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The Commodity Futures Trading Commission Act: Preemption as Public Policy

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The Commodity Futures Trading Commission Act: Preemption as Public Policy

*Philip F. Johnson**

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I. INTRODUCTION

On October 23, 1974, President Ford signed into law P.L. 93-463, bearing the breathless title "Commodity Futures Trading Commission Act of 1974"[1] [hereinafter the CFTC Act]. The CFTC Act followed a series of hearings, beginning in the summer of 1973, held first by a subcommittee of the House Committee on Small Business[2] and followed rapidly by the more traditional oversight committees

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1. Pub. L. No. 93-463, 88 Stat. 1389, *amending* 7 U.S.C. § 1 (1970) (codified at 7 U.S.C.A. § 1 (Supp. 1, 1975)).

2. *Hearings Before the Subcomm. on Special Small Business Problems of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. (1973).

of the Congress—the House Agriculture Committee[3] and the Senate Agriculture and Forestry Committee.[4] The result was a major overhaul of the Commodity Exchange Act,[5] which had governed the commodity futures markets since 1922. More significantly, however, the Act has become an experiment in centralizing regulatory power within a single federal agency—the Commodity Futures Trading Commission [hereinafter CFTC]—and has resulted in the preemption of all other would-be regulators at every level of government.

During the 1973-1974 period the rather obscure commodity futures industry was not merely alive and well; it was thriving. The twelve organized commodity exchanges[6] in the United States registered record trading volume in 1973: 51.6 million futures transactions having an estimated dollar value of $520 billion.[7] The year 1974 was even better: 55.4 million transactions worth $571 billion.[8] These growth figures reflect an amazing 400% increase in trading volume in the ten years since 1964.[9] These are hardly the typical circumstances that invite congressional attention toward an industry, nor was this the crisis-oriented environment in which Congress is most apt to respond. And yet, both the futures industry and Congress—for both complementary and differing reasons—were enthusiastic about legislative action. The industry wished to modernize the archaic Commodity Exchange Act, basically an agriculture bill, to facilitate the extension of futures trading into nonfood

3. *Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. (1973); *Hearings on H.R. 11,955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings on H.R. 11,955*].

4. *Hearings on S. 2485, S. 2578, S. 2837, & H.R. 13,113 Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings on H.R. 13,113*].

5. 7 U.S.C. § 1 (1970). The many substantive changes made in the Commodity Exchange Act by the 1974 CFTC Act have been reported elsewhere and will not be reviewed in this article. *See, e.g.*, Rainbolt, *What the New Commodity Futures Trading Commission Means to You*, COMMODITIES, Feb. 1975, at 23-26; Johnson, *Antitrust Under the CFTC Act: An Ounce of Prevention . . .* , 20 ANTITRUST BULL. 441 (1975); Johnson, *The Changing Face of Commodities Regulation*, 20 PRAC. LAW., Dec. 1974, at 27; Johnson, *The Commodity Futures Trading Commission: Newest Member of Each Exchange's Management Team*, 34 FED. B.J. 173 (1975); Schroeder & Pollack, *Commodities Regulation*, 8 REV. SEC. REG., no. 7, (Apr. 9, 1975); Note, *The Role of the Commodity Futures Trading Commission Under the CFTC Act of 1974*, 73 MICH. L. REV. 710 (1975).

6. Chicago Board of Trade; Chicago Mercantile Exchange; Mid-America Commodity Exchange (Chicago); Kansas City Board of Trade; Minneapolis Grain Exchange; New York Cocoa Exchange; New York Coffee and Sugar Exchange; Commodity Exchange, Inc. (New York); New York Cotton Exchange and Associates; New York Mercantile Exchange; Pacific Commodity Exchange (San Francisco); West Coast Commodity Exchange (Los Angeles).

7. Bulletin No. 1304 of the Ass'n of Commodity Exchange Firms, Inc., New York, N.Y.

8. These figures were supplied by the Futures Industry Ass'n, New York, N.Y.

9. H.R. REP. No. 93-975, 93d Cong., 2d Sess. 156 (1974).

areas. In addition, the industry had suffered from scandals in so-called "naked options," which although they occurred outside of the industry, routinely were identified in the media as part of the "commodities" business.[10] Congress, on the other hand, was under great public pressure to find a solution to the changing economics of food production, distribution, and marketing. If the futures markets with their *multi-billion* dollar volume[11] were responsible in any way for the rising cost of food, for example, or if those markets could provide some relief from that burden, legislative action would be in order. Thus, hearings in the Congress to modernize the Commodity Exchange Act generally were well received by all concerned.

Curiously, the legislative process began with Congress and the futures industry concerned about quite different things. Congress continued to envision the futures markets in their traditional role as part of the agricultural community; hence its interest centered upon food prices and food marketing. The futures industry realized, on the other hand, that its dependence upon an agricultural role had lessened in recent years because of the introduction of futures trading in many nonfood items. Even before Congress began to evolve the CFTC Act, futures markets were offering trading in the following other products:

Cocoa	Iced Broilers
Coffee	Lumber
Copper	Mercury
Foreign currency:	Palladium
British Pound	Platinum
Canadian Dollar	Plywood
Deutschmark	Propane Gas
Dutch Guilders	Silver
Japanese Yen	Silver Coins
Mexican Peso	Sugar
Swiss Franc	
Canadian Silver Coins	

10. *See, e.g.*, Long, *The Naked Commodity Option Contract as a Security*, 15 WM. & MARY L. REV. 211, 214-17 (1973); Wall Street J. (East. ed.) Mar. 6, 1973, at 4, Feb. 28, 1973, at 2, Feb. 23, 1973, at 25, Feb. 8, 1973, at 18, Feb. 7, 1973, at 36, Feb. 2, 1973, at 44, Nov. 3, 1972, at 6.

11. The "dollar volume" calculation is more hypothetical than real. It is the estimated total cost of each transaction if it were to result in delivery of the underlying commodity and payment of the full purchase price. Since few transactions result in delivery, but rather are "offset" in the market, the actual cost is usually only the difference between acquiring and liquidating the futures position in the market.

The focus of industry interest in legislation, therefore, was to update the Commodity Exchange Act in light of the rapidly expanding universe of the futures markets.

The problem with the Commodity Exchange Act was its applicability to only a specified number of identified agricultural products. The Act's coverage was limited to "commodities" as defined in section 2, which was a narrow listing of specific farm items:

> The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, onions, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice.[12]

Since none of the products shown in the table above were listed in section 2, the Act did not apply to trading in them, and thus an additional potential risk existed for persons trading in those products. The federal watchdogs under the Act, the Commodity Exchange Commission and the Secretary of Agriculture, could not regulate trading in these items. Neither the markets nor the brokers engaged in the trading were subject to federal screening or approval. The antifraud provisions of the Act, and the important requirement that all customer money must be segregated from the broker's own funds, were inapplicable. It was simply a matter of time, the industry feared, before these promising new fields for futures trading would be tainted by scandal. As previously noted, scandals in "naked options" outside the industry already had emerged in the absence of strong federal oversight. The industry thus committed itself to a major modernization of the Commodity Exchange Act and to the elimination of the regulatory gap caused by the Act's outdated definition of "commodity."

Closing the regulatory gap could be accomplished in a variety of ways. One approach, similar to what had occurred under the Act in the past, was to extend the definition of "commodity" to include each of the nonfood products already traded and, thereafter, as new items were introduced, to add to the list. The obvious disadvantage of this approach was that repeated amendments by Congress would be necessary; the Act's definition of "commodity" already had been amended many times simply to keep abreast of new *food* items being traded. Also, it could be expected that each new item would trade for awhile free from the Act's coverage because of the lead time needed for amendatory relief, thus perpetuating the regulatory

12. 7 U.S.C. § 2 (1970).

gap. In balance, the better solution appeared to be to define the term "commodity" in the broadest possible way, so that each new futures contract—no matter what is traded—would automatically be covered by the Commodity Exchange Act.

Assuming that Congress could be persuaded to expand the Commodity Exchange Act to embrace all things that were or could be traded under futures contracts, it remained for Congress and the industry to determine how best to reach that objective. The Act as then worded covered most major agricultural products and gave regulatory jurisdiction to the logical federal official, the Secretary of Agriculture. A new definition, embracing all products that might underlie a futures contract, eventually would cover trading activity outside the Secretary's traditional jurisdiction and expertise and potentially within the jurisdiction of other federal, state, or local public regulatory bodies. For example, futures trading in propane would fall outside the traditional purview of the Secretary of Agriculture. Similarly, in the 1973-1974 period Congress was aware that futures markets were actively investigating new contracts in items ranging from mortgages to petroleum allocations.[13] Other federal, state, and local agencies might evince a regulatory interest in these items. The potential for a hodgepodge of regulatory requirements, acting in countervailing or conflicting fashion to one another, clearly was present—unless, of course, Congress centralized regulatory power in a single federal agency.

The balance of this article will discuss the legislative history of the 1974 amendments as it pertains to the jurisdiction of the CFTC, the centralization of regulatory power in the CFTC, and the preemption of other regulators. Later developments in the legislature will be discussed along with the emerging case law. This article will conclude with an examination of two key issues that must be resolved: the status of private litigation under other state and federal statutes and the antifraud provisions of the CFTC Act.

II. PRIOR EFFORTS AT REGULATORY CENTRALIZATION

The question of how to avoid regulatory congestion if futures trading in all products were brought under the Commodity Exchange Act had been addressed prior to 1973. In December 1970, the securities industry had obtained passage of the Securities Investor Protection Act,[14] which, among other things, insured securities cus-

13. *See* H.R. REP. No. 93-975, *supra* note 9, at 41.
14. Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa (1970).

tomers against loss, within limits, in the event of the financial collapse of the carrying brokerage firm. In addition to contributions from the securities industry, the insurance reserve was backed by a $1 billion call upon the Treasury of the United States. In early 1971 attorneys for the Department of Agriculture, at the request of the Commodity Exchange Authority [hereinafter CEA],[15] prepared similar legislation to insure commodity futures customers against loss due to broker insolvencies. The draft legislation was circulated to the various commodity exchanges for their comments. Thereafter, as the result of negotiations principally between the CEA and the Chicago Board of Trade, a mutually acceptable text was agreed upon and introduced in the Senate as S. 1921 on May 21, 1971, by Senator Everett Jordan. The bill was then entitled "The Federal Commodity Account Insurance Corporation Act."[16]

Nothing in S. 1921 sought to extend the jurisdiction of the Commodity Exchange Act over futures trading in nonfarm items. Instead, in recognition of the potential additional risk of customer loss if an unregulated broker became insolvent, mainly because the segregation requirements of the Act did not apply, the bill provided for variable assessment rates based upon this or other risk factors. In addition to assessments from the industry, the bill provided for a $50 million call upon the Treasury in emergencies.

Because of the involvement of Treasury funds in the proposed program, S. 1921 had to be reviewed by the Office of Management and Budget before it could receive Administration backing. In a series of conferences and communications between the Administration and the Chicago Board of Trade, it became evident that the Administration's backing could not be expected as long as futures trading in nonfood items remained outside the jurisdiction of the Commodity Exchange Act. Accordingly, in the hope of facilitating the progress of S. 1921, the Chicago Board of Trade prepared and tendered an additional bill[17] that redefined the term "commodity" in section 2 of the Act to be all-inclusive: "The word 'commodity' [includes] anything deliverable upon a contract of sale for future delivery. . . ."[18]

15. The Commodity Exchange Authority was the bureau within the Department of Agriculture to which the Secretary had delegated bis responsibilities under the Commodity Exchange Act.

16. The bill is reprinted in full in *Hearings Before the Subcomm. on Special Small Business Problems of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. 145-55 (1973).

