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Extraterritorial Reach Of White-Collar Criminal Statutes

'Vilar' suggests a significant limitation.

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In *United States v. Vilar*,[1] the U.S. Court of Appeals for the Second Circuit held that the presumption against extraterritoriality, which the Supreme Court applied to civil actions under the federal securities fraud statute in *Morrison v. National Australia Bank*, [2] applied equally in criminal cases. Rejecting the government's argument that the presumption did not apply "in the criminal context," the Second Circuit ruled that "a defendant may be convicted of securities fraud under Section 10(b) and Rule 10b-5 only if he has engaged in fraud in connection with (1) a security listed on a U.S. exchange, or (2) a security purchased or sold in the United States."[3] Nevertheless, the court upheld the defendants' convictions in light of evidence that they had also "engaged in fraud in connection with a domestic purchase or sale of securities."[4]

At the same time that it applied the presumption against extraterritoriality in the criminal context, the Second Circuit emphasized 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."[5] This principle, articulated by the Supreme Court nearly a century ago in *United States v. Bowman*,[6] has long guided courts considering the extraterritorial reach of criminal statutes. While *Morrison* and its progeny may generally curtail the reach of federal laws, it remains to be seen whether the Second Circuit's affirmation of *Bowman* in *Vilar* will place a limit on the class of criminal laws to which *Morrison* will apply. The potential impact of *Vilar* on several criminal laws familiar to white-collar practitioners is considered below.

'United States v. Bowman'

In *Bowman*, the defendants were accused of conspiring to defraud a corporation in which the United States was a stockholder. Their plan, formulated and put into motion from a ship at sea, was to purchase 1,000 tons of fuel on behalf of the victim corporation, deliver 600 tons and resell the rest for their own benefit. The trial court dismissed the indictment on jurisdictional grounds. It acknowledged that Congress could exercise jurisdiction over ships at sea, but noted:

> Congress had always expressly indicated … when it intended that its laws should be operative on the high seas" and that the statute under which the defendants were charged made "no reference to the high seas as a part of the locus of the offense.[7]

The Supreme Court applied a different analysis, recognizing the presumption against extraterritoriality as valid but holding that its application depended on the nature of the offense. Offenses "against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must … be committed within the territorial jurisdiction of the government" and "[i]f punishment of them is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for Congress to say so in the statute."[8] However, "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents."[9] Where a territorial limitation on such a statute would "curtail [its] scope and usefulness" and "leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home," extraterritorial application may be "inferred from the nature of the offense."[10]

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Finding that the defendants' offense fell into the latter category, the Supreme Court upheld the indictment.

'United States v. Vilar'

In *Vilar*, the Second Circuit was also faced with the question of whether criminal liability could arise from acts committed outside the United States. Alberto Vilar and Gary Alan Tanaka were investment managers and advisers operating through companies in the United States and abroad. Between 1986 and 2005, Vilar and Tanaka induced a group of individual clients to transfer significant sums into so-called Guaranteed Fixed Rate Deposit Accounts (GFRDAs). The clients were told their money was being placed in low-risk investments, when in fact Vilar and Tanaka were using the funds to take positions in volatile stocks.[11] While at least one client signed an investment agreement concerning a GFRDA in the United States, the defendants argued that the vast majority of the transactions "were deliberately and carefully structured to occur outside the United States … by the investors."[12]

The value of these investments collapsed in late-2000, creating significant financial problems for Vilar and Tanaka. In June 2002, the defendants solicited a $5 million investment from one of their long-time clients, claiming that they had been licensed to form a Small Business Investment Company (SBIC), which would receive significant financial support from the U.S. government. The client agreed to make the investment and signed documents to that effect while in New York. In reality, Vilar and Tanaka had no such license and used the funds to cover personal and business expenses—including claims arising out of the collapsing GFRDA scheme. When Vilar was unable to promptly return the client's funds in early 2005, the client reported Vilar and Tanaka to the SEC.[13]

In August 2006, Vilar and Tanaka were indicted on 12 counts, including committing and conspiring to commit securities fraud. A nine-week jury trial in the Southern District of New York ended in November 2008, when Vilar was convicted on all counts and Tanaka convicted on, among other counts, securities fraud. In February 2010, Vilar was sentenced to a term of 108 months imprisonment and Tanaka was sentenced to a term of 60 months imprisonment.[14]

While **'Morrison' and its progeny may generally curtail the reach of federal laws**, it remains to be seen whether the Second Circuit's affirmation of 'Bowman' in 'Vilar' will place a limit on the class of criminal laws to which 'Morrison' will apply.

