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THE COMMODITY EXCHANGE ACT IN PERSPECTIVE
A SHORT AND NOT-SO-REVERENT HISTORY OF FUTURES TRADING LEGISLATION IN THE UNITED STATES

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Over the last several years, I have had the pleasure of pontificating before at least a score of audiences on the history of futures trading legislation in the United States. As I am introduced on each occasion, I literally can hear a wave of ennui cascade across the audience. And so I feel as I begin this short written history.

Admittedly, the history of futures trading legislation is of only remote interest to most normal, rational human beings. Yet, as dull and arcane as it appears, it affords some interesting insights into the development of economic regulation in the United States generally. To a remarkable extent, futures have been a pilot program for U.S. economic regulation—predating, for example, the system of federal securities regulation by over a decade. To a serious student of futures trading and the legal system that surrounds it, a working knowledge of the legislative history of futures regulation is obviously of great value.[1]

It comes as a surprise to many that what is still described as the "last best bastion of free enterprise"[2] has suffered increasingly meddlesome federal oversight since 1921.[3] Conceived in error, and largely administered under delusion for six solid decades, federal futures regulation remains a growth area. To the best of my knowledge, not a single legislator or bureaucrat has ever uttered the word "deregulation" when addressing the subject of futures.[4]

This fact is not surprising. Futures markets are not, and never have

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[1] I make no attempt in the pages that follow to explain the mechanics, terms, and economics of futures trading. This job has been done admirably elsewhere, and too much scarce timber already has been exhausted in the process. *See, e.g.*, the lengthy listing of "commodity futures law articles" in COMM. FUT. L. REP. [CCH] ¶951 (1978). For the *non-cognoscente* who finds all of this bewildering but nonetheless worthy of mastery, I particularly recommend P. JOHNSON, COMMODITIES REGULATION 1-203 (1982).

[2] Senator Helms, who serves as the current chairman of the Senate Committee on Agriculture, Nutrition & Forestry, the Senate committee which exercises oversight jurisdiction over federal futures trading law, made this statement.

[3] Future Trading Act of 1921, Act of Aug. 24, 1921, ch. 86, 42 Stat. 187 (1921). Current federal futures trading law—styled the Commodity Exchange Act—is codified at 7 U.S.C. §§ 1-24 (1976 & Supp. II 1978).

[4] *See, e.g.*, H.R. REP. No. 97-565, 97th Cong., 2d Sess. (1982); S. REP. No. 97-384, 97th Cong., 2d Sess. (1982).

been, popular institutions. In fact, the history of futures legislation in the United States is largely the saga of a single institution—the Chicago Board of Trade—fending off countless politicians on both the state and national level, all of whom seemed intent on shutting the Board down.

During the latter half of the 19th century, legislatures enacted a system of state laws—labeled "anti-gaming" or "anti-bucket shop" laws—in an attempt to make it as difficult as humanly possible to trade futures in Chicago.[5] None was so ingenious as to actually prevent the Chicago Board of Trade from functioning. The Board was too hearty and resilient an institution.

The principal problem was that no one then really knew or understood what was happening in Chicago—and to a large extent, neither did the Board of Trade. The Board did not spring into existence one day and proclaim itself to be a futures exchange. The Board's existence as a futures exchange was the result of evolution, not intent or design.[6]

The Chicago Board of Trade was created by businessmen as a commercial exchange for businessmen—grain merchants—who needed some order in a world of chaos, and some relief from a hostile judicial system which only reluctantly enforced businessmen's bargains. For example, the courts in Illinois, as in most states, adhered to old English precedent which placed damages for expected profits on a par with usury.[7]

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[5] *See, e.g.*, T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 313 (1977) [hereinafter cited as Hieronymus]; G. HOFFMAN, FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES 5-6, 354-363 (1932) [hereinafter cited as Hoffman]. *See generally* Taylor, *Trading in Commodity Futures—A New Standard of Legality?*, 43 YALE L. J. 63 (1933).

[6] Holbrook Working, one of the foremost scholarly commentators on the economic foundations of futures trading, describes the Chicago Board of Trade's evolution into a futures exchange as follows:

> Futures trading, like banking, is an institution that developed as a contribution to efficiency of a relatively free competitive economy. A primitive form of futures trading emerged spontaneously in various market centers at least as early as 1850. Only in the grain trade at Chicago, however, was the demand for hedging commercial risks then strong and persistent enough to permit this unconventional form of trade to survive the fluctuations in speculative interest, overcome conservative opposition, and live through the stormy period of experimentation necessary to put it on a firm footing. When that had been accomplished at Chicago, the new form of trading was soon adopted at other market centers and for comodities other than grains.

Working, "Futures Trading and Hedging," cited in B. GOSS & B. YAMEY, THE ECONOMICS OF FUTURES TRADING 68-69 (1976). [hereinafter cited as Goss & Yamey]. *See also* Hoffman, *supra* note 5, at 29.

[7] *See* Lurie, *Commodities Exchanges As Self-Regulating Institutions In the Late 19th Century: Some Perimeters In the History of American Administrative Law*, 28 RUTGERS L. REV. 1107, 1112-1130 (1975). *See also* Simon & Novack, *Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Modern Contracts*, 92 HARV. L. REV. 1395, 1398-1402 (1979).

So a group of Chicago merchants formed the Chicago Board of Trade to develop a set of codes and rules for buying, weighing and grading the prairie gold that flowed to Chicago as the great terminal market of middle America, and for arbitrating commercial disputes which arose as a result of this trade in grain.[8]

The futures contract came later, like Topsy. It was a businessman's invention—a practical answer to the problem of minimizing the risks inherent in dealing in something as basic and as necessary, but volatile, as grain. No economist conceived the idea. Nor did it result from any federal task force or act of Congress.[9]

Many called it gambling.[10] After all, in any other context, "him who sells what isn't hissun soon finds himself in prissun."[11] The ability to sell what isn't hissun was and is the hallmark of futures trading. That ability is also what makes futures trading work from an economic standpoint.[12]

Not surprisingly, efforts began in Washington as early as the Civil War to outlaw this peculiar type of enterprise. In fact, in 1864, an act of Congress banned gold futures trading. Fortunately for the growth of our economy, this precedent failed to stand for long. Cooler heads prevailed; Congress repealed the law two weeks after passage and permitted the evolutionary process to continue.[13]

Nonetheless, futures trading remained a favorite target of the populist movement and its spokesmen in Washington. Legislators filed numerous bills in Congress designed to close down the Chicago Board of Trade.[14] All of this reached a somewhat feverish pitch in the period of 1890-93, under the leadership of Representative Hatch.[15] Hatch's "Anti-Options Bill" was aimed directly at those scoundrels in Chicago who, while turning the chaos surrounding the marketing of grain in the United States into a rational economic system, were viewed widely in the wheat belt as stealing from the very mouths of farm families.[16]

As the name of Representative Hatch's "Anti-Options Bill" suggests,

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[8] *See* Legislative Act (state of Illinois) to Incorporate the Board of Trade, Chicago, February 18, 1859, *reproduced in* the Rulebook of the Chicago Board of Trade.

