GIR Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

SIXTH EDITION

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2021

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Extraterritoriality: The US Perspective

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29.1 Extraterritorial reach of US laws

Investigations conducted by US prosecutors and regulators often concern conduct outside the United States and involve evidence located abroad. The two questions of whether US law applies to the conduct under investigation and whether US authorities can compel the production of evidence located abroad are of significant importance to practitioners. As to the first question, in a series of civil cases, the United States Supreme Court has reasserted a presumption against the extraterritorial application of US statutes.[2] What this means is that lower US courts have been instructed to assume that US law applies only to conduct that takes place within the borders of the United States unless the particular law explicitly states it has extraterritorial application. In practice, this presumption is an important but limited check on US prosecutors' and regulators' powers to investigate and bring cases involving foreign conduct. Even limited contacts with the United States, such as the use of the US wires or financial system, may bring related conduct that takes place outside the United States within the domestic purview of certain US laws. Courts look to the statute's 'focus'[3] to determine whether a case involves a domestic application of a statute:

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2 *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

3 *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010); *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

> *If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory.*[4]

In addition, courts have reasoned that 'the extraterritorial reach of an ancillary offense such as conspiracy is coterminous with that of the underlying statute'.[5] In recent years, lower courts have grappled with this issue of determining the focus of various statutes case by case and have not always reached consistent results. This chapter will address the recent jurisprudence in this area, focusing on statutes that are most commonly invoked to reach overseas conduct. As to the second question, US prosecutors often seek to obtain evidence located overseas during the course of investigations. This chapter will address the muscular stance taken by prosecutors to obtain evidence located overseas from non-US entities and the support this approach has found in the courts to date.[6]

Securities laws 29.2

The Securities Exchange Act of 1934 (the Exchange Act) regulates domestic securities markets and transactions. Its general anti-fraud provision, Section 10(b), along with accompanying SEC Rule 10b-5, prohibits fraud in connection with the purchase or sale of securities. The Exchange Act and its associated rules are enforced civilly by the SEC (as well as through private actions) and criminally by the US Department of Justice (DOJ). Much extraterritoriality litigation – including the Supreme Court's landmark decision in *Morrison v. Nat'l Australia Bank Ltd*[7] – has involved the securities laws.

The Morrison decision 29.2.1

Some forty years before *Morrison*, the Second Circuit developed an approach to extraterritoriality in the securities fraud context that would be adopted (albeit with variation) by many other courts of appeals.[8] Under this 'conduct and effects' test, the court determined the extraterritorial reach of the securities laws in a given case by asking (1) 'whether the wrongful conduct had a substantial effect in the United States or upon United States citizens', and (2) 'whether the wrongful conduct occurred in the United States'.[9] Other circuits adopted

4 *RJR Nabisco*, 136 S. Ct. at 2101.

5 *United States v. Napout*, 963 F.3d 163, 179 (2d Cir. 2020) (quoting *United States v. Hoskins* 902 F.3d 69, 96 (2d Cir. 2018)).

6 See, e.g., *In re: Sealed Case*, No. 19-5068 (D.C. Cir. 6 August 2019).

7 561 U.S. 247 (2010).

8 See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968).

9 *Morrison*, 561 U.S. at 257 (quoting *SEC v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003)).

related (though not identical) tests.[10] Whatever the precise formulation, the conduct-and-effects approach required a fact-intensive, case-specific inquiry calculated to reveal whether Congress would have wanted United States law to apply had it considered the matter.[11]

In *Morrison*, the Supreme Court rejected this long-standing test. The Court criticised the notion that congressional silence on the extraterritorial scope of Section 10(b) gave judges licence to 'determine what Congress would have wanted'.[12] It added that the imprecise conduct-and-effects approach was inconsistent in application and yielded unpredictable results.[13] The proper approach, the majority held, was to apply the presumption against extraterritoriality in all cases.[14] Because Section 10(b) lacked 'a clear statement of extraterritorial effect', it applied only domestically.[15]

The Court went on to describe the domestic scope of Section 10(b). The statute's focus is not merely deceptive conduct, but deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered'.[16] Therefore, Section 10(b) applies only to 'transactions in securities listed on domestic exchanges, and domestic transactions in other securities'.[17]

In explaining the territorial reach of Section 10(b), the Court upset existing case law in another respect. Many courts had considered a statute's extraterritorial scope to raise a question of subject-matter jurisdiction.[18] Not so, wrote the majority: to 'ask what conduct Section 10(b) reaches is to ask what conduct Section 10(b) prohibits', which is not a question of adjudicative authority but 'a merits question'.[19]

29.2.2 Post-Morrison developments

In *Morrison*, the Court announced that its new approach was (unlike the conduct-and-effects standard) a 'clear test' that could be predictably applied.[20] Nonetheless, lower courts have wrestled with a number of questions that *Morrison* did not answer.

One fundamental issue arises not from any lack of clarity in *Morrison* but from Congress's apparent response to the decision. Days after *Morrison* came down, a joint congressional committee finalising the proposed Dodd-Frank

10 See *Morrison*, at 259 (collecting cases).

11 Id. at 259–60.

12 Id. at 260.

13 Id.

14 Id.

15 Id. at 265.

16 Id. at 266–67 (quoting 15 U.S.C. § 78j(b)).

17 Id.

18 Id. at 253–54.

19 Id. at 254.

20 Id. at 269.

Act published a final version of the bill, which would be enacted less than a month later.[21] That version (and the enacted law) included a provision, Section 929P, that appears calculated to abrogate *Morrison* in the context of SEC and criminal actions. It amends the jurisdictional section of the Exchange Act by providing that district courts 'shall have jurisdiction' over such actions involving 'conduct within the United States that constitutes significant steps in furtherance of the violation' or 'conduct occurring outside the United States that has a foreseeable substantial effect within the United States'.[22] The legislator who had drafted the provision, Representative Paul Kanjorski, stated that its purpose 'was to make clear that the antifraud provisions apply extraterritorially in enforcement actions'.[23]

The intent behind Section 929P seems clear enough, but *Morrison* explicitly held that the question of a statute's extraterritorial application is a merits question, not a jurisdictional question. Section 929P speaks only to jurisdiction and leaves untouched the substantive anti-fraud provisions of the Exchange Act. Faced with this conflict between contextual evidence of congressional intent and plain text, several courts have sidestepped the issue.[24] But in 2019, the Tenth Circuit became the first court of appeals to directly confront the question. The court prioritised 'context and historical background' – particularly Congress's inability to respond to *Morrison*'s jurisdiction/merits holding in the days between the decision and reporting of the final bill – to hold that Section 929P abrogated *Morrison* and that 'the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied'.[25] In May 2021 the First Circuit followed suit.[26] Whether other courts of appeals will embrace the Tenth Circuit's conclusion remains to be seen.[27]

In addition to this basic question of *Morrison*'s vitality outside the context of private actions, courts have addressed a number of issues regarding its

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21 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

22 15 U.S.C. § 78aa(b).

23 *SEC v. Scoville*, 913 F.3d 1204, 1218 (10th Cir. 2019), cert. denied, 18-1566 (4 November 2019).

24 See, e.g., *SEC v. Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 911–17 (N.D. Ill. 2013) ('The plain language of Section 929P(b) and its placement in the jurisdictional section of the Exchange Act indicate that it may be jurisdictional. It is unclear, however, whether the Court's analysis should stop there because it is possible that this interpretation would create superfluity or contradict the legislative intent. The Court need not resolve this complex interpretation issue, however, because . . . under either the Morrison "transactional" inquiry or the allegedly revived "conduct and effects test," the SEC's Complaint survives the present motion to dismiss.').

25 *Scoville*, 913 F.3d at 1218.

26 *SEC v. Morrone*, 997 F.3d 52, 60 n.7 (1st Cir. 2021) ('We note that *Morrison*'s transactional test only governs conduct occurring before July 22, 2010. Shortly after *Morrison* was decided, Congress amended the federal securities laws to "apply extraterritorially when the [newly added] statutory conduct-and-effects test is satisfied".')

27 At least one district court outside the Tenth Circuit has also followed *Scoville*. See *SEC v. Montano*, 2020 WL 5534653 *7 (M.D. Fla. 24 Jul. 2020).

application. The first prong of *Morrison*'s transactional test permits actions based on 'transactions in securities *listed* on domestic exchanges'.[28] In 2014, the Second Circuit considered whether this formulation permitted a 'foreign-cubed' claim – foreign institutional investors suing foreign banking defendants over shares purchased on a foreign exchange – because those shares were cross-listed on the New York Stock Exchange.[29] The court acknowledged that the plaintiffs' 'listing theory' comported with *Morrison*'s language 'taken in isolation', but concluded that, 'read as a whole', *Morrison* made clear that domestic application of the Exchange Act requires that the shares in question be purchased, not just listed, on a domestic exchange.[30] Courts have also addressed just what qualifies as a domestic exchange. One district court held in 2011 that *Morrison*'s first prong reaches securities traded on domestic over-the-counter markets, reasoning that 'transactions on the domestic over-the-counter market are as imbued with our national interest as trades on national exchanges'.[31] But that decision appears to be an outlier. Other courts have concluded that over-the-counter transactions may qualify under *Morrison*'s second prong (as domestic transactions in other securities), but do not occur on exchanges.[32]

Morrison's second prong has likewise received attention from litigants and courts. In 2012, the Second Circuit held that a securities transaction is domestic under *Morrison* if (1) 'the purchaser incurred irrevocable liability within the United States to take and pay for a security', (2) 'the seller incurred irrevocable liability within the United States to deliver a security' or (3) 'title to the shares was passed within the United States'.[33] Under the 'irrevocable liability' test, the court must identify 'the point at which the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time'.[34] What matters is not where the 'contract is said to have been executed' as a matter of contract law, but 'where, physically, the purchaser or seller committed him or herself'.[35] The Second

28 *Morrison*, 561 U.S. at 267 (emphasis added).

