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Recent Judicial Developments Impacting FCPA Investigations and Enforcement

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Introduction

The Department of Justice and the Securities Exchange Commission (SEC) continue to devote significant resources to investigating potential violations of the Foreign Corrupt Practices Act (FCPA).[1] Enforcement actions by these agencies are often the focus of analysis for corporate boards, management, and outside counsel. Of equal importance, however, are judicial developments that impact how the government will investigate and prosecute FCPA violations and related charges going forward. In 2013, federal courts issued several opinions with implications for FCPA enforcement ranging from decisions about deferred prosecution agreements, to statutes of limitations, to the extent of US courts' extraterritorial jurisdiction over foreign conduct. This chapter reviews several of these opinions and discusses their implications for the future of FCPA enforcement.

Judicial Oversight of Deferred Prosecution Agreements

Deferred prosecution agreements (DPAs) have become a primary tool by which federal prosecutors enforce the FCPA as well as other criminal laws—such as the Bank Secrecy Act,[2] the wire fraud statute,[3] the False Claims Act,[4] and the Sherman Act—against a corporate defendant.[5] Prosecutors frequently describe DPAs as an important middle ground between, on the one hand, criminal conviction of a corporation and, on the other hand, declining to pursue any penalty for alleged misconduct. Some enforcement authorities have described DPAs as incentivizing and rewarding corporate self-disclosure of wrongdoing, ongoing cooperation by companies with government investigations, and corporate remediation through enhanced legal compliance programs and training. Moreover, prosecutors have highlighted that DPAs limit or avoid the potential collateral consequences of a criminal conviction on a company's innocent employees, investors, and other third parties.[6] These concerns have been described as especially

[1] 15 U.S.C. §§ 78dd-1 *et seq*. (West).
[2] Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114-2 (October 26, 1970).
[3] 18 U.S.C. § 1343 (West).
[4] 31 U.S.C. §§ 3729-33 (West).
[5] 15 U.S.C. §§ 1-7 (West).
[6] *See generally* Department of Justice, UNITED STATES ATTORNEYS' MANUAL § 9-28.1000, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html.

prevalent in the financial sector, where certain criminal convictions can trigger mandatory or discretionary revocation of banking or insurance charters, licenses or governmental contracting authorizations.

Under a typical DPA, the government files a criminal charging instrument against the company in court and requests to defer prosecution of charge(s).[7] In exchange, the defendant agrees to pay a monetary penalty, admits to a stipulated statement of facts concerning the alleged wrongful conduct, and implements remedial provisions usually involving legal compliance program enhancement, ranging from imposition of stricter compliance policies, to self-certification of ongoing legal compliance, to an independent monitor funded by the company. At the conclusion of the deferral period, if the defendant has complied with the terms of the DPA, the prosecutor moves the court to dismiss the criminal information.

In the past, DPAs were not generally viewed as raising significant questions regarding court review and oversight. Courts routinely permitted DPA-related charging instruments to be filed and did not necessarily scrutinize whether the DPA bargain was warranted.[8] In addition, few courts sought to oversee compliance with the DPA's requirements during the period of deferment. Motions to dismiss the charging instrument at the end of the DPA's term also were fairly routinely granted.

A court's role in assessing whether to approve a DPA, and in supervising a DPA during the term of deferment, received renewed attention in *United States v. HSBC Bank USA, N.A.*[9] The underlying criminal investigation involved HSBC's failure to implement an effective anti-money laundering program, such that laundering of at least $881 million in drug trafficking

[7] A DPA functions differently than a non-prosecution agreement (NPA). Pursuant to an NPA, no documents are filed with a court.

[8] *See, e.g., United States v. WakeMed*, 5:12-CR-398-BO, 2013 WL 501784 (E.D.N.C. Feb. 8, 2013) (order approving DPA without considering court's authority to do so); *United States v. Credit Suisse AG*, CRIM 09-352, 2009 WL 4894467 (D.D.C. Dec. 16, 2009) (same); *United States v. KPMG LLP*, 05 CR 903 (LAP), 2007 WL 541956, at *7 (S.D.N.Y. Feb. 15, 2007) ("courts have routinely approved or entered deferred prosecution agreements containing restitution components and/or other remedial measures or sanctions voluntarily agreed to by the parties").