On appeal, Vilar and Tanaka argued that their convictions for securities fraud should be reversed in light of the Supreme Court's ruling in *Morrison* that liability under §10(b) could only arise from "transactions in securities listed on domestic exchanges[] and domestic transactions in other securities."[15] The conduct for which they had been convicted, they claimed, had been "extraterritorial" because it "occurred in the territory of a sovereign other than the United States."[16] In response, the government argued that "the presumption against extraterritoriality for civil statutes … does not apply in the criminal context," and that at least some of the transactions on which the convictions were based involved "domestic transactions in other securities."[17] The government also pointed out that Vilar and Tanaka had solicited investments from customers based in the United States, received funds through accounts in the United States, and invested those funds in securities traded on exchanges in the United States.[18]

The Second Circuit began its analysis by noting that in *Morrison*, the Supreme Court had invoked a "longstanding principle of American law" that the "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[19] However, the Second Circuit recognized that under the court's earlier decision in *Bowman*, this principle did not apply to "criminal statutes which are, as a class … enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated."[20]

Having affirmed these two principles, the Second Circuit rejected the argument that *Bowman* "limit[ed] the presumption against extraterritoriality to civil statutes," on the ground that this "would establish … the dangerous principle that judges can give the same statutory text different meanings in different cases."[21] Recognizing "broadly worded … statements" in prior opinions suggesting otherwise, the court emphasized that prior decisions finding the presumption against extraterritoriality inapplicable in criminal cases involved statutes that either contained express provisions concerning extraterritorial application or that "relate[d] to crimes against the United States government," and thus fell squarely within the exception carved out by *Bowman*.[22] The court rejected the argument that §10(b) fell within the latter class of statutes and held instead that it was within the category of laws that "prohibit '[c]rimes against private individuals or their property,' which [are] exactly the sort of statutory provision for which the presumption against extraterritoriality does apply."[23] The Second Circuit concluded that because the *Morrison* decision rejected extraterritorial application of §10(b) in "unmistakable terms," the only question that remained was whether the relevant conduct occurred domestically, or "in the territory of a foreign sovereign."[24]

Turning to this dispositive issue, the Second Circuit sustained Vilar and Tanaka's convictions concerning the GFRDA and SBIC schemes because both schemes involved at least one domestic purchase or sale.[25] In reaching this conclusion, the court was guided by its decision post-*Morrison* in *Absolute Activist Value Master Fund v. Ficeto*, which held that "a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States."[26]

Implications of 'Vilar' for White-Collar Practitioners. The significance of *Vilar*

for white-collar criminal practitioners lies just as much in the framework it establishes for determining whether extraterritorial conduct can give rise to criminal liability generally, as it does in the specific limitation it imposes on §10(b).[27] Under the post-*Morrison* framework set out in *Vilar*, the first question to ask is whether a "clear indication of an extraterritorial application" can be discerned for a given statute.[28] In the absence of such a "clear indication," the second question is whether the statute is of a "class[] … enacted because of the right of the government to defend itself against obstruction[] or fraud" or whether it merely identifies "[c]rimes against private individuals or their property."[29] In the event that the answer to the first two questions is "no," the statute has no extraterritorial application, and liability will only arise in connection with foreign activity when there is domestic conduct within the "focus of Congressional concern" evinced by the statute.[30]

An application of this framework to the statutes that typically concern white-collar practitioners—several of which are considered below—suggests that the impact of Morrison and Bowman will vary depending not only on the precise language of the statute, but also on the interests the statute is intended to protect.

