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**“Direct and Significant Connection”: The Ramifications of Extraterritorial Derivatives  
Enforcement under Dodd-Frank and Adopting Antitrust Principles to Create Analogous  
Enforcement Policies**

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Submitted in partial fulfillment of the requirements of the  
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## Introduction

While Congress passed Dodd-Frank to create greater control and regulation of the financial markets following the collapse of some of the world's largest financial institutions, some of its language contains vagueness in an extraterritorial enforcement clause that creates important international policy questions for the Securities and Exchange Commission (hereafter "SEC") and the Commodities Futures Trading Commission (hereafter "CFTC") to solve. A misguided approach could lead to a regulatory policy that negates much of the very purpose of the legislation. Under Sec. 722(d) of Dodd-Frank, the U.S. Government and its enforcement and regulatory agencies are not to obtain jurisdiction or enforcement over derivative activities taking place outside of the United States unless those activities have a "direct and significant connection" to the United States.<sup>1</sup> A difficult to navigate debate has thus ensued which asks just how far the regulatory agencies should be able to reach into financial transactions which partially or wholly take place outside of U.S. borders.<sup>2</sup> Enforcement and jurisdictional questions are abound as the U.S. agencies must balance international policy, politics, and commercial realities against protecting the very purpose of important financial regulations that were created to prevent such financial calamities from again taking place within the United States.

In determining how the CFTC should apply this rule, it is important to evaluate what specific problems exist and what the agency is trying to solve. This analysis should take account of existing agency commentary and the full context and content of the statute itself. Additionally, the regulations implicate several problems of extraterritorial and jurisdictional application that would be clarified by a jurisprudential or rulemaking analogy from which the

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<sup>1</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

<sup>2</sup> Ben Protess, *Derivatives Without Borders vs. Dodd-Frank*, N.Y. TIMES, May 25, 2011, available at <http://dealbook.nytimes.com/2011/05/25/derivatives-without-borders-vs-dodd-frank/>.

CFTC can draw parallels of policy enforcement. The use of an existing enforcement analogy seems most efficient and legally sound, as opposed to a reinvention of the policy wheel type approach.

This paper will argue that a strong analogy can be found in antitrust jurisprudence. The antitrust framework is of apt comparison because it has a long track record of relative success, and courts have experience with its concepts and principles of extraterritorial enforcement. With such a framework as our base, it is then necessary to look at the ramifications of what such a policy means in the broader picture. While antitrust principles offer a solid foundation, it will be explained that the regulation of derivatives has almost inverse concerns to antitrust issues as, in the case of derivatives, the most restrictive nation faces issues of financial flight of derivative activities to less regulated markets.<sup>3</sup> Thus, this paper will conclude with an examination of what strong domestic regulations would mean in regards to global enforcement.

**The Legislation: What it Says and What the CFTC and the Banks Argue It Says...So Far**

Section 722(d) of the legislation states as follows:

(d) APPLICABILITY.—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) (as amended by section 723(a)(3)) is amended by adding at the end the following: “(i) APPLICABILITY.—The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities— “(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or “(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.”<sup>4</sup>

The legislation, on its face, indicates that Congress was worried about the reach of such regulations, attempting to limit enforcement and jurisdictional boundaries to U.S. based actors

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<sup>3</sup> *Id.*

<sup>4</sup> Dodd Frank, *supra* note 1, at 722(d).

and activities.<sup>5</sup> A broader rule would bring about tensions in international comity and may be difficult to enforce as each nation wants to be able to regulate activity within its own borders, just as the United States wants to enforce Dodd-Frank domestically.<sup>6</sup> At the same time, some type of reach must exist and collaborate with the principles of comity and cooperation as \$600 trillion worth of derivative transactions take place across multi-national borders and have dramatic implications on the commerce of so many nations.<sup>7</sup> At the same time, even though Congress's main goal is to regulate domestic action, subsections (1) and (2) clearly address a concern that U.S. banks or foreign actors and entities will somehow move activities offshore that will still have a relation or an effect on the United States.<sup>8</sup> These subsections give the CFTC some amount of reach, one that is not clearly defined, to prevent offshore activities which might otherwise circumvent the American domestic regulations. While international enforcement or jurisdiction may be difficult, Congress created a vague opening for the CFTC to target entities attempting to hide activities in international forums or subsidiaries that ultimately still have effect on the United States' financial system and economy.

It seems clear that if the legislation is to mean anything at all, there has to be some reach of Dodd-Frank to overseas activity. The question is, how far? The application of extraterritorial jurisdiction creates numerous concerns including how to make a national or international clearinghouse process effective, coordinating capital and margin requirements, and centralizing data reporting and record keeping functions.<sup>9</sup> All of these areas ultimately play into the extraterritorial question as each nation or group of nations will be implementing their own rules

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<sup>5</sup> Testimony Before the U.S. House Comm. on Financial Services, 112<sup>th</sup> Cong. (June 16, 2011) (statement by Gary Gensler, Chairman of the Commodity Futures Trading Comm'n).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Dodd Frank, *supra* note 1, at 722(d).

<sup>9</sup> Gensler Testimony, *supra* note 5.

on all of these issues. When rules are not uniform, the possibility of a break in comity arises, creating the muddy and potentially contentious waters that are likely to open up once the implementation process begins internationally.<sup>10</sup> Additional questions are thus raised: Will it apply to U.S. companies who are acting overseas? What about if the action is through an international subsidiary? What if both actors to an activity are completely foreign based? Are these activities potentially enforceable under U.S. law at all? If so, what amount of effect must they have? The answer of where the line is may be difficult to draw as the CFTC has to weigh international cooperation against the effect such enforcement would have on domestic commerce.

The CFTC has given some initial commentary on where it currently stands. Gary Gensler, the Chairman of the CFTC, recently spoke about the CFTC's current progress in its rulemaking procedures regarding implementation of the derivative's regulation, including extraterritorial issues under 722(d). His first speech occurred on June 16, 2011 in front of the U.S. House of Representatives;<sup>11</sup> he also spoke on October 13, 2011 as part of a panel on "Global Reform for Derivatives Markets" at the London School of Economics.<sup>12</sup> Gensler received a good amount of attention in London, which is of no coincidence since its markets, as the financial center of Europe, may be most affected by the CFTC's ultimate enforcement procedures.<sup>13</sup> Gensler highlighted the importance of interplay between the U.S. regulations and regulations that were occurring around the world, stating that Japan, the European Commission,

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<sup>10</sup> Ethan Mark, *Making Sense of Dodd-Frank*, Nov. 17, 2010, available at <http://dodd-frank.com/cftc-proposes-rules-on-registration-of-swap-dealers-and-major-swap-participants-and-requests-comment-on-extraterritorial-reach-of-registration-requirements/>.

<sup>11</sup> Gensler Testimony, *supra* note 5.

