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EXTRATERRITORIAL ENFORCEMENT OF THE COMMODITIES, SECURITIES AND ANTITRUST LAWS: A GROWING CONFLUENCE?

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In the nearly 10 years since the United States Supreme Court's decision in *Morrison* v. *National Australia Bank*,[1] which held that U.S. securities laws do not apply extraterritorially, courts have grappled with what constitutes a permissibly "domestic" versus an impermissibly extraterritorial application of the securities laws. Congress has also weighed in, attempting to restore the authority of the United States Department of Justice ("DOJ") and the United States Securities and Exchange Commission ("SEC") to pursue certain extraterritorial violations of the securities laws.

More recently, a federal appellate court held that the presumption against extraterritoriality that the Supreme Court found in the securities laws applies equally to the commodities laws.[2] Congress quickly stepped in with proposed legislation that, if passed, would seemingly allow the DOJ and the United States Commodity Futures Trading Commission ("CFTC") to pursue certain violations of the commodities laws based on overseas fraudulent or manipulative activity. All of this activity by the courts and by Congress has resulted in a somewhat confusing array of circumstances in which parties may be exposed to criminal or regulatory liability or lawsuits by private plaintiffs based on overseas misconduct.

While the law in this area is still developing, it appears that Congress is seeking to bring extraterritorial enforcement of the commodities and securities laws broadly in line with extraterritorial enforcement of the antitrust laws. Under the antitrust laws, both the DOJ and private plaintiffs can pursue violations based on overseas conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[3]

Similarly, Congress has passed legislation that purports to give the DOJ and the SEC authority to pursue extraterritorial violations of the anti-fraud provisions of the securities laws that have a "foreseeable substantial effect" in the United States.[4] The House Committee on Agriculture has recently proposed legislation that would give the CFTC and DOJ similar authority to pursue extra-territorial violations of the antifraud and anti-manipulation provisions of the commodities laws.

This article analyzes recent cases and legislation in an attempt to provide some clarity regarding the scope of potential extraterritorial liability based on overseas trading in the securities and commodities markets. The law in this area is still very much in flux, and federal appellate courts could in the future adopt or depart from the cases discussed here. Likewise, Congress could seek to further refine the scope of extraterritorial application of the securities and commodities laws. Subject to such developments, however, the recent cases and legislative efforts suggest the following:

- The DOJ and private plaintiffs can both pursue anti-competitive collusive trading in the securities and commodities markets whenever there is a direct, substantial and reasonably foreseeable effect in the United States, but private plaintiffs, unlike the DOJ, must also prove that they were "direct purchasers" of a product subject to collusion.

- Absent anti-competitive collusion, the SEC and the DOJ likely have the authority to pursue certain extraterritorial violations of the securities laws, provided those violations involve:

  - Fraud; and

  - Either wrongful conduct in the United States, or wrongful conduct outside the United States that has a foreseeable substantial effect within the United States;

- Absent anti-competitive collusion, private plaintiffs can sue only based on domestic violations of the securities laws, and even the domestic purchase or sale of a security may not always suffice for private plaintiffs to bring a claim; and

- Absent anti-competitive collusion, the DOJ, the CFTC and private plaintiffs do not have the authority to pursue extraterritorial violations of the commodities laws (with the possible exception of violations involving swaps); however recently proposed legislation would grant the DOJ and CFTC, but not private plaintiffs, authority to pursue extraterritorial violations of the commodities laws based on overseas fraudulent or manipulative conduct that has a foreseeable substantial effect within the United States.

APPLICATION OF THE ANTITRUST LAWS TO OVERSEAS CONDUCT

The territorial boundaries of the Sherman Antitrust Act (the principal U.S. competition law) are set by the Foreign Trade Antitrust Improvements Act ("FTAIA").[5] It provides that overseas conduct is actionable under U.S. law when that conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, provided that this effect "gives rise to" a U.S. antitrust claim.[6]

Practically speaking, the first prong of this standard sets the territorial boundaries for foreign conduct actionable under U.S. antitrust law, while the second prong differentiates the criminal and civil liabilities that may arise. Two appellate decisions, involving the companies AU Optronics and Motorola, illustrate the differing authority of the DOJ and private plaintiffs to pursue violations based on overseas conduct.