[9] *See* text accompanying note 6 *supra*. For an astute description of the Board of Trade and its important economic role, *see* Mr. Justice Holmes' opinion in Board of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U.S. 236 (1905).

[10] *See generally* Rainbolt, *Regulating the Grain Gambler and His Successors*, 6 HOFSTRA L. REV. 1 (1977) [hereinafter cited as Rainbolt].

[11] My thanks to James O'Hagan of the Minnesota bar for this bit of populist wisdom.

[12] *See generally*, Telser, *Why There Are Organized Futures Markets*, XXIV(1) J. L. & ECON. 1-22 (April 1981).

[13] *See* Hoffman, *supra* note 5, at 364-65.

[14] *See* Hieronymus, *supra* note 5, at 313; Note, *Federal Regulation of Commodity Futures Trading*, 60 YALE L. J. 822, 832 n. 46 (1951).

[15] *See* Hoffman, *supra* note 5, at 365-66; Hieronymous, *supra* note 5, at 313; C. TAYLOR, HISTORY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO 837-39, 857 (1917) [hereinafter cited as Taylor].

[16] *See* HOUSE COMM. ON AGRICULTURE, DEALING IN FICTITIOUS FARM PRODUCTS, H. R. REP. NO. 969, 52d Cong., 1st Sess. (1892). The legislation levied a prohibitive tax on all

any dissimilarity between futures and options was considered a distinctions without a difference.[17] In fact, the Board of Trade provided facilities for trading a form of both—at various times calling the options "indemnities" and "privileges."[18] Later, in 1936, the grain exchanges sacrificed these "options" on the legislative altar to save "futures."[19] History has now come full circle, and a program for exchange-traded options on futures will commence in the fall of 1982.[20]

Almost a century ago, in 1893, Mr. Hatch's brain child almost became law. The Anti-Options Bill actually passed both Houses of Congress (in different versions)—the Senate in the waning hours of the Fifty-Second Congress. With adjournment imminent, House rules required a two-thirds vote to bring the Senate-imposed amendments up for House approval. By a mere twenty-five votes, the sponsors failed to achieve the two-thirds required for final House consideration. (The sponsors had a solid majority.)[21]

Charles Taylor, in his otherwise turgid history of the Chicago Board of Trade, provides a delightful account of activities on the floor of the Exchange on the day of the House's deliberations. All trading ceased, "and the pits were deserted, the brokers crowding about the bulletin boards to get the news from Washington." Upon word that the Hatch effort failed, the brokers returned jubilant to the pits—"and all markets advanced, wheat gaining two cents per bushel."[22]

Efforts to shut down the futures markets subsided in the ensuing years, no doubt because farm prices improved.[23] Crusades to ban or

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"future contracts" made on grain and cotton. According to Mr. Hatch, on behalf of the House Agriculture Committee:

> That restoring to the exchange its beneficient functions (of which it has been despoiled by the short seller), it will again become a place where commodities shall be sold and exchanged instead of being, as now, a place of fixing prices and where much the greater part of the transactions assumes the form of swapping contracts, and where the initiated are able to secure great gain without performing any service for the community, but, on the contrary, destroy the prosperity of the cultivator, thereby lessening benefit by this unnatural and vicious system of traffic.

Id. at 6.

[17] *See, e.g.*, HOUSE COMM. ON AGRICULTURE, TAX UPON DEALERS IN 'OPTIONS' AND 'FUTURES,' H.R. REP. No. 1321, 51st Cong., 1st Sess. (1890).

[18] *See generally* Taylor, *supra* note 15.

[19] *See* Stassen, "Speculation: How the Growth of Fundamental Economic Issues Has Been Done Through Legislation Rather Than Research or How Fundamental Economic Principles Have Been Ignored In Legislation, Notwithstanding Research," in Chicago Board of Trade, *Research on Speculation Seminar Report* 32-33 (1981) [hereinafter cited as Stassen].

[20] Regulation of commodity options under federal futures trading law is a story in itself. For those with a masochistic bent, that saga appears in an appendix at the end of this article.

[21] *See* text accompanying note 15 *supra*.

[22] Taylor, *supra* note 15, at 857.

[23] The legislative crusade of the 1890's came during a period of "generally low agricultural prices." Goss & Yamey, *supra* note 6, at 46.

regulate futures trading generally occur in periods of declining prices—or at least in periods of great price volatility. In such times, politicians and their public always need a scapegoat, and futures markets provide a perfect candidate.[24]

A period of declining prices was the climate three decades later in 1921. The country had entered a postwar agricultural depression, and farmers were demanding action. The new Republican Administration came to power on a platform of agricultural reform, at the same time promising to bring "less government in business and more business in government."[25]

One of the agricultural reforms involved getting a handle on the packers and stockyards—the Armours, and Swifts, and their ilk.[26] Another involved getting a firm grip on the Chicago Board of Trade. Much as Protestant children once memorized the cruel tale of the Catholic massacre of the Huguenots in France, every farm child in Kansas apparently learned by rote that the Chicago Board of Trade drove down the God-ordained natural price of grain. The Republicans promised action once and for all.

In 1921 a host of bills floated about the halls of Congress. The bills ranged from proposals to prohibit futures trading outright, to moderate measures calling for a system of benign federal oversight.[27] Two principal players emerged, both from Kansas—Congressman Tincher and Senator Capper.[28] Senator Capper was a particularly vocal and impassioned critic of the Chicago Board of Trade, characterizing the Board as the world's greatest gambling house:

> Mr. President, it is nothing new that we hear today from the producers of food, from grain dealers and millers, and from the victims of speculation carried on without restriction, of the abominations of speculation in these basic products. . . . During the past year the price of wheat and corn has been determined to a large extent not by the demand and supply of the commodity itself but by the fabulous quantities sold on the exchange that never had an existence, that no grain farmer in the world ever planted, ever toiled over its cultivation and harvest, or offered for sale. . . . Mr. President, it is against the law to run a gambling house anywhere within the United States. But today under the cloak of business respectability, we are permitting the biggest

[24] According to two British economists, "[t]he ease with which futures trading can be made the scapegoat for price levels and price movements considered to be against the public interest explains much ill-considered official intervention and regulation." Goss & Yamey, *supra* note 6, at 47.

[25] *See* Virtue, *Legislation for the Farmers: Packers and Grain Exchanges*, 37 Q. J. ECON. 687, 693 (1923) [hereinafter cited as Virtue]; Stassen, *supra* note 19, at 35-36.

[26] Packers and Stockyards Act of 1921, Act of August 15, 1921, ch. 64, 42 Stat. 159 (1921). Congress enacted the Future Trading Act of 1921 eight days later.

[27] *See* Virtue, *supra* note 25, at 693-94.