29 *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 179–80 (2d Cir. 2014).

30 Id. at 180–81.

31 *SEC v. Ficeto*, 839 F. Supp. 2d 1101, 1108 (C.D. Cal. 2011); see id. at 1108–14; see also *Rubenstein v. Cosmos Holdings Inc.*, 2020 WL 3893347 *11 (S.D.N.Y. 10 Jul. 2020) (assuming that transactions involving a corporation listed on the OTCQB market satisfied *Morrison*'s transactional test while acknowledging the contrary holding of *Stoyas).*

32 See, e.g., *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 945–47 (9th Cir. 2018); *United States v. Georgiou*, 777 F.3d 125, 134–35 (3d Cir. 2015); *In re Volkswagen 'Clean Diesel' Marketing, Sales Practices, and Prods. Liab. Litig.*, Nos. 15-cv-6167, 15-cv-6168, 16-cv-190, 16-cv-184, 2017 WL 66281, at *3–4 (N.D. Cal. 4 Jan. 2017); *Acerra v. Trulieve Cannabis Corp.*, No. 4:20-cv-186-RH-MJF, 2021 WL 1269919, at *4 (N.D. Fla. 18 Mar. 2021).

33 *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68–69 (2d Cir. 2012).

34 Id. at 68.

35 *United States v. Vilar*, 729 F.3d 62, 77 n.11 (2d Cir. 2013). Notwithstanding this focus on where, 'physically', the parties committed themselves, the Second Circuit has also stated that

Circuit's approach has met generally with approval and has been expressly adopted by the First, Third and Ninth Circuits.[36] Determining whether irrevocable liability was incurred, or title passed, in the United States requires analysis of 'factual allegations concerning contract formation, placement of purchase orders, passing of title, and the exchange of money'.[37] Given the varied and complex nature of modern transactions in securities, the moment of irrevocable commitment (or passing of title) will not always be obvious.[38]

Finally, there is disagreement among several of the circuit courts about a fundamental aspect of *Morrison*'s holding: is a domestic transaction in a security (or a transaction in a security listed domestically) merely necessary for application of the Exchange Act, or is it both necessary and sufficient? In *Parkcentral Global Hub Ltd v. Porsche Auto Holdings SE*,[39] the Second Circuit concluded that some domestic transactions are beyond the territorial reach of Section 10(b). The plaintiffs in *Parkcentral* were international hedge funds that entered

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'[t]he location . . . of the buyer, seller, or broker will not necessarily establish the situs of the transaction.' *In re Petrobas Sec.*, 862 F.3d 250, 262 (2d Cir. 2017). The case of *United States v. Boustani* implicated this tension. The DOJ initially contended that its indictment alleged domestic transactions because 'United States investors purchased [the relevant securities] while physically present in the United States.' Memorandum in Opposition 15–17, *United States v. Boustani*, No. 18-cr-681-WFK (E.D.N.Y. 22 Jul. 2019), ECF No. 113. The defendant argued that this fact alone did not establish domesticity, and that the relevant transactions occurred abroad because they were settled and cleared in Europe. Memorandum of Law in Support of Motion to Dismiss 19–24, *United States v. Boustani*, No. 18-cr-681-WFK (E.D.N.Y. 21 Jun. 2019), ECF No. 98. Before the Court decided the issue, the government obtained a superseding indictment, which alleged that 'investors in the United States incurred irrevocable liability in the United States by purchasing the [securities] while physically present in the United States'. Supplemental Memorandum in Opposition 14–15, *United States v. Boustani*, No. 18-cr-681-WFK (E.D.N.Y. 13 Sep. 2019), ECF No. 166. The defendant's motion to dismiss the indictment was denied. Decision & Order, *United States v. Boustani*, No. 18-cr-681-WFK (E.D.N.Y. 3 Oct. 2019), ECF No. 231. On 2 December, the jury acquitted the defendant on all counts. The defence had argued that 'the US is not the world's policeman'. Three jurors later told press that they could not see 'how federal prosecutors in Brooklyn had the authority to prosecute crimes that hadn't occurred in their jurisdiction'. Patricia Hurtado, 'Salesman Cleared in US$2 Billion African Scam in Blow to US', Bloomberg (2 Dec. 2019), available at https://www.bloomberg.com/news/articles/2019-12-02/privinvest-salesman-is-acquitted-of-defrauding-u-s-investors.

36 See SEC v. Morrone, 997 F.3d 52, 59–60 (1st Cir. 2021); *Stoyas*, 896 F.3d at 947–49; *Georgiou*, 777 F.3d at 137.

37 *Stoyas*, 896 F.3d at 949. In *Banco Safra S.A. Cayman Islands Branch v. Samarco Mineracao S.A.*, No. 19-3976-cv, 2021 WL 825743 (2d Cir. 4 Mar. 2021) (Summary Order), the Second Circuit emphasised that conclusory allegations are insufficient to satisfy the domestic transactions test, and that '[d]etailed factual allegations describing contract formation in the United States' are required. Id. at *2.

38 See *SEC v. Ahmed*, 308 F. Supp. 3d 628, 660–64 (D. Conn. 2018) (summarising cases applying the Second Circuit's standard in a variety of factual circumstances).

39 763 F.3d 198 (2d Cir. 2014).

securities-based swap agreements in the United States.[40] These instruments were pegged to the price of Volkswagen shares, but the shares themselves were traded only on foreign exchanges, and the foreign defendant (which had allegedly engaged in fraud, primarily in Germany, affecting the price of shares) was not a counterparty to any of the agreements.[41] The court acknowledged that the relevant transactions had occurred in the United States, but nonetheless concluded that the case was extraterritorial. If the suit proceeded, 'it would permit the plaintiffs, by virtue of an agreement independent from the reference securities, to hale the European participants in the market for German stocks into US courts and subject them to US securities laws'.[42] This would be incompatible with *Morrison*.

In *Stoyas v. Toshiba Corp*, the Ninth Circuit disagreed. *Toshiba*, like *Parkcentral*, involved American depository receipts (ADRs), issued by United States depositary institutions without defendant Toshiba's formal participation and representing a beneficial interest in, not legal ownership of, Toshiba shares.[43] The plaintiffs alleged that Toshiba had engaged in fraud overseas, causing the value of its shares (and the value of plaintiffs' ADRs) to decrease. It appeared that plaintiffs had purchased the ADRs in the United States.[44] But Toshiba argued that the case was nonetheless extraterritorial. As in *Parkcentral*, there was 'no connection between Toshiba and the Toshiba ADR transactions', making the dispute so overwhelmingly foreign as to require dismissal.[45] The Ninth Circuit disagreed. The court wrote that *Parkcentral* was distinguishable on several grounds, but that, in any event, it was wrongly decided: the Second Circuit's approach replaced *Morrison*'s bright-line transactional test with an

40 Id. at 207.

41 Id. at 206–08.

42 Id. at 214–17. After *Parkcentral*, some Second Circuit decisions distinguished or ignored the case, casting doubt on its continued relevance. See, e.g., *Giunta v. Dingman*, 893 F.3d 73, 82 (2d Cir. 2018); *Myun-Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60, 66 (2d Cir. 2018). But in 2019, in a case arising under the Commodity Exchange Act, the court both reaffirmed *Parkcentral* and extended it to that new statutory context. See *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 104-07 (2d Cir. 2019). And in January 2021, the Second Circuit once again applied *Parkcentral*'s 'predominantly foreign' exception and concluded that § 10(b) claims based on a private offering between a Bermudan investor and a Bermudan issuer were impermissibly extraterritorial, even though the alleged misstatements were made from New York and the subscription agreement was countersigned there. See *Cavello Bay Reinsurance Ltd. v. Stein*, 986 F.3d 161, 167–68 (2d Cir. 2021).

43 *Stoyas*, 896 F.3d at 940–41.

44 Id. at 949.

45 Id..

undefined standard asking whether (notwithstanding a domestic transaction) a case was 'too foreign' for US adjudication.[46]

In *SEC v. Morrone*, the First Circuit sided with the Ninth Circuit and rejected *Parkcentral*'s 'predominantly foreign' exception as inconsistent with *Morrison*.[47] In *Morrone*, the SEC filed a complaint against Bio Defense Corporation and several of its senior executives for alleged violations of the federal securities laws in connection with sales of the company's securities to foreign investors.[48] The district court held that the federal securities laws applied to the stock sales because Bio Defense incurred irrevocable liability for them in Boston, Massachusetts, where Bio Defense's founder countersigned the subscription agreements at issue, and the First Circuit affirmed.[49] In doing so, the First Circuit rejected the defendants' argument that the SEC's claims were 'predominantly foreign' under *Parkcentral* and therefore outside the reach of the federal securities laws, concluding that '[t]he existence of a domestic transaction suffices to apply the federal securities laws under *Morrison*. No further inquiry is required'.[50]

The Supreme Court declined to review the Ninth Circuit's *Stoyas* decision, and the defendants did not file a petition for a writ of *certiorari* in *Morrone*, leaving the circuit conflict unresolved. As it stands, the practical importance of the disagreement is unclear. The Ninth Circuit indicated that in the unusual circumstances present in *Parkcentral* and *Stoyas* – namely a foreign defendant drawn into a US lawsuit based solely on domestically traded derivative instruments – other elements of Section 10(b), such as the requirement that fraud be 'in connection with' the purchase or sale of a security, might preclude liability.[51]

Criminal versus civil cases 29.3

In *Morrison*, the Supreme Court described the applicability of the presumption against extraterritoriality in unequivocal terms: 'Rather than guess anew in each case, we apply the presumption in all cases.'[52] That blanket pronouncement sits uneasily with *United States v. Bowman*,[53] a 1922 decision holding that the presumption is inapplicable in certain classes of criminal cases. Neither *Morrison* nor any of the Court's other recent extraterritoriality decisions arose in the criminal context, creating uncertainty about how the Court's aggressive application of the presumption translates to criminal prosecutions.

