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THE IMPACT OF *MORRISON* ON CROSS-BORDER M&A

Cases after Morrison, applying its teaching, have held that whether a transaction is "domestic," and thus is subject to Section 10b, turns only on whether "irrevocable liability is incurred or title passes within the United States." Applying this test literally to a typical M&A transaction for a non-US company, the authors find that a crafty buyer or seller could arrange to have a stock purchase agreement executed with title to shares passing in a location that would make Section 10(b) applicable or inapplicable, as it chose.

By John M. Vasily and Michael J. Rosenthall *

The ability of buyers in cross-border M&A transactions to bring actions against their sellers under Section 10(b) of the Securities Exchange Act of 1934 has been reduced significantly under recent decisions of the United States Supreme Court and lower federal courts. In the leading case of *Morrison v. National Australian Bank Ltd.*, the Supreme Court held that Section 10(b) applies only to "transactions in securities listed on domestic exchanges and domestic transactions in other securities."[1] More recently, in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, the Second Circuit held that a transaction is "domestic" within the meaning of *Morrison* only if "irrevocable liability is incurred or title passes within the United States."[2] The impact of such cases would seem to eliminate the availability of Section 10(b) to buyers of non-US companies, and likely of non-listed U.S. companies, if the stock purchase agreement is executed and title to the shares passes outside of the United States, even if a United States buyer, seller, or target is involved, or the misstatements or omissions were made in the United States. Conversely, a seller could create

[1] *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (U.S. 2010).

[2] *Absolute Activist Value Master Fund v. Ficeto*, 672 F.3d 143 (2d Cir. 2012).

* *JOHN M. VASILY is a partner in the New York office of Debevoise & Plimpton LLP specializing in cross-border M&A and is also an adjunct professor of law at Georgetown University Law Center. MICHAEL J. ROSENTHALL is an Attorney-Advisor in the Division of Corporation Finance of the U.S. Securities and Exchange Commission and is also an adjunct professor of law at Georgetown University Law Center. Mr. Rosenthall will join Arnold & Porter as an associate in July 2012. Their e-mail addresses are jmvasily@debevoise.com and RosenthallM@SEC.gov.*

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