The Territorial Reach of U.S. Securities Laws After *Morrison v. National Australia Bank*

**SUMMARY**

In June 2010, in *Morrison v. National Australia Bank*, the U.S. Supreme Court held that U.S. securities antifraud laws do not reach transactions by non-U.S. investors in securities of non-U.S. companies effected on non-U.S. exchanges, even if the investors claim that their losses arose from conduct in the United States. In its decision, which overturned the so-called “conduct” and “effects” tests previously followed by U.S. courts, the Supreme Court adopted a “transactional” test for determining the territorial scope of the U.S. securities laws. In rejecting the efforts of the plaintiffs’ bar to end-run *Morrison*, lower federal courts have applied the Supreme Court’s reasoning to avoid the extraterritorial application of the U.S. securities laws. Most notably, in separate securities fraud actions against UBS AG (“UBS”) and Porsche Automobil Holding SE (“Porsche”), federal courts recently dismissed claims (i) based on purchases of securities outside the United States where the non-U.S. issuer had dually listed the class of relevant securities on both U.S. and non-U.S. exchanges, (ii) by U.S. purchasers of a non-U.S. issuer’s securities on a non-U.S. exchange, and (iii) based on securities-based swap agreements referencing shares traded on non-U.S. exchanges. (S&C partners Bob Giuffra and Suhana Han represented both UBS and Porsche.) Following these and other post-*Morrison* decisions, non-U.S. issuers should take some comfort that they will not expose themselves to “worldwide” securities class actions simply by participating in U.S. capital markets.
BACKGROUND

Following enactment of the Private Securities Litigation Reform Act of 1995, which sought to limit the filing of meritless “strike suit” securities class actions, the plaintiffs’ bar began looking for new ways to increase the size of securities class actions in U.S. courts and, accordingly, started scouring Europe and Asia to find clients that would participate in such actions.1 As a result, the last decade saw a surge of “foreign-cubed” class action filings, i.e., cases brought on behalf of classes of mainly foreign plaintiffs against foreign companies based on trades on foreign stock exchanges. Although many of these foreign-cubed cases were dismissed, the few that survived resulted in large settlements.2

Pre-Morrison Approach to Cases Involving the Extraterritorial Application of the Securities Laws

Prior to the Supreme Court’s decision in Morrison, the various U.S. courts of appeals held that district courts should apply the U.S. securities laws extraterritorially to foreign transactions and foreign activity if there was sufficient domestic U.S. “conduct” or domestic U.S. “effects.” Under the “conduct test,” courts asked whether “the wrongful conduct occurred in the United States.” The securities fraud “occurred” in the United States if such conduct was “more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad.”3 In the early and leading case of Bersch v. Drexel Firestone, for example, plaintiffs alleged a violation of the securities laws in connection with stock offerings made outside the United States. Although there was some U.S. conduct, the Second Circuit held that this U.S. conduct did not “directly cause” plaintiffs’ alleged losses, because the U.S. conduct was minimal compared to defendants’ conduct abroad, and “[t]he fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers’ hands.”4

The “effects test” asked “whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,”5 specifically, “the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges.”6 Standing alone, this test did not provide an independent basis for jurisdiction in foreign-cubed cases,7 but the Second Circuit opined that “an admixture” of the

2 See, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig., 437 F. Supp. 2d 467 (D. Md. 2006) (final judgment approving $1.1 billion settlement).
4 519 F.2d 974, 987 (2d Cir. 1975).
5 Morrison, 547 F.3d at 171.
7 See, e.g., Stephen J. Choi & Linda J. Silberman, Transnational Litigation and Global Securities Class Action Lawsuits, 2009 Wis. L. Rev. 465, 476 (2009) (“[W]e know of no court that has used the effects test to apply extraterritorial jurisdiction in an f-cubed case.”).
conduct and effects tests “often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.”