46 Id. at 950. See *In re Volkswagen 'Clean Diesel' Marketing, Sales Practices, and Product Liability Litigation*, _ F. Supp. 3d _ 2020 WL 4905093, at *11 (N.D. Cal. 20 Aug. 2020) ('what matters is not the foreign character of [a defendant's] conduct but whether the SEC has adequately alleged a nexus between that conduct and the bond offerings').

47 997 F.3d at 60.

48 Id. at 58.

49 Id. at 58–61.

50 Id. at 60.

51 *Stoyas*, 896 F.3d at 950–52.

52 *Morrison*, 561 U.S. at 261.

53 260 U.S. 94 (1922).

The defendants in *Bowman* schemed to defraud a government-owned company, acting on the high seas and in Brazil.[54] The Court acknowledged the presumption against extraterritoriality and stated that it applied to '[c]rimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds'.[55] But, the Court reasoned, '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'.[56] In such cases, Congress need not speak clearly for its statute to apply extraterritorially, for it has allowed it 'to be inferred' from the 'nature' of the offence.[57]

By its terms, the *Bowman* exception was drawn narrowly.[58] But in the decades that followed, the courts of appeals 'applied *Bowman* . . . with varying degrees of liberality'[59] and many courts held *Bowman* applicable (and the presumption against extraterritoriality inoperative) in circumstances well removed from 'criminal statutes . . . enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated'.[60] For example, some courts drew on *Bowman*'s reference to the nature of the crime to exempt whole classes of criminal statutes that frequently involve transnational conduct or effects, such as 'immigration . . . , sex tourism and human trafficking, and drug trafficking'.[61]

The Court's reinvigorated commitment to the presumption against extraterritoriality suggests that, in an appropriate case, it might be willing to revisit *Bowman*. In the meantime, lower courts have not been willing to conclude that *Bowman* has been impliedly overruled.[62] The government has read *Bowman* broadly to argue that cases like *Morrison* and *RJR Nabisco* simply do not apply in criminal matters. Lower courts have not been receptive to that argument either.[63] Instead, the question in lower courts has been the extent of the *Bowman*

54 Id. at 95–97.

55 Id. at 98.

56 Id.

57 Id.

58 Id. at 98–99.

59 *United States v. McVicker*, 979 F. Supp. 2d 1154, 1171 (D. Or. 2013).

60 *Bowman*, 260 U.S. at 98.

61 Zachary D Clopton, 'Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank', 67 *N.Y.U. Ann. Surv. Am. L.* 137, 169–70 (2011); see id. at 170 nn. 135–37 (collecting cases).

62 e.g., *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 91 n. 5 (D.D.C. 2017), reconsideration granted in part on other grounds sub nom. *United States v. All Assets Held at Bank Julius, Baer & Co., Ltd.*, 315 F. Supp. 3d 90 (D.D.C. 2018).

63 See, e.g., *United States v. Vasquez*, 899 F.3d 363, 374 (5th Cir. 2018) (rejecting the 'puzzling position' that '*RJR Nabisco* does not apply to criminal cases'); *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013) ('no plausible interpretation of *Bowman*' supported the government's argument that 'the presumption against extraterritoriality has no place in our reading of

exception in light of the Court's recent extraterritoriality decisions. Many have applied the presumption in criminal cases while acknowledging that there is tension between *Morrison* and *Bowman* or, at a minimum, explaining that *Morrison* highlights the need to confine *Bowman*'s exception to narrow limits.[64]

However lower courts navigate the *Bowman–Morrison* tension as a general matter, *Morrison* appears to bear directly on the interpretation of 'hybrid' statutes, namely statutes that apply both criminally and civilly. As a rule, federal courts construe hybrid statutes consistently across applications, rather than interpret the same statute one way in criminal cases and another in civil cases.[65] *Morrison* makes clear that the presumption against extraterritoriality (1) applies universally in (at least) the civil context, and (2) is a rule of statutory construction.[66] Therefore, under *Morrison*, statutes capable of civil application should be construed using the presumption against extraterritoriality, generating an interpretation that applies perforce if the statute is also capable of criminal application. Indeed, as the Second Circuit held in *Vilar*, the statute construed in *Morrison* – Section 10(b) – is itself a hybrid statute and after *Morrison* lacks extraterritorial effect in both its civil and criminal dimensions.[67]

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criminal statutes'). See also *United States v. Sota*, 948 F.3d 356, 358–59, 361–62 (D.C. Cir. 2020) (rejecting the government's argument that the statute prohibiting murder of US employees while engaged in official duties should have extraterritorial reach).

64 See, e.g., *Vasquez*, 899 F.3d at 373–74 & n.6; *Vilar*, 729 F.3d at 72–74; *All Assets*, 251 F. Supp. 3d at 91 n. 5; *United States v. Abu Khatallah*, 151 F. Supp. 3d 116, 124–26 (D.D.C. 2015) (explaining that *Bowman* 'sits uneasily with *Aramco*, *Morrison*, and *Kiobel*'). But not all courts have embraced the idea that the Court's recent extraterritoriality cases bear on the *Bowman* exception. See, e.g., *United States v. Leija-Sanchez*, 820 F.3d 899, 901 (7th Cir. 2016) ('A decision such as *Bowman*, holding that criminal and civil laws differ with respect to extraterritorial application, is not affected by yet another decision showing how things work on the civil side [i.e., *Morrison*].').

65 See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 12 n. 8 (2004) ('[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.'); *FCC v. Am. Broadcast Co.*, 347 U.S. 284, 296 (1954) ('There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.'); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013) ('A single statute with civil and criminal applications receives a single interpretation.'). Notwithstanding the Supreme Court's apparently clear statements on this matter, some cases contravene or call into question the rule of consistent interpretation. See, e.g., *United States v. Plaza Health Labs, Inc.*, 3 F.3d 643, 648 (2d Cir. 1993); see also *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 n. 18 (1995) (deferring to an agency interpretation of a law carrying criminal penalties, and suggesting that the rule of lenity had no application because the case arose in a civil context).

66 See *Vilar*, 729 F.3d at 74.

67 Id. ('[E]ven if it were the case that we do not generally apply the presumption against extraterritoriality to criminal statutes, Section 10(b) would still not apply extraterritorially in criminal cases. The reason is simple: The presumption against extraterritoriality is a method of interpreting a statute, which has the same meaning in every case.'); see *Vasquez*, 899 F.3d at 373 n. 6 (applying *RJR Nabisco* to a criminal RICO case, and explaining that RICO 'is a

29.4 RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits engaging in 'a pattern of racketeering activity' in relation to an enterprise.[68] 'The statute defines "racketeering activity" to encompass dozens of state and federal offenses, known in RICO parlance as predicates.'[69] Violations of RICO's substantive prohibitions are subject to criminal prosecution and civil enforcement proceedings.[70] In addition, RICO creates an express private right of action for '[a]ny person injured in his business or property by reason of a violation of Section 1962'.[71]

See Chapter 26 on fines, disgorgement, etc.

The Supreme Court considered RICO's extraterritorial scope in *RJR Nabisco*, a civil action brought by the European Community and 26 of its Member States against defendants alleged to have 'participated in a global money-laundering conspiracy in association with various organized crime groups'.[72] The Court reached three significant conclusions. First, it held that RICO overcomes the presumption against extraterritoriality because certain predicates apply extraterritorially, 'a clear, affirmative indication that Section 1962 applies to foreign racketeering activity'.[73] But 'when a statute provides for some extra-territorial application, the presumption against extraterritoriality operates to limit that provision to its terms'.[74] Therefore, RICO applies extraterritorially 'only to the extent that the predicates alleged in a particular case themselves apply extraterritorially'.[75] Second, the Court held that – even where an alleged predicate offence applies extraterritorially – RICO's substantive prohibitions require 'proof of an enterprise that is "engaged in, or the activities of which affect, interstate or foreign commerce"'.[76] This necessary link to US commerce provides a further limit on RICO's extraterritorial scope. Third, the Court held that RICO's private right of action has no extraterritorial application, even in cases involving extraterritorial predicates.[77] 'A private RICO plaintiff therefore must allege and prove a domestic injury to its business or property.'[78]

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hybrid statute authorizing criminal prosecution, civil enforcement, and private civil actions' (internal citations omitted)); see id. (collecting criminal RICO cases that apply *RJR Nabisco*).

68 *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2096–97 (2016); see 18 U.S.C. § 1962.

69 *RJR Nabisco*, 136 S. Ct. at 2096.

70 18 U.S.C. §§ 1963(a), 1964(a)–(b).

71 *RJR Nabisco*, 136 S. Ct. at 2097 (quoting 18 U.S.C. § 1964(c)).

72 Id. at 2098.

73 Id. at 2102.

74 Id. (quoting *Morrison*, 561 U.S. at 265).

75 Id.

76 Id. at 2105 (quoting 18 U.S.C. § 1962(a)–(c)).

77 Id. at 2106.

78 Id.

A number of courts have applied *RJR Nabisco* in the context of criminal prosecutions.[79] In a criminal case, where the domestic-injury requirement applicable to private plaintiffs has no operation, extraterritorial application will turn on the reach of the alleged predicates and the nexus between the enterprise and US commerce.[80]

Wire fraud 29.5

The wire fraud statute, 18 USC Section 1343, prohibits wire transmissions 'in interstate or foreign commerce . . . for the purpose of executing' a scheme to defraud. Federal prosecutors have broadly applied this statute to reach a variety of fraudulent conduct. Questions of the extraterritoriality of the wire fraud statute arise not only in criminal prosecutions, but also in civil cases, particularly RICO suits in which wire fraud is alleged as a predicate act.