AU Optronics was one of a handful of Taiwanese and Korean companies the DOJ targeted for conspiring to fix prices of liquid crystal display, or "LCD," panels, which are widely used in consumer electronics.[7] Over a five-year period, the six leading LCD manufacturers met in Taiwan to set and stabilize the price of LCDs, which were sold in consumer electronic end products by several U.S. companies, including Motorola.[8]

The DOJ criminally charged two AU Optronics entities and several AU Optronics executives in 2010 with conspiring to fix LCD prices.[9] Nearly concurrently, Motorola, as a customer of AU Optronics, brought a private civil suit against the company alleging damages from violations of U.S. antitrust laws based on purchases of price-fixed LCD panels.[10] The criminal action and Motorola's civil action proceeded on the same two theories: (1) that AU Optronics' conduct related to products imported directly into the United States violated the Sherman Antitrust Act outright; and (2) that AU Optronics also sold price-fixed LCD panels abroad that later found their way into the U.S. market, and that these foreign sales "directly affected" the U.S. marketplace, bringing that conduct within the reach of the FTAIA. Despite the identical theories, the results of the two cases were different. In the criminal case, both theories were successful: A jury in California federal court convicted all four AU Optronics defendants, and the trial court imposed a $500 million fine on the corporate defendants and sentenced two executives to several years in prison.[11]

The U.S. Court of Appeals for the Ninth Circuit affirmed that result, finding that the United States was a target of the foreign LCD price-fixing conspiracy, and that the price fixing therefore had direct, substantial and reasonably foreseeable effects in the United States.[12]

With regard to the latter theory—that of the "direct effects" of AU Optronics' foreign sales—the appellate court reviewing the criminal conviction found persuasive that (1) the cost of LCDs made up a substantial portion of the price of the final products eventually sold to U.S. consumers; (2) the foreign price-fixing meetings among members of the LCD cartel led to direct negotiations with U.S. customers concerning the prices of LCD panels; and (3) that it was "common knowledge" among members of the cartel (including the AU Optronics defendants) that a significant amount of the finished products incorporating the price-fixed LCD panels sold to manufacturers abroad would be destined for the U.S. marketplace.[13] Accordingly, the incorporation of price-fixed LCDs into computers manufactured for eventual sale in the United States had a sufficiently "direct" effect on U.S. commerce.[14]

By contrast, the bulk of Motorola's civil case was dismissed at the pleadings stage, on the grounds that—as to all but a small number of its purchases—Motorola had failed to state a claim for relief under U.S. antitrust laws.[15] How could that be, given that Motorola's civil allegations against AU Optronics so closely resembled DOJs

successful criminal allegations? The distinguishing factor was the identity of the plaintiff in the Motorola case.

With the exception of very few transactions, Motorola's U.S. entity (the plaintiff in the civil case) had not directly purchased LCD screens from AU Optronics on the import market. Rather, the vast majority (99%) of purchases at issue in the case were made by Motorola's foreign-incorporated subsidiaries (mainly in China and Singapore) and used in final products that were sold through intra-company sales to Motorola in the U.S. as well as to other Motorola companies abroad.[16]

This distinction was fatal to the bulk of Motorola's claim. In the United States, indirect purchasers—parties who did not purchase price-fixed products directly from a cartelist—generally lack "standing" (or, ability) to sue under federal antitrust laws.[17] DOJ is not limited by this "direct purchaser" doctrine, but instead can bring an enforcement action against a cartelist on the basis of downstream harm to indirect purchasers of the products in domestic U.S. commerce.[18]

Thus, in affirming the dismissal of Motorola's civil case, the Court of Appeals for the Seventh Circuit found that even assuming that AU Optronics' sales to Motorola's foreign subsidiaries for eventual U.S. import had a sufficiently "direct, substantial and reasonably foreseeable effect" on U.S. commerce (as they were found to have had in the AU Optronics criminal case), claims by Motorola's U.S. parent based on those foreign sales could not satisfy FTAIA's requirement that the conduct "give[] rise to" a claim under the U.S. antitrust laws, because the parent was not the direct purchaser of the price-fixed LCD panels from AU Optronics.[19] Nor could Motorola's foreign subsidiaries—the "direct" purchasers of 99% of the LCD panels—assert antitrust claims against AU Optronics themselves. This is because, with few exceptions, the FTAIA bars claims by foreign plaintiffs alleging injuries in foreign commerce.

