NOTE

THE SECOND CIRCUIT'S EXTRATERRITORIAL APPLICATION OF THE COMMODITY EXCHANGE ACT

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In August 2019, the Second Circuit ruled in Prime International Trading, Ltd. v BP P.L.C. that plaintiffs bringing a private action under the Commodity Exchange Act (CEA) must plead a domestic transaction and domestic violative conduct. By requiring that plaintiffs plead domestic illegal conduct, Prime International's holding will severely limit plaintiffs' ability to seek damages in the United States, even when they trade entirely on U.S. markets. The high pleading bar imposed by Prime International is especially impactful given that trading commodities and futures contracts is more accessible than ever due to electronic platform-based trading, which allows traders to access U.S. and foreign markets with ease.

This Note argues that Prime International improperly narrowed the domestic application of CEA section 22, which grants plaintiffs a private right of action. Instead, courts should adopt the "sufficiently domestic" analysis from Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings. Under this suggested analysis, a plaintiff would need to allege that violative conduct impacted a domestic transaction to plead section 22. Additionally, the court would need to evaluate whether the claim is properly domestic or impermissibly foreign. Unlike the Prime International standard, domestic conduct would not be necessary—though it would likely satisfy the sufficiency analysis.

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I. INTRODUCTION

In the first half of 2019, global derivative markets saw

$640 trillion in trading activity.[1] Because the markets for commodities and commodity derivatives are so vast and interconnected, price changes ripple throughout U.S. and international markets. Indeed, in March 2020, U.S. markets' worst day in over a decade was attributable in part to a severe decline in Brent crude prices, which function as an international benchmark for global oil prices.[2] Yet, in the 2019 case *Prime International Trading, Ltd. v. BP P.L.C.*, the Second Circuit affirmed the dismissal of the plaintiffs' claims that the defendants had manipulated the Brent crude prices and benchmarks affecting their positions on U.S. markets.[3] In doing so, the Second Circuit prohibited plaintiffs from bringing suit under the Commodity Exchange Act (CEA) when the alleged violative conduct occurs abroad.[4] The holding that plaintiffs can only bring suit under the CEA when the plaintiffs' affected transaction *and* the alleged manipulative conduct are domestic[5] will severely limit plaintiffs' ability to seek damages in the United States, even when they trade entirely on U.S. markets. The high pleading bar imposed by *Prime International* is particularly impactful given that commodities and futures contracts are more accessible than ever due to electronic platform-based trading, which allows

[1] Valdis Dombrovskis & Heath Tarbert, *A New Pact Will Help Derivatives Markets*, WALL ST. J. (Sept. 16, 2020, 6:56 PM) https://www.wsj.com/articles/a-new-pact-will-help-derivatives-markets-11600297002?mod=opinion_lead_pos11 (on file with the Columbia Business Law Review).

[2] Rosie Perper, *Oil Is Down 21% After Its Biggest Drop in Decades Following Saudi Price Cuts That Sparked a Race to the Bottom with Russia*, BUS. INSIDER: MKTS. INSIDER (Mar. 8, 2020, 7:27 PM), https://markets.businessinsider.com/news/stocks/oil-price-crash-market-drop-global-price-war-futures-coronavirus-2020-3-1028974518 [https://perma.cc/YYH6-5BFE]; *see also* Petition for a Writ of Certiorari at *10, Atl. Trading USA, LLC v. BP P.L.C., 141 S. Ct. 113 (2020) (mem.) (No. 19-1141), *denying cert. to* 937 F.3d 94 (2d Cir. 2019), 2020 WL 1313359.

[3] Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 98–100 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[4] *See id.* at 105.

[5] *Id.*

traders to access U.S. and foreign markets with ease.[6]

This Note argues that the Second Circuit in *Prime International* improperly narrowed the domestic application of CEA section 22, which grants plaintiffs a private right of action,[7] and that courts should adopt the "sufficiently domestic" analysis from *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings*.[8] Part II introduces the CEA and commodities extraterritoriality law, much of which comes from securities cases. Next, Part III argues that the Second Circuit incorrectly applied *Parkcentral*'s sufficiency test to the CEA by creating a bright-line rule that requires both a domestic transaction and domestic conduct. Finally, Part IV suggests that the Second Circuit should apply *Parkcentral*'s sufficiency analysis to the CEA and offers an alternative standard that abrogates *Prime International* and is consistent with Supreme Court and Second Circuit case law.

II. BACKGROUND

A. Introduction to the Commodity Exchange Act

The CEA regulates commodity derivative markets and transactions. As defined by the CEA, "commodities" include financial instruments—such as currency and interest rates—in addition to physical commodities like agricultural products and natural resources.[9] A "derivative" is a financial instrument whose price "is directly dependent upon (i.e., '*derived* from') the value of" an underlying commodity.[10]

[6] David E. Kovel & Andrew M. McNeela, *The Commodities Exchange Act and the Presumption Against Extraterritoriality: An Examination of Transnational, Platform-Based Electronic Trading Under Second Circuit Precedent*, 18 J. INT'L BUS. & L. 147, 147 (2019).

[7] 7 U.S.C. § 25 (2018).

[8] 763 F.3d 198 (2d Cir. 2014) (per curiam).

[9] CFTC Glossary: "Co", U.S. COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/LearnAndProtect/EducationCenter/CFTCGlossary/glossary_co.html [https://perma.cc/K3PK-9B83] (last visited Feb. 11, 2021).

[10] CFTC Glossary: "D", COMMODITY FUTURES TRADING COMM'N (emphasis added),

Individuals and businesses use these markets to hedge risk and as "price discovery mechanism[s] that reflect[] the collective views of all market participants with regard to the future supply and demand prospects of a commodity."[11]

Early on, Congress recognized that commodity derivative markets were international in nature.[12] In the CEA's predecessor, the 1922 Grain Futures Act, Congress acknowledged that grain futures were "affected with a national public interest" in part because "the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining . . . prices."[13] In 1936, Congress passed the CEA, and for nearly 40 years, the commodities regulated by the Act grew to include a wide array of goods.[14]

In 1974, Congress overhauled the CEA and created the Commodity Futures Trading Commission (CFTC), greatly extending the scope of commodity futures regulation.[15] The CEA's definition of "commodity" was further expanded to preempt the need for iterative updates by including nearly

https://www.cftc.gov/LearnAndProtect/EducationCenter/CFTCGlossary/glossary_d.html [https://perma.cc/T9D6-H762].

[11] *Introduction to Commodities and Commodity Derivatives*, CFA INST., https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/introduction-commodities-commodity-derivatives [https://perma.cc/3C4D-VXY6].

[12] Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party at 7, Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94 (2d Cir. 2019) (No. 17-2233), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[13] Grain Futures Act of 1922, Pub. L. No. 67-331, § 3, 42 Stat. 998, 999 (codified as amended at 7 U.S.C. § 5(a) (2018)); *see also Introduction to Commodities and Commodity Derivatives*, *supra* note 11 ("[C]ommodity exchanges allow important parties beyond traditional suppliers and buyers . . . to participate in the[] price discovery and risk transfer processes.").

[14] *See* Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 7–8; *History of the CFTC*, U.S. COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html [https://perma.cc/UYT3-EERS] (last visited Feb. 14, 2021).

[15] *See* Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 8.

"'all' goods and articles, 'services, rights and interests.'"[16] This broad definition included foreign commodities such as "coffee, cocoa, copper, and foreign currency" futures.[17] Indeed, Congress stated that the foreign nature of a commodity matters little to domestic purchasers, sellers, and processors as well as "to U.S. consumers whose prices are affected by the futures market."[18] Congress further emphasized that all commodities, regardless of their origin, should be regulated "under a single regulatory umbrella."[19]

A recent study shows that risk in global commodities markets is increasingly connected.[20] Since the 2008 financial crisis, average connectedness has risen from fifteen percent to fifty percent.[21] Interconnectedness "serves as a conduit for contagion" and is recognized as an aspect of systemic risk.[22] When an interconnected entity fails, the "impact . . . can spread rapidly and extensively across the financial system, to the point where it can cause worldwide financial instability."[23] In commodities markets, for example, this means an increased dependence between food prices and international oil prices.[24] The current CEA's purpose is to serve the public interest in these markets through self-regulation and CFTC oversight.[25] Consequently, effective regulation by the CFTC

[16] *Id.* (quoting Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, sec. 201(b), § 2(a), 88 Stat. 1389, 1395 (codified as amended at 7 U.S.C. § 1a(9))).

[17] *Id.*

[18] *Id.* at 9 (internal quotation marks omitted) (quoting S. REP. NO. 93-1131, at 19 (1974)).

[19] *Id.* (internal quotation marks omitted) (quoting H.R. REP. NO. 93-975, at 41–42 (1974)).

[20] Dayong Zhang & David C. Broadstock, *Global Financial Crisis and Rising Connectedness in the International Commodity Markets*, INT'L REV. FIN. ANALYSIS, 2020, at 1, 10.

[21] *Id.*

[22] DTCC, UNDERSTANDING INTERCONNECTEDNESS RISKS TO BUILD A MORE RESILIENT FINANCIAL SYSTEM 4 (2015), https://www.dtcc.com/~/media/Files/Downloads/WhitePapers/InterconnectednessWP-101815.pdf?la=en [https://perma.cc/23C8-SSQX].

[23] *Id.*

[24] Zhang & Broadstock, *supra* note 20, at 10.

[25] 7 U.S.C. § 5(b) (2018).

includes "global oversight" and the cooperation of regulators.[26] Thus, to achieve the CEA's purpose, the global interconnectedness of commodities markets necessitates that the CEA's anti-fraud provisions reach some international conduct that affects U.S. markets and market participants.

