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‘DERIVING’ AN UNDERSTANDING OF THE EXTRATERRITORIAL APPLICABILITY OF THE COMMODITY EXCHANGE ACT

GABRIELLE SCHWARTZ[†]

INTRODUCTION

“[H]ad Loginovskaya resided on Main Street, U.S.A. or Sutton Place, New York rather than in Surgut, Russia at the time she made her investments, we all agree that her suit would have been allowed to proceed[.]”¹

Every single day, individual investors are defrauded in the derivatives marketplace. Should an individual be able to pursue a claim against the fraudster? Absolutely. Unfortunately, confusion has diluted this seemingly obvious “yes” over time, ultimately barring individuals like Ludmila Loginovskaya, a Russian citizen, from pursuing a cause of action in the Southern District of New York against a domestic commodity broker.

Derivative markets have existed for centuries, but were not widely followed until the late 2000s. In the early 1930s, the Commodity Exchange Act (“CEA”) was enacted to regulate commodities, such as wheat, corn, and potatoes, and other agricultural futures contracts.² These are the products that continue to come to mind for most people when they think about what the Act must regulate today. However, the derivatives marketplace has expanded vastly and rapidly over time, and the Act also regulates major financial instruments, including credit, currency, and interest rate swaps.

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¹ *Loginovskaya v. Batratchenko (Loginovskaya II)*, 764 F.3d 266, 276 (2d Cir. 2014) (Lohier, J., dissenting).

² *History of the CFTC: US Futures Trading and Regulation Before the Creation of the CFTC*, U.S. COMMODITY FUTURES TRADING COMM’N, http://www.cftc.gov/About/HistoryoftheCFTC/history_precftc (last visited Dec. 23, 2017).

It was not until the Financial Crisis of 2008 that individuals, governments, and industry experts alike realized the magnitude and significance of the derivatives market and the damage that could be done if it was not responsibly regulated. While the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) closed many of these market loopholes, questions remain regarding the extent to which extraterritorial jurisdiction exists over claims related to commodities and other derivative products that are subject to the CEA, and who is permitted to assert such a claim.

This Note argues that courts should return to using a holistic approach, similar to the traditional “conducts” and “effects” test previously used by courts to analyze extraterritorial securities and commodities claims, to assess claims brought under the CEA. Furthermore, this Note argues that both the Commodity Futures Trading Commission and private individuals including foreign plaintiffs, should be permitted to bring these claims to uphold Congress’s intent in establishing a regulatory regime and maintaining the integrity of the international derivatives market. Part I discusses the history of derivative regulation and how both court decisions and statutory changes have created the potential for confusion when asserting causes of action in the commodities context. Fueling this confusion, one Supreme Court case in particular, *Morrison v. National Australia Bank Ltd.*, held that the presumption against extraterritoriality is applicable in Rule 10b-5 cases, and eliminated the use of the “conducts” and “effects” test to assess these extraterritorial claims. Part II uses recent case law, specifically a case out of the Second Circuit, *Loginovskaya v. Batratchenko*, to illustrate the problems and inconsistencies with extending the *Morrison* decision to commodity and derivative fraud claims under the CEA in a post-Dodd-Frank world. Part III.A argues that courts should return to using a holistic, fact-specific approach, rather than *Morrison*’s transactional test, when evaluating extraterritorial jurisdiction in commodity and derivative fraud cases. Part III.B argues that, consistent with the use of a holistic test outlined in Part III.A, foreign plaintiffs should continue to be afforded private rights of action for commodity and derivative fraud or manipulation suits in U.S. courts. Lastly, Part III.C

addresses the steps that courts must take to correct or address policy misstatements when presented with these claims in the future.

I. THE EVOLVING REGULATION OF THE DERIVATIVES MARKETPLACE AND THE EXTRATERRITORIAL JURISDICTION OF THE CEA

A. *Understanding Derivatives and Their Role in the 2008 Financial Crisis*

A derivative is a contract between two parties whose value is derived from an asset's underlying price and performance.³ "The value of derivatives is *derived* from the performance of an asset, index, interest rate, commodity or currency."⁴ Derivatives have existed since ancient times,⁵ and can be broken down into four major categories: forwards, futures, options, and swaps.⁶ Swaps come in many varieties, but since the passage of Dodd-Frank in 2010, swaps have been more specifically defined in both the CEA and the Securities Exchange Act of 1934.⁷ As currently defined in the CEA, a swap could be any transaction that is not settled by delivery of the underlying commodity, including, but not limited to (1) options, such as puts, calls, caps, and floors on most reference assets; (2) swaps, such as those on interest rates, broad-based securities indices, and other reference assets; (3) credit default swaps; (4) any other instrument "that is or . . . becomes commonly known . . . as a swap"; (5) foreign

³ Steven Nickolas, *What Is the Difference Between Derivatives and Swaps?*, INVESTOPEDIA (June 2, 2015, 1:21 PM), <http://www.investopedia.com/ask/answers/060215/what-difference-between-derivatives-and-swaps.asp>.

⁴ *Id.* (emphasis added).

⁵ GARY E. KALBAUGH, DERIVATIVES LAW AND REGULATION 25 (2014) ("There is the anecdote of Thales the Milesian and his financial device According to the story, he knew by his skill in the stars while it was yet winter that there would be a great harvest of olives in the coming year; so, having a little money, he gave deposits for the use of all the olive-presses in Chios and Miletus, which he hired at a low price because no one bid against him. When the harvest-time came, and many were wanted all at once and of a sudden, he let them out at any rate which he pleased, and made a quantity of money. . . . Thales, by buying the future right to the use the olive presses, entered into an economic derivative, a futures contract." (quoting ARISTOTLE, POLITICS, BOOK 1)).

⁶ HECTOR COLON, NAT'L CTR. FOR POLICY ANALYSIS, THE ROLE OF DERIVATIVES IN THE FINANCIAL CRISIS 2 (2016), <http://www.ncpa.org/pdfs/ib187.pdf>.

⁷ See Commodity Exchange Act, 7 U.S.C. § 1a(47) (2012).

exchange swaps and foreign exchange forward contracts; and (6) any instrument that combines any of the above.⁸ The definition of swap excludes futures and most forward contracts.

