v. Nat'l Australia Bank Ltd.* (2010). The court disagreed, concluding that amendments in the Dodd-Frank Act, passed after *Morrison*, indicated that, with respect to SEC enforcement proceedings, Congress intended that the antifraud provisions of the federal securities laws should be applied to extraterritorial transactions. The court accordingly issued an injunction with, as the petition puts it, "contained *no* territorial limitations, and that, by its terms, applied across the globe."

The [Tenth Circuit](#) affirmed. According to the court, the antifraud provisions reached sales to customers outside the U.S. because, under the conduct-and-effects test added by Dodd-Frank, the company undertook significant conduct in the U.S. to make those overseas sales. The court also concluded that AdPacks, were securities subject to SEC jurisdiction and the 1933 and 1934 Acts. Despite the placement of the Dodd-Frank amendments in the jurisdictional provisions of the securities laws, the court said, agreeing with the lower court, the context and historical background indicated that Congress "undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied."

Argument: *Morrison* applies. The petition argues that *Morrison's* principal holding that Exchange Act Section 10(b) does not reach extraterritorial conduct was not legislatively overturned by the Dodd-Frank Act. The petitioner maintains instead that the plain terms of Section 929P(b) of Dodd-Frank (adding Exchange Act Section 27(b) and Securities Act Section 22(c)) did not amend or alter the extraterritorial reach of the substantive regulatory provisions of the securities laws. The petition then pointed to the distinction between jurisdiction and the merits of the case. *Morrison*, the petition says, held that the jurisdictional provisions may be satisfied, but that does not mean that the substantive statute at issue also has extraterritorial effect. And, the language of Section 929P(b) clearly addresses only subject-matter jurisdiction, and not the merits. This language was ignored by

the court of appeals in favor of extratextual content, the petition asserts, and the statute should be enforced according to its terms.

Cert. denied. The Court [denied certiorari](#) in two securities-related cases. First, *Toshiba Corporation v. Automotive Industries Pension Trust Fund* ([18-486](#)) asked the Court whether the Exchange Act applies, without exception, whenever a claim is based on a domestic transaction or whether in certain circumstances the Exchange Act does not apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial. The Solicitor General had [recommended](#) that certiorari be denied in this case, noting that it was undisputed that the transactions at issue were domestic transactions and, further, that Toshiba appeared to conflate the separate questions of whether Section 10(b) applies and whether that provision had been violated.

The Solicitor General also [recommended](#) that certiorari be denied in *First Solar, Inc. v. Mineworkers' Pension Scheme* ([18-164](#)). This petition asked whether a private securities-fraud plaintiff may establish the critical element of loss causation based on a decline in the market price of a security where the event or disclosure that triggered the decline did not reveal the fraud on which the plaintiff's claim is based. The SG's brief said that there was no circuit split on this issue and that under the Court's precedent, loss causation can be shown by proving the existence of a corrective disclosure: the plaintiff does not need to go further and prove that the market actually learned of and reacted to the information revealing the fraud.

Read the docket. These cases, and others pending before the Court, can be referenced in the latest version of the [Supreme Court Docket](#). Cases are listed separately, along with a brief summary of the questions raised and the status of the appeal.

The petition is [No. 18-1566](#).

Attorneys: Micah S. Echols (Marquis Aurbach Coffing) and John S. Williams (Williams & Connolly LLP) for Charles D. Scoville.

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