17. *Id.* at 143-45.

18. *Id.* at 144.

The bill offered by the Chicago Board of Trade in 1971 also sought to deal with the regulatory aftermath of the proposed expansion of the term "commodity" by vesting exclusive jurisdiction in one agency.[19] The exact language proposed for this purpose by the Chicago Board of Trade was as follows:

> Sec. 11. The jurisdiction conferred by this Act upon the Secretary of Agriculture and the Commission to administer and enforce the act, and to establish requirements governing transactions and markets in contracts of sale of any commodity for future delivery, shall be exclusive; and no act of Congress shall be construed to empower any other department, agency, instrumentality or officer of the United States to adopt or impose regulatory requirements applicable to transactions or markets in any such contract.[20]

Neither this bill, nor the proposed "Federal Commodity Account Insurance Corporation Act," was ever acted upon by Congress.

III. THE LEGISLATIVE HISTORY OF THE CFTC ACT

A. *The 1973-1974 Hearings*

When a subcommittee of the House Permanent Select Committee on Small Business held hearings over the summer of 1973 to consider possible new legislation for the futures industry, the Chicago Board of Trade seized upon the opportunity to reintroduce its 1971 bills. Its chairman presented both proposals to the subcommittee and gave testimony explaining the bills:

> Is additional legislation necessary to strengthen the regulation of futures markets?
>
> So far as the Board of Trade is concerned the answer is an unqualified "Yes." As a matter of fact, the board has long advocated additional legislation—legislation, for example, which would have prevented the commodity put-and-call scandals of the last year or so.
>
> Some time ago, we submitted to the House Agriculture Committee and the Department of Agriculture a bill to regulate all commodities. The bill is

---

19. An explanatory comment to this Bill stated that the legislature should:

> Add a new section 11 to the act . . . placing complete regulatory authority over futures trading under the Secretary of Agriculture and the Commodity Exchange Commission. Under the present act, jurisdiction resides with the Secretary and the Comission. However, the amendment to section 2(a) will extend their jurisdiction to include certain activities or articles which might also fall under another Department or agency as a technical matter, even though no other Department or agency has undertaken to regulate futures trading in those areas. For example, the metals traded for future delivery might he also within the purview of the Department of Commerce or of the Interior, although neither has ever involved itself in this activity. Section 11 would make clear that the Secretary of Agriculture and the Commodity Exchange Commission shall regulate futures trading, thus assuring uniform regulation and avoiding duplication of costs and functions by other Federal bodies.

Id.

20. *Id.* at 145.

similar to bills introduced by Congressmen Foley and Findley, but has two significant additions.

. . .

Second, our proposal for legislation would place complete regulatory authority over all futures trading under the CEA. This would be an extension of jurisdiction, and it would prevent jurisdictional conflicts which might arise from the establishment of trading in commodities or instruments over which some other Federal agency might feel it had authority.

In 1971, the Chicago Board of Trade prepared a bill which was introduced in the Senate to create a Federal Commodity Account Insurance Corporation to provide commodity customers the same financial guarantees that the SIPC bill gives security customers. I'll not go further into details other than to indicate that copies of both of these proposals are being submitted to this subcommittee and to the House Agriculture Committee for consideration. We feel both should be enacted as promptly as possible.[21]

The House Committee on Agriculture began a series of hearings on October 16, 1973, to consider possible improvements in the Commodity Exchange Act. Witnesses were encouraged to discuss a series of twenty-five issues formulated by the Committee, including whether all futures trading should be regulated under the Act and whether a SIPC-type customer insurance plan should be developed. The chairman of the Chicago Board of Trade reasserted the exchange's support for both proposals, emphasizing once again the importance of vesting exclusive regulatory jurisdiction in a single agency:

7. *Regulation of All Commodities.* We favor this and have submitted a bill. We want to place particular emphasis on that provision in our bill which would give the commodity regulatory agency exclusive jurisdiction over futures trading. This would prevent any possible conflicts over jurisdiction over futures trading. This would prevent any possible conflicts over jurisdiction.[22]

At these initial hearings, the Chicago Board of Trade was the only witness directly to address the need for "exclusive" jurisdiction in a single agency, although the testimony of some other witnesses seemed to infer a comparable objective.[23]

On December 13, 1973, a draft bill, was finalized by a subcommittee of the House Committee on Agriculture and was introduced as H.R. 11,955. The bill included many major changes in the Commodity Exchange Act, including the creation of a new and independent Commodity Futures Trading Commission to replace the earlier CEA and Secretary of Agriculture, and greatly expanding enforcement powers under the Act. Moreover, H.R. 11,955 redefined the

21. *Id.* at 141-42.

22. *Hearings Before the House Comm. on Agriculture,* 93d Cong., 1st Sess. 128 (1973).

23. See, e.g., the testimony for Cargill, Inc. that the agency "ought to be the focus of authority for regulating all commodity futures trading. . . ." *Id.* at 169.

term "commodity" by adding the following open-ended phrase after the previous listing of specific agricultural items:

> . . . and all [other] goods and articles and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in . . . .[24]

In this fashion an initial attempt was made to extend the Commodity Exchange Act to cover both existing nonagricultural futures contracts and all new contracts that would be developed in future years. Equally significant was the expansion of the definition of "commodity" clearly to embrace intangibles ("services, rights and interests") as well as tangible products.

The redefinition of "commodity" in H.R. 11,955 left unresolved whether all other federal, state, and local agencies could regulate futures trading in items under their technical jurisdictions. Indeed, H.R. 11,955 seemed to confuse the issue. Although it said nothing about the scores of other agencies at all levels of government that might claim jurisdiction under certain circumstances, H.R. 11,955 singled out the Securities and Exchange Commission [hereinafter SEC] and declared that its jurisdiction was *not* to be affected:

> *Provided,* That nothing contained in this Act shall preclude the Securities and Exchange Commission from carrying out its duties and responsibilities in accordance with the laws of the United States under which it was established and currently functions.[25]

Did this mean that the SEC alone would be permitted to share the regulatory effort with the futures agency, or had the SEC merely forced a breach in H.R. 11,955 through which any other public regulator likewise could pass?

Whatever the explanation for singling out the SEC in a jurisdictional saving clause in H.R. 11,955, it appears likely that the SEC had been consulted on the subject. In fact there were several lengthy bills to amend the Commodity Exchange Act that were introduced in the House and Senate either prior to or immediately after H.R. 11,955, all of which contained similar special language for the SEC's benefit. For example, as early as September 26, 1973, Senator Humphrey introduced S. 2485, which, after expanding the definition of "commodity," contained this saving clause:

> *Provided,* that nothing in this definition shall be construed to derogate from the jurisdiction of the Securities and Exchange Commission.[26]

24. *Hearings on H.R. 11,955, supra* note 3, at 348.
25. *Id.*
26. *See Hearings on H.R. 13,113, supra* note 4, pt. 1, at 3.

Other, later bills contained similar language: On October 12, 1973, Senator McGovern introduced S. 2578, which contained language identical to the Humphrey bill; and on October 30, 1973, Congressman Neal Smith introduced H.R. 11,195, which also contained identical language. Thus, the origin of the SEC saving clause appears to be the Humphrey bill. Neither Senator Humphrey's remarks when introducing S. 2485,[27] however, nor his testimony at the later hearings before the Senate Agriculture and Forestry Committee,[28] mention the reservation of SEC jurisdiction or reveal to what extent the SEC was involved in the original formulation of that clause.

The House Committee on Agriculture announced a new set of hearings beginning on January 23, 1974, that focused upon the specific text of H.R. 11,955. The Chicago Board of Trade reiterated its position that a single agency should have exclusive jurisdiction, and, it addressed specifically the proviso in H.R. 11,955 on the SEC's jurisdiction:

> Another area of concern—and the final area in which we are urging modification of the proposed act—involves the broadening of the definition of the term "commodity" (sec. 201). It appears that the definition would be sufficiently broad to include all presently foreseeable futures contracts.
>
> While we favor this broadened definition, we believe it would be highly imprudent to give jurisdiction to the Securities and Exchange Commission over futures trading in instruments that might fall within the expansive definition of "security." It would unavoidably result in major confiict of policy and regulation.
>
> The distinguished chairman of this committee was among the first to recognize the pitfall of placing the regulation of futures trading within the SEC.[29] As the chairman most wisely pointed out, "there is little correlation in theory or fact between the regulation of futures trading and the regulation of securities transactions."
>
> The inherent differences would quickly become evident if, for example, futures trading in mortgages were to be initiated. There is, at the present time, considerable pressure within the lending industry for a futures market in mortgages due to the extreme volatility of interest rates. Mortgages, however, have been defined as securities. Thus, any exchange contemplating a futures market in mortgages would find itself in a regulatory morass of confiicting legislation and rules.[30]

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27. 119 CONG. REC. 17,727 (1973).

28. *Hearings on H.R. 13,113, supra* note 4, pt. 1, at 371-84. Indeed, the SEC did not testify at *any* of the hearings held on the CFTC Act or submit any materials for the record.

29. The comment referred to the introductory remarks of the Committee's chairman, W.R. Poage, on December 13, 1973, in the House of Representatives. 119 CONG. REC. 41,331-35 (1973).

30. On October 20, 1975, the Cbicago Board of Trade opened trading in a form of mortgage futures contract, involving the participation certificates of the Government National Mortgage Association, after gaining approval ("designation") of the contract by the CFTC under § 5 of the Commodity Exchange Act.

> It is therefore our recommendation that the SEC's jurisdiction remain confined to securities transaction[s] and securities markets other than futures contracts and futures markets. This, of course, would in no way rule out close liaison and consultation between the two agencies. Indeed, the Commission might choose to adopt certain SEC policies where it promotes the act. Such a relationship could be carried out informally or it could be specifically provided for in the act itself.[31]

Other witnesses likewise objected to the jurisdictional proviso, although some did not discuss the desirability of vesting exclusive jurisdiction in a single agency.[32] A number of commodity exchange and trade interests, on the other hand, joined the Chicago Board of Trade in urging that the SEC be ousted of any present or potential role in the regulation of futures trading.[33]

After the second round of hearings were concluded on January 31, 1974, the House Committee on Agriculture promptly began "mark up" sessions to finalize the text of its bill. On February 6, 1974, the Committee revised the jurisdictional provision in section 201 of H. R. 11,955 in a manner described as "clarifying Commodity Futures Commission and SEC jurisdiction."[34] Instead, the new language seemed only to confuse the issue. The new CFTC was given "exclusive jurisdiction" over futures trading but, curiously, the provision continued to carry the protective language for the SEC and *expanded* the language to benefit all other federal agencies as well:

> *Provided*, that the Commission [CFTC] shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market: *And provided further*, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission [*sic*] or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with laws of the United States.[35]

What did this language mean? If the CFTC's jurisdiction were declared "exclusive," then there must be other public agencies that were excluded from exercising jurisdiction over futures trading. Yet, at least as to other federal agencies, the new provision seemed to

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31. *Hearings on H.R. 11,955, supra* note 3, at 168.

32. *See, e.g.*, testimony on behalf of the National Grain Trade Council, *id.* at 51; testimony on behalf of the Minneapolis Grain Exchange, *id.* at 97.

33. *Id.* at 105, 113-14 (Chicago Merchantile Exchange); *id.* at 249, 253 (New York Coffee & Sugar Exchange, Inc.; Commodity Exchange, Inc.; New York Cocoa Exchange, Inc.); *id.* at 322 (Continental Grain Co.).

34. House Comm. on Agriculture, Memorandum for Members and Comm. Staff, Feb. 6, 1974, at 1 (copy available through *Vanderbilt Law Review*).