<sup>12</sup> Gary Gensler, Chairman, Commodity Futures Trading Comm'n, Speech at the London School of Economics (Oct. 13, 2011). (As summarized by Cadwalader, Wickersham & Taft LLP, *Clients and Friends Memo: CFTC Chairman Discusses Derivatives Reform in London* (Oct. 21, 2011), available at [http://www.cadwalader.com/assets/client\\_friend/102111\\_-\\_CFTC.pdf](http://www.cadwalader.com/assets/client_friend/102111_-_CFTC.pdf)

<sup>13</sup> *Id.*

Canada, and other nations are all in the process of developing their own reforms, hopefully similar to that of the United States.<sup>14</sup>

Gensler addressed the amazing new reach of the agency by stating that “the CFTC and the SEC will, for the first time, have oversight of the swaps and security-based swaps markets. The CFTC’s remit is growing from a marketplace that has a notional value of approximately \$40 trillion to one with a notional value of approximately \$300 trillion.”<sup>15</sup> Gensler then emphasized the importance of comity, “As we work to implement the derivatives reforms in the Dodd-Frank Act, we are actively coordinating with international regulators to promote robust and consistent standards and avoid conflicting requirements in swaps oversight.”<sup>16</sup> Thus, how the CFTC ultimately deals with 722(d) is no small or light decision. Yet, the agency appears to be stalled. 722(d) was first directly addressed in the House hearing in June of 2011 when Gensler stated that the CFTC was still developing a plan of implementation and that a public comment stage was still in the works, meaning any actual implementation would still be down the road.<sup>17</sup> A few months later in London, it seemed little progress had been made as Gensler stated that full and official stages of public comment would not be done until at least 2012, meaning any actual implementation of the rule remains a future based proposition.<sup>18</sup>

In London, Gensler paid even more attention to the extraterritorial question than at his hearing before the U.S. House of Representatives.<sup>19</sup> Still, while Gensler was essentially answering questions on 722(d), most of his responses related to universal norms, highlighting the notion that the European Union should attempt to best mirror the proposals the United States has

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<sup>14</sup> Gensler Testimony, *supra* note 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Gensler Speech, *supra* note 12.

<sup>19</sup> *Id.*

already put forward as implementation stateside is arguably ahead of their European counterparts.<sup>20</sup> The tone was one of cooperation to best create symmetrical enforcement and regulation, thus allowing the United States an easier way out from a potential overreach of 722(d). If the regulations are similar in the EU, 722(d) becomes a much simpler proposition as fewer enforcement discrepancies are likely to arise, and the United States can further ensure that the overall purpose of Dodd-Frank stays intact without having to counterbalance what otherwise might be lighter regulations overseas.

To promote such uniformity, Gensler stated that the EU should work with the United States so that the two groups could come up with similar requirements on clearing, capital and margin amounts, and transparency.<sup>21</sup> While it is a potentially difficult proposition to tell another nation or group of nations that it should copy the rules of the United States, Gensler's defense of such an idea relied on the notion that the United States' rules have already been set forth, as opposed to the still developing talks in Europe.<sup>22</sup> Still, to lessen conflict, Gensler pointed out that Dodd-Frank allows the CFTC to utilize and recognize "the rules of foreign regimes which are comprehensive and comparable to U.S. regulatory framework."<sup>23</sup> Finally, on the issue of 722(d) directly, "The Chairman stressed that Dodd-Frank would not cover activities which did not have a direct and significant effect on commerce in, or on the commerce of, the United States. He explained that he felt that this requirement was clear in itself..."<sup>24</sup> When asked for more specifics as to the type of transactions and activities that would be reachable under 722(d), "the Chairman explained that it would probably not cover transactions between foreign entities in foreign countries, but that it was foreseeable that it could touch on transactions between U.S. entities

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*



outside of the U.S., particularly if an entity is guaranteed by a U.S. parent.”<sup>25</sup> While that seems understandable, Gensler admits the possibility that U.S. entities operating overseas could find themselves within enforcement reach.<sup>26</sup> Thus, the answer apparently becomes no clearer. Must this be a subsidiary? Must it be the corporation itself? How related does this entity have to be to its U.S. entity? And, while Gensler has stated that completely foreign entities are unlikely to be regulated,<sup>27</sup> even that does not seem to be a definite.

In contrast to the vague statements of the CFTC, the banks have taken quite a different approach, offering a specific and pointed public comment. Through their representative law firm of Sullivan and Cromwell, on February 22, 2011, Bank of America, JP Morgan Chase, and Citigroup wrote a comment letter to the SEC and the CFTC.<sup>28</sup> Their view on swap registration and regulation was summarized by stating that, “to the extent that the activities of the Companies’ Non-U.S. Operations take place with non-U.S. persons outside of the United States,” these activities should not be subject to registration or regulation requirements otherwise imposed by the CFTC on transactions which are strictly domestic in nature.<sup>29</sup> Accordingly, if the banks were to get their way, this would potentially exempt them from many clearing and data reporting requirements. Furthermore, while the CFTC was vague in their description of specific examples, the banks tried to outline bright line rules of foreign activities which should not be regulated:

Non-U.S. Operations should not be considered swaps entities, or be required to register as such, solely on the basis that they are affiliated with, or, in the case of non-U.S. branches of U.S. banks, a part of, a U.S. bank. - Non-U.S. Operations that engage in swaps activities should fall within the definition of swaps entity only if they engage in swap activities with U.S. persons, other than in

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Comment Letter From Sarah Lee, Carl Howard, & Diane Genova, General Counsels and Managing Director of Bank of America Corp., Citigroup Inc., and JP Morgan Chase & Co., respectively, to CFTC and SEC (Feb. 22, 2011) (on file with the SEC), *available at* <http://www.sec.gov/comments/s7-39-10/s73910-60.pdf>.

<sup>29</sup> *Id.*

any de minimis amount authorized by the final rules and in transactions with their U.S. affiliates for purposes of risk management. - Engaging in transactions with non-U.S. counterparties whether or not the non-U.S. counterparties have a U.S. affiliate should not cause the Non-U.S. Operations to be swaps entities provided that the transactions are not conducted out of the Non-U.S. Operations to evade the requirements of Title VII. - The presence of a guarantee by one of the Companies or its U.S. subsidiaries of a swap transaction engaged in by a Non-U.S. Operation with a non-U.S. counterparty should not cause the Non-U.S. Operation to be considered a swaps entity.<sup>30</sup>

These proposals by the banks are none too surprising as they of course are likely to argue for as little regulation as possible. The implication of the banks' argument is that a domestic institution's guarantee of international derivative transactions does not have a significant impact on American commerce and that such activities can properly be regulated by another international jurisdiction. This argument is flawed as it denies the reality that ill-regulated derivative activities occurring in other territories can still have an immense effect on domestic commerce and institutions, especially if the domestic institution was a guarantee at some level in the transaction. If a Lehman like collapse occurred offshore, there is little doubt the contagion effect could reach the U.S., only all the more likely if a U.S. institution was such a guarantee. This is corroborated by Gensler's statement that it was conceivable that the CFTC would look at activities that took place in foreign territories, particularly if they were guaranteed by a U.S. entity.<sup>31</sup>

Secondly, the banks' argument leaves open what constitutes activity that is meant to circumvent U.S. regulation. In the middle of the banks' letter, they state that transactions with non-U.S. counterparties should not be regulated domestically "provided that the transactions are not conducted out of the Non-U.S. Operations to evade the requirements of Title VII."<sup>32</sup> This merely raises further questions: How is the intent to "evade" shown, and who bears the burden of persuasion? Must the CFTC first file an audit or investigation on the activity? Or, must the banks

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<sup>30</sup> *Id.*

<sup>31</sup> Gensler Testimony, *supra* note 5.