THE *MORRISON* DECISION ELIMINATES EXTRATERRITORIAL APPLICATION OF THE SECURITIES LAWS

With its 2010 decision in *Morrison* v. *National Australia Bank*,[20] the United States Supreme Court touched off the recent round of cases analyzing the extraterritorial effect of the securities and commodities statutes, which in turn touched off Congressional efforts to preserve at least some those statutes' extraterritorial scope. In *Morrison*, the Supreme Court threw out claims brought by private plaintiffs against both U.S. and foreign defendants for alleged fraud involving securities traded on foreign exchanges, holding that the Securities Exchange Act of 1934 does not apply extraterritorially.[21] The Supreme Court utilized a two-part test to reach this conclusion.

In Step One, the Court considered whether the Exchange Act applies extraterritorially. The Court concluded that it does not, reasoning that statutes only apply extraterritorially when their text clearly provides for extraterritorial application, and the Exchange Act includes no such clear statement.[22] In Step Two, the Court considered whether the plaintiffs' allegations amounted to a "domestic" application of the Exchange Act, and concluded that they did not.[23] The Court found that the Exchange Act is focused primarily on

trading on U.S. exchanges and in U.S. over-the-counter markets.[24]

In reaching this conclusion under Step Two, the Court threw out the so-called "conduct-and-effects test," under which courts had permitted private plaintiffs and enforcement authorities to pursue violations of the securities acts when "the wrongful conduct occurred in the United States," or "the wrongful conduct had a substantial effect in the United States or upon United States Citizens."[25] Subsequent cases have made clear that Morrison's rationale applies with equal force to the Securities Act of 1933.[26]

CONGRESS SEEKS TO REVIVE (PARTIALLY) THE CONDUCT-AND-EFFECTS TEST

Very shortly after *Morrison* was decided, Congress sought to breathe new life into the conduct-and-effects test by inserting a provision into the Dodd Frank Act, which was only days away from enactment. The new provision, Section 929P(b), provided, in relevant part:

> "The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the [SEC] or the [DOJ] alleging a violation of [either Section 10(b) of the Securities Exchange Act or Section 17(a) of the Securities Act] involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[27]

This provision is more limited than the prior conduct-and-effects test in two important ways. First, it applies only to actions brought by the SEC or DOJ—but not to actions brought by private plaintiffs. And second, it applies only to the antifraud provisions of the Securities Act and the Exchange Act (Section 17(a) and Section 10(b), respectively).

It is of note that Section 929P(b)'s "foreseeable substantial effect" formulation is very similar to the "direct, substantial, and reasonably foreseeable effect" requirement found in the antitrust laws.

AN APPELLATE COURT FINDS SECTION 929P(b) EFFECTIVE

In January 2019, an appellate court for the first time considered whether Congress had succeeded in reviving conduct-and-effects in an antifraud action brought by the SEC. The court ruled that the SEC could maintain an enforcement action against an internet advertising company, Traffic Monsoon, and its founder, Charles Scoville, who operated in the United States, based on allegedly fraudulent sales of securities to overseas purchasers.[28]

Traffic Monsoon marketed package deals to its advertising clients, many of whom were located overseas, which included (among other things) an option to share in Traffic Monsoon's revenues by viewing and clicking on internet advertisements and by recruiting new customers to Traffic Monsoon.[29] The SEC brought an enforcement action alleging violations of multiple antifraud provisions of the Securities Act and the Exchange Act, arguing that Traffic Monsoon's revenue-sharing scheme constituted a security, and that Traffic Monsoon operated as a Ponzi Scheme.[30]

The SEC obtained emergency orders freezing

Scoville's assets, barring him from continuing to run Traffic Monsoon, and appointing a receiver to operate Traffic Monsoon while the SEC's case was pending. Scoville argued that these emergency orders should be set aside for several reasons, including that, after *Morrison*, the SEC no longer had the authority to apply the antifraud provisions of the securities laws to overseas offers or sales of securities. The appellate court disagreed, finding that in light of Section 929P(b), the SEC could once again bring antifraud actions based on conduct within the United States related to overseas sales of securities (here, Scoville's conduct in the United States to induce overseas advertising purchases).[31]

It remains to be seen whether other courts will adopt the *Scoville* court's analysis.[32] As the case demonstrates, however, parties acting outside the United States could once again be subject to criminal or regulatory action under the securities laws based on actions taken outside of the United States, provided their activities would have foreseeable and substantial effects within the United States.