[9] *United States v. HSBC Bank USA, N.A.*, 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

proceeds went undetected.[10] HSBC was also alleged to have violated US sanctions by processing bank transactions for entities located in Cuba, Iran, Libya, Sudan, and Burma.[11] To resolve these allegations, HSBC and the government entered into a five-year DPA requiring HSBC to remit forfeiture of $1.256 billion, enhance its anti-money laundering and compliance programs, and submit to an independent monitor.[12] The DPA requires the monitor to, among other things, provide regular reports to the government regarding HSBC's compliance (or lack thereof) with the DPA.[13]

In his lengthy opinion, Judge Gleeson considered the underlying source for the court's authority to review and approve—or reject—a DPA. The court held that it has authority to review a DPA pursuant to the court's inherent supervisory power,[14] which "permits federal courts to supervise the administration of criminal justice among the parties before the bar."[15] Judge Gleeson acknowledged that the "exercise of supervisory power in this context is novel" but necessary "to protect the integrity of the Court."[16]

The court rejected the parties' assertion that the court's review of a DPA is limited to deciding whether to exclude time under the Speedy Trial Act to account for the period of deferment.[17] The court found that "approving the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself… [T]he question of whether to exclude the duration of the DPA from the speedy trial clock hinges on a determination of whether the Court approves the DPA."[18]

The court proceeded to consider the standard for reviewing a DPA. The court acknowledged that "[s]ignificant deference is owed [to] the Executive Branch in matters pertaining to prosecutorial discretion. . . Judges . . . need to be mindful that they have no business exercising that discretion and, as an institutional matter, are not equipped to do so."[19] The court noted that

[10] *HSBC*, 2013 WL 3306161, at *8.
[11] *Id*. at *9.
[12] *Id*. at *10-11.
[13] *Id*. at *10.
[14] *Id*. at *4.
[15] *Id*. (quoting *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980)).
[16] *Id*. at *6.
[17] *Id*. at *2-3.
[18] *Id*. at *3.
[19] *Id*. at *7-8.

one component of its deferential analysis should be whether "actions that have been taken pursuant to the DPA thus far" reveal any "impropriety that implicates the integrity of the Court."[20] The court was mindful that there could be circumstances where the DPA, "or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court."[21] For example, a DPA that requires the company to cooperate with the government in any and all investigations may be problematic if such cooperation results in a violation of attorney-client privilege, work-product protections or an employee's Fifth or Sixth Amendment rights.[22] A DPA that seeks remediation that is so far removed from the offending conduct could likewise call for judicial intervention.[23]

With this deference in mind and finding no evidence of any impropriety regarding the HSBC DPA, the court concluded that "the decision to approve the [HSBC] DPA is easy, for it accomplishes a great deal."[24] The court noted that the DPA requires the defendants to implement "remedial measures that address [their] systemic failures" as to the underlying misconduct, "forfeit $1.256 billion and to admit to criminal wrongdoing."[25] These "significant" measures led the court to observe that "much of what might have been accomplished by a criminal conviction has been agreed to in the DPA."[26]

The court further held that its supervisory power allowed it to continue to oversee the implementation of the DPA as long as the matter remains on the court's docket.[27] Because the matter remains pending before the court, "the Court retains the authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of

[20] *Id.* at *7.
[21] *Id.* at *6.
[22] *Id.*
[23] *Id.* ("The DPA also contemplates, in the event of a breach by HSBC, an explanation and remedial action, which the government will consider in determining whether to prosecute the pending charges and/or bring new ones. What if, for example, the 'remediation' is an offer to fund an endowed chair at the United States Attorney's *alma mater*?") (internal citation omitted).
[24] *Id.* at *8.
[25] *Id.* at *10-11.
[26] *Id.* at *11.
[27] *Id.*

this Court."[28] Exercising its supervisory power, the court ordered the parties to file quarterly reports "to keep it apprised of all significant developments in the implementation of the DPA."[29]

HSBC adds greater complexity to a company's decision whether to enter into a DPA and how to prepare for court proceedings once a DPA is executed. Parties to a DPA should be fully prepared to justify the DPA's terms to a court and explain how those terms reflect an appropriate combination of punishment, deterrence, remediation and, where applicable, restitution. On the remediation front, for example, the *HSBC* defendants argued that the DPA "serves the interests of justice[] and the public's interest" because, pursuant to its terms, the defendants spent over $290 million on their remediation efforts; replaced many senior managers and installed a new head of compliance and anti-money laundering director; hired consultants to revamp their compliance policies; required their global operations to comply with US standards on anti-money laundering; and developed systems for checking customers against sanctions lists.[30] Counsel to parties to a DPA must also be prepared to explain why the DPA does not include certain provisions. For instance, if the DPA does not require that an independent monitor oversee the defendant's compliance during the deferral period, counsel should be prepared to explain why a monitor is not necessary.