Until 2010, the swaps market was “completely lacking in transparency, and virtually unregulated,” as described by former SEC Chairman Christopher Cox.⁹ Major financial institutions “were using credit default swaps . . . as a means of ‘insuring’ against some of their overly risky subprime business practices.”¹⁰ Swaps, like securities and other derivative products, have generally been traded in “over-the-counter” (“OTC”) markets.¹¹ OTC derivatives are traded by large financial institutions, traditionally banks, holding companies and investment banks, which act as derivatives dealers, buying and selling contracts with customers.¹² Unlike the futures, options and national securities exchanges, the OTC market is neither centralized nor regulated, nor is it transparent, and thus price discovery is limited.¹³ OTC markets let derivatives traders, including the large investment banks, increase their leverage—a double-edged sword in terms of risk and reward.¹⁴ “While up until the mid-2000s, derivatives were ‘generally regarded as a beneficial financial innovation that distributed financial risk more efficiently and made the financial system more stable, resilient, and resistant to shock . . . [t]he [financial] crisis essentially

⁸ See *id.*; see also Memorandum from Willkie Farr & Gallagher LLP to Clients on CFTC and SEC Adopt Definition of “Swap” and “Security-Based Swap” 5 (Aug. 23, 2012), http://www.willkie.com/~media/Files/Publications/2012/08/CFTC%20and%20SEC%20Adopt%20Definition%20of%20Swap%20and%20Securi_/Files/CFTCandSECAdoptDefinitionofSwap1pdfFileAttachment/CFTC_and_SEC_Adopt_Definition_of_Swap1.pdf.

⁹ Christopher Cox, Chairman, Sec. Exch. Comm’n, Opening Remarks at SEC Roundtable on Modernizing the Securities and Exchange Commission’s Disclosure System (Oct. 8, 2008), <http://www.sec.gov/news/speech/2008/spch100808cc.htm>.

¹⁰ See Jonathan Lindenfeld, *The CFTC’s Substituted Compliance Approach: An Attempt To Bring About Global Harmony and Stability in the Derivatives Market*, 14 J. INT’L BUS. & L. 125, 127 (2015).

¹¹ See *id.* at 128.

¹² *Id.* at 128–29.

¹³ *Id.*

¹⁴ THE FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 43 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

reversed this view.’¹⁵ In the aftermath of the 2008 Financial Crisis, Former Federal Reserve Chairman Alan Greenspan testified before the Financial Crisis Inquiry Committee (“FCIC”), a ten-member, government-appointed committee tasked with investigating the cause of the financial crisis, that credit default swaps created problems during the financial crisis.¹⁶ Furthermore, Former Treasury Secretary Larry Summers stated to the FCIC that “while risks could not necessarily have been foreseen years ago, ‘by 2008 our regulatory framework with respect to derivatives was manifestly inadequate’ and that ‘the derivatives that proved to be by far the most serious, those associated with credit default swaps, increased 100 fold between 2000 and 2008.’”¹⁷ However, this increase was built on a faulty presumption of success. While the worldwide value of the underlying assets for credit default swaps grew to \$58.2 trillion at the end of 2007, “[a] significant portion was . . . speculative or naked credit default swaps.”¹⁸ In the aftermath of the crisis, it was easy to see that derivatives helped create a perfect storm for systematic failure.¹⁹

B. Dodd-Frank Changes the CEA by Adding Provisions That Specifically Address the Extent of the CFTC’s Jurisdiction over Extraterritorial Activities

In order to patch market loopholes and address the greatest financial collapse in modern history, Congress enacted Dodd-Frank “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system.”²⁰ More specifically, Title VII of the Dodd-Frank Act,

¹⁵ *Sec. Indus. & Fin. Markets Ass’n v. U.S. Commodity Futures Trading Comm’n*, 67 F. Supp. 3d 373, 385–86 (D.D.C. 2014) (quoting *Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm’n*, 891 F. Supp. 2d 162, 173 (D.D.C. 2012)).

¹⁶ THE FIN. CRISIS INQUIRY COMM’N, *supra* note 14, at 48–49.

¹⁷ *Id.* at 49.

¹⁸ *Id.* at 50.

¹⁹ *See id.* at 51; *id.* at 352 (“AIG’s failure was possible because of the sweeping deregulation of over-the-counter (OTC) derivatives, including credit default swaps, which effectively eliminated federal and state regulation of these products, including capital and margin requirements that would have lessened the likelihood of AIG’s failure. The OTC derivatives market’s lack of transparency and of effective price discovery exacerbated the collateral disputes of AIG and Goldman Sachs and similar disputes between other derivatives counterparties.”).

²⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

known as the Wall Street Transparency and Accountability Act of 2010,²¹ imposed a comprehensive and far-reaching regulatory regime on derivatives and market participants and mandated the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”) to engage in new rulemaking.²² Under Dodd-Frank, the CFTC was tasked with implementing four goals: “(1) clearing of standardized swaps through central counterparties or clearinghouses; (2) trading of swaps on transparent, regulated platforms; (3) oversight of swap dealers and major swap participants; and (4) reporting of data on the swaps market to facilitate greater transparency and enhance regulatory oversight.”²³

To address and achieve these goals, § 722 of Dodd-Frank explicitly granted jurisdiction over swaps to the CFTC,²⁴ and also created a new § 2(i) of the CEA, which states that provisions of Dodd-Frank “shall not apply to activities outside the United States unless those activities have a direct and significant connection with activities in, or effect on, commerce of the United States”²⁵

The CEA has several different provisions that address jurisdiction and govern who may bring a cause of action. “The CEA is a ‘remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived.’”²⁶ Section 2 of the CEA confers exclusive jurisdiction to the CFTC, but does not “supersede or limit the jurisdiction conferred on courts of the United States”²⁷ The Act also affords rights to individuals.

²¹ *Id.* at 1641 (codified at 15 U.S.C. § 8301 (2012)).

²² MORRISON & FOERSTER, THE DODD-FRANK ACT: A CHEAT SHEET 3 (2010), <http://media.mof.com/files/uploads/Images/SummaryDoddFrankAct.pdf>.

²³ U.S. COMMODITY FUTURES TRADING COMM’N, PRESIDENT’S BUDGET: FISCAL YEAR 2017, at 2 (2016), <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcbudget2017.pdf>.

²⁴ *See* Commodity Exchange Act, 7 U.S.C. § 2(a)(1) (2012); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, § 722(a)(2) (2012) (reserving jurisdiction over “security-based swaps” for the SEC).