**Difficulties with the “Conduct” and “Effects” Tests**

Applying the “conduct” and “effects” tests—or the “admixture” of them—was difficult and resulted in an inconsistent body of law such that issuers had a difficult time determining their exposure prior to an actual decision by the court hearing the securities law claims against them. The courts of appeals generally adopted the Second Circuit’s conduct test, but formulated that test in varying ways. The D.C. Circuit questioned whether a U.S. court “should ever assert jurisdiction over domestic conduct that causes loss to foreign investors,” but adopted the conduct test because of the Second Circuit’s preeminence in the field of securities law. Nevertheless, the D.C. Circuit’s version of the conduct test was more restrictive, requiring “all the elements of a defendant’s conduct necessary to establish a [securities fraud] violation” to establish jurisdiction. The Third Circuit, by contrast, held that the conduct test was satisfied so long as “some activity designed to further the fraudulent scheme occurs within this country.” Similarly, the Eighth Circuit held that the Act applied extraterritorially when the domestic conduct “was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment,” an approach with which the Ninth Circuit agreed.

All in all, the tests turned on “very fine distinctions,” which led to “unpredictability . . . in jurisdictional analysis,” best encapsulated by one court’s observation that “any notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe.”

**Policy Consequences of Permitting Global Class Actions**

Perhaps more troubling than the difficulties courts had in applying the “conduct” and “effects” tests were the policy consequences resulting from the uncertainty of their application. Prior to Morrison, non-U.S.
issuers were leaving U.S. capital markets, in large part because of fear of private securities litigation in the United States. For example, between June 2007, when the Commission amended its rules to remove certain barriers to de-listing, and June 2009, 15 out of 27 French companies listed in the United States at the end of 2005 had de-listed, as had 19 of 44 United Kingdom companies, seven of 20 German companies, six of 11 Italian companies, and 15 of 24 Australian companies. In addition to losing these foreign issuers, the U.S. capital markets have failed to attract substantial numbers of new foreign issuers: the U.S. percentage of global IPOs, which is widely viewed as an indicator of capital markets competitiveness, has rapidly decreased in the last ten years, with the United States capturing a meager 2.7% of global IPO activity in the first quarter of 2010.

According to Professor John Coffee of Columbia Law School, "while the press and others attribute the growing disenchantment of foreign issuers with the U.S. market to the Sarbanes-Oxley Act, closer analysis and interview data suggests that fear of U.S. private antifraud litigation may be the better explanation [for the flight of foreign private issuers from U.S. markets]." Senator Charles Schumer and Mayor Michael Bloomberg likewise concluded that “the increasing extraterritorial reach of U.S. law and the unpredictable nature of the legal system were . . . significant factors that caused New York to be viewed negatively” by business leaders. The prospect of “worldwide” securities class actions, then, undoubtedly contributed to this country’s reputation as the “Shangri-La of class action litigation.”

The Morrison Decision

Morrison changed the legal landscape dramatically. In Morrison, non-U.S. plaintiffs who purchased ordinary shares of National Australia Bank (“NAB”), an Australian corporation, on the Australian Stock Exchange brought a securities fraud class action under Section 10(b) of the Securities Exchange Act of 1934 against NAB in the Southern District of New York. To connect the alleged fraud to the United States, the non-U.S. plaintiffs alleged that employees of HomeSide, NAB’s U.S. mortgage service provider, knowingly created models that falsely inflated the value of its Mortgage Servicing Rights (“MSRs”). HomeSide employees then allegedly transmitted these inflated values to NAB executives in Australia, who allegedly participated in the fraud by including that information in NAB’s financial disclosures that they issued from Australia. When the inflated MSR values became apparent, NAB took large write-downs, causing a decline in NAB’s share price.

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19 Morrison, 130 S. Ct. at 2886.
Applying the “conduct” and “effects” tests, the trial court in the Southern District of New York dismissed the non-U.S. plaintiffs’ claims for lack of subject matter jurisdiction, holding that the “heart” of the alleged fraud had occurred in Australia, where NAB executives determined the content of, and issued, NAB’s purportedly false public disclosures. The Second Circuit affirmed, holding that a U.S. court generally has jurisdiction to hear foreign-cubed claims only if activities in the United States “were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad.” Although rejecting “rigid bright-line rules,” the Second Circuit reasoned that, because the U.S. securities laws focus on disclosures, a U.S. court should not exercise jurisdiction where primary responsibility for the content and issuance of the disclosures lies abroad. The Second Circuit also noted that none of the alleged misstatements was made from the United States. The total “mix of factors,” the court concluded, “add[s] up to a determination that we lack subject matter jurisdiction.”

The U.S. Supreme Court affirmed the result reached by the Second Circuit, but on different grounds.