The company's conduct during the deferral period is also likely to receive greater scrutiny in the wake of *HSBC*. A defendant company will need to allocate appropriate resources to ensure full compliance with the DPA's requirements, including remedial conditions and any self-reporting or cooperation provisions set forth in the DPA. A company should also anticipate possible media attention surrounding any periodic reports to the court regarding compliance with the DPA. For example, in *HSBC*, the three status reports filed with the court since it approved the DPA have received attention in the press.[31] These reports describe the monitor's review of HSBC's anti-money laundering and sanctions compliance programs, the monitor's findings and recommendations, and HSBC's response to those recommendations.[32]

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[28] *Id.*
[29] *Id.*
[30] Letter Brief for Defs. at 2-4, *United States v. HSBC Bank USA, N.A.*, 2013 WL 3306161 (12 Cr. 763 (JG)).
[31] Status Reports dated September 30, 2013, December 31, 2013 & April 1, 2014, *United States v. HSBC Bank USA, N.A.*, 2013 WL 3306161 (12 Cr. 763 (JG)).
[32] *Id.*

In sum, *HSBC* highlights that negotiating a DPA with the government is only one, and not the last, step to finality.

Statute of Limitations

Another recent judicial development that has significant implications for FCPA enforcement involves the statute of limitations for a conspiracy charge. In *United States v. Grimm*,[33] the Second Circuit addressed whether an unindicted co-conspirator's ongoing interest payments on a guaranteed investment contract (GIC) constituted overt acts in furtherance of a criminal conspiracy charged under 18 U.S.C. § 371.[34] GICs are municipal bond derivatives that typically require periodic interest payments to the municipality.[35] Pursuant to Treasury regulations, the amount of these interest payments is determined by a bidding process by which a broker solicits bids for interest rates from three GIC providers.[36] The conspiracy in *Grimm* involved a GIC provider's employees who, together with the broker, rigged the bidding process, thereby depressing the interest payments from the GIC provider to the municipalities.[37] The result of the conspiracy was that, depending on the interest rates, the municipality or the Treasury, or both, was defrauded.[38] The only overt acts alleged within the limitations period were the interest payments.[39]

The Second Circuit held that the interest payments did not constitute conspiratorial overt acts because they "are ordinary commercial obligations, made pursuant to a common form of commercial arrangement; they are noncriminal in themselves; they are made unilaterally by a single person or entity; and they are made indefinitely, over a long time, typically up to 20 years or more."[40] The Second Circuit further highlighted that aside from the interest payments, "there [was] no evidence that any concerted activity posing the special societal dangers of conspiracy [were] still taking place" during the limitations period.[41]

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[33] *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013).
[34] *Id.* at 499.
[35] *Id.*
[36] *Id.* at 500.
[37] *Id.* at 499.
[38] *Id.*
[39] *Id.* at 501.
[40] *Id.* at 503.
[41] *Id.* (quoting *United States v. Salmonese*, 352 F.3d 608, 616 (2d Cir. 2003)).

> In any event, when anticipated economic benefit continues, in a regular and ordinary course, well beyond the period "when the unique threats to society posed by a conspiracy are present," the advantageous interest payment is the *result* of a completed conspiracy, and is not in furtherance of one that is ongoing.[42]

Thus, the Second Circuit held that the interest payments did not extend the statute of limitations for purposes of a conspiracy count. Accordingly, the court reversed the defendants' judgments of conviction and remanded the matter to the district court for dismissal of the indictment.[43]

Grimm's holding may impact how courts analyze conspiracies involving other underlying crimes, including FCPA violations. In an FCPA action, the government often brings conspiracy charges in addition to FCPA charges. A conspiracy charge is particularly attractive in situations where the bribery used to secure a government contract occurred more than five years ago. In that scenario, the government might assert that more recent contract payments to the defendant company constitute continued overt acts in furtherance of the bribery conspiracy. One can draw several parallels between these kinds of FCPA conspiracy counts and the interest payments in *Grimm*. As in *Grimm*, the economic benefit of the proceeds received by the company from the bribe-obtained contract is commercial, the contract is not in itself criminal, and there is a long duration to the economic benefit flowing from the contract. Applying *Grimm*, a defendant may thus argue that the continued flow of contract proceeds does not constitute an overt act in furtherance of a conspiracy to bribe a government official.