B. *Morrison v. National Australia Bank* and the Presumption Against Extraterritoriality

Because of the similarities between commodities and securities anti-fraud statutes,[27] the relevant commodities extraterritoriality jurisprudence originates in securities law. In particular, the 2010 Supreme Court case *Morrison v. National Australia Bank*, which established a new test for whether federal law and section 10(b) of the Securities Exchange Act (SEA)[28] apply extraterritorially or domestically, is the foundation of commodities extraterritoriality caselaw.[29]

[26] Heath P. Tarbert, Chairman, Commodity Futures Trading Comm'n, Remarks to the 36th Annual FIA Expo 2020 (Nov. 10, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbetstatement111020 [https://perma.cc/X7V2-A7AR].

[27] For example, CEA section 6(c)(1) is based closely on section 10(b) of the Securities Exchange Act. *Compare* 7 U.S.C. § 9(1) ("It shall be unlawful for any person . . . 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, in contravention [of CFTC rules.]"), *with* 15 U.S.C. § 78j(b) (2018) ("It shall be unlawful for any person . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention [of SEC rules.]"). *See also* CFTC v. Monex Credit Co., 931 F.3d 966, 976 (9th Cir. 2019) ("CEA [section 6(c)(1)] is a mirror image of § 10(b) of the Securities Exchange Act . . . . We presume that by copying § 10(b)'s language and pasting it in the CEA, Congress adopted § 10(b)'s judicial interpretations as well.").

[28] 15 U.S.C. § 78j(b). Section 10(b) of the 1934 Act is the securities law's general anti-fraud statute. It prohibits using any manipulative or deceptive device in connection with the purchase or sale of a security or security swap in contravention of rules and regulations prescribed by the SEC. *Id.*

[29] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).

Thus, it is helpful to consider *Morrison* and its securities law progeny before turning to the CEA.

Prior to *Morrison*, the Second Circuit relied on the "conduct" and "effects" tests to determine when a plaintiff's claim was within SEA section 10(b)'s reach.[30] The Second Circuit reasoned that when the SEA was silent on the extraterritorial application of a statutory provision, it was the court's role to "discern" whether Congress would have wanted the statute to apply.[31] To guide this analysis, the Second Circuit created the "conduct" and "effects" tests, under which a 10(b) claim could be premised on "a substantial *effect* in the United States or upon United States citizens" or on "wrongful *conduct*" in the United States.[32] In practice, the test was difficult to administer and unpredictable in application.[33]

The Supreme Court in *Morrison* critiqued the "conduct" and "effects" tests for lacking clarity and textual basis.[34] To guide the extraterritorial analysis of all federal law claims, the Court replaced the Second Circuit's test with a two-pronged textual framework to determine whether a statute reaches a plaintiff's claim.[35] The first part of the *Morrison* framework is the presumption against extraterritoriality. Under this prong, a statute is presumed only to apply domestically, unless "'the affirmative intention of the Congress [is] clearly expressed' to give a statute extraterritorial effect."[36] When a statute does not rebut the presumption against extraterritoriality, thus failing the first

[30] *Id.* at 257 (internal quotation marks omitted) (quoting SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003), *abrogated by Morrison*, 561 U.S. 247).

[31] *Id.* (internal quotation marks omitted) (quoting Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 170 (2d Cir. 2008), *aff'd on other grounds*, 561 U.S. 247).

[32] *Id.* (emphasis added) (quoting *Berger*, 322 F.3d at 192–93).

[33] *Id.* at 258.

[34] *Id.* at 258, 260–61.

[35] *Id.* at 262, 266.

[36] *Id.* at 255 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 264 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 109(a), § 701(f), 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2018))).

step, a plaintiff can seek the domestic application of the statute under *Morrison*'s second step. Under this prong, the Court instructed judges to examine whether the statute's focus targets the alleged conduct to determine whether domestic application of the statute is permissible.[37] The presumption against extraterritoriality and domestic application framework generally applies to federal statutes, though how the *Morrison* Court applies the framework to SEA section 10(b) is particularly instructive for the CEA.

First, the Supreme Court found "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," and concluded that section 10(b) did not rebut the presumption against extraterritoriality.[38] In holding that section 10(b) does not apply extraterritorially, the Court rejected several arguments which indicated that the SEA considered some elements of foreignness. For example, the Court stated that the statute's "general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality."[39] Nor were "possible interpretations of statutory language" or "uncertain indications" sufficient.[40] Instead, the Court emphasized that "a clear statement of extraterritorial effect" is required to rebut the presumption.[41]

Under the domestic application prong, the Court noted that SEA section 10(b) only punishes deceptive conduct in connection with securities transactions.[42] Accordingly, the Court found that section 10(b)'s focus is on the "purchase[] and sale[] of securities in the United States."[43] Therefore, the Court concluded that section 10(b) only reaches "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[44] Because the case at hand

[37] *Id.* at 266.
[38] *Id.* at 265.
[39] *Id.* at 263.
[40] *Id.* at 264–65.
[41] *Id.* at 265.
[42] *Id.* at 266.
[43] *Id.*
[44] *Id.* at 267.

did not involve a security listed on a domestic exchange, and the purchases occurred outside the United States, the Court dismissed the plaintiffs' section 10(b) claims as impermissibly extraterritorial and thus outside the reach of the statute.[45] The Court bolstered its conclusion by looking to the text of the entire Exchange Act, which the Court determined focuses on domestic exchanges and transactions.[46]

C. The Ninth and Second Circuits Disagree Whether Domestic Transaction Is Sufficient To Satisfy *Morrison's* Transactional Test

Although *Morrison* aimed to clarify the extraterritorial scope of securities regulation, there is a circuit split on what constitutes a domestic application of SEA section 10(b). Specifically, the Ninth and Second Circuits disagree on whether a domestic transaction is sufficient to allege a domestic application of Rule 10b-5.[47] To be within 10b-5's reach, the Second Circuit has ruled that the conduct could not be "so predominantly foreign as to be impermissibly extraterritorial."[48] In contrast, the Ninth Circuit has rejected the "predominantly foreign" gloss and has held that a domestic transaction is sufficient to allege a violation of 10b-5.[49]

1. The Second Circuit's Sufficiency Test in *Parkcentral Global Hub Ltd. v. Porsche*

[45] *Id.* at 273.

[46] *Id.* at 267–69.

[47] Section 10(b) grants the SEC the power to prescribe anti-manipulation and anti-deception regulation "as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j (2018). Promulgated under Section 10, Rule 10b-5, 17 C.F.R. § 240.10b-5 (2020), is the SEC's implementing regulation and specifies the statute's reach. *See* Jay B. Kasner & Mollie M. Kornreich, *Section 10(b) Litigation: The Current Landscape*, BUS. L. TODAY, Oct. 2014, at 1, 1.

[48] Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 216 (2d Cir. 2014) (per curiam).

[49] Stoyas v. Toshiba Corp., 896 F.3d 933, 949–50 (9th Cir. 2018).

Automobile

In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings*, the Second Circuit found that a domestic transaction is necessary, but not sufficient, to state a claim under section 10(b).[50] The *Parkcentral* plaintiffs, some thirty international hedge funds with short positions in Volkswagen (VW) security-based swaps in U.S. markets, alleged that Porsche fraudulently concealed its planned acquisition of VW to manipulate the company's stock price in violation of section 10(b).[51] When Porsche ultimately revealed the acquisition, VW stock skyrocketed, and the plaintiffs' swaps suffered huge losses.[52]

The Second Circuit found that because the swaps' underlying security was foreign and the defendants traded on a foreign market and were not privy to the swap agreement, the plaintiffs' claims were impermissibly foreign, and, thus, not a valid claim.[53] The court declined to apply *Morrison*'s transactional test, stating that a domestic transaction is necessary but not sufficient to plead a violation of section 10(b).[54] Therefore, the court identified a carveout to *Morrison*'s transactional test (the "impermissibly foreign" carveout or gloss). It is important to note, however, that the Second Circuit emphasized that its conclusion could not "be perfunctorily applied to other cases based on the perceived similarity of a few facts," nor did the court "purport to proffer a test that will reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial."[55] Thus, the Second Circuit cabined the holding of *Parkcentral* and stressed that the sufficiency analysis is highly fact-dependent.

2. The Ninth Circuit Rejects *Parkcentral's*

[50] *Parkcentral*, 763 F.3d at 215.
[51] *Id.* at 203.
[52] *Id.* at 205.
[53] *Id.* at 216.
[54] *Id.*
[55] *Id.* at 217.

Sufficiency Test

In *Stoyas v. Toshiba Corp.*, the Ninth Circuit rejected *Parkcentral*'s "impermissibly foreign" carveout and found that alleging a domestic transaction was sufficient to satisfy *Morrison*'s transactional test.[56] Following Toshiba's admission of accounting fraud and restatements of pre-tax profits, plaintiffs brought a securities fraud class action suit against Toshiba and several of its executives.[57] The plaintiffs did not own Toshiba stock, which trades on the Tokyo Stock Exchange, but owned American depository receipts (ADRs) pegged to Toshiba stock.[58]

Toshiba urged that the court should dismiss plaintiffs' section 10(b) claim because they "did not allege any connection between Toshiba and the Toshiba ADR transactions."[59] The Ninth Circuit flatly rejected this argument, stating that *Morrison* and section 10(b) compel examining the transaction's location and that "it does not matter that a foreign entity was not engaged in the transaction."[60] The court differentiated between when section 10(b) applies, which requires a domestic transaction, and whether Toshiba would ultimately be found in violation of the statute and therefore

[56] Stoyas v. Toshiba Corp., 896 F.3d 933, 949–50 (9th Cir. 2018).

[57] *Id.* at 937.

[58] *Id.* at 937–38. "ADRs 'allow U.S. investors to invest in non-U.S. companies and give non-U.S. companies easier access to U.S. capital markets.'" *Id.* at 940 (quoting OFF. OF INV. EDUC. & ADVOC., SEC, INVESTOR BULLETIN: AMERICAN DEPOSITARY RECEIPTS 1 (2012), https://www.sec.gosv/investor/alerts/adr-bulletin.pdf [https://perma.cc/38G9-CEUN]). Practically, ADRs share many similarities with securities of a company, including voting rights, but they do not represent the legal title of shares. *Id.* at 940–42. Instead, ADRs represent a beneficial interest in a specific number of shares that are held by the U.S. depositary institution. *Id.* at 940. The Toshiba ADRs at issue were unsponsored, meaning that the depositary institution could issue ADRs to U.S. investors without Toshiba's participation "and possibly without its acquiescence." *Id.* at 941 (citing American Depositary Receipts, 56 Fed. Reg. 24,420, 24,422 (May 30, 1991)).