Courts disagree about whether Section 1343 applies extraterritorially. In *United States v. Georgiou*,[81] the Third Circuit held that it does. The court relied on *dicta* from *Pasquantino v. United States*,[82] in which the Supreme Court stated that 'the wire fraud statute punishes frauds executed in "interstate or foreign commerce", so this is surely not a statute in which Congress had only "domestic concerns in mind"'.[83] But the Second Circuit rejected that view in *European Community v. RJR Nabisco, Inc.*[84] The court acknowledged the *dicta* in *Pasquantino* but reasoned that it had been abrogated by *Morrison*, which held that 'a general reference to foreign commerce . . . does not defeat the presumption against extraterritoriality'.[85] After concluding that the statute had no extraterritorial application, however, the Second Circuit left unsettled the second step of the inquiry (i.e., the focus, and therefore the domestic reach, of Section 1343) by disclaiming any need to decide 'precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute'.[86] The court reasoned that the defendants were alleged to have satisfied

79 See, e.g., *United States v. Vasquez*, 899 F.3d 363, 373 n.6 (5th Cir. 2018) (citing *United States v. Sitzmann*, 893 F.3d 811, 822 (D.C. Cir. 2018) (*per curiam*); *United States v. Ubaldo*, 859 F.3d 690, 700–01 (9th Cir. 2017); *United States v. Valenzuela*, 849 F.3d 477, 484–85 & n. 3 (1st Cir. 2017); *United States v. Gasperini*, 729 F. App'x 112, 113–14 (2d Cir. 2018)); *United States v. Harris*, 991 F.3d 552, 558–60 (4th Cir. 2021).

80 See, e.g., *United States v. Hawit*, No. 15-cr-252-PKC, 2017 WL 663542, at *9–10 (E.D.N.Y. 17 Feb. 2017).

81 777 F.3d 125 (3d Cir. 2015).

82 544 U.S. 349 (2005).

83 Id. at 371–72 (internal citation omitted). This statement was made *obiter* in that the Court held that the case involved a domestic application of the statute. Id.

84 764 F.3d 129 (2d Cir. 2014), rev'd on other grounds sub nom. *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

85 Id. at 141 (quoting *Morrison*, 561 U.S. at 263).

86 Id. at 142.

each element of the statute through conduct in the United States; accordingly, 'wherever [the] line should be drawn', the case fell on the domestic side of it.[87]

After *European Community*, district courts – particularly district courts within the Second Circuit – struggled to define the kind and degree of domestic conduct necessary for application of the wire fraud statute. In *Laydon v. Mizuho Bank, Ltd*,[88] defendants acting abroad were alleged to have manipulated benchmark interest rates through fraudulent submissions to entities in London and Tokyo.[89] The court rejected the idea that mere use of the domestic wires in connection with the fraud was sufficient without proof that the scheme was managed from or directed to the United States.[90] Yet in *United States v. Hayes*,[91] another benchmark manipulation case, the court stated without qualification that using 'domestic wires to carry out [a] fraudulent scheme' is 'clearly sufficient' for domestic application. Some courts tried to explain this apparent divergence on the ground that *Laydon* was civil and *Hayes* criminal.[92] But the court in *United States v. Gasperini*,[93] a criminal case, applied a *Laydon*-like analysis to hold that the focus of the wire fraud statute is 'the scheme to defraud', and that domestic application of Section 1343 requires 'a substantial amount of conduct in the United States' that is 'integral to the commission of the scheme'.[94]

After several years of confusion, the Second Circuit imposed a measure of order in *Bascuñán v. Elsaca*.[95] *Bascuñán* was a civil RICO case (with a wire fraud predicate) in which the plaintiff alleged that the defendant, acting abroad, had fraudulently used domestic wires to obtain funds from New York bank accounts.[96] The Second Circuit noted that the critical issue, the focus of the wire fraud statute 'for the purpose of the presumption against extraterritoriality [was] a question of first impression in [the] circuit'.[97] The court rejected the view that the wire fraud statute gives way unless the scheme to defraud is 'planned, managed, and directed' from the United States.[98] It reasoned that the focus of Section 1343 'is not merely a scheme to defraud, but more precisely the use of the . . . wires in furtherance of a scheme to defraud'.[99] The court went

87 Id.

88 No. 12-cv-3419-GBD, 2015 WL 1515487 (S.D.N.Y. 31 Mar. 2015).

89 Id. at *1, *9.

90 Id. at *8–9.

91 99 F. Supp. 3d 409 (S.D.N.Y. 2015).

92 See *Sonterra Cap. Master Fund v. Credit Suisse Grp.*, 277 F. Supp. 3d 521, 581 (S.D.N.Y. 2017); see also *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.*, No. 16-cv-5263-AKH, 2017 WL 3600425, at *15 (S.D.N.Y. 18 Aug. 2017).

93 No. 16-cr-441-NGG, 2017 WL 2399693 (E.D.N.Y. 1 Jun. 2017).

94 Id. at *7–8; see also *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 103 (D.D.C. 27 Apr. 2017) (applying the same test).

95 927 F.3d 108 (2d Cir. 2019).

96 Id. at 112–15, 123.

97 Id. at 121.

98 Id. at 121, 123.

99 Id. (internal quotation marks and original emphasis omitted).

on to observe that the Supreme Court, and other courts of appeals, 'though not in the context of applying the presumption against extraterritoriality [had] described the focus' of the wire fraud statute in precisely those terms.[100] But not just any wire furthering a scheme would do. Because 'incidental' domestic conduct is not enough to trigger United States law, use of the wires 'must be essential' to, or 'a core component of', the scheme to defraud.[101] Applying this standard to the facts was straightforward, in that the defendant allegedly had used domestic wires to fraudulently 'transfer millions of dollars' out of domestic bank accounts – clearly a core component of the scheme.[102]

Bascuñán therefore goes some distance towards resolving the confusion that persisted after *European Community*. The Second Circuit recently made clear that *Bascuñán* extends to the honest services fraud conspiracy.[103] In addition, it remains to be seen whether other courts of appeals will follow *Bascuñán* and its 'core component' test. The First, Sixth and Ninth Circuits have all followed *Bascuñán* and concluded that the focus of the wire fraud statute is the use of domestic wires in furtherance of a scheme to defraud rather than the scheme itself.[104] The First Circuit, in *dicta*, seemingly endorsed the core component test for use in cases where 'a foreign defendant is alleged to have committed wire fraud against a foreign victim'.[105] The Ninth Circuit noted the core component test in *United States v. Hussain* and found the test satisfied by the facts of that case, without explicitly adopting the test.[106]

Commodity Exchange Act 29.6

The Commodity Exchange Act (CEA), enforced by the Commodity Futures Trading Commission (CFTC), regulates markets in commodities. This broad category embraces 'all services, rights and interests . . . in which contracts for future delivery are presently or in the future dealt in', covering not only

100 Id. at 122 (citing *Skilling v. United States*, 561 U.S. 358, 369 n. 1 (2010); *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001); *United States v. Alston*, 609 F.2d 531, 536 (D.C. Cir. 1979); *United States v. Jefferson*, 674 F.3d 332, 336 (4th Cir. 2012)).

101 Id. at 122–23.

102 Id. at 123.

103 See *United States v. Napout et al.*, 963 F.3d 163 (2d Cir. 2020).

104 See *United States v. McLellan*, 959 F.3d 442, 470–71 (1st Cir. 2020) ('its focus is not the fraud itself but the abuse of the instrumentality in furtherance of a fraud'); *United States v. Hussain*, 972 F.3d 1138,1145 (9th Cir. 2020) ('the focus of the wire fraud statute, 18 U.S.C. 1343, is the use of the wires in furtherance of a scheme to defraud'); *United States v. Coffman*, 574 F. App'x 541, 558 (6th Cir. 2014) (unpublished) ('[W]ire fraud occurs in the United States when defendants use interstate wires as part of their scheme.').

105 *McLellan*, 959 F.3d at 970, n. 7.

106 *Hussain* 972 F.3d at 1143, n. 2; see *Bascuñán*, 927 F.3d 108 (2d Cir. 2019) at 121–23.

traditional commodities like agricultural products,[107] but 'currency and other financial instruments'.[108]

The CEA is aimed at protecting the 'individual investor – who may know little about the intricacies and complexities of the commodities market – from being deceived or misled'.[109] To that end, the statute contains several antifraud provisions.[110] Section 22(a) of the CEA 'establishes a private right of action for individual litigants in four, limited circumstances';[111] in addition, the CFTC may pursue violations through enforcement actions, and the DOJ may bring criminal charges for certain violations.

'Prior to *Morrison*, courts deciding commodities cases applied the same conduct or effects test as was used in the securities context.'[112] But *Morrison* prompted courts to revisit those precedents. In *Loginovskaya v. Batratchenko*,[113] the Second Circuit held that the CEA's private right of action provision, Section 22, 'is silent as to extraterritorial reach' and therefore lacks extraterritorial application.[114] The court then considered the provision's domestic reach. It concluded that the focus of Section 22 is on transactions in commodities, just as the focus of Section 10(b) was found in *Morrison* to be transactions in securities. Accordingly, the court concluded, private suits under the CEA 'must be based on transactions occurring in the territory of the United States'.[115] The court further held that in determining whether a given transaction is domestic, the irrevocable liability test developed in the securities context should govern.[116] Therefore, in the Second Circuit, a transaction in a commodity will be regarded as domestic if 'the transfer of title or the point of irrevocable liability . . . occurred in the United States'.[117] Courts applying this standard have stressed the need for plaintiffs to plead and prove facts demonstrating 'the location of the transactions' at issue, including 'the formation of . . . contracts,

107 7 U.S.C. § 1a(9).

