COMMENT

CFTC V. GIBRALTAR MONETARY CORP. AND VICARIOUS LIABILITY UNDER THE COMMODITY EXCHANGE ACT

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This Comment analyzes CFTC v. Gibraltar Monetary Corp.*, a 2009 decision in which the U.S. Court of Appeals for the Eleventh Circuit introduced a control requirement into the Commodity Exchange Act's vicarious liability provision. In so doing, the court rejected the U.S. Commodity Futures Trading Commission's long-held totality of the circumstances approach, in which any one factor, including control, is not dispositive of an agency relationship. This decision has created an undesirable situation in which retail foreign exchange dealers and futures commission merchants need not investigate the character of their introducing entities before retaining them, allowing them to easily avoid liability for frauds committed in furtherance of mutual profit.*

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INTRODUCTION

> The ascription of agency [under the Commodity Exchange Act] is a purposive, policy-oriented act rather than an exercise in semantics. The Commission has deemed [the introducing entity] an agent of [the futures commission merchant] in soliciting investors through fraudulent means . . . because [the vicarious liability provision's] words allow this interpretation and the interpretation may reduce the amount of fraud in the sale of commodity future contracts, whether directly or through commodity pools. Commodities brokers will be more careful about whom they grasp to their bosoms as branch managers and commodity solicitors and this will be (or so the Commission is authorized to conclude) all to the good.
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> \- Judge Richard Posner, writing for the Seventh Circuit in *Rosenthal & Co. v. CFTC*.[1]

One summer day in 2002, the Gibraltar Monetary Corporation mailed a package of informational materials to Brook McDonald after she responded to their Internet advertisement on foreign exchange (forex) trading.[2] The package contained a letter touting the "potential for a 200%–300% return" and the limited risk involved in options trading.[3] It also boasted of Gibraltar's relationship with Forex Capital Markets (FxCM), a futures commission merchant registered with the U.S. Commodity Futures Trading

1. 802 F.2d 963, 969 (7th Cir. 1986).
2. CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS, 2006 U.S. Dist. LEXIS 45129, at *14–15 (S.D. Fla. May 30, 2006), *aff'd*, 575 F.3d 1180 (11th Cir. 2009).
3. *Id.* at *15.

Commission (CFTC or Commission), which highlighted the fact that all of Gibraltar's clients send their documents and funds directly to FxCM and that all options purchased through Gibraltar are cleared through the firm.[4]

Shortly after these promotional materials arrived, McDonald received a call from a Gibraltar sales representative who baited her with promises of quick profits.[5] She decided to open an account with the firm, mailed the required documentation to FxCM, and granted Gibraltar power of attorney to make forex trading decisions on her behalf.[6] The sales representative transferred McDonald's account to Edward Johnson, a senior account executive, who gained her trust by telling her, untruthfully, that his clients had never lost money.[7] After her initial investment, Johnson called McDonald repeatedly, pressing her to complete additional options trades.[8] Shockingly, when Mrs. McDonald lost "nearly all of the money she invested" with Gibraltar, Johnson urged her to sell her car.[9]

Gibraltar's representatives, however, omitted the unpleasant facts that forex options could expire worthless, that nearly all of Gibraltar's customers were losing money, and that several Gibraltar employees had formerly worked for firms which were penalized for sales fraud.[10] During the CFTC's investigation of Gibraltar and FxCM, the Commission asked Mrs. McDonald to detail her trading experiences with the two firms.[11] She lambasted Gibraltar, but did not "express any dissatisfaction with FxCM in regards to her trading" or "confusion between the roles played in her trades by FxCM and Gibraltar."[12]

In *CFTC v. Gibraltar Monetary Corp.*,[13] the court found Gibraltar and its principals liable for their role in the solicitation fraud perpetrated against Mrs. McDonald and many others.[14] Both the district court and the U.S. Court of Appeals for the Eleventh Circuit, however, determined that the

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4. *Id.* at *14–15.

5. *Id.* at *15. Specifically, the Gibraltar sales representative, Al Gropman, informed McDonald "that she could double her money by investing with Gibraltar if she invested quickly to take advantage of the rise in the Euro that resulted from the September 11, 2001 terrorist attacks." *Id.*

6. *Id.* at *17.

7. *Id.* at *15–16. Johnson "repeatedly pressured McDonald to invest more money. He regularly indicated that he had background in trading [foreign exchange (forex)] options, and because of McDonald's inexperience with such trading that he needed to "drive the train." Despite his aggressiveness—which included calling up to three times in a single day—McDonald trusted Johnson, because of his representations that as a senior [account executive], with years of trading experience, none of his clients ever lost money." *Id.*

8. *Id.* at *16. Because Gibraltar's profits were driven by commissions Forex Capital Markets (FxCM) paid Gibraltar for each options trade Gibraltar's clients placed with FxCM; it did not matter to the firm whether its discretionary trades were profitable—only that they were executed. *See id.* at *8.

9. *Id.* at *16.

10. *Id.* at *16–17; *see* Charles Lunan, *Broker Accused of Fraud: 97% of Investors Ended Up as Losers*, SUN-SENTINEL, May 6, 1992, at A1.

11. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *17–18.

12. *Id.* at *18.

13. No. 04-80132-CIV-DIMITROULEAS, 2006 U.S. Dist. LEXIS 45129 (S.D. Fla. May 30, 2006), *aff'd*, 575 F.3d 1180 (11th Cir. 2009).

14. *See id.* at *42-60, *73.

Commodity Exchange Act's (CEA or the Act) vicarious liability provision did not permit the imposition of Gibraltar's frauds to FxCM because the CFTC failed to demonstrate that FxCM exerted sufficient control over the firm.[15] The Eleventh Circuit in *Gibraltar* became the first circuit court of appeals to adopt such a restrictive construction of the provision, concluding that the CEA requires an element of control to establish an agency relationship.[16] In so doing, the court declined to defer to the Commission's long-held liberal interpretation of the statute[17]—one to which the Seventh Circuit paid deference and credited with reducing the amount of commodities fraud by compelling futures commission merchants to "be more careful about whom they grasp to their bosoms."[18]

Part I of this Comment provides an overview of commodities regulation, the CEA's vicarious liability provision, and judicial review under the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[19] Part II analyzes in detail the Eleventh Circuit's *Gibraltar* decision, and the proceedings leading up to that decision. Part III advocates that case law and *Chevron* doctrine support the Commission's interpretation of the provision and contends that good policy dictates broad application of vicarious liability for commodities fraud.

I. CLIMBING UP *GIBRALTAR*: COMMODITIES REGULATION, THE COMMODITY EXCHANGE ACT'S VICARIOUS LIABILITY PROVISION, AND *CHEVRON* DEFERENCE

To better understand the fraud Gibraltar perpetrated against Mrs. McDonald, the role of FxCM in facilitating that fraud, and the law underlying each party's arguments in the *Gibraltar* case, Part I provides a wealth of background information. Part I.A provides an overview of the CFTC's regulation of the commodity futures and options markets, Part I.B provides an overview of secondary liability under the CEA, and Part I.C explores judicial review of the CFTC's interpretation of the CEA under *Chevron* doctrine. Information specific to transactions in foreign exchange, which were at issue in the *Gibraltar* case, is also included throughout this part.

A. Overview of the Commodity Futures and Options Markets

Often overshadowed by the larger and better-funded[20] Securities and Exchange Commission on which it was modeled, the CFTC plays a crucial

15. CFTC v. Gib. Monetary Corp., 575 F.3d 1180, 1186–90 (11th Cir. 2009); *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *60–72.

16. *See Gib. Monetary Corp.*, 575 F.3d at 1189.

17. *See id.* at 1188.

18. Rosenthal & Co. v. CFTC, 802 F.2d 963, 969 (7th Cir. 1986) (stating that "[s]ome deference must be paid to the special knowledge which the Commission brings to the regulation of the commodities markets").

19. 467 U.S. 837 (1984).

20. In fiscal year 2007, the SEC's operating budget was $876 million. By contrast, the CFTC's stood at just $98 million. *Hearing before the S. Appropriations Subcomm. on Fin.*

role in fighting fraud, abuse, and manipulation in the U.S. financial markets.[21] Established by the Commodity Futures Trading Commission Act of 1974 (CFTCA)[22] to replace the outmoded Commodity Exchange Commission,[23] Congress granted to the CFTC exclusive jurisdiction over the commodity futures and options markets and empowered the new agency to initiate administrative disciplinary proceedings and seek injunctions in federal district court to enforce the CEA.[24]

Since the CFTC's inception in 1974, the trading volume on U.S. futures exchanges has increased by a staggering 8000% to approximately five trillion dollars each day.[25] Financial engineers have developed derivative instruments of increasing size and complexity, and these contracts are traded electronically around the globe twenty-four hours a day.[26] As the futures and options markets have grown, so too has commodities fraud.[27] Poor Mrs. McDonald, who was fleeced out of thousands in Gibraltar's forex options trading scam, is certainly not alone.[28]

The sections below provide a basic overview of the commodities markets by introducing commodities, commodities futures and options, the CEA's various classes of registrants, and CFTC enforcement actions and reparations proceedings.

Servs. and Gen. Gov't and the S. Comm. on Agric., Nutrition and Forestry, 111th Cong. 7 (2008) (Testimony of Walter Lukken, Acting Chairman, CFTC) [hereinafter *Lukken Testimony*].

21. Michael S. Sackheim, *Administrative Enforcement of the Federal Commodities Laws by the Commodity Futures Trading Commission*, 12 SETON HALL L. REV. 445, 445–46 (1982) (stating that Congress modeled the U.S. Commodity Futures Trading Commission (CFTC or Commission) in the image of the U.S. Securities and Exchange Commission and created the agency to shield investors in the commodities markets from "abusive and criminal practices").

22. Commodity Futures Trading Commission Act of 1974 (CFTCA), Pub L. No. 93-463, 88 Stat. 1389 (codified as amended in scattered sections of 7 U.S.C.).

23. Congress enacted the Commodity Futures Trading Act of 1974 (CFTCA) to revamp the Commodities Exchange Act (CEA) and to strengthen its regulation of the commodities markets as a result of market abuse and fluctuating commodity prices during the 1970s. *See* S. REP. NO. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5858–59; Jerry W. Markham, *The Seventh Amendment and CFTC Reparations Proceedings*, 68 IOWA L. REV. 87, 92–94 (1982).

24. 7 U.S.C. § 2(a)(1)(A) (2006) ("The Commission shall have exclusive jurisdiction . . . with respect to . . . [commodity] 'option[s]' . . . and transactions involving contracts of sale of a commodity for future delivery . . . ."); *id.* § 9 (empowering the CFTC to initiate administrative disciplinary hearings); *id.* § 13a-1 (empowering the CFTC to initiate injunctions in federal court); *see* Markham, *supra* note 23 at 92–94; Sackheim, *supra* note 2121, at 445–46.

25. *Lukken Testimony*, *supra* note 20, at 1, 6. During that time, the CFTC's staffing levels have actually fallen by twelve percent. *Id.* at 6.

26. *Id.* at 1.

27. *Financial Crimes Report to the Public: Fiscal Year 2009*, http://www.fbi.gov/stats-services/publications/financial-crimes-report-2009 (last visited Oct. 23, 2010) (reporting that instances of commodities fraud and the investor losses associated with them have been increasing).

28. *See supra* Introduction.

1. Commodities: More Than Just the Bacon in Your BLT

> What are commodities? Commodities are agricultural products like coffee that you had for breakfast; wheat, which is used to make bread; pork bellies, which is used to make bacon, which you might find in a bacon and lettuce and tomato sandwich; and then there are other commodities, like frozen orange juice and gold. Though, of course, gold doesn't grow on trees like oranges. That clear so far?[29]
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> - Mortimer Duke

Though informative, Mortimer Duke's explanation of commodities simplifies the statutory definition. As originally enacted in 1936, the Commodity Exchange Act defined "commodity" as "wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs and Solanum tuberosum (Irish potatoes)."[30] Over the next four decades, this definition gradually expanded to embrace wool tops in 1938,[31] fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, and soybean meal in 1940,[32] wool in 1954,[33] onions in 1955,[34] and livestock, livestock products, and frozen concentrated orange juice in 1968.[35]

Congress again enlarged the definition of "commodity" as part of its major overhaul of the CEA in 1974 to include all "goods and articles, except onions . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."[36] The expansion

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29. TRADING PLACES (Paramount Pictures 1983) (describing the commodities business to Eddie Murphy's character, Billy Ray Valentine).

30. Commodity Exchange Act, Pub. L. No. 74-675, § 2(a), 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. § 1a(4)).

31. *See* Commodity Exchange Act Amendment of 1938, Pub. L. No. 75-471, 52 Stat. 205 (codified as amended at 7 U.S.C. § 1a(4)).

32. *See* Commodity Exchange Act Amendment of 1940, Pub. L. No. 76-818, 54 Stat. 1059 (codified as amended at 7 U.S.C. § 1a(4)).

33. *See* National Wool Act of 1954, Pub. L. No. 83-690, § 710, 68 Stat. 910, 913 (codified as amended at 7 U.S.C. § 1a(4)).

34. *See* Commodity Exchange Act Amendment of 1955, Pub. L. No. 84-174, 69 Stat. 375 (codified as amended at 7 U.S.C. § 1a(4)). Trading in onion futures was prohibited in 1958. *See* Commodity Exchange Act Amendment of 1958, Pub. L. No. 85-839, 72 Stat. 1013 (codified at 7 U.S.C. § 13-1) ("No contract for the sale of onions for future delivery shall be made on or subject to the rules of any board of trade in the United States."). In connection with the exclusion of onions from the CEA's definition of commodity, one judge quipped, "[t]his provision brought tears to the eyes of at least some would-be onion futures traders." Salomon Forex Inc. v. Tauber, 795 F. Supp. 768, 772 n.10 (E.D. Va. 1992) (citing Chi. Mercantile Exch. v. Tieken, 178 F. Supp. 779 (N.D. Ill. 1959)).

35. *See* Commodity Exchange Act Amendment of 1968, Pub. L. No. 90–258, § 1, 82 Stat. 26, 26 (codified as amended at 7 U.S.C. § 1a(4) (2006)) (livestock and livestock products); Act of July 23, 1968, Pub. L. No. 90-418, 82 Stat. 413 (codified as amended at 7 U.S.C. § 1a(4) (frozen concentrated orange juice).

36. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 201(a)-(b), 88 Stat. 1389, 1395 (codified as amended at 7 U.S.C. § 1a(4)). This broad definition of "commodity," enacted as part of the CFTCA, "expanded the definition of *commodity* to encompass virtually anything that is or becomes the subject of futures trading, intangible as well as tangible." 1 PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, COMMODITIES REGULATION § 1.02[1], at 1-7 (3d ed. Supp. 2002-2). The purpose of

of the statute to include nonagricultural commodities irked the Treasury Department, which urged Congress to exclude off-exchange currency transactions from the statute's grasp.[37] The enactment of the Treasury Amendment that same year was intended to insulate off-exchange currency trading between sophisticated institutional investors,[38] but the provision ultimately "made it difficult for the CFTC to bring fraud actions against off-exchange foreign currency scams aimed at retail customers."[39]

Congress modified the Treasury Amendment as part of the Commodity Futures Modernization Act of 2000 (CFMA), and granted the CFTC limited jurisdiction over off-exchange forex futures and options transactions.[40] By the words of the statute, certain forex transactions, like those between Mrs. McDonald and FxCM, were expressly subject only to the CEA's anti-fraud provisions.[41] As such, many courts determined that the Act's vicarious liability provision should not apply to such transactions.[42] In part to resolve this dispute, Congress passed the CFTC Reauthorization Act of 2008 (CRA), which amended the CEA to clarify that off-exchange forex transactions are indeed subject to the CEA's vicarious liability provision as well.[43]

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enlarging the definition of futures and extending the regulation of the futures markets was "to suppress cheating, fraud, and fictitious transactions in futures which were seriously impairing the services of the market." S. REP. NO. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5855.

37. *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 201(b), 88 Stat. 1389, 1395 (codified as amended at 7 U.S.C. § 2(c)(1)) ("Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade."); Dunn v. CFTC, 519 U.S. 465, 468–69, 471 n.8 (1997) ("The amendment was enacted on the suggestion of the Treasury Department at the time of a dramatic expansion in the scope of federal commodities regulation. The Department expressed concerns . . . that this development might lead, *inter alia*, to the unintended regulation of the off-exchange market in foreign currency futures.").

38. *See* S. REP. NO. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5862–63 ("A great deal of the trading in foreign currency in the United States is carried out through an informal network of banks and tellers. The Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary.").

39. Walter Lukken, Acting CFTC Chairman, Keynote Address at Hofstra University FOREX Symposium (Feb. 8, 2008), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/speechandtestimony/opalukken-36.pdf.

40. Commodities Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, § 102, 114 Stat. 2763A-365, -376, -377.

41. *See* 7 U.S.C. § 2(c)(2)(C) (2006); CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS, 2006 U.S. Dist. LEXIS 45129, at *60–61 (S.D. Fla. May 30, 2006), *aff'd*, 575 F.3d 1180 (11th Cir. 2009). The exempted transactions included those in which eligible contract participants, including financial institutions and future commission merchants, acted as counterparties. *See* 7 U.S.C. § 1a(12); *id.* § 2(c)(2)(C); CFTC v. Zelener, 373 F.3d 861, 862 (7th Cir. 2004).

42. *See, e.g.*, CFTC v. Sterling Trading Grp., 605 F. Supp. 2d 1245, 1256 (S.D. Fla. 2009); *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *60–61.

43. *See* CFTC Reauthorization Act of 2008 (CRA), Pub. L. No. 110-246, § 13,101, 122 Stat. 1651, 2189–2194 (to be codified at 7 U.S.C. § 2(c)(2)); H.R. REP. NO. 110-627, at 979 (2008) (Conf. Rep.), *reprinted in* 2008 U.S.C.C.A.N. 536, 801 (stating that the CRA makes § 2(a)(1)(B) explicitly apply "to fraudulent forex activities").

2. Commodities Derivatives Contracts: Futures, Forwards, and Options

The Commodity Exchange Act charges the CFTC with exclusive jurisdiction over certain commodities derivatives contracts, including futures and options.[44] Section 2(a)(1) of the CEA grants the CFTC jurisdiction over "transactions involving contracts of sale of a commodity for future delivery,"[45] commonly referred to as futures contracts.[46] These instruments are simply agreements to buy or sell a specified quantity of a commodity at a particular price for delivery at a set future date.[47] Like the underlying commodities themselves, futures contracts are fungible because they are written in standard, uniform terms and each party's obligations to the other are guaranteed by an intermediary.[48]

Despite being a contract of sale for future delivery, futures contracts rarely result in actual delivery of the commodity because either party may extinguish its obligations by taking an offsetting position.[49] As Judge Posner wryly stated, this process "enables people who are not agriculturalists, and wouldn't know an ear of corn from a soybean if it slapped them in the face, to speculate in the prices of commodities."[50]

The CEA excludes from its definition of futures contract "any sale of any cash commodity for deferred shipment or delivery."[51] These instruments, called forwards, are contracts in which a sale occurs, but the parties agree

44. *See* 7 U.S.C. § 2(a)(1)(A); Noah L. Wynkoop, Note, *The Unregulables? The Perilous Confluence of Hedge Funds and Credit Derivatives*, 76 FORDHAM L. REV. 3095, 3100 (2008) (stating that the CEA "broadly regulates derivative products").

45. 7 U.S.C. § 2(a)(1)(A) ("The Commission shall have exclusive jurisdiction . . . with respect to . . . transactions involving contracts of sale . . . for future delivery . . . .").

46. Grain Futures Act, Pub. L. No. 67-331, § 3, 42 Stat. 998, 999 (1922) ("Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade [are] known as 'futures' . . . ."); *see* Benjamin E. Kozinn, Note, *The Great Copper Caper: Is Market Manipulation* Really *A Problem in the Wake of the Sumitomo Debacle?*, 69 FORDHAM L. REV. 243, 249–50 (2000) (explaining that the CEA grants the CFTC with exclusive jurisdiction over futures, without ever defining the term "futures contract").

47. *See* Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 971 (4th Cir. 1993) (defining a commodity futures contract as "an executory, mutually binding agreement providing for the future delivery of a commodity on a date certain where the grade, quantity, and price at the time of delivery are fixed"); Chi. Mercantile Exch. v. SEC, 883 F.2d 537, 542 (7th Cir. 1989) ("A futures contract, roughly speaking, is a fungible promise to buy or sell a particular commodity at a fixed date in the future."); 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[3], at 1-19; Kozinn, *supra* note 46, at 250.

48. *See* 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[3], at 1-19; Kozinn, *supra* note 46, at 250.

49. *See Salomon Forex*, 8 F.3d at 971; *Chi. Mercantile Exch.*, 883 F.2d at 542; 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[4], at 1-21 (stating that nearly ninety-five percent of futures contracts are closed out through the offsetting process).

50. Nagel v. ADM Investor Servs., Inc. 217 F.3d 436, 440 (7th Cir. 2000).

51. 7 U.S.C. § 1a(19) (2006); *see Nagel*, 217 F.3d at 440 ("The Act defines a futures contract as a contract for future delivery, but defines future delivery to exclude 'any sale of any cash commodity for deferred shipment or delivery,' that is, any forward contract." (internal citations omitted)); 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[3], at 1-18.1 (Supp. 2002-2).

that actual delivery of the specified commodity will be delayed until some later date.[52] In contrast with futures contracts, parties to a forward contract actually contemplate the physical delivery of the commodity.[53] This subtle distinction is often the subject of litigation,[54] for if a court deems the transaction in question a forward and not a future, the instrument would generally lie outside the CFTC's regulatory jurisdiction.[55]

In addition to futures, Congress has charged the CFTC with the exclusive authority to regulate trading in commodity options[56]—contracts that confer a right, but not an obligation, to either buy or sell an underlying commodity (or future) at a fixed price and date.[57] To purchase an option, the trader pays a premium to the writer, which will expire unless its holder chooses to exercise his right to complete the transaction.[58] An option holder can simply allow the option to lapse if it is unprofitable,[59] thus limiting her loss to the premium paid to the writer of the option.[60] Commodity options further differ from commodity futures in that commodity options trading is not limited to organized exchanges.[61] This fact enabled Gibraltar to route Mrs. McDonald's forex options trades through FxCM's off-exchange forex trading platform.

3. Categories of CFTC Registrants

In addition to defining "commodities" and "futures," the CEA introduces a hodgepodge of statutory classifications of individuals or entities required

52. *See* 7 U.S.C. § 1a(19); *Nagel*, 217 F.3d at 440; 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[3], at 1-18.1 (Supp. 2002-2).

53. *See* Lachmund v. ADM Investor Servs., Inc., 191 F.3d 777, 786 (7th Cir. 1999) ("[C]ash forward contracts . . . contemplate or result in the physical transfer of the underlying commodity.").

54. *See, e.g.*, CFTC v. Erskine, 512 F.3d 309 (6th Cir. 2008) (rollovers of currency sales); CFTC v. Zelener, 373 F.3d 861 (7th Cir. 2004) (rollovers of currency sales); *Nagel*, 217 F.3d at 440 (rollovers of grain sales); *Lachmund*, 191 F.3d at 786 (same).

55. *Erskine*, 512 F.3d at 325; Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 138 F. Supp. 2d 1144, 1156 (N.D. Iowa 2001).

56. *See* 7 U.S.C. § 2(a)(1)(A) (2006) (granting "[t]he Commission . . . exclusive jurisdiction . . . with respect to . . . [commodity] 'option[s]'"); Markham, *supra* note 23, at 87 (stating that the CFTC has exclusive jurisdiction over all commodity options transactions). As originally enacted in 1936, however, the Commodity Exchange Act prohibited options trading on all *regulated* commodities. *See* Commodity Exchange Act, Pub. L. No. 74-675, § 4c, 49 Stat. 1491, 1494 (1936); 13A JERRY W. MARKHAM, COMMODITIES REGULATION: FRAUD, MANIPULATION & OTHER CLAIMS § 27:2, at 27-18 (2010). The Act's limited prohibition, however, created a regulatory loophole, in which trading in unregulated commodities options, such as gold, silver, coffee, and sugar, was able to thrive. *See id.* In 1982, Congress lifted the ban and authorized commodity options trading on the organized exchanges under a limited pilot program. *See id.* Today, exchange-based options trading is widespread. *See* Futures Trading Act of 1982, Pub. L. No. 97-444, § 206, 96 Stat. 2294, 2301; 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[9], at 1-62.8 (Supp. 2003).

57. 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[9], at 1-62.6 (Supp. 2003); Carolyn H. Jackson, Note, *Have You Hedged Today?: The Inevitable Advent of Consumer Derivatives*, 67 FORDHAM L. REV. 3205, 3212 (1999).

58. 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[9], at 1-62.6 (Supp. 2003).

59. *Id.* at 1-62.8 (Supp. 2003).

60. *Id.*; Jackson, *supra* note 57, at 3212.

61. 1 JOHNSON & HAZEN, *supra* note 36, § 1.02[9], at 1-62.8 (Supp. 2003).

to register with the CFTC and comply with its rules and regulations.[62] Among the first of the CEA's required registrants was the futures commission merchant, which was added to the statutory scheme in 1936.[63] A futures commission merchant is the commodities equivalent of a brokerage house[64]—it is an individual or entity that solicits or accepts orders from clients to buy or sell commodity futures or options and accepts payment in connection with those orders.[65] Although the largest futures commission merchants are affiliates of multinational banks and insurance companies, other futures commission merchants, such as FxCM, are standalone entities dealing exclusively with retail customers.[66]

The CFTCA introduced registration and reporting requirements for several classes of commodities professionals: associated persons, commodity pool operators, and commodity trading advisors.[67] A commodity pool operator is an individual or entity that operates or solicits funds for a commodity pool—an enterprise that, like a mutual fund, combines investor funds for the purpose of trading commodity futures or options contracts.[68] A commodity trading advisor is an individual or entity engaged in the business of giving advice or issuing reports or analyses with respect to trading in commodity futures or options.[69] An associated person is anyone other than an introducing broker engaged in soliciting and

62. *See generally* 7 U.S.C. § 1a (2006).

63. *See* Commodity Exchange Act, Pub. L. No. 74-675, § 4(d), 49 Stat. 1491, 1494 (1936) ("It shall be unlawful for any person to engage as [a] futures commission merchant . . . unless . . . such person shall have registered [and complied with the Act's regulations]."); 1 JOHNSON & HAZEN, *supra* note 36, § 1.06[1], at 1-137 (Supp. 2001) (stating that futures commission merchants "first came under regulation when the Commodity Exchange Act was amended in 1936"). Such regulations include segregation of customer accounts, mandatory disclosures, and minimum net capital requirements. *See* 7 U.S.C. §§ 6d, 6f, 6g.

64. 1 JOHNSON & HAZEN, *supra* note 36, § 1.06[1], at 1-137 (Supp. 2001) (explaining that a futures commission merchant "if in the securities business, would probably be called a *brokerage house*"). An individual investor wishing to trade on the commodities markets opens an account with a futures commission merchant, which receives trading orders directly from its customers or through an intermediary such as an introducing broker. *Id.*

65. 7 U.S.C. § 1a(20) (2006).

66. *See* 1 JOHNSON & HAZEN, *supra* note 36, § 1.06[3], at 1-142 (Supp. 2001). With roughly $13 billion each in adjusted net capital, UBS and Goldman Sachs operate the largest futures commission merchants. By contrast, FxCM has just $58 million. *See* CFTC, SELECTED FCM FINANCIAL DATA AS OF OCTOBER 31, 2009, http://www.cftc.gov/ucm/groups/public/@financialdataforfcms/documents/file/fcmdata1009.pdf.

67. *See* Pub L. No. 93-463, 88 Stat. 1389, 1396–97; S. REP. NO. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5871-75; 1 JOHNSON & HAZEN, *supra* note 36, § 1.08[2], at 1-157 (Supp. 2003) (associated persons); *id.* § 1.10[1], at 1-175 (commodity trading advisors); *id.* § 1.11[1], at 1-184 (commodity pool operators).

68. 7 U.S.C. § 1a(5); 1 JOHNSON & HAZEN, *supra* note 36, § 1.11[2], at 1-185 (Supp. 2002-2); 13 MARKHAM, *supra* note 56, § 17A:1, at 17A-1. Commodity pools are attractive to investors because they offer: (1) easy entry to the complex commodity markets; (2) limited liability; (3) diversification; (4) lack of margin calls; and (5) no responsibility to make or take delivery on futures contracts. *Id.* at 17A-1 to -2. As of 2005, there were roughly 3500 commodity pools with about $600 billion in assets under management. *Id.* at 17A-2.