35. *See Hearings on H.R. 13,113, supra* note 4, pt. 1, at 140-41.

guarantee to each of them a complete retention of their existing and potential jurisdiction.

The House Committee on Agriculture reintroduced its bill with the "mark up" changes as H.R. 13,113 and filed a Report on April 4, 1974.[36] In its Report, the Committee endeavored to reconcile the jurisdictional language of section 201 by stating that the retention of jurisdiction by other agencies was limited to those areas *other than futures trading on a contract market* (designated commodity exchange). Additionally the Report made clear in a somewhat backhanded fashion that the CFTC's exclusive jurisdiction would embrace securities, and would preempt the SEC, if the securities were the subject of futures trading on a contract market:

> Although the expanded definition of "commodity" contained in Section 201(B) may include rights and interests which are securities as defined in the federal securities laws, *except in the area of transactions involving a contract market*, the jurisdiction of the Commodity Futures Trading Commission ("CFTC") over any such rights and interest[s] is intended to exist concurrently with the jurisdiction vested in the Securities and Exchange Commission. Accordingly, the first proviso of the Section 201(B) indicates that the CFTC's jurisdiction shall be exclusive with respect to transactions involving contracts of sale of a commodity for future delivery which are traded or executed on a contract market that has been designated pursuant to Section 5 of the Commodity Exchange Act (the "CEA") (7 U.S.C. § 7) and which, in accordance with Section 4h of the CEA (7 U.S.C. § 6), may not lawfully be executed or consummated otherwise than through a member of a contract market, and the second proviso of Section 201(B) indicates that, *except as to transactions covered by the first proviso*, the expanded definition of commodity is not intended to [derogate] from the jurisdiction of the Securities and Exchange Commission (the "SEC").[37] [Emphasis added]

But for the explanatory statements in the Report, the text of section 201(B) of H.R. 13,113 as it related to the CFTC's "exclusive jurisdiction" would have been hopelessly muddled. The authors of H.R. 13,113 on the Committee, and its staff, were skilled draftsmen, and the murky language of section 201(B) does not reflect in any way upon their talents. Rather, the condition of the text itself and the somewhat cumbersome but effective clarification in the Report are best explained by the trepidation felt in the Congress, even in compelling circumstances, whenever it realigns power ("jurisdiction") between agencies within the federal establishment. Similar delicate language was used by the Committee's chairman in presenting the bill to the full House on April 11, 1974:

> Title II provides broad new authority to the new Commission over futures

36. H.R. REP. No. 93-975, *supra* note 9.
37. *Id.*, pt. 1 at 38.

> trading in a number of areas. All commodity trading in futures will be brought within federal regulation under the aegis of the new Commission, however, provision is made for the preservation of Securities Exchange Commission jurisdiction *in those areas traditionally regulated by it.*[38] [Emphasis added]

Since the SEC had never regulated futures trading or futures markets, it would seem that nothing over which the CFTC had exclusive jurisdiction—including possible futures trading in securities—would constitute "areas traditionally regulated by" the SEC.

Having concluded its work, the House Committee on Agriculture forwarded its final effort, H.R. 13,113, to the Senate Agriculture and Forestry Committee where that bill joined several others sponsored by Senators Humphrey (S. 2485), McGovern (S. 2578), and Hart (S. 2837).[39] The Senate Committee held hearings on the various bills from May 13 through May 22, 1974.[40] Although the Chicago Board of Trade and other industry witnesses favoring exclusive jurisdiction testified on unresolved issues at those hearings, the principal effort to remedy the ambivalent text in section 201(B) occurred in discussions at the staff level. It was pointed out, for example, that the Report of the House Committee on Agriculture disclosed the true intent of sponsors of H.R. 13,113 to foreclose other agencies from regulating futures trading on organized futures markets, regardless of their interest in the underlying "commodity." The Senate Committee thereafter revised section 201(B) of H.R. 13,113 to codify that intent. The solution was a relatively simple one: All that was needed to reconcile the first proviso of section 201(B) on the CFTC's "exclusive jurisdiction" over futures trading with the second proviso's preservation of other agencies' jurisdiction was to insert the phrase "except as hereinabove provided" between the two clauses. Thus, the Senate version of section 201(B) was made to read as follows:

> Provided, That the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act and which, in accordance with section 4h of this Act, may not lawfully he executed or consummated otherwise than through a member of a contract market: And provided further, That, *except as hereinabove provided*, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States

38. 120 CONG. REC., 42,925 (daily ed. Apr. 11, 1974). Indeed the Committee's chairman warned the House in the same remarks against assuming that futures trading is similar to the activities which the SEC regulates. *Id.* at H. 2924.

39. The bills are reproduced in *Hearings on H.R. 13,113, supra* note 4, pt. 1, at 1-124.

40. *Id.* pts. 1-3.

> or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.[41] [Emphasis added]

Although the Senate Committee made other significant improvements in section 201(B), discussed below, its principal contribution on the matter of exclusive jurisdiction was to build the bridge ("except as hereinabove provided")[42] between the first and second provisos, which for the first time permitted the reader of section 201(B) itself to discern the congressional objective.

The Report prepared by the Senate Agriculture and Forestry Committee likewise was clearer on the issue of "exclusive jurisdiction." Characterizing its contribution to section 201(B) as a "clarification," the Committee offered a straightforward explanation in its Report:

> The House bill provides for exclusive jurisdiction of the Commission over all futures transactions. However, it is provided that such exclusive jurisdiction would not supersede or limit the jurisdiction of the Securities and Exchange Commission or other regulatory authorities.
>
> The [Senate] Committee amendment retains the provision of the House bill but adds three clarifying amendments. The clarifying amendments make clear that (a) the Commission's jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options; (b) the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies. . . .[43]

Thus, the Senate Agriculture and Forestry Committee undertook to transform the House's professed intent into specific statutory language vesting exclusive jurisdiction in the new CFTC over futures trading on commodity markets, thereby preempting the SEC and all other public agencies that, absent section 201(B), might undertake to regulate that field. But the contribution of the Senate Committee went much further. For example, it extended the CFTC's exclusive jurisdiction to "accounts" and "agreements" as well as "transactions" for future delivery on a contract market. This important change extended the Act to the activities surrounding trading, such as the regulation of so-called "discretionary accounts" or "discretionary agreements" common in futures trading, which had sometimes been treated as "securities" in the courts.[44] Simi-

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41. S. REP. No. 93-1131, 93d Cong., 2d Sess. 54 (1974).

42. The critical role of this phrase in the Senate Committee's solution is demonstrated by its own special reference to the clause in its Report. *Id.* at 31.

43. *Id.* at 6.

44. Federal appellate courts have held that discretionary commodity accounts are not securities subject to SEC regulation. *See* Milnarik v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972); Wasnowic v. Chicago Bd. of Trade, 352 F.

larly, the CFTC's exclusive jurisdiction was extended to commodity options, and to "leverage contracts" in gold and silver bullion and bulk coins, which had also come under attack as "securities."[45] Additionally, the Senate Committee clarified the point that state agencies, such as the various "blue sky" commissions, were preempted to the same extent as the other federal agencies: "The Committee wished to make clear that where the jurisdiction of the Commodity Futures Trading Commission is applicable, it supersedes State as well as Federal agencies."[46]

The Senate Committee, on the other hand, modified the House version of H.R. 13,113 in several significant respects that narrowed somewhat the CFTC's new grant of exclusive jurisdiction. While the House text vested exclusive jurisdiction in the CFTC over futures trading on "a domestic board of trade or contract market or on any other board of trade, exchange, or market,"[47] the Senate Committee limited exclusive jurisdiction to futures trading on "a contract market designated pursuant to section 5 of this Act. . . ."[48] The practical effect of the Senate Committee's amendment was to eliminate the CFTC's exclusive jurisdiction over trading in futures contracts or commodity options on foreign markets, such as the trading that takes place in London. In addition, following a request from the Treasury Department after the hearings had ended,[49] the Senate Committee agreed to bar the CFTC from regulating certain financial dealings carried on directly between banks and other sophisticated investors, but the CFTC would retain purview over any such dealings on a commodity exchange:

Supp. 1066 (M.D. Pa. 1972), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973), *cert. denied*, 416 U.S. 994 (1974); *cf.* Stuckey v. duPont Glore Forgan, Inc., 59 F.R.D. 129 (N.D. Cal. 1973). Some lower courts, however, have adopted the contrary view. *See, e.g.*, Marshall v. Lamson Bros. & Co., 368 F. Supp. 486 (S.D. Iowa 1974); Berman v. Orimex Trading, Inc., 291 F. Supp. 701 (S.D.N.Y. 1968); *cf.*, SEC V. Continental Commodities Corp., 497 F.2d 516 (5th Cir. 1974).

45. *See, e.g.*, SEC v. Continental Commodities Corp. 497 F.2d 516 (5th Cir. 1974). *See also*, Note, *Federal Legislation for Commodity Option Trading: A Proposal*, 47 S. CAL. L. REV. 1418 (1974).

The CFTC's exclusive jurisdiction, however, did not extend to *securities* options such as those traded on the Chicago Board Options Exchange or the American Stock Exchange, since such options, when exercised, do not result in the delivery of a futures contract. The Senate Committee so stated: "The Commission [CFTC] will have exclusive jurisdiction over options trading in commodities (but not in securities)." S. REP. No. 93-1131, *supra* note 41, at 31.

46. *Id.* at 23.

47. H.R. REP. No. 93-975, *supra* note 9, at 87.

48. S. REP. No. 93-1131, *supra* note 41, at 54.

49. *Id.* at 49-50.

> Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, *unless such transactions involve the sale thereof for future delivery conducted on a board of trade.*[50] [Emphasis added]

While the CFTC's right to regulate dealings between financial institutions was greatly circumscribed by this exclusion, the language served in another sense to reconfirm the CFTC's exclusive authority under section 201(B) over *all* futures transactions on a contract market, including trading in traditional securities such as "security warrants, security rights, . . . government securities, or mortgages . . ." whenever "such transactions involve the sale thereof for future delivery conducted on a board of trade." Finally, the Senate Committee inserted a proviso that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State."[51]

The Senate Committee took its version of H.R. 13,113 to the floor of the Senate on September 6, 1974,[52] and debate was held on September 9.[53] Chairman Talmadge, in his prepared statement informed the Senate of the CFTC's proposed exclusive jurisdiction but, at the same time, seemed to confuse the effect of that grant upon other agencies:

> In establishing the Commission it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.[54]

Read literally, the foregoing statement cannot be reconciled with the Senate's revised text of section 201(B) nor with the Senate Committee's own Report, which states quite clearly that the CFTC will preempt *all* federal and state agencies in the regulation of futures trading on contract markets. The better reading would be that the Chairman, like his counterpart in the House,[55] wished simply to

50. *Id.* at 54-55.

51. *Id.* at 54.

52. *See* 120 CONG. REC. S 16,075 (daily ed. Sept. 6, 1974).

53. 120 CONG. REC. S 16,127-37 (daily ed. Sept. 9, 1974).

54. *Id.* at S 16,128.

55. 120 CONG. REC. H 2925 (daily ed. April 11, 1974). Indeed, the Committee's chairman warned the House in the same remarks against assuming that futures trading is similar to

assure his colleagues that the SEC and other agencies would retain their "traditional" roles, which had never included the regulation of futures trading on commodity markets.

