

Federal District Court Expresses Skepticism That Dodd-Frank Extraterritorial Jurisdiction Provision Overturns Morrison in Government Enforcement Actions



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In a [memo](#) we wrote on the day the Dodd-Frank Act was signed into law, we discussed a provision in that law seemingly intended to render the Supreme Court's decision in [Morrison v. National Australia Bank](#) inapplicable to cases brought by the SEC or the Justice Department. We noted that this "extraterritorial jurisdiction" provision, [Section 929P\(b\)](#), contains a significant drafting error, one that likely makes it a practical nullity. Since then, much academic commentary has concurred in our view. Last week, a federal court comprehensively considered the provision for the first time, and likewise expressed doubt that it undoes Morrison. [SEC v. A Chicago Convention Center, LLC](#), No. 13 C 982 (N.D. Ill. Aug. 6, 2013).

In that decision, Judge Amy St. Eve of the United States District Court for the Northern District of Illinois addressed a motion to dismiss an SEC enforcement action that charged the defendants with having fraudulently induced Chinese nationals to invest in an Illinois company. The defendants argued that the transactions had taken place outside the United States, and that Morrison therefore required dismissal. The SEC, in opposition, invoked Section 929P(b) of Dodd-Frank and contended that Morrison did not apply.

Judge St. Eve found that the statute, as written, did not support the SEC. She explained that “Section 929P(b), on its face, merely addresses subject matter jurisdiction ... rather than the substantive reach of Section 10(b)” of the Securities Exchange Act. The difficulty for the SEC is that, as Morrison made clear with Section 10(b), the territorial scope of a regulatory provision is a “merits question” that goes to the law’s substantive reach, and not to the court’s subject-matter jurisdiction—the power to decide cases. Indeed, Morrison held that courts undoubtedly did have jurisdiction to decide whether Section 10(b) applied abroad. Accordingly, as our memo did three years ago, Judge St. Eve concluded that there is a “conflict between the language as drafted and Congress’s possible intent” to overturn Morrison.

Judge St. Eve’s analysis also cast serious doubt on the SEC’s efforts to overcome the clear language of the statute. The SEC argued that the court should not “interpret[] Section 929P(b) as purely jurisdictional based on its plain language,” because that “may render the entire provision superfluous.” The court, however, questioned the propriety of disregarding statutory language that “appears unambiguous on its face” merely “to avoid superfluity.” Nor did the court find convincing the SEC’s reliance on legislative history. “It is clear,” Judge St. Eve observed, “that legislative history does not permit a judge to turn a clear text on its head,” and that “it is beyond [the judiciary’s] province to rescue Congress from its drafting errors.”

In the end, Judge St. Eve managed to avoid ruling definitively on the effect of Section 929P(b): she found that, under Morrison, the SEC’s complaint sufficiently alleged that the defendants had engaged in securities transactions in the United States. Nonetheless, her thoughtful and thorough opinion underscores the serious difficulties that the SEC and the DOJ face in trying to use Section 929P(b) to get around Morrison.