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The **Global Reach** Of U.S. Law Enforcement

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In the past decade, the Department of Justice has increased its focus on prosecuting white-collar crimes that are committed outside of the United States. Some observers have questioned the fairness of this emphasis on offshore targets, but DOJ has collected billions of dollars in financial penalties from international banks and corporations based on investigations relating to benchmark rates (LIBOR, foreign exchange), violations of the Foreign Corrupt Practices Act (FCPA), and money laundering. Jesse Eisinger, "France Sees Double Standard in U.S. Prosecution of BNP, but Justice is Weak," *New York Times* (June 18, 2014). "Cases such as LIBOR, and the subsequent cases involving manipulation of the foreign exchange markets," DOJ officials have explained, "reflect a natural continuation of the growing relationship between the Criminal Division and foreign law enforcement." Department of Justice, Office of Public Affairs, "Principal Deputy Assistant Attorney General David Bitkower Delivers Remarks At American Bar Association Southeastern White Collar Crime Institute," Sept. 8, 2016.

DOJ's international focus has expanded at the same time as courts have shown increased skepticism about using our laws to punish conduct that only indirectly or tangentially impacts the United States. Courts seem increasingly willing to limit the extraterritorial application of U.S. law. Given that DOJ typically resolves its corporate investigations with settlement agreements, it may be left to counsel for individual defendants to advocate for expansion of this developing body of law.

The Presumption Against Extraterritoriality

Securities fraud. This recent trend of limiting the global reach of U.S. law began in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), in which the Supreme Court considered whether §10(b) of the Securities Exchange Act of 1934 provided a cause of action to plaintiffs who sued foreign and American defendants for misconduct relating to securities of an Australian bank, traded on an Australian stock exchange. *Morrison* strictly applied the presumption against extraterritoriality and concluded there was no affirmative indication that §10(b) was meant to cover conduct occurring outside of the United States, overruling decades of circuit court jurisprudence. The court unanimously held that §10(b) reaches misconduct only in connection with the purchase or sale of a security listed on an American stock exchange, or the purchase or sale of securities in the United States. As the Supreme Court later explained in limiting the reach of the Alien Tort Claims Act, there is

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a "presumption that United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664 (2013).

Morrison involved a civil securities lawsuit, but the Second Circuit soon concluded in *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013) that neither §10(b) nor Rule 10b-5 can be applied to extraterritorial conduct in the context of a criminal prosecution. Thus, in the Second Circuit, a defendant may be prosecuted for securities fraud only in connection with a security listed on a U.S. exchange, or purchased or sold in the United States. Id. at 67.

Racketeering and wire/mail fraud. The Supreme Court followed *Morrison* in *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016), limiting the international reach of the Racketeer Influenced and Corrupt Organizations Act (RICO). The European Community sued RJR Nabisco in federal court, alleging racketeering based on the company's claimed involvement with drug traffickers, money laundering, and foreign terrorist organizations. Before the case reached the Supreme Court, the Second Circuit held that two RICO predicate acts—wire fraud and mail fraud—did not apply extraterritorially, notwithstanding the general reference to "foreign commerce" in the wire fraud statute. 764 F.3d 129 (2d Cir. 2014). The Supreme Court went further, holding that the presumption against extraterritorial application was rebutted with respect to certain, but not all, applications of RICO. In addition, the Court rejected the argument that RICO contained a "domestic enterprise requirement," but held that the "RICO enterprise must engage in, or affect in some significant way, commerce directly involving the [United States]" Id. at 2105.

FCPA. Most recently, in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), the Second Circuit held that the FCPA did not permit the government to employ theories of conspiracy or aiding and abetting to charge an individual outside the category of persons directly covered by the statute. The relevant FCPA provisions prohibit American companies, persons, and their agents from paying bribes to foreign officials, and prohibit foreign nationals and businesses from taking part in such schemes while in the United States. Based on the plain language of the statute and its legislative history, as well as the presumption against extraterritorial application, the court held that the defendant, who worked in France for a global corporation headquartered there, did not fall within the FCPA's purview unless he acted as an agent for a covered person or entity.