First, the Supreme Court held that whether foreign-cubed claims may proceed in a U.S. court is not an issue of jurisdiction, but rather a question of whether there is a cause of action for foreign-cubed claims under Section 10(b).

Second, the Court held that there was no cause of action under Section 10(b) for securities fraud based on misstatements or omissions if the securities at issue were purchased on a foreign exchange. Writing for the majority of the Court, Justice Scalia reaffirmed that the Supreme Court always presumes that a U.S. law does not apply extraterritorially, unless there is a clear indication in the statute that Congress intended it do so. Looking at the Exchange Act, Justice Scalia noted that “there is no clear indication in the Exchange Act that Section 10(b) applies extraterritorially, and we therefore conclude that it does not.”

The majority next rejected the “conduct” and “effects” tests, stating that these tests were vague and noting that they would potentially encompass too many actions, because “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.” Turning to the text of the Exchange Act, the majority said that the test for whether a claim is covered by the Exchange Act turns “not upon the place where the deception originated but upon purchases and sales of securities in the United States.” Accordingly, the majority concluded that Section 10(b) applies only to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”

The majority also noted two policy concerns driving its opinion: (i) the “fear that [the U.S.] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets” and (ii) the concern that, when considering claims brought based on purchases on foreign exchanges, U.S. courts might issue decisions that conflict with the laws and regulatory determinations of the foreign sovereigns in which those foreign exchanges reside.
POST-MORRISON ISSUES

Although *Morrison*, at first blush, appeared to be a complete victory for foreign issuers, the plaintiffs' bar sought to end-run the holding in several ways:

1. The “Listing” Theory

The “boldest and most creative” interpretation of *Morrison* advanced by plaintiffs thus far has come to be known as the “listing theory” or the “listed securities theory.” It turns on the following statement in *Morrison*, summarizing the Court’s holding:

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.\(^\text{21}\)

Proponents of the “listing theory” contend that Justice Scalia’s use of the term “and” in *Morrison* delineated two separate categories of transactions in securities to which Section 10(b) applies: (1) any security that is “listed” on a U.S. exchange regardless of whether the purchase or sale occurred in the United States or abroad and, separately, (2) unlisted securities traded in the United States in the over-the-counter market. Under this reading of *Morrison*, the majority’s supposedly deliberate choice of the word “listed” supports the conclusion that Section 10(b) reaches transactions in securities that are listed on a U.S. exchange regardless of where the trade is actually executed. Thus, under this theory, if a foreign issuer dually lists its shares for trading on both a home country exchange and a U.S. exchange, then Section 10(b) reaches all purchases and sales of the company’s shares, whether inside or outside the United States and regardless of how small the U.S. percentage of the worldwide trading volume in that issuer’s shares.

The “listing theory” suffered from several flaws. *First*, Justice Scalia’s majority opinion focused exclusively on the location of the transaction and made clear that U.S. securities laws were not intended to interfere with the securities laws of foreign countries. *Second*, NAB itself had listed American Depositary Receipts (“ADRs”) on the NYSE, meaning it also listed (though not for trading) its underlying shares. Indeed, if the “listing theory” were correct, the Supreme Court would have reinstated the plaintiffs’ claims against National Australia Bank, rather than dismissing them.

Early lower court decisions rejected the “listing theory.” In a securities fraud class action against the French issuer Alstom, which had listed its ADRs on the NYSE, the court acknowledged that “isolated clauses” of *Morrison* provide some support for the theory, but rejected it as a “selective and overly-


\(^{21}\) 130 S. Ct. at 2888 (emphasis added).
technical reading of Morrison that overlooks the larger point of the decision."22 Other courts facing
securities fraud claims against foreign issuers with ADRs on the NYSE agreed with this logic, including in
dismissing after trial foreign-cubed claims brought against Vivendi, though the court there added that this
reading was “not . . . free from doubt.”23

A recent opinion by a court in the Southern District of New York in a securities class action against S&C
client UBS held that the listing theory relied on “selective quotations” of Morrison and could not be
harmonized with the Supreme Court’s “clear intention to limit the extraterritorial reach of § 10(b).”24 While
the previous courts that had rejected the listing theory were faced with actions against issuers that listed
ADRs on a U.S. exchange, UBS listed its ordinary shares for trading on the NYSE as well as the Swiss
and Tokyo exchanges. Plaintiffs in the UBS case tried to make much of this distinction, but did not sway
the court, which focused on where the transactions took place—not where the securities were listed. One
commentator described the UBS case as “pretty much the last big foreign-exchange 10b-5 class action
left in the federal district courts” and said the ruling likely represented “an end to plaintiffs’ attempts to get
around Morrison.”25 The “listed securities” issue, however, has yet to be addressed by the Second
Circuit.