[59] *Id.* at 949.

[60] *Id.*

liable for the plaintiffs' loss.[61]

Additionally, the Ninth Circuit explicitly stated that it would not follow *Parkcentral* "because [the decision] is contrary to Section 10(b) and *Morrison* itself."[62] First, the court stated that *Parkcentral*'s predominantly foreign carveout is contrary to the broad language of Section 10(b), which encompasses "the domestic 'purchase or sale of *any* security registered on a national securities exchange or *any* securities not so registered.'"[63] Moreover, the court critiqued *Parkcentral* as speculating about congressional intent and creating an "open-ended, under-defined multifactor test"—the type of test *Morrison* explicitly rebuffed.[64] The court then reiterated that whether there was a connection between the alleged violative conduct and the purchase or sale of a security was a question on the merits, not about extraterritoriality.[65]

D. The Second Circuit's Application of *Morrison* and *Parkcentral* to the CEA

The Second Circuit has applied both *Morrison* and *Parkcentral* to the CEA. Specifically, in analyzing CEA section 22, the court has adopted *Morrison*'s presumption against extraterritoriality and transaction test and, in *Prime International Trading, Ltd. v. BP P.L.C*, recently has applied *Parkcentral*'s "impermissibly foreign" gloss.[66]

Section 22 grants an express private cause of action against defendants who violate certain provisions of the CEA.[67] Relevant to the analysis at hand, section 22 allows plaintiffs to recover actual damages where a defendant manipulates the price of a "contract or swap or the price of the commodity underlying such contract or swap," or uses a manipulative device "in connection with a swap, or a contract

[61] *Id.*

[62] *Id.* at 950.

[63] *Id.* (quoting 15 U.S.C. § 78j(b)).

[64] *Id.*

[65] *See id.* at 950–51.

[66] Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 104–05 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[67] 7 U.S.C. § 25 (2018).

of sale of a commodity, in interstate commerce, or for future delivery."[68] Thus, a plaintiff who engaged in a swap of a commodities future or options contract and who suffered harm as the result of manipulation can sue a defendant for violating the CEA's anti-manipulation statutes—sections 9(a)(2) and 6(c)(1).[69]

CEA section 6(c)(1) prohibits using or attempting to use any manipulative or deceptive device or contrivance "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."[70] CEA section 6(c)(1)(A) specifies that unlawful manipulation includes communicating a false, misleading, or inaccurate report concerning "conditions that affect . . . the price of any commodity in interstate commerce."[71] CEA section 9(a)(2) prohibits manipulation of "the price" of the products contained in section 6(c)(1)'s categories, cornering the market of a commodity in interstate commerce, and false or misleading reporting.[72]

The plaintiffs in *Prime International* traded futures and derivative contracts pegged to Brent crude oil on the New York Mercantile Exchange (NYMEX) and the Intercontinental Exchange Futures Europe (ICE Futures Europe).[73] The defendants were entities that "produc[ed], refin[ed], and distribut[ed] Brent crude," in addition to trading Brent crude on the physical and derivative markets.[74] The plaintiffs alleged that the defendants engaged in artificial trades of physical Brent crude to manipulate the physical and futures Brent crude markets, causing the plaintiffs financial

[68] *Id.* § 25(a)(1)(D).

[69] *See Prime Int'l*, 937 F.3d at 101. The Second Circuit does not recognize a right to sue for alleged manipulation that transpired extraterritorially. *Id.* at 101–03.

[70] 7 U.S.C. § 9(1).

[71] *Id.* § 9(1)(A).

[72] *Id.* § 13(a)(2).

[73] *Prime Int'l*, 947 F.3d. at 98.

[74] *Id.* at 98–99.

losses.[75]

However, the plaintiffs did not claim that the defendants directly engaged in manipulative transactions on ICE Futures Europe or NYMEX.[76] Instead, the defendants allegedly manipulated over-the-counter physical transactions in foreign markets, "initiat[ing] a chain of events that caused ripple effects across global commodities markets."[77] This, the plaintiffs asserted, affected Brent futures prices on NYMEX and ICE Futures Europe to their detriment.[78]

The Second Circuit reasoned that the "text and structure of Section 22" and the presumption against extraterritoriality compelled applying *Parkcentral* to *Prime International*.[79] First, the court noted that section 22 requires the violation of a substantive CEA provision, and the underlying anti-fraud statutes at issue, CEA sections 6(c)(1) and 9(a)(2), "apply only to *domestic* conduct, and not to foreign conduct."[80] Therefore, as with *Parkcentral*'s application to the SEA, while a domestic transaction is necessary to fall under section 22, it is not sufficient. Rather, the structure of the CEA also requires plaintiffs to allege domestic conduct, such as manipulation, under sections 6(c)(1) or 9(a)(2).[81]

The Second Circuit then explained how the presumption against extraterritoriality suggested that *Parkcentral* should be applied to *Prime International*. The court emphasized that allowing plaintiffs to bring claims merely based on a foreign transaction is insufficient to rebut the presumption against extraterritoriality and could result in conflicts between U.S. and foreign laws.[82] Applying *Parkcentral*, the court found that plaintiffs' claims were "impermissibly extraterritorial" because they did not allege any violative domestic conduct.[83]

[75] *Id.* at 100.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 105–06.
[80] *Id.* at 105.
[81] *See id.*
[82] *Id.* at 106.
[83] *Id.* at 105–07.

Lower courts have subsequently read *Prime International* as requiring violative domestic conduct, in addition to a domestic transaction, to allege a violation of section 22. For example, in *In re Platinum & Palladium Antitrust Litigation*, the Southern District of New York stated that *Prime International* requires the court to "assess whether Plaintiffs' CEA claims are predominantly foreign."[84] Furthermore, where the plaintiff alleges a domestic transaction, *Prime International* directs the court to "focus . . . where the allegedly unlawful manipulation occurred."[85] In *Laydon v. Mizuho Bank, Ltd.*, the Southern District again arrived at a similar result, finding that because the defendants' alleged violative conduct was "almost entirely foreign," the plaintiffs' claim was "impermissibly extraterritorial."[86]

III. THE SECOND CIRCUIT IMPROPERLY LIMITED THE EXTRATERRITORIAL REACH OF THE CEA IN *PRIME INTERNATIONAL*

Prime International's holding, that plaintiffs can only bring suit under the CEA when the alleged transaction and manipulative conduct are domestic, constrains U.S. plaintiffs' ability to seek damages. The high pleading bar is particularly demanding because U.S. commodities and commodity derivatives markets are widely available outside the United States.[87] Beyond this concern, *Prime International* is problematic because it improperly limits the scope of the CEA's extraterritorial application. First, *Prime International* is contrary to *Morrison* and *Parkcentral*. Second, *Prime International*'s version of the "impermissibly foreign" carveout contravenes the CEA's purpose of protecting market integrity and market participants. Third, *Prime International* and its line of cases wrongly constrain the CFTC's enforcement

[84] *In re* Platinum & Palladium Antitrust Litig., 449 F. Supp. 3d 290, 331 (S.D.N.Y. 2020).

[85] *Id.*

[86] Laydon v. Mizuho Bank, No. 12 Civ. 3419, 2020 WL 5077186, at *2 (S.D.N.Y. Aug. 27, 2020).

[87] *See* Kovel & McNeela, *supra* note 6, at 147.

capabilities.

A. *Prime International* Is Inconsistent with *Parkcentral* and *Morrison*

1. *Prime International* Misapplied *Parkcentral*'s "Impermissibly Foreign" Gloss

Prime International purports to adopt *Parkcentral*'s rule, but the court's bright-line domestic conduct requirement is not supported by *Parkcentral*'s qualified and fact-dependent holding. *Prime International* presented the question of whether *Parkcentral*'s conclusion "that 'a domestic transaction or listing is *necessary*' but 'not alone sufficient' to state a claim under Section 10(b)" applies to the CEA.[88] The Second Circuit answered this question affirmatively, noting "that courts 'have looked to the securities laws' when . . . 'interpret[ing] similar provisions of the CEA.'"[89] However, *Prime International* did not merely adopt *Parkcentral*'s holding but also significantly broadened it.

In *Parkcentral*, the Second Circuit held that the defendants' conduct was "so predominantly German" that the plaintiffs' claim could not be "consistent with the presumption against extraterritoriality."[90] The *Parkcentral* court did not offer any rule besides stating that a domestic transaction, while necessary to state a section 10(b) claim, may not be sufficient. Indeed, the court cautioned that

> [i]n a world of easy and rapid transnational communication and financial innovation, transactions in novel financial instruments . . . can come in innumerable forms of which we are unaware and which we cannot possibly foresee. We do not purport to proffer a test that will reliably determine when a

[88] *Prime Int'l*, 937 F.3d at 105 (quoting Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 215–16 (2d Cir. 2014)).

[89] *Id.* at 106 (quoting Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2d. Cir. 2014)). Recall that *Parkcentral* concerned interpretation of securities law. *Parkcentral*, 763 F.3d at 209.

[90] *Parkcentral*, 763 F.3d at 216.

> particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial.[91]

In addition to declining to establish a test, the *Parkcentral* court emphasized that its decision was highly dependent on the facts before the court and that its holding could not "be perfunctorily applied to other cases."[92]

In applying *Parkcentral* to the CEA, however, the Second Circuit created a bright-line and generally applicable test for section 22 claims. *Parkcentral* guided courts to pay "careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law."[93] Nonetheless, in *Prime International*, the Second Circuit developed a test whose factual inquiry is limited to two bright-line requirements. A plaintiff must allege (1) a domestic transaction and (2) domestic violative conduct to plead a permissible domestic application of the CEA.[94] In contrast to *Parkcentral*'s fact-dependent analysis, the court in *Prime International* identified and relied on the geographic locations of transactions and violative conduct and instructed other courts to do the same without further inquiry into the manipulative scheme, type of financial instrument, parallel enforcement actions, or comity concerns.[95] Therefore, *Prime International*'s strict and generally applicable test is not aligned with *Parkcentral*'s narrow and fact-intensive sufficiency test.

2. *Prime International*'s Domestic Conduct Is Contrary to *Morrison*'s Domestic Application

[91] *Id.* at 217.

[92] *Id.*

[93] *Id.*

[94] *Prime Int'l*, 937 F.3d at 105.

[95] *Compare id.* ("[T]he conduct regulating provisions of the CEA . . . apply only to *domestic* conduct, and not to foreign conduct."), *with Parkcentral*, 763 F.3d at 217 ("[C]ourts must carefully make their way with careful attention to the facts of each case[.]").

Test

The Second Circuit's analysis in *Prime International* incorrectly interpreted the sections at issue in the CEA, and therefore is contrary to *Morrison*'s domestic application test. The *Prime International* court stated that the focuses of CEA sections 6(c)(1) and 9(a)(2) are the prevention of manipulation in commodities markets and of the price of any commodity, respectively.[96] According to the *Prime International* court, it follows that the domestic application of sections 6(c)(1) and 9(a)(2) requires "manipulative conduct or statements made in the United States."[97] This requirement for domestic conduct is unsound. Both the statutory text of the provisions at issue and the CEA as a whole support the conclusion that, similar to SEA section 10(b), the focuses of CEA sections 6(c)(1) and 9(a)(2) are on domestic transactions, not domestic conduct.

When analyzing the domestic application of a statute, the Supreme Court instructs lower courts to consider the "'conduct' . . . [a] statute 'seeks to regulate,' as well as 'the parties and interests it seeks to protect or vindicate.'"[98] A court considers both the statute's text[99] and how "the statutory provision at issue works in tandem with other provisions."[100] Neither the text of the statutes at issue in *Prime International* nor other provisions of the CEA focus on domestic conduct.[101] Rather, they are concerned with protecting U.S. markets and vindicating U.S. market participants' rights.[102]

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[96] *Prime Int'l*, 937 F.3d at 107–08.

[97] *Id.* at 108.

[98] *See id.* at 104 (quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018)); Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266–70 (2010).

[99] *See Morrison*, 561 U.S. at 266–70 (analyzing the text of the Exchange Act to determine its focus).

[100] *WesternGeco*, 138 S. Ct. at 2137.

[101] *E.g.*, *Prime Int'l*, 937 F.3d at 107 ("There is nothing in Section 6(c)(1)'s text suggesting that it is focused on [domestic transactions].").

[102] *Id.* ("[T]he CEA . . . suggests that the focus is on rooting out manipulation and ensuring market integrity—not on the geographical coordinates of the transaction.").

Indeed, the congressional focus of CEA sections 6(c)(1) and 9(a)(2) is on domestic transactions, not domestic conduct. Section 6(c)(1) prohibits using "in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery . . . any manipulative or deceptive device."[103] Thus, the statute's focus is on manipulation *in connection with* a transaction specified by the provision. Similarly, section 9(a)(2) forbids manipulating the price of "any commodity in interstate commerce, or for future delivery . . . or of any swap, or . . . corner[ing] or attempt[ing] to corner any such commodity."[104] While this statute does not explicitly require a transaction, when read in tandem with the CEA's purpose, it is clear that the statute's focus is "to ensure the financial integrity of all transactions"[105] by prohibiting the manipulation of prices. Consequently, the focus of both provisions, as expressed by the text of the statute, is to prevent the manipulation of domestic transactions.

In contrast, the Second Circuit held that because sections 6(c)(1) and 9(a)(2) do not mention the "purchase or sale" of commodities or a "national securities exchange," unlike SEA 10(b), *Morrison*'s transactional test does not control the CEA's anti-fraud and anti-manipulation statutes.[106] This analysis is flawed. First, the text of the statutes, as discussed above, centers around manipulation in connection with a transaction, especially when read in light of the CEA's purpose. Second, the Second Circuit confused "national securities exchange" with the CEA's equivalent "registered entity," which generally refers to contract markets, derivative clearing organizations, swap execution facilities, and electronic trading facilities.[107] And since section 6(c)(1) prohibits manipulative devices and price manipulation "in connection with . . . any commodity . . . for future delivery on

[103] 7 U.S.C. § 9(1) (2018).

[104] *Id.* § 13(a)(2).

[105] *Id.* § 5(b).

[106] *Prime Int'l*, 937 F.3d at 107 (internal quotation marks omitted) (first quoting Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266 (2010); and then quoting 15 U.S.C. § 78j(b)).

[107] *See* 7 U.S.C. § 1a(40).

or subject to the rules of any registered entity,"[108] its focus is likewise on domestic transactions. Thus, by not considering the provisions at issue in context, the Second Circuit incorrectly assumed that Congress's intent in writing sections 6(c)(1) and 9(a)(2) was to regulate manipulative conduct and not manipulative conduct *in connection with* a transaction.

Generally, the CEA's purpose is to maintain the integrity of U.S. commodities and commodity derivatives markets and protect participants in those markets. The CEA is a remedial statute that seeks to protect the public interest by "deter[ring] and prevent[ing] price manipulation [and] any other disruptions to market integrity" and protecting market participants.[109] In writing the CEA, Congress found that the transactions subject to the statute "are entered into regularly in *interstate and international* commerce and are affected with a national public interest."[110] Indeed, since the first commodity regulations, Congress has recognized the need for law to reach foreign commodities and conduct when they affect prices on U.S. markets.[111]

The CEA, and specifically sections 6(c)(1) and 9(a)(2), seeks to regulate conduct that affects domestic markets and market participants. Therefore, the Second Circuit should have applied the *Morrison* transactional test in *Prime International* and should not have created an additional domestic conduct requirement. By doing so, the court wrongly foreclosed valid manipulation claims from being heard in court. A brief written by the CFTC explains the problem clearly:

> [I]magine a scenario in which traders in Turkey establish positions in Black Sea Wheat contracts on CME, under which the foreign wheat is deliverable only in Romania, Russia, and Ukraine. This group can also control or disrupt a significant portion of the physical supply of wheat. They do so with the intent to distort the price of the Black Sea Wheat contract,

[108] *Id.* § 9(1).
[109] *Id.* § 5(b).
[110] *Id.* § 5(a) (emphasis added).
[111] *See supra* Section II.A.

> and they are successful. This wrongdoing causes injury to other traders on CME, in Chicago. On that clean set of facts, there is no question that the overseas traders in the foreign commodity triggered all elements of manipulation, including for private damages. The target of the wrongdoing was in the United States, the CFTC would pursue those wrongdoers, and the Court in *Morrison* could not have intended to prevent that.[112]

In other words, *Morrison* could not have intended to prevent a private party from suing a party who intentionally manipulated the price of a commodity in interstate commerce or traded on a registered entity.[113] Yet under *Prime International*, if a party engages in such manipulation from outside the United States, they are not within the reach of the statute.[114] Not only does *Prime International*'s reading of the CEA's anti-fraud and anti-manipulation statutes conflict with the language and purpose of the CEA, but giving this meaning to the presumption against extraterritoriality would reduce the CEA to a "craven watchdog" of domestic markets.[115]

B. Requiring Domestic Conduct Runs Contrary Purpose of the CEA

The Second Circuit's strict requirement of domestic conduct runs contrary to Congress's intent to protect U.S. commodities and derivatives markets from foreign interference. From the first commodities regulations to the modern CEA, Congress has sought to protect domestic commodity and derivative markets regardless of the

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[112] Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 24.

[113] *Id.*

[114] Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 108 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[115] *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266 (2010) (warning that the presumption against extraterritoriality should not "be a craven watchdog").

commodity's foreignness.[116] Indeed, Congress acknowledged that U.S. market participants and consumers whose prices are impacted by futures markets care little about the underlying commodities' origins.[117]

1. Congress Has Recognized the Global Nature of Modern Derivatives in CEA Section 2(i) and the Reauthorization Act

With the development of complex derivative trading, Congress recognized that U.S. markets are affected by a wide range of foreign conduct. In the wake of the 2008 financial crisis, Congress passed several cross-border swap regulations as part of the Dodd-Frank Act (Dodd-Frank).[118] Congress found these CEA provisions necessary to "reduce systematic risk, increase transparency, and promote market integrity" given the global nature of swaps.[119]

Additionally, Dodd-Frank amended the CEA by adding section 2(i) to strengthen the CEA's reach over foreign swaps.[120] Section 2(i) specifies that the CEA's swap provisions apply to activities outside the United States with either "(1) [a] direct and significant effect on U.S. commerce; or in the alternative, (2) a direct and significant connection with activities in U.S. commerce."[121] The purpose of this provision is to create a "comprehensive scheme of risk regulation" and address risk created by "interconnections in the swap

[116] *See* Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 7–8.

[117] *Id.* at 9.

[118] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 714, 752, 124 Stat. 1376, 1647, 1749–50 (codified at 15 U.S.C. §§ 8303, 8325 (2018)).

[119] *See* Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56,924, 56,925 (Sept. 14, 2020) (to be codified at 17 C.F.R. pt. 23).

[120] Dodd-Frank Wall Street Reform and Consumer Protection Act § 722(d), 124 Stat. at 1673.