108 *Salomon Forex Inc. v. Tauber*, 795 F. Supp. 768, 771 (E.D. Va. 1992).

109 *Loginovskaya v. Batratchenko*, 936 F. Supp. 2d 357, 363 (S.D.N.Y. 2013), aff'd, 764 F.3d 266 (2d Cir. 2014).

110 Id.

111 Id. at 364.

112 Id. at 367.

113 764 F.3d 266 (2d Cir. 2014).

114 Id. at 271.

115 Id. at 272. The Second Circuit observed in a later case that the relevant portion of the CEA 'does not contain language similar to the language in § 10(b) that led *Morrison* to craft the "domestic exchange" prong' of its two-pronged test for domestic application (i.e., transactions in securities registered on domestic exchanges, or domestic transactions in other securities).' *Myun-Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60, 67 (2d Cir. 2018). The court 'le[ft] aside whether *Morrison*'s discussion of exchanges is applicable to the CEA', concluding that the 'domestic transaction' test was satisfied on the facts before it. Id.

116 See *Loginovskaya*, 764 F.3d at 274; supra Section 29.2.2.

117 Id.

the placement of orders, the passing of title and the exchange of money'.[118] It is insufficient for the plaintiff to show that he or she is a 'US resident who engaged in . . . futures transactions' from the United States, without proof of 'the location of the transactions themselves'.[119] In addition, the Second Circuit has extended the rule of *Parkcentral*,[120] originally developed in the securities context, to CEA cases. A domestic transaction is therefore necessary but not sufficient for an action under Section 22.[121]

Loginovskaya's statement that Section 22 is 'silent as to extraterritorial reach' is subject to a potential qualification.[122] As the court observed, Dodd-Frank amendments to the CEA altered the statute's reach in a limited set of cases:

> *[Dodd-Frank] amended CEA Section 22 to cover swaps, and provided that its 'provisions . . . relating to swaps' may, under certain circumstances, 'apply to activities outside the United States'*.[123]

Specifically, the CEA provisions regulating swaps apply to activities outside the United States that (1) 'have a direct and significant connection with activities in, or effect on, commerce of the United States', or (2) contravene CFTC rules or regulations aimed at preventing 'the evasion of any provision' added to the CEA through Dodd-Frank.[124] Because *Loginovskaya* did not involve swaps, the court took 'no view of the effect that the Dodd-Frank amendments may have on the extraterritorial reach of the CEA'.[125]

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118 *Sullivan v. Barclays PLC*, No. 13-cv-2811-PKC, 2017 WL 685570, at *29 (S.D.N.Y. 21 Feb. 2017).

119 Id.

120 See *Park Central*, 763 F.3d 198 (2d Cir. 2014); supra Section 29.2.2.

121 See *Prime Int'l*, 937 F.3d 104–07. *Prime Int'l* was similar to *Parkcentral* in that the plaintiffs, acting in the United States, traded derivatives pegged to a foreign asset, whose price was allegedly affected by purely foreign conduct (producing losses on the domestic derivatives trades). Id. at *2–3, *8. The court held that plaintiffs were required to show not only a domestic transaction that would satisfy § 22, but domestic conduct that violated a substantive, conduct-regulating provision of the CEA. Id. at *7.

122 764 F.3d at 271.

123 Id. at 271 n. 4.

124 7 U.S.C. § 2(i). Dodd-Frank's limited revision of the extraterritorial reach of the CEA stands in contrast to its (attempted) wholesale revision of the extraterritorial reach of the Exchange Act: While § 929P of Dodd-Frank appears aimed at restoring the conduct-and-effects test in all SEC and criminal actions under the anti-fraud provisions of the Exchange Act, see supra Section 29.2.2, no such sweeping provision was made for CEA cases.

125 764 F.3d at 271 n. 4. The Second Circuit again declined to consider the effect of Dodd-Frank's swaps provisions in *Prime Int'l* 937 F.3d at 103–04, concluding that the plaintiffs had forfeited the argument that the CEA applied extraterritorially on that basis. See id.

Some questions of extraterritoriality play out differently in the context of enforcement actions, as opposed to private actions.[126] To begin, several provisions in the CEA expressly grant the CFTC regulatory and enforcement authority over certain conduct involving foreign elements. The statute permits the CFTC to adopt rules proscribing fraud concerning transactions or instruments made on or subject to the rules of foreign exchanges or markets, so long as the regulated behaviour is committed by 'any person located in the United States'; it also grants the Commission authority to enforce those rules through lawsuits.[127]

In addition, because enforcement actions do not rely on the transaction-focused private right of action in Section 22, it is likely that some such actions will be permitted to proceed as domestic applications of the CEA based on territorial connections other than US transactions. For example, the Second Circuit has held that the anti-fraud provisions Sections 6(c)(1)[128] and 9(a)(2)[129] centre on manipulation of commodities markets and prices, not on transactions.[130] Similarly, Section 4o, another anti-fraud provision, prohibits commodity trading advisers, and associated individuals or entities, from defrauding clients – without any requirement that the fraud occur in connection with a transaction in a commodity.[131] Given that the provision is not transaction-based, there appears to be no warrant for applying *Morrison*'s 'domestic transaction' test in this context.[132]

29.7 Antitrust

On its face, the Sherman Act proscribes 'every contract, combination . . . or conspiracy in restraint of trade', but the Supreme Court has held that the Act 'outlaw[s] only *unreasonable* restraints'.[133] Most trade practices are evaluated under the rule of reason, which requires a determination whether, in all the circumstances, 'a restrictive practice should be prohibited as imposing

126 See id. ('[T]he CEA draws a distinction between the extraterritoriality limits on a private action and enforcement actions brought by the CFTC itself.'); *CFTC v. Vision Fin. Partners, LLC*, 19 F. Supp. 3d 1126, 1131 (S.D. Fla. 2016) (distinguishing, for purposes of extraterritoriality, between private actions and 'suits brought by the Commission itself').

127 *Vision Fin. Partners, LLC*, 190 F. Supp. 3d at *1131 (quoting 7 U.S.C. § 6(b)(2)).

128 'It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance'. 7 U.S.C. § 9(a)(1).

129 'It shall be a felony . . . for . . . [a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce' 7 U.S.C. § 13(a)(2).

130 *Prime Int'l*, 937 F.3d at 107–08.

131 *Loginovskaya*, 936 F. Supp. 2d at 368.

132 Id. at 369 ('*Morrison*'s transaction test is not immediately applicable to § 4o.').

133 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) quoting 15 U.S.C. § 1 (emphasis added).

an unreasonable restraint on competition'.[134] But horizontal cartel activity – outright collusion among competitors – is a *per se* violation of the Sherman Act.[135] The antitrust laws are enforced both civilly and criminally, with criminal enforcement generally limited to *per se* violations.[136]

In *Hartford Fire Insurance Co v. California*, decided in 1993, the Supreme Court declared it 'well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'.[137] That formulation tracked the 'effects' test that *Morrison* would reject in 2010.[138] Arguably, then, *Morrison* may be read to have called into question the continued vitality of *Hartford Fire*.[139]

But *Morrison* has not prompted broad reconsideration of the extraterritorial reach of the Sherman Act, likely for two reasons. First, it may be possible to harmonise *Morrison* and *Hartford Fire*. In *Morrison*, it was held that lower courts had been wrong not to apply the presumption against extraterritoriality in cases where the effects test was satisfied, and should in the future apply the presumption in all cases.[140] One reading of *Hartford Fire* is that the presumption against extraterritoriality is rebutted in Sherman Act cases; that is, the Court's 'effects' language was offered not as a reason to avoid applying the presumption (which would contravene *Morrison*), but as a description of the extraterritorial reach of a statute that overcomes the presumption. Although the majority did not say as much (or mention the presumption at all), the author of the decision, Justice Scalia, took that view in dissent: 'We have . . . found the presumption to be overcome with respect to our antitrust laws.'[141]

Second, when Congress adopted the Foreign Trade Antitrust Improvements Act (FTAIA), it 'expressly endorsed an extraterritorial application of the Sherman Act'.[142] The FTAIA first provides that all foreign commercial activity (except import commerce, namely commerce between foreign sellers and

134 Id. (internal quotation marks omitted).

135 Id. at 893.

136 See D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 Wm. & Mary L. Rev. 1545, 1572–73 (2019).

137 509 U.S. 764, 795–96 (1993).

138 See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443–44 (2d Cir. 1945)).

139 See Julie Rose O'Sullivan, 'The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusion, and a Plea to Congress for Direction', 106 *Geo. L.*J. 1021, 1049–52 (2018) (noting apparent tension between the Court's antitrust cases and *Morrison*).

140 See *Morrison*, 561 U.S. at 256–61.

141 *Hartford Fire*, 509 U.S. at 813.