1. Obstruction of Justice. 18, U.S.C. ch. 73 sets out 19 offenses related to methods of obstructing governmental activity under the heading "Obstruction of Justice."[31] Only two of these offenses, witness tampering (§1512) and retaliation against a witness (§1513), contain express provisions establishing "extraterritorial Federal jurisdiction" over the offenses they proscribe.[32]

Because two sections of Chapter 73 contain provisions concerning their extraterritorial application while the others do not, it could be argued that Congress did not intend for other obstruction statutes to apply to conduct occurring abroad. However, as a class, the offenses outlined in Chapter 73 fall squarely within the exception articulated in *Bowman*. Like the statute at issue in *Bowman*, the obstruction laws clearly protect the integrity of governmental activity from interference and should presumably apply wherever that governmental activity takes place.[33]

2. Money Laundering. 18 U.S.C. §§1956 and 1957 impose criminal penalties for various money laundering offenses. Under both sections, the derivation of funds from specified unlawful activities is essential to the offense, and under both sections the definition of unlawful activity includes crimes arising under foreign law.[34] Similarly, the term "financial transaction," which is relevant to both offenses, includes a wide array of transactions that "in any way or degree affect[] interstate or foreign commerce" or that involve financial institutions "engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree."[35] Further, §1956 applies to "foreign persons" who commit offenses involving transactions, property, or institutions with certain specified connections to the United States.[36] And §1957 imposes criminal liability on "United States person[s]" who engage in prohibited transactions "outside of the United States."[37]

Because these statutes contain clear guidelines concerning their applicability to extraterritorial conduct, their interpretation should remain untouched by *Morrison*.[38] Indeed, courts interpreting *Morrison* have continued to find that unlawful activity abroad can serve as a predicate for money laundering charges under §1956 or 1957.[39] That said, no reported decision has found that the money laundering statutes protect the interests of the government itself, meaning that where foreign conduct does not satisfy the specific criteria of these statutes, *Vilar* and *Bowman* would not prevent the application of the presumption against extraterritoriality.

3. The RICO Statute. Congress enacted the RICO statute in 1970, in an effort to create additional tools for the "eradication of organized crime in the United States."[40] The statute provides for both criminal and civil liability for using, or conspiring to use, a "pattern of racketeering activity" to affect an "enterprise" in certain ways.[41] While one could argue that the extraterritorial application of RICO should be determined on a case-by-case basis, depending on whether the charged predicate offenses arise from extraterritorial conduct, this has not been the approach taken by courts since *Morrison*. In *Norex Petroleum v. Access Industries*, a civil case decided less than a year after Morrison, the Second Circuit held that because "RICO is silent as to any extraterritorial application," it does not reach foreign conduct, despite the fact that statutes defining certain predicate offenses do.[42]

Recognizing that RICO is both a civil and criminal statute, one court has looked to *Bowman* for guidance on the question of whether the RICO statute applies extraterritorially. In *United States v. Philip Morris USA*, the District Court for the District of Columbia ruled that Bowman did not create an exception to the presumption against extraterritoriality in that case because the alleged concealment of information concerning the effects of smoking by tobacco companies "[did] not implicate the right of the government to defend itself."[43] It remains to be seen whether courts in the future will consider the extraterritorial reach of the RICO statute on a case-by-case basis based on whether the alleged conduct of the enterprise "implicate[s] the right of the government to defend itself," or whether courts will adopt the more categorical approach—which appears to have been followed in *Norex*—and hold that the RICO statute does not apply extraterritorially no matter the nature of the conduct at issue.

4. Insider Trading. Another common focus of white-collar practitioners is insider trading, which can give rise to criminal and civil liability under §10(b) of the Exchange Act of 1934—the subject of *Morrison* and *Vilar*—and §14(e) of the Williams Act of 1968.