B. The Conference

The House and Senate versions of H.R. 13,113 went to Conference Committee in September 1974. The House version of section 201(B) granted exclusive jurisdiction to the CFTC over "transactions" in futures contracts conducted on any domestic or foreign exchange. The Senate version extended that exclusive jurisdiction to "accounts" and "agreements" as well as to the futures transactions themselves, and added commodity options as well as "leverage" contracts in gold and silver bullion or bulk coins. On the other hand, the Senate limited the CFTC's exclusive jurisdiction to activities on a designated "contract market" rather than on any exchange, barred the CFTC from regulating certain institutional banking transactions, and declared that the jurisdiction of federal and state courts remained unaffected. Most importantly, the Senate version bridged the gap between the first proviso granting exclusive jurisdiction to the CFTC and the second proviso preserving other agencies' rights by inserting the keystone phrase "except as hereinabove provided."

In every respect except one, the Senate version prevailed in the Conference. The one exception was that the House's language bringing all domestic and foreign commodity markets under the CFTC's exclusive jurisdiction was accepted in lieu of the Senate's narrower provision limiting that exclusive authority to "contract markets." The Conference Report[56] explained the result as follows:

> The Conference substitute adopts the Senate amendment, including the provision in section 402(d) of the bill which strikes the last sentence of section 4c of the Commodity Exchange Act. The language being struck provides that "Nothing in this section [section 4c] or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections."[57]
>
> *Under the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned.* Therefore, if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern. In view of the

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the activities that the SEC regulates. *Id.* at H 2924.

56. H.R. REP. No. 93-1383, 93d Cong., 2d Sess. (1974).

57. Senator Curtis, by motion on the Senate floor, had succeeded in having § 4c stricken "in order to assure that Federal preemption is complete." 120 CONG. REC. S 16,133 (daily ed. Sept. 9, 1974).

broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States.[58] [Emphasis added]

Although the foregoing language seems to confuse the objective of total preemption with the lesser concept of federal supremacy when state law is in conflict, it is clear that the conferees intended the CFTC to be the sole regulatory authority for the futures industry.

The compromise version of H.R. 13,113 returned to the floor of the House on October 9, 1974, and Chairman Poage spoke at some length about the CFTC's new exclusive jurisdiction. He stated that his remarks were prompted by "some concern" among unidentified persons that "in effectuating the intent to fill regulatory gaps, the Conference substitute appears to have an unintended impact on the jurisdiction of the Securities and Exchange Commission."[59] With respect to the specific jurisdiction to be retained by the SEC and not to be preempted by the CFTC, Chairman Poage first assured the SEC that it would continue to regulate the stock markets:

This grant of exclusive jurisdiction is not to be construed as preempting the jurisdiction of the Securities and Exchange Comission over securities, including stock options, traded on any national securities exchange or any other U.S. securities market.[60]

He further explained that the SEC was not divested of jurisdiction over "traditional" stocks, bonds and the like, but that futures trading on contract markets was a different matter:

It was not intended, however, to apply to trading in interests and rights traditionally known as securities, including, for example, stocks, corporate bonds, warrants, and debentures, nor was it intended to apply to trading in options to purchase any of the foregoing. *However, the last sentence of subsection (b) of section 201 of the bill helps to clarify that the intent of the conferees was to subject all trading in futures contracts on a "contract market" designated pursuant to section 5 of the act, to the jurisdiction of the CFTC.*[61] [Emphasis added]

Similarly, Chairman Poage sought to reassure the SEC that its jurisdiction over "investment contracts" was preempted *only* when they related to futures trading on a contract market:

I further understand, however, that the Securities and Exchange Commission has jurisdiction over other types of securities, including investment contracts, and that the term investment contract includes a broad category of arrangements and contracts relating to investments. In this area, there may be some apparent overlap between the jurisdiction of the Securities and Exchange

58. H.R. REP. No. 93-1383, *supra* note 56, at 35-36.
59. 120 CONG. REC. H 10,247 (daily ed. Oct. 9, 1974).
60. *Id.* at H 10,248.
61. *Id.*

Commission and the intended jurisdiction of the Commodity Futures Trading Commission over trading in futures contracts relating, or purporting to relate, to tangible commodities. It was not intended that the jurisdiction of the Securities and Exchange Commission with respect to investment contract be superseded, *except to the extent that jurisdiction is granted to the CFTC with respect to contracts for future delivery or options relating, or purporting to relate, to tangible commodities, or which are effected on a contract market designated pursuant to section 5 of the act.* As a result, the act is designed to supplement the present framework of regulation and to operate in conjunction with existing statutes; it is not intended to create any regulatory gaps.[62] [Emphasis added]

Finally, Chairman Poage stated that pending SEC investigations against abuses not previously under the CFTC's jurisdiction could continue to their completion, implying at the same time that new SEC actions of a similar nature would not be permissible after CFTC jurisdiction takes effect:

This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC. . . . Accordingly, section 412 was included in the bill to make clear that all pending proceedings, including ongoing investigations, as well as court proceedings, should continue unabated by any provision of the Act. . . . During the course of our deliberations, we learned, for example, that the SEC has a number of such matters currently under investigation. We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this act.[63]

The following day, October 10, the final text of H.R. 13,113 reached the floor of the Senate.[64] The prepared remarks accompanying the submission of H.R. 13,113 for final Senate passage were identical to the statements of Chairman Poage the day before in the House. Thereafter, on October 24, 1974, the President signed the bill into law (P.L. 93-463) with the observation that:

This act will provide the first major overhaul of the existing Commodity Exchange Act since its inception by establishing a new regulatory structure to apply to all commodity futures trading. This is an objective which I fully support.[65]

C. *The Appointments Delay*

Under section 418 of H.R.13,113 as enacted, the many provisions of the Act were to take effect 180 days after the President's signature was affixed. Thus, the Act was to be operational by April 21, 1975. The President, however, did not promptly nominate candidates to serve as the five Commissioners of the CFTC, and it was

62. *Id.*
63. *Id.*
64. 120 CONG. REC. S 18,864 (daily ed. Oct. 10, 1974).
65. 10 WKLY COMP. OF PRES. DOCS. 1366 (1974).

March 18, 1975, before names were transmitted by the President to Congress.[66] Both the House and the Senate realized that, because of that delay, it was unrealistic to expect the new Commissioners to meet an April 21 deadline.

Accordingly, a joint resolution, H.R.J. Res. 335,[67] was prepared in late March 1975 and was thereafter reviewed by the House Committee on Agriculture and by the Senate Agriculture and Forestry Committee. On April 7, 1975, the House Committee issued its Report,[68] explaining those provisions of the Act that would be deferred to a later date. H.R.J. Res. 335, however, did not delay the effective date of the CFTC's new "exclusive jurisdiction" or otherwise alter the jurisdictional results of section 201(B): "No provision in the resolution, as amended, alters existing law with respect to the jurisdiction of other Federal or State regulatory efforts."[69] The Senate Committee filed its Report on H.R.J. Res. 335 on April 10, 1975,[70] the same day that the first four Commissioners of the CFTC were confirmed by the Senate. Like the House Committee's report, the Senate also confirmed that "[e]xcept as specifically provided therein, the resolution is not intended in any way to make substantive changes in the 1974 Act and the Commodity Exchange Act, as amended."[71] The Senate Committee's report, however, indicated that the ouster of state jurisdiction did not foreclose the enforcement of a state's regular *criminal* fraud statutes: "The Committee wishes to make clear that the preemption of the regulation of commodity futures trading by the Commodity Futures Trading Commission Act of 1974 does not prevent the States from enforcing their criminal anti-fraud statutes."[72]

IV. The Legislative Aftermath

In light of the zigzag course followed by Congress toward CFTC preemption of other agencies, several conclusions appear to be justified. First, Congress intended to centralize in a single agency the full regulatory authority over futures trading on commodity exchanges, regardless of the item or interest being traded, as well as over certain other activities (commodity options and "leverage" contracts in gold and silver bullion or bulk coins). Secondly, Congress recognized

66. 121 Cong. Rec. H 2508 (daily ed. April 8, 1975).
67. H.R.J. Res. 335, 94th Cong., 1st Sess. (1975).
68. H.R. Rep. No. 94-122, 94th Cong., 1st Sess. (1975).
69. *Id.* at 7.
70. S. Rep. No. 94-73, 94th Cong., 1st Sess. (1975).
71. *Id.* at 5.
72. *Id.*

that successful centralization would affect the existing or projected jurisdiction of other agencies at the state and federal level. And, thirdly, the difficulty that Congress experienced in clearly articulating the effect of its action illustrates the tremendous stress imposed upon Congress whenever its decisions are perceived by established public agencies as affecting their real or hoped-for authority. As a tool for statutory interpretation, the Act itself ordinarily is the best source and, under section 201(B) [now section 2(a)], agencies other than the CFTC have been expressly excluded from regulating:

> accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option," "privilege," "idemnity," "bid," "offer," "put," "call," "advance guaranty," or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 217 of the Commodity Futures Trading Commission Act of 1974. . . .[73]

The next best source of congressional intent, at least in terms of the time and attention customarily given to their preparation, is the reports of the congressional committees that reviewed the bills.[74] These reports are typically prepared with full realization that they will be the first source, beyond the statutory language itself, consulted to ascertain congressional intent. Lastly, an additional source of somewhat more fragile reliability is the dialogue during congressional debates on the bill.[75] Time limitations, and sometimes a desire to minimize controversy, however, militate against a full and precise explanation of the bill in such an environment.

The legislative history of the CFTC's exclusive jurisdiction over futures trading on commodity markets and over commodity options and leverage contracts seems preoccupied with the Act's impact on one particular agency—the Securities and Exchange Commission. That is the only agency mentioned by name in the Act, and, as noted earlier, clauses attempting to protect the SEC appeared in even the earliest bills introduced to overhaul the Commodity Exchange Act. The preemptive effect of the final bill, however, reached *all* other agencies at every level of government and did not single out the SEC: "The Committee wished to make clear that where the jurisdiction of the Commodity Futures Trading Commission is applicable, it supersedes State as well as Federal agencies."[76] Only by

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73. CFTC Act § 201(b), 7 U.S.C.A. § 2 (Supp. 1, 1975).

74. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.06 (3d ed. 1973).

75. *Id.* § 48.13.

76. S. REP. No. 93-1131, *supra* note 41, at 23.

such comprehensive preemption could Congress reach its avowed objective:

> Under the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned.[77]

The decision of Congress to grant exclusive jurisdiction to the CFTC over futures trading on commodity markets and over commodity options and leverage contracts met little if any resistance from the many agencies other than the SEC that were affected by it.[78] The extension of the definition of "commodity" to include "all . . . goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in,"[79] when coupled with the grant of exclusive jurisdiction to the CFTC, made it inevitable that future growth of the commodity industry would invade areas previously governed by other federal, state, or local agencies or other areas into which such agencies arguably could intervene.

The long-term effects of Congress's decision in favor of preemption can be illustrated as follows. The ouster of other agencies from regulating futures trading on commodity markets relieves the CFTC and the industry from the risk not only of incompatible regulation by the SEC but, at the same time, of the additional inefficiency and confusion of regulation by the "blue sky" commission of each state. Very early in the development of H.R. 13,113, the Chairman of the House Committee on Agriculture acknowledged that, despite some superficial similarities, the regulatory framework for futures is necessarily quite different from the traditional policies that govern securities regulation.

> There was also a proposal advanced briefly to place the regulation of futures trading within the present SEC. The advantages were the existence of the SEC as an independent regulatory structure. The disadvantages were legend.
>
> Often erroneously viewed as twins, there is little correlation in theory or in fact between the regulation of Futures Trading and the regulation of securities transactions. Futures trading regulation is essentially a regulation of a marketing device, that is, a contract right which is terminable at a time certain, for agricultural commodities while the SEC regulates the handling of certificates of tangible ownership which are permanent in nature.
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> . . .