²⁵ 7 U.S.C.A § 2(i)(1)–(2) (West 2015).

²⁶ *Loginovskaya II*, 764 F.3d 266, 270 (2d Cir. 2014) (quoting *Commodity Futures Trading Comm’n v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002)).

²⁷ 7 U.S.C.A § 2(a)(1)(A) (West 2015).

Section 25 affords a private right of action to individuals,²⁸ and in addition to bringing a cause of action in court, “[a]n aggrieved party otherwise may seek recovery through an administrative proceeding at the Commodity Futures Trading Commission.”²⁹ However, the sheer magnitude and expanse of the OTC derivatives market means that identifying, regulating, and policing all trades is virtually impossible, making the need for private rights of action readily apparent. While the CEA is said to afford rights to both the agency and the individual against a defendant broker, how are courts to determine whether there is proper jurisdiction over the claim itself, particularly if the alleged fraud took place outside of the United States or if the aggrieved party is not a U.S. citizen?

C. Methods for Assessing Extraterritorial Jurisdiction Over Commodity Fraud Claims

1. “Conducts” and “Effects” Test

For decades, courts used a fact-specific “conducts” and “effects” test to assess the extraterritorial applicability of the CEA.³⁰ For example, in *Psimenos v. E.F. Hutton & Co., Inc.*,³¹ the Second Circuit held that the Southern District had subject matter jurisdiction to hear a CEA claim brought by a Greek citizen and resident against a U.S. commodity broker, even though the transaction was executed through the defendant’s Athens office.³² The court noted:

The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of the conduct within the United States as it relates to carrying out the alleged fraudulent scheme, on the theory that Congress did not want ‘to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.’³³

²⁸ See *id.* § 25(a)(1) (2012).

²⁹ *Loginovskaya II*, 764 F.3d at 270 (citing 7 U.S.C. § 18 (2012)).

³⁰ See KALBAUGH, *supra* note 5, at 451.

³¹ 722 F.2d 1041 (2d Cir. 1983).

³² *Id.* at 1044.

³³ *Id.* at 1045 (quoting *ITT v. Vencamp, Ltd.* 519 F.2d 1001, 1017 (2d Cir. 1975)).

Similarly, in *Tamari v. Bache & Co. (Lebanon) S.A.L.*,³⁴ the Seventh Circuit held that the District Court correctly applied the conduct and effects test to determine that it had “subject matter jurisdiction . . . over a cause of action arising from trading on United States exchanges, even though the parties were nonresident aliens and contacts between them occurred in a foreign country.”³⁵ However, in 2010, one month before Dodd-Frank’s enactment, the United States Supreme Court decided *Morrison v. National Australia Bank Ltd.*³⁶ and announced a new “transactional test” to define the extraterritorial reach of § 10(b) of the Securities Exchange Act of 1934.³⁷

2. *Morrison* and the “Transactional Test”

In *Morrison*, the Court held that § 10(b) of the Securities Exchange Act of 1934 (“’34 Exchange Act”) did not have extraterritorial reach because there was no affirmative indication in the ’34 Exchange Act that this Section should apply extraterritorially.³⁸ Writing for the majority, Justice Scalia—known for his black-and-white textualist methods of interpretation—stated that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,”³⁹ giving deference to earlier precedent and canons of statutory interpretation.⁴⁰

However, as importantly noted by Justice Stevens in his concurring opinion, “while the clarity and simplicity of [a transactional test] may have some salutary consequences, like all bright-line rules it also has drawbacks.”⁴¹ Primarily, the Court did not directly address what happens when a statute includes “a

³⁴ 730 F.2d 1103 (7th Cir. 1984).

³⁵ *Id.* at 1105–06, 1108; *see also* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (“We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the *effects* of improper foreign transactions in American securities.” (emphasis added)).

³⁶ 561 U.S. 247 (2010).

³⁷ *Id.* at 274 (Stevens, J., concurring).

³⁸ *Id.* at 255 (majority opinion).

³⁹ *Id.*

⁴⁰ *Id.* at 255 (“It is a longstanding principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”” (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).

⁴¹ *Id.* at 285 (Stevens, J., concurring).

clear statement of extraterritorial effect”⁴² and conceded that the presumption against extraterritoriality is not a “clear statement rule” that requires a statute to explicitly say “this law applies abroad.”⁴³ As a result, courts have failed to read past the straightforward language of the transactional test and have begun to erroneously extend *Morrison* in contexts that a bright-line test is not suited for, namely in fraud cases that fall under the CEA.⁴⁴

Most importantly, as highlighted in Part II of this Note, “[a]n additional complicating factor is that *Morrison* was decided before Dodd-Frank.”⁴⁵ *Morrison* implicitly held that the presumption against extraterritoriality applies to all laws that are silent on extraterritorial application, and therefore there are two clear issues here. First, the applicability of the transactional test outside of § 10(b) is not self-evident, and second, the CEA is *not* silent on extraterritorial application, as explicitly amended by Dodd-Frank less than one month after *Morrison* was decided.

D. *Morrison and Dodd-Frank Fail to Clarify Who May Bring a Claim*

In light of essentially overlapping and potentially contradictory judicial and legislative activity trying to address issues of extraterritorial jurisdiction, it has become increasingly unclear what causes of actions U.S. courts have jurisdiction to hear based on (1) the type of financial instrument used to defraud a purchaser; (2) who is permitted to bring a claim—an individual plaintiff exercising a private right of action or only the Commodity Futures Trading Commission; (3) the domestic versus international nature of the events giving rise to the claim; and (4) which test the court should apply in evaluating the claim. Despite its attempt to be clear and concise, *Morrison* has not been received as clear, black-letter law governing securities claims. In fact, in the securities regulation and litigation context, there have been inconsistent results interpreting and applying

⁴² *Id.* at 264–65 (majority opinion) (comparing § 30(a) of the Act with § 10(b), § 30(a) “contains what § 10(b) lacks: a clear statement of extraterritorial effect. . . . No one claims that § 30(a) applies here”).

⁴³ *Id.* at 265 (“Assuredly context can be consulted as well.”).

⁴⁴ *See, e.g., Loginovskaya II*, 764 F.3d 266 (2d Cir. 2014) (discussed *infra*, Part II).