The extraterritorial application of the prohibition against insider trading under SEC Rule 10b-5 is determined by *Morrison*'s construction of §10(b). Rules promulgated under §10(b) cannot "extend beyond conduct encompassed by [its] prohibition,"[44] and §10(b) only extends to "fraud in connection with [] a security listed on a U.S. exchange, or [] a security purchased or sold in the United States," even in the criminal context.[45] However, as *Vilar* also illustrates, fraudulent conduct with an extraterritorial component can still give rise to liability

under §10(b), provided that it takes place "in connection" with one of these transactions.[46] Thus, as the Southern District of New York found in *S.E.C. v. Compania Internacional Financiera*, a foreign investor who purchases derivatives on a foreign exchange based on inside information obtained in a foreign country could violate Rule 10b-5, and face liability under §10(b), when the purchase of the derivative abroad led directly to the purchase of securities domestically.[47]

No court has considered the application of *Morrison* to §14(e) and SEC Rule 14e-3, but these provisions are silent concerning their application to foreign conduct and do not appear to fall within the class of statutes described in *Bowman*, given the general treatment of securities fraud in *Vilar*. As a result, the presumption against extraterritoriality would limit the application of the section and rule to domestic tender offers, much as it has limited the application of other securities laws in the wake of *Morrison*.[48]

5. Other White-Collar Frauds. 18 U.S.C. ch. 63 establishes criminal liability for a number of different types of fraud, including mail fraud (§1341), wire fraud (§1343), and bank fraud (§1344).

In the case of the mail and wire fraud statutes, courts have typically found it unnecessary to reach the question of whether the statutes should be given extraterritorial effect. In *Pasquantino v. United States*, the U.S. Supreme Court avoided the question by concluding that the offense of wire fraud was complete when participants in a scheme to defraud the Canadian government of tax revenue made telephone calls from New York to Maryland in connection with the fraud.[49] Other courts have found that no extraterritorial application is needed to reach communications sent from the United States in connection with frauds against foreign victims,[50] or fraudulent statements sent to recipients in the United States from abroad.[51] Indeed, the Second Circuit has held that the "identity and location of the victim … are irrelevant" to liability when domestic mails or wires are used in the execution of a scheme.[52]

Neither of these statutes would likely fall within the *Bowman* exception. While the mail fraud statute arguably protects the integrity of the federal postal system, no court has ever held that the mail fraud statute falls within the "class" of statutes "enacted because of the right of the government to defend itself."[53] Indeed, the focus of both the mail fraud and wire fraud statutes on "money or property" would appear to make them "exactly the sort of statutory provision[s] [to] which the presumption against extraterritoriality does apply" according to *Vilar*.[54]

With respect to the bank fraud statute, no reported case has considered how it should be treated under *Bowman*. While the Second Circuit did state in *United States v. Jacobs* that the bank fraud statute was "enacted to protect the financial integrity of federally guaranteed financial institutions, and assure a basis for Federal prosecution of those who victimize these banks through fraudulent schemes," it seems unlikely that a statute focused on protecting private financial institutions, and not the government, would fall within the class of statutes covered by *Bowman*.[55]

In sum, while *Vilar* suggests a potentially significant limitation on the extraterritorial reach of white-collar criminal statutes, the full impact of the decision will depend on how broadly courts construe the *Bowman* exception to the presumption against extraterritoriality. As the level of cooperation between the U.S. and global law enforcement authorities has never been better and the geographic reach of U.S. regulators has never been broader, this will likely be a recurring issue upon which courts will be asked to provide further guidance in the coming years.