[28] *See* Stassen, *supra* note 19, at 35-43.

gambling hall in the world to be operated on the Chicago Board of Trade. The grain gamblers have made the exchange building in Chicago the world's greatest gambling house. Monte Carlo or the Casino at Habana are not to be compared with it.[29]

Putting their minds and pens together, Capper and Tincher scratched out and guided through Congress a piece of legislation which emerged as the Future Trading Act of 1921.[30] The Future Trading Act was not perfect, of course, from anyone's perspective. To the rabid populist, it obviously failed miserably (notwithstanding Senator Capper's inflamed rhetoric), because it merely subjected the Chicago Board of Trade to a licensing scheme administered by the Secretary of Agriculture rather than shutting the Board down. To the grain trader in Chicago, it undoubtedly smacked of bolshevism.

Principal among its defects from a legal standpoint was the fact that the Future Trading Act was unconstitutional—or so the Supreme Court declared in May of 1922.[31] Clearly maneuvering at the then-twilight zone of federal regulatory power, Capper and Tincher chose to ground their law on Congress' taxing authority. A mere sham, the Supreme Court said.[32]

In so declaring the Future Trading Act unconstitutional, however, the Chief Justice of the United States and former President, William Howard Taft, felt constrained to provide Congress with a blueprint for doing the job the right way. Use the commerce clause, Taft said. Declare that futures trading, if unregulated, will burden interstate commerce to the detriment of the national economy, Taft advised.[33]

Congress willingly and promptly used the commerce clause to regulate futures trading in time for the November 1922 elections. With cut and paste, the 1921 Future Trading Act became the Grain Futures Act of 1922.[34] The next year, when the Supreme Court dutifully passed judgment,[35] the result was preordained, despite the fact that the Chicago

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[29] 61 CONG. REC. 4761, 4763 (Aug. 9, 1921) (remarks of Sen. Capper).

[30] Act of August 24, 1921, ch. 86, 42 Stat. 187 (1921). For a discussion of the relationship of the earlier Cotton Futures Act of 1917 to the Future Trading Act of 1921, *see* Clark, *Genealogy and Genetics of 'Contract of Sale of a Commodity for Future Delivery' in the Commodity Exchange Act*, 27 EMORY L. J. 1175, 1183-1189 (1978).

[31] Hill v. Wallace, 259 U.S. 44 (1922).

[32] *See* Stassen, *supra* note 19, at 36-37.

[33] Hill v. Wallace, 259 U.S. 44, 69 (1977). Representative Ellis of Missouri observed at the time that "the writer of the opinion, the distinguished Chief Justice, was prompted to depart somewhat from the direct path to his conclusions to suggest another possible basis for the bureaucratic sway promoters of this legislation have so ardently craved." 62 CONG. REC. 9419 (June 26, 1922) (remarks of Rep. Ellis). Ellis also noted that the Chief Justice's opinion reflected in that dicta "a tolerance of bureaucratic control of private business for which I have neither sympathy nor patience." *Id.*

[34] *See* Stassen, *supra* note 19, at 37-43.

[35] Board of Trade v. Olsen, 262 U.S. 1 (1923) (Grain Futures Act permissible as an exercise of Congress' commerce clause power).

Board of Trade adduced a great body of evidence demonstrating that Congress' hasty commerce-clause declarations were economic gibberish.[36]

Thus the Grain Futures Act emerged in 1922 as a model for further federal economic regulation, including the federal securities laws which appeared over a decade later.[37]

The 1922 Act prescribed a system of oversight regulation. Commodity exchanges were to be licensed—or "designated"—as "contract markets" for particular futures. As contract markets, the exchanges had to provide for the prevention of manipulation, and to meet other requirements. The Secretary of Agriculture would monitor the exchanges' activity and, if the exchanges failed to meet statutory standards, the Secretary could revoke "designation." The federal noose was in place, but only loosely.[38]

Not surprisingly, the Department of Agriculture quickly determined

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[36] *See* Stassen, *supra* note 19, at 37-45; *see also* Stassen, *Facts Are Stubborn Things: Section 3 Should Be Revised*, 1 J. FUTURES MARKETS 457-460 (1981).

[37] The *George Washington Law Review* observed in 1934 that this "opinion of Mr. Chief Justice Taft [in *Board of Trade v. Olsen*] is of decided interest in the broad philosophy which it expounds. It clearly goes beyond the current of trade doctrine of the earlier [*Stafford*] case and expresses a willingness to proceed on a foundation of 'national public interest.' This willingness, thus announced, may well be of extreme importance in furnishing a benchmark for the high court in its later determinations. . . . As a legal proposition much encouragement lies . . . for those who believe that progress implies an increase in governmental supervision such as the currently proposed National Securities Act." Mayers, *Federal Regulatory Legislation, the Federal Grain Futures Act*, 2 GEO. WASH. L. REV. 457, 459, 462 (1934).

In 1932, when Representative Fiorello LaGuardia of New York introduced legislation to "protect banking and commerce against short sales of securities issued by corporations engaged therein," § 3 of the LaGuardia bill was patterned after § 3 of the Grain Futures Act. *See* H.R. 4, 72d Cong., 1st Sess. (1932); *Short Selling of Securities: Hearings Before the House Committee on the Judiciary on H.R. 4, H.R. 4604, H.R. 4638, and H.R. 4639*, 72d Cong., 1st Sess. 2, 49 (1932) [hereinafter cited as *Hearings*].

Testimony on the LaGuardia and related bills—which would have regulated or prohibited short selling of stock—is strikingly reminiscent of Congress' 1921-22 deliberations concerning grain futures trading. For example, a Frank D. Cummings of Portland, Maine advised the House Judiciary Committee in 1932 that the Committee was confronted "with a very strange and anomalous condition. With every other form of gambling which you can name banned by law, how in Heaven's name can you justify the greatest gambling institution on the face of this earth." *Hearings* at 89. Mr. Cummings referred to the New York Stock Exchange, not the Chicago Board of Trade. Obviously, short selling—described by one witness as "selling for future delivery"—was "an admirable scapegoat upon whose head we may all read the signs of failure and loss." *Id.* at 160, 161 (statement of Joseph Stagg Lawrence). In fact, according to Representative Adolph Sabath of Illinois, "[i]t was the incessant and wanton destruction of security and commodity values by short selling that caused, and is prolonging, the depression." *Id.* at 230.

Short-selling has been a favorite whipping boy of politicians for centuries. In 1733, for example, Sir John Bernard introduced a Bill in Parliament which became law as An Act to Prevent the Infamous Practice of Stockjobbing. The Act banned all option dealing and all sales of stock which the seller did not possess. Its impact on speculation was negligible, however. *See* E. MORGAN, A HISTORY OF MONEY 135-36 (1965).

[38] *See* Rainbolt, *supra* note 10, at 8.

that Congress vested it with inadequate powers—too many gaps and loopholes, too loose a noose. The battle to expand the Grain Futures Act began.[39]

In 1936, after Congress imposed regulations on the New York Stock Exchange (by way of punishment for causing the Great Depression, in particular[40]), Agriculture Department-sponsored amendments to the Grain Futures Act finally reached President Roosevelt's desk.[41] Of foremost interest to legal scholars, the name of the 1922 cut-and-paste revision of the unconstitutional 1921 Future Trading Act became the Commodity Exchange Act—the current misappellation for the statute that still governs futures and options trading, but which statute has very little to do with commodities as commodities.