77. H.R. REP. No. 93-1383, *supra* note 56, at 35.

78. The Treasury Department was the only other federal agency to endeavor to erode the CFTC's exclusive jurisdiction, and it readily conceded that the CFTC should not be ousted when the transactions of interest to it were available on a commodity exchange. *See* S. REP. No. 93-1131, *supra* note 41, at 49-51.

79. CFTC Act § 201(b), 7 U.S.C.A. § 2 (Supp. 2, 1975).

> While securities markets attract the small speculator, with a limited exposure to loss, futures speculation is normally limited to the more venturesome and solvent speculator. . . . Additionally, the concept of margin—which is a guarantee of performance in the futures market as contrasted with an extension of credit by the broker in the securities industry—the actual delivery of commodities in certain limited situations—approximately 3 percent—of all contracts, and tbe bandling of devices such as options are, and should remain, entirely different within the respective spheres of regulation.
>
> The existence of another, more volatile regulatory function with the SEC could create difficulties that could probably never be overcome. No SEC Commissioner is appointed because of expertise in futures trading, and a merger of the staffs of the CEA within the respective organizations would do little more than precipitate a continuing conflict as to the priorities of the Commission with its jurisdiction so confused. The possibility seemed to terrify experts on futures trading who appeared before the full committee, and who met with the committee staff on numerous occasions. Neither is it a welcome prospect at the SEC.[80]

Those sentiments had been echoed in the past by SEC personnel as well. Appearing before the same House Committee in 1967, the General Counsel of the SEC (now Commissioner), Philip A. Loomis, testified that the SEC's knowledge and expertise do not extend to commodities regulation and that a different regulatory scheme might be required for futures trading:

> The Securities and Exchange Commission has no jurisdiction or responsibility with respect to the Commodity Exchange Act or the commodities market and our understanding of those markets is limited.
>
> . . .
>
> We, of course, do not claim any particular experience or familiarity with the commodities market and we know that these markets operate in a way which is in many respects quite different from the securities market. For these and other reasons, regulation in the commodities markets may call for different provisions and for somewhat different objectives than those of securities regulation.[81]

When specific SEC policies are examined, the differences between commodities regulation and securities regulation become readily apparent, and the disparities can be critical. One major area of conflict, for example, relates to the availability of exchange memberships. In the commodity field a primary economic function of the markets is to provide a vehicle for commercial enterprises (such as farm cooperatives, grain merchandisers, and food processors) to "hedge" against fluctuations in their operating costs or in their selling prices. Accordingly, these entities are encouraged to become members of the commodity exchanges. In fact, the Commodity Exchange Act declares it unlawful for any contract market to discrimi-

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80. 119 CONG. REC. 41,335 (1973).

81. *Hearings on H.R. 11,930 Before the House Comm. on Agriculture*, 90th Cong., 1st Sess. 156 (1967).

nate against farm cooperatives seeking membership.[82] By contrast, the SEC has adopted a policy, codified in Rule 19b-2,[83] that precludes any entity from membership on a stock exchange unless eighty percent of its business is conducted for public customers. Thus, an entity seeking membership principally to facilitate its own trading will be denied admittance under Rule 19b-2. If the policy of that Rule were superimposed on the futures markets, the principal users and beneficiaries of futures transactions would be excluded from membership since very few of them conduct a substantial public brokerage business. Similarly, the futures markets depend for their liquidity upon active floor trading by members, who perform the valuable function of absorbing the large orders frequently placed by commercial "hedgers."[84] Absent the participation of these floor traders, the markets' ability to perform efficiently might be severely impaired. By contrast again, the SEC has virtually eliminated floor trading from the national stock exchanges. Pursuant to section 11(a) of the Securities Exchange Act,[85] the SEC adopted Rule 11a-1[86] banning all stock exchange members from trading for their own account or any controlled account on the exchange floor unless they have qualified under certain limited exceptions. A witness with a securities background testified at the hearings on the predecessor bill of H.R. 13,113 before the House Committee on Agriculture that the imposition of this policy in the commodities field could have devastating effects:

> Mr. Chairman, there is one other consequence which worries us as we look down the road at the effects of this legislation. It worries us greatly, and I hope that it would worry this committee. It is this: As the number of brokers available to execute the public's orders is reduced, and as those remaining brokers with the greatest financial resources are prohibited from "taking the other side" of the public's orders through trading for their own accounts, it will inevitably mean that the trading on our markets will increasingly become commercial trading. With fewer speculators or investors, price swings will tend to be much more violent—the reason being that speculators are price responsive whereas commercials are not. We see this happening in our Nation's securities exchanges as participation by the "small investor" diminishes. I would ask this committee whether it really wants to see our commodity markets at some time in the future choking and gagging on commercial business in the same way that our securities exchanges are choking and gagging on institutional business. I should hope not.[87]

82. 7 U.S.C. §§ 7(e), 10(a) (1970).

83. 17 C.F.R. § 240.19b-2 (1975).

84. A brief discussion of this function can be found in Johnson, *The Changing Face of Commodities Regulation*. 20 PRAC. LAW., Dec. 1974, at 27, 31-32.

85. 15 U.S.C. § 78k(a) (1970).

86. 17 C.F.R. § 240.11a-1 (1975).

87. *Hearings on H.R. 11,955, supra* note 3, at 165 (testimony of Frederick G. Uhlmann,

Aside from the SEC's conflicting policies, Congress had to consider the real possibility that scores of other agencies at every level of government might attempt to regulate futures trading in the absence of preemption. Congress was well aware, for example, that a futures contract based upon mortgage interest rates was under development in 1973 and 1974.[88] In the final analysis, this contract took the form of futures involving mortgage-backed certificates guaranteed by the Government National Mortgage Association[89] (the "GNMA contract"). The CFTC entered an order on September 11, 1975, authorizing the Chicago Board of Trade to initiate trading in its GNMA contract.[90] In addition to the SEC[91] and state "blue sky" commissions, other public agencies might have laid claim to a regulatory role over that contract if Congress had not preempted them. For example, the mortgages underlying the GNMA contract are insured by either the Federal Housing Administration, the Veterans' Administration, or the Farmers Home Administration.[92] The principal users of the GNMA contract apparently are the banks and savings and loan associations of the United States. The banking entities currently are regulated by the Comptroller of the Currency or by state banking authorities, and the savings and loan associations are answerable to either the Federal Home Loan Bank Board or state regulatory agencies. In addition, the Federal Reserve Board has an active role in the regulation of money markets and interest rates. Any one or all of these federal and state agencies, including the Government National Mortgage Association itself, would have the opportunity—absent preemption—to promulgate regulations affecting the GNMA futures contract.[93]

Congress was likewise aware of research into a futures contract

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Chairman of the Chicago Board of Trade and officer of Drexel Burnham & Co.).

88. *See, e.g.*, H.R. Rep. No. 93-975, *supra* note 9, at 41, 62; S. Rep. No. 93-1131, *supra* note 41, at 19; *Hearings on H.R. 13,113, supra* note 4.

89. The underlying certificates are authorized by § 306 of the National Housing Act, 12 U.S.C. § 1721 (1970).

90. CCH Commod. Fut. L. Rep. Newsletter No. 9, at 1 (Sept. 23, 1975).

91. BNA Sec. Reg. & L. Rep. No. 329, at A-7 (Nov. 26, 1975).

92. *See* 2 CCH Fed. Banking L. Rep. ¶ 25,403.

93. The problem of several agencies involved in the regulation of the same activities was sidestepped in the Securities Reform Act of 1975, P.L. 94-29, 89 Stat. 97, *amending* scattered sections of 15 U.S.C. (1970). Unlike the CFTC Act, which made the new Commission the exclusive regulator of the futures markets, commodity options, and leverage contracts, the Securities Reform Act simply states that some "appropriate regulatory agency" should administer the various provisions of that Act. *See* Securities Exchange Act of 1934, §§ 3(a)(34), 15B, 17, 19, 23, 25, 15 U.S.C.A. § 78c(a) (34), 78o-4, 78q, 78s, 78w, 78y (Supp. 4, 1975).

relating to ocean freight rates.[94] Interested agencies might range from the Federal Maritime Commission to local port authorities at the major export-import cities. The possibility of futures trading in petroleum also was known to Congress.[95] Potential regulators of that contract could range from the Federal Energy Administration to the state agencies controlling crude oil production. Thus, while attention in Congress seemed to focus primarily upon the SEC, the decision to vest exclusive jurisdiction in the CFTC was addressed to a far broader problem.

V. Subsequent Legislative Efforts

On November 20, 1974, roughly a month after the CFTC Act was signed by the President, a letter was transmitted to the SEC by the chairman of the House Committee on Interstate and Foreign Commerce expressing the view that the CFTC had preempted the SEC in certain circumstances:

> I realize that the framers of the Commodity Futures Trading Commission Act were anxious to draft that Act sufficiently broadly to include numerous types of arrangements which at present may be entirely unregulated or inadequately regulated. The accomplishment of this purpose would appear to be in the public interest. These provisions, however, are so broad as to encompass many types of securities and securities transactions now regulated by the Securities and Exchange Commission, including not only unusual types of securities, but also securities and transactions which are clearly, and traditionally have been covered by the Federal securities laws. The resulting apparent overlap and preemption of Securities and Exchange Commission jurisdiction are a source of considerable concern to me and to the Subcommittee on Securities.
>
> I would appreciate receiving your views on the concerns stated above at your earliest convenience.[96]

In a response sent nearly three months later Chairman Ray Garrett, Jr. of the SEC preferred to characterize the CFTC Act as "ambiguous" on the question of preemption, but nevertheless he proposed to amend the Securities Exchange Act in a way that, as a practical matter, would have totally repealed the CFTC's *exclusive* jurisdiction vis-a-vis the SEC. The SEC's proposed amendment read as follows:

> No definition of "commodity" *or grant of exclusive jurisdiction* to the Commodity Futures Trading Commission contained in the Commodity Futures Trading Commission Act of 1974 shall supersede or limit the jurisdiction of the

94. *See* S. Rep. No. 93-1131, *supra* note 41, at 19.

95. *See* H.R. Rep. No. 93-975, *supra* note 9, at 41, 62.

96. Letter from Chairman Harley O. Staggers, House Comm. on Interstate and Foreign Commerce, Subcomm. on Securities, to Chairman Ray Garrett, Jr., Securities and Exchange Commission, Nov. 20, 1974 (copy available through *Vanderbilt Law Review*).

> Commission [SEC] or the courts of the United States or of any State with respect to accounts, agreements and transactions involving a "security" within the meaning of this Title, the Securities Act of 1933, as amended, the Public Utility Holding Company Act of 1935, as amended, the Trust Indenture Act of 1939, as amended, the Investment Company Act of 1940, as amended and the Investment Advisers Act of 1940, as amended.[97] [Emphasis added]

Neither the House Committee on Interstate and Foreign Commerce nor either of Congress's agriculture committees adopted the SEC proposal. In fact, when H.R.J. Res. 335 came before the Senate Agriculture and Forestry Committee approximately two months after Chairman Garrett's proposal first was made, the Report stated pointedly that "[e]xcept as specifically provided therein, the resolution is not intended in any way to make substantive changes in the 1974 act. . . ."[98] The spokesman for the House Committee on Agriculture made the same observation about H.R.J. Res. 335 on the fioor of the House:

> . . . the extension of time we recommend here will in no way alter the basic charter that was created by the creation of the Commodity Futures Trading Commission Act of 1974.[99]

These "concerns" of the SEC regarding its jurisdiction were quiescent through the spring and summer of 1975. On September 11, 1975, however, the CFTC entered an order designating the Chicago Board of Trade as a "contract market" for trading in futures contracts involving the mortgage-backed certificates guaranteed by the Government National Mortgage Association. At the same time, the Chicago Mercantile Exchange had pending before the CFTC its application for designation as a "contract market" for trading in futures contracts involving Treasury Bills. Prompted by these developments, the SEC renewed its criticism of the CFTC's "exclusive jurisdiction" and alluded once again to a possible legislative effort.