There are limits to *Grimm*'s holding, however. The interest payments in *Grimm* were made by the GIC provider to the municipality—a victim of the fraud. In contrast, in the above bribery scenario, the conspirator itself receives the proceeds of the bribe-obtained contract and continues to benefit from the wrongful conduct for the duration of the contract.[44]

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[42] *Id*. (quoting *United States v. Doherty*, 867 F.2d 47, 62 (1st Cir. 1989)) (emphasis in original) (internal citation omitted).

[43] *Id*. at 504.

[44] In non-FCPA cases involving conspiracies, courts have held that a payoff to the conspirators may constitute an overt act in furtherance of the conspiracy. For example, in *United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), the defendant was convicted of

Moreover, in *Grimm*, there was nothing improper about the GIC itself; interest payments would have been made regardless of the defendants' misconduct. In contrast, in a bribery case, the contract was improperly obtained through bribery and, thus, the economic benefits flowing from that contract would not have happened but for an unlawful bribe.

Another implication of *Grimm* is its potential impact on tolling agreements. *Grimm* likely will encourage prosecutors to pay greater attention to securing tolling agreements, especially in matters where the investigation involves aged underlying conduct and only the receipt of economic benefits would support a viable conspiracy count within the statute of limitations. At the same time, individuals who are the subject of an investigation involving similar conduct may well determine that a tolling agreement is not in their best interest. Harder questions may arise for corporate counsel. Because agreeing to toll the statute of limitations is ordinarily viewed as a gesture of the company's cooperation, *Grimm* may not, even in close cases, change most companies' approach to tolling agreements.

In sum, it remains to be seen how courts will apply *Grimm* to a situation where the only alleged overt act within the limitations period is the defendant's receipt of an economic benefit from a bribe-obtained government contract. Counsel should be cognizant of any potential statute of limitations issues and approach requests for a tolling agreement with *Grimm* in mind.

Personal Jurisdiction over FCPA Foreign Defendants

Two courts have recently addressed the reach of the FCPA in civil enforcement actions by the SEC involving foreign conduct and actors. Both cases, decided in the US District Court in the Southern District of New York, illustrate the issues that can arise when asserting personal

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rigging bids for timber sales offered by the U.S. Forest Service. *Id*. at 1344-45. The court held that the conspiracy did not end when the defendant submitted his winning bid, but extended until he "had cut the last timber, obtained title to it, paid the government a noncompetitive price for it, resold it a[t] an excess profit, and split the excess with his co-conspirators." *Id*. at 1347. Thus, the conspiracy continued until the co-conspirators received their profits from participating in the bid-rigging scheme. *Id*.; *see also United States v. Mennuti*, 679 F.2d 1032, 1033-35 (2d Cir. 1982) (defendant's conspiracy to destroy private residences for insurance proceeds extended until defendant received payoff from the scheme, which co-conspirators agreed would be his right to purchase the destroyed home at a bargain price).

jurisdiction over an individual defendant whose alleged wrongful conduct occurred outside of the United States.

In *SEC v. Straub*,[45] the government alleged that executives of Magyar Telekom, a Hungarian telecommunications company whose shares were traded on the New York Stock Exchange, bribed government officials in Macedonia and Montenegro.[46] The government further alleged that the defendants made false certifications to auditors to cover up the bribes.[47] Several of the defendants moved to dismiss the action, arguing that the court lacked personal jurisdiction over them.[48] Judge Sullivan held that the minimum contacts for personal jurisdiction were satisfied because, during the bribery scheme, the defendants, while located outside the United States, either signed SEC filings, false certifications to auditors or false management representation letters.[49] These actions were "designed to violate United States securities regulations and [were] thus necessarily directed toward the United States, even if not principally directed there."[50] This was sufficient to show that the defendants' intent was "to cause a tangible injury in the United States."[51]