<sup>32</sup> Lee, Howard, & Genova, *supra* note 28.

or those who guarantee or have a subsidiary that participates in such an action demonstrate a legitimate purpose to the transactions, and, if so, how often must they show this? Must they meet clearing requirements abroad or here at home? Thus, even the arguments provided by those most resistant to regulation offer little to help resolve the multitude of challenging policy questions. This lack of clarity creates an opportunity to look toward analogous extraterritorial enforcement principles that can be adopted to help the CFTC explain how “direct and significant” may actually apply in the derivatives context. With so many contradictions and with so little of Section 722(d) defined as of yet, the need for a more definitive jurisprudential scope of extraterritorial enforcement is thus apparent. This opens up the argument for the analogy to international enforcement under antitrust law.

**Antitrust Enforcement: An Analogy of Useful Guidance to Help the CFTC Answer Some of its Extraterritorial Dilemmas**

While there may be many helpful comparisons to international enforcement in multiple regulatory areas, an analogy to extraterritorial enforcement within the framework of antitrust law seems particularly apt. International antitrust enforcement operates under the notion that corporations based in one country may fall under the regulatory reach of another jurisdiction.<sup>33</sup> This reach often means the corporation must follow the antitrust regulations of two, if not multiple, regulatory agencies.<sup>34</sup> This takes place as any jurisdiction that believes it may be impacted by the activities of the corporation wants to have a say in the proposed or ongoing activity. Such is often the case in international mergers where a corporation from one jurisdiction

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<sup>33</sup> See generally Sam Halibi, *The Comity of Empagran: The Supreme Court Decides That Foreign Competition Regulation Limits American Antitrust Jurisdiction Over International Cartels*, 46 HARV. INT’L L.J. 279 (2005).

<sup>34</sup> William Kolasky, *International Comity in Antitrust: Advances and Challenges*, 22 LEGAL BACKGROUNDER 16 (May 25, 2007).

is merging or acquiring a corporation from another jurisdiction.<sup>35</sup> Still, extraterritorial enforcement can reach even further as one jurisdiction may claim enforcement abilities just because the corporation sells products in its market, even though the corporation has no management base in the jurisdiction.<sup>36</sup> Additionally, this reach can potentially even take place if a jurisdiction has no direct relation to the corporate activity other than a worry that such activity may, for example, limit the competitiveness of one of the jurisdiction's own corporations, likely a domestic competitor who may be hurt by the activity of the outside corporation.<sup>37</sup> A likely defense of such expansive reach is that such an activity would have a dramatic effect on the commerce of the nation enforcing extraterritorial reach, under the guise that such activity would ultimately have effect on the consumers in said country, such as an increase in consumer prices.<sup>38</sup> Thus, corporate activities and mergers can be blocked globally by the regulative action of a single jurisdiction.<sup>39</sup> This often takes place as the corporation would ultimately like to participate in the regulating jurisdiction, especially if that jurisdiction is a large area of commerce, such as the U.S. or the E.U.<sup>40</sup> In contrast, extraterritorial reach from a smaller nation such as Israel might not destroy such a merger as the merging corporations may simply decide to avoid the Israeli market, if not approved, as much more could still be gained by the merger as a whole than the little bit of commercial activity they may be losing from Israel.<sup>41</sup> Still, even such a limited commercial zone may find ways to create leverage as it may still remain a viable

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<sup>35</sup> See generally *Id.*

<sup>36</sup> Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME MAGAZINE, July 08, 2001.

<sup>37</sup> Jeremy Grant & Damien Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict* (2005), available at <http://ec.europa.eu/dgs/competition/economist/honeywell.pdf>.

<sup>38</sup> See Elliott, *supra* note 36.

<sup>39</sup> *Id.*

<sup>40</sup> Grant & Neven, *supra* note 37.

<sup>41</sup> Michael Gal, *Extra-territorial Application of Antitrust – The Case of a Small Economy*, LAW AND ECONOMICS RESEARCH PAPER SERIES WORKING PAPER No. 09-03 (2009), available at [https://mail-attachment.googleusercontent.com/attachment?ui=2&ik=b8fc2a31ce&view=att&th=132ee98e7d97ee05&attid=0.7&disp=inline&realattid=f\\_gtlndqgz6&safe=1&zw&saduie=AG9B\\_P8x8NJ8FSYI28iL6VyimKR5&sadet=1324324318138&sads=f\\_EWqqzgW4pT0RL2qdbH9D\\_i0pM](https://mail-attachment.googleusercontent.com/attachment?ui=2&ik=b8fc2a31ce&view=att&th=132ee98e7d97ee05&attid=0.7&disp=inline&realattid=f_gtlndqgz6&safe=1&zw&saduie=AG9B_P8x8NJ8FSYI28iL6VyimKR5&sadet=1324324318138&sads=f_EWqqzgW4pT0RL2qdbH9D_i0pM).

market the corporation does not want to lose.<sup>42</sup> When a larger commercial zone, such as the European Union, blocks the deal, the corporation may likely withdrawal from the merger, unable to lose out on the entire European market.<sup>43</sup> To prevent a nightmarish scene of never ending discrepancy between various nations' regulatory agencies, the principles of comity and cooperation are often paramount in the antitrust context.<sup>44</sup> Still, complications can arise.

The last century has created an expanding amount of mergers, acquisitions, and other corporate activities that sometimes have a dramatic effect on commerce. It is in investigating such publicized cases as the GE/Honeywell merger attempt that an analogy between international antitrust comity skirmishes and potential future extraterritorial battles regarding financial regulations begins to appear. But, before getting to GE/Honeywell as a representative example, it is important to understand that the foundation of requiring a substantial connection is also used in the context of antitrust enforcement.

A particularly illustrative example of modern day comity conflict arose in the *Hartford Fire Insurance Co. v. California* case where United Kingdom based insurance corporations argued against extraterritorial reach of the United States.<sup>45</sup> The U.S. Supreme Court found that, "Although the proposition was perhaps not always free from doubt, it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."<sup>46</sup> In the antitrust context, this foreign conduct includes actions by foreign parties that affect the market and market prices in the United States.<sup>47</sup> Even though the Court stated that international comity should be a consideration, the

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<sup>42</sup> *Id.*

<sup>43</sup> Grant & Neven, *supra* note 37.

<sup>44</sup> Gensler, *supra* note 5.