142 *Sonterra Cap. Master Fund v. Credit Suisse Grp.*, 277 F. Supp. 3d 521, 569 (S.D.N.Y. 2017) (internal quotation marks omitted). The FTAIA provides an independent basis for extraterritorial application of the antitrust laws – separate from *Hartford Fire* – because *Hartford Fire* expressly disclaimed any reliance on the FTAIA. 509 U.S. at 796 n. 23.

domestic buyers) is 'outside the Sherman Act's reach', but then 'brings such conduct back within' the Act if:[143]

> *(1) the foreign conduct has a 'direct, substantial, and reasonably foreseeable effect' on US domestic, import or certain export commerce; and (2) that effect 'gives rise to a claim under' the Sherman Act.*[144]

This standard is similar (but not identical) to *Hartford Fire*'s rule.[145] Therefore, in antitrust cases involving foreign conduct, there are two related but conceptually distinct paths to extraterritorial application. Foreign activity not subject to the FTAIA (i.e., import commerce) is tested under *Hartford Fire*.[146] Other foreign activity is tested under the similar formulation set out in the FTAIA.[147]

It is clear, therefore, that the Sherman Act may reach extraterritorial conduct based on domestic effects. For example, in civil cases arising from the manipulation of benchmark interest rates by non-US traders working for defendant banks, courts applied the FTAIA to conclude that conduct occurring abroad was reachable where it affected the price of financial products sold domestically: '[M]anipulation of a benchmark that is globally disseminated and serves as a pricing component of derivatives sold widely in the United States . . . would have a foreseeable effect within the United States.'[148]

The case law is less clear about what domestic effects count. The Ninth Circuit has interpreted 'direct' in the first prong of the FTAIA – 'direct, substantial, and reasonably foreseeable effect' – to require that the domestic

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143 *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004).

144 *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413–14 (2d Cir. 2014) (citations omitted) (quoting 15 U.S.C. § 6a).

145 In addition to requiring that the effect on commerce be 'direct', see *United States v. LSL Biotechnologies*, 379 F.3d 672, 679–80 (9th Cir. 2004), the FTAIA eliminated the requirement that the foreign actor intend to affect US commerce – a product of Congress's determination that a subjective intent-based standard was undesirable and should be replaced with a 'single, objective test'. H.R. Rep. No. 97-686, at 2–3, 9 (1982); see *United States v. Hui Hsiung*, 778 F.3d 738, 748 (9th Cir. 2015) ('[T]he FTAIA's requirement that the defendants' conduct had a "direct, substantial, and reasonably foreseeable" effect on domestic commerce displaced the intentionality requirement of *Hartford Fire* where the FTAIA applies.').

146 See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 855 (7th Cir. 2012) ('[T]he Sherman Act covers imports when actual and intended effects on US commerce have been shown. In *Hartford Fire*, the Supreme Court confirmed this rule, stating that "the Sherman Act covers foreign conduct producing a substantial intended effect in the United States".' (quoting *Hartford Fire*, 509 U.S. at 797)). Of course, for entities that direct goods into domestic commerce through importing activity, the requisite effects will generally be easily proved.

147 Id. at 855–56.

148 *Sonterra*, 277 F. Supp. 3d at 569; *Sullivan v. Barclays PLC*, No. 13-cv-2811-PKC, 2017 WL 685570, at *22 (S.D.N.Y. 21 Feb. 2017) ('Defendants also point to the Europe-based conduct of defendants, even though the FTAIA's express language and the decisions applying it focus on the anti-competitive effects within the United States.') (emphasis in original).

effect follow 'as an immediate consequence of the defendant's activity'.[149] Other courts, including the Second and Seventh Circuits, have embraced what appears to be a weaker conception of directness, expressly rejecting the Ninth Circuit's position and holding that 'the term "direct" means only a reasonably proximate causal nexus'.[150] Despite this overt disagreement, however, there may be little daylight between the competing approaches. The Ninth Circuit has upheld convictions arising from a foreign price-fixing conspiracy where the conspirators fixed the prices of components that were sold abroad and then incorporated into products sold domestically, reasoning that 'the practical upshot of the conspiracy would be and was increased prices to customers in the United States'.[151] In so doing, the court approvingly quoted Seventh Circuit case law contrasting sufficiently direct effects with 'action in a foreign country [that] filters through many layers and finally causes a few ripples in the United States'.[152] In practice – although the precise contours of the rule are unclear – it appears that any of these courts would apply the FTAIA to some foreign anticompetitive conduct that is a step removed from any domestic effects.[153]

Finally, some territorial constraints on private antitrust actions may not apply, or apply differently, in enforcement or criminal actions. For example, in *Motorola Mobility LLC v. AU Optronics Corp*,[154] the Seventh Circuit held that the plaintiff's private action failed under the FTAIA requirement that domestic effects on commerce 'give rise to' the claim, as well as the indirect-purchaser doctrine.[155] But the court cautioned: 'If price fixing by the component manufacturers had the requisite statutory effect on cell phone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies.'[156]

149 *LSL Biotechnologies*, 379 F.3d at 680.

150 *Lotes Co.*, 753 F.3d at 410 (internal quotation marks omitted); see *Minn-Chem*, 683 F.3d at 856–57 (rejecting the Ninth Circuit's test in favour of the 'reasonably proximate causal nexus' formulation).

151 *Hsiung*, 778 F.3d at 759.

152 Id. (quoting *Minn-Chem*, 683 F.3d at 860).

153 Underscoring the lack of practical difference between the two standards, the defendants in *Hsiung* filed a petition for certiorari arguing that the Ninth Circuit's conception of directness was weaker than the Seventh Circuit's. See Pet. for Certiorari 15–16, *Hsiung v. United States*, No. 14-1121 (16 Mar. 2015), cert. denied, 135 S. Ct. 2837 (15 Jun. 2015).

154 775 F.3d 816 (7th Cir. 2015).

155 Id. at 819–23.

156 Id. at 825. Indeed, the same cartel activity was successfully prosecuted in *Hsiung*. See also *Empagran*, 542 U.S. at 170–71 (concluding that plaintiffs' private action failed under the 'give rise to' requirement because their injury flowed purely from foreign effects, and distinguishing earlier cases permitting the government to seek 'relief that might have helped to protect those injured abroad' on the ground that the government enjoys 'broad' authority to 'seek to obtain the relief necessary to protect the public from further anticompetitive harm').

29.8 Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act regulates certain persons and entities by proscribing bribery of foreign officials. The FCPA also prohibits issuers of US securities from falsifying its books and records.[157] As its name suggests, the FCPA applies extraterritorially.[158] But even 'when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms'.[159] The FCPA sets out with 'surgical precision' the circumstances in which its anti-bribery provisions apply.[160] Specifically, these provisions reach (1) issuers of securities registered on US exchanges or that file periodic reports with the SEC that use interstate commerce in furtherance of a bribery scheme (issuers), (2) United States companies or persons that use interstate commerce in furtherance of a bribery scheme (domestic concerns) and (3) 'foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States'.[161] In addition, the statute reaches 'any officer, director, employee, or agent' acting on behalf of a covered entity.[162]

In published guidance and enforcement actions, the government has taken a broad view of the kind of conduct that will render a largely foreign scheme subject to US jurisdiction. Jointly published guidance from the SEC and DOJ states that the use-of-commerce requirement would be satisfied by any telephone call, email, text message or fax to the United States, or by 'sending a wire transfer . . . to a US bank or otherwise using the US banking system'.[163] The government has asserted this view in enforcement actions. For example, in *United States v. JGC Corp*, a Japanese defendant was charged with FCPA violations arising from a scheme to bribe Nigerian officials. The jurisdictional theory was that 'certain alleged bribe payments . . . flowed through US bank accounts and that co-conspirators faxed or e-mailed information into the United States

157 15 U.S.C. §§ 78dd-1–3, 78m.

158 See *United States v. Hoskins*, 902 F.3d 69, 96 (2d Cir. 2018).

159 *Morrison*, 561 U.S. at 265.

160 *Hoskins*, 902 F.3d at 84.

161 Id. at 71; see 15 U.S.C. § 78dd-1–3. The government has taken the position that the territorial jurisdiction prong of 15 U.S.C. § 78dd-3 applies to 'foreign persons . . . that, either directly *or through an agent*, engage in any act in furtherance of a corrupt payment . . . while in the territory of the United States'. Criminal Division of the US Department of Justice and Enforcement Division of the US Securities and Exchange Commission (SEC), A Resource Guide to the US Foreign Corrupt Practices Act, Second Edition (2020) (FCPA Resource Guide), at 10.

162 *Hoskins* at 71. An agent of a foreign person or business is covered only for acts that occur 'while in the territory of the United States'. 15 U.S.C. § 78dd-3.

163 FCPA Resource Guide, at 10.

in furtherance of the bribery scheme'.[164] The case was resolved through a deferred prosecution agreement (DPA) so the issue was not litigated.[165]

FCPA actions are frequently resolved without adversarial litigation, through plea agreements, DPAs, non-prosecution agreements (NPAs), or SEC 'neither admit nor deny' settlements, so aggressive theories of jurisdiction have rarely been subjected to judicial scrutiny.[166] When they have been, results have been mixed. In *United States v. Patel*, the defendant was not an issuer or a domestic concern (or acting on behalf of such an entity), meaning that he was subject to the FCPA only for acts taken 'while in the territory of the United States'.[167] The government charged an FCPA count based on the defendant's mailing a DHL package from London to the United States.[168] The government acknowledged the requirement of territorial conduct, but argued that this element was satisfied based on separate conduct that formed the basis for a different count; that is, the government theorised that once any domestic conduct was proved, further FCPA counts could be charged based on purely foreign acts.[169] The court disagreed, reasoning that each charged violation had to have occurred while in US territory.[170] In *SEC v. Straub*,[171] the defendants were officers of an issuer – making the requirement of territorial conduct inapplicable – but the government still had to prove that they had used interstate commerce to further their bribery scheme.[172] The government alleged that the defendants had sent emails that were 'routed through and/or stored' on US servers.[173] The defendants argued that this element contained a *mens rea* requirement, so that conviction was improper without proof that they knew the emails would be routed through or stored in the United States.[174] The court, addressing 'a matter of first impression in the FCPA context', sided with the government, concluding that the defendants were subject to the FCPA even if they lacked knowledge that their conduct involved interstate commerce.[175]

In addition to pressing aggressive interpretations of the FCPA's textual coverage, the government has also sought to expand the statute's reach through conspiracy and complicity theories. Two recent decisions diverge on whether

164 Mike Koehler, The Foreign Corrupt Practices Act in a New Era 110 (2014); see Information 10–17, *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. 6 April 2011).