2. Foreign-Squared Claims

Morrison was a foreign-cubed case. After Morrison, some foreign-squared plaintiffs (i.e., U.S. purchasers
of foreign issuers’ securities on foreign exchanges) have tried to argue that, although their shares of
foreign issuers were acquired on foreign exchanges, the actual “purchase” still occurred “in the United
States” because that is where the “buy order” originated. Alternatively, some plaintiffs have argued that
their claims survive because the “injury” occurred in the United States.

Post-Morrison cases have unanimously rejected these foreign-squared arguments as well.26 Most
recently, in UBS, the court rejected this argument because “there is nothing in the text of Morrison to

23 In re Vivendi Universal S.A. Sec. Litig., 765 F. Supp. 2d 512, 531 (S.D.N.Y. 2011) (Holwell, J.); see
also In re Royal Bank of Scot. Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y. 2011) (Batts,
J.) (rejecting the listing theory); Absolute Activist Value Master Fund Ltd. v. Homm, No. 09 Civ. 8862,
2010 WL 5415885, at *5 (S.D.N.Y. Dec. 22, 2010) (Daniels, J.) (same); In re Infineon Technologies
AG Sec. Litig., No. 04 Civ. 4156, slip op. at 6-7 & n.12 (N.D. Cal. Mar. 17, 2011) (same).
25 Nate Raymond, Wielding Morrison, Sullivan & Cromwell Slashes Securities Class Action Against
UBS, American Lawyer.com, Sept. 13, 2011; Alison Frankel, Investors Lose Last, Best Chance to
26 Plumbers’ Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178
(S.D.N.Y. 2010) (Berman, J.); In re Royal Bank of Scot., 765 F. Supp. 2d at 337; Cornwell v. Credit
Suisse Grp., 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010) (Marrero, J.); In re Merkin & BDO Seidman
suggest that the Court intended the location of an investor placing a buy order to be determinative of whether such a transaction is ‘domestic’ for purposes of § 10(b),” and, moreover, the “mere allegation” that a plaintiff suffered injury in the United States was “in essence a re-articulation of the ‘effects’ test [which] was squarely rejected by the Morrison Court.”

3. Application to Security-Based Swap Agreements

In dismissing two securities actions against S&C client Porsche, a federal court in New York addressed how Morrison’s “transactional test” for determining the territorial reach of Section 10(b) would apply to private transnational swap agreements in which counterparties agree to exchange cash flows that depend on the price of a reference security traded exclusively outside the United States.

Plaintiffs alleged that Porsche and certain former officers violated Section 10(b) of the Exchange Act when, in connection with Porsche’s acquisition of a stake in Volkswagen (“VW”), they allegedly misrepresented Porsche’s intentions regarding a takeover of VW and its ownership stake in VW. Plaintiffs alleged that following a Porsche press release announcing the extent of its holdings in VW, the price of VW ordinary shares shot up, resulting in a massive “short squeeze” forcing plaintiffs to cover their short positions at artificially high prices and causing them enormous losses.

Plaintiffs allegedly created their short positions through short sales of VW shares and security-based swap agreements referencing VW ordinary shares that would have increased in value if the price of the VW shares had declined. Plaintiffs dropped their short sale claims following Morrison, but argued that their swap claims were covered by Section 10(b) because plaintiffs signed confirmations and “took all steps necessary to transact” their swap agreements in the United States. In an effort to buttress the connection of their swap agreements to the United States, plaintiffs alleged that the swap agreements were governed by New York law and required disagreements relating to the swap agreements to be resolved in a New York court.