69. 7 U.S.C. § 1a(6); 1 JOHNSON & HAZEN, *supra* note 36, § 1.10[2], at 1-175 to -178 (Supp. 2003).

accepting orders or supervising those activities on behalf of another entity regulated by the CFTC.[70]

Until the CEA was again amended in 1982, futures commission merchants solicited business from the public primarily through their associated persons and loosely affiliated "agents."[71] These "agents" were mostly unregistered and unregulated and the futures commission merchants for which they solicited clientele would generally disclaim all responsibility for their violations of the commodities laws.[72] In response, Congress created a new class of registrants, known as introducing brokers, as part of the Futures Trading Act of 1982.[73] An introducing broker is an individual or entity that solicits or accepts orders to buy or sell commodity futures or options but does not accept money or other assets as payment for the order.[74] Generally, those who solicit "customers for futures commission merchants must register with the CFTC as introducing brokers and either meet capital requirements or obtain a guarantee of their obligations from their futures commission merchant."[75] These restrictions did not apply, however, in the off-exchange market; a loophole that allowed the Gibraltar firm to solicit customers for FxCM without registering with the Commission.[76]

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70. 7 U.S.C. § 6k (declaring it "unlawful for any person to be associated with a futures commission merchant," introducing broker, commodity pool operator, or commodity trading advisor in a sales capacity if such person is not registered with the CFTC as an associated person).

71. *See* H.R. REP. NO. 97-565, pt. 1, at 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3898 ("Although agents may perform the same functions as branch officers of futures commission merchants, agents generally are separately owned and run."); 1 JOHNSON & HAZEN, *supra* note 36, § 1.08[2], at 1-157 (Supp. 2003).

72. *See* H.R. REP. NO. 97-565, pt. 1, at 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3898 ("Futures commission merchants frequently disavow any responsibility for sales abuses or other violations committed by these agents."); 1 JOHNSON & HAZEN, *supra* note 36, § 1.08[2], at 1-157 (Supp. 2003).

73. *See* H.R. REP. NO. 97-565, pt. 1, at 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3898 ("Under [The Act], persons now considered agents would be required to register directly with the Commission as introducing brokers . . . ."); 1 JOHNSON & HAZEN, *supra* note 36, § 1.08[2], at 1-157 (Supp. 2003). Although the CFTC had lobbied Congress to require all of these former "agents" to register as associated persons, Congress instead decided to create the introducing broker. *See* H.R. REP. NO. 97-565, pt. 1, at 49 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3898. Congress chose this structure in part to shield futures commission merchants from liability, but expressed that a futures commission merchant could be held liable as principal when its introducing broker acts as a de facto branch office of the futures commission merchant or when the introducing broker is not truly acting an independent business entity. *See id.* at 3982.

74. 7 U.S.C. § 1a(23) (2006).

75. Brief of Appellant CFTC at 34–35, CFTC v. Gib. Monetary Corp., 575 F.3d 1180 (11th Cir. 2009) (No. 06-14270-C); *see* 7 U.S.C. § 6d(a)(1) (establishing requirements for introducing brokers); 17 C.F.R. §§ 1.17(a)(1)(iii), (2)(ii) (2010) (same).

76. 7 U.S.C. § 6d(a)(1); 17 C.F.R. §§ 1.17(a)(1)(iii), (2)(ii) (2010)). In a 2002 advisory release, the CFTC also explained that although most soliciting brokers must register with the CFTC as an associated person of the futures commission merchant or an introducing broker, "entities that introduce retail customers solely to trade off-exchange foreign currency futures and options with registered futures commission merchants that act solely as counterparties, are not required to register under the Act as introducing brokers, but may do so voluntarily." Division of Trading & Markets, CFTC, Advisory Concerning Foreign Currency Trading by

The CRA, which clarified the Commission's jurisdiction over retail forex transactions, also created the retail foreign exchange dealer designation, a new category of CFTC registrant for firms serving as counterparties in retail forex transactions.[77] Retail foreign exchange dealers must register with the Commission as a retail foreign exchange dealer and maintain a minimum of $20 million in adjusted net capital.[78]

4. CFTC Enforcement Actions and Reparations Proceedings

This section introduces CFTC administrative proceedings and enforcement actions in federal court and discusses their differences, including judicial review, to help readers better understand the causes and effects of the Commission's decision in *Gibraltar* to file suit in federal court rather than proceeding administratively.

a. CFTC Administrative Proceedings

Section 6(b) of the Commodity Exchange Act, amended in 1974 as part of the CFTCA, empowers the CFTC to initiate administrative disciplinary proceedings against any person who violates the CEA or the regulations promulgated thereunder.[79] The disciplinary hearing is held before an administrative law judge designated by the Commission[80] who is empowered to prohibit violators from trading on contract markets, revoke or suspend their registrations, assess monetary penalties, and require restitution.[81]

The CFTCA also established a reparations procedure, giving aggrieved investors the opportunity to seek redress before the Commission for a CFTC registrant's alleged violations of the CEA or CFTC regulations.[82] In

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Retail Customers at 2 (2002), *available at* http://www.cftc.gov/ucm/groups/public/@cpfraudawarenessandprotection/documents/file/forex_advisoryretailcustomers.pdf. Although not required to register with the CFTC, the National Futures Association (NFA), the industry's self-regulatory organization, requires most entities that solicit business for forex dealers to register with the NFA and be subject to its anti-fraud rules. *See* NFA COMPLIANCE RULE 2-39 (2010), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=RULE%202-39&Section=4.

77. *See* CFTC Reauthorization Act of 2008, Pub. L. No. 110–246, § 13,101, 122 Stat. 1651, 2189–2204 (to be codified at 7 U.S.C. § 2(c)(2)).

78. *See id.*

79. *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 103, 88 Stat. 1389, 1392 (codified as amended at 7 U.S.C. § 9); 13A MARKHAM, *supra* note 56, § 23:1, at 23-2; Sackheim, *supra* note 21, at 451.

80. *See* 7 U.S.C. § 9 (2006); 13A MARKHAM, *supra* note 56, § 23:1, at 23-2 (explaining that the administrative law judge "oversees all initial motions, discovery and the hearing of the factual evidence").

81. *See* 7 U.S.C. § 9; Sackheim, *supra* note 21, at 446, 456; Jerry W. Markham & Ellen R. Meltzer, *Secondary Liability Under the Commodity Exchange Act—Respondeat Superior, Aiding and Abetting, Supervision, and Scienter*, 27 EMORY L.J. 1115, 1116 (1978).

82. *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 106, 88 Stat. 1389, 1393 (codified as amended at 7 U.S.C. § 18); Markham, *supra* note 23 at 87–88 (stating that the CFTC Act created a reparations procedure and made the Commission their adjudicative body); Markham & Meltzer, *supra* note 81, at 1116–17 (same).

a reparations proceeding, administrative law judges are authorized to render an award for "actual damages proximately caused by" a registrant's violation[83] that a claimant may enforce in federal district court.[84] If the award is not timely paid, the registrant faces an automatic bar from trading and suspension of her registration.[85]

Following both disciplinary and reparations hearings, the administrative law judge may render an initial decision,[86] which either party can appeal to the Commission.[87] The Commission's final orders are further appealable to the appropriate court of appeals,[88] which reviews the Commission's orders (like other agency actions) in accordance with the deferential standard set forth in Section 706 of the Administrative Procedure Act (APA).[89]

Under the APA, reviewing courts must set aside agency actions and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "in excess of statutory jurisdiction."[90] Findings of fact are reviewed under the substantial evidence standard, in which reviewing courts set aside any finding "unsupported by substantial evidence."[91] In the Commission's case, findings of fact are upheld so long as supported by the weight, or preponderance, of the evidence.[92]

83. 7 U.S.C. § 18(a)(1).

84. *Id.* § 18(d).

85. *Id.* § 18(f).

86. 17 C.F.R. § 10.84 (2010) (disciplinary proceedings); *id.* § 12.314 (reparations hearings). Unless the Commission specifically adopts the reasoning of an administrative law judge's initial decision, it does not represent Commission precedent and is "not an appropriate basis for inferring limitations on reasoning included in a Commission decision." *In re* Three Eight Corp., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444 (June 16, 1993).

87. 17 C.F.R. § 10.102 (discussing disciplinary proceedings); *id.* § 12.401 (reparations hearings). The Commission "may affirm, reverse, modify, set aside or remand for further proceedings." *Id.* § 10.104 (disciplinary proceedings); *id.* § 12.406 (reparations hearings).

88. 7 U.S.C. § 9 ("After the issuance of the order by the Commission, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business."); *id.* § 18(e) (stating that any order of the Commission entered in connection with a reparations hearing "shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located").

89. 5 U.S.C. § 706; *see* Purdy v. CFTC, 968 F.2d 510, 518 n.21 (5th Cir. 1992) (explaining that "judicial review of the Commission's final rulings are governed by the Administrative Procedures Act ('APA')[, which] applies to all administrative agencies, including the Commodity Futures Trading Commission"). Section 706 charges reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

90. 5 U.S.C. § 706.

91. *Id.*

92. *See* 7 U.S.C. § 9 ("[T]he findings of the Commission as to the facts, if supported by the weight of evidence, shall . . . be conclusive."); 13A MARKHAM, *supra* note 56, § 23:20, at 23-79 to -85 (listing cases).

b. Enforcement Actions in Federal Court

Section 6(c) of the CEA, also enacted as part of the CFTCA, empowers the CFTC to seek both temporary and permanent injunctions in federal district court whenever the Commission believes anyone "has engaged, is engaging, or is about to engage in" a violation of the CEA or the regulations promulgated thereunder[93]—thereby equipping the agency with a powerful weapon to protect the investing public and deter future violations of the CEA.[94] The CFTC may also request, and the district court may award, civil penalties and ancillary remedies such as disgorgement, an accounting, or the appointment of a receiver.[95] In the *Gibraltar* case, which is further detailed below, the CFTC chose to commence its enforcement action in the district court, seeking to enjoin Gibraltar, its principals, and FxCM from violating the CEA.[96]

Review of a district court's decision to issue an injunction, assess monetary fines, or award ancillary remedies differs from judicial review of CFTC administrative proceedings. Unlike the Commission's issuance of an order, filing suit in federal court is not considered an agency action,[97] a distinction which deprives the Commission of the deferential standard of review set forth in the APA. Instead, appellate courts review a district court's factual findings for clear error[98] and questions of law de novo.[99]

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93. 7 U.S.C. § 13a-1(a); *see* CFTC v. Cassidy, No. 08-CIV-9962 (GBD), 2010 U.S. Dist. LEXIS 52455, at *6-7 (S.D.N.Y. March 8, 2010) (explaining that "7 U.S.C. § 13a-1 . . . authorizes the Commission to seek injunctive relief against any person, or, to enforce compliance with the Act, whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder"); CFTC v. Efrosman, No. 05 Civ 08422 (KMW), 2009 U.S. Dist. LEXIS 84529, at *19 (S.D.N.Y. Sept. 16, 2009) ("Section 13a-1 states that courts have jurisdiction to hear claims arising from the CEA whenever it 'shall appear' to the CFTC that there has been a violation of the CEA."); *see also* Michael S. Sackheim, *Judicial Equitable Enforcement of the Commodities Laws*, 32 AM. U. L. REV. 945, 948-50 (1983).

94. Sackheim, *supra* note 93, at 950 (stating that "[a] permanent injunction granted in an action brought by the CFTC is a harsh form of equitable relief designed to prevent future violations of the [CEA]").

95. *Id.* at 956.

96. *See* CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS, 2006 U.S. Dist. LEXIS 45129, at *74-75 (S.D. Fla. May 30, 2006), *aff'd*, 575 F.3d 1180 (11th Cir. 2009).

97. 5 U.S.C. § 551(13) (incorporated by reference in *id.* § 701(b)(2)) (defining an "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").

98. *See* FED. R. CIV. P. 52(a)(6) (providing that "[f]indings of fact . . . must not be set aside unless clearly erroneous"); Easley v. Cromartie, 532 U.S. 234, 242 (2001).

99. *See* CFTC v. Equity Fin. Grp., 572 F.3d 150, 154 n.8 (3d Cir. 2009) ("We review the District Court's findings of fact for clear error, and we exercise plenary review over its interpretation of the law and its legal conclusions."); CFTC v. Gibraltar Monetary Corp., 575 F.3d 1180, 1186 (11th Cir. 2009) (stating that "[t]he district court's determination of the correct standard for vicarious liability under the relevant vicarious liability provisions is a matter of law," but its "determination regarding the scope of vicarious liability and the principal-agent relationship is a question of fact").

B. Secondary Liability Under the Commodity Exchange Act

1. The CEA's Vicarious Liability Provision

Since the inception of commodity futures trading in the United States in the mid-1850s,[100] farm groups and their supporters in Congress have been suspicious of the practice and demanded its regulation.[101] To curb perceived market abuses, legislators introduced over 200 bills calling for the "prohibition, supervision, or regulation" of commodities futures trading between 1884 and 1921.[102] Despite the mounting populist pressure, however, comprehensive federal regulation of commodities trading was delayed until 1921, when roller-coaster commodity prices finally created enough momentum for legislation in the area.[103]

The Future Trading Act of 1921,[104] which taxed grain futures contracts, sought to curb market manipulation and excessive speculation, prevent fraud, and promote market stability.[105] Among other things, this Act contained a vicarious liability provision in its definitions section, under a subsection entitled "[p]rincipals responsible for acts of agents."[106] Section 2 of the Future Trading Act provides:

> The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as such official, agent, or other person.[107]

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100. *See* William R. Johnson, *Herbert Hoover and the Regulation of Grain Futures*, *in* BUSINESS AND GOVERNMENT IN AMERICA SINCE 1870: ANTITRUST AND REGULATION DURING WORLD WAR I AND THE REPUBLICAN ERA 1917–1932, at 265, 265–66 (Robert F. Himmelberg ed., 1994).

101. *See id.*

102. *See* Note, *Federal Regulation of Commodity Futures Trading*, 60 YALE L.J. 822, 832 n.46 (1951); *see also* Note, *Prevention of Commodity Futures Manipulation Under the Commodity Exchange Act*, 54 HARV. L. REV. 1373, 1374 n.4 (1941). Farm-belt congressmen advocated such legislation "to break up the . . . system of swindling small farmers and poor people by alluring them into making 'wind contracts' with rich men about agricultural products that result nearly always in the strong wolves devouring the weak lambs." 23 CONG. REC. 5076 (June 6, 1892) (statement of Rep. Tillman). Rep. George D. Tillman of South Carolina delivered this statement in connection to the proposed "anti-option" bill of 1892, which despite strong support in the House, ultimately failed in the Senate. *See* Johnson, *supra* note 100, at 266 n.2.

103. *See* Johnson, *supra* note 100, at 266; 61 CONG. REC. 1312 (May 11, 1921) (statement of Rep. Tincher) (stating that "[t]here never was a time where there was more vicious fluctuations in the market").

104. Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921), *invalidated by* Hill v. Wallace, 259 U.S. 44 (1922).

105. SEN. CAPPER, TAXING CONTRACTS FOR SALE OF GRAIN FOR FUTURE DELIVERY, AND OPTIONS FOR SUCH CONTRACTS, AND PROVIDING FOR REGULATION OF BOARDS OF TRADE, ETC., S. REP. NO. 67-212, at 4–5 (1921).