By contrast, in *SEC v. Sharef*,[52] Judge Scheindlin expressed the "need for a limiting principle" in a court's "exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings."[53] In that case, the SEC brought charges of securities law violations against individual defendants who allegedly participated in Siemens' long-running bribery scheme in Argentina.[54] One of the defendants, Herbert Steffen, moved to dismiss the action, arguing that his foreign conduct lacked the minimum contacts necessary for personal jurisdiction.[55] Under the governing standard, a foreign defendant is subject to personal jurisdiction when he has "'followed a course of conduct directed at . . . the jurisdiction of a given

[45] *SEC v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013).
[46] *Id.* at 248-49.
[47] *Id.* at 250-51.
[48] *Id.* at 251.
[49] *Id.* at 255-56.
[50] *Id.* at 255.
[51] *Id.* at 256.
[52] *SEC v. Sharef*, 924 F. Supp. 2d 539 (S.D.N.Y. 2013).
[53] *Id.* at 547.
[54] *Id.* at 541-42.
[55] *Id.* at 540-41.

sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.'"[56]

Judge Scheindlin agreed with Steffen that he lacked sufficient minimum contacts with the United States because "he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified [SEC] filings."[57] The government alleged that Steffen, the former CEO of Siemens' Argentina division, was hired by Siemens to "facilitate the payment of bribes" to government officials in Argentina.[58] According to the government, Steffen negotiated with the Argentine government, which requested bribes, and also pressured the chief financial officer of a Siemens business unit to approve bribes to Argentine officials.[59] After the CFO authorized the bribe, Steffen allegedly had limited involvement in the bribery scheme, amounting to participation in one telephone call initiated by a co-defendant from the United States about the scheme and, on another occasion, "urg[ing]" the same co-defendant to pay additional bribes to Argentine officials.[60] Notably, the government did not allege that Steffen was involved with falsifying SEC filings.[61] Based on these allegations, the court held that "Steffen's actions are far too attenuated from the resulting harm [in the US] to establish minimum contacts."[62] Steffen's role in the bribery scheme was "tangential at best," such that his contacts with the United States fell "far short of the requirement[s]" necessary for the court to exercise personal jurisdiction over him.[63] To hold otherwise under these facts, according to Judge Scheindlin, would "exceed[] the limits of due process."[64]

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[56] *Id.* at 545 (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 2789 (2011)) (alteration in original).
[57] *Id.* at 547.
[58] *Id.* at 542.
[59] *Id.* at 542.
[60] *Id.* at 542-43.
[61] *Id.* at 546.
[62] *Id.*
[63] *Id.* at 546-48. The court also concluded that exercising jurisdiction over Steffen would not be reasonable because of his "lack of geographic ties to the United States, his age, his poor proficiency in English, and the forum's diminished interest in adjudicating the matter." *Id.* at 548-49 (noting that the SEC and Department of Justice had "obtained comprehensive remedies against Siemens" and that Germany "resolved an action against Steffen individually").
[64] *Id.* at 548.

Considering *Sharef* and *Straub* together, we see that personal jurisdiction is clearly satisfied when the individual defendant "sign[s] or directly manipulat[es] financial statements to cover up illegal foreign action, with knowledge that those statements will be relied upon by United States investors."[65] However, when the individual defendant has no role in signing or preparing the firm's financial statements—as was the case in *Sharef*—the question of personal jurisdiction is fact dependent and will turn on the specific allegations of that defendant's conduct in the overall bribery scheme.

Reach of US Laws over Foreign Conduct

There has been recent judicial attention as well regarding the extraterritorial reach, or lack thereof, of US criminal laws. In 2013, in *United States v. Vilar*, the Second Circuit addressed whether US securities laws apply to foreign conduct in the criminal context.[66] *Vilar* was an extension of the Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.*,[67] which held that, in a civil action, Section 10(b) of the Securities Exchange Act "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."[68] *Morrison*'s holding was based on the Supreme Court's interpretation of the text of Section 10(b) and the Securities Exchange Act: "[T]here is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."[69] In *Vilar*, which involved criminal securities fraud charges, the Second Circuit refused to depart from *Morrison*'s holding and similarly held that "Section 10(b) and its implementing regulation, Rule 10b-5, do not apply to extraterritorial conduct, regardless of whether liability is sought criminally or civilly."[70]