1. 729 F.3d 62 (2d Cir. 2013).
2. 561 U.S. 247, 130 S. Ct. 2869 (2010).
3. *Vilar*, 729 F.3d at 67.
4. Id. at 77.
5. Id. at 73 (citation omitted).
6. 260 U.S. 94, 98 (1922).
7. Id. at 97.
8. Id. at 98.
9. Id.
10. Id.
11. *United States v. Vilar*, 729 F.3d 62, 68 (2d Cir. 2013); Brief for United States of America at 4-7, *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013) (No. 10-521-cr(L)) (Brief for United States).
12. *Vilar*, 729 F.3d at 76-78, 78 n.12; Brief for Alberto Vilar at 65, *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013) (No. 10-521-cr(L)).
13. *Vilar*, 729 F.3d at 68-9, 77.
14. Id. at 69.
15. Id. at 70 (quoting *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 130 S. Ct. 2869 at 2884 (2010)).
16. Id. (internal punctuation and quotations omitted).
17. Id. at 70, 72.
18. Brief for the United States at 89.
19. *Vilar*, 729 F.3d at 71-72.
20. Id. at 72-73.
21. Id. at 73, 75 (internal quotations omitted).
22. Id. at 73.
23. Id. at 74 (quoting *Bowman*, 260 U.S. at 98).
24. Id.
25. Id. at 67, 76-79.
26. Id. 76; 677 F.3d 60, 69 (2d Cir. 2012).
27. For a discussion of whether provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 granting courts "jurisdiction" over certain actions superseded *Morrison*, see Roberta S. Karmel, "The Application of 'Morrison' to SEC and Criminal Cases," NYLJ (Oct. 17, 2013).
28. See *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 130 S. Ct. 2869, 2878, 2883 (2010).
29. *United States v. Bowman*, 260 U.S. 94, 98 (1922).
30. *Morrison*, 561 U.S. 247, 130 S. Ct. at 2884.
31. 18 U.S.C. §§1501-13, 1516-21.
32. Id. §§1512(h), 1513(d).
33. See *United States v. Walczak*, 783 F.2d 852, 853-54 (9th Cir. 1986) (per curiam) (court may hear claims under 18 U.S.C. §1001 based on fraudulent statements made on a U.S. customs form in Canada).
34. 18 U.S.C. §§1956(c)(1) & (7), 1957(f).
35. Id. §§1956(c)(4), 1957(f).
36. Id. §1956(b)(2), (f).
37. Id. §1957(d)(2).
38. See, e.g., *United States v. Galvis-Pena*, Crim. Action No. 1:09-CR-25-TCB-CCH-4, 2011 WL 7268437, at *7 (N.D. Ga. Dec. 6, 2011) ("[T]he plain language of [§1956] indicates a clear intent by Congress to apply the statute extraterritorially"), adopted as modified on other grounds by 2012 WL 425240 (N.D. Ga. Feb. 9, 2012).
39. See, e.g., *United States v. Chao Fan Xu*, 706 F.3d 965, 982 (9th Cir. 2013).
40. *United States v. Turkette*, 452 U.S. 576, 589 (1981) (internal quotation marks omitted).
41. See 18 U.S.C. §§1961, 1962(a)-(c).
42. *Norex Petroleum v. Access Indus.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (per curiam).
43. 783 F. Supp. 2d 23, 28 n.6 (D.D.C. 2011) (internal citations omitted).
44. *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 130 S. Ct. 2869, 2881 (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)).
45. *United States v. Vilar*, 729 F.3d 62, 76 (2d Cir. 2013).
46. Id. at 75-79.
47. No. 11 Civ. 4904 (DLC), 2011 WL 3251813 at *2-4, *6-7 (S.D.N.Y. July 29, 2011); see also *S.E.C. v. Wyly*, 788 F. Supp. 2d 92, 119-21 (S.D.N.Y. 2011).
48. See *S.E.C. v. Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 163-65 (S.D.N.Y. 2011) (applying *Morrison* to §17(a) of the Securities Act of 1933).
49. 544 U.S. 349, 371-72 (2005).
50. E.g., *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997).
51. E.g., *United States v. Singhal*, 876 F. Supp. 2d 82, 97 (D.D.C. 2012); also *United States v. Kim*, 246 F.3d 186, 189 (2d Cir. 2001).
52. *Trapilo*, 130 F.3d at 552.
53. *United States v. Bowman*, 260 U.S. 94, 98 (1922).
54. 18 U.S.C. §§1341, 1342; *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013).
55. 117 F.3d 82, 93 (2d Cir. 1997) (citations and internal quotations omitted).