For example, a foreign company that knows there is substantial U.S. trading in synthetic derivatives that price based on its shares could potentially face liability for false statements made outside the United States to boost its share price, even if its actual shares trade entirely outside the United States, if there was a foreseeable substantial effect within the United States. Such a case would suggest a somewhat broader extraterritorial application of the securities laws than is found in the antitrust laws.

Under the antitrust laws, the effect in the United States must be both substantial and "direct." In this hypothetical, the effect, however substantial, would not necessarily be "direct," as the false statements would be aimed at impacting the price of its own overseas shares, rather than the U.S.-traded derivatives. Like in the antitrust context, the company would not likely be liable in a securities fraud action brought by U.S. purchasers of the synthetic derivatives, as Congress' resurrection of the conduct-and-effects test does not apply to actions brought by private plaintiffs.[33]

MORRISON GETS APPLIED TO THE COMMODITIES LAWS

In August 2019, an appellate court, in *Prime International Trading* v. *BP p.l.c. et al*, considered whether *Morrison* applied to the antifraud and anti-manipulation provisions of the Commodity Exchange Act (the "CEA"), the primary U.S. commodities-regulation statute. The court upheld a district court's dismissal as improperly extraterritorial of a class action alleging violations of the antifraud and anti-manipulation provisions of the CEA.[34] In doing so, the appellate court concluded, for the first time, that claims under the CEA must be premised on domestic misconduct.

The class action had been brought by individuals and entities who traded crude oil futures and derivatives contracts, including on the New York Mercantile Exchange ("NYMEX") against several entities involved in the production of Brent crude oil in Europe's North Sea.[35] Plaintiffs alleged that defendants had traded physical Brent crude in Europe in order to manipulate an important Brent crude benchmark, the Dated Brent Assessment, with the goal of benefitting their own physical Brent positions and related futures positions, including their futures positions on NYMEX.[36]

The Dated Brent Assessment is factored into the price of futures contracts traded on ICE Europe, an exchange located outside the United States that lists the most actively traded Brent futures contract (where plaintiffs also claimed to have transacted).[37] The price of the futures contract on ICE Europe, in turn, is factored into the price of the Brent futures contract traded on NYMEX.[38] Plaintiffs alleged that defendants' manipulative trading of physical Brent crude in Europe harmed them by impacting the price of their NYMEX Brent futures.[39]

The court, following the Supreme Court's reasoning in Morrison as well as other appellate precedent, concluded, for the first time, that the antifraud and the anti-manipulation provisions of the CEA cited in plaintiffs' complaint (namely, CEA Sections 6(c)(1) and 9(a)(2)) do not apply extraterritorially.[40] On that basis, the court next considered whether the plaintiffs had alleged a domestic violation of the CEA. The court assumed for purposes of its analysis that plaintiffs' alleged trades on NYMEX and ICE Futures Europe constituted "domestic transactions." But the court nevertheless dismissed the claims, because it concluded that a properly domestic application of the CEA requires plaintiffs to plead not only domestic transactions but also domestic misconduct, "*conduct* by defendants that is violative of a substantive provision of the CEA."[41]

Although plaintiffs had alleged that their domestic purchases were harmed by defendants' allegedly manipulative trading in Europe, the court concluded that such "ripple effects" were insufficient to render the alleged violations domestic. Because defendants had allegedly acted outside the United States to manipulate the price of Brent crude cargoes that were also located outside the United States, plaintiffs' claims were "so predominantly foreign as to [be] impermissibly extraterritorial."[42]

The appellate court's ruling is potentially sweeping in impact: It makes clear that overseas misconduct, except with respect to swaps, will not give rise to a violation of the CEA.[43] It thus casts doubt on some of the CFTC's and DOJ's more aggressive assertions of authority to regulate overseas conduct. For example, the CFTC and DOJ resolved investigations with multiple panel banks involving alleged attempts to manipulate foreign benchmarks such as LIBOR.