[121] Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. at 56,929.

market."[122] It allows the CFTC to enforce swap provisions with "the requisite connection with activities in U.S. commerce, regardless of whether a 'harmful domestic effect' has occurred."[123]

For now, section 2(i)'s reach is limited to swaps. However, the CFTC Reauthorization Act of 2019 (Reauthorization Act) includes a provision which, had it passed, would have extended the CFTC's fraud and manipulation enforcement capabilities to foreign activities with "a reasonably foreseeable substantial effect within the United States."[124] The House Committee on Agriculture's Report on the Reauthorization Act cites *Prime International* as the impetus for this provision.[125] The report opines that "[t]he [c]ourt's ruling opens the possibility that would-be fraudsters or manipulators of commodity markets within the United States would seek safe havens from—and assert challenges to—the CFTC's enforcement authority by conducting their manipulative or fraudulent activities outside the territory of the United States."[126] Thus, the Committee on Agriculture was aware that financial derivatives other than swaps are global in nature, can affect U.S. markets, and should be regulated as such. Although this bill failed to make it out of the House of Representatives, it nevertheless showed congressional concern regarding the implications of *Prime International*. This Section proceeds to explain how *Prime International* is inconsistent with the purpose of the CEA even without revision.

2. *Prime International* Is Inconsistent with Congress's Stated Purpose for the CEA

Prime International suggests that a private party who brings a claim under section 2(i) would easily rebut the

[122] *Id.*

[123] *Id.*

[124] CFTC Reauthorization Act of 2019, H.R. 4895, 116th Cong. § 112 (2019).

[125] H.R. REP. NO. 116-313, at 28 (2019).

[126] *Id.*

presumption against extraterritoriality because the swap provision contains a "clear statement of extraterritorial" application.[127] Yet, if we accept this statement and the court's requirement of domestic conduct and a domestic transaction to plead a domestic application of sections 6(c)(1) and 9(a),[128] the results would be arbitrary and absurd. Under this formulation, a plaintiff who alleges a direct and significant relation with or effect on U.S. commerce in connection with *swaps* would immediately rebut the presumption against extraterritoriality—no domestic conduct or transaction required. However, a plaintiff who alleges that they were harmed while trading commodities *futures* on U.S. markets must also allege that the defendant committed violative conduct on U.S. soil, or they would be turned away for failure to state a claim. This result would be inconsistent with Congress's recognition that commodity markets are global and that "a single regulatory umbrella" should cover all derivatives trading.[129]

Congress passed Dodd-Frank's swap provisions in response to the 2008 financial crisis; swaps "were at the center" of the crisis,[130] which made clear the risky and "global nature" of swap markets.[131] While this context explains Congress's myopic focus on swaps in 2010, Congress has repeatedly recognized the international nature of commodities markets from the inception of the CEA.[132]

[127] Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 103 (2d Cir. 2019) (internal quotation marks omitted) (quoting Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 265 (2010)), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[128] *Id.* at 105.

[129] Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 9 (internal quotation marks omitted) (quoting H.R. REP. NO. 93-975, at 41–42 (1974)).

[130] *Dodd-Frank Act*, U.S. COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm [https://perma.cc/L4RB-MX9Z] (last visited Feb. 12, 2021).

[131] *See* Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56,924, 56,925 (Sept. 14, 2020) (to be codified at 17 C.F.R. pt. 23).

[132] *See* Section II.A.

Indeed, "protecting U.S. markets and market participants from manipulation, including manipulation using transactions in international commerce, is a core stated purpose of the CEA" and is not limited to swap transactions.[133] Thus, while only section 2(i) applies extraterritorially, the Second Circuit should reevaluate the domestic application of sections 6(c)(1) and 9(a) in light of Congress's aim in enacting the CEA.

Furthermore, the CEA's purpose is to protect market integrity and market participants, yet risks to markets do not depend on where violative conduct occurs.[134] By requiring that plaintiffs allege a domestic transaction and domestic violative conduct to plead a cause of action under the CEA, the Second Circuit has created a significant loophole for fraudsters. Those who wish to avoid liability can trade on U.S. markets and intentionally target U.S. markets. As long as they do not commit any illegal conduct physically within the United States, they cannot be haled into court for harming Americans or traders on U.S. markets. Additionally, electronic platform-based trading makes U.S. markets easily accessible to foreign actors, who would not be liable under *Prime International*'s formulation.[135] Indeed, bright-line rules, such as the one proclaimed in *Prime International*, generally offer potential commodities law violators a roadmap of how to avoid being dragged into court[136]—especially given the increasing accessibility and complexity of trading.

Prime International's domestic conduct requirement cannot be squared with the CEA's purpose of protecting

[133] *See* Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 3 (citing 7 U.S.C. § 5 (2012)).

[134] *See id.* at 9–10.

[135] Kovel & McNeela, *supra* note 6, at 147.

[136] *Cf.* Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 221 (2d Cir. 2014) (Leval, J., concurring) ("Bright-line rules (unless seriously over-inclusive) would permit unscrupulous securities dealers to design their transactions with their victims so as to stay on the side of the line that is outside the reach of the statute. Defrauded victim investors would have no recourse to the law Congress passed to secure the integrity of U.S. securities markets.").

domestic markets, regardless of the manipulation's geographic origin. While Congress has only explicitly applied the CEA's swap provisions extraterritorially,[137] it has recognized the international and interconnected nature of commodities and commodity futures.[138] Moreover, Congress never intended to limit private manipulation actions to foreign conduct, as it would lead to absurd and unfair results to private plaintiffs—and potentially harm the CFTC's ability to ensure market integrity for all participants.

C. Requiring Domestic Conduct Undercuts the CFTC's Enforcement Capabilities

Although *Prime International* involved private party plaintiffs, the court's domestic conduct requirement in the case appears to apply generally to any fraud or manipulation claim under sections 6(c)(1) and 9(a)(2). In *Prime International*, the court found that the plaintiffs failed the *Parkcentral* sufficiency test because they did not allege domestic conduct that was violative of a substantive provision of the CEA, such as section 6(c)(1) or section 9(a)(2).[139] Moreover, the Second Circuit determined that the focuses of sections 6(c)(1) and 9(a)(2) are conduct that manipulates commodities markets and the price of commodities, respectively.[140] Since the plaintiffs failed to allege any domestic manipulative conduct, the court dismissed their claim as impermissibly foreign.[141]

Though *Prime International* was a private suit, the court's analysis of sections 6(c)(1) and 9(a)(2) appears to apply to any claim under those sections. Indeed, there is no reason to think that the CEA's anti-fraud and anti-manipulation protections would have different meanings depending on who brings an action. However, if the Second Circuit adopts this reasoning

[137] *See* Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 103 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[138] *See supra* Section II.A.

[139] *Prime Int'l*, 937 F.3d at 105–06.

[140] *Id.* at 107–08.

[141] *Id.* at 106.

more generally and applies it to CFTC actions, it could severely handicap the agency's enforcement actions, which regularly rely on sections 6(c)(1) and 9(a)(2).

1. The CFTC Depended on CEA Section 6(c)(1) and 9(a)(2) in Benchmark Manipulation Cases To Protect U.S. Markets Against Foreign Violative Conduct

Since *Morrison*, the Department of Justice (DOJ) and CFTC have protected the integrity of U.S. markets by bringing manipulation actions against foreign conduct that affects U.S. markets and exchanges. Prominent examples are the interest rate benchmark abuse actions and settlements arising from the London Inter-Bank Offered Rate (LIBOR), Euroyen Tokyo Interbank Offering Rate (Euroyen TIBOR), and Euro Interbank Offered Rate (Euribor) scandals. These actions were primarily the result of foreign conduct manipulating global interest rate benchmarks, which affected "trillions of dollars of financial instruments, including" futures and swaps traded on U.S exchanges.[142] As a result of these actions, the CFTC "imposed penalties of nearly $2.7 billion on six [major] financial institutions and two interdealer brokers."[143] The CFTC additionally imposed fines of over $1.4

[142] Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Société Générale S.A. To Pay $475 Million Penalty to Resolve Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor (June 4, 2018), https://www.cftc.gov/PressRoom/PressReleases/7736-18 [https://perma.cc/75R4-ZKVN] (announcing a penalty for LIBOR and Euribor manipulation); *see also* Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Citibank, N.A. and Japanese Affiliates To Pay $175 Million Penalty for Attempted Manipulation of Yen LIBOR and Euroyen LIBOR, and False Reporting of Euroyen TIBOR and U.S. Dollar LIBOR (May 25, 2016), cftc.gov/PressRoom/PressReleases/7372-16 [https://perma.cc/Y42S-N7DE] (announcing a penalty for, inter alia, Euroyen TIBOR misstatements).

[143] Press Release, U.S. Commodity Futures Trading Comm'n, Deutsche Bank To Pay $800 Million Penalty To Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor, CFTC (Apr. 23, 2015),

billion on five financial institutions for "similar conduct relating to foreign exchange benchmarks."[144]

One particular action, *United States v. Sindzingre*, was decided three months before *Prime International*.[145] There, the government charged two defendant employees of Société Générale with participating in a scheme to manipulate LIBOR for the U.S. dollar (USD) by submitting false and misleading USD LIBOR rates.[146] Société Générale's "false and misleading submissions artificially reduced the USD LIBOR fix and affected millions of USD LIBOR-based financial transactions."[147] The defendants were French citizens and residents; all their alleged conduct occurred in France.[148] Nevertheless, the district court found that the indictment alleged a domestic application of the CEA section 9(a)(2) because one of the defendants "caused to be transmitted into the United States false reports that affected the prices of commodities in commerce in the United States—'the objects of the statute's solicitude.'"[149]

To determine the proper domestic application of section 9(a)(2), the *Sindzingre* court first considered the purpose of the CEA and recognized that "[i]t 'is a remedial statute that serves the crucial purpose of protecting the innocent individual investor.'"[150] Next, the court looked to the text "of Section 9(a)(2), which prohibits the 'manipulat[ion] or attempt[ed] . . . manipulat[ion of] the price of any commodity

https://www.cftc.gov/PressRoom/PressReleases/7159-15 [https://perma.cc/RU65-AZY7] (giving a total from early 2015).

144 *Id.*

145 United States v. Sindzingre, 17-CR-0464, 2019 WL 2290494 (E.D.N.Y. filed May 29, 2019), *appeal docketed*, No. 19-1698 (2d. Cir. June 10, 2019).