<sup>45</sup> *Hartford Fire Insurance Co v. California*, 113 S.Ct. 2891 (1993).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Court still said such a consideration could ultimately be limited and fail as a preventative factor for the United States to exercise extraterritorial enforcement.<sup>48</sup> In an example of such a case, the Court started with the comity proposition that the “application of [American] antitrust laws to the (European insurance) market(s) ‘would lead to significant conflict with English law and policy...and that “[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction.”<sup>49</sup> Still, even with such a consideration, the Court looked at factors such as whether the foreign entity intended to affect American markets and at the “substantial nature of the effect produced.”<sup>50</sup> If the activity had a substantial enough effect, the Court ultimately determined that such a consideration could outweigh any international enforcement conflicts that may have been created.<sup>51</sup>

Even when Congress has created vague or indefinite language, the Court has still allowed American agencies and courts breathing room to extend their international reach.<sup>52</sup> The Court has found that, “Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.”<sup>53</sup> The first question of the Court’s test is whether “there is in fact a true conflict between domestic and foreign law.”<sup>54</sup> In other words, just because a foreign entity has complied with foreign law does not mean an international conflict of enforcement has been created if the United States has differing policies which do not affect enforcement of said entity in said foreign country. The Court has thus concluded “the fact that conduct is lawful in the state in which it

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Justice Scalia has offered dissents to the contrary stating that international comity should be the first factor weighed in such an analysis. Under his approach, if international comity is no longer possible with such reach of the U.S., the enforcement and jurisdiction abilities of the United States should automatically cease.

<sup>54</sup> *Id.*

took place will not, of itself, bar application of the United States antitrust laws.”<sup>55</sup> The Court has said this is true even if the other nation encourages such actions within its own borders,<sup>56</sup> so long as, “no conflict exists, for these purposes, ‘where a person subject to regulation by two states can comply with the laws of both.’”<sup>57</sup> Thus, unless a foreign entity can argue that their nation’s domestic “law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible,” the Court has said that there is no conflict, and the principles of foreign relations laws are upheld.<sup>58</sup> As long as no conflict exists, the Court has found no need to reach the question of comity.<sup>59</sup>

Thus, antitrust jurisprudence could offer the CFTC an analogous foundation that holds the principle that, if an entity participating in derivative activities that have effect on multiple jurisdictions can comply with both jurisdictions’ regulations without lacking compliance with their local jurisdiction, comity is not breached. This would mean that a potentially more restrictive nation may be able to have international reach as added restrictions do not create a conflict in themselves. In the context of financial regulation, those added rights would be comparable to added regulations of a jurisdiction that adds to but does not have effect on the other jurisdiction. In other words, in the derivatives context, this would mean that, if the United States was more restrictive than Europe, the United States could still enforce its more restrictive regulations without breaking international comity, as long as those regulations were merely more restrictive as opposed to contradictory. An illustration might be increased collateral requirements. If the European Union requires a collateral amount lower than the United States, the company could still comply with U.S. regulations by keeping more collateral without being

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

in any way in conflict with their Europe based requirements which simply require a lower amount, not a different procedure. This gives the United States a great argument to promote regulations that are not in conflict with other bodies but are instead additional or more restrictive measures of similar requirements in that jurisdiction.

The problem with international comity and cooperation is that it may work in theory and even in practical application the majority of the time but, with so many different jurisdictional interests at play, there are bound to be examples of what happens when these principles falter. This is why the GE/Honeywell example is particularly illustrative of extraterritorial enforcement problems. In 2000 and 2001, American based international conglomerates, General Electric and Honeywell, two companies who made everything from home appliances to jet engine parts, attempted a merger, driven by Jack Welch, General Electric's chairman at the time.<sup>60</sup> Honeywell's strengths, particularly those in aviation electronics, were complimentary to General Electric's research and product line, especially regarding General Electric's jet engine manufacturing division.<sup>61</sup> The deal happened quickly after Welch made a counteroffer to beat United Technologies Corporation's own bid for Honeywell.<sup>62</sup> Thus, in late 2000, the corporations seemingly had a deal in place that would make it the largest ever merger between two such companies.<sup>63</sup> The only thing that stood in their way was clearance by merger review agencies such as the United States Department of Justice.<sup>64</sup>

As both companies were American based, they thought the deal would easily move forward after the U.S. Department of Justice approved the merger after placing a few obligations

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<sup>60</sup> Elliott, *supra* note 36.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*



on GE, such as the divestment of some of its helicopter division.<sup>65</sup> However, a few months later, the European Commission for Competition attempted to block the merger, arguing its potential harm to competition.<sup>66</sup> Many American economists and analysts were puzzled by the intense scrutiny placed on the merger by the Commission.<sup>67</sup> After all, this would have been the first time the E.U. commission blocked a merger of two non-European companies that was already approved by the domestic regulatory agency of those companies.<sup>68</sup> Still, that is exactly what occurred as, in unprecedented fashion, the Commission stopped the merger, killing the deal in its entirety.<sup>69</sup>

The failure of the GE/Honeywell merger has significance beyond its own confines and illustrates ramifications beyond mere antitrust principles. It is an example of what can go wrong within the principles of international comity when pressured by competing jurisdictional interests and concerns, issues that are sure to have analogies when applied to financial activities such as derivatives. An observer to the ordeal stated the international regulatory ramifications of the modern world as follows: “In the macho world of merger regulation...authorities strive to win a tough reputation.”<sup>70</sup> While General Electric was an American headquartered company, it still had major operations in Europe and would have had major effects on European customers, competitors, and related European companies.<sup>71</sup> The GE case thus offers the illustration that while operations within a jurisdiction’s borders may give the jurisdiction enforcement abilities, it is the effect of a company’s activities that may also concern regulators who may be willing to regulate extraterritorially to prevent domestic effect on commerce.

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Grant & Neven, *supra* note 37.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Tobias Buck, *No Easy Way Out for Monti*, FINANCIAL TIMES, Sept. 20, 2004, available at <http://www.ft.com/intl/cms/s/1/a1712b04-0b28-11d9-b403-00000e2511c8.html#axzz1h0rMcdx5>.

<sup>71</sup> Elliott, *supra* note 36.

The American banks are arguing that swaps performed through their subsidiaries overseas should not be regulated by Dodd-Frank and instead be left to the regulating authorities of the country where the actions are taking place.<sup>72</sup> But, if the CFTC sees that those actions are having an effect in the U.S., it arguably could find itself in a situation similar to what Europe found itself in regarding the GE deal. On one hand, the CFTC may not want to regulate too heavy handedly over non-American entities and activities. On the other end, the CFTC and American regulators are likely to find themselves in a situation where major swap and derivative transactions are taking place overseas. In between these questions is the reality of retaliation which might occur once one country is viewed as reaching too far. Be it in antitrust or derivatives regulation, if the U.S. views European regulatory actions as inappropriate, such as the GE blockage, then the U.S. may retaliate by blocking an activity which might otherwise be viewed as Eurocentric. The failure of comity in one regulatory enforcement reaction thus may cause further collapse of the principles of comity, causing distrust or bitterness on both sides, ruining a notion of cooperation, an element that may be crucial in international derivatives regulation. Furthermore, as the CFTC reviews these transactions, it is likely that activities could include two subsidiaries of U.S. corporations, two parties which are completely foreign based but large enough to have a commercial impact on the United States, or any mash up of possible relationships in between such a spectrum. When would it thus be appropriate for the CFTC to get involved?