Some of these matters appear to have been based on allegedly manipulative conduct occurring entirely outside the United States and predominantly affecting futures and derivatives traded outside the United States. The CFTC's and DOJ's ability to bring similar actions in the future may be impaired by this decision.

CONGRESS CONSIDERS IMPOSING THE CONDUCT-AND-EFFECTS TEST ON THE CEA

Two months after the *Prime International* decision was announced, the House Committee on Agriculture published a wide-ranging "discussion draft" bill to reauthorize the CFTC.[44] That bill, which has since been reported by the Committee on Agriculture, includes a provision titled "Applicability of Prohibitions on Fraud and Manipulation to Activities Outside the United States."[45] This provision extends the authority of the CFTC and the DOJ to bring antifraud and anti-manipulation actions "to activities outside the United States where such activities, independently or in conjunction with activities in the United States, have or would have a reasonably

foreseeable substantial effect within the United States."[46] If passed, this provision would give the CFTC and DOJ substantially the same authority to enforce overseas violations of the CEA based on overseas misconduct as Section 929P(b) purports to enforce overseas violations of the securities laws.[47]

As with the Section 929P(b) fix to the securities laws, Section 112 would not give private plaintiffs the authority to pursue overseas violations of the CEA. Moreover, it is unclear whether Section 112 would give the CFTC or DOJ sufficient authority to bring an action against traders engaging in the sort of conduct alleged in the *Prime International* case. While the plaintiffs in that case alleged that the defendants' trading in European oil cargoes had an effect on NYMEX positions, the appellate court characterized these as indirect "ripple effects."[48] A future court could find that such "ripple effects" do not amount to "reasonably foreseeable substantial effect[s]," as required by draft Section 112.

* * *

The law regarding extraterritorial application of the securities and commodities laws continues to develop, with both Congress and the courts weighing in. While things remain in flux, there can be no certainty regarding where, exactly, the law in this area will land. However, Congress' recent efforts suggest an intention to bring the extraterritorial application of the securities and commodities laws broadly in line with the extraterritorial application of the antitrust laws. If this trend continues, antitrust cases may serve as useful precedents in determining what overseas conduct has sufficient U.S. effects to invite U.S. enforcement.

ENDNOTES:

[1]*Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 249, 130 S. Ct. 2869, 177 L. Ed. 2d 535, Fed. Sec. L. Rep. (CCH) P 95776, R.I.C.O. Bus. Disp. Guide (CCH) P 11932, 76 Fed. R. Serv. 3d 1330 (2010).

[2]*Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), reh'g and reh'g en banc denied, No. 17-2233, Dkt. No. 272 (2d Cir. Oct. 16, 2019).

[3]15 U.S.C.A.§ 6a(1).

[4]15 U.S.C.A.§ 77v(c).

[5]*See* 15 U.S.C.A.§ 6a.

[6]*Id.*

[7]*See U.S. v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015) (mem.).

[8]*Id.* at 743.

[9]*Id.* at 744.

[10]*Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 817, 2015-1 Trade Cas. (CCH) ¶ 78976 (7th Cir. 2015) (mem.).

[11]Press Release No. 12-1513, Dep't of Justice, "AU Optronics Corporation Executive Convicted for Role in LCD Price-Fixing Conspiracy," Dec. 18, 2012.

[12]*Hsiung*, 778 F.3d at 743.

[13]*See id.* at 759.

[14]*Id.*

[15]*Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 817, 2015-1 Trade Cas. (CCH) ¶ 78976 (7th Cir. 2015) (mem.).

[16]*See id.*

[17]*Id.* at 820-21.

[18]*Hsiung*, 778 F.3d at 760.

[19]*See Motorola*, 775 F.3d at 819-20.

[20]*Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535, Fed. Sec. L. Rep. (CCH) P 95776, R.I.C.O. Bus. Disp. Guide (CCH) P 11932, 76 Fed. R. Serv. 3d 1330 (2010).