Despite these alleged domestic connections, the court held that the claims were essentially based on foreign transactions and, thus, the actions were barred by Morrison. The court reasoned that “[s]ince the economic value of securities-based swap agreements is intrinsically tied to the value of the reference security, the nature of the reference security must play a role in determining whether a transnational swap agreement may be afforded the protection of § 10(b).” The court concluded that plaintiffs’ swap agreements “were the functional equivalent of trading the underlying VW shares on a German exchange,” and, therefore, the “economic reality” is that such agreements are “essentially transactions conducted

upon foreign exchanges and markets, and not domestic transactions that merit the protection of § 10(b).” Moreover, the court expressed the concern that applying Section 10(b) to plaintiffs’ claims “would extend extraterritorial application of the Exchange Act’s antifraud provisions to virtually any situation in which one party to a swap agreement is located in the United States.”

The *Porsche* decision is currently on appeal to the Second Circuit, and several prominent groups, including the Securities Industry and Financial Markets Association, the United States Chamber of Commerce, and various German, French, and Swiss industry groups, have submitted *amicus* briefs urging affirmance of this decision. These *amici* have argued that an adverse decision deeming private swaps referencing non-U.S. securities “domestic” transactions under *Morrison* would result in virtually unlimited exposure for issuers that had no knowledge of—let alone participation in—these agreements.

4. “Offers” Under the 1933 Act

Finally, a recent case in the Southern District of New York, *SEC v. Tourre*, considered whether and how to apply *Morrison*’s "transactional test" to claims under Section 17(a) of the Securities Act of 1933 (the “1933 Act”), which prohibits fraud “in the offer or sale of any securities or security-based swap agreement.”30

The SEC alleged that an individual, Fabricio Tourre, violated the securities laws by structuring a collateralized debt obligation ("CDO") and marketing it (in New York) without disclosing certain material information to investors. Tourre moved to dismiss the complaint under *Morrison*, arguing that, although the structuring and marketing of the CDO occurred in the United States, the purchases and sales occurred abroad.

The court adopted Tourre’s argument with respect to the SEC’s (i) Section 10(b) claims and (ii) Section 17(a) claims to the extent they were predicated on “sales.”31 The court held, however, that the

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31 *Tourre* is also notable in that it dismissed certain claims brought by the SEC. 2011 WL 2305988, at *6-11 (dismissing Exchange Act claims because the SEC failed to allege a transaction in the United States); cf. *Morrison*, 130 S. Ct. at 2894 n.12 (Stevens, J. concurring) (noting that the Court’s opinion “does not . . . foreclose the Commission from bringing enforcement actions in additional circumstances, as no issue concerning the Commission’s authority is presented by this case. The Commission’s enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, but they also pose a lesser threat to international comity.”). This may have little precedential value, however, because the case was brought prior to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which gave U.S. courts “jurisdiction” over SEC and Department of Justice enforcement actions where (i) there is “conduct within the United States that constitutes significant steps in furtherance of the violation” or (ii) the “conduct occurring outside the United States has a foreseeable and detrimental effect within the United States.” Pub. L. 111-203, § 929P, 124 Stat. 1376, 1864-65 (2010). It is important to note, however, that *Morrison* held that it is breadth of the statute—not the jurisdiction of the courts—that determines whether the U.S. securities laws apply extraterritorially. Accordingly, courts may hold that this provision of Dodd-Frank is effectively a nullity.
“transactional test” announced by Morrison did not mandate dismissal altogether, because “unlike Section 10(b), [Section 17(a)] applies not only to the ‘sale’ but also to the ‘offer’ . . . of any securities or any security-based swap agreement.” Therefore, after noting that Morrison itself provided “little guidance” on the issue, the court held that the SEC’s allegations of “offering” securities in the United States—even to foreign investors—were sufficient to establish coverage under the 1933 Act. Tourre has since moved for leave to file an interlocutory appeal of the decision, arguing that the court’s interpretation of “offer” was overly broad and inconsistent with the presumption against extraterritoriality undergirding Morrison.

IMPLICATIONS

Although none of the recent post-Morrison decisions has been tested on appeal, their relative unanimity shows that courts are skeptical of plaintiffs’ efforts to evade the Supreme Court’s bright-line transactional test for determining the reach of the securities laws. We expect that courts will continue to scrutinize the precise location where a plaintiff purchased the securities at issue and to dismiss claims based on overseas purchases or sales of such securities. We also expect that courts will continue to look to the policy reasons underlying Morrison, including avoiding conflicts between U.S. and non-U.S. law, and decline to extend the reach of the U.S. securities laws to cover private agreements that merely reference the price of a non-U.S. issuer’s shares on a non-U.S. exchange. The Morrison precedent may serve to encourage non-U.S. issuers to continue to list their shares on U.S. exchanges and strengthen U.S. capital markets.