In addition, the amendments tightened the noose on futures trading considerably, and the statute began to take on a less agrarian, more consumerist tone. For example, the public speculator—a subject of scorn and denunciation in the 1920's—suddenly became the beneficiary of statutory protections against fraud and conversion.[42]

The change in the statute's title from the Grain Futures Act to the Commodity Exchange Act reflected one phenomenon—the futures trading mechanism now extended to goods other than grains. Congress chose to embrace these other goods by defining and redefining "commodity" as a term of art. Thus began a process of periodically updating the statute's definition as Congress deemed new futures products worthy of the Department's oversight. Many new futures products were not deemed worthy of protection, such as coffee, sugar, cocoa, and silver, all of which were actively traded on New York exchanges.[43]

One commodity Congress deemed worthy of protection was onions. In 1955 Congress added onions to the list, and thus onion futures became subject to federal regulation.[44] Faced with low onion prices, onion growers immediately discerned that futures trading caused low prices. Onion growers enlisted a number of congressional champions, including an otherwise not-so-radical congressman from Michigan named Gerald Ford; and these legislators introduced bills to make onion futures trading a federal crime. Success came in 1958.[45] The onion growers of Michigan achieved the futures ban that the grain farmers of Kansas had dreamed of once.

Significant amendments of more general interest came in 1968, after

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[40] *See* text accompanying note 37 *supra*.

[41] Act of June 15, 1936, ch. 545, 49 Stat. 1491 (1936).

[42] *See The Commodity Exchange Act of 1936*, 85 UNIV. OF PA. L. REV. 614 (1937); Johnson, *The Commodity Futures Trading Commission Act: Selected Challenges to Agriculture*, 1976 UNIV. ILL. L. F. 509, 512-514 (1976) [hereinafter cited as Johnson].

[43] *See* 7 U.S.C.A. § 2 (1980) (Historical Note); *see also* Johnson, *supra* note 42, at 514-515.

[44] Act of July 26, 1955, ch. 382, § 1, 69 Stat. 37 (1955).

[45] 7 U.S.C. § 13-1 (1976); *see* Stassen, *supra* note 19, at 33.

years of agency lobbying. Again, the federal government tightened its noose, particularly on the exchanges. The amendments imposed new duties and filing requirements, although Congress rejected proposals for direct federal regulation of security deposits for futures transactions confusingly called "margins" by the futures industry.[46]

A new decade dawned, and with it the world agricultural economy changed. From a period of U.S. agricultural surpluses an era of shortages emerged, as foreign demand for American grain and protein products soared.[47] Then the anchovy schools disappeared from the waters near Peru—a singularly seminal event in the history of futures legislation.[48]

As grain and soybean prices rapidly rose thereafter, Congress began a feverish effort to convince everyone that it was on top of the situation.[49] The futures markets became a principal focus of inquiry, based upon the time-honored maxim that if the temperature is too hot, blame the thermometer.

The most important piece of futures legislation in fifty years, the Commodity Futures Trading Commission Act of 1974,[50] then emerged. This Act extensively amended the Commodity Exchange Act. Most significantly, the Act established a five-member federal commission (the CFTC), and Congress transferred all authority under the Commodity Exchange Act from the Department of Agriculture to the CFTC. Unabashedly modeled on that paradigm of regulatory virtue, the Securities and Exchange Commission, the CFTC assumed broad and pervasive powers, including the power to close markets and fix prices in response to self-proclaimed market emergencies.[51] The long-suffering bureaucrats of the Department of Agriculture who found themselves a part of this new super agency thought they had died and gone to heaven.

Even the SEC envied the CFTC—or soon envied it. Congress buried among the 1974 amendments to the Commodity Exchange Act an ex-

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[46] Pub. Law No. 90-258, 82 Stat. 26 (Feb. 19, 1968). *See* Johnson, *supra* note 42, at 515; H.R. REP. No. 743, 90th Cong., 1st Sess. (1967). *See also Tightened Regulation for Commodity Exchanges*, 55 A.B.A. J. 858 (Sept. 1969).

[47] *See* S. REP. No. 93-1131, 93d Cong., 2d Sess. 18-19 (1974).

[48] *See* CHICAGO BOARD OF TRADE, THE SOYBEAN PHENOMENON 5, 8 (1973). *See also* Greenstone, *The CFTC and Government Reorganization: Preserving Regulatory Independence*, 33 BUS. LAW. 163, 177-185 (1977).

[49] *See, e.g.,* SMALL BUSINESS PROBLEMS INVOLVED IN THE MARKETING OF GRAIN AND OTHER COMMODITIES, H. R. REP. No. 93-963, 93d Cong., 2d Sess. (1974). A bandwagon effect resulted, making legislation inevitable. As one who closely observed this process in 1973 and 1974, I am particularly amused by the learned commentaries which solemnly proclaim that the 1974 Amendments resulted from a failure of the self-regulatory mechanisms then in place. *See, e.g.,* Slater, *The Commodities Game Has A New Referee*, 52 CHI.-KENT L. REV. 438 (1975).

[50] Pub. Law. No. 93-463, 88 Stat. 1389 (1974).

[51] *See* Valdez, *Modernizing the Regulation of Commodity Futures Markets*, 13 HARV. J. LEGIS. 35 (1975); I P. JOHNSON, COMMODITIES REGULATION 175-190 (1982). *See also* Board of Trade of the City of Chicago v. Commodity Futures Trading Comm'n, 605 F.2d 1016 (1979), *cert. denied*, 446 U.S. 928 (1980) (CFTC emergency powers not subject to judicial review).

panded definition of the term "commodity" to include literally anything, with one exception, which was or might in the future be the subject of futures trading. As a corollary, Congress awarded the new CFTC exclusive regulatory jurisdiction over futures trading in any of these "commodities." Congress expressly intended to accommodate the creation of new futures markets in federal or federally-insured debt securities, free of any SEC meddling.[52]

Thus, in a few words, Congress expanded the Commodity Exchange Act to embrace not only all agricultural futures (including previously unregulated agricultural commodities such as coffee, cocoa and sugar), but also silver and gold, petroleum products, Government National Mortgage Association certificates, and U.S. Treasury bonds, bills, and notes. The one exception was and is onions, the sole item'in this universe which under present law cannot be a "commodity."[53]

A floor amendment offered by a congressman with serious reservations about the necessity for yet another federal agency (a rather forlorn voice in 1974) subjected the CFTC to a four-year "sunset" provision. Thus, in 1978, the CFTC's authority to receive and spend appropriated funds was due to expire. The amendment obviously intended to subject the new futures trading agency to a thorough and searching congressional examination.[54]

The CFTC officially came into being on April 21, 1975. Less than five months later, the CFTC designated the Chicago Board of Trade as a contract market in Government National Mortgage Association certificates. The SEC/CFTC jurisdictional battle began in earnest.[55]

All too quickly for the new CFTC, 1978 and "sunset" hearings arrived, with jurisdiction as a major theme. Despite considerable effort and formidable allies, however, Congress rebuffed the SEC soundly. Congress affirmed CFTC exclusive jurisdiction over "financial commodities"—including jurisdiction over stock-index futures.[56]

In a number of areas, however, commentators criticized the CFTC harshly, especially its handling of trading in London options.[57] The congressional solution, however, was to affirm rather than diminish CFTC authority. Moreover, Senator Thomas Eagleton, finding the CFTC's over-all performance particularly disgraceful, urged that Congress give

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[52] *See generally* Johnson, *The Perimeters of Regulatory Jurisdiction Under the Commodity Futures Trading Commission Act*, 25 DRAKE L. REV. 61 (1975); I P. JOHNSON, COMMODITIES REGULATION 33-53 (1982).