⁴⁵ VED P. NANDA ET AL., 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 8:34 (2d ed. 2017).

Morrison, causing confusion and disagreement among courts across the nation.⁴⁶ If courts have not been able to properly use the *Morrison* test in its intended field, it should not come as a surprise that this decision has led to widespread confusion in the commodities context as well.

Therefore, this Note proposes a three-part solution. Part III.A argues that courts should return to using a holistic, fact-specific approach, rather than *Morrison*'s transactional test, in evaluating extraterritorial jurisdiction over derivatives cases. Part III.B argues that, consistent with the use of a holistic test outlined in Part III.A, foreign plaintiffs should continue to be afforded the right to bring a cause of action for derivative fraud or manipulation suits in U.S. courts. Lastly, Part III.C addresses the steps that courts must take to correct erroneous misstatements to avoid a flawed line of policy and precedent moving forward. However, before turning to these solutions, Part II provides in-depth illustration of the problem at hand by examining the the Second Circuit decision in *Loginovskaya v. Batratchenko*.

II. THE *MORRISON* TEST FALLS SHORT IN A DERIVATIVES CONTEXT

A. *The Loginovskaya Decision: The Perfect Storm for Extraterritorial Confusion*

In *Loginovskaya v. Batratchenko*,⁴⁷ the United States Court of Appeals for the Second Circuit held that that private fraud claims under the CEA may only proceed if the alleged fraudulent

⁴⁶ See *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 527 (S.D.N.Y. 2011) ("Though the Supreme Court purported to lay out a bright-line rule regarding the extraterritorial application of Section 10(b), *Morrison*'s impact on this case is far from clear."); *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012) ("While *Morrison* holds that § 10(b) can be applied to domestic purchases or sales, it provides little guidance as to what constitutes a domestic purchase or sale."); see also *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 623–24 (S.D.N.Y. 2010); *SEC v. Chicago Convention Ctr., LLC.*, 961 F. Supp. 2d 905, 908 (N.D. Ill. 2013).

⁴⁷ 764 F.3d 266 (2d Cir. 2014).

commodities *transaction* was within the United States, even though the defendant corporation was domiciled in the United States and the alleged fraud took place in the United States.⁴⁸

In *Loginovskaya*, the Thor Group (“Thor”), “an international financial services organization based in New York,” managed investment programs in commodity futures and real estate.⁴⁹ Several Thor entities were registered participants in the commodities markets as commodity pool operators or commodity trading investors.⁵⁰ The defendant, Oleg Batratchenko, a U.S. citizen residing in Moscow, was Thor’s chief executive officer, while the plaintiff, “[Ludmila] Loginovskaya, a Russian citizen residing in Russia, was solicited by Batratchenko in 2006 to invest in Thor’s programs.”⁵¹ Loginovskaya entered into two investment contracts with Thor in 2006 and 2007 and transferred a total of \$720,000 for these contracts to Thor’s bank accounts located in New York.⁵²

In 2010, Batratchenko sent a letter to Loginovskaya falsely stating that “due to onerous new regulations in the United States, investors could not withdraw their funds from the investment accounts without providing burdensome documentation.”⁵³ Loginovskaya later learned that Thor used invested client funds to extend \$40 million in unsecured loans to Atlant Capital Holdings LLC, an undercapitalized real estate investment firm in which Batratchenko had personal financial interests.⁵⁴ Ultimately, the loans defaulted and Batratchenko was unable to recover Loginovskaya’s funds.⁵⁵

⁴⁸ OWEN C. PELL & SCOTT E. HERSHMAN, WHITE AND CASE, CLIENT ALERT, *LOGINOVSKAYA V. BATRATCHENKO: THE SECOND CIRCUIT LIMITS THE REACH OF COMMODITIES FRAUD CLAIMS 1* (Sept. 2014), <http://www.whitecase.com/sites/whitecase/files/files/download/publications/wc-alert-the-second-circuit-limits-the-reach-of-commodities-fraud-claims.pdf>.

⁴⁹ *Loginovskaya II*, 764 F.3d at 268.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 268–69.

⁵³ *Id.* at 269.

⁵⁴ *Id.*

⁵⁵ *Id.*

Loginovskaya sued under CEA § 25, which provides a plaintiff with a private cause of action under the Act,⁵⁶ and § 4o, one of the CEA's several antifraud provisions.⁵⁷ The Southern District dismissed Loginovskaya's claim, extending *Morrison* to CEA claims and held that the CEA's antifraud provision did not apply extraterritorially.⁵⁸

On appeal, the Second Circuit agreed with the Southern District.⁵⁹ In reaching its decision, the court stated that "[t]he CEA as a whole—and sections 4o and 22 in particular—is silent as to extraterritorial reach," and therefore applied *Morrison*'s presumption against extraterritoriality.⁶⁰ The court reasoned that "the CEA creates a private right of action for persons anywhere in the world who transact business in the United States, and does not open our courts to people who choose to do business elsewhere."⁶¹ The court stopped its analysis at § 22 and did not proceed to analyze Loginovskaya's § 4o claim.

In a vigorous and well-executed dissent, Judge Lohier argued that Loginovskaya sufficiently alleged a violation of and satisfied the territoriality requirement under § 4o and identified several inconsistencies in the majority's analysis.⁶² In part, he states:

In other words, had Loginovskaya resided on Main Street, U.S.A. or Sutton Place, New York rather than in Surgut, Russia at the time she made her investments, we all agree that her suit would have been allowed to proceed: a large part of the defendants' scheme transpired in the United States, involved United States actors regulated by the CEA, and was premised on false promises to invest Loginovskaya's money in commodities markets in the United States, in violation of § 4o. . . . Instead, the majority opinion affords an extra,

⁵⁶ See 7 U.S.C. § 25(a)(1) (2012).

⁵⁷ *Loginovskaya v. Batratchenko (Loginovskaya I)*, 936 F. Supp. 2d 357, 363 (S.D.N.Y. 2013).

⁵⁸ *Id.* at 366 ("[I]n order for the CEA to be applicable, the implicated fraud prohibited by the statute must be domestic. In a post-*Morrison* universe, however, determining whether actionable conduct falling within a given statute is domestic in nature presents complications for provisions whose language departs from that of § 10(b).").

⁵⁹ *Loginovskaya II*, 764 F.3d at 275.

⁶⁰ *Id.* at 271.