106. Future Trading Act, Pub. L. No. 67-66, § 2, 42 Stat. 187 (1921), *invalidated by* Hill v. Wallace, 259 U.S. 44 (1922).

107. *Id.* Neither the bill itself nor the extensive congressional record elaborated on the identity of those other persons, besides officers and agents, who would fall within the scope of the statute. *See* 61 CONG. REC. 1312-31 (May 11, 1921); *see also* Jing Bian v. MG Fin.,

This provision, which is nearly identical to other vicarious liability provisions in Title 7 of the United States Code,[108] reflects "the evolution of legal thinking about a firm's liability for the acts of agents."[109] Although the U.S. Supreme Court invalidated the Future Trading Act as an unconstitutional application of Congress's taxing power soon after its passage,[110] the Court retained in full its vicarious liability provision in the reformulated Grain Futures Act of 1922.[111] Congress used the provision again when it enacted the Commodity Exchange Act in 1936[112] and the provision has remained virtually unchanged ever since.[113] In 1976, when

No. 08-R17, 2009 CFTC LEXIS 76, at *25 (Oct. 28, 2009) (stating that "[t]he reference to 'other person acting for' another person or entity in [§ 2(a)(1)(B)] thus implies that *respondeat superior* under the Act applies to persons who act for others, but who do not fall within the usual definition of 'agent'"); *In re* Glass, [1994–1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,787 at 44,238 (Sept. 11, 1996) ("There is no legislative history for Section 2(a)(1)[B]. It is generally known that this section is grounded in the theory of common law respondeat superior, yet intended to reach a wider range of relationships."); Lobb v. J.T. McKerr & Co., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,441 n.13 (Dec. 14, 1989) (stating that the extent of relationships reached by § 2(a)(1)(B) include not only common law agents, but also officials and other persons). It appears, however, that Congress considered such a provision necessary to provide regulators with an added weapon to prevent perceived abuses in the marketplace. *See* 62 CONG. REC. 9412 (June 26, 1922) (statement of Rep. Williams).

108. *See, e.g.*, 7 U.S.C. § 63 (2006) (discussing cotton standards); *id.* § 87d (grain standards); *id.* § 136*l*(b)(4) (environmental pesticide control); *id.* § 223 (live poultry dealers and handlers); *id.* § 473c-3 (cotton statistics and estimates); *id.* § 499p (perishable agricultural commodities); *id.* § 511*l* (tobacco inspection); *id.* § 2139 (transportation of animals); *id.* § 8313(c) (animal health protection). Few courts have addressed these nearly identical provisions, although it is clear from courts' decisions that the provisions' language imposes a strict liability regime like § 2(a)(1)(B). *See, e.g.*, Koam Produce, Inc. v. United States, 269 Fed. App'x 35, 37 (2d Cir. 2008) (noting that a corporation may be held vicariously liable under PACA for its employees violative acts even if it was not aware of them); Kleiman & Hochberg, Inc. v. United States Dep't of Agric., 497 F.3d 681, 689 (D.C. Cir. 2007) (stating that PACA's vicarious liability provision "simply makes applicable to wholesale produce merchants the principle of respondeat superior"); Post & Taback, Inc. v. Dep't of Agric., 123 Fed. App'x 406, 408 (D.C. Cir. 2005) (stating that the plain language of § 499p makes clear that employers need not have knowledge of their employees' misconduct to be held vicariously liable); Rosenthal & Co. v. CFTC, 802 F.2d 963, 966 (7th Cir. 1986) (stating that § 2(a)(1)(B) imposes strict liability on principals); United States v. Corbin Farm Serv., 444 F. Supp. 510, 526 (E.D. Cal.), *aff'd* 578 F.2d 259 (9th Cir. 1978) (per curiam) (explaining that independent contractors may be held liable under the Federal Insecticide, Fungicide, and Rodenticide Act's vicarious liability provision, § 136*l*(b)(4)).

109. *In re* Big Red Commodity Corp., [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,623 at 30,668 (June 7, 1985).

110. *See Hill*, 259 U.S. at 44.

111. Pub. L. No. 67-331, § 2(a), 42 Stat. 998 (codified at 7 U.S.C. § 2(a)(1)(B)). This time, Congress grounded the Act in its commerce power. The U.S. Supreme Court upheld the constitutionality of the Grain Futures Act of 1922 in *Board of Trade v. Olsen*, 262 U.S. 1 (1923).

112. Commodity Exchange Act, Pub. L. No. 74-675, § 2, 49 Stat. 1491 (1936); *see* CFTC v. Gib. Monetary Corp., 575 F.3d 1180, 1188 (11th Cir. 2009) (explaining that the CEA was enacted "to expand [the federal government's] jurisdiction over commodities trading and introduce additional mechanisms to prevent fraud and manipulation").

113. Reed v. Sage Grp., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943 at 34,300 (Oct. 14, 1987) (stating that section 2(a)(1)(B) "has remained unchanged since its enactment more than 65 years ago").

the CFTC promulgated its own vicarious liability provision, Regulation 1.2,[114] it adopted language nearly identical to that of § 2(a)(1)(B).[115]

With the passage of the Futures Trading Act of 1982, Congress sought to distinguish the meaning of the Act's long-standing vicarious liability provision from the CEA's new controlling person provision, 7 U.S.C. § 13c(b).[116] The report states that the provision "in essence provides respondeat superior and general principal-agent standards for imposing liability on employers and principals for the acts of their employers or agents."[117] Although commentators considering the CEA's vicarious liability provision once surmised that "[s]uits brought under section 2(a)(1) . . . trigger an agency law analysis,"[118] the Commission and the federal courts now understand the provision as broader than the common law.[119]

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114. 17 C.F.R. § 1.2 (2009) ("The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation or trust within the scope of his employment or office, shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust as well as of such official, agent, or other person.").

115. *See* Rules Under the Commodity Exchange Act, 41 Fed. Reg. 3191, 3194 (Jan. 21, 1976). Although Regulation 1.2 does not supplement the meaning of the statutory provision, courts have held that it provides liability to the same extent as that provided by § 2(a)(1)(B) in those limited circumstances in which the CFTC may exercise regulatory jurisdiction but § 2(a)(1)(B) does not apply. *See, e.g.*, CFTC v. Liberty Mut. Grp., No. 07-21267-CIV, 2008 U.S. Dist. LEXIS 484, at *19 (S.D. Fla. Jan. 3, 2008) (stating that even if § 2(a)(1)(B) might not apply to certain off-exchange foreign currency transactions, Regulation 1.2 still applies); CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS, 2006 U.S. Dist. LEXIS 45129, at *71 n.7 (S.D. Fla. May 30, 2006), *aff'd*, 575 F.3d 1180 (11th Cir. 2009) (explaining that although "the CFMA did not make the vicarious liability provision of the CEA applicable to [certain] off-exchange foreign currency transaction[s] . . . vicarious liability may be imposed pursuant to CFTC regulation 1.2").

116. H.R. REP. NO. 97-565, pt. 1, at 105 (1982), *reprinted in* 1982 U.S.C.C.A.N 3871, 3954.

117. *Id*. Congress further expressed that the new provision should become the sole "basis for imputing liability to a controlling person," *id.*, but its passage has not affected the scope of § 2(a)(1)(B). *See* Rosenthal & Co. v. CFTC, 802 F.2d 963, 966–67 (7th Cir. 1986) (explaining that "[t]he legislative history makes plain . . . that these additions were intended to supplement rather than displace the respondeat superior liability created by section 2(a)(1)[B]").

118. Sackheim, *supra* note 21, at 464–65 ("Section 2(a)(1) of the Act appears to adopt the common law doctrine of respondeat superior . . . ."); *see* Markham & Meltzer, *supra* note 81, at 1125–34. Under common law agency, principals are only subject to liability to third parties harmed by an agent's tortious conduct when it is within the scope of the agent's actual or apparent authority or when the agent is an employee and the tort was committed within the scope of its employment. *See* RESTATEMENT (THIRD) OF AGENCY § 7.03 (2005). Apparent authority exists where, based on manifestations traceable to the principal, the third party reasonably believes that the actor has authority to act on the principal's behalf. *See id.* § 2.0. Actual authority, either express or implied, exists where both the principal and agent consent to the agency relationship and the principal exercises or has the right to exercise *control* over the agent. *See id.* §§ 1.01, 2.01.

119. *See* Committee on Futures Regulation, Association of the Bar of the City of New York, *Secondary and Supervisory Liability Under the Commodity Exchange Act: An Update*, 56 RECORD 240, 242 (2001) ("[T]he CFTC and courts have continued to interpret this vicarious liability provision broadly and aggressively. . . . [They] have expanded the application of Section 2(a)(1) vicarious liability to futures industry participants who might not be liable under traditional agency principles."); Guttman v. CFTC, 197 F.3d 33 (2d Cir. 1999); Dohmen-Ramirez v. CFTC, 837 F.2d 847 (9th Cir. 1988); Stotler & Co. v. CFTC,

2. Controlling Person and Aiding and Abetting Liability under the CEA

Apart from § 2(a)(1)(B), the CEA provides two additional forms of secondary liability—aiding and abetting liability and controlling person liability. Section 13(b) of the CEA, the CEA's controlling person provision, provides that anyone who "directly or indirectly" controls another who has violated the CEA "may be held liable for such violation . . . to the same extent as [the] controlled person."[120] This provision applies only in CFTC enforcement actions, in which the Commission must prove the controlling person's lack of good faith.[121] To be liable as a controlling person under this section, the person need only possess the power to direct the primary violator; actual involvement in the primary violator's illegal acts is not required.[122]

Section 13(a) of the Act provides that anyone who willfully aids and abets a violation of the commodities laws "may be held responsible for such violation as a principal."[123] To be liable under the provision, the purported aider and abetter must have acted willfully.[124] Unlike the CEA's controlling person provision, aiding and abetting liability under the Act is not limited to CFTC enforcement proceedings. Rather, like § 2(a)(1)(B), the CEA contains a private cause of action for aiding and abetting liability.[125]

C. Chevron *Doctrine*

In appeals from Commission orders or district court decisions, the meaning of a particular provision of the CEA is often at issue—the CFTC will offer one meaning of the statute and the defendant, presumably to avoid liability, will offer another.[126] In these situations, where an

855 F.2d 1288 (7th Cir. 1988); Jing Bian v. MG Fin., LLC, No. 08-R17, 2009 CFTC LEXIS 76 (Oct. 28, 2009); Knight v. First Commercial Fin. Grp., Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,942 (Jan. 14, 1997).

120. 7 U.S.C. § 13c(b) (2006); *see* CFTC v. Baragosh, 278 F.3d 319, 330 (4th Cir. 2002); Monieson v. CFTC, 996 F.2d 852, 859–60 (7th Cir. 1993). Under the CEA, the term "person" includes "individuals, associations, partnerships, corporations, and trusts." 7 U.S.C. § 1a(28).

121. 7 U.S.C. § 13c(b); *see Baragosh*, 278 F.3d at 330; 2 JOHNSON & HAZEN, *supra* note 36, § 5.09[11], at 5-243 to -244 (Supp. 2003).

122. *See Baragosh*, 278 F.3d at 330; 2 JOHNSON & HAZEN, *supra* note 36, § 5.09[11], at 5-244 (Supp. 2003). Those categorized as controlling persons would generally include the firm itself, its principal officers and supervisors, the president of the firm, or its sole shareholder, if any. *See id*.

123. 7 U.S.C. § 13c(a).

124. *See id.* 2 JOHNSON & HAZEN, *supra* note 36, § 5.09[10], at 5-240 (Supp. 2002-2); Markham & Meltzer, *supra* note 81, at 1153.

125. *See* 7 U.S.C. § 25; 2 JOHNSON & HAZEN, *supra* note 36, § 5.09[10], at 5-240 (Supp. 2002-2) (explaining that "aiders and abettors may be sued under section 22's private remedy for injured investors"). Originally, the provision only applied in administrative proceedings, but a 1983 amendment to the law removed the term. *See* Fleming v. Bank of Boston Corp., 127 F.R.D. 30, 37 (D. Mass. 1989); *see also* Markham & Meltzer, *supra* note 81, at 1147–48 (providing background information on the provision's enactment).

126. *See, e.g.*, CFTC v. Schor, 478 U.S. 833 (1986) (jurisdiction over state law counterclaims); DiPlacido v. CFTC, No. 08-5559-ag, 2009 U.S. App. LEXIS 22692, at *6–7

administrative agency proffers its own construction of a statute it is authorized to administer, reviewing courts are guided by the two-step framework articulated by the Supreme Court in the landmark case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[127]

Under *Chevron* doctrine, the reviewing court must first determine whether "Congress has directly spoken to the precise question at issue."[128] If so, the court must yield "to the unambiguously expressed intent of Congress."[129] If, however, the court concludes that the statute is silent or ambiguous, it shall defer to the agency's interpretation so long as it is "based on a permissible construction of the statute."[130]

Professors Thomas W. Merrill and Kristin E. Hickman have further identified an antecedent step, fittingly dubbed Step Zero, where courts determine whether *Chevron* applies at all.[131] The Court has explained that an agency's interpretation merits *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[132]

(2d Cir. Oct. 16, 2009) (manipulation); CFTC v. Erskine, 512 F.3d 309, 314 (6th Cir. 2008) (spot transactions); CFTC v. Zelener, 373 F.3d 861, 867 (7th Cir. 2004) (same); Wilson v. CFTC, 322 F.3d 555, 559–60 (8th Cir. 2003) (wash sales); MBH Commodity Advisors, Inc. v. CFTC, 250 F.3d 1052, 1059-64 (7th Cir. 2001) (standard of review); Commodity Trend Serv., Inc. v. CFTC, 233 F.3d 981, 987–92 (7th Cir. 2000) (commodity trading advisor); First Am. Disc. Corp. v. CFTC, 222 F.3d 1008, 1012–14 (D.C. Cir. 2000) (minimum financial requirement); R & W Tech. Servs., Ltd. v. CFTC, 205 F.3d 165, 174 n.39 (5th Cir. 2000) (same); Haekal v. Refco, Inc., 198 F.3d 37, 41–42 (2d Cir. 1999) (bond requirement); Geldermann, Inc. v. CFTC, 836 F.2d 310, 315–16 (7th Cir. 1987) (mandatory arbitration); Premex, Inc. v. CFTC, 785 F.2d 1403, 1406 (9th Cir. 1986) (minimum financial requirement); Lawrence v. CFTC, 759 F.2d 767, 774–76 (9th Cir. 1985) (choice of sanctions).

127. 467 U.S. 837 (1984).

128. *Id.* at 842.