Characteristic of the SEC's posture was a lengthy letter dated November 13, 1975, from the new SEC chairman, Roderick M. Hills, to the CFTC chairman, William T. Bagley.[100] Chairman Hills first summarized the positions of both agencies:

> We [SEC] have previously advised you of our view that GNMA certificates and Treasury Bills are securities, as that term is defined in the federal securities laws. We also believe it to be quite clear that contracts for future

97. Letter from Ray Garrett, Jr. to Harley O. Staggers, Feb. 14, 1975 (copy available through *Vanderbilt Law Review*).

98. S. Rep. No. 94-73, *supra* note 70, at 5.

99. 121 Cong. Rec. H 2509 (daily ed. April 8, 1975) (Mr. Bob Bergland).

100. BNA Sec. Reg. & L. Rep., No. 329, at F-1, F-2 (Nov. 26, 1975). For a collection of jurisdictional correspondence of the CFTC and the SEC, see CCH Fed. Sec. L. Rep. ¶ 80,336.

delivery of those securities are also "securities." You, in turn, argue that the Commodity Exchange Act, as amended, grants exclusive jurisdiction over trading in contracts for future delivery, including contracts for future delivery of securities, to the CFTC.[101]

The SEC letter, however, did not attempt to deal with the CFTC's view that its jurisdiction over the Chicago Board of Trade's GNMA contract and the Chicago Mercantile Exchange's T-Bill contract is exclusive. Instead, Chairman Hills proposed to bypass that question:

> Both the CFTC and this Commission should be concerned, not with the bare questions of jurisdiction, but with a number of important questions relating to the integrity and viability of our capital markets, and the effect futures trading will have on the securities markets and on public investors therein.[102]

The letter then propounded fourteen questions to the CFTC's chairman and, while Chairman Hills had side-stepped the question of jurisdiction, many of the questions involved traditional SEC requirements, as if the CFTC's jurisdiction were *not* exclusive. Chairman Hills, however, concluded his letter with the inference that the SEC might seek legislative relief—as his predecessor had sought unsuccessfully to do earlier in 1975:

> Until we have clarified the questions raised above, either through a monitoring program, or through hearings pursuant to our own statutory authority, or until the Congress has been given an opportunity to consider whether it wishes to draw different distinctions than the ones that presently exist in the organic acts of our two agencies, such trading [in new futures contracts on securities other than GNMA and T-Bills] would be premature.[103]

VI. THE JUDICIAL RESPONSE

The CFTC Act took effect on April 21, 1975, except for those provisions relating to licensing, contract market approval, and rules review, which were postponed by H.R.J. Res. 335. Little time elapsed before the CFTC confronted the SEC in court on the question of jurisdiction. On July 11, 1975, the CFTC filed a brief as amicus curiae in *SEC v. American Commodity Exchange, Inc.*[104] The SEC sought to enjoin alleged violations of the federal securities laws by a dealer in commodity options. The SEC contended that commodity options were securities ("investment contracts") and that the defendant had violated the registration requirements, antifraud provisions, and broker-dealer registration requirements of

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101. *Id.*
102. *Id.*
103. *Id.*
104. CCH COMMOD. FUT. L. REP. ¶ 20,063 (Civ. No. 15-0436-c) (W.D. Okla. 1975).

the federal securities laws. In its memorandum as amicus curiae, the CFTC stated that in its opinion the CFTC Act did not oust the SEC of jurisdiction in that action because the alleged securities violations occurred prior to April 21, 1975:

> To be sure, the Commodity Futures Trading Commission Act has carved out an area in which the Commodity Futures Trading Commission has been granted exclusive jurisdiction. . . . Without going into the question of the impact of this provision on fraudulent commodity or commodity-related option transactions which have occurred *since* April 21, 1975 (or which may occur in the future), the enactment of that provision should in no way be held to affect the jurisdiction of the Securities and Exchange Commission *prior to* April 21, 1975.[105] [CFTC's emphasis]

The CFTC's brief, however, implied that similar conduct occurring after April 21, 1975, would be within its own exclusive jurisdiction. Thus, for example, the CFTC said that "[o]f course, activities of the kind discussed in the Securities and Exchange Commission's complaint are now plainly within the jurisdiction of the Commodity Futures Trading Commission," and offered to intervene in the proceeding as an additional plaintiff to enjoin future violations of the CFTC's new antifraud rule [17 C.F.R. § 30.01] or the provisions of the Commodity Exchange Act.[106]

The CFTC's preemption of state regulation received its first reported test in the state courts of Texas. In *Texas v. Monex International, Ltd.*,[107] the state securities commission sought to enjoin the defendant from offering "leverage" contracts in that state on the ground that they are unregistered securities. The trial court dismissed the case. The Texas Court of Civil Appeals affirmed on August 29, 1975, holding that the CFTC has preempted the states in the regulation of those instruments, even if they are "securities":

> The State contends Pacific's "margin account" investment plan constitutes an "investment contract" and is thus a security. . . . We do not reach this point.
>
> . . .
>
> We think it is clear that the newly established Commodity Futures Trading Commission now has exclusive jurisdiction to regulate Pacific's margin account sales. . . .[108]

Curiously, the suit was dismissed even though it had been initiated *before* the effective date of the CFTC Act. In fact, the CFTC Act did not become effective until the case had ended in the trial court

105. *Id.* at 20,681.
106. *Id.* at 20,682.
107. CCH COMMOD. FUT. L. REP. ¶ 20,083 (Tex. Civ. App., Aug. 29, 1975).
108. *Id.* at 20,738.

and was awaiting hearing on appeal. Nevertheless, the Texas appellate court rejected the State's argument that under section 412 of the CFTC Act the case could continue:

> The State argues that Section 412 of the Commodity Futures Trading Commission Act of 1974 expressly exempts from coverage under the Act all proceedings pending prior to enactment. We disagree.
>
> . . .
>
> We hold that Section 412 pertains to matters pending under the Commodity Exchange Act before the 1974 amendment. Here, the State seeks to enjoin future conduct on the part of Pacific under the Texas Securities Act. Section 412 is not applicable.[109]

While this result seems incompatible with the assurances expressed on the floor of the House and Senate that pending state and federal proceedings would be unabated by the CFTC Act,[110] the outcome appears to be entirely warranted because the relief sought by the State—a prospective injunction—would reach into the period after the CFTC Act took effect. The result might have been different if no prospective relief had been sought.

The question not answered in the preceding actions is whether the CFTC preempts all other *federal* agencies (like the SEC) from instituting enforcement actions after April 21, 1975. That question now has been faced and decided by a federal court—in the CFTC's favor. In *SEC v. Univest, Inc.*,[111] the United States District Court for the Northern District of Illinois dismissed a complaint by the SEC alleging certain violations of the federal securities laws by a dealer in commodity options. While the SEC had an investigation underway prior to April 21, 1975, the effective date of the CFTC Act, its suit was instituted after that date. The district court held that the SEC could not pursue this action:

> This new statute [CFTC Act], which went into effect on April 21, 1975, serves to strip the S.E.C. of standing to bring this suit. The text of the Commodity Act of 1974 and its legislative history indicates to me that under this particular factual pattern, the new Commodity Futures Trading Commission, and not the S.E.C., has exclusive jurisdiction over this conduct. [Quoting section 2(a)]. To me, that language plainly states that exclusive jurisdiction is vested in the Commodity Commission; that group, and not the S.E.C., is empowered to bring a suit in a situation like that presently before the court.[112]

The SEC countered with the argument (implicit in the Hills-Bagley correspondence discussed above) that the second proviso of section

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109. *Id.*

110. *See* note 63 *supra* and accompanying text.

111. SEC v. Univest, Inc., CCH FED. SEC. L. REP. ¶ 95,369 (N.D. Ill., Nov. 18, 1975). The SEC has asked the court to reconsider its decision. CCH FED. SEC. L. REP., No. 620, at 2 (Dec. 17, 1975).

112. *Id.* at 98,843.

2(a) preserving its jurisdiction somehow modifies the CFTC's exclusive jurisdiction and allows the suit to proceed. Emphasizing the keystone phrase "except as hereinabove provided," the court rejected the SEC's position.

> The Plaintiff's argument that the second proviso within Section 2 somehow negates that grant of exclusive jurisdiction is simply invalid. . . . The key phrase in this proviso is the introductory one; I must assume that it means exactly what it says. The fact is that the statements "hereinabove provided" do limit the jurisdiction of the S.E.C. with regard to commodity futures trading. In effect, those statements transfer jurisdiction from the S.E.C. to the new Commodity Futures Trading Commission.[113]

Finally, the court ruled that, even though the activities alleged in the complaint occurred prior to April 21, 1975, the suit was not "pending" on that date within the meaning of section 412, and any information that the SEC had obtained from its investigation should have been turned over to the CFTC for prosecution:

> The S.E.C. was entitled to continue any investigation commenced prior to the effective date, but any information developed from those inquiries should have been turned over to the proper party for prosecution. In this instance, the proper party was the new Commodity Commission. The Congress, by enacting this legislation, created a body with special expertise in the commodities field and it is my belief that the wording of the statute removes standing from the S.E.C. and vests it in the "new" experts—the Commodity Futures Trading Commission. I must follow the dictates of the Congress in this matter and allow the proper party to prosecute any alleged violators.[114]

As in the opinion rendered in the *Monex* case, the language used here to preclude SEC prosecutions of activities occurring prior to April 21, 1975, seems unnecessarily broad. When, however, prospective relief is sought, for example an injunction controlling future conduct, a court cannot grant the desired relief without interfering with the CFTC's exclusive jurisdiction in the post-enactment period. Thus, a complete prohibition of injunctive actions by other regulatory agencies, even for pre-Act conduct, is consonant with the congressional intent.

VII. THE REMAINING ISSUES

The preceding discussion is a chronicle of the CFTC's struggle to gain—and now to retain—"exclusive jurisdiction" over futures trading on the commodity exchanges. While the principal assault on the CFTC's new authority has come from the SEC, the attack could as easily have come from any other governmental agency whose existing of potential power has been similarly affected. Each, no

113. *Id.*
114. *Id.* at 98,844.

doubt, could formulate a series of "questions" about the CFTC's ability to replace the work done by that agency. The CFTC, in turn, must consider the reality that any accommodation made to one agency in derogation of its "exclusive jurisdiction" necessarily will be shared by all other agency claimants—a result that Congress plainly did not intend.

A. *Private Suits Under Other Statutes*

A different question arises, however, when consideration is given to the effect of the CFTC's "exclusive jurisdiction" on the applicability of the substantive requirements of other regulatory statutes. Even if the agencies created to administer those statutes are preempted, do the statutes themselves remain applicable for such purposes as private actions? It has been suggested[115] that private suits under other regulatory statutes may continue to be permissible because of the language in section 201(B) [now section 2(a)] that—

> Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.[116]

The SEC itself raised that issue in the Hills-Bagley correspondence of November 13, 1975, although it indicated the possibility that "problems would arise from such anomalous situation."[117]

The legislative history of the "saving" clause for courts is quite sparse. The House version of H.R. 13,113 did not contain that clause, and, while it was added by the Senate Agriculture and Forestry Committee, the Report of that Committee offers no explanation of its purpose. The remarks made by Chairman Talmadge on the Senate floor, however, are instructive, and they tend to indicate only that the new administrative proceedings and remedies vested in the CFTC under H.R. 13,113 do not displace the right of parties to judicial review:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved.[118]

Presumably, concern over the continued right of judicial review was

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115. *See, e.g.*, Schroeder & Pollack, *Commodities Regulation* 8 Rev. Sec. Reg., no. 7, at 938 (Apr. 9, 1975).