The CFTC could break down these types of activities in a few ways. First, on the simplest of levels, if an American corporation was purchasing credit default swaps with an American subsidiary operating out of London, the CFTC could likely argue that the activity was actually initiated in the United States, potentially allowing the CFTC jurisdictional support and thus

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<sup>72</sup> Lee, Howard, & Genova, *supra* note 28.

regulation enforcement abilities. Extraterritorial reach quickly grows murky from here. Second, what if that American corporation was operating through a former or newly created subsidiary or an even less related financial partner which is based in London? Third, what if the American corporation sold all of its swaps or mortgages to a foreign entity several years before and then that foreign entity later sold the swaps or mortgages to the American subsidiary located in London? Meanwhile, the original American corporation has purchased new swaps which hedge against its subsidiary's investment and relationship to the foreign entity which is actually weakly leveraged against junk mortgages and swaps initially sold by the American corporation to begin with. Do any of these actions meet the "direct and significant" requirements? If the foreign entity were to collapse, it would certainly have an impact on U.S. domestic commerce. Such a significant impact could arguably be direct in that its initiation was within the U.S., even if such an initiation was several swaps and sales ago. The downfall of one of the world's largest companies could also thus be deemed significant, especially if the downfall were to be related to U.S. commerce in the first place. Thus, for reasons analogous to the European Commission in the GE case, the U.S. would have an interest to monitor and regulate the American corporation's foreign subsidiary's international transactions if not the completely foreign entity's transactions as well, based on the argument of significant effect. Of course, international comity could quickly dissipate if the regulators in Berlin, Frankfurt, and Brussels had approved or ignored the activity that the CFTC sought to regulate extraterritorially. Thus, the challenge of extraterritorial enforcement by the CFTC mirrors that of the antitrust agencies: As the U.S. complained of overreach by the European Commission in GE/Honeywell, so might Europe complain the CFTC is overreaching in its derivatives enforcement.

An analytical argument of the GE deal was the frequent observation and criticism by many that the stoppage of the deal was little more than local or regional politics at play.<sup>73</sup> Prof. Grant suspected “that the Commission’s decision may have been affected by bureaucratic capture, such that civil servants did not follow the mandate that had been assigned to them.”<sup>74</sup> While Prof. Grant’s argument focuses blame on the action of a single regulatory agency, it could almost justify restricting all regulation in total. Instead, his argument actually illustrates the much greater problem of international cooperation. Any agency or commission is inherently political to some degree to protect the interests of its own sovereign civilians or corporations, even if such instances may be locally fueled by little more than public relations considerations.<sup>75</sup> Be it the GE/Honeywell deal in Europe or the Dubai Ports deal in the United States, a sovereign’s wants and needs often come into play, be they corporate, political, or other. The very reason 722(d) exists is for the United States to protect the interests of its own soil, which sometimes extends to protecting against foreign based activity. If such sovereign interests could be universally enforced through mere comity, 722(d) would not even be necessary. Yet, its existence highlights the complex realities of extraterritorial enforcement.

Much of the problem regarding any extraterritorial reach is complexity as both the regulated entities and regulators can find it difficult to follow, creating uncertainty and great expense. With no such certainty, a financial institution may have to get some sort of derivatives pre-clearance in not only the U.S. and Europe but also Brazil, Japan, Korea, Australia, and a host of other countries. Beyond mere expense, it seems inefficient and almost impractical as derivative swaps and purchases, unlike mergers which may expectedly take months or years, are often meant to adapt quickly to other transactions and market occurrences. The political

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<sup>73</sup> Grant & Neven, *supra* note 37.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

challenges of extraterritorial jurisdiction are not limited to the U.S. versus one other country. Instead, these are challenges facing jurisdictions across the world with a litany of concerns and complex relations to sort through.<sup>76</sup> Already behind American legislators and regulatory agencies, the European regulating bodies are being further slowed by disagreements within their own borders.<sup>77</sup> Few such discrepancies have received as much attention as over-the-counter derivatives, largely based out of London's financial markets.<sup>78</sup> Essentially all of the European nations but Britain have been on board for tougher clearing and regulatory standards for the non-exchange driven over-the-counter market.<sup>79</sup>

As many of these rules were similar to goals of Dodd-Frank in regards to over-the-counter transactions, the British government and regulatory agencies have faced massive pressure from within the country that arguably mirrors the pressure placed upon the CFTC and SEC from the large American banks who host similar concerns.<sup>80</sup> Britain was faced with being the minority party at the enforcement table, hosting only eight percent of the voting power on an issue where it holds seventy-five percent or so of the over-the-counter derivatives market in Europe.<sup>81</sup> The very occurrence of such a disparity illustrates the race to the bottom effect as these transactions have flowed into Britain because British regulators offer the fewest regulations, illustrated by the rest of the continent's efforts to beef up these loose standards.<sup>82</sup> This race to the bottom effect is one of the key difficulties in practical application of financial regulations, as will be discussed in the next section of this paper. In contrast, Germany has been seeking greater

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<sup>76</sup> Gensler Testimony, *supra* note 5.

<sup>77</sup> Stephen Castle, *Britain and European Union Agree on Regulating Derivatives Trades*, N.Y. TIMES, Oct. 4, 2011, available at <http://dealbook.nytimes.com/2011/10/04/britain-and-e-u-in-compromise-on-derivatives-regulation/>.

<sup>78</sup> David Gow, *Chancellor to Tackle EU Finance Ministers Over Derivatives Regulation*, THE GUARDIAN, Sept. 30, 2011, available at <http://www.guardian.co.uk/business/2011/sep/30/chancellor-eu-ministers-derivatives-regulation>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

influence over the regulations regarding exchange driven derivatives which are largely run out of Frankfurt.<sup>83</sup> What has been the result? For months, George Osborne, British Chancellor of the Exchequer, has been pushing back, insisting on stronger domestically based decision making processes that can potentially trump uniformity enforcement agencies at the larger E.U. level.<sup>84</sup> While not firmed up by final passage, Osborne seemed to have won “a concession that would in most cases prevent the national regulator from being overruled on the authorization of trading by companies in over-the-counter derivatives in Britain.”<sup>85</sup> Still, even if such a concession takes hold in permanent reform, it still strikes of the same problems that are likely to exist under 722(d). Just as the U.S. is generally conceding its right to enforcement overseas to other jurisdictions, the E.U. compromise allows Britain to cede uniformity of regulation to the E.U. unless its own regulatory review boards think differently.<sup>86</sup> Both 722(d) and the E.U. compromise illustrate how each body arguably is agreeing to international and multi-state comity, unless they strongly find it in their interest not to follow such comity. With such a philosophy, the risk of GE/Honeywell instances in the financial context may be all but assured.