129. *Id.* at 843. When Congress explicitly leaves "a gap for the agency to fill, there is an express delegation of authority to the agency" to promulgate regulations in that area. Courts must give such regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44.

130. *Id.* at 843. Courts have justified this doctrine of deference to executive agencies on the grounds that interpretation of ambiguous statutes is an exercise in policymaking, which is outside the realm of the courts. *See id.* at 843 (stating that when Congress charges "'an administrative agency to administer a congressionally created'" scheme, it "'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'" (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) ("[R]esolution of ambiguity in a statutory text is often more a question of policy than of law." (citing Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2085–88 (1990))); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 160–61 (5th ed. 2010) (explaining that Congress often leaves many policy decisions unaddressed when enacting a statute on account of "inadequate expertise, inadequate time, inadequate foresight, or problems inherent in collective decisionmaking").

131. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

132. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The *Mead* Court continued: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. The *Mead* test has

While the Court has determined that an agency's construction of a statute articulated by way of formal adjudicative proceedings and notice-and-comment rulemaking generally qualify for *Chevron* deference,[133] agency interpretations that lack the force of law such as those advanced in opinion letters,[134] policy statements, agency manuals, enforcement guidelines,[135] customs ruling letters,[136] and litigating positions[137] do not.[138] Where, as in *Gibraltar*, the CFTC has advanced a construction of the CEA derived from a formal adjudication or notice-and-comment rulemaking, courts have generally deferred to the Commission so long as its interpretation was reasonable.[139]

II. BREAKING DOWN *CFTC V. GIBRALTAR MONETARY CORP.*

In *Gibraltar*, the Eleventh Circuit observed that there is no consensus among the circuit courts as to the appropriate standard for vicarious liability

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returned to the courts the role of determining what the law means. *See* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 751 (2002). Professor Krotoszynski explains:

> A reviewing court that wishes to sustain an agency interpretation will find an implied delegation, whereas a court that wishes to displace an agency's interpretation will find that such an implied delegation of lawmaking power does not exist. Because the inference will arise not from any direct language in the statute, but rather from the overall structure and operation of the law, a reviewing court will face few practical constraints in granting or withholding *Chevron* deference.

Id.

133. *See Mead*, 533 U.S. at 230; Christensen v. Harris County, 529 U.S. 576, 587 (2000); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (noting that *Chevron* applies to legal interpretations adopted by agencies in formal adjudications); PIERCE, *supra* note 130, at 172-73 (explaining that the *Chevron* deference applies to formal adjudications and notice-and-comment rulemaking); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1316 (2008) (stating that legal interpretations by agencies adopted through notice-and-comment rulemaking procedures or through formal adjudications warrant *Chevron* deference).

134. *Christensen*, 529 U.S. at 587.

135. *Mead*, 533 U.S. at 234; *Christensen*, 529 U.S. at 587.

136. *Mead*, 533 U.S. at 231.

137. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) ("We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.").

138. *See Mead*, 533 U.S. at 226–27. Such interpretations instead warrant the less yielding standard set forth by the Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* Criddle, *supra* note 133, at 1275 (stating that where agency interpretations do not warrant *Chevron* deference, courts "consider instead whether deference is warranted under *Skidmore v. Swift & Co.*"). Under *Skidmore* deference, "[t]he weight of [an agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140; *see* Krotoszynski, *supra* note 132, at 739–40 (explaining that agency expertise is the reasoning underlying *Skidmore* deference).

139. *See supra* note 126 (listing cases in which courts have deferred to the CFTC's construction of the CEA).

under the CEA.[140] The Second, Seventh, and Ninth Circuit Courts of Appeal have seemingly embraced the CFTC's totality of the circumstances approach, in which any one factor, including control, is not dispositive of an agency relationship.[141] The Eighth Circuit, by contrast, has looked to common law agency principles when considering vicarious liability in the commodities context—without specific reference to the CEA's vicarious liability provision, 7 U.S.C. § 2(a)(1)(B).[142]

The Eleventh Circuit in *Gibraltar*, however, became the first federal court of appeals to determine that, like common law agency, a finding of agency under the CEA's vicarious liability provision requires control of the agent by the principal.[143] Moreover, in dismissing the CFTC's totality of the circumstances approach, the court essentially disregarded a key element of both parties' briefs—namely, whether the CFTC's interpretation of the CEA's vicarious liability provision warranted judicial deference in accordance with *Chevron* doctrine.[144] Before discussing the Eleventh Circuit's opinion, this Part provides an overview of *Gibraltar's* facts, summarizes the district court's opinion, and sets forth key points from the parties' appellate briefs.

A. *Gibraltar's Fraud and FxCM*

Ten years prior to forming Gibraltar, Jayson Kline and Charles Fremer worked together at Bachus & Stratton Commodities, Inc. of Pompano Beach, Florida.[145] Touting its "financial wizard whose 'Einstein software' made commodities trading almost a sure bet,"[146] Bachus and its employees reaped $5.9 million in commissions from churning its customers' accounts while its customers lost most—if not all—of their investments.[147] The CFTC and the National Futures Association (NFA) charged the firm with sales solicitation fraud and revoked its registration, and the U.S. District

140. *See* Gib. Monetary Corp. v. CFTC, 575 F.3d 1180, 1187 (11th Cir. 2009) ("[A]ppellate case law reveals no clear precedent . . . . District courts, as expected, are split on the issue as well.").

141. *See id.* at 1187 & nn.15–16; *see, e.g.*, Guttman v. CFTC, 197 F.3d 33, 39–40 (2d Cir. 1999); Stotler & Co. v. CFTC, 855 F.2d 1288, 1292–93 (7th Cir. 1988); Dohmen-Ramirez v. CFTC, 837 F.2d 847, 858 (9th Cir. 1988); Rosenthal & Co. v. CFTC, 802 F.2d 963, 967–68 (7th Cir. 1986).

142. *See Gib. Monetary Corp.*, 575 F.3d at 1187 & n.14; Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738, 743 (8th Cir. 2003); Gunderson v. ADM Investor Servs., Inc., No. 99-4032, 2000 U.S. App. LEXIS 20971, at *5 (8th Cir. Aug. 16, 2000).

143. *See Gib. Monetary Corp.*, 575 F.3d at 1189.

144. *See id.* at 1188.

145. CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS, 2006 U.S. Dist. LEXIS 45129, at *4–6 (S.D. Fla. May 30, 2006), *aff'd*, 575 F.3d 1180 (11th Cir. 2009); Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties under the Commodity Exchange Act at 4–5, CFTC v. Gib. Monetary Corp., No. 04-80132 (S.D. Fla. May 30, 2006) [hereinafter *CEA Complaint*].

146. Lunan, *supra* note 10, at A1.

147. *See id.*

Court for the Southern District of Florida permanently enjoined Kline from violating the Commodity Exchange Act.[148]

New York-based Forex Capital Markets, a registered futures commission merchant and Forex Dealer Member of the NFA since 2001,[149] is among the world's largest dealers of retail off-exchange foreign currency futures and options transactions.[150] As a dealer, FxCM trades, for its own account, spot forex and forex options with members of the public, many of whom are unsophisticated retail traders like Mrs. McDonald.[151] Since commencing operations in 1999, FxCM has twice settled charges with the NFA for rule violations. The first charge—using deficient promotional material—settled in 2005 for $110,000.[152] The second—for not implementing a written anti-money laundering program and for failure to supervise—settled in 2007 for $175,000.[153]

In February 2002, Kline and Fremer established the Gibraltar Monetary Corporation in Boca Raton, Florida to generate commission income by soliciting members of the public to trade forex with an outside firm.[154] At

148. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *74–75; *CEA Complaint*, *supra* note 145, at 4–5.

149. *See Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *7; Complaint at 1–2, *In re* Forex Capital Markets LLC, Case No. 06-BCC-046 (NFA Dec. 8, 2006). The NFA's Forex Dealer Members (FDM) are futures commission merchants that "are the counterparty or offer to be the counterparty to" retail off-exchange foreign currency transactions. NFA BYLAW 306 (2010), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=BYLAW%20306&Section=3; *see* NFA BYLAW 1507(b), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=BYLAW%201507&Section=3 (defining forex as foreign currency transactions entered into with persons that are not eligible contract participants and not executed or subject to the rules of a contract market).

150. *See Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *7; Complaint, *supra* note 149, at 1–2; Forex Capital Markets Company Profile, http://www.fxcm.com/company-profile.jsp (last visited Oct. 23, 2010) (stating that FxCM "is one of the largest Forex Dealer Members"). Retail foreign exchange transactions are those entered into with persons who are not "eligible contract participants" as described by 7 U.S.C. § 1a(12). *See* 7 U.S.C. § 1a(12) (2006).

151. *See Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *14–16; Brief of Appellant CFTC, *supra* note 75, at 5. Spot forex transactions are those in which one currency is bought for another, and they are exchanged immediately. *See* CFTC v. Int'l Fin. Servs. (N.Y.), Inc., 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (citations omitted).

152. *See In re* Forex Capital Markets LLC, Case No. 05-BCC-025 (NFA Nov. 28, 2005). Specifically, the NFA charged FxCM with violating Compliance Rule 2-36(b)(1), which makes it a violation of NFA rules for a FDM or its associates to "[c]heat, defraud or deceive, or attempt to cheat, defraud or deceive any other person." *See* NFA COMPLIANCE RULE 2-36(b)(1) (2010), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=RULE%202-36&Section=4.

153. *See In re* Forex Capital Markets LLC, Case No. 06-BCC-046 (NFA Sept. 27, 2006). In this case, the NFA Panel found that FxCM violated Compliance Rules 2-9(c) and 2-36(e). Rule 2-9(c) requires futures commission merchant members to "develop and implement a written anti-money laundering program." NFA COMPLIANCE RULE 2-9(C) (2010), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=RULE%202-9&Section=4. Rule 2-36(e) provides that FDMs and their associates with supervisory duties "shall diligently supervise its employees and agents in the conduct of their forex activities for or on behalf of the Forex Dealer Member." NFA COMPLIANCE RULE 2-36(E) (2010), *available at* http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=RULE%202-36&Section=4.

154. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *3–4.

the time, neither Gibraltar nor its employees were registered with the CFTC or NFA in any capacity.[155] The Gibraltar scheme was launched in earnest when, in April of that year, FxCM reached an agreement with Fremer in which Gibraltar received hefty commissions for referring its customers to open options accounts with FxCM on an exclusive basis.[156]

Luring prospective investors with claims of two hundred to three hundred percent returns and other false promises,[157] Gibraltar's salespeople persuaded Mrs. McDonald and over 270 others to open accounts with FxCM, and to trade forex under Gibraltar's "expert" guidance.[158] Once the customers agreed to open an account there, the firm mailed them several forms, including FxCM's account opening documentation and a limited power of attorney granting Gibraltar discretion to trade its customers' accounts.[159] Those customers then returned the signed paperwork to Gibraltar, but sent their money directly to FxCM.[160] Gibraltar would later forward the account opening documentation to FxCM, which reviewed the materials to ensure that Gibraltar's customers satisfied its customer qualification standards.[161]

Those that satisfied FxCM's standards must have soon regretted their decisions to open accounts there. Gibraltar's "expert" traders actually had little trading experience,[162] and some even had criminal backgrounds.[163] They placed large bets on risky options, which ultimately resulted in "nearly ninety-five percent of Gibraltar's customers los[ing] most if not all" of the three million dollars they invested.[164] Meanwhile, Gibraltar and

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155. *Id.*

156. *Id.* at *8. "Gibraltar generated at least $879,379.50 in commissions from at least 267 members of the retail public, who invested $3,022,998.39 to engage in trading of foreign currency option contracts through FXCM . . . . FXCM charged Gibraltar's customers $50 per round turn on trades and it received at least $200,000 in commissions." *CEA Complaint*, *supra* note 145, at 2.

157. *Id.* at *45–46. Gibraltar's misrepresentations to its customers included the following:

> (1) that Gibraltar customers could obtain 200% to 300% returns on their investments in a short period of time; (2) for every $.01 movement in the foreign currency market Gibraltar customers could make $ 1,000.00 in profit; (3) political conditions, such as the September 11, 2001 terrorist attacks and the then-expected war with Iraq, would affect the foreign currency markets in a manner that would increase the likelihood that Gibraltar's customers would realize profits; (4) that most other Gibraltar customers were profiting from their investments; and (5) that as a result of Gibraltar's, and/or Johnson's, extensive trading experience none of Gibraltar's clients lost money. . . .

Id.

158. *Id.* at *3–4.

159. *Id.* at *9–10.

160. *Id.*

161. *Id.*

162. *Id.* at *45.

163. *Id.* at *44–51; *CEA Complaint*, *supra* note 145, at 10–13.

164. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *47; *see CEA Complaint*, *supra* note 145, at 10–13.

FxCM made out like thieves, together generating over one million dollars in commissions and fees.[165]

B. The District Court's Decision

Seeking injunctive relief, monetary fines, and various ancillary remedies against Gibraltar, Fremer, Kline, Johnson, and FxCM,[166] the CFTC filed suit in the U.S. District Court for the Southern District of Florida on February 10, 2004.[167] The parties presented their case during a two-week jury trial that culminated on September 12, 2005, and the district judge issued an opinion on May 30, 2006.[168]

The district judge held that Gibraltar and its principals, Kline, Fremer, and Johnson, were liable for the company's repeated material misrepresentations and omissions in soliciting members of the public to trade and invest with the firm.[169] Specifically, the court determined that Johnson, Gibraltar's account executive, violated 7 U.S.C. § 6c(b), which makes it unlawful to participate in commodity options transactions in violation of CFTC rules, and also Regulations 32.9(a) and (c), which forbid engaging in fraud and deceit in connection with such transactions.[170] The court held Kline and Fremer liable as controlling persons of Johnson pursuant to 7 U.S.C. § 13c(b).[171]

The court, however, declined to hold FxCM vicariously liable for Gibraltar's frauds. Deciding that the CFMA foreclosed application of § 2(a)(1)(B) to the off-exchange forex transactions in question,[172] the court

165. *CEA Complaint*, *supra* note 145, at 2. Gibraltar generated at least $879,379.50 in commissions from this arrangement and FxCM generated more than $200,000. *Id.*

166. *Id.* at 3.

167. *Id.* at 21. As explained above, the CFTC's decision to litigate in federal court instead of initiating an administrative disciplinary proceeding, empowered the agency to seek an injunction but deprived them of the APA's deferential standard of review. *See supra* Part I.A.4.

168. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *1–2.

169. *Id.* at *42–60.