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[65] *Id.* at 547.
[66] *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013).
[67] *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).
[68] *Id.* at 2888.
[69] *Id.* at 2883.
[70] *Vilar*, 729 F.3d at 67. Recently, the Second Circuit held that *Morrison* "precludes claims brought pursuant to the Securities Exchange Act of 1934 . . . by purchasers of shares of a foreign issuer on a foreign exchange, even if those shares were cross-listed on

Vilar's holding is also supported by the Supreme Court's opinion in *United States v. Bowman*.[71] *Bowman* articulated a presumption against extraterritorial application of federal statutes.[72] An exception to that presumption, however, is made for certain criminal statutes that are "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, especially if committed by its own citizens, officers or agents."[73] "In other words, the presumption against extraterritoriality *does* apply to criminal statutes, except in situations where the law at issue is aimed at protecting 'the right of the government to defend itself.'"[74] With respect to Section 10(b), *Vilar* concluded that *Bowman*'s exception does not apply because that statute's purpose is not to defend the government's rights but rather prohibits "[c]rimes against private individuals or their property."[75] Thus, *Vilar* held that the presumption against extraterritoriality applies to Section 10(b).[76]

While *Vilar* does not directly affect FCPA charges, it is likely to impact FCPA-related cases that include other counts such as obstruction of justice charges under 18 U.S.C. § 1519[77] or wire fraud violations under 18 U.S.C. § 1343.[78] Whether these charges apply to extraterritorial conduct depends on how courts interpret the language of the statutes themselves, which remains

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a United States exchange." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 12-4355-CV, 2014 WL 1778041, at *1 (2d Cir. May 6, 2014).

[71] *United States v. Bowman*, 260 U.S. 94 (1922).

[72] *Id*. at 97-98.

[73] *Id*. at 98.

[74] *Vilar*, 729 F.3d at 73 (quoting *Bowman*, 260 U.S. at 98) (emphasis in original).

[75] *Id*. at 72 (quoting *Bowman*, 260 U.S. at 98).

[76] *Id*. at 74.

[77] Section 1519 of Title 18 provides: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

[78] 18 U.S.C. § 1343 provides in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

to be seen post-*Vilar*. If the statute evinces a "clear indication of extraterritoriality,"[79] then it can be said that it applies to extraterritorial conduct. If the statute lacks such indications, the court's analysis then must focus on the exception to the presumption against extraterritoriality articulated in *Bowman*. Under that analysis, the court asks whether the criminal statute was enacted to permit the government to "defend itself against obstruction[] or fraud";[80] if the answer is yes, then the statute applies to extraterritorial conduct.[81]

Conclusion

The recent run of court decisions impacting FCPA enforcement is unlikely to end any time soon.[82] As the Department of Justice and the SEC continue their increased emphasis on prosecuting individuals, motion practice over the scope and meaning of the FCPA itself and related lines of criminal law will undoubtedly continue.

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[79] *Morrison*, 130 S. Ct. at 2883.

[80] *Bowman*, 260 U.S. at 98. Neither *Bowman* nor *Vilar* provides a more detailed framework for conducting this analysis. In *Bowman*, the criminal charges alleged that the defendants, while sailing on the high seas, sought to harm the government by attempting to defraud a company owned by the United States. *See id*. at 95. Under those circumstances, it was necessary for the government to protect its rights by prosecuting the defendants' extraterritorial conduct. In *Vilar*, the court easily determined that the securities statute at issue was enacted to protect investors and the securities they owned—the statute was not passed to protect the government's right to defend itself from obstruction or fraud. *See Vilar*, 729 F.3d at 74.

[81] *See* Benjamin Gruenstein & Alan Guy, *Extraterritorial Reach Of White-Collar Criminal Statutes*, N.Y. LAW J., Feb. 24, 2014 (explaining that, under this analysis, obstruction of justice statute would apply to extraterritorial conduct but that the wire fraud statute would not).

[82] For example, in a recent appeal by two individual FCPA defendant in United States v. Esquenazi, the Eleventh Circuit ruled, in a case of first impression, that the term "instrumentality" of a foreign government under the FCPA should be construed as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own" and further found that "what constitutes control and what constitutes a function the government treats as its own are fact-bound questions." No. 11-15331, 2014 WL 1978613, at *8 (11th Cir. May 16, 2014).

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