⁶¹ *Id.* at 273. In the wake of the *Loginovskaya II* decision, the CFTC asserted that this statement, given Dodd-Frank's changed to the CEA, is factually incorrect. See *infra* note 68.

⁶² *Loginovskaya II*, 764 F.3d at 276 (Lohier, J., dissenting).

unfounded layer of protection to the defendants by applying the presumption against extraterritoriality and the *Morrison* transaction test to § 22 of the CEA Under the rule announced today, private victims of commodities fraud will be required to allege a separate domestic commodities transaction even if they adequately plead a violation of § 4o, which does not require such a transaction. In fashioning this new rule, the majority misunderstands both the commodities laws of the United States and the presumption of extraterritoriality.⁶³

Additionally, Judge Lohier explained why *Morrison*'s transaction test does not apply to § 4o and, most importantly, reflected on the purpose and intent of the CEA: to “‘protect *all* market participants from fraudulent or other abusive sales practices and misuses of customer assets’ and to preserve the integrity of the United States commodities markets.”⁶⁴

As highlighted by Judge Lohier, there are two major problems with the court's *Loginovskaya* analysis. First, as noted by the Southern District and the dissent in this case, it is not entirely clear that the Supreme Court intended *Morrison* to apply outside of the securities context, let alone to commodity claims.⁶⁵ Second, the court chose to apply *Morrison* after interpreting the CEA to be silent with regard to extraterritoriality.⁶⁶ However, as the text of the CEA has read since July 2010, this is not the case: § 2(i) discusses the extraterritorial application of the Act.⁶⁷

⁶³ *Id.* at 276–77; *see also id.* at 279 (“I share the majority’s optimism that the CFTC can effectively police bad behavior. Having announced, however, that ‘the CEA creates a private right of action for persons anywhere in the world who transact business in the United States, and does not open our courts to people who choose to do business elsewhere,’ the majority cannot have it both ways.” (citation omitted)).

⁶⁴ *Id.* at 280 (emphasis in original) (quoting 7 U.S.C. § 5 (2012)).

⁶⁵ *Loginovskaya I*, 936 F. Supp. 2d 357, 368 (S.D.N.Y. 2013). (“[T]he appropriateness of extending *Morrison*’s transaction test to CEA claims under § 4o is not immediately clear.”).

⁶⁶ *See supra* note 60.

⁶⁷ 7 U.S.C.A § 2(i)(1)–(2) (West 2015).

B. The CFTC Rejects the Second Circuit's Reading of the CEA

Days after the *Loginovskaya* opinion was published, the CFTC wrote to the Second Circuit requesting the correction of “certain erroneous statements about the CEA.”⁶⁸ Specifically, the CFTC wrote, “the Court stated incorrectly that the CEA is ‘silent’ with respect to its extraterritorial application” in Section II of the majority opinion.⁶⁹ The CFTC continued, “[b]ased on the facts as described in the opinion, it appears that the Court intended to address the CEA as it existed prior to July 2010 . . . when Congress overhauled the statute in the Dodd-Frank Wall Street Reform and Consumer Protection Act.”⁷⁰ In contrast, “when Congress amended the CEA in Dodd-Frank, it specified that the CEA does apply overseas to swaps activity with a sufficient nexus to U.S. commerce” and therefore, because “the private right of action provision under CEA Section 22, 7 U.S.C. § 25, was amended by Dodd-Frank to include references to swaps activities, [it is] covered by Section 2(i),” and the court’s “statement that the CEA is ‘silent as to extraterritorial reach’ and related statements on the intent of Congress are . . . incorrect.”⁷¹

The CFTC concluded by requesting that the Court amend its opinion to clarify which version of the CEA it is referring to for the relevant time period in question.⁷² Most importantly, the CFTC’s letter addressed the heart of its issue with the Second Circuit’s incorrect application of the law:

Given the Second Circuit’s preeminence in the field of financial regulation, the error regarding the CEA’s current overseas applicability may be cited by other courts and litigants to create a flawed line of precedent that could hamper the Commission’s enforcement and regulatory efforts in the future, [and] [a]t a minimum, this incorrect language is likely to sow confusion.⁷³

Despite the CFTC’s efforts, the *Loginovskaya* opinion remains unchanged.

⁶⁸ Letter on behalf of the U.S. Commodity Futures Trading Comm’n, requesting a change to be made to the Opinion Filed at 1, *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014) (No. 13-01624) 2014 BL 245952.

⁶⁹ *Id.*

⁷⁰ *Id.* (internal citations omitted).

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ *Id.* at 3.

C. Loginovskaya's *Lingering Effects Reveal Inconsistent Case Law Across the Country*

The CFTC accurately predicted that the Second Circuit's failure to correct the statements in its opinion would create a flawed line of precedent. Since 2014, many opinions that have come out of the Southern District of New York have relied on the Court's analysis in *Loginovskaya* to interpret the CEA and, in several cases, have led the Court to conclude that the Act does not have extraterritorial reach.⁷⁴

However, the United States District Court for the Southern District of Florida recently accepted the opposing argument. In *US Commodity Futures Exchange Commission v. Vision Financial Partners, LLC*,⁷⁵ the defendant, Vision Financial, operating from Florida, recruited individuals to invest in binary options traded through three foreign platforms: one located in Israel, one located in Cyprus, and one located in the United Kingdom.⁷⁶ Vision Financial did not invest the majority of the funds received; instead, its key director, Neil Pecker, used these funds to pay for his personal expenses.⁷⁷ The defendant claimed that the CEA "does not extend the Commission's authority to binary options" and that the court would lack jurisdiction over such a matter "because [the options] were purchased by foreign investors and exchanged on foreign trading platforms."⁷⁸ The