170. *Id.* at *42–57; 7 U.S.C. § 6c(b) (2006) (making it unlawful to "offer to enter into, enter into or confirm the execution of, any transaction involving any commodity [option] . . . contrary to any rule, regulation, or order of the [CFTC] prohibiting any such transaction or allowing any such transaction under such terms and conditions as the [CFTC] shall prescribe"); 17 C.F.R. § 32.9 (2010) (declaring it "unlawful for any person directly or indirectly: (a) [t]o cheat or defraud or attempt to cheat or defraud any other person . . . [or] (c) [t]o deceive or attempt to deceive any other person by any means whatsoever; in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction").

171. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *55–60; 7 U.S.C. § 13c(b) (providing that "[a]ny person who, directly or indirectly, controls any person who has violated any provision of [the CEA] or any of the rules, regulations, or orders [promulgated thereunder] may be held liable for such violation in any action brought by the Commission to the same extent as such controlled person").

172. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *60–61, 62 n.7 (explaining that although the Commodity Futures Modernization Act of 2000 (CFMA) "did not make the vicarious liability provision of the CEA applicable to [certain] off-exchange foreign currency transaction[s] . . . vicarious liability may be imposed pursuant to CFTC regulation 1.2."); *see* 7 U.S.C. § 2(c)(2)(C). Although the CFMA only specifically subjected those transactions to the CEA's anti-fraud provisions when the district court decided *Gibraltar* in 2006, a 2008

instead analyzed the FxCM-Gibraltar relationship under CFTC Regulation 1.2, a vicarious liability provision that parrots the language of § 2(a)(1)(B).[173] Although the court embarked on its vicarious liability analysis with the mantra that "whether one is an agent for another depends on an assessment of the totality of circumstances[,]"[174] the court ultimately undertook a common law agency analysis,[175] in part because the CFTC itself had argued common law agency principles in its response to FxCM's summary judgment motion.[176]

The court first determined that express actual authority was lacking because the parties never executed an express agreement to form an agency relationship.[177] It also rejected agency under an implied actual authority theory, finding that, from the parties' course of conduct, they failed to consent to the formation of an agency relationship, FxCM did not provide a sufficient degree of operational support to Gibraltar, and FxCM exercised little control over the firm.[178] The court last considered the relationship

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amendment to the law subjected all off-exchange forex transactions to the CEA's vicarious liability provision as well. *See* CFTC Reauthorization Act of 2008, § 13,101, Pub. L. 110-246, 122 Stat. 1651, 2189–2204 (to be codified at 7 U.S.C. § 2(c)(2)).

173. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *61–62 n.7.

174. *Id.* at *63 (citing Stotler & Co. v. CFTC, 855 F.2d 1288, 1292 (7th Cir. 1988)). In so doing, the district court cited a number of cases supporting that approach, including the Second Circuit's *Guttman* decision and the Seventh Circuit's *Rosenthal* and *Stotler* decisions. *See id.* at *62–63. Unlike *Gibraltar*, which began as an action for injunctive relief in federal district court, each of those cases were appeals from Commission orders expansively applying the totality of the circumstances approach. *See* Guttman v. CFTC, 197 F.3d 33 (2d Cir. 1999); Stotler & Co. v. CFTC, 855 F.2d 1288 (7th Cir. 1988); Rosenthal & Co. v. CFTC, 802 F.2d 963 (7th Cir. 1986). As such, those courts had far less latitude to second-guess the finding of vicarious liability in the Commission's order than the district court did in the first instance in *Gibraltar*. *See supra* note 167.

175. *See Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *63–71 (examining the FxCM-Gibraltar relationship under actual authority—both express and implied—and apparent authority theories and concluding that an agency relationship did not exist).

176. *See id.* at *64 ("The CFTC relies upon both actual and apparent authority theories to support its argument that an implied agency relationship existed between Gibraltar and FxCM."); Plaintiff's Memorandum in Support of Response to FXCM's Motion for Summary Judgment at 8–10, CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS (S.D. Fla. May 12, 2005). The CFTC's reference to common law agency principles in its response to FxCM's summary judgment motion is indeed quite puzzling. The argument was absent from the Commission's argument in its response to FxCM's motion to dismiss and in its brief to the Eleventh Circuit. *See* Brief of Appellant CFTC, *supra* note 75, at 33 (explaining that "the statutory and regulatory language—'official, agent *or* other person'—indicates that section 2(a)(1)(B) and Rule 1.2 can extend to persons who may not technically be agents at common law"); Plaintiff CFTC's Response to Defendant Forex Capital Markets LLC's Motion to Dismiss at 9–11, CFTC v. Gib. Monetary Corp., No. 04-80132-CIV-DIMITROULEAS (S.D. Fla. June 14, 2004).

177. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *63.

178. *Id.* at *64–67. To guide its implied actual authority analysis, the court applied a framework articulated by a CFTC administrative law judge in an initial decision. *See id.* at *64 ("To demonstrate the existence of implied actual authority a party must provide evidence that: (1) the purported agent and purported principal acquiesced to the relationship, (2) the purported principal gave sufficient support to the purported agent, and (3) the purported principal exercised sufficient control over the purported agent." (citing Buckner v. Refco, Inc., [2000–2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,532 (April 25, 2001))). As the Eleventh Circuit correctly pointed out, this framework is actually found in a

under an apparent authority theory, concluding that the evidence adduced at trial was insufficient to support a finding of apparent agency because the CFTC never made clear which, if any, representations of FxCM were relied upon by Gibraltar's customers in opening accounts there.[179]

The court ultimately granted the CFTC's request for permanent injunctions against all defendants—with the exception of FxCM—prohibiting future violations of the CEA and barring the defendants from engaging in any commodities-related activities.[180] Turning to the issue of ancillary remedies, the court first held Kline, Fremer, and Johnson jointly and severally liable for restitution to Gibraltar's clients in the amount of $2,752,377.50, the amount of its customers' total losses.[181] The court also imposed civil monetary penalties against Fremer for $352,011, Johnson for $191,367, and Kline for $240,000.[182] Disappointed over the district court's refusal to hold FxCM liable for Gibraltar's frauds, the Commission decided to appeal.[183]

C. Arguments from the Briefs

The section below recounts the arguments offered by the CFTC and FxCM in the briefs they submitted to the Eleventh Circuit on appeal.

1. The CFTC's Briefs

The Commission filed its principal brief with the Eleventh Circuit Court of Appeals on February 9, 2007.[184] The CFTC contended that the district court misapplied the legal standard for determining agency relationships under the CEA's vicarious liability provision,[185] a decision the CFTC claimed would encourage "foreign currency dealers wishing to work with

different CFTC initial decision. CFTC v. Gib. Monetary Corp., 575 F.3d 1180, 1185 n.10 (11th Cir. 2009) (presuming that the district court meant to cite Webster v. Refco, [1998–1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,578 (Feb. 1, 1999)). Nevertheless, it raises a moot point, as neither administrative law judge's initial decision carries precedential value. *See supra* note 86.

179. *Gib. Monetary Corp.*, 2006 U.S. Dist. LEXIS 45129, at *64–71.

180. *Id.* at *74.

181. *Id.* at *77.

182. *Id.* at *80–81 (quoting CFTC v. Wilshire Inv. Mgmt. Corp., 407 F. Supp. 2d 1604, 1316 (S.D. Fla. 2005)). The court declined to order disgorgement, finding the civil monetary penalties "sufficient 'to ensure that the Defendants did not profit' from their fraudulent conduct." *Id.* at *81.

183. *See* CFTC v. Gib. Monetary Corp., 575 F.3d 1180 (11th Cir. 2009).

184. *See* Brief of Appellant CFTC, *supra* note 75, at 48. The CFTC devoted the first section of its argument in the brief to its contention that the district court erred by holding that § 2(c)(2)(C) precluded application of § 2(a)(1)(B) to the off-exchange foreign currency transactions at issue in Gibraltar. *Id.* at 20–31. That issue, once contested, is now settled. As noted above, the 2008 amendments to the CEA in the CFTC Reauthorization Act of 2008 (CRA) clarified Congress's intent by making the CEA's vicarious liability provision expressly applicable to such transactions. *See supra* notes 40–43 and accompanying text.

185. Brief of Appellant CFTC, *supra* note 75, at 31–46.

disreputable marketing companies . . . to model their working relationship on the one here."[186]

After muddling its stance earlier in the litigation,[187] the Commission articulated its long-held position that vicarious liability under § 2(a)(1)(B) is broader than common law principal-agent liability.[188] Whereas principals at common law are vicariously liable only for the tortious acts of their agents and employees, the CEA also makes them liable for the acts of an "official, agent, *or other person*,"[189] such as an independent contractor,[190] so long as the "agent" is acting in furtherance of the agency.[191]

Noting that "[t]he ascription of agency is a purposive, policy-oriented act,"[192] the Commission argued that the imposition of vicarious liability to FxCM was necessary in this case to further the valuable policy of encouraging futures commission merchants to weed out swindling soliciting brokers like Gibraltar.[193] This policy was particularly relevant here, the CFTC noted, because entities like Gibraltar that solicit customers solely for off-exchange forex dealers like FxCM are not required to register with the CFTC as introducing brokers.[194]

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186. *Id.* at 32. The Commission also conveyed the policy implications of the district court's decision:

> The district court creates an opening for regulated foreign currency dealers to spin off marketing functions to unregulated agents who may have little capital and less incentive to deal fairly and honestly with customers. At the same time, the court's error allows unscrupulous futures commission merchants to enjoy the fruits of their agents' conduct without fear of recourse if the agents break the law. In these circumstances, futures commission merchants have little incentive to assure that their agents obey the law.

Id. at 18.

187. *Compare* Plaintiff's Memorandum in Support of Response to FXCM's Motion for Summary Judgment, *supra* note 176, at 8–10 (evaluating FxCM-Gibraltar under Florida agency law, and considering the concepts of actual and apparent authority), *with* Plaintiff CFTC's Response to Defendant Forex Capital Market LLC's Motion to Dismiss, *supra* note 176, at 3 (stating that vicarious liability under the CEA, which does not require control, is determined "on an overall assessment of the totality of the circumstances of each case" (quoting Berisko v. Eastern Capital Corp., [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,772 at 31,223 (Oct. 1, 1985))).

188. Brief of Appellant CFTC, *supra* note 75, at 32–33.

189. *Id.* at 33 (citing 7 U.S.C. § 2(a)(1)(B) (2006) (emphasis added); *see* Lobb v. J.T. McKerr & Co., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,441 n.13 (Dec. 14, 1989).

190. Brief of Appellant CFTC, *supra* note 75, at 33 (citing Bogard v. Abraham-Reitz & Co., [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,273 at 29,393 (July 5, 1984)); *see Lobb*, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 36,444; *Bogard*, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 29,393 (stating that "even if [one] were an independent contractor whose conduct in the performance of the services undertaken was not controlled by [the purported principal], that status would not itself preclude his being [an] agent").

191. Brief of Appellant CFTC, *supra* note 75, at 33 (citing Stotler and Co. v. CFTC, 855 F.2d 1288, 966 (7th Cir. 1986)).

192. *Id.* at 34 (citing Dohmen-Ramirez v. CFTC, 837 F.2d 847, 858 (9th Cir. 1988)).

193. *Id.* at 34–35.

194. *See id.* at 34–35; *supra* notes 75–76 and accompanying text.

The CFTC maintained that courts should employ a totality of the circumstances test, which has long been utilized by the Commission to analyze agency under § 2(a)(1)(B).[195] This approach, under which any one factor, including control, is not dispositive of an agency relationship, has been applied by the CFTC since its first articulation in the Commission's 1984 *Bogard* decision.[196] Perhaps more importantly, the Commission's use of the test had been upheld by several courts of appeal in subsequent years.[197] Under this framework, the Commission argued, the traditional common law framework of actual and apparent authority does not apply.[198]

In support of that position, the CFTC analogized *Gibraltar* with *Reed v. Sage Group, Inc.*,[199] a 1987 reparations action in which the Commission articulated a framework for analyzing futures commission merchant-introducing broker relationships for purposes of establishing agency under § 2(a)(1)(B).[200] In *Reed*, the Commission relied on several factors to

195. Brief of Appellant CFTC, *supra* note 75, at 33–34; *see, e.g.*, Knight v. First Commercial Grp., [1996–1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,942 at 44,553–54 (Jan. 14, 1997) (explaining that pursuant to § 2(a)(1)(B), a putative principal is derivatively liable for the wrongdoing of another so long as he was "acting for" the other at the time of the wrongdoing and that CFTC precedent provides that a totality of the circumstances test is employed in this determination); *Bogard*, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 29,393 ("[A]ny person 'acting for' another 'within the scope of [an] employment or office,' is an agent, whose acts are attributable to the principal. . . . [T]he agent [need not] be registered with the Commission or be known by any particular title . . . in order to confer liability upon the principal." (quoting 7 U.S.C. § 4 (1976)); Berisko v. Eastern Capital Corp., [1984–86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,772 at 31,223 (Oct. 1, 1985) ("Whether one person is an agent acting for another turns not on any one fact or talismanic formula, but on an overall assessment of the totality of the circumstances in each case." (internal citation omitted)).

196. *See* Brief of Appellant CFTC, *supra* note 75, at 33–34 (citing cases).

197. *See id.* at 34 (citing *Dohmen-Ramirez*, 837 F.2d at 858). In *Dohmen-Ramirez*, a reparations action, Bert Dohmen-Ramirez, a registered commodity trading advisor and president and owner of Wellington Advisory, appealed a Commission order holding him and his company vicariously liable for the fraudulent misrepresentations of Jon Handy, an associated person of futures commission merchant Murlas Brothers Commodities, to Ronald Ho, an airport employee. *See* Dohmen-Ramirez, 837 F.2d at 850. The Commission had affirmed the administrative law judge's finding of vicarious liability against Wellington and Dohmen-Ramirez because of their use of Handy to distribute its forms, their commission-splitting arrangement, their reference to Handy as a "subcontracted advisor," and their frequent consultations with Handy on the management of Ho's account. *See* Ho v. Dohmen-Ramirez, [1986–1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,391 at 33,052 (Nov. 21, 1986). The Ninth Circuit Court of Appeals affirmed the Commission's order on appeal, noting that "it is not necessary to show control to establish agency under the CEA." *Dohmen-Ramirez*, 837 F.2d at 858–61. The weight of the evidence supported the Commission's finding that an agency relationship existed between Dohmen-Ramirez and Wellington and Handy. *See id* at 858–59.

198. Brief of Appellant CFTC, *supra* note 75, at 41. In addition to arguing that Gibraltar was FxCM's agent under the totality of the circumstances test, the CFTC made the alternative argument that Gibraltar and FxCM formed an agency relationship even under a common law analysis. *See id.* at 40–46.

199. *Id.* at 35–40. For general information about introducing brokers, see *supra* Part I.A.3.