[53] *See* 7 U.S.C. § 2 (1976).

[54] *See* 120 CONG. REC. 10766 (1974) (remarks of Rep. Broyhill). Mr. Broyhill was concerned that the CFTC might become an "inflated bureaucracy." *Id.* at 10767. *See also* Young, *A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission*, 27 EMORY L. J. 853, 858-859 (1978) [hereinafter cited as Young].

[55] *See* II P. JOHNSON, COMMODITIES REGULATION 40-45 (1982).

[56] *Id.*

[57] *See* Young, *supra* note 54, at 862-91; Johnson, *The Commodity Futures Trading Commission Reauthorization Process: A View From The Trenches*, 1979 DET. C. L. REV. 1-50.

the CFTC the authority to pass on at least a portion of its regulatory costs to market participants.[58] Congress responded by enacting this provision in the 1978 reauthorization legislation, the Futures Trading Act of 1978.[59] Furthermore, Congress found sunset review such a wholesome experience that it slated a new sunset for 1982.[60]

As I conclude this short history, Sunset II nears its final moments. A Futures Trading Act of 1982 is wending its way through Congress to expand CFTC authority in some areas and contract it in others. Most significantly, the legislation, along with companion legislation to revise the federal securities laws, will affirm once again CFTC jurisdiction over futures on financial commodities, options on these futures, and futures on stock indices. At the same time, however, the Futures Trading Act of 1982 will confer on the SEC jurisdiction over options directly on financial commodities.[61]

The protracted hearings on this jurisdictional reallocation remind me of where the commodities markets were near the outset of this history. The same rhetoric Senator Capper of Kansas used in 1921 to assault grain futures trading is echoing today. The target today is not grain futures, however. Quite to the contrary, congressional critics most readily concede that grain futures trading is economically desirable, and in fact vital.

Today, the critics' target is the new and "exotic" futures on financial commodities, particularly stock indices. Fortunately, these modern-day Cappers thus far have been unsuccessful in halting the natural and necessary evolution of the futures trading mechanism which so clearly benefits the nation's economy.

The danger of futures trading regulation today is not simply mindless prohibitions such as now pertain to onion futures, but also suffocating, uneconomic overregulation of futures trading generally. I am reminded of the words of the current Chairman of the CFTC on the subject of "single-purpose regulatory agencies":

> It makes me wonder whether pure regulatory agencies are a good idea. Maybe if they had some other job to do, in addition to regulating, they could please the "boss"—Congress—without having to show each year that the noose has been tightened further around an industry's neck. The danger posed by pure regulatory agencies is not that they police an industry, but that there is no other way that they can satisfy the internal and external pressures for constant growth.[62]

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[58] 124 CONG. REC. S10574 (daily ed. July 12, 1978).

[59] Act of September 30, 1978, Pub. Law No. 95-405, § 26.

[60] *See* 7 U.S.C. § 16(d) (Supp. II 1978).

[61] *See* text accompanying note 4 *supra*.

[62] Johnson, "Random Thoughts" (Remarks to the Futures Industry Association's Law and Compliance Division, New York City, May 24, 1979) at 7-8.

The federal noose is already tight, and shows no signs of loosening. Yet strangulation does not seem imminent. If nothing else, a review of the history of futures legislation in the United States teaches that these American futures trading institutions are hearty economic organisms that have learned how to survive in a most inhospitable environment. Over time, the environment has and will continue to become more hospitable, as more segments of the American economy better understand the economic benefits of futures trading.

Appendix

Since the enactment of the Future Trading Act of 1921, the same statutory scheme has regulated commodity options and commodity futures, which were regarded as related, if not identical, economic activities.[1] The present Commodity Exchange Act is derived substantially from the Future Trading Act of 1921.

The Future Trading Act imposed a prohibitory tax on "contracts of sale of grain for future delivery," except (1) where the seller owned or produced the grain sold for future delivery, or (2) where the contract was made by or through a member of a "board of trade" licensed by the

[1] Congress regarded options and futures as related instruments long before 1921. For example, in 1890 the House Agriculture Committee reported out a bill which would have taxed out of business so-called "dealers" in "contracts or agreements for . . . future delivery" known as "options" and "futures." In the view of the Committee, those who dealt in " 'options' and 'futures' contracts, which is mere gambling, no matter what less offensive name such transactions may be designated, neither add to the supply nor increase the demand for consumption, nor do they accomplish any useful purpose by their calling; but on the contrary, they speculate in fictitious products." H.R. 5353, 51st Cong., 1st Sess. (1890). Lumped together for condemnation were all the " 'bulls' and the 'bears' who deal in 'puts' and 'calls' and 'futures' contracts in the 'bucket shops' and 'grain pits' of the country." H.R. REP. NO. 1321, 51st Cong., 1st Sess. 2 (1890). The House Agriculture Committee reported out similar legislation in 1892, with equal invective. *See* H.R. REP. NO. 969, 52d Cong., 1st Sess. (1892). *See also* G. HOFFMAN, FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES 365-66 (1932) [*Hoffman*]. Charles Taylor in his *History of the Board of Trade of the City of Chicago* chronicles for the year 1892 "the Anti-option bills then pending in Congress" which would have "prohibited all trading for future delivery where the property involved was not in actual existence at the time the deal was made". C. TAYLOR, HISTORY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO (1917). Taylor notes that, "in order to strengthen the Board's position as to legitimate trade, an effort was made to stop trading Puts and Calls." Taylor goes to great length—writing in 1917—to disassociate the Board of Trade from the trade in "real 'options,' which the courts have uniformly pronounced gambling contracts, and void at law." *Id.* at 837, 838, 898. *See also Hearings Before the Senate Agriculture & Forestry Committee on H.R. 11843*, 67th Cong., 2d Sess. 13-15, 30, 45 (1922). Nonetheless, as Hoffman observed in 1932, "[t]rading in futures is frequently referred to as option trading." *Hoffman* at 28, 99, 103.