Even though such challenges may create pessimism, many have argued that GE/Honeywell has actually improved international comity in the antitrust context, thus allowing us to look at it as a model from which financial regulators can learn from. William Kolasky, a former Deputy Assistant Attorney General at the U.S. Department of Justice not long after the GE/Honeywell debacle, has stated that this progress has resulted from the realization of nations that international comity may have taken on a new meaning in this globalized world.<sup>87</sup> His view is that, instead of using comity to prevent extraterritorial reach of one’s laws, “We have come to

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<sup>83</sup> *Id.*

<sup>84</sup> Castle, *supra* note 77.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Kolasky, *supra* note 34.

accept that in a global economy, conduct will often have effects in multiple jurisdictions and that each jurisdiction has not only the right, but the obligation to protect its own consumers.”<sup>88</sup> He thus summarized that the world has “shifted (its) attention...to promoting greater cooperation among jurisdictions and to achieving greater substantive convergence of...legal standards...”<sup>89</sup> As an illustration of such progress, Kolasky describes a successful antitrust model that has relied on an intense push by the United States and other nations to sit down and lessen the divergence of their antitrust laws through communication and an expression of sovereign interests, particularly through the DOJ created International Competition Network (“ICN”).<sup>90</sup> ICN, an organization with now over 80 jurisdictions participating, has succeeded at getting multiple jurisdictions to achieve near agreement of their antitrust laws and procedures, including the recommended following of merger notification practices.<sup>91</sup> Kolasky concluded that such agreed procedures have “already had a dramatic impact in moving jurisdictions to improve their procedures and reduce the burden on multinational businesses,” potentially a great model for financial regulators and regulated entities who may be looking for some international certainty, hoping against diverse regulations which might create inefficient and expensive pre-clearance and related procedures.<sup>92</sup> Even using antitrust law as an analogy, it still must be addressed how the CFTC can apply these principles in the financial regulatory context. Additionally, while antitrust law allows the most restrictive body potentially the most say, it needs to be examined whether, in the financial regulation context, the race to the bottom effect, that which may allow the least restrictive body to gain financial activities seeking security from strong regulation, will likely have any real effect.

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

**The Proposed Practical Application of Extraterritorial Enforcement for the CFTC and  
Preventing the Race to the Bottom Effect**

Even if the CFTC were to use the antitrust analogy as its base, it still must come to terms with the practical effect of its ultimate extraterritorial enforcement policy. Unlike antitrust law where the most restrictive regulatory agency has the ability to have the final say, potentially trumping other jurisdictions, regulators in the financial markets have to consider the inverse: the race to the bottom effect.<sup>93</sup> Most recently, American legislators, with an assist from the nation's largest banks, have cautioned that domestic regulations with too much teeth could ultimately harm U.S. financial commerce, supporting the argument that such financial transactions will move offshore to a location with the least restrictive regulations in place.<sup>94</sup> While some, like the banks, may be making this argument to ultimately weaken the effectiveness of Dodd-Frank, critics on the other end of the spectrum are concerned that, in the context of the race to the bottom effect, overly heavy handed domestic regulations, if they in fact do move such transactions offshore, may make Dodd-Frank similarly ineffective as these dangerous transactions may continue to skirt U.S. regulators, leaving U.S. commerce in danger of future financial mishandlings.<sup>95</sup> The question then becomes, are these fears justified, or might the CFTC be able to prevent these very problems by actually adopting an antitrust model which promotes universal comity and financial regulatory agreement? If the U.S. is to exercise some degree of extraterritorial enforcement, the argument can thus be made that these concerns may be unjustified. The result would allow the CFTC to properly give some teeth to domestic

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<sup>93</sup> See generally Gow, *supra* note 78.

<sup>94</sup> Ben Protess, *Lawmakers Challenge Derivatives Rules*, N.Y. TIMES, June 23, 2011, available at <http://dealbook.nytimes.com/2011/06/23/lawmakers-challenge-derivatives-rules/>.

<sup>95</sup> *Id.*



enforcement without too much fear that these regulations will cause potentially damaging transactions and activities to move offshore.

As was seen in the antitrust context, collateral requirements and other aspects of Dodd-Frank may not be the biggest concern for the CFTC as the agency can apply more restrictive requirements that do not necessarily conflict with overseas obligations.<sup>96</sup> If a company faces collateral requirements in London that are two percent below that of the United States, that company will likely figure out how to meet American requirements so as not to lose the ability to deal with the American market. Instead, perhaps the most important consideration regarding enforcement in the international context deals with transparency, an issue addressed by data reporting and ultimately clearinghouse requirements in Dodd-Frank.<sup>97</sup> This rationale argues that one of the most helpful ideals for the CFTC to push as it spreads its message to international regulatory bodies is one of data reporting and sharing as, with such transparency in place, investors, financial institutions, and regulators from around the world at least know what they are dealing with as they review transactions and activities, even if the results that are reported show problematic symptoms.<sup>98</sup> Thus, even if, say collateral requirements, are different in two different jurisdictions, at least reviewing parties on both sides are able to recognize the differences and decide if activities in the less restrictive jurisdiction might not be something they want to get involved in, or, in the terms of a regulatory agency, be something that the agency wants to attempt to regulate in some way, even if it means some sort of extraterritorial reach is required.

The recent example of MF Global serves as an illustration of the important nature of this transparency argument. While the collapse of MF Global made headlines for a few days, it did

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<sup>96</sup> See *supra* text accompanying notes 45-59.

<sup>97</sup> See generally Ben Protess, *Clearing House Group Assails Bank Capital Rules*, N.Y. TIMES, Sept. 30, 2011, available at <http://dealbook.nytimes.com/2011/09/30/clearing-house-assails-bank-capital-rules/>

<sup>98</sup> See Dodd-Frank, *supra* note 1, at 154(b)-(c).

not reach or cause the mass contagion effect that resulted from the downfall of Lehman Brothers and other financial institutions in 2008.<sup>99</sup> In many ways, this limited outflow has to do with MF Global's size which was nowhere near that of Lehman Brothers or the bailouts of AIG.<sup>100</sup> Still, it can be argued that one of the very reasons MF Global did not turn into a bigger financial nightmare was transparency, preventing it from being a larger collapse.<sup>101</sup> While complaints have been lodged against the CFTC for not properly reviewing what MF Global was doing with individual client funds, the relevant issue here is that investors and other participants were able to see the mess MF Global had gotten itself into, investing and leveraging itself in European bonds and debt, something most participants wanted nothing to do with.<sup>102</sup> As news broke, investors fled, leaving MF Global to file bankruptcy within days.<sup>103</sup> As bad as the situation was, without transparency, it arguably could have turned into a bigger disaster.<sup>104</sup> Even if MF Global or other financial institutions were failing to follow other obligations of Dodd-Frank as its regulations get rolled out, arguably one of the most important things is to know detrimental activities are occurring, such as the case was in MF Global.<sup>105</sup> All of this relies on the notion of transparency, an attainable proposition supported by data reporting requirements that already exist under the language of Dodd-Frank.

With data reporting as its base, the CFTC is then able to expand its extraterritorial reach by obtaining international cooperation on these requirements. This international cooperation on data reporting is important for a few reasons. First, it tells U.S. regulators, as well as financial

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<sup>99</sup> Gillian Tett, *Heed the "Transparent" Lessons From MF Global*, FINANCIAL TIMES, Nov. 24, 2011, available at <http://www.ft.com/intl/cms/s/0/6a284472-16ae-11e1-bc1d-00144feabdc0.html#axzz1h0rMcdx5>.