165 See Deferred Prosecution Agreement, *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. 6 Apr. 2011).

166 See Koehler, supra note 164, at 60–63.

167 15 U.S.C. § 78dd-3(a).

168 Tr. 7–10, *United States v. Patel*, No. 09-cr-335 (D.D.C. 12 August 2011), ECF No. 434.

169 Id.

170 Id. at 11, 29.

171 921 F. Supp. 2d 244 (S.D.N.Y. 2013).

172 Id. at 260, 262.

173 Id. at 262.

174 Id.

175 Id. at 263–64.

the government may so employ principles of secondary liability to reach individuals who would not otherwise be subject to the FCPA. In *United States v. Hoskins*,[176] prosecutors argued that the defendant, a foreign national employed by a French company who never entered the United States during the alleged scheme, was criminally liable for conspiring with and aiding and abetting employees of his company's US subsidiary in a scheme to bribe Indonesian officials.[177] The Second Circuit rejected that view. The court reasoned that the statute's text and legislative history evinced an affirmative legislative policy to limit liability to the categories of individuals and entities described therein; the government could not override that choice by charging individuals outside those categories under conspiracy or complicity theories.[178] In any event, wrote the court, the presumption against extraterritoriality limits the FCPA's extraterritoriality provisions to their terms, and '[t]he government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes'.[179] But a judge in the Northern District of Illinois expressly broke with *Hoskins* in *United States v. Firtash*,[180] concluding that Seventh Circuit precedent on conspiracy and accomplice liability commanded the opposite result.[181] The court permitted the government to proceed against two defendants, neither of whom belonged to 'the class of individuals capable of committing a substantive FCPA violation', on theories of secondary liability.[182]

At trial in *Hoskins*, the government proceeded on a theory that the defendant was an agent of a domestic concern and therefore among the class of persons subject to the FCPA. This was an aggressive theory because the defendant was employed by the French parent company, not its US subsidiary. The district court instructed the jury that an agency relationship requires the following: 'one, a manifestation by the principal that the agent will act for it; two, acceptance by the agent of the undertaking; and, three, an understanding between the agent and the principal that the principal will be in control of the undertaking'.[183] The jury convicted but the trial court set aside the FCPA counts of conviction on the basis that the government failed to prove the control prong of the agency test. The government has appealed this ruling.[184]

The statute does not by its terms extend to foreign subsidiaries of US issuers or domestic concerns. But the government's published guidance states its position that US parents may be held liable for the conduct of their

176 902 F.3d 69 (2d Cir. 2018).

177 Id. at 72–76.

178 Id. at 76–95.

179 Id. at 95–97.

180 392 F. Supp. 3d 872 (N.D. Ill. 2019).

181 Id. at *11–13.

182 Id.

183 Trial Tr. 1246–47, *United States v. Hoskins* (D. Conn. 6 Nov. 2019).

184 Jury Verdict, *United States v. Hoskins* (D. Conn. 8 Nov. 2019), ECF No. 583; *United States v. Hoskins* _ F. Supp 3d _ 2020 WL 914302 *7 (D. Conn. 26 Feb. 2020).

foreign subsidiaries 'under traditional agency principles'.[185] If the government determines that there exists an agency relationship between the parent and its subsidiary – based on such factors as 'the parent's control – including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction', it will view the parent as 'liable for bribery committed by the subsidiary's employees'.[186]

Sanctions 29.9

Starting in earnest in the aftermath of World War I, the United States has pursued its foreign policy goals through imposition of economic sanctions, namely 'the deliberate withdrawal of normal economic relations between [the US] and a target country, government, entity, or individual in order to coerce the target to modify its behavior in a manner consistent with' US policy goals.[187] The statutory basis for most modern sanctions programmes is the International Emergency Economic Powers Act of 1977,[188] which grants the executive broad economic regulatory authority to respond to threats against 'the national security, foreign policy, or economy of the United States'.[189] US sanctions are administered by the Treasury Department's Office of Foreign Assets Control (OFAC), which may impose civil penalties for non-compliance.[190] In addition, the DOJ may seek criminal penalties for wilful violations, including imprisonment and fines up to US$1 million.[191]

See Chapter 45 on sanctions

See Chapter 26 on fines, disgorgement, etc.

Sanctions programmes 'vary greatly in scope and objective'.[192] OFAC's 'country-based' programmes are aimed at governments, and its 'list-based programmes' are targeted at specific persons.[193] Under list-based programmes, designated entities and individuals are added to OFAC's Specially Designated Nationals and Blocked Persons List (SDN List), which is regularly updated and publicly accessible.[194] Once added to the list, '[t]heir assets are blocked and

185 FCPA Resource Guide, supra note 161, at 28.

186 Id.

187 Court E Golumbic and Robert S Ruff III, 'Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions', 38 *N.C. J. Int'l L. & Com. Reg.* 729, 731 (2013).

188 Pub. L. No. 95-223, 91 Stat. 1625 (1997), codified as amended at 50 U.S.C. §§ 1701–1707.

189 50 U.S.C. §§ 1701–1702.

190 Id. § 1705(b).

191 Id. § 1705(a), (c).

192 Golumbic and Ruff III, supra note 187, at 732; see id. at 770 (describing the operation of various programmes, from the Cuba programme's 'near total embargo on all goods and services' to programmes that 'are not tied to a geographic region, but instead target persons deemed to be engaged in' certain illicit activities).

193 Perry S. Bechky, Sanctions and the Blurred Boundaries of Int'l Economic Law, 83 *Mo. L. Rev.* 1, 4 (2018).

194 See OFAC, Specially Designated Nationals and Blocked Persons List (10 Nov. 2021), available at treasury.gov/ofac/downloads/sdnlist.pdf (last visited 10 November 2021). OFAC also maintains several non-SDN sanctions lists – collected in the Consolidated Sanctions List –

US persons are generally prohibited from dealing with them'[195] unless authorised by OFAC through a licence.[196]

The territorial reach of a given sanctions programme turns on the particular regulations that define its scope. Many prohibitions apply by their terms only to 'US persons',[197] a term that includes 'any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States'.[198] Such prohibitions therefore apply on the basis of both nationality (including the foreign branches of domestic entities) and territoriality (as to foreign nationals). They are broad enough to reach any transactions made using the US financial system – even transactions beginning and terminating abroad that simply pass through domestic correspondent banks (as US dollar-denominated transactions generally do).[199] Moreover, sanctions applicable to Iran and Cuba apply even more broadly, reaching all persons 'subject to the jurisdiction of the United States' – a category embracing (in addition to US citizens or residents, persons in the United States, and US entities) any organisation owned or controlled by a US citizen, resident or entity.[200]

Secondary sanctions, a feature of several US sanctions programmes, are a cousin to extraterritorial primary sanctions.[201] Like primary sanctions (i.e., compliance obligations, the violation of which is civilly or criminally

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including the Foreign Sanctions Evaders List and the Sectoral Sanctions Identifications List. See OFAC, List of Foreign Sanctions Evaders Sanctioned Pursuant to Executive Order 13608 (11 May 2021), available at https://www.treasury.gov/ofac/downloads/fse/fselist.pdf (last visited 10 November 2021) (including entities and individuals determined to have 'engag[ed] in conduct relating to the evasion of US economic and financial sanctions with respect to Iran or Syria'); OFAC, Sectoral Sanctions Identifications List (12 Mar. 2020), available at https://www.treasury.gov/ofac/downloads/ssi/ssilist.pdf (last visited 10 November 2021) (including 'persons determined by OFAC to be operating in' certain sectors of the Russian economy identified by the Secretary of the Treasury).

195 OFAC, Specially Designated Nationals and Blocked Persons List (SDN), available at https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last visited 10 November 2021).

196 See Golumbic and Ruff III, supra note 187, at 778 ('OFAC issues two types of licenses: (1) general licenses, which are made public and provide universal exemptions to a given set of sanctions, and (2) specific licenses, which are granted only upon application and authorize only the applicant to engage in a specific transaction or category of transaction.' (footnotes omitted)).

197 See, e.g., 31 C.F.R. § 542.206 (prohibiting new investment in Syria by a United States person).

198 See, e.g., 31 C.F.R. § 542.319 (defining the term for purposes of Syrian sanctions).

199 See *United States v. $1,071,251.44 of Funds Associated with Mingzheng Int'l Trading Ltd.*, 324 F. Supp. 3d 38, 43, 52 (D.D.C. 2018); *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 95 (D.D.C. 2017), reconsideration granted in part on other grounds sub nom. *United States v. All Assets Held at Bank Julius, Baer & Co., Ltd.*, 315 F. Supp. 3d 90 (D.D.C. 2018).