116. CFTC Act § 201(b), 7 U.S.C.A. § 2 (Supp. 1, 1975).

117. BNA Sec. Reg. & L. Rep., No. 329, at F-1 (Nov. 26, 1975).

118. 120 Cong. Rec. S 16,128 (daily ed. Sept. 9, 1974).

prompted to some degree by certain new roles that the CFTC would perform under H.R. 13,113. For example, under section 106 of the bill (now section 14 of the CFTC Act), injured commodity customers may seek monetary "reparations" from their carrying brokerage firms or other registered persons in an administrative hearing conducted by the CFTC rather than by the courts. The "saving" clause relating to the courts' jurisdiction makes it clear that the customer can sue under the Act for damages instead, if he wishes.[119]

There also is evidence that Congress did not wish to nullify pending court proceedings brought under other statutes before the effective date of the new amendments. In his report to the House on the work of the Conference Committee, Chairman Poage indicated that the "saving" clause preserving courts' jurisdiction would allow pending litigation to continue to completion:

> In addition, the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC. Congress was aware that there have been ongoing efforts by various State and Federal regulators to prevent some of these abuses. . . . We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this act.[120]

Additionally, the intent of Congress to permit courts to continue to adjudicate state criminal fraud cases can be found in the Report of the Senate Agriculture and Forestry Committee on H.R.J. Res. 335,[121] which extends the CFTC's deadlines to accomplish certain duties imposed by the 1974 amendments:

> The Committee wishes to make clear that the preemption of the regulation of commodity futures trading by the Commodity Futures Trading Commission Act of 1974 does not prevent the States from enforcing their criminal anti-fraud statutes. The Committee realizes that many fraudulent schemes are devised to prey on the unsuspecting and unsophisticated investor. In many cases, these schemes purport to deal in commodities trading. The States are encouraged to continue to utilize their criminal anti-fraud statutes to discourage such schemes.[122]

More specific insight into congressional intent to preempt the substantive provisions of other regulatory statutes, as well as the agencies themselves, can be found in the remarks of Senator Curtis on the Senate floor, where he successfully urged the repeal of a

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119. A private right of action for damages exists by implication under the Commodity Exchange Act. Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).

120. 120 CONG. REC. H 10,248 (daily ed. Oct. 9, 1974).

121. S. REP. No. 94-73, *supra* note 70.

122. *Id.* at 5-6.

sentence in the pre-existing Commodity Exchange Act that had been designed to preserve "any State law applicable to any transaction enumerated or described" in certain parts of the Act. Senator Curtis explained that such a sentence was incompatible with the CFTC's new exclusive jurisdiction and the intended preemption of all state agencies. He indicated that only the substantive law contained in the Commodity Exchange Act would govern in the future:

> Mr. President, I understand that the intent of the bill is to grant exclusive jurisdiction over commodity futures trading to the new Commission, except to the extent the bill specifies that other Federal and State agencies and Federal and State courts are to retain jurisdiction. However, as I understand it, it is also the intent of the bill that, even in the cases where the State agencies and State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act as amended by the bill would pre-empt the field completely, so that if any substantive State law were contrary to or inconsistent with Federal law, the Federal law would govern.[123] [Emphasis added]

The genesis of the provision in section 201(B) retaining the jurisdiction of federal and state courts appears to be the testimony filed in the Senate Agriculture and Forestry Committee by Congressman Peter W. Rodino, Chairman of the House Committee on the Judiciary.[124] He indicated, first, that the CFTC's exclusive jurisdiction might oust the courts' jurisdiction to hear typical contract claims or other commercial disputes:

> Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction.[125]

Also, Chairman Rodino expressed concern that without a "saving" clause federal courts would be barred from hearing antitrust suits and that, in fact, the CFTC's decisions might not be reviewable in the courts.

> In addition, this double proviso could possibly be read as an attempt to oust even the federal courts of jurisdiction. The first proviso confers "exclusive jurisdiction" on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. . . . [A]ntitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Argnably, too, if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.[126]

123. 120 CONG. REC. S 16,133 (1974).
124. *Hearings on H.R. 13,113, supra* note 4, pt. 1, 257-62.
125. *Id.* at 260.
126. *Id.*

The effort of Congressman Rodino to modify section 201(B) in the Senate, therefore, appears to have had the limited objective of allowing courts to hear claims at common law or under statutes that do not compete with the regulatory functions of the CFTC under the Commodity Exchange Act. However difficult it might prove to be in particular cases to differentiate between permissible and barred claims, neither Congressman Rodino's proposal nor any other part of the legislative history warrants the conclusion, characterized as "anomalous" by the SEC,[127] that private parties should be allowed to invoke the standards of other regulatory acts for their private gain after the agency that administers those standards has been barred by the Congress from doing so.

Strong public policy considerations likewise militate against the idea that private remedies under other regulatory statutes should remain available even after the CFTC's "exclusive jurisdiction" has preempted those regulatory agencies. As a rule, regulatory statutes contain fairly broad and flexible concepts. The Securities Exchange Act, for example, requires stock exchanges to have rules designed to "prevent fraudulent and manipulative acts and practices" and to "promote just and equitable principles of trade."[128] Similarly, a commodity exchange cannot obtain designation as a "contract market" in a particular commodity unless the CFTC finds that the new futures contract "will not be contrary to the public interest."[129] These fluid concepts not only require the continual exercise of judgment and discretion, but, to provide effective regulation, they must be administered on a relatively consistent and uniform basis. It is reasonable to assume that Congress, having created a regulatory agency under the same statute, intends for that agency to exercise the requisite judgment and to provide the needed uniformity. Otherwise, the key decisions influencing the scope and direction of federal regulatory policy in that field would be left to a variety of different courts responding piecemeal to the advocacy of private interests. There would appear to be distinct public benefits in assuring that the overall character of regulatory policy is set by the agency charged by Congress with that function. Conversely, once Congress has directed the agency *not* to formulate regulatory policy with respect to a particular activity—perhaps that task has been assigned to another agency under a different statute—no public benefit can be discerned from allowing private actions for private gain, which may evolve new policies or standards at variance with

127. BNA SEC. REG. & L. REP., no. 329, at F-1 (Nov. 26, 1975).

128. 15 U.S.C.A. § 78f(b) (5) (Supp. 4, 1975).

129. CFTC Act § 103(g), 7 U.S.C.A. § 7(g) (Supp. 1, 1975).

the congressional intent, under the preempted agency's governing statute.

B. *The Prevention of Fraud*

Another major issue, as yet unresolved, is whether the new CFTC will have the tools to detect and prosecute fraudulent conduct in connection with futures trading, the sale of commodity options, or the offering of "leverage" contracts in gold and silver bullion or bulk coins. The most frequently cited "policy" rationale in criticism of the CFTC's exclusive jurisdiction is that other agencies may be better equipped to prevent fraudulent activities. For example, former SEC Chairman Ray Garrett Jr., opined to Chairman Staggers of the House Committee on Interstate and Foreign Commerce in February 1975 that "[w]e believe . . . that the disclosure and antifraud provisions of the federal securities laws do not have an adequate counterpart in the CFTC and the Commodity Exchange Act."[130]

There is superficial appeal to the contention that the Commodity Exchange Act and the CFTC's regulations presently do not call for the intense disclosure typical of securities regulation. In large part, however, this disclosure distinction exists because of the fundamentally different character of futures contracts. For instance, a futures contract is created by the sponsoring *commodity exchange*, not by a private issuer, and its terms are completely standardized. Futures contracts, unlike securities, are not created to raise capital for the promoters of a commercial enterprise. Disclosures concerning the quality of management, the financial condition of the enterprise, and the prospects for success are inapposite. Also, each of the basic terms and conditions of a futures contract must be submitted to, and affirmatively approved by, the CFTC before trading in it can be initiated by the sponsoring exchange. Indeed, the CFTC has authority[131] to *alter* those terms in the public interest. Once approved, the terms and conditions of each futures contract are published in the exchange's rulebook and are readily available to the trading public.

A somewhat different situation has existed, of course, with respect to commodity options and "leverage" contracts, which have been offered privately and without exchange sponsorship. These

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130. Garrett letter, *supra* note 97.

131. Section 5a(10) of the CFTC Act, 7 U.S.C.A. § 7a(10) (Supp. 1, 1975), permits the CFTC to set the locations where deliveries must be permitted, and § 8a(7), 7 U.S.C.A. § 12a(7) (Supp. 1, 1975), allows the CFTC to "alter or supplement" any other rule or contract term.

instruments, like traditional securities, may vary widely in their terms and may depend to some degree upon the financial condition or management skills of a promoter. The CFTC promptly recognized that fact, however, and adopted antifraud rules in June 1975 with respect to these instruments.[132] Although the CFTC found that the adoption of a provision identical to SEC Rule 10b-5[133] was inappropriate when applied to commodity options because it "might invite an uncritical application of security law principles and practices" and might "misapply non-disclosure-of-information standards taken from securities laws decisions,"[134] the CFTC did adopt Rule 10b-5 criteria in regard to "leverage" contracts because "[t]hese are not transactions of a type commonly entered in the markets for commodity futures or cash commodities."[135]

Despite the CFTC's adoption of antifraud rules governing commodity options and "leverage" contracts, some concern has persisted that the Commodity Exchange Act does not protect the public against fraud as effectively as some other statutes, most notably the Securities Exchange Act. Former Chairman Garrett of the SEC expressed that view in February 1975,[136] and at least one court has held that the antifraud provisions of the federal securities laws are broader. In *McCurnin v. Kohlmeyer & Co.*,[137] the plaintiff urged the court to interpret the principal antifraud provision of the Commodity Exchange Act, section 4b,[138] as broadly as the case law under SEC Rule 10b-5. In pertinent part, section 4b prohibits "any member of a contract market" or "any person" in connection with any commodity transaction on a contract market for or on behalf of another person:

> (A) to cheat or defraud or attempt to cheat or defraud such other person;
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person. . . .[139]

The court, evidently ignoring subsection (A) in which "willfullness"

132. Regs. §§ 30.01, 30.03, CCH COMMOD. FUT. L. REP., ¶¶ 12,650, 12,652.
133. 17 C.F.R. § 240.10b-5 (1975).
134. *See* 40 Fed. Reg. 26,505, n.1 (1975).
135. *Id.* at 26,505.
136. Garrett letter, *supra* note 97.
137. 347 F. Supp. 573 (E.D. La. 1972), *aff'd on other grounds*, 477 F.2d 113 (5th Cir. 1973).
138. 7 U.S.C. § 6b (1970).
139. *Id.*

is not an element, held that section 4b "is clearly directed only toward willful misconduct" and stated that SEC Rule 10b-5 is much broader:

> The Securities Exchange Act of 1934, for example, employs much broader language, forbidding "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Section 10(b), 15 U.S.C.A. § 78j(b). The regulations, Rule 10 b 5 elaborate on what is forbidden. There is no counterpart of Section 10(b) in the C.E.A., nor any counterpart of Rule 10 b 5 in the Commodities Act regulations.[140]

The CFTC, on the other hand, has expressed its disagreement with the *McCurnin* decision and the position of the SEC that Commodity Exchange Act provisions proscribing fraud are inferior to those in the federal securities laws:

> The operative language of the anti-fraud provision contained in section 4b of the Commodity Exchange Act, as amended, 7 U.S.C. § 6b, is no less broad than Rule 10b-5 with respect to misrepresentations and deceptive acts and practices. . . .[141]