146 *Id.* at *1–2.

147 *Id.* at *2 (citing Indictment at 4, United States v. Sindzingre, 17-CR-0464, 2019 WL 2290494 (E.D.N.Y. May 29, 2019), *appeal docketed*, No. 19-1698 (2d Cir. June 10, 2019)).

148 *Id.* at *3.

149 *Id.* at *13 (quoting Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 267 (2010)).

150 *Id.* at *11 (quoting Loginovskaya v. Batratchenko, 764 F.3d 266, 270 (2d Cir. 2014)).

in interstate commerce, or for future delivery on or subject to the rules of any registered entity.'"[151] With the text of the subsection and the purpose of the CEA in mind, the court determined that a claim is properly domestic "if it involves (1) commodities in interstate commerce or (2) futures contracts traded on domestic exchanges."[152] The court found that the claim was permissibly domestic because the defendant's foreign conduct affected the prices of USD LIBOR, a commodity within the meaning of the CEA.[153]

Requiring the CFTC to show domestic conduct significantly limits the DOJ and CFTC's ability to bring fraud and manipulation cases under sections 6(c)(1) and 9(a)(2)—and would appear to affect cases like the one against the employees of Société Générale. Indeed, had the *Sindzingre* court applied *Prime International*'s domestic conduct requirement, it would have dismissed the case as impermissibly extraterritorial. Rather than looking at how the conduct involved commodities in interstate commerce, the court would have focused on whether the defendants submitted false reports while in the United States. Since the defendants lived in France, the case would fall outside the reach of the CEA under *Prime International*'s rule. Furthermore, had courts accepted *Prime International*'s understanding of the CEA's anti-fraud and anti-manipulation statutes, such an interpretation would have severely constrained the CFTC's and DOJ's bargaining power in reaching settlements with banks in the LIBOR, Euroyen TIBOR, and Euribor scandals. Yet, as the then-CFTC Director of Enforcement, David Meister, described:

> The American public, as well as people and companies around the globe, rely on interest rate benchmarks every day for mortgages, loans and other transactions, trusting that the underlying benchmark rates are

[151] *Id.* (alterations in original) (quoting 7 U.S.C. § 13(a)(2)).

[152] *See id.* (internal quotation marks omitted) (quoting *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666, 696 (S.D.N.Y. 2013), *rev'd and remanded on other grounds sub nom.* Gelboim v. Bank of Am., 823 F.3d 759 (2d Cir. 2016)).

[153] *Id.* at *12–13.

> honest. Market integrity is seriously compromised where, as here, a bank spins its rate submissions to boost trading profits, pays off a network of brokers to disseminate false rate information, or makes false submissions to protect its reputation.[154]

If the *Sindzingre* court followed *Prime International*, whose domestic conduct requirement appears to apply to any section 9(a)(2) claim, the case likely would not have survived a motion to dismiss. The CFTC also would not have been able to secure interest rate benchmarks.

2. Private Causes of Action Help Protect U.S. Markets

If the CFTC cannot rely on private plaintiffs to sue those who commit fraud and manipulate markets from overseas, *Prime International*'s domestic conduct requirement will burden the agency.[155] Thanks to electronic platforms, individuals can trade commodity derivatives on international markets, and derivative prices are interconnected.[156] Individuals can access U.S. markets from abroad as well as trade commodity derivatives on several markets. This makes it easier to conduct fraudulent or manipulative schemes outside the United States and broadens the ripple effect of such behavior. When it is not in the CFTC's interests to prosecute this manipulation, the CFTC benefits from having private individuals pursue manipulation claims because the threat of private litigation may deter individuals from illegal

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[154] Press Release, U.S. Commodity Futures Trading Comm'n, *CFTC Orders UBS To Pay $700 Million Penalty To Settle Charges of Manipulation, Attempted Manipulation and False Reporting of LIBOR and Other Benchmark Interest Rates* (Dec. 19, 2012) (internal quotation marks omitted), https://www.cftc.gov/PressRoom/PressReleases/6472-12 [https://perma.cc/TRC3-UQDV].

[155] *See* Gabrielle Schwartz, *'Deriving' an Understanding of the Extraterritorial Applicability of the Commodity Exchange Act*, 91 ST. JOHN'S L. REV. 769, 788 (2017) (explaining the importance of private enforcement to the "underfunded and overstretched" CFTC).

[156] *See* Kovel & McNeela, *supra* note 6, at 148–49.

conduct that harms U.S. markets.[157] In addition to providing fraudsters a roadmap for committing illegal acts, *Prime International*'s domestic transaction and conduct requirements may also embolden fraudsters who are safe from private actions.[158]

IV. THE SECOND CIRCUIT SHOULD ABROGATE *PRIME INTERNATIONAL*'S DOMESTIC CONDUCT REQUIREMENT AND ADOPT *PARKCENTRAL*'S "IMPERMISSIBLY FOREIGN" CARVEOUT

Prime International's domestic transaction and domestic conduct requirements are too demanding a pleading standard for section 22. Yet, if the Second Circuit allows plaintiffs to plead any claim with a domestic transaction, as pre-*Prime International* caselaw suggested,[159] *Morrison*'s presumption against extraterritoriality could become a "craven watchdog indeed."[160] Although some commentators[161] and the Ninth Circuit[162] disagree with *Parkcentral*'s sufficiency analysis, the analysis imposes important limits on who can allege a violation of SEA section 10(b) by recognizing that manipulative conduct is sometimes simply too foreign and unrelated to the underlying claim.[163] Therefore, the Second Circuit should adopt the *Parkcentral* sufficiency test for CEA section 22.

Under this suggested analysis, a plaintiff would need to allege that violative conduct impacted a domestic transaction

[157] *See* Schwartz, *supra* note 155, at 790 n.110.

[158] *See* Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 221 (2d Cir. 2014) (Leval, J., concurring) (making a similar argument in an Exchange Act case).

[159] *Cf., e.g.,* Myun-Uk Choi v. Tower Rsch. Cap. LLC, 890 F.3d 60, 67 (2d Cir. 2018) (determining that a domestic transaction, at least if it triggers irrevocable liability, is "a sufficient basis to resolve the extraterritoriality question"), *abrogated by* Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[160] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

[161] Kovel & McNeela, *supra* note 6, at 160 n.144.

[162] *See* Stoyas v. Toshiba Corp., 896 F.3d 933, 950 (9th Cir. 2018).

[163] *See Parkcentral*, 763 F.3d at 215–16 (per curiam).

to plead section 22. Yet, the court also would need to evaluate whether the claim is properly domestic or impermissibly foreign. Unlike the *Prime International* standard, domestic conduct would not be necessary—though it would likely satisfy the sufficiency analysis.

A. To Follow Morrison, the Second Circuit Should Abrogate the Domestic Conduct Requirement and Apply *Parkcentral*'s Sufficiency Test to the CEA

In *Parkcentral*, the Second Circuit determined that while a domestic transaction or listing is necessary under *Morrison*, it is not alone sufficient to state a section 10(b) claim.[164] The court arrived at this conclusion for three reasons. First, the Second Circuit noted that the *Morrison* court did not say that a domestic transaction or listing was sufficient to place a claim within the statute's reach.[165] Second, the Second Circuit found that applying section 10(b) whenever the plaintiff alleged a domestic transaction, "regardless of the foreignness of . . . the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application."[166] Finally, the court found that if pleading a domestic transaction was sufficient to plead a violation of section 10(b), it would inevitably lead to conflicts of international law.[167] *Parkcentral*'s sufficiency holding should be applied to CEA section 22 for parallel reasons, especially because that SEA case law is regularly embraced when interpreting the CEA.

1. The Supreme Court Has Not Definitively Ruled That a Domestic Transaction Is Sufficient To Plead a Violation of SEA Section 10(b) or CEA Section 22

As stated above, the "first, and most important," reason

164 *See id.*
165 *Id.* at 215.
166 *Id.*
167 *Id.* at 215–16.

for *Parkcentral's* sufficiency test was that *Morrison* did not say if a domestic transaction is sufficient to plead a violation of section 10(b).[168] This reasoning has come into question in recent years because of the Supreme Court's reiteration of the presumption against extraterritoriality in two non-securities cases. In a Racketeer Influenced and Corrupt Organizations Act case and a subsequent patent infringement case, the Supreme Court treated the domestic application as a "binary test."[169] Specifically, the Court stated, "'[*i*]*f* the conduct relevant to the statute's focus occurred in the United States, *then* the case involves a permissible domestic application' of the statute, 'even if other conduct occurred abroad.'"[170]

Although its simplicity is appealing, this argument should not decide whether a domestic transaction is sufficient to plead a violation of CEA section 22 for two reasons. First, it is not clear that these non-securities cases foreclose the possibility that pleading domestic application of SEA section 10(b) requires more than a domestic transaction. The Supreme Court is "'acutely aware . . . that [it] sit[s] to decide concrete cases and not abstract propositions of law' and has therefore 'decline[d] to lay down . . . broad rule[s] . . . to govern all conceivable future questions in [an] area.'"[171] Moreover, the *Morrison* court dismissed the plaintiffs' section 10(b) claim because the plaintiffs failed to plead a domestic transaction, and the court did not determine whether a domestic transaction was sufficient to plead section 10(b).[172] This remains an open issue, as the Supreme Court has denied the

[168] *Id.* at 215.

[169] *See* Brief for Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Neither Party, *supra* note 12, at 19 (citing RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2101 (2016)).

[170] WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018) (emphasis added) (quoting *RJR Nabisco*, 136 S. Ct. at 2101).

[171] *Parkcentral*, 763 F.3d at 214 (alterations in original) (quoting Upjohn Co. v. United States, 449 U.S. 383, 386 (1981)).