<sup>100</sup> Bill Rochelle, *MF Global, Lehman, AMR, Solyndra, L.A. Dodgers: Bankruptcy*, SAN FRANCISCO CHRONICLE, Dec. 1, 2011, available at [http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2011/11/30/bloomberg\\_articlesLVH75Z6JTSEC.DTL&ao=all](http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2011/11/30/bloomberg_articlesLVH75Z6JTSEC.DTL&ao=all).

<sup>101</sup> Tett, *supra* note 99.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

participants and investors, what is going on in financial transactions abroad.<sup>106</sup> Like the situation in MF Global, even if base line spreadsheets tell ominous signs of financial institutions gone awry, it is better to know and act accordingly than to continue to transact through an unknown abyss.<sup>107</sup> Secondly, it allows the CFTC to root out the jurisdictional nature and location of where global activities are occurring, allowing the agency to synch up with the analogies created in the antitrust context. By utilizing a more global data reporting cooperative, whether it is a near universal reporting center or a country by country cooperative, the CFTC may then be able to draw the line on when an activity has a “direct and significant” connection to U.S. commerce, thus allowing it some sort of direct regulatory abilities or perhaps indirect reach.

The CFTC will come across activities that have varied levels of connection to the United States, but all of them may be subject to U.S. regulatory influence in some way. The first and most straightforward example involves an activity which has funding from U.S. persons or corporations or one that interacts with U.S. persons or corporations who are counterparties to the transaction. This example would be easy for the CFTC to regulate without stepping on international toes as one of the financial participants would be rooted in the United States.<sup>108</sup> U.S. hedge funds, pensions, and individual investment activities originating out of the U.S. could all be covered, even if one of the participants were internationally based as one of the participants still had a direct connection to the United States.

The second level of regulated activities, those activities which may involve foreign parties operating foreign transactions that may be traceable back to the United States, requires greater extraterritorial reach, but this reach is consistent with the principles adopted from the antitrust analogy as combined with the realities of financial activity. As seen by the financial

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Gensler, *supra* note 5.

meltdown of 2008, major detrimental financial activity in one nation leads to contagion that spreads globally, allowing the CFTC the argument that it is able to reach extraterritorially to regulate activities which may trace back to or effect U.S. financial institutions or commerce.<sup>109</sup> The antitrust analogy gives us a helpful example, such as the ongoing litigation regarding De Beers, an international company acting internationally.<sup>110</sup> On the surface, the United States would lack jurisdiction if limiting the analysis to a foreign activity done by a foreign entity on the prong of “direct” connection. As De Beers shows though, foreign activity by foreign actors can have an immense influence on domestic commerce and markets, in this case on diamond pricing internationally and thus within the United States, allowing the U.S. regulators to make the argument that it was in violation of U.S. antitrust laws, satisfying the “significant” prong.<sup>111</sup> There was a time when this argument failed, such as in 1945 when U.S. regulators were denied jurisdiction over the activities of De Beers.<sup>112</sup> But, in the modern world of global commerce and resulting effect, such large activities are bound to have effect on U.S. commercial interests, allowing for rational arguments of U.S. extraterritorial reach in such instances. As a result, U.S. regulators have been able to obtain a massive settlement against De Beers under the notion of a non-U.S. company acting collusively, even if internationally, to ultimately have effect on U.S. commerce.<sup>113</sup> The realities of global financial activities are aptly comparable as financial institutions attempting to circumvent U.S. regulators overseas should still be able to fall prey to American regulators if their activities trace back to the United States, something likely to occur in many large scale financial activities.

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<sup>109</sup> *Id.*

<sup>110</sup> *Sullivan vs. DB Investments*, 2009 WL 961371, Notice of Class Action Settlement (2008).

<sup>111</sup> *Id.*

<sup>112</sup> Stephen Labaton, *De Beers Agrees to Guilty Plea to Re-Enter the U.S. Market*, N.Y. TIMES, July 10, 2004, available at <http://www.nytimes.com/2004/07/10/business/de-beers-agrees-to-guilty-plea-to-re-enter-the-us-market.html?pagewanted=all&src=pm>.

<sup>113</sup> Sullivan, *supra* note 110.

Though the CFTC is able to cast a broad net to reach almost any foreign activity or entity under this rationale, practical limits should be put in place to limit international pushback which may undermine needed cooperation from non-domestic regulatory agencies.<sup>114</sup> As has been argued, it is important for the CFTC to promote international cooperation and uniformity, as Chairman Gensler has himself stated.<sup>115</sup> Under this rationale, while the CFTC may theoretically reach many such transactions on its own, it is cleaner and less politically difficult to promote uniform standards that allow other agencies to enforce regulations on activities happening within their own jurisdictions. If uniformity or near uniformity is in place, the CFTC can feel confident that its same procedures are being enforced internationally without having to step on regulatory toes and causing complaints of overreach.<sup>116</sup> The result is that more regulatory bodies are satisfied, further promoting comity and allowing further cooperation on such important issues as data reporting and data sharing.

The practical application of this would allow the CFTC to regulate activity taking place one jurisdiction away but rely on comity to reach activities further removed than a one-step reach. The illustration of this promotes the idea that the United States can regulate any activity taking place between a U.S. participant and a U.K. participant, even if the activity is perhaps facilitated through London. The activity involves a U.S. entity or capital infusion, allowing the CFTC little difficulty in making the argument that the activity has a “direct” connection to the United States based on its active American participant.<sup>117</sup> A different policy consideration must occur when the activity is two steps away from the U.S., such as a transaction between a party in the United Kingdom and a party in Singapore. In a large scale financial activity, especially one

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<sup>114</sup> See generally Gensler Testimony, *supra* note 5.

<sup>115</sup> See *supra* text accompanying notes 5-27.

<sup>116</sup> See generally Gensler Testimony, *supra* note 5.

<sup>117</sup> See Dodd-Frank, *supra* note 1.

with major concerns, such as a Singapore version of Lehman, the CFTC could argue the “significant” prong of 722(d), making the case for extraterritorial reach.<sup>118</sup> Still, such may not be needed and may be politically unwise as the CFTC can ensure similar regulatory satisfaction through regulatory comity, in this instance, by allowing United Kingdom regulators the ability to review the activity.

International comity allows the United States the ability to enforce its own regulatory policies and prevent domestic effect on commerce without causing consternation and potential retaliation of foreign regulatory bodies. In the above instance, the United States can rely on the United Kingdom to, at the very least, share data reporting information on the Singapore activity between Singapore’s institution and that of the United Kingdom participant. Furthermore, assuming international comity and cooperation has created regulatory policy in the United Kingdom that closely matches that of the United States, the CFTC can rely on the notion that the United Kingdom, in protecting its own interests while also promoting international comity, will be reviewing the activity with Singapore in a relatively similar manner as the United States would if it were doing the same. This allows the United States almost vicarious reach through the United Kingdom without having to create a political mess of overreach. In return, the United States is able to share similar data and participate in similar enforcement with activities between the U.S. and Singapore that may have an effect on the United Kingdom. This principle of comity then conceivably includes all of the major nations and their regulating bodies, ensuring that almost any transaction may be no more than two steps away from the nation hosting regulatory concerns. And, while the concerned nation may not be participating directly, it is still being sufficed and comforted by its influence through the principle of comity. Of course, this creates even more protection if Singapore regulators are on board and already participating in this global

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<sup>118</sup> *Id.*

cooperative. In such an instance, the U.K. regulators may never even have to exert extraterritorial reach themselves but are at least in place to step in as a safety net if needed. Under any scenario, this prevents a situation where a Singapore firm's activities could lead to the collapse of a British institution whose collapse would lead to a subsequent collapse of an American institution, thus dramatically limiting the concern of financial contagion.