[21]*Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 273, 130 S. Ct. 2869, 177 L. Ed.

2d 535, Fed. Sec. L. Rep. (CCH) P 95776, R.I.C.O. Bus. Disp. Guide (CCH) P 11932, 76 Fed. R. Serv. 3d 1330 (2010).

[22]*Id.* at 265.

[23]*Id.* at 267.

[24]*Id.*

[25]*See id.* at 260-61.

[26]*See, e.g.*, *In re Vivendi Universal, S.A., Securities Litigation*, 842 F. Supp. 2d 522, 529, Fed. Sec. L. Rep. (CCH) P 96724 (S.D. N.Y. 2012) ("*Morrison* permits Securities Act claims only 'in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.")

[27]Dodd Frank Wall Street Reform and Consumer Protection Act, § 929P(b), codified at 15 U.S.C.A. § 78aa and 15 U.S.C.A. § 77v.

[28]*Securities and Exchange Commission v. Scoville*, 913 F.3d 1204, Fed. Sec. L. Rep. (CCH) P 100338 (10th Cir. 2019), cert. denied, 205 L. Ed. 2d 268, 2019 WL 5686461 (U.S. 2019) (mem.).

[29]*Id.* at 1210-11.

[30]*Id.* at 1213.

[31]*Id.* at 1215.

[32]There is some uncertainty regarding whether Congress' attempted revival of conduct-and-effects will be conclusive. Section 929P(b) purported to give courts "jurisdiction" based on the conduct-and-effects test. But the *Morrison* Court did not reject conduct-and-effects as a matter of "jurisdiction." Instead, the *Morrison* court rejected non-domestic applications of the securities laws based on the Constitutional presumption against extraterritoriality. The Supreme Court has elsewhere held that "unless there is the affirmative intention of the Congress c*learly expressed*," a statute only applies domestically. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274, 55 Fair Empl. Prac. Cas. (BNA) 449, 55 Empl. Prac. Dec. (CCH) P 40607 (1991) (emphasis added). Because Section 929P(b) referred to jurisdiction rather than extraterritorial application, there is some question as to whether courts would read it as a "clear[] express[ion]" of extraterritoriality sufficient to revive the conduct-and-effects test. To date, only the *Scoville* appellate court has considered this issue, and there remains a possibility that future courts considering this issue will apply the presumption against extraterritoriality more rigidly and not allow an action based on conduct-and-effects.

[33]*See Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 215, Fed. Sec. L. Rep. (CCH) P 98151 (2d Cir. 2014) (holding that a foreign corporation's potentially fraudulent statements made abroad but repeated in the U.S. which affected the price of plaintiffs' shares on European stock exchanges were not sufficiently "domestic" for a private plaintiff to have a valid claim under § 10b(5)).

[34]*Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), reh'g and reh'g en banc denied, No. 17-2233, Dkt. No. 272 (2d Cir. Oct. 16, 2019).

[35]*Id.* at 98-100.

[36]*Id.* at 100.

[37]*Id.* at 99.

[38]*Id.* at 100.

[39]*Id.*

[40]*Id.* (*citing Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535, Fed. Sec. L. Rep. (CCH) P 95776, R.I.C.O. Bus. Disp. Guide (CCH) P 11932, 76 Fed. R. Serv. 3d 1330 (2010) *and Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, Fed. Sec. L. Rep. (CCH) P 98151 (2d Cir. 2014)).

[41]*Id.* 105 (emphasis in original).

[42]*Id.* at 107 (internal quotations omitted).

[43]In spite of the sweeping nature of this decision, however, a court would likely reach a different conclusion in a matter involving swaps. The Dodd Frank Act amended the CEA to provide that its swaps provisions:

> shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or ef-

> fect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe . . . to prevent the evasion of any provision of [the CEA]. 7 U.S.C.A.§ 2(i).

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

[45]*Id. §* 112.

[46]*Id.*

[47]The pertinent language in HR 4985 differs slightly from the language of Section 929P(b), and could potentially provide for a somewhat different extraterritorial reach of the commodities laws than the securities laws.

[48]*Prime Int'l*, 937 F.3d at 106.