[172] *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 267 (2010) ("And it is in our view *only* transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." (emphasis added)).

petitions for a writ of certiorari in both *Stoyas*[173] and *Prime International*.[174]

Second—and more importantly—the structure of the CEA's private right of action is different from that of SEA section 10(b). Therefore, even if the Supreme Court rules that pleading any domestic transaction satisfies SEA section 10(b), the same does not necessarily apply to CEA section 22. In contrast with the judicially created private right of action under 10(b), CEA section 22 expressly grants private plaintiffs a cause of action only if they allege a substantive violation of the CEA.[175] Since the Supreme Court advises lower courts to consider how "the statutory provision . . . works in tandem with other provisions,"[176] the "text and structure of Section 22" require that courts evaluate the focus of the substantive provision at issue in addition to section 22's transactional focus.[177]

The Supreme Court has not stated that a domestic transaction is sufficient to plead a 10(b) violation. Moreover, because of the structural differences between the SEA's and CEA's private right of actions, *Morrison* should not stand in the way of a section 22 sufficiency analysis. In fact, requiring more than a domestic transaction will strengthen *Morrison*'s presumption against extraterritoriality.

2. Allowing Plaintiffs To Plead CEA Section 22 Whenever the Underlying Transaction Is Domestic Would Undermine Morrison's

[173] Toshiba Corp. v. Auto. Indus. Pension Tr. Fund, 139 S. Ct. 2766 (2019) (mem.), *denying cert. to* 896 F.3d 933 (9th Cir. 2018).

[174] Atl. Trading USA, LLC v. BP P.L.C., 141 S. Ct. 113 (2020) (mem.), *denying cert. to* 937 F.3d 94 (2d Cir. 2019).

[175] *Compare* 7 U.S.C. § 25(a)(1) (2018) (imposing liability for "the commission of a violation of this chapter), *with* 15 U.S.C. 78j(b) (imposing liability for the use of "manipulate or deceptive device[s] or contrivance[s] in contravention" of SEC rules). *See also* Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 105 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[176] *See* WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018).

[177] *Prime Int'l*, 937 F.3d at 105.

Presumption Against Extraterritoriality

The *Parkcentral* court ruled that permitting plaintiffs to state an SEA section 10(b) claim whenever the suit alleged a domestic transaction, "regardless of the foreignness of [other] facts . . . would seriously undermine *Morrison*'s" ruling that 10(b) is not extraterritorially applicable.[178] When a transaction's location is unrelated to the parties' conduct, *Morrison*'s transaction test, taken alone and read narrowly, allows cases whose foreignness conflicts with the presumption against extraterritoriality to be brought in U.S. courts.[179] *Morrison* cautioned that "it is a rare case . . . that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[180] The Second Circuit's reasoning in *Parkcentral* ensures that, where entirely foreign conduct affects a derivative financial instrument traded on U.S. markets, courts have the flexibility to dismiss the claim as impermissibly extraterritorial.[181]

It is logical to extend *Parkcentral*'s sufficiency analysis to CEA section 22 because the Second Circuit has repeatedly held that (1) section 22 does not apply extraterritorially and that (2) *Morrison*'s transaction test applies to the statute.[182] In *Loginovskaya*, the Second Circuit first applied *Morrison* to the CEA.[183] At *Morrison*'s first step, the Second Circuit held that CEA section 22 did not apply extraterritorially.[184] The

[178] Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 215 (2d Cir. 2014) (per curiam).

[179] *See* Kaitlin A. Bruno, Comment, *The Halfway Point Between Barbary Coast and Shangri-La: Extraterritoriality and the Viability of the Economic Reality Method Post*-Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE, 65 AM. U. L. REV. 435, 455 (2015) (explaining the problems with a narrow reading of *Morrison*).

[180] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 266 (2010).

[181] *See Parkcentral*, 763 F.3d at 216.

[182] *See, e.g.*, Loginovskaya v. Batratchenko, 764 F.3d 266, 271–72 (2d. Cir. 2014).

[183] *Id.* at 270.

[184] *Id.* at 271–72.

Second Circuit then found that, like SEA section 10(b), section 22 focuses on domestic transactions.[185] Given the similarities between securities and commodities law, the court found that *Morrison*'s transactional test should decide the domestic reach of section 22.[186] The *Loginovskaya* court rejected the argument that *Morrison* only governs substantive, not procedural, provisions because *Morrison* instructs courts to apply the presumption against extraterritoriality "generally to 'statutes.'"[187]

The Second Circuit has found that section 22 and SEA section 10(b) should be treated nearly equally with respect to extraterritorial analysis.[188] Therefore, the Second Circuit should now apply the sufficiency test to the CEA because *Parkcentral*'s logic applies equally to the CEA. Where a derivative trade is several causal steps removed from the underlying and predominantly foreign fraud, private plaintiffs should not be able to hale foreign defendants into court.[189] Moreover, by requiring a domestic transaction, but not finding one sufficient, *Morrison*'s presumption against extraterritoriality will be upheld in commodities fraud cases where the facts are so foreign that Congress could not have intended the statute to apply.

3. International Comity Concerns Require That Domestic Transactions Be Necessary, but Not Sufficient, To Plead a Violation of CEA Section 22

Because of the interconnected nature of commodities markets, international comity concerns will arise if the

[185] *Id.* at 272.

[186] *Id.*

[187] *Id.* (citing Morrison v. Nat'l Austl. Bank, 133 S. Ct. 2869, 2877–78 (2010)).

[188] *See* Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 106 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[189] *See* Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 216 (2d Cir. 2014) (per curiam) (finding an alleged foreign fraud affecting privately traded U.S. security-based swaps impermissibly foreign).

presumption against extraterritoriality does not have teeth. Indeed, central to *Morrison*'s presumption against extraterritoriality was the idea that if Congress wants a U.S. statute to apply extraterritorially, Congress "would . . . address[] the subject of conflict[ing] foreign laws and procedures."[190] *Parkcentral* sought to address this issue by inquiring into the facts of the alleged violation, in addition to requiring a domestic transaction, in its SEA section 10(b) territoriality analysis.[191] The Second Circuit should also apply the sufficiency test to CEA section 22 because of the similar risk of conflicting international laws.

In *Parkcentral,* the Second Circuit reiterated *Morrison*'s comity concern as the third reason for establishing the sufficiency test. The complaint alleged that the defendants made statements "primarily in Germany with respect to stock in a German company traded only on exchanges in Europe."[192] The Second Circuit reasoned that were the suit allowed to proceed solely on the basis of "an agreement independent from the reference securities . . . . [t]he potential for regulatory and legal overlap and conflict would have been obvious to any legislator."[193] Indeed, the alleged conduct was the subject of investigation and adjudication by German authorities.[194] The *Parkcentral* court therefore ruled that complaint was "so predominantly German" that it could not rebut the presumption against extraterritoriality, though it had passed *Morrison*'s domestic transaction requirement.[195]

The same comity concerns expressed by *Morrison* and *Parkcentral* apply to the CEA. Indeed, regulatory leaders in the United States and Europe agree that a "commitment to

[190] Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 269 (2010) (internal quotation marks omitted) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 109(a), § 701(f), 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e(f) (2018)).

[191] *Parkcentral*, 763 F.3d at 217.

[192] *Id.* at 216.

[193] *Id.*

[194] *Id.*

[195] *See id.*

international regulatory comity remains of vital importance in the financial world after the global financial crisis—and even more so in the post-COVID future."[196] To avoid conflicts with and offer deference to international law, U.S. courts cannot rely on a bright-line rule when financial, economic, and political relationships are in constant flux.[197] Therefore, the Second Circuit should dismiss claims brought on an "attenuated 'ripple effects' theory," where nearly all conduct is foreign, as being *impermissibly* foreign—even if the underlying transaction is domestic.[198]

The Restatement of Foreign Relations of the United States supports this proposition. The United States can prescribe law with respect to foreign conduct that has a substantial effect within the United States, harms U.S. nationals, or affects a fundamental U.S. interest.[199] That said, the United States may not prescribe law to foreign persons or activity when the exercise of jurisdiction is unconstitutional or otherwise unreasonable.[200] Whether an exercise of jurisdiction is unreasonable is determined by factors including the connection between the regulated activity or person to U.S. territory, the importance of the regulated activity to the United States, the extent to which another state may be interested in regulating the activity, and the likelihood of conflict with another state's regulation.[201] Thus, in deciding whether a plaintiff properly pleads a domestic application of section 22, a court must balance the U.S. interest in regulating the conduct with other states' and consider

[196] *See* Dombrovskis & Tarbert, *supra* note 1.

[197] *See id.* (explaining the difficulty of harmonizing regulatory jurisdictions in "ever-changing" circumstances).

[198] *See* Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 106–07 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[199] RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 402(1) (AM. L. INST. 2018).

[200] *Id.* §§ 403, 405 (stating that, in addition to constitutional limitations, "courts in the United States may interpret federal statutory provisions to include other limitations on their applicability").

[201] *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 403(2) (AM. L. INST. 1987); RESTATEMENT (FOURTH) OF FOREIGN RELS. L. OF THE U.S. § 405 n.6 (noting continuity with the prior Restatement's position).

potential regulatory conflicts. Specifically, within the *Morrison* framework, the Second Circuit should adopt *Parkcentral*'s sufficiency test as an additional barrier to the exercise of section 22 jurisdiction because it allows the court to consider international comity.

B. Under the Proposed Standard, CEA Section 22's Domestic Application Would Depend on the Nature of the Transaction and Conduct, in Addition to Requiring a Domestic Transaction

Under the proposed standard, a domestic CEA section 22 claim (1) must allege a domestic transaction and (2) must be sufficiently domestic. As a threshold matter, a domestic transaction is required by *Morrison* and *Loginovskaya*.[202] However, the analysis does not end there; the claim must also be sufficiently domestic to satisfy *Parkcentral*'s prohibition of impermissibly foreign claims.[203] The second step instructs courts to holistically consider the facts and context of the transaction and alleged violative conduct. This two-part standard does not conflict with *Morrison* because it maintains the supremacy of the Supreme Court's transactional test, and it strengthens the presumption against extraterritoriality. At the same time, the sufficiency test's fact-intensive analysis preserves international comity, prevents "gaming" of bright-line rules, and allows courts to evolve extraterritoriality analysis with new innovations in financial instruments and derivatives.