An objection to this notion, as made by the banks and some legislators, is that this reliance on extraterritorial reach and promotion of international comity would allow the CFTC to regulate Dodd-Frank with some real teeth, causing American capital and financial commerce to flee to less regulated safe havens.<sup>119</sup> Still, this argument should fail for a few reasons. First, if the less regulated jurisdiction is still within two steps of the United States, as long as the middle jurisdiction, such as the United Kingdom in the above example, is actively participating in cooperation with the United States, the financial institution has little to nothing to gain by moving its capital to Singapore. Even if Singapore is a mostly unregulated market, as illustrated above, the principle of international comity will mean the United Kingdom is going to step in to promote standards of regulation. Thus, the argument only has some level of legitimate concern if done three steps away, i.e. an activity done between two jurisdictions who are both loosely regulated and accordingly not a participant in this cooperative network. The reality is, as seen by Chairman Gensler's description of participating countries already on board, that the nations with the largest derivative and financial activity are already in working agreement to promote some sort of comity based enforcement network.<sup>120</sup> Furthermore, masking activity to hide U.S. connections and avert U.S. regulators would be dangerous, difficult, and likely expensive.<sup>121</sup> To

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<sup>119</sup> Protess, *supra* note 94.

<sup>120</sup> Gensler Testimony, *supra* note 5.

<sup>121</sup> Peter Henning, *S.E.C. Seeks More Power, but Does it Need It?*, N.Y. TIMES, Dec. 5, 2011, available at <http://dealbook.nytimes.com/2011/12/05/s-e-c-seeks-more-power-but-does-it-need-it/>.

be a viable concern, this would mean financial players would have to move their activities to new or smaller centers, creating new transaction zones between say, Maldives and Bermuda. While some activities and transactions could move to these loose and small jurisdictions, it would likely only create a financial commerce effect on the margins. Such a hypothesis stretches cynicism as it would require the most talented and lucrative hedge funds, hedge fund managers, banks, bankers, and other financial personnel and institutions to abandon ship and move to these new, and potentially remote, locations. While it is true that, if heavily regulated, the U.S. may lose out on new capital infusions, hemorrhaging its current market share on the sole reason of heavy regulation seems remote.<sup>122</sup> The same has been illustrated in other commercial arenas as, while statutory incentives have changed the dynamic at the margins, no jurisdiction has been able to take Hollywood out of the film industry.<sup>123</sup> The talent and main operations are indefinitely there to stay.<sup>124</sup> Likewise, it is a difficult proposition to argue that the financial world will abandon New York, London, Frankfurt, Shanghai, and Tokyo for the indefinite future. Thus, any push to create new hedge funds in Dubai or other locales is limited.

The antitrust analogy comes full circle when applying these principles to the mentioned case of De Beers. If a similar scenario were to occur in the context of the financial markets, the United States would be one or two steps away from De Beers. While the United States finally exerted its reach over the international diamond market,<sup>125</sup> the antitrust principles from that and related instances show the CFTC that, while it could exert such reach and sometimes may have to, it could most often rely on the principles of international comity, ensuring that its goals were

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<sup>122</sup> See generally Protes, *supra* note 94.

<sup>123</sup> Los Angeles County Economic Development Corp., *Film Industry Profile of California/Los Angeles County*, Nov. 29, 2005, available at <http://www.laedc.org/reports/Film-2005.pdf>.

<sup>124</sup> *Id.*

<sup>125</sup> Sullivan, *supra* note 113.



met without having to overreach. The United States would then be able to enforce stricter rules domestically and promote uniformity internationally as it lobbies for the principles of comity.

### Conclusion

As the CFTC continues to go through its rulemaking process, it has much to consider in how it views principles of international comity. Based on their public comments and actions, it seems clear the CFTC is doing its best to do what it can from the outset to prevent conflict of laws between nations. As seen by Mr. Gensler's travels to Europe,<sup>126</sup> the CFTC is attempting to get derivatives regulations abroad to mirror the Dodd-Frank legislation that has already been passed here at home.<sup>127</sup> If such language mirrors that of Dodd-Frank, theoretical and potential practical application of 722(d) would be limited, alleviating the CFTC's likelihood of being involved in numerous and large extraterritorial disputes.<sup>128</sup> Still, as seen by international antitrust enforcement, it seems almost naive to believe that, even if such mirrored laws were in place, issues of differing enforcement opinions, state interests, and other subjective factors are likely to come into play, creating a mess of international comity and enforcement of securities regulations.

Planning for such events, the CFTC is still able to find existing jurisprudential standards, as adopted from the antitrust context. Such an analogy approach to extraterritorial enforcement and jurisdiction would aid the CFTC in finding an approach that is generally hands off in regards to foreign activities while still having the ability to reach out on significant cases that may have a dramatic effect on U.S. commerce and financial well being. Still, the CFTC has much difficulty ahead. Domestic enforcement with teeth could drive American companies offshore or, in some instances, further offshore, making domestic enforcement of financial regulations almost

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<sup>126</sup> Gensler Speech, *supra* note 12.

<sup>127</sup> Gensler Testimony, *supra* note 5.

<sup>128</sup> *Id.*

meaningless.<sup>129</sup> The very purpose of Dodd-Frank could be undermined as dangerous and unregulated derivatives activities could be regulated to weak jurisdictions with an almost Wild West approach.<sup>130</sup> In such a global financial market, the damage of such regulated activities are likely to reach back to American shores, even if the activities were not deemed to have an initial direct and significant connection to the U.S.<sup>131</sup> On the flip side, if U.S. regulators, in fear of such overreach, simply water down and neuter Dodd-Frank, the reverse would occur. Even though such derivatives activities may remain stateside, domestic regulators, while having jurisdiction, may have little teeth to their enforcement principles, allowing such dangerous activity to continue, though this time, even closer to home. Still, as has been illustrated, all of these fears may best be alleviated by creating a network of nations that promote similar rules and policies and follow the principles of international comity. With such agreement in place, sovereign regulators are likely to cooperate to ensure their own interests are continually met and protected, themselves wanting to avoid the challenging landscape which may otherwise exist if they too had to revert to unilateral extraterritorial enforcement.

Whatever ultimate rule is to be adopted, it seems likely that growing pains will ensue as, no matter what is on paper, practical application is far more difficult, especially when multiple jurisdictions and sovereign interests are required to play together. To think otherwise would be to ignore what we have already learned from extraterritorial enforcement in the context of antitrust law. While not fool proof in itself, such a history of policy may yet serve as a strong foundation for the CFTC to adopt as it moves forward to ensure the U.S. markets and consumers are properly protected.

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<sup>129</sup> Protess, *supra* note 94.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*