The CFTC has announced its intention to interpret section 4b broadly, notwithstanding the narrower *McCurnin* interpretation:

> The Commission does not believe these decisions should have continued vitality as applied to the Act as recently amended. It is appropriate—particularly in light of the Commodity Futures Trading Commission Act of 1974—that all provisions of the Commodity Exchange Act, as amended, be broadly construed to effectuate their remedial purposes. . . . The courts have frequently held in the context of remedial legislation that willfulness connotes no more than an awareness of an act or omission and not whether the act or omission is understood to be unlawful. . . .[142]

Despite the CFTC's efforts to treat the antifraud provisions of the Commodity Exchange Act as coextensive with those of the federal securities laws, it would appear that section 4b and other antifraud sections of the Act are not that broad. The principal deficiency of section 4b is that it applies only to those acting as agent or broker in commodity transactions, and not to the principals in the transactions. Section 4b proscribes fraudulent conduct by a member of a contract market or his correspondent, agent, or employee only if the activities involve transactions "for or on behalf of any other person." Similarly, the provision of section 4b applicable to "any person" applies only when his actions are "for or on behalf of any other person." The offense, therefore, exists when the *agent* cheats or defrauds "such other person," or makes false records to

140. 347 F. Supp. at 575-76.
141. 40 Fed. Reg., 26,505 (1975).
142. *Id.* at 26,505 n.2.

deceive "such person." Aside from these agents or brokers, the only persons specifically covered by antifraud provisions of the Commodity Exchange Act are commodity pool operators and commodity trading advisers.[143] It would appear that a fraud committed by a principal to the transaction (a buyer or seller) or by a third party not acting as a principal's agent cannot be the basis of a private suit or disciplinary action under section 4b of the Commodity Exchange Act. All cases brought under section 4b, for example, have been by investors against their brokers.[144] When effort has been made to invoke section 4b in the absence of a broker-investor relationship, the complaint has been dismissed.[145]

By contrast, it is well established that a defrauded securities investor can proceed under section 10(b) of the Securities Exchange Act against a violator other than his own broker, such as the offeror or seller of securities.[146] It could be argued that for this reason section 10(b) provides substantially better protection for the investing public than section 4b of the Commodity Exchange Act. The capacity of direct parties to the transaction to defraud each other in futures trading, or the ability of third party non-brokers to do so, however, may be less in futures trading than in securities merchandising since futures contracts are standardized instruments, sponsored by the commodity exchanges, that have readily ascertainable terms and are valued basically in relation to the prevailing market price of the underlying commodity. In such circumstances, the opportunity and temptation of a seller, buyer, or third party to disclose falsehoods or to withhold material facts about the futures contract may be more limited than in securities transactions. The inference in section 4b itself seems to be that the greatest danger of fraud exists in the relationship of the trader with his broker, rather than in the other contacts that an investor in futures contracts may make. In any event, it would appear that non-brokers would be liable to investors even in section 4b cases if they are shown to have "aided and abetted" the broker's fraud.[147]

143. Section 4o, 7 U.S.C. § 6o (1970).

144. *See, e.g.*, Booth v. Peavy Co. Commodities Serv., 430 F.2d 132 (8th Cir. 1970); Gould v. Barnes Brokerage Co., 345 F. Supp. 294 (N.D. Tex. 1967); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338 (E.D. La. 1972); Rohinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 337 F. Supp. 107 (N.D. Ala. 1971), *aff'd*, 453 F.2d 417 (5th Cir. 1972); Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Calif. 1968); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).

145. *See* Rosee v. Board of Trade, 311 F.2d 524 (7th Cir. 1963) and the discussion thereof in Goodman v. H. Hentz & Co., 265 F. Supp. 440, 446-47 (N.D. Ill. 1967).

146. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

147. *See, e.g.*, Wasnowic v. Board of Trade, Civil No. 69-328, at 5 (M.D. Pa., Dec. 31,

Criticism also has been leveled against the antifraud provisions of the Commodity Exchange Act on the ground that they do not afford the breadth of "remedies" available under other regulatory statutes such as the Securities Exchange Act. Former Chairman Garrett has stated that "the remedies available [under the Commodity Exchange Act] to victims of fraud are siguificantly narrower in scope than those available under the federal securities laws."[148] But the remedies for fraud under the Commodity Exchange Act compare quite favorably to the remedies under the federal securities laws and, in some respects, offer superior relief.

It is well established that an investor in the futures market can recover damages if he is injured by a violation of the Commodity Exchange Act.[149] Alternatively, the investor may file a complaint with the CFTC, which, under section 14,[150] can conduct an administrative proceeding and award "reparations" in favor of the complainant. The federal securities laws have no comparable administrative remedy for private parties. The CFTC itself has the right (as does the SEC under the federal securities acts)[151] to seek injunctions in its own name against violations of the Act.[152] In addition, the CFTC can seek writs of mandamus or similar relief whenever "necessary to remove the danger of violation of this Act or any such rule, regulation or order. . . ." Alternatively, in an administrative proceeding the CFTC can impose "civil penalties" up to $100,000 on any contract market or registered person for each violation of the Act, pursuant to section 6 of the Act.[153] The CFTC's right to assess civil penalties has no counterpart in the federal securities laws. Finally, the Act provides strict criminal sanctions for major offenses under the Act.[154]

The only significant remedy available to private parties under the federal securities laws that has no direct parallel in the Commodity Exchange Act is the express right of rescission enjoyed by

1970) (copy available through *Vanderbilt Law Review*); *cf.* Hochfelder v. Midwest Stock Exch., 350 F. Supp. 1122 (N.D. Ill. 1972); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 680 (N.D. Ill. 1966), *aff'd*, 417 F.2d 147, 153-54 (7th Cir. 1969).

148. Garrett letter, *supra* note 97.

149. Deaktor v. L.D. Schreiber & Co., 479 F.2d 52 (7th Cir. 1973) (against other traders and commodity exchange); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967) (against broker).

150. CFTC Act § 106, 7 U.S.C.A. § 18 (Supp. 1, 1975).

151. 15 U.S.C. § 78u(e) (1970).

152. CFTC Act § 211, 7 U.S.C.A. § 13a-1 (Supp. 1, 1975).

153. CFTC Act § 212(a)(1), (3), 7 U.S.C.A. § 9, 9a (Supp. 1, 1975).

154. CFTC Act §§ 212(d), 401, 7 U.S.C. § 13 (Supp. 1, 1975). The securities acts also provide criminal sanctions. *See* Securities Act of 1933, § 24, 15 U.S.C. § 77x (1970); Securities Exchange Act of 1934, § 32, 15 U.S.C. § 78ff (1970).

investors under section 12(1)[155] of the Securities Act of 1933 when, for example, securities have not been properly registered with the SEC, or the offering prospectus is untruthful. The context in which this remedy is available, however, has no relevance to futures trading since futures contracts are not "registered" with the CFTC in the SEC sense nor are they offered by means of a prospectus. Futures contracts, instead, are creatures of the commodity exchanges themselves and are reviewed exhaustively by the CFTC with respect to their economic justification and other public policy interests. The CFTC can require changes in the basic terms and conditions of futures contracts before trading is authorized. Affirmative approval is given by the CFTC in the form of a designation of the applicant exchange as a "contract market" for that particular contract. The SEC has no equivalent screening procedure with respect to the registration of securities or the review of prospectuses.

The Commodity Exchange Act, as amended in 1974, therefore, seems adequate in both its safeguards and its remedies to deal with fraudulent activity. The broad rulemaking power possessed by the CFTC under section 8a(5) of the Act[156] "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this Act" offers ample opportunity for the CFTC to fill in any remaining gaps. For example, the CFTC may wish to develop a "know your customer" rule or to set certain suitability standards for participating in the futures market or for entering transactions in commodity options or "leverage" contracts. In any event, there are certain unique safeguards already built into the Act that offer special protection to the investing public, such as the absolute prohibition under section 4d(2)[157] against a broker commingling customer money with his own funds.[158] Futhermore, public investors can benefit uniquely from the margin rules of the commodity markets, which require that additional funds must be put up by investors whenever their equity is impaired by adverse market price movements. These "margin calls" act as a practical inducement for investors to liquidate losing positions before massive losses are incurred. In securities trading, on the other hand, the tendency of many investors is to "ride out" adverse mar-

155. 15 U.S.C. § 77*l* (1970).

156. 7 U.S.C.A. § 12(a)(5) (Supp. 1, 1975).

157. 7 U.S.C. § 6d(2) (1970).

158. Compare the far less rigid "segregation" requirement contained in SEC Rules 15c3-2 and 15c3-3, 17 C.F.R. §§ 240.15c3-2, .15c3-3 (1975).

ket movements since no additional expenditure is involved. As a result, securities investors may take greater risks of major losses than their counterparts in the commodity markets.

A final concern expressed about the CFTC's ability to protect the investing public has been that the CFTC might not initiate enforcement actions as aggressively as agencies like the SEC. Former Chairman Garrett noted, for example, that the SEC had filed a number of injunctive actions against promoters of commodity options and "leverage" contracts whom the SEC believed to be defrauding their investors.[159] Those SEC enforcement actions and Chairman Garrett's observations occurred before the CFTC began operations in late April of 1975. Whether the expressed concerns were warranted would depend, in the final analysis, upon whether the CFTC proved to be an aggressive enforcer when it became operational.

The CFTC's record to date suggests that the concerns over its determination to protect public investors were unwarranted. In addition to promulgating antifraud rules for commodity options and "leverage" contracts[160] during June of 1975, the CFTC has initiated a number of enforcement actions and has procured injunctions against persons operating investment programs in violation of the Act.[161] Also, the CFTC presently has under study by its staff and by a recently appointed Advisory Committee the form of regulations that should be adopted to protect the public against unscrupulous dealers in commodity options or "leverage" contracts.[162]

VIII. CONCLUSION

The amendments made by Congress in 1974 to the Commodity Exchange Act would have attracted little attention outside the commodity industry but for the extraordinary fact that Congress, in an era of proliferating public agencies and spiraling federal budgets to support them, chose in this Act to *centralize* regulation of the futures markets, commodity options, and "leverage" contracts in a single entity—the Commodity Futures Trading Commission. The Act has become, therefore, a bold experiment in whether the regulation of an American industry can be conducted more efficiently and

159. Garrett letter, *supra* note 97.

160. CFTC Reg. §§ 30.01, 30.03, CCH COMMOD. FUT. L. REP. ¶¶ 2288, 2290.

161. *See, e.g.*, CFTC v. American Options Corp., CCH COMMOD. FUT. L. REP. ¶ 20,107 (C.D. Calif. 1975); CFTC v. American-Overseas Trading Corp., CCH COMMOD. FUT. L. REP. Newsletter No. 10, at 5-6 (D. Ga. 1975).

162. CCH COMMOD. FUT. L. REP., Newsletter No. 11, at 4 (Oct. 31, 1975); BNA SEC. REG. & L. REP., No. 329, at A-8 (Nov. 26, 1975).

more uniformly under a centralized leadership. It also will test whether other agencies, previously imbued with power or aspirations of power over some features of the industry, will give the experiment a chance to work. The CFTC, to its credit, has expressed its determination to resist all efforts to erode its exclusive jurisdiction.[163] The industry, for its part, can be expected to support the CFTC's position since fragmented and conflicting regulatory crosscurrents would, in the long run, be injurious to the industry and its orderly growth.

163. See brief of CFTC as amicus curiae in SEC v. American Commodity Exch., Inc., CCH COMMOD. FUT. L. REP. ¶ 20,063 (W.D. Okla. 1975).