200. Reed v. Sage Grp., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943 (Oct. 14, 1987). In *Reed*, Stanley M. Reed sought to hold Murlas Commodities, a futures commission merchant vicariously liable for the frauds of Sage Group, its introducing broker, and Russ Thiessen, Sage's associated person. *Id.* at 34,297–98. Thiessen persuaded

determine that the introducing broker was the futures commission merchant's agent, including "the introducing broker's use of account-opening documents provided by the futures commission merchant, the futures commission merchant's provision of market information to the introducing broker for the use of customers, and use of a form contract drafted by the futures commission merchant to govern the parties' relationship."[201] The CFTC asserted that those factors, particularly FxCM's use of Gibraltar as a conduit for its account opening forms and the parties' exclusive dealing, were also present in *Gibraltar*, thus indicating that the court ought to hold FxCM liable for Gibraltar's frauds.[202]

Last, but certainly not least, the Commission argued that *Chevron* doctrine required the court to defer to the Commission's interpretation of the CEA's vicarious liability provision because of its exclusive administration of the CEA and its specialized expertise of commodities law and practice.[203] Although the agency seemingly relied on a *Skidmore* rationale to support the agency deference argument in its principal brief,[204] the Commission reformulated and expanded on that argument in its reply, contending that its interpretation of the provision was grounded in formal adjudications, that the statute was ambiguous, and that its construction of the provision was a reasonable one.[205]

The Commission contended that its interpretation of § 2(a)(1)(B) was not a mere litigating position devised for the lone purpose of holding FxCM liable for Gibraltar's frauds, but rather an interpretation long articulated by

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Reed, a reverend, to invest with Murlas by promising that he would make "a 'hell' of a lot of money," which as the administrative law judge humorously noted, is awfully "[o]dd language for a preacher to accept." Reed v. Sage Grp., [1986–1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,144 at 32,364 (July 9, 1986). Not surprisingly, Thiessen's claims were nothing but a load of hot air. The preacher ultimately lost virtually all of the $23,800 he invested through Sage. *Reed*, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,297–98; *Reed*, [1986–1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 32,365.

201. *See* Reply Brief of Appellant CFTC at 12, CFTC v. Gib. Monetary Corp., 575 F.3d 1180 (11th Cir. 2009) (No. 06-14270-C). The CFTC also directed the court to the Seventh Circuit's decision in *Stotler & Co. v. CFTC*, in which the court upheld a Commission order holding Stotler & Co., a futures commission merchant, vicariously liable for frauds committed by Richard C. Allen, a commodity pool operator and commodity trading advisor with whom the firm had a business relationship. *See* 855 F.2d 1288, 1289 (7th Cir. 1988). The court highlighted that the commission-sharing agreement and Stotler's distribution of forms and literature through Allen supported a finding of agency. *Id.* at 1294. Other factors indicative of an agency relationship included Allen's exclusivity agreement with Stotler, Stotler's assigning to Allen a salesman number, reference to Allen as a salesman in Stotler's internal records, and Allen's ability to place an order directly to the trading floor. *Id.* at 1290, 1293–94. As the totality of the circumstances suggested that Allen was Stotler's agent, and the fraudulent activities occurred within the scope of the agency, the court held Stotler vicariously liable for Allen's frauds under § 2(a)(1)(B). *Id.* at 1294–95.

202. *See* Brief of Appellant CFTC, *supra* note 75, at 41.

203. *See id.* at 46–48.

204. *See id.*; *supra* note 138.

205. *See* Reply Brief of Appellant CFTC, *supra* note 201, at 3–6 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). For background information on *Chevron* doctrine, see *supra* Part I.C.

the Commission through numerous CFTC administrative proceedings.[206] Unlike litigating positions, interpretations established by the CFTC through its formal adjudicatory processes carry the force of law and warrant *Chevron* deference.[207]

After addressing Step Zero, the CFTC attacked *Chevron*'s first prong, asserting, of course, that § 2(a)(1)(B) is ambiguous.[208] The Commission explained that while the imposition of liability for the actions of "any official, agent, *or other person* acting for" makes clear that the provision is broader than common law agency, its reference to "*other person* acting for" has created an ambiguity because the statute offers no guidance on the identity of those undefined other persons.[209] Importing a distinct meaning to each of the statute's words, the CFTC argued, reveals the existence of a gap waiting to be filled by the CFTC.[210]

Concluding its *Chevron* analysis, the Commission asserted that its long-held construction of the provision was a reasonable one.[211] Its interpretation that § 2(a)(1)(B) does not require control was reasonable, the CFTC maintained, because whereas the common law requires that an agent both act for the principal and be subject to its control, the CEA only contains the "acting for" requirement, without requiring control.[212] Likewise, the CFTC contended that its totality of the circumstances test was reasonable because only relevant circumstances are considered under the approach, courts use totality of the circumstances tests in a variety of situations, and a flexible standard is necessary to achieve the provision's policy objectives.[213]

2. FxCM's Brief

Forex Capital Markets, the appellee, filed its brief on March 9, 2007.[214] FxCM devoted the first part of its argument to refuting the Commission's position that the agency's interpretation of the CEA's vicarious liability

206. *See* Reply Brief of Appellant CFTC, *supra* note 201, at 4–5 (citing numerous cases); *see, e.g.*, Knight v. First Commercial Grp., [1996–1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,942 (Jan. 14, 1997); Lobb v. J.T. McKerr & Co., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,441 n.13 (Dec. 14, 1989); Reed v. Sage Grp., Inc., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943 at 34,303 (Oct. 14, 1987); Berisko v. Eastern Capital Corp., [1984–86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,772 at 31,223 (Oct. 1, 1985); Bogard v. Abraham-Rietz & Co., [1984–86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,273 at 29,391 (July 5, 1984).

207. *See supra* notes 133–39 and accompanying text (explaining that while *Chevron* applies to legal interpretations adopted by agencies in formal adjudications, courts do not apply *Chevron* to pure litigating positions).

208. *See* Reply Brief of Appellant CFTC, *supra* note 201, at 3–4.

209. *See id.* (quoting 7 U.S.C. § 2(a)(1)(B) (2006) (emphasis added)).

210. *Id.* at 4 (quoting United States v. Fuentes-Rivera, 323 F.3d 869, 872 (11th Cir. 2003)).

211. *See id.* at 6–10.

212. *See id.* at 7 (citing cases). The CFTC noted that the Ninth Circuit has explicitly recognized this requirement, and the Seventh Circuit has implicitly done so. *See id.*

213. *See id.* at 7–10.

214. *See* Answer Brief of Defendant-Appellee Forex Capital Markets, LLC at 49, CFTC v. Gib. Monetary Corp., 575 F.3d 1180 (11th Cir. 2009) (No. 06-14270-CC).

position was time-tested and warranted the court's deference in accordance with *Chevron*.[215] Rather, FxCM argued, the district court correctly applied common law standards to its analysis of vicarious liability under Regulation 1.2, § 2(a)(1)(B)'s twin;[216] and under that standard, the district court did not clearly err in determining that Gibraltar was not FxCM's agent.[217]

In its response to the Commission's abbreviated opening *Chevron* argument, FxCM alleged that the CFTC's interpretation of the provision was a mere litigating position, and thus not entitled to the court's deference.[218] According to the firm, the CFTC had utterly failed to set forth a consistent interpretation of § 2(a)(1)(B) in the decades since the provision's first enactment in 1921.[219] FxCM pointed out that the CFTC offered "no relevant case law, or even legislative history, to support its theory."[220]

Before rebutting the remainder of the Commission's argument, FxCM attacked the CFTC's position in the district court as plainly conflicting with its position on appeal.[221] FxCM noted that, in the Commission's response to FxCM's summary judgment motion, the CFTC actually advocated for the application of common law agency principles rather than a totality of the circumstances approach.[222]

FxCM likewise contended that each of the cases relied on by the CFTC applied common law principles.[223] Regarding *Dohmen-Ramirez v. CFTC*, which the CFTC cited to show that control is not required to establish agency under the CEA, FxCM claimed that the court applied an apparent authority theory rather than a broad totality of the circumstances test.[224] Control was unnecessary in that case, FxCM argued, solely because apparent authority requires that the purported principal "creates the appearance that the acts are authorized" and nothing else.[225]

According to FxCM, *Reed* similarly did not support the agency's position.[226] The firm asserted that *Reed*, a reparations action decided long

215. *See id.* at 16–32. It reserved the remainder of its brief to arguing that neither § 2(a)(1)(B) nor Regulation 1.2 applied to the retail forex transactions in question. *See id.* at 33-48. As noted above, that argument has since been rendered moot by the amendment to Section 2 of the CEA in the CRA of 2008. *See supra* notes 40–43 and accompanying text.

216. *See* Answer Brief of Defendant-Appellee Forex Capital Markets, *supra* note 214, at 16–27.

217. *See id.* at 27–32.

218. *See id.* at 18 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)); CFTC v. Zelener, 373 F.3d 861, 867 (7th Cir. 2004)).

219. *See id.* at 20 n.8 (citing cases).

220. *Id.* at 17.

221. *See id.* at 19.

222. *Id.* at 19 (stating that "the CFTC never suggested that the district court should apply any standard requiring less, or different, proof than was required under the common law" and arguing that the court should not consider the CFTC's "'broader' vicarious liability standard for the first time on appeal"); *see* Plaintiff CFTC's Response to Defendant Forex Capital Markets LLC's Motion to Dismiss, *supra* note 176, at 9–11.

223. Answer Brief of Defendant-Appellee Forex Capital Markets, *supra* note 214, at 20.

224. *Id.* at 21. For a summary of the facts of *Dohmen-Ramirez*, see *supra* note 197.

225. *Id.* (quoting *Dohmen-Ramirez*, 837 F.2d 847, 858 (9th Cir. 1988)).

226. *Id.* at 22.

before the CFTC gained partial jurisdiction over forex, only supports the position that those factors common to all futures commission merchant-introducing broker relationships do not themselves suffice to establish an agency relationship under the CEA.[227] Additional indicia of an agency relationship must be present for a finding of agency—none of which were present here.[228] In any case, FxCM contended, the Commission applied an apparent authority theory in *Reed* (even if it never said as much) because the introducing broker represented to his client that he was "part of" the futures commission merchant.[229] No such claim was made in this case.

FxCM claimed that, in addition to *Dohmen-Ramirez* and *Reed*, several other federal court opinions—as well as CFTC case law—supported its position that common law agency is the correct test for agency under the CEA.[230] Rather than statutorily creating a broader scope of liability as the CFTC insists, the CEA's vicarious liability provision merely codifies the common law rule.[231] Congress, the firm noted, has also long understood § 2(a)(1)(B) as "in essence provid[ing] respondeat superior and general principal-agent standards for imposing liability on employers and principals for the acts of their employ[ees] or agents."[232] What's more, FxCM argued, the case law indicated that control is indeed essential to a finding of agency under the CEA.[233] Under that standard, FxCM argued, the firm could not

227. Reed v. Sage Grp., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943 (Oct. 14, 1987).

228. Answer Brief of Defendant-Appellee Forex Capital Markets, *supra* note 214, at 22 (citing *Reed,* [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,302–03).

229. *Id.* at 23.

230. *Id.* at 24–27; *see, e.g.*, Clayton Brokerage Co. of St. Louis, Inc. v. CFTC, 794 F.2d 573, 581 (11th Cir. 1986) (stating that § 2(a)(1)(B) "'provides respondeat superior and general principal-agent standards for imposing liability on employers and principals for the acts of their employees or agents'" (citing H.R. REP. NO. 97-565, pt. 1, at 105 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3954)); Aspacher v. Kretz, No. 94 C 6741, 1997 U.S. Dist. LEXIS 8000, at *12–22 (N.D. Ill. June 3, 1997) ("As in common law, vicarious liability under § 2(a)(1)[(B)] may be based on agency theories of express, implied, and apparent authority."); Pac. Trading Grp., Inc. v. Global Futures & Forex, Ltd., [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,910 at 56,751 (Nov. 16, 2004) ("Section 2(a)(1)(B) of the CEA is a codification of the common law principle of *respondeat superior*, and imposes strict liability on a principal provided that the agent's misconduct was in furtherance of the agency." (citing Rosenthal & Co. v. CFTC, 802 F.2d 963, 966 (7th Cir. 1986))).

231. Answer Brief of Defendant-Appellee Forex Capital Markets, *supra* note 214, at 26 (citing *Pac. Trading Grp.*, [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 56,751).

232. *Id.* at 24–25 n.11 (citing H.R. REP. NO. 97-565, pt. 1, at 105 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3871, 3954).

233. *Id.* at 26–27; *see* Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738, 743 (8th Cir. 2003) (noting that "in determining whether an agency relationship exists, the question hinge[s] on the principal's right to exercise control over the activities of the agent" (citing Gunderson v. ADM Investor Servs., Inc., No. 99-4032, 2000 U.S. App. LEXIS 20971, at *2 (8th Cir. Aug. 16, 2000))); *Pac. Trading Grp.*, [2003–2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 56,751 ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1958))).

be held liable as principal under the CEA for Gibraltar's frauds because of the absence of control.[234]

D. The Eleventh Circuit's Decision

On appeal to the Eleventh Circuit, the court reviewed de novo the district court's application of common law agency principles under the CEA's vicarious liability provision.[235] The court's determination that FxCM was not liable for Gibraltar's frauds, however, was considered a purely factual matter that the appeals court reviewed under the very deferential clearly erroneous standard.[236]

Because the issue of whether vicarious liability under the CEA requires an element of control was a matter of first impression, the court began its analysis with a discussion of the relative case law from her sister circuit courts.[237] The court acknowledged a circuit split with respect to the appropriate standard for the establishment of agency relationships under the provision, pointing out that some courts follow the totality of the circumstances approach, while others apply the test for common law agency.[238] The court further noted that the majority of circuit court decisions, like the district court below, have actually employed language that conflates the two contrasting approaches.[239]

The court noted that the majority of CFTC case law indicated the application of a totality of the circumstances test and that control is not required to establish agency under the CEA.[240] While the court considered this authority somewhat "helpful" to its determination, it did not defer to the agency's interpretation of § 2(a)(1)(B) because "there was [no] gap in which the agency needed to regulate."[241] Its own reading of the provision's legislative history suggested the contrary; "that the vicarious liability statute and [identical] regulation codify common law principal agent liability."[242]

Holding that the CEA codified common law principal-agent liability, the court explained that "actual agency, either implied or express, requires: (1) consent to the agency by both principal and agent; and (2) the control of the agent by the principal," and concluded that this standard had been correctly applied by the district court.[243] Because the facts adduced at trial failed to

234. *Id.* at 27–32. For a brief overview of common law principal-agent liability, see *supra* note 118.