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CONTACTS

New York

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>David H. Braff</td>
<td>+1-212-558-4705</td>
<td><a href="mailto:braffd@sullcrom.com">braffd@sullcrom.com</a></td>
</tr>
<tr>
<td>Gandolfo V. DiBlasi</td>
<td>+1-212-558-3836</td>
<td><a href="mailto:dibilasig@sullcrom.com">dibilasig@sullcrom.com</a></td>
</tr>
<tr>
<td>Theodore Edelman</td>
<td>+1-212-558-3436</td>
<td><a href="mailto:edelmanmt@sullcrom.com">edelmanmt@sullcrom.com</a></td>
</tr>
<tr>
<td>Brian T. Frawley</td>
<td>+1-212-558-4983</td>
<td><a href="mailto:frawleyb@sullcrom.com">frawleyb@sullcrom.com</a></td>
</tr>
<tr>
<td>Robert J. Giuffra, Jr.</td>
<td>+1-212-558-3121</td>
<td><a href="mailto:giuffrar@sullcrom.com">giuffrar@sullcrom.com</a></td>
</tr>
<tr>
<td>Suhana S. Han</td>
<td>+1-212-558-4647</td>
<td><a href="mailto:hans@sullcrom.com">hans@sullcrom.com</a></td>
</tr>
<tr>
<td>John L. Hardiman</td>
<td>+1-212-558-4070</td>
<td><a href="mailto:hardimanj@sullcrom.com">hardimanj@sullcrom.com</a></td>
</tr>
<tr>
<td>Sharon L. Nelles</td>
<td>+1-212-558-4976</td>
<td><a href="mailto:nelless@sullcrom.com">nelless@sullcrom.com</a></td>
</tr>
<tr>
<td>Richard C. Pepperman II</td>
<td>+1-212-558-3493</td>
<td><a href="mailto:peppermanr@sullcrom.com">peppermanr@sullcrom.com</a></td>
</tr>
<tr>
<td>David M.J. Rein</td>
<td>+1-212-558-3035</td>
<td><a href="mailto:reind@sullcrom.com">reind@sullcrom.com</a></td>
</tr>
<tr>
<td>Jeffrey T. Scott</td>
<td>+1-212-558-3082</td>
<td><a href="mailto:scottj@sullcrom.com">scottj@sullcrom.com</a></td>
</tr>
<tr>
<td>Michael T. Tomaino, Jr.</td>
<td>+1-212-558-4715</td>
<td><a href="mailto:tomainom@sullcrom.com">tomainom@sullcrom.com</a></td>
</tr>
<tr>
<td>Stephanie G. Wheeler</td>
<td>+1-212-558-7384</td>
<td><a href="mailto:wheelers@sullcrom.com">wheelers@sullcrom.com</a></td>
</tr>
</tbody>
</table>

Washington, D.C.

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daryl A. Libow</td>
<td>+1-202-956-7650</td>
<td><a href="mailto:libowd@sullcrom.com">libowd@sullcrom.com</a></td>
</tr>
</tbody>
</table>

Los Angeles

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert A. Sacks</td>
<td>+1-310-712-6640</td>
<td><a href="mailto:sacker@sullcrom.com">sacker@sullcrom.com</a></td>
</tr>
<tr>
<td>Michael H. Steinberg</td>
<td>+1-310-712-6670</td>
<td><a href="mailto:steinbergm@sullcrom.com">steinbergm@sullcrom.com</a></td>
</tr>
</tbody>
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Palo Alto

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brendan P. Cullen</td>
<td>+1-650-461-5650</td>
<td><a href="mailto:cullenb@sullcrom.com">cullenb@sullcrom.com</a></td>
</tr>
</tbody>
</table>
### London

- Nikolaos G. Andronikos  
  +44-20-7959-8470  
  andronikosn@sullcrom.com
- David B. Rockwell  
  +44-20-7959-8575  
  rockwelld@sullcrom.com

### Paris

- Krystian Czerniecki  
  +33-1-7304-5880  
  czernieckik@sullcrom.com
- William D. Torchiana  
  +33-1-7304-5890  
  torchianaw@sullcrom.com