⁷⁴ See, e.g., *MBC Fin. Servs. v. Boston Merch. Fin, LLC*, 15-cv-00275 (DAB), 2016 U.S. Dist. LEXIS 140195, at *29 (S.D.N.Y. Oct. 4, 2016) (holding that the plaintiff's CEA claim could not survive a motion to dismiss because the "[p]laintiff [did] not demonstrate that any title of a commodity or swap was transferred within the United States, or that either party incurred irrevocable liability within the United States to pay or deliver a swap"); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 13 Civ. 7789 (LGS), 2016 U.S. Dist. LEXIS 128237, at *93 (S.D.N.Y. Sept. 20, 2016) (determining that the CEA does not apply extraterritorially to foreign exchange claims because "[i]n *Loginovskaya*, the Second Circuit held that because 'the CEA as a whole is silent as to extraterritorial reach,' courts must 'presume it is primarily concerned with domestic conditions'" (internal alterations omitted) (quoting *Loginovskaya II*, 764 F.3d 266, 270 (2d Cir. 2014))); *Sullivan v. Barclays Plc*, 13-cv-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, at *87–88 (S.D.N.Y. Feb. 21, 2017); *In re Platinum and Palladium Antitrust Litig.*, 1:14-cv-9391-GHW, 2017 U.S. Dist. LEXIS 46624, at *84–87 (S.D.N.Y. Mar. 28, 2017); *Wah v. HSBC N. Am. Holdings, Inc.*, 15 Civ. 8974 (LGS) 2017 U.S. Dist. LEXIS 86107, at *6 (S.D.N.Y. June 5, 2017); *In re North Sea Brent Crude Oil Futures Litig.*, 13-md-02475 (ALC), 2017 U.S. Dist. LEXIS 88246, at *26–28 (S.D.N.Y. June 8, 2017).

⁷⁵ 190 F. Supp. 3d 1126 (S.D. Fla. 2016).

⁷⁶ *Id.* at 1128.

⁷⁷ *Id.* at 1129.

⁷⁸ *Id.* at 1130.

court declined to accept either of these arguments, and stated that “[t]he Commodity Exchange Act . . . *does* contain an affirmative indication that it applies to extraterritorial transactions”⁷⁹

There are two key differences between *Loginovskaya* and *Vision Financial* that those in support of the *Loginovskaya* decision might point out. First, *Loginovskaya* deals with a plaintiff seeking to exercise a private right of action, whereas *Vision Financial* deals with the Commission bringing a suit.⁸⁰ *Morrison* is designed to limit the former, not the latter, and § 13a-1 explicitly grants jurisdiction to the Commission to sue for a “violation of any provision of [the Commodity Exchange Act].”⁸¹ Second, in *Loginovskaya*, the victim was defrauded through investment in a swap, whereas in *Vision Financial*, the victims were defrauded through investment in binary options.⁸² While it may seem that either of these differences could be a “smoking gun” to solidify a motion to dismiss, this is not the case.

Using a factually-focused, holistic approach, partnered with a close reading of the post-Dodd-Frank CEA, it is evident that despite the cross-border nature of the facts, both *Loginovskaya* and the CFTC should be permitted to assert their claims. The same way that § 13a-1 permits the CFTC to assert a claim with regard to any violation of the Act, including instruments commonly known to the trade such as binary options, § 22 and § (2)(i), read together, should permit Ludmila Loginovskaya to assert her claim for fraudulent swap activity.⁸³

Therefore, to ensure consistency, predictability, and stability within the law and international commodity markets, three different things need to happen. First, courts need to return to a holistic approach in evaluating extraterritorial claims that are subject to the CEA. Second, using this holistic approach, courts

⁷⁹ *Id.* at 1131 (emphasis in original).

⁸⁰ Compare *Loginovskaya II*, 764 F.3d 266, 268 (2d Cir. 2013), with *Vision Financial*, 190 F. Supp. 3d at 1127.

⁸¹ See *Vision Financial*, 190 F. Supp. 3d at 1129; see also 7 U.S.C. § 13a-1 (2012).

⁸² Compare *Loginovskaya II*, 764 F.3d at 268–69, with *Vision Financial*, 190 F. Supp. 3d at 1128.

⁸³ See 7 U.S.C. § 13a-1 (2012) (“[T]he Commission may bring an action . . . to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions.”); see also 7 U.S.C. § 25(c) (2012) (extending private rights of action in options in various financial contracts, including swaps).

need to give the Dodd-Frank amendments to the CEA their full effect and permit individual plaintiffs to assert private rights of action in court. Finally, the Second Circuit needs to address the shortcomings of the *Loginovskaya* decision to curtail further confusion.

III. REVIVING A HOLISTIC APPROACH TO INTERPRETING EXTRATERRITORIAL CLAIMS ASSERTED UNDER THE CEA

A. *Courts Should Not Extend Morrison in the Commodities and Derivatives Context*

Although securities law analyses have often been analogously extended to commodity claims in the past,⁸⁴ *Morrison's* transactional test and presumptions against extraterritoriality should not be extended to commodity claims, and courts should return to a more holistic analysis in determining whether a court has jurisdiction over a claim. This idea has been alluded to in several instances, including by the Southern District in the initial *Loginovskaya* decision,⁸⁵ and by the concurring justices in the *Morrison* decision.

In his concurring opinion, Justice Stevens, joined by Justice Ginsburg, focused on the importance of a flexible method and argued that “while the Court devotes a considerable amount of attention to the development of case law . . . it draws the wrong conclusions [here].”⁸⁶ “The text and history of § 10(b) are famously opaque on the question of when, exactly, transnational securities frauds fall within the statute’s compass.”⁸⁷ Therefore, while Scalia’s bright-line rule “makes for a nice catchphrase, the point is overstated.”⁸⁸ Best stated, “[t]he presumption against

⁸⁴ See *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1044 (2d Cir. 1983) (“In construing the reaches of jurisdiction under the CEA, courts have analogized to similar problems under the securities laws which have been more extensively litigated.”). Note that this was at the time of courts using the “conducts” and “effects” test, which is more appropriately suited for a commodities claim analysis.

⁸⁵ *Loginovskaya I*, 936 F. Supp. 2d 357, 368 (S.D.N.Y. 2013).

⁸⁶ *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 278 (2010) (Stevens, J., concurring); *id.* at 278–79 (“[T]he Court seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule. . .”).

⁸⁷ *Id.* at 274; *id.* at 276 (“[T]he Court’s critique of the decision below for applying ‘judge-made rules’ is quite misplaced [because] [t]his entire area of law is replete with judge-made rules, which give concrete meaning to Congress’ general commands.”).