Secretary of Agriculture as a "contract market." The Act carved out a special class of "future trading" known as "privilege[s] or option[s] for a contract either of purchase or sale of grain . . . known to the trade as 'privileges', 'bids', 'offers', 'puts and calls', 'indemnities', or 'ups and downs.' " The Act made this class of "future trading" absolutely subject to the prohibitory tax.[2]

The Supreme Court declared imposition of the tax on "futures" unconstitutional.[3] The Supreme Court likewise declared imposition of the tax on "privileges or options" unconstitutional, but not until 1926.[4] In both instances, the Supreme Court held that the statute was not, and was not intended to be, a revenue raising measure.[5]

Following the Supreme Court's decision in *Hill v. Wallace*, Congress promptly reenacted the 1921 Act in substantially the same form in 1922 but grounded the Act on Congress' powers under the Commerce Clause, to the subsequent satisfaction of the Supreme Court.[6] This new Act—the Grain Futures Act—did not expressly regulate "options" as opposed to "futures" because the Future Trading Act was considered to still be in effect with regard to options.[7]

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[2] Act of August 24, 1921, ch. 86, §§ 3 & 4, 42 Stat. 187 (1921).

[3] Hill v. Wallace, 259 U.S. 44 (1922).

[4] Trusler v. Crooks, 269 U.S. 475 (1926).

[5] Section 3 of the 1921 Act clearly refused to limit the prohibitory tax on options to options calling for the purchase or sale of futures contracts. Nor was the tax limited to exchange-traded options such as "indemnities," which were the subject of the specific transaction at issue in *Trusler* and which are an American antecedent to current plans for exchange-traded commodity options. *See, e.g.*, 61 CONG. REC. 1316, 1323-24 (1921).

[6] Board of Trade v. Olsen, 262 U.S. 1 (1923).

[7] "The word 'options,' as used in the grain trade, has a technical meaning and refers to such transactions as 'puts and calls,' 'ups and downs,' 'indemnities,' which, while *they are also 'futures'* within the broad meaning of that term, need not be included in this bill because they are subject to the tax of 20 cents per bushel laid by the future trading act of August 24, 1921 (42 Stat. 187)." S. REP. NO. 871, 67th Cong., 2d Sess. 1 (1922). The Senate Agriculture and Forestry Committee was explaining why the words "options or" were stricken from this introductory phrase to § 3 of the bill (§ 3 of the current Commodity Exchange Act) as passed by the House: "That transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'options' or 'futures' are affected with a national public interest". *See* 62 CONG. REC. 9419 (1922). *See also* Hoffman, *supra* note 1, at 370; *Grain Futures Act: Hearings Before the House Agriculture Committee*, 67th Cong., 2d Sess. 2, 12-13 (1922). The draftsmen of the 1922 Act clearly understood that commodity options—essentially conditional contracts to acquire either a particular commodity or a futures contract for that commodity—fall within the meaning of the term "contract of sale of a commodity for future delivery" as that term is defined and used in the Commodity Exchange Act. *See* § 2 (a)(1), 7 U.S.C. § 2 (1976). As recently as 1973, the principal author of the Commodity Futures Trading Commission Act of 1974, in introducing that legislation, confirmed that commodity options are generic futures when he observed that unscrupulous option vendors were "trafficking exclusively in *futures* that are not regulated by the present Act." H.R. REP. NO. 975, 93rd Cong., 2d Sess. 37 (1974) (emphasis added). *See also* H.R. REP. NO. 975 at 50; S. REP. NO. 1131, 93d Cong., 2d Sess. 6 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5848; Clark, *Geneology and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity*

Thus, while the drafters of the 1922 Act understood that commodity options (then limited to grain) were generic futures (a type of "contract of sale" of a commodity "for future delivery" to which the 1922 Act and the Commodity Exchange Act today are directed), Congress assumed that it effectively prohibited trading of these options.

Efforts to amend the 1922 Act to deal with the Supreme Court's decision in *Trusler v. Crooks* declaring the options tax unconstitutional—which tax was an important element in the 1921-22 congressional program to regulate "future trading"—finally came to fruition in 1936. Congress renamed the 1922 Act the Commodity Exchange Act (the 1921 Future Trading Act had been made effectively inoperative by virtue of the two Supreme Court decisions),[8] and enacted a total ban on "puts and calls" on all "commodities" as expressly defined in section 2 of the Act.[9]

Exchange Act, 27 EMORY L.J. 1175, 1194-98 (1978); Lower, *The Regulation of Commodity Options*, 1978 DUKE L.J. 1095, 1128 n. 165 (1978); *see* text accompanying note 9 *infra*.

[8] Congress finally repealed certain vestigial sections of the 1921 Act in 1976 in connection with the enactment of title 5 of the U.S. Code. Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8(c), 80 Stat. 645.

[9] Commodity Exchange Act of 1936, § 4c, ch. 545, 49 Stat. 1491 [current version at § 4c(a), 7 U.S.C. § 6c(a) (1976)]. The Supreme Court upheld the constitutionality of § 4c in Moore v. Chicago Mercantile Exchange, 90 F.2d 735, 737, 740 (7th Cir. 1937), *cert. denied*, 302 U.S. 710 (1937). Senator Pope, Senate floor manager for the 1936 amendments which added section 4c, inserted in the Congressional Record a detailed glossary he prepared of "technical terms which are used in trading in futures." *See* 80 CONG. REC. 6159, 6612 (1936). Senator Pope described "futures" as "a general term used to designate any or all contracts covering the sale of commodities for future delivery on or subject to exchange rules." That general term clearly included both "futures contracts" and "privileges, indemnities, bids, offers, puts, calls, etc." "Futures contracts" were described as "executory contracts, the detailed terms of which are set forth in exchange rules and made a part of the contracts . . .". "[P]rivileges . . . etc." were described as "true option contracts . . . to buy or sell, as the case may be, a stated amount of a given commodity for future delivery at a then stipulated price". 80 CONG. REC. 8088-89 (1936). *See also* 80 CONG. REC. 6162 (1936) (remarks of Senator Pope: Commodity option contracts are "contracts wherein . . . the buyer . . . obtains the right . . . to buy or sell . . . a given commodity for future delivery . . .") Thus it was also clear to Senator Pope that commodity option contracts are generic futures embraced by the term "contract of sale of a commodity for future delivery" as that term is used in the Act. *See, e.g.*, § 2a(1). Significantly, this is the position now taken by the CFTC in its new Regulation § 33.2 in connection with its options pilot program. 17 C.F.R. § 33.2 (1981).

In the same vein, Paul Mehl in his 1934 monograph on "Trading in Privileges on the Chicago Board of Trade" viewed "privileges" as but a variation of the "ordinary future contract" and noted that Europeans considered "privileges" (or "premiums") as "ordinary contracts for future delivery with a special stipulation". USDA Circular No. 323, 2-3. Mehl was senior agricultural economist for the Grain Futures Administration.

The options ban enacted in 1936 in section 4c [now codified as section 4c(a), 7 U.S.C. § 6c(a)] was in no way limited to "options on futures." See, for example, the definition of "advance and decline guarantees" (a term contained in section 4c) provided by Senator Pope. 80 CONG. REC. 8088 (1936). It was a modern-day variation of these "advance and decline guarantees"—the naked options on then unregulated commodities peddled in the early 1970s by firms such as Goldstein-Samuelson, and which definitely were not "options on futures"—which motivated Congress' enactment of section 4c(b) in 1974, as well as the conforming amendments to section 2a(1). *See* text accompanying note 13 *infra*.