Domestic Application

Taken together, these cases place notable limitations on the ability of prosecutors in the Second Circuit to use securities law, RICO, wire fraud, mail fraud, or the FCPA to prosecute individuals or entities for extraterritorial conduct. It is important to observe, however, that most courts have held that even a crime that transpires primarily outside of the United States does not require extraterritorial application of the law if part of the crime occurs within the United States.

United States v. Hayes, 118 F. Supp. 3d 620 (S.D.N.Y. 2015) exemplifies this point. In *Hayes*, the moving defendant was a Swiss national who worked for a Swiss bank in Asia. He was charged with conspiracy to commit wire fraud by manipulating LIBOR and falsifying the bank's Yen LIBOR submissions to the British Bankers' Association. He allegedly influenced the final LIBOR fixings published both abroad and in the United States to move in directions favorable to his employer. Despite the relative paucity of alleged U.S. connections, the complaint did allege the use of U.S. wires. This was enough to render the indictment a domestic application of the wire fraud statute. See also *United States v. Kim*, 246 F.3d 186 (2d Cir. 2001) (holding that jurisdiction for wire fraud where crime involved wire communications between Hong Kong and Manhattan).

To be sure, there was some U.S. connection alleged in *Hayes* and in other LIBOR cases. See *United States v. Allen*, 160 F. Supp. 3d 698, 707 (S.D.N.Y. 2016) ("[T]he wires used to settle payments under

interest rate swap contracts, and the wires used to publish LIBOR to subscribers in New York, originated or terminated in New York … [met] the requirements for domestic application."). But it seems inconsistent with the spirit of *Morrison* for such a limited connection to be sufficient. *See Morrison*, 130 S. Ct. at 2884 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."). To permit charges based on just a single wire also seems inconsistent with the developing trend in the area of personal jurisdiction, where the Supreme Court has limited the exercise of general personal jurisdiction over corporations to those states in which the corporation's contacts are "so constant and pervasive as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (internal quotation omitted; alteration in original). Arguments seeking to build upon *Morrison* and *Daimler* may be fruitful for overseas defendants seeking to block prosecution here.

Other Options

For overseas defendants who cannot attack the extraterritorial reach of a particular statute or challenge the domestic component of the conduct, recent decisions suggest two other options. One is to use the conduct of prosecutors overseas to advance an argument based on a defendant's U.S. constitutional rights. In *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017), the Second Circuit held that the Fifth Amendment's prohibition on the use of compelled testimony against a defendant applies even when a foreign sovereign does the compelling. In *Allen*, the defendants gave compelled testimony to U.K. authorities; U.K. law permits such compulsion. This testimony was then shared by U.K. authorities with the government's cooperating witnesses, who later testified at trial in federal court. The court reversed the defendants' convictions as a violation of the right against self-incrimination. Notably, at oral argument, Judge José Cabranes, who authored *Vilar* and is an apparent skeptic of extraterritorial application, questioned the government's focus on these defendants—U.K. nationals who worked for a Dutch bank outside of the United States.

Another option is to consider fighting extradition. While most defendants in Western nations who contest extradition have ultimately been extradited to face criminal charges in the United States, the same types of jurisdictional arguments discussed above recently appealed to U.K. judges who declined to order the extradition of an HSBC currency trader. The court found that "most of the harm took place" in the U.K., not the United States, and that the trader had no significant connection or links with the United States other than working for an international bank, making extradition not in the "interests of justice." "Former HSBC trader wins extradition appeal against US," *Financial Times* (July 31, 2018).

Conclusion

As DOJ persists in its international focus in prosecuting white-collar crime and the courts restrict the global reach of various statutes while expanding the scope of constitutional protections for defendants, DOJ and the courts do appear to be on a collision course. This is likely to open up opportunities for defense attorneys to move the law in the direction of *Morrison* and its progeny and to expand the reach of U.S. constitutional rights, as in *Allen*.