200 See 31 C.F.R. § 515.329 (Cuba); id. § 535.329 (Iran).

201 Bechky, supra note 193, at 9.

punishable) that apply extraterritorially, secondary sanctions apply to conduct occurring outside the United States.[202] But unlike primary sanctions, secondary sanctions are not enforced by fines or imprisonment. Instead, secondary sanctions threaten economic restrictions on a third-party country or its citizens for certain conduct, generally transacting with a target of primary sanctions.[203] For example, the Iran Sanctions Act, enacted in 1996 and amended several times since, 'mandated the imposition of specified sanctions against foreign firms that reached threshold levels of involvement with Iran's energy sector'.[204] Such secondary sanctions are not extraterritorial in the sense of extending US regulatory jurisdiction to foreign conduct – they are not backed by coercive measures like fines or imprisonment – but they can carry significant consequences for violators, and have at times been 'condemned as "extraterritorially" illegal' by US trading partners.[205]

Money laundering 29.10

The Money Laundering Control Act (MLCA) prohibits (among other conduct) engaging in a financial transaction involving the proceeds of 'specified unlawful activity', or transporting money into or from the United States, with intent to promote or conceal specified unlawful activity.[206] The term 'specified unlawful activity' embraces more than 250 predicate offences.[207] The government need only prove that the defendant intended to promote or conceal the specified unlawful conduct, not that he or she actually committed the predicate offence (or even had the capacity to do so).[208]

Section 1956 provides that:

> *There is extraterritorial jurisdiction over the conduct prohibited by this section if: (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.*[209]

202 See id.

203 See Jeffrey A Meyer, 'Second Thoughts on Secondary Sanctions', 30 *U. Pa. J. Int'l L.* 905, 926 (2009).

204 See *United States v. Amirnazmi*, 645 F.3d 564, 579 (3d Cir. 2011) (citing Iran Sanctions Act, Pub. L. No. 104-72, 110 Stat. 1541 (1996) (codified in part at 50 U.S.C. § 1701 (note)).

205 Meyer, supra note 203, at 929.

206 18 U.S.C. § 1956(a)(1), (2).

207 *United States v. Santos*, 553 U.S. 507, 516 (2008).

208 *United States v. Kozeny*, 493 F. Supp. 2d 693, 706 (S.D.N.Y. 2007), aff'd, 541 F.3d 166 (2d Cir. 2008) ('The elements of a money laundering offense do not include, or even implicate, the capacity to commit the underlying unlawful activity.').

209 18 U.S.C. § 1956(f).

This express provision overcomes the presumption against extraterritoriality.[210]

A number of courts have addressed the requirement (applicable only in cases in which the defendant is not a US citizen) that 'the conduct occurs in part in the United States'.[211] This requirement does not mean that the defendant must have been physically present in the United States.[212] Courts have held that, irrespective of the defendant's physical presence, 'a transfer from a foreign account to an account in a US financial institution and a transfer from a US account to a foreign financial institution occur in part in the United States under 18 USC Section 1956(f)'.[213] Fewer cases have addressed whether Section 1956(f) is satisfied by a transfer from one foreign bank to another that passes through a correspondent or intermediate bank in the United States.[214] On this issue, results have been mixed.[215]

Because the MLCA applies extraterritorially and does not require proof that the defendant engaged (or had the capacity to engage) in specified unlawful activity, prosecutors may use the statute to charge individuals otherwise beyond the reach of US criminal law. For example, foreign officials who take bribes are not subject to FCPA liability. But foreign officials have been prosecuted

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210 In *United States v. Ojedokun*, 2021 WL 4955239 (4th Cir. 26 Oct. 2021), the Fourth Circuit held that § 1956(f) 'overcomes the presumption against extraterritorial jurisdiction not only as applied to the substantive money laundering offenses, but also with respect to conspiracy offenses under § 1956(h).' Id. at *9.

211 18 U.S.C. § 1956(f)(1); see also *Ojedokun*, 2021 WL 4955239, at *11 (rejecting argument that defendant's conspiratorial conduct did not 'occur in part in the United States' and concluding that by 'making an agreement with at least one resident of the United States and engaging in a conspiracy extensively carried out in this country, he took part in a course of conduct relevant to the § 1956(h) charge that transpired within the United States, placing his actions squarely within the confines of § 1956(h)').

212 *United States v. Stein*, No. 93-cr-375, 1994 WL 285020, at *4–5 (E.D. La. 23 Jun. 1994).

213 *United States v. Firtash*, 392 F. Supp. 3d 872, 886 (N.D. Ill. 2019); see *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 93 (D.D.C. 2017), reconsideration granted in part on other grounds sub nom. *United States v. All Assets Held at Bank Julius, Baer & Co., Ltd.*, 315 F. Supp. 3d 90 (D.D.C. 23 April 2018) (collecting cases).

214 See *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d at 95 (characterising the issue as 'a question of first impression in this Court' that 'has not been considered widely').

215 Compare id. at 93–96 ('In this case, the United States alleges that Lazarenko and his associates transferred millions of dollars to and from accounts and between foreign bank accounts as [electronic funds transfers] that passed through US financial institutions. In the Court's view, this conduct is precisely what Congress intended to prevent in enacting the money laundering statutes – the use of US financial institutions as clearinghouses for criminal money laundering.'), and *United States v. Prevezon Holdings, Ltd.*, 251 F. Supp. 3d 684, 694 (S.D.N.Y. 10 May 2017) ('[T]he use of US correspondent banks to launder illegal proceeds qualifies as domestic conduct.'), with *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314, 324 n.4 (S.D.N.Y. 2009) (characterising a correspondent bank transfer as 'peripheral and transitory contact with the United States' that does not satisfy § 1956(f)); see also *Firtash*, 392 F. Supp. 3d 886–87 (avoiding the question).

under the money laundering statute for engaging in transactions to promote or conceal FCPA violations they are incapable of committing.[216]

Power to obtain evidence located overseas 29.11

Demands by US prosecutors and regulators for individuals and entities to produce evidence located abroad can lead to conflicts with foreign law. As the DOJ has recognised:

> *Every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders without authorization. Such efforts can constitute a violation of that nation's sovereignty or criminal law.*[217]

To mitigate against the potential for such conflict, US policy requires prosecutors to attempt to obtain evidence located abroad through mutual legal assistance treaties (MLATs) rather than unilateral compulsory process, such as grand jury and administrative subpoenas. To do otherwise requires prosecutors to obtain written permission from the DOJ's Office of International Affairs.[218] The United States has entered into MLATs with around 70 countries around the world.[219] MLATs enable US prosecutors to deploy foreign law enforcement authorities to gather evidence for US investigations using the power of foreign law to compel production. While MLATs are powerful evidence-gathering tools, the process can be cumbersome and time-consuming, therefore, US law permits prosecutors to obtain orders suspending the running of the limitation period for crimes under investigation for up to three years during the pendency of any MLAT request.[220]

Outside the MLAT process, US prosecutors often utilise *Bank of Nova Scotia* subpoenas to obtain financial records located overseas by serving subpoenas on US branches of foreign financial institutions.[221] These subpoenas have been

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216 See, e.g., *United States v. Duperval*, 777 F.3d 1324, 1328–31 (11th Cir. 2015) (former Haitian official found guilty of laundering the proceeds of 'schemes in which international companies gave him bribes in exchange for favors'); Plea Agreement 11–12, *United States v. Mikerin*, No. 14-cr-529-TDC (D. Md. 31 Aug. 2015) (former Russian official pleaded guilty to laundering proceeds of a bribery scheme).

217 DOJ, Justice Manual § 9-13.510.

218 Id. § 9-13.525

219 The United States has also entered into agreements that do not rise to the treaty level, mutual legal assistance agreements with China and the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States. In addition, the SEC has entered into memoranda of understanding that enable it to obtain evidence from foreign securities regulators. SEC, Cooperative Arrangements with Foreign Regulators, available at https://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.

220 18 U.S.C. § 3292.

221 *In re Grand Jury Proceeding*, 691 F.2d 1384 (11th Cir. 1982).

upheld by US courts even when compliance would require the subpoena recipient to violate foreign law.[222] Such was the case in *In Re: Sealed Case*, in which the DC Court of Appeals upheld civil contempt findings against three Chinese banks that had been served with subpoenas to produce records located in China, the production of which they maintained would violate Chinese law.[223] Two of the banks had US branches and were served with grand jury subpoenas. The third bank did not have a US branch and was served pursuant to a Patriot Act subpoena that gives prosecutors 'special investigatory tools when it comes to US correspondent bank accounts'.[224] The DOJ did not attempt to first gather the evidence sought pursuant to the mutual legal assistance agreement with China, arguing that any such attempt would be futile.[225] After conducting a comity analysis, the Court agreed and found that US interests outweighed the Chinese interests at issue.[226] The Court affirmed the contempt orders against all three banks.[227]

On 1 January 2021, the US Congress passed the Anti-Money Laundering Act of 2020 (AMLA) as part of the National Defense Authorization Act of 2021. This legislation dramatically expanded the government's subpoena power with respect to foreign banks that maintain correspondent accounts in the United States. In particular, the AMLA granted the Department of the Treasury and the DOJ authority to subpoena such foreign banks for records relating to any account at the bank, 'including records maintained outside of the United States', as long as the records are the subject of a federal criminal investigation, civil forfeiture action or certain other types of investigations.[228] Section 6308 also prohibits the foreign bank's employees, agents and attorneys from notifying account holders about the existence or contents of the subpoena.[229]

29.12 Conclusion

US authorities continue to investigate and bring cases based on conduct that largely takes place outside the United States. Practitioners should carefully analyse the conduct at issue and the elements of the applicable statutes to determine whether the conduct is outside the reach of US law.

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222 Id.

223 932 F.3d 915 (D.C. Cir. 2019).

224 Id. at 920; 31 U.S.C. § 5318(k)(3)(A).

225 932 F.3d at 936.

226 Id.

227 Id. at 940.

228 AMLA § 6308 (adding 31 U.S.C. § 5318(k)(3)(A)(i)). Prior to the enactment of the AMLA, the DOJ was authorised by Section 5318 of the Patriot Act to subpoena foreign banks for records maintained abroad, but only related to correspondent accounts in the United States.

229 AMLA § 6308 (adding 31 U.S.C. § 5318(k)(3)(C)).

Appendix 1

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ISBN 978-1-83862-272-5