In 1974, following lengthy hearings on all aspects of "future trading" (including traditional futures, options, and so-called "leverage contracts"), Congress made extensive amendments to the Commodity Exchange Act.[10] In particular, and in order "to provide a uniform regulatory structure covering all futures trading . . . [and] allow for the extension of the economic benefits of futures trading under this structure to those areas of commerce where the risk-shifting and price-discovery functions of futures markets might prove to be of value,"[11] Congress substantially expanded the definition of "commodity" to embrace a number of new items including, for example, sugar, gold, and GNMA Certificates.[12]

As a result of this expansion of the term "commodity," Congress needed to review the scope and application of the Act's options ban contained in section 4c. This review occurred at the same time that a number of commodity option scandals rocked the nation, among them the notorious Goldstein-Samuelson fraud. The activities of these option operators fell outside of the limited jurisdiction of the pre-1974 Commodity Exchange Act, and case after case demonstrated that efforts to regulate these operators' activity under federal and state securities law were ineffectual.[13]

Congress seized upon this opportunity to subject this form of "future trading" to pervasive federal oversight. First, Congress chose to keep in force the outright ban on options trading in those specifically listed "commodities" that were previously the sole subject of the Act. With regard to the many new "commodities" embraced by the Act for the first time, several of which had been the subject of the many option scandals, Congress chose to:

(1) Expressly subject this class of "future trading" to federal regulation under the Commodity Exchange Act.
(2) Vest broad regulatory authority over this economic activity in the new CFTC, which Congress specifically created "in order to assure that a single expert agency would have the

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[10] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389.

[11] *See, e.g.*, S. REP. No. 850, 95th Cong., 2d Sess. 10 (1978).

[12] *Id.* at 13, 21-22. Congress had long recognized that "the same fundamental principles apply to futures trading," regardless of the "commodity". H.R. REP. NO. 421, 74th Cong., 1st Sess. 3 (1935).

[13] *See, e.g.*, 120 CONG. REC. 34997 (statement of Senator Herman Talmadge, Chairman, Senate Agriculture and Forestry Committee, on consideration of the Conference Report on H.R. 13113): "[T]rading in . . . options relating to commodities or commodity futures . . . is now poorly regulated, if it is regulated at all." *See also* H.R. REP. NO. 975, 93d Cong., 2d Sess. 37-38, 48-50 (1974); *Hearings on S. 2485, and H.R. 13113, Senate Committee on Agriculture & Forestry*, 93d Cong., 2d Sess. 224-25, 682-83, 830-35 (1974); Note, *The Role of the Commodity Futures Trading Commission Under the Commodity Futures Trading Commission Act of 1974*, 73 MICH. L. REV. 710, 722 (1975); *see* text accompanying note 9 *supra*.

> responsibility for developing a coherent regulatory program encompassing futures trading *and related activities*."[14]

Thus Congress again recognized that commodity options are generic futures that are properly the subject of the same regulatory program. Congress also anticipated that the public would trade such options in due course on the nation's commodity exchanges, subject to the new CFTC's pervasive oversight jurisdiction. Congress hoped, in fact, that such exchange trading would simply drive out the cheats and charlatans who had become so prominent.[15]

Armed with broad authority under section 4c(b) of the Act, the new CFTC promptly set out to regulate the option trade. On April 25, 1975, only four days after the 1974 amendments became effective and the CFTC assumed administrative authority under the Commodity Exchange Act, the CFTC proposed interim antifraud rules covering option transactions.[16]

Less than two months later, the CFTC's option antifraud rule was promulgated.[17] The CFTC specifically modeled the rule on section 4b of the Commodity Exchange Act, as opposed to SEC rule 10b-5 as originally proposed, lest "an uncritical application of security law principles and practices" result.[18] Thus, the CFTC recognized, as Congress had recognized since at least 1921, that commodity options are generic futures rather than securities.

On October 22, 1975, in a detailed *Federal Register* release, the CFTC expressly solicited the views of the public regarding the proper over-all regulatory approach for options, including the possibility of forbidding options altogether, or, as an alternative, restricting their trading to CFTC-licensed exchanges.[19] In addition, the CFTC established a formal advisory committee of industry and academic experts to make recommendations to the CFTC on the subject of options.[20] This advisory committee held public hearings on January 21, 1976.[21]

On February 20, 1976, in a twelve-page *Federal Register* release, the CFTC proposed detailed option regulations. In this connection, the Com-

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[14] S. REP. No. 850, 95th Cong., 2d Sess. 13 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2087, 2107.

[15] *See, e.g.*, S. REP. No. 1131, 93d Cong., 2d Sess. 26 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5866-67; H.R. REP. No. 975, 93d Cong., 2d Sess. 31 (1974).

[16] 40 Fed. Reg. 18187 (1975); *see also* 40 Fed. Reg. 19020 (1975).

[17] 40 Fed. Reg. 26504 (1975).

[18] 17 C.F.R. 30.01 (1982); 40 Fed. Reg. 26505 (1975).

[19] 40 Fed. Reg. 49360 (1975).

[20] *See* 40 Fed. Reg. 49360 (1975); 40 Fed. Reg. 32866 (1975).

[21] *See* 41 Fed. Reg. 814 (1976); *see also* 41 Fed. Reg. 5654 (1976); 41 Fed. Reg. 7170 (1976) (notices of open meetings). The advisory committee's recommended policies on commodity option transactions are contained in a voluminous report dated July 16, 1976. *See Recommended Policies on Commodity Option Transactions*, COMM. FUT. L. REP. (CCH) (No. 26, Extra Ed., July 15, 1976).

mission formally announced that it was "affirmatively considering permitting commodity option transactions" to be traded on CFTC-licensed exchanges, and that it might adopt regulations restricting all options trading to such exchanges.[22]

On October 8, 1976, the CFTC promulgated its comprehensive option regulations, including "Regulation of Commodity Options Transactions."[23] At the same time, the CFTC announced that it planned to adopt "comprehensive regulations for a limited, rigidly controlled three-year (or shorter) test program that ultimately will require commodity options to be purchased and sold on or through the facilities" of CFTC-licensed exchanges. The test program would be designed "to determine the nature and the extent of the impact of commodity option trading on the underlying futures and cash markets," in order to "enable the Commission to obtain sufficient data on which to base a permanent regulatory program concerning commodity options or, if necessary, to determine to prohibit trading in commodity options in the United States."[24]

The *Federal Register* published proposed comprehensive regulations for the pilot program for exchange-traded options on April 5, 1977.[25] The *Federal Register* published a revised proposal, reflecting the comments filed and testimony received at three days of public hearings in May of 1977, and published in the *Federal Register* on October 17, 1977.[26] The CFTC considered options on sugar, metals, and GNMA's as part of the program.[27]

Throughout this period, commodity option abuses continued despite the CFTC's best efforts. The most notorious incident involved the Lloyd Carr firm.[28] Thus, on February 6, 1978, the CFTC proposed to generally prohibit all commodity option transactions "until such time as the Commission determines that adequate protection to option customers can

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[22] 41 Fed. Reg. 774 (1976).