⁸⁸ *Id.* at 280.

extraterritoriality can be useful as a theory of congressional purpose, a tool for managing international conflict, a background norm, a tie breaker. It does not relieve courts of their duty to give statutes the most faithful reading possible.”⁸⁹ The Court’s real question in *Morrison* was addressing “how much, and what kinds, of *domestic* contacts were sufficient to trigger the application of § 10(b)” of the Exchange Act, and that is where *Morrison*’s application should end.⁹⁰

While there certainly are critical underlying differences between securities and derivative products, the regulatory regimes governing each, especially following the enactment of Dodd-Frank, are quite similar.⁹¹ Dodd-Frank amended the language of both the CEA as well as the ’34 Exchange Act.⁹² The language in both of the acts has led to a widespread divide among courts in interpreting how *Morrison* should now apply, but it seems clear that Congress included this language in both of the acts to clarify the reach of Dodd-Frank and address its disagreement with the *Morrison* Court.⁹³

Under the amended language of the ’34 Exchange Act, *Morrison* should be less relevant in the securities context than it still is, as it was meant to be overridden by the statutory language. Courts have long understood the importance of plaintiffs being able to bring a private right of action,⁹⁴ and over time, it seems that courts have begun to experience and understand the post-Dodd-Frank challenges associated with using the *Morrison* test.⁹⁵

⁸⁹ *Id.*; *id.* at 285 (“[W]hile the clarity and simplicity of the Court’s test may have some salutary consequences, like all bright-line rules it also has its drawbacks.”).

⁹⁰ *Id.* at 281.

⁹¹ See Wall Street Transparency and Accountability Act, Pub. L. No. 111-203, 124 Stat. 1376, 1672 (2010).

⁹² *Id.*

⁹³ Jonathan E. Richman, *Proskauer Rose Discusses the SEC’s Extraterritorial Reach*, CLS BLUE SKY BLOG (Apr. 11, 2017), <http://clsbluesky.law.columbia.edu/2017/04/11/proskauer-rose-discusses-the-secs-extraterritorial-reach/> (“The *Morrison* decision was announced on June 24, 2010. On July 21, 2010—less than one month later—President Obama signed the 850-page Dodd-Frank Act”)

⁹⁴ See *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (“This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).”).

⁹⁵ See *supra* note 46.

Therefore, because of the intended effect of the Dodd-Frank amendments to the CEA and the '34 Exchange Act and the fact that the *Morrison* test cannot be consistently applied and used in its intended securities context,⁹⁶ it should follow that the test cannot be consistently applied and should not be used in the commodities and derivatives context.

B. The Importance of Affording Foreign Plaintiffs a Private Right of Action

Dodd-Frank unwound the broad exemption from OTC derivatives regulation provided by the Commodity Futures Modernization Act and substituted a complex regulatory framework by dividing the market into “swaps” to be primarily regulated by the CFTC, and “security-based swaps” to be primarily regulated by the SEC, and “mixed swaps.”⁹⁷ The definition of “swap” is not exactly straightforward.⁹⁸ Due to the complexity and diversity of swaps and other derivatives, it is easy to see how fraud, though not physically taking place on U.S. soil, could easily disrupt the domestic and international markets. This volatility, partnered with the sheer size of the industry alone, is a leading reason why § 22 of the CEA exists and why we should allow plaintiffs to exercise private rights in situations where they may have been defrauded. While critics may argue that permitting foreign plaintiffs to gain access to U.S. courts will open litigation floodgates and overwhelm the court system, when balancing the interests of preserving an interdependent system, this interest should outweigh procedural hurdles.

Similar balancing and interdependent policy arguments can be seen outside of the derivatives context in bankruptcy cases. For example, § 109(a) of the United States Bankruptcy Code articulates that in order to be eligible to file in the United States, the debtor must either be domiciled, have a place of business, or *property* in the United States.⁹⁹ Foreign debtors that are neither domiciled nor operate a business in the United States are permitted to file and reap the benefits of the United States'

⁹⁶ See *supra* note 46.

⁹⁷ See KALBAUGH, *supra* note 5, at 71–72, 78–89.

⁹⁸ See *id.* at 73 (fig.3-B: Swap Definition); see also Commodity Exchange Act, 7 U.S.C. § 1a(47) (2012); Memorandum from Willkie Farr & Gallagher LLP to Clients, *supra* note 8.

⁹⁹ 11 U.S.C. § 109 (2012).

system, even where their property in the United States is something as minimal as \$194 in a bank account.¹⁰⁰ Similarly, Bankruptcy Courts have attempted to extend the *Morrison* test to bankruptcy claims and, like in commodity cases, reached inconsistent decisions on the Code's extraterritorial applicability.¹⁰¹ This Note does not suggest that commodity fraud claims should be treated like bankruptcy cases, but rather that other legal contexts allow foreign plaintiffs to assert claims in U.S. courts for the overall benefit of the system and these same policy rationales should be considered in this context.

In addition to this practical policy argument, it would be highly inefficient to narrowly constrain a plaintiff's ability to bring a private right of action under the CEA. In lieu of allowing potentially wronged plaintiffs to exercise, and likely settle, their claims with a commodity broker, this would require that enforcement gap to be filled by the CFTC—an already underfunded and overstretched agency.

As noted by the CFTC Chairman, Timothy Massad, in light of Dodd-Frank's changes, "the CFTC's budget has not kept pace with its expanded role and market growth."¹⁰² "The traditional markets overseen by the Commission—that is, the futures and options markets—are vastly different today than when the Commission was established 40 years ago or even five years ago. They have grown dramatically in size, technological sophistication and complexity."¹⁰³ To understand the full scope of its jurisdiction, consider the following from the 2015 Strategic Plan:

¹⁰⁰ See *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 38 (Bankr. De. 2000) (citing *In re McTague*, 198 B.R. 428, 429 (Bankr. W.D.N.Y. 1996)) (holding that the debtor corporation, headquartered in Athens, Greece, was eligible to file bankruptcy in the United States because it had funds in a bank account here).

¹⁰¹ Compare *In re Sec. Inv'r Prot. Corp.*, 480 B.R. 501, 506 (Bankr. S.D.N.Y. 2012) (concluding that Congress expressed a clear intention that § 550 of the Bankruptcy Code should apply extraterritorially), with *In re Madoff Sec.*, 513 B.R. 222, 228 (S.D.N.Y. 2014) ("Nothing in [the] language [of § 550] suggest[ed] that Congress intended for this section to apply for foreign transfers," and that the presumption against extraterritoriality had not been rebutted).

¹⁰² U.S. COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET: FISCAL YEAR 2017, *supra* note 23. Similarly, the SEC has not kept pace with its expanded role and is only about halfway through with its mandated rulemaking.