1. The Proposed Standard Does Not Run Afoul of *Morrison*

As discussed above, the *Parkcentral* sufficiency analysis does not contradict the Supreme Court's decision in *Morrison*. Rather, the suggested test strengthens *Morrison* by allowing

[202] *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 267 (2010); Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2d. Cir. 2014).

[203] Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 215–16 (2d Cir. 2014) (per curiam).

courts to dismiss claims "that are at odds with the presumption" against extraterritoriality, even if the claim alleges a domestic transaction.[204] Moreover, the proposed standard is not a return to the open-ended and difficult-to-administer tests that *Morrison* expressly rejected.[205]

The Ninth Circuit rejected *Parkcentral*'s sufficiency test in *Stoyas v. Toshiba* because *Parkcentral* "is contrary to Section 10(b) and *Morrison* itself."[206] The Ninth Circuit criticized the Second Circuit's analysis for whether a claim is impermissibly foreign as "akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a 'clear,' administrable rule."[207] The court concluded that a domestic transaction is necessary and sufficient to plead a domestic violation of SEA section 10(b), regardless of any comity concerns.[208]

While less predictable than the Ninth Circuit's bright-line rule, the suggested two-part standard balances administrability and clarity with deterring manipulation, respecting international law, and adapting to evolving financial instruments. This standard maintains predictability and administrability through the threshold transactional test. To state a domestic claim, a domestic transaction is *necessary*; this requirement sifts out claims that touch the United States but do not fall within section 22's focus—transactions.[209] On the other hand, the second step's sufficiency analysis allows courts to assess whether the claim is permissibly domestic based on a variety of interests that Congress and *Morrison* aimed to protect.[210]

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[204] *See* Bruno, *supra* note 179, at 453.

[205] *See Morrison*, 561 U.S. at 260–61 (criticizing these tests).

[206] Stoyas v. Toshiba Corp., 896 F.3d 933, 950 (9th Cir. 2018).

[207] *Id.*

[208] *See id.* at 949–50.

[209] Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2d. Cir. 2014) (identifying this focus).

[210] *See, e.g.*, *Morrison*, 561 U.S. at 269 (expressing concern about conflicts with foreign laws).

2. Considerations Under the Sufficiency Test

Under the proposed standard, once plaintiffs allege a domestic transaction under section 22, courts would consider several factors when deciding whether the claim is permissibly domestic. The factors that courts would contemplate derive from case law and from an inquiry into Congress's purpose in writing the CEA. The considerations suggested are not exhaustive but rather would develop over time and would evolve with innovations in trading and financial instruments.

As discussed above, a court should consider whether a concurrent investigation or action is proceeding against the defendant in a foreign court.[211] A court should also assess whether allowing plaintiffs to bring their claims would conflict with any international regulatory law. In addition to any comity concerns, the nature of the defendant's connection to the commodity or derivative at issue is relevant. For example, where a defendant's actions affect an entirely privately traded derivative whose value is indirectly related to the alleged manipulation, such as the security swaps in *Parkcentral*[212] or the futures tied to Brent crude in *Prime International*,[213] a court may find the defendant's relationship with the plaintiffs too attenuated to hale them into U.S. courts.

Foreign conduct alone is not a dispositive factor. In a pre-*Prime International* case that did not decide whether *Parkcentral* applied to the CEA, the Southern District of New York suggested that the reasoning in *Parkcentral* "weigh[ed] in favor" of sustaining the plaintiff's claims.[214] In *Dennis v. JPMorgan*, the alleged foreign conduct was intended to affect a foreign benchmark interest rate that would increase the

[211] *See supra* text accompanying note 194.

[212] *See* Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, 763 F.3d 198, 205–06 (2d Cir. 2014) (per curiam).

[213] *See* Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 99–100 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 113 (2020) (mem.).

[214] Dennis v. JPMorgan Chase & Co., 343 F. Supp. 3d 122, 182 (S.D.N.Y. 2018).

defendants' derivative returns linked to that benchmark.[215] The court reasoned that the case was distinguishable from *Parkcentral*, and should be allowed to proceed, because the defendant's conduct was intended to reach these benchmark derivatives worldwide—including in the United States.[216] Under *Prime International*'s test, this case would have been dismissed as impermissibly foreign because the alleged violative conduct occurred abroad.[217] However, Congress's intent in writing the CEA was to protect U.S. markets from this kind of foreign manipulation.[218] Therefore, like in *Dennis*, courts should consider the type of commodity manipulated, how the manipulation affects U.S. markets, and the causal relationship between the alleged conduct and the plaintiff's harm. The suggested analysis is not a return to open-ended tests against which *Morrison* admonished[219] because it preserves the transaction test and reinforces the presumption against extraterritoriality.

C. Applying Parkcentral's Sufficiency Test to *Laydon v. Mizuho Bank*, a District Court Case Decided Under Prime International's Requirements

In *Laydon v. Mizuho Bank*, the Southern District of New York perfunctorily applied *Prime International*'s domestic transaction and conduct tests.[220] The court found the case impermissibly foreign because the alleged manipulation occurred abroad.[221] In this private action, the plaintiffs sued several financial institutions to recover losses they suffered in Euroyen TIBOR short positions.[222] The defendants were all banks who had previously settled with state regulators for

[215] *Id.*

[216] *Id.*

[217] *See Prime Int'l*, 937 F.3d at 107–08 (dismissing a claim because of its solely foreign violative conduct).

[218] *See supra* Section II.A.

[219] *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 260–61 (2010)

[220] Laydon v. Mizuho Bank, 12 Civ. 3419, 2020 WL 5077186, at *2–3 (S.D.N.Y. Aug. 27, 2020).

[221] *Id.* at *2.

[222] *Id.* at *1.

manipulating Euroyen TIBOR, Yen LIBOR, and the price of Euroyen TIBOR futures contracts during the class period.[223] Despite at least some defendants having admitted liability in enforcement actions,[224] the Southern District of New York dismissed the private action because nearly all of the defendants' conduct occurred overseas.[225] The plaintiffs distinguished their claim from *Prime International* by highlighting how the defendants' manipulation directly affected commodities in interstate commerce and that the plaintiffs' harm had a closer causal relationship with the defendants' violative conduct.[226]

Specifically, the plaintiffs alleged that the defendants intentionally manipulated commodities and futures contracts pegged to commodities in interstate commerce, in contrast with *Prime International*.[227] Understanding that, on its face, *Prime International*'s domestic conduct requirement would extinguish their claim, the plaintiffs tried to reframe *Prime International*'s domestic conduct requirement. The plaintiffs argued that "manipulating a domestic commodity is domestic conduct" within *Prime International*'s requirement.[228] The court rejected the domestic "conduct by operation of law" argument as being equivalent to an effects test.[229] Instead, the court reasoned that *Prime International* required "boots on the ground" violative conduct.[230]

As other courts have done,[231] the *Laydon* court dismissed

[223] *See id.* at *1 (identifying the defendants); Transcript of Oral Argument at 32, Laydon v. Mizuho Bank, 12 Civ. 3419, 2020 WL 5077186 (S.D.N.Y. Aug. 27, 2020) (noting the defendants' settlements).

[224] *See* Transcript of Oral Argument, *supra* note 223, at 32.

[225] *Laydon*, 2020 WL 5077186, at *2–3.

[226] *See* Transcript of Oral Argument, *supra* note 223, at 14–15.

[227] *Id.* at 14.

[228] *Id.* at 17.

[229] *Id.* at 18–22 (giving an extended exchange between the court and the plaintiffs' attorney on the issue).

[230] *See id.* at 45 (recording plaintiffs' attorney's objection to such a requirement); *Laydon*, 2020 WL 5077186, at *2 (emphasizing the foreignness of defendants' conduct in dismissing claims against them).

[231] *In re* Platinum & Palladium Antitrust Litig., 449 F. Supp. 3d 290, 331–32 (S.D.N.Y. 2020).

the plaintiffs' claims based on *Prime International's* domestic conduct requirement.[232] Importantly, domestic conduct would not be decisive under the suggested standard. Rather, the district court would have considered parallel enforcement actions, comity concerns, intent to affect U.S. markets, and the causal relation between the violative conduct and the plaintiffs' harm. In favor of sustaining the plaintiffs' claim, the court would note the purpose of the CEA, defendants' intent to affect interstate commodities on U.S. markets, and the settlement with U.S. regulatory bodies over the violation. Conversely, the lack of a direct causal link between the defendants' manipulation and the plaintiffs' harm and the fact that most of the violative conduct occurred abroad[233] point to dismissal. The court might also look to precedent, such as *Prime International* and *Dennis v. JPMorgan*, in assessing the territoriality of the claim and in building a consistent bedrock of case law. Under the suggested analysis, *Laydon* would have come out similarly to *Dennis v. JPMorgan* because the U.S. enforcement actions and defendants' alleged intent to affect U.S. markets should weigh more heavily than the location of the defendants' violative conduct.

V. CONCLUSION

Sound regulation is the bedrock on which the global economy is built.[234] The success of financial regulation is dependent on having both a sufficient scope and effective means to deter wrongdoing. Regulatory agencies rely on the courts to punish those defendants who violate their regulations, harming the markets and individuals that Congress intended to protect. *Prime International* deviates from this notion by favoring a bright-line rule with a high

[232] Laydon, 2020 WL 5077186 at *2.

[233] *Id.*

[234] *Cf.* Heath P. Tarbert, *Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation*, HARV. BUS. L. REV. ONLINE, 2020, at 1, 1 ("The fundamental objective for any government agency overseeing financial markets and institutions should be sound regulation.").

pleading bar which unfairly restricts plaintiffs' private right of action. We should question rulings that erode the stability of the market and provide loopholes for potential malfeasants. Instead, clarity and predictability must be balanced with the necessary flexibility to adapt to rapid changes in technology and the marketplace.[235]

[235] *See id.* at 1–2.