[23] 41 Fed. Reg. 44560 (1976). The CFTC modified these regulations slightly prior to their effective date. 41 Fed. Reg. 51808 (1976). *See also* 42 Fed. Reg. 61831 (1977) (amendments); 41 Fed. Reg. 16685 (1976) (release of letter to Congress relative to delay in implementing option regulations).

[24] 41 Fed. Reg. 44560 (1976).

[25] 42 Fed. Reg. 18246 (1977).

[26] 42 Fed. Reg. 55538 (1977).

[27] *See* Letter to the Hon. Herman E. Talmadge from William T. Bagley (CFTC Chairman), reprinted in *Reauthorization of the Commodity Futures Trading Commission, Hearings Before the Senate Subcommittee on Agricultural Research and General Legislation of the Committee on Agriculture, Nutrition, and Forestry*, 95th Cong., 2d Sess. 365-66 (1978) (*"1978 Senate Hearings"*).

[28] *See* S. REP. No. 850, 95th Cong., 2d Sess. 14 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2087, 2102; H.R. REP. No. 1181, 95th Cong., 2d Sess. 16, 100-102 (1978); Schneider & Santo, *Commodity Futures Trading Commission: A Review of the 1978 Legislation*, 34 BUS. LAW 1755, 1766 (1979); Johnson, *The Commodity Futures Trading Commission Reauthorization Process*, 1979 DET. C.L. REV. 1, 20, 26-31 (1979); (1976) CFTC Annual Report 28, 68-69; (1977) CFTC Annual Report 18-19; (1978) CFTC Annual Report 34-41.

reasonably be assured."[29] On April 17, 1978, the CFTC promulgated its prohibition.[30]

In the spring of 1978, the controversy over commodity options again became the subject of extensive congressional review as a part of the CFTC-reauthorization process mandated in the 1974 amendments to the Commodity Exchange Act. As a result of this process Congress adopted several amendments to the Act, including section 4c(c), which is a codification of the earlier CFTC option ban promulgated under the authority of section 4c(b) of the Act.[31]

On April 13, 1979, the CFTC reaffirmed its intention to implement a program for exchange-traded options in conformity with the congressional intent in adopting the 1978 Commodity Exchange Act amendments.[32] The CFTC solicited additional comments from the public.[33]

Finally, on June 29, 1981, the CFTC proposed and published in the *Federal Register* revised comprehensive regulations for exchange-traded options on futures contracts, which further reflected the public comments received during this lengthy and exhaustive rule-making proceeding which formally began on October 22, 1975.[34] On September 8, 1981, the CFTC formally voted to adopt regulations substantively similar to those proposed on June 29. Each exchange which has been designated as a "contract market" for a futures contract underlying a proposed option may apply for designation as a contract market for the option.[35]

The CFTC designed its "closely controlled" pilot program in part, "to provide the Commission with the information necessary to make a detailed economic analysis . . . in the three principal areas: (1) the degree and type of commercial use of options; (2) the effect of options-trading on the underlying futures and cash markets; and (3) the economic characteristics of the option pricing process."[36] The pilot program expressly contemplates exchange-traded options on sugar, gold, and GNMA Certificates.[37]

Under the terms of section 4c(c) of the Act, which history clearly reveals to be consistent with a 60-year congressional determination to regulate all "future trading" activity under the same statutory scheme,

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[29] 43 Fed. Reg. 4869 (1978).

[30] 43 Fed. Reg. 16153 (1978).

[31] Futures Trading Act of 1978, Pub. L. No. 95-405, § 3, 92 Stat. 865. In connection with Congress' action, *see also* 46 Fed. Reg. 23469 (1981); 43 Fed. Reg. 23704 (1978); 43 Fed. Reg. 47492 (1978); 43 Fed. Reg. 52467 (1978); 43 Fed. Reg. 54220 (1978); 43 Fed. Reg. 59353 (1978).

[32] *See* S. REP. No. 850, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2087; 124 CONG. REC. H10683 (daily ed. Sept. 25, 1978).

[33] 44 Fed. Reg. 22088 (1979).

[34] 46 Fed. Reg. 33293 (1981).

[35] CFTC Release No. 803-81 (Sept. 10, 1981).

[36] 46 Fed. Reg. 33293, 33294 (1981).

[37] 46 Fed. Reg. 33297 (1981).

the Commission's regulations governing exchange-traded options could not become effective until the expiration of 30 calendar days of continuous congressional session after the CFTC sent to its house and senate oversight committees "documentation of its ability to regulate successfully such [commodity option] transactions."[38] The CFTC transmitted this documentation on September 18, 1981.[39] The 30-day time period expired on October 25, 1981;[40] and on November 3, 1981 the *Federal Register* published the CFTC's final rules to be effective on December 3, 1981.[41]

On November 3, 1981, the CFTC also solicited specific comments on its proposal to supplement the pilot program with rules authorizing exchange-traded options on physical commodities.[42] The CFTC proposed specific regulations to accomplish this on June 30, 1982.[43]

Previously, in March of 1982, the Seventh Circuit Court of Appeals confirmed the CFTC's jurisdiction over all options trading on "commodities" regulated under the Commodity Exchange Act (including GNMA's).[44] At the same time, the court held that the Securities and Exchange Commission had no jurisdiction over such options.

Legislation pending in Congress in the summer of 1982, if enacted, will vest the SEC with jurisdiction over options directly on securities, divest the CFTC of jurisdiction, even if the securities are the subject of futures trading, while confirming CFTC jurisdiction over options on futures (including futures on securities) and on physicals involving all other commodities that the Commodity Exchange Act regulates.

This legislation results from a "jurisdictional accord" that the CFTC and SEC arrived at prior to the Seventh Circuit decision.[45]

[38] It is a felony under § 9(b) of the Act, 7 U.S.C. § 13(b) (1976), knowingly to violate the provisions of section 4c(c) (as well as section 4c(b)). *See also* § 14 of the Act, 7 U.S.C. § 18 (1976) ("reparations"). For detailed discussions of commodity option regulation, particularly post-1974, *see* Lower, *The Regulation of Commodity Options*, 1978 DUKE L. J. 1095-1145 (1978); *1978 Senate Hearings*, *supra* note 27, at 313-68, 378-402, 465-70, 480-501.

[39] Letters from CFTC Chairman Philip McB. Johnson to Congressman E (Kika) de la Garza and Senator Jesse Helms (Sept. 18, 1981), with enclosures.

[40] *See* 46 Fed. Reg. 54570 (November 3, 1981).

[41] 46 Fed. Reg. 54500-54536 (November 3, 1981).

[42] 46 Fed. Reg. 54570-71 (1981).

[43] 47 Fed. Reg. 28401-28425 (1982).

[44] Board of Trade of the City of Chicago v. SEC, 677 F.2d 1137 (7th Cir. 1982).

[45] *See, e.g.*, H.R. REP. No. 97-565 (Part 1), 97th Cong., 2d Sess. 38-40, 127-28 (1982).