235. CFTC v. Gib. Monetary Corp., 575 F.3d 1180, 1186 (11th Cir. 2009) (citing United States v. Trainor, 376 F.3d 1325, 1330 (11th Cir. 2004)).

236. *Id.* (citing Wood v. Holiday Inns, Inc., 508 F.2d 167, 173 (5th Cir. 1975)).

237. *Id.* at 1187.

238. *Id.*

239. *Id.*

240. *Id.* at 1188.

241. *Id.* at 1188–89 (discussing the legislative history of the CFTCA). The court stated that the legislative "history indicates that Congress conceived of this language as a standard governing principals and agents, or a common law agency standard, and that Congress had not altered the conception despite the changes in commodities regulation." *Id.*

242. *Id.* (noting that the CFTC's vicarious liability rule, which the court below applied, is interpreted the same way as § 2(a)(1)(B)).

243. *Id.* at 1189 (citing RESTATEMENT (SECOND) OF AGENCY § 1 (1958)).

indicate that FxCM exercised sufficient control over Gibraltar to establish an agency relationship, the appeals court upheld the district court's findings as plausible in light of the record below.[244]

III. RIPPLE EFFECT OR EROSION?: THE IMPACT OF THE ELEVENTH CIRCUIT'S *GIBRALTAR* DECISION

As detailed above, the *Gibraltar* court skirted lengthy *Chevron* analysis in holding that the CEA's vicarious liability provision, 7 U.S.C. § 2(a)(1)(B), merely codifies common law principal-agent liability.[245] In disregarding a long-held CFTC position, the Eleventh Circuit dismissed the totality of the circumstances approach and became the first appeals court to read a control requirement into the CEA's vicarious liability provision.[246] Although the decision has temporarily created a situation where forex dealers need no longer be "careful about whom they grasp to their bosoms as branch managers and commodity solicitors,"[247] subsequent federal and administrative decisions as well as proposed CFTC regulations governing firms like Gibraltar suggest that the case's impact will ultimately be nominal.[248]

A. Case Law and Chevron *Doctrine Support Application of the Commission's Totality of the Circumstances Test and the Absence of a Control Requirement*

On appeal to the Eleventh Circuit in *Gibraltar*, FxCM contended that the Commission's totality of the circumstances test was a mere litigating position, not worthy of the court's deference.[249] The CFTC, of course, asserted that its interpretation of § 2(a)(1)(B) did qualify for *Chevron* deference because the provision is ambiguous, and its interpretation of the provision, expressed through two decades of formal adjudicative proceedings, is a permissive one.[250] Despite the issue's prevalence in the parties' briefs, the appeals court disposed of *Chevron* with a half sentence buried in a lengthy paragraph about the long-standing statute's legislative history.[251]

Upon closer inspection, however, the CFTC's contention—that the court ought to have deferred to its interpretation of the CEA's vicarious liability provision—is persuasive. As a preliminary matter, the CFTC's position that control is not required to establish "agency" and that courts should assess agency under the CEA based on a totality of the circumstances is decidedly not a mere litigating position as FxCM contended.[252] As

244. *See id.* at 1189–90.
245. *See supra* notes 235–44 and accompanying text.
246. *See supra* note 141 and accompanying text.
247. *See supra* note 18 and accompanying text.
248. *See infra* notes 288–94 and accompanying text.
249. *See supra* notes 215–20 and accompanying text.
250. *See supra* notes 203–13 and accompanying text.
251. *See supra* notes 240–42 and accompanying text.
252. *See supra* notes 196–97, 215–20 and accompanying text.

demonstrated by numerous administrative proceedings before the Commission since the mid-1980s—a number of which were upheld by U.S. courts of appeals[253]—the totality of the circumstances test has been firmly established as *the test* for determining agency relationships under the CEA's vicarious liability provision.[254]

FxCM's contention that the case law on which the CFTC relied, including *Dohmen-Ramirez* and *Reed*, supported the proposition that common law agency rules apply,[255] ignores the plain truth: These cases—and others—demonstrate that courts interpret the CEA's vicarious liability provision "broadly and aggressively," holding liable "futures industry participants who might not be liable under traditional agency principles."[256]

Nevertheless, the Eleventh Circuit declined to defer to the CFTC's interpretation of the provision because, after reviewing its legislative history, it determined that "there was [no] gap in which the agency needed to regulate," i.e., the statute clearly and unambiguously provides for common law principal-agent liability.[257]

The legislative history, however, is not as clear as the court suggested. When Congress first enacted the vicarious liability provision in the Grain Future Act of 1921, it was included under a heading titled "[p]rincipals responsible for acts of agents."[258] The legislation was enacted to combat fraud and manipulation in the commodities markets at a time of unprecedented volatility, in which a robust vicarious liability provision was necessary to provide the Commission with the ammunition needed to combat these market abuses.[259]

Not until sixty years later, in connection with the addition of controlling person liability to the CEA's statutory scheme, did Congress offer additional guidance on the provision, stating that it "in essence provides respondeat superior and general principal-agent standards for imposing liability on employers and principals for the acts of their employers or agents."[260] The spotty congressional record, which is essentially devoid of any reference to the provision until six decades after its enactment, is simply not enough to divine congressional intent.[261] In any case, the 1982 statement does not conflict with the Commission's broader reading of the statute, in which respondeat superior-like strict liability is applied to other persons acting for another.[262]

Giving meaning to each of the provision's words further reveals its ambiguity. Because § 2(a)(1)(B) imputes the acts and omissions of "any official, agent, or *other person*" acting in furtherance of the "agency" to

253. *See supra* notes 119, 141 and accompanying text.
254. *See supra* note 240 and accompanying text.
255. *See supra* notes 223–29 and accompanying text.
256. Committee on Futures Regulation, *supra* note 119, at 242.
257. *See supra* notes 240–42 and accompanying text.
258. *See supra* notes 104–07 and accompanying text.
259. *See supra* note 107 and accompanying text.
260. *See supra* notes 116–17 and accompanying text.
261. *See supra* notes 104–17 and accompanying text.
262. *See supra* notes 108–09 and accompanying text.

their putative principals,[263] its plain meaning suggests that, under the CEA, principals are liable for the acts of both common law agents and others. Although the provision clearly extends that liability to other persons acting for the principal, the statute does not elaborate on their possible identities or provide a test to be used by the Commission in identifying them.[264] This gap is waiting to be filled by the CEA's sole administrator, the CFTC.[265]

Had the district court applied the CFTC's totality of the circumstances approach, however, it might still have reasonably concluded that the connection between Gibraltar and FxCM was in fact too tenuous to establish an agency relationship under the CEA.[266] That said, the appeals court went astray in *Gibraltar* not only by glancing over the *Chevron* issue and not affording any deference to the CFTC's long-held totality of the circumstances approach, but also by introducing a control requirement for determining principal-agent liability under the CEA.[267]

B. The Aftermath of the Gibraltar *Decision*

While courts within the Eleventh Circuit are compelled to embrace the *Gibraltar* court's introduction of a control requirement and the rejection of the CFTC's totality test with respect to the CEA's vicarious liability provision,[268] those outside of the Circuit have explicitly dismissed it.[269] The U.S. District Court for the Southern District of New York, for instance, recently rejected the *Gibraltar* court's holding in *In re Amaranth Natural Gas Commodities Litigation*,[270] in which a putative class of commodity futures and options holders sued a hedge fund and its associates for manipulating the price of natural gas futures in violation of the CEA.[271] Looking to the Second Circuit's *Guttman* decision for guidance, the court deemed it unnecessary to "determine whether [one] exercised control over [another] . . . to find [an agency relationship] within the meaning of the

263. *See supra* notes 107, 209–10 and accompanying text.
264. *See supra* notes 107, 209–10 and accompanying text.
265. *See supra* notes 209–10 and accompanying text.
266. *See supra* Introduction.
267. *See supra* notes 143–44, 235–44 and accompanying text.
268. *See* CFTC v. Diamond, No. 8:09-cv-1811-T-17MAP, 2009 U.S. Dist. LEXIS 110537, at *19 (M.D. Fla. Sept. 22, 2009) (explaining that "[t]he common law test for agency supplies the standard for vicarious liability under the Act and accompanying regulations").
269. *See In re* Amaranth Natural Gas Commodities Litig., No. 07 Civ. 6377 (SAS), 2010 U.S. Dist. LEXIS 44571, at *14 & n.37 (S.D.N.Y. Apr. 30, 2010) (stating that the *Gibraltar* court "appl[ied] common law agency principles and require[d] plaintiffs to demonstrate control in order to find an agency relationship" under the CEA and declining to adopt that position). *But see* Shroff v. Rosenthal Collins Grp., No. 08 C 929, 2009 U.S. Dist. LEXIS 75262, at *13–14 (N.D. Ill. Aug. 25, 2009) (citing *Gibraltar* and applying the common law test).
270. No. 07 Civ. 6377 (SAS), 2010 U.S. Dist. LEXIS 44571, at *14 & n.37 (S.D.N.Y. Apr. 30, 2010).
271. *Amaranth*, 2010 U.S. Dist. LEXIS 44571, at *3.

CEA. '[I]t is enough if [he] was "acting for" [her]'" within the scope of his employment.[272]

The Commission has also remained steadfast in its approach, similarly rejecting the Eleventh Circuit's introduction of a control requirement into the CEA's vicarious liability provision and continuing to apply its totality of the circumstances test in its administrative proceedings.[273] In *Jing Bian v. MG Financial, LLC*,[274] a reparations proceeding by an aggrieved investor against a registered futures commission merchant and its unregistered and unregulated introducing agent, an administrative law judge reaffirmed the Commission's long-standing approach, finding the futures commission merchant vicariously liable for its introducing agent's frauds under a set of facts quite similar to *Gibraltar*'s.[275] Even though courts have not widely embraced the *Gibraltar* decision,[276] the case has negative policy implications; it has greatly reduced the incentive for futures commission merchants and retail foreign exchange dealers (at least those in the Eleventh Circuit) to screen those individuals or companies that solicit business for them[277] and enabled them to escape liability for frauds committed by their ill-intentioned "branch managers and commodity solicitors."[278]

As Judge Posner stated in the Seventh Circuit's *Rosenthal* decision, "the ascription of agency is a purposive, policy-oriented act rather than an exercise in semantics."[279] The purpose of the CEA is to protect the investing public from fraud and manipulation in the commodities markets.[280] A robust vicarious liability rule is necessary to protect unsophisticated investors like Mrs. McDonald, "to ensure that futures commission merchants bear responsibility for the wrongdoing by their agents and employees,"[281] and to incentivize futures commission merchants to "be more careful about whom they grasp to their bosoms as branch managers and commodity solicitors."[282] Gibraltar was owned and operated

272. *Id.* at *25 (quoting Guttman v. CFTC, 197 F.3d 33, 39 (2d Cir. 1999) (internal citations omitted)).

273. *See* Jing Bian v. MG Fin., LLC, No. 08-R17, 2009 CFTC LEXIS 76, at *26 n.6 (Oct. 28, 2009) (stating that "while *Gibraltar* is the law in that circuit, it does not control in this case").

274. No. 08-R17, 2009 CFTC LEXIS 76 (Oct. 28, 2009).

275. *See id.* at *5.

276. *See supra* notes 268–73 and accompanying text.

277. *See supra* notes 192–94 and accompanying text.

278. *See supra* note 1 and accompanying text.

279. *See supra* note 1 and accompanying text.

280. *See* 7 U.S.C. § 5(b) (2006) ("It is the purpose of [the CEA] to . . . deter and prevent price manipulation . . . [and] to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets[.]").

281. *Jing Bian*, 2009 CFTC LEXIS 76, at *22 (citing CFTC v. Commonwealth Fin. Grp., 794 F.2d 573, 581–82 (S.D. Fla. 1996)).

282. *See supra* notes 1, 18 and accompanying text; Lobb v. J.T. McKerr & Co., [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,568 at 36,444 (Dec. 14, 1989) ("Section 2(a)(1)[(B)]'s imposition of secondary liability on a principal for the wrongdoing of its agent protects the interests of customers by providing a source of compensation that is generally more stable and reliable than 'often judgment-proof (or fine-proof) employees' . . . [and] encourages principals to take steps to limit their potential liability. As a result, principals are more likely to investigate the character and ability of agents before they are

by a couple of known swindlers whose disciplinary history and checkered past was publicly available to anyone over the Internet.[283] A simple investigation by FxCM into Kline and Fremer's backgrounds would have most likely nipped Gibraltar's frauds in the bud, preventing the tragic losses incurred by Mrs. McDonald and its other investors.[284]

This problem is especially acute in situations like *Gibraltar*, because in the off-exchange forex business, soliciting brokers are not required to register with the CFTC as introducing brokers.[285] Such brokers have not been required to meet capital requirements or obtain a guarantee of their obligations from their futures commission merchant or retail foreign exchange dealer.[286]

The Commission is currently seeking to close this gap through new rulemaking,[287] having proposed a swath of rules to overhaul its regulation of the off-exchange retail forex markets.[288] The proposed regulations mandate that all brokers soliciting business for a retail foreign exchange dealer or a futures commission merchant dealing in forex, like Gibraltar, register with the CFTC as introducing brokers.[289] The new rules would require these forex introducing brokers to solicit business for only one retail foreign exchange dealer or futures commission merchant, like FxCM, with whom they must have a guarantee agreement.[290] Were these restrictions in place when Kline and Fremer were developing their scheme, the frauds committed against Mrs. McDonald and others likely never would have occurred.[291]

CONCLUSION

Because the case law and *Chevron* doctrine so directs, federal courts addressing the issue ought to follow the Second, Seventh, and Ninth Circuits in paying deference to the CFTC's interpretation of § 2(a)(1)(B) and applying its flexible totality of the circumstances test without requiring control.[292] That said, in light of recent federal and CFTC administrative decisions rejecting the *Gibraltar* court's conclusion and the forthcoming CFTC rules governing retail foreign exchange, it appears that the case's negative implications will be only negligible, "and this will be . . . all to the good."[293]

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retained and to provide supervision for those activities likely to result in liability." (quoting Rosenthal & Co. v. CFTC, 802 F.2d 963, 968 (7th Cir. 1986))).

283. *See supra* notes 145–48 and accompanying text.

284. *See id.*; *supra* notes 5–10 and accompanying text.

285. *See supra* notes 75–76 and accompanying text.

286. *See supra* notes 75–76 and accompanying text.

287. *See infra* notes 288–89 and accompanying text.

288. *See* Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 Fed. Reg. 3282, 3284 (proposed Jan. 20, 2010) (to be codified at scattered sections of 17 C.F.R.).

289. *See id.*

290. *See id.* at 3287.

291. *See supra* notes 2–12, 145–62 and accompanying text.

292. *See supra* notes 119, 141 and accompanying text.

293. *See supra* note 1 and accompanying text.