¹⁰³ *Id.* at 2.

[T]he CFTC regulates a futures and options industry that increased from 580 million contracts in 2000 to more than 3.1 billion contracts in 2010. The value of customer funds held in Futures Commission Merchants Accounts, during the same period, increased from \$56.7 billion to more than \$170.1 billion, and the value of these contracts is notionally estimated at \$40 trillion. . . . [W]ith the passage of the Dodd-Frank Act, the CFTC is [now] tasked with regulating the swaps markets with an estimated notional value of approximately \$300 trillion—roughly *eight times* the size of the regulated futures markets.¹⁰⁴

Though there have been increases to the CFTC's budget over time, these increases have not sufficiently helped the agency carry out its expanded responsibilities.¹⁰⁵ In fact, the CFTC's budget did not increase from 2015 to 2016.¹⁰⁶ As a result of these inevitable constraints, one of the biggest drawbacks noted by the Commission is the crux of this argument: "The Commission cannot engage in the necessary level of market surveillance, risk surveillance and oversight, and enforcement efforts. This places customers, the market, and by extension the U.S. economy at increased risk of fraud, abusive practices and manipulation."¹⁰⁷

Given these limitations and the scope of the market it regulates, limiting private rights of action afforded under the CEA would only increase the overall burden on the CFTC and work counterintuitively against this goal. An aggrieved plaintiff will always have the option of bringing its allegations to and seeking a remedy through the Commission,¹⁰⁸ but to make this their *sole* option for recovery would undercut the mission of both the Commission and the CEA itself.

Courts have generally affirmed the CFTC's power to engage in rulemaking under Title VII and determine the extraterritorial scope of those rules,¹⁰⁹ and the Commission itself has also recognized the need for private rights of action to supplement its

¹⁰⁴ U.S. COMMODITY FUTURES TRADING COMM'N, STRATEGIC PLAN FY 2011–2015, at 6 (2011), <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/2015strategicplan.pdf> (emphasis added).

¹⁰⁵ U.S. COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET: FISCAL YEAR 2017, *supra* note 23, at 4.

¹⁰⁶ *Id.* at 10 tbl.1.

¹⁰⁷ *Id.* at 3.

¹⁰⁸ See 7 U.S.C. § 13a-1(a)–(c) (2012); 7 U.S.C. § 18(a)(1) (2012).

¹⁰⁹ See *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 384 (D.D.C. 2014).

jurisdiction to support its mission.¹¹⁰ Considering all of these factors, courts should permit plaintiffs to exercise private rights of action in U.S. courts to preserve the integrity of the international derivatives markets and to give both the CEA and Dodd-Frank their full effect.

C. Clarifying Loginovskaya Will Help Preserve Market Integrity

The last step in untangling the web of extraterritorial confusion is determining how to correct previous missteps of the court. The CFTC advised the Second Circuit that its opinion in *Loginovskaya*, if not corrected, would likely sow confusion.¹¹¹ However, a simple timeline breakdown may reveal a way for the decision to make sense in an isolated circumstance.

The fraud in *Loginovskaya* took place between 2006 and 2010, *Morrison* was decided in June 2010, and Dodd-Frank, amending the relevant provisions of the CEA addressed in the decision, was enacted in July 2010. If the Second Circuit's statement and analysis meant that the CEA did not apply extraterritorially at the time of the fraud, the court needed to make that assumption explicitly clear. By making these unclear statements in its July 2014 decision, other courts have taken the Second Circuit's statements at face value. This unclear language will not only continue to confuse courts, but will also continue to confuse future plaintiffs trying to determine whether they can assert a claim under the CEA in a U.S. court, ultimately blocking their access to the court system and barring them from bringing legitimate claims. Therefore, this error should be remedied, at a

¹¹⁰ "Private rights of action have been instrumental in helping to protect market participants and deter bad actors. These actions can also augment the limited enforcement resources of the CFTC, and serve the public interest by allowing harmed parties to seek damages in instances where the Commission lacks the resources to do so on their behalf." Timothy Massad, Chairman, Commodity Futures Trading Comm'n, Statement in Support of the Proposed Amendment to the RTO-ISO Order (May 10, 2016), <http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement051016> (advocating for the Commission's proposal to expressly preserve the right of private litigants to sue utilities, power producers, marketers and other market participants for fraud and manipulation resulting from certain transactions); J. Christopher Giancarlo, Commissioner, Commodity Futures Trading Comm'n, Statement of Dissent on the Proposed Amendment to the RTO-ISO Order (May 10, 2016), <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement051016> (disagreeing with the proposal but conceding that "private claims may serve the public interest by empowering injured parties to seek compensation for damages where the Commission lacks the resources to do so on their behalf").

¹¹¹ See *supra* note 73.

minimum, by amending the opinion to specify that the Court considered the language of the CEA as it existed during the relevant pre-Dodd-Frank fraud period in the facts of the case.¹¹²

Congress's intent of protecting both markets and individuals has been recognized through the enactment of Dodd-Frank and the amending of the CEA. This intent has been echoed by both the SEC and the CFTC and is consistent with the agencies' rulemaking and governance. It is important that courts accurately interpret and reflect these goals and the appropriate statutory mechanisms to achieve them.

CONCLUSION

If Ludmila Loginovskaya was defrauded by Thor Entities tomorrow, and the Second Circuit correctly interpreted the language of the CEA in a post-Dodd-Frank world, the difference of her residing on Main Street, U.S.A. or Sutton Place, New York, rather than in Surgut, Russia would have been immaterial. She would have had her day in court. "[P]rivate rights of action were called for by Congress under the CEA, to ensure wronged parties were provided with an appropriate remedy Our job is to ensure that determination is properly implemented and enforced."¹¹³

By eliminating the use of the *Morrison* test and returning to a holistic, fact-specific approach in assessing extraterritorial commodity claims, both private plaintiffs, foreign and domestic, and the CFTC will be permitted to bring a cause of action for commodities fraud under the CEA. More specifically, permitting foreign plaintiffs to bring private causes of action in the United States will allow for all three branches of government to work towards the common goal of preserving the integrity of both the domestic and international derivatives markets, and the individuals who seek to participate in those markets.

¹¹² See *supra* note 68.

¹¹³ Massad, *supra* note 110.