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The Commodity Futures Trading Commission Act: Selected Challenges to Agriculture

by

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THE COMMODITY FUTURES TRADING COMMISSION ACT: SELECTED CHALLENGES TO AGRICULTURE†

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During 1975, the most actively traded commodity on the nation's futures markets was *silver*.[1] For the first time in the century and a half of commodity futures trading in the United States, an agricultural product failed to top the list. This is the latest but far from the only evidence of profound change in the character of futures trading and futures markets in this country. By one popular measure,[2] the futures industry has become a half trillion dollar business. By the same standard, the largest exchange in the world during 1975 was in Chicago,[3] not on Wall Street. Nevertheless, judged by any standard, the enormous commodity futures industry is undergoing fundamental changes in its orientation, its constituency, and its areas of growth. The market's agricultural roots, although still deep, must now compete for nourishment with other roots being sunk by newcomer commodities such as plywood, gold, foreign currencies, and even mortgage instruments.

I. THE NATURE OF FUTURES

In its simplest form, a futures contract is an agreement between a buyer and a seller that, at today's market price, the seller will deliver a certain quantity of a specific commodity to the buyer during an identi-

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1. CFTC Release No. 120-76 (Feb. 7, 1976). There were 5,300,195 silver futures contracts traded, with an estimated dollar value of $110,824,800,000.

2. The estimated dollar "value" of all commodity futures contracts traded in 1975 on American commodity exchanges, as compiled by the Commodity Futures Trading Commission, would have been nearly $600 *billion* if all had been delivered at the contract price. CFTC Release No. 120-76 (Feb. 7, 1976).

3. The 1975 Annual Report of the Chicago Board of Trade reflects, with qualifications, an estimated dollar volume of approximately $323 billion.

fied month. Payment is not due until delivery takes place. The principal terms of a "futures" are standardized in the rules of the exchange, except for the price which brokers negotiate competitively for the parties on the exchange floor. The exchange's rulebook will identify the quantity of commodity in each contract, the quality or grade of the commodity, the location for delivery, and the months for delivery.[4] Because the exchange's own rules contain all but the price term of the contract, the parties do not prepare a written agreement.[5]

After futures are acquired, the executing broker submits them to an exchange organization on the same day for "clearing." Clearing is the process whereby all transactions in one day are reconciled with each other. In addition, the clearing organization guarantees that all futures it clears will be honored, thus assuming the risk of default. To minimize that risk, the clearing organization calculates daily the gain and loss on all pending futures resulting from the day's market movement. It also collects funds on the losing futures while paying out funds on the futures showing a gain for the day. This "marking to the market" reduces the risk of default to one day's market change. Finally, the clearing organization steps into the shoes of the original contracting parties, so that the original buyer becomes obligated to the clearing organization (the substitute "seller") and the original seller becomes obligated to the clearing organization (the substitute "buyer"). By releasing the original parties from their personal obligation to one another in this fashion, the clearing organization greatly improves the negotiability of the futures.

For sound economic reasons, the great majority of market participants do not wish to fulfill their contracts by actual delivery. Although the delivery obligation is binding, an alternative method called "offset" is available to fulfill the contracts during most of the contract's life.[6] An investor can offset by acquiring an identical but opposite futures contract. For example, the owner of a "long" futures to buy the commodity may cancel that obligation by acquiring a "short" futures to sell the same commodity on the same terms, except for price. The owner of a "short" futures to sell the commodity can likewise cancel his obligation by obtaining a "long" futures to buy the same commodity on the same terms. Of course, the market value of the futures may have changed between the two transactions. If so, a gain or loss will result that the investor will either receive or pay.

4. Thus, according to the Rules of the Chicago Board of Trade, a "July corn" futures is an agreement to deliver 5,000 bushels of No. 2 yellow corn in Chicago during the month of July.

5. As a result, the commodity futures industry did not face the back-office paper crunch which beset the securities industry (with its stock certificates) in the late 1960's, despite record volume of trading. *See* S. REP. No. 2058, 93d Cong., 1st Sess. 1-3 (1973).

6. For a judicial discussion of the offset process, see Board of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 248-50 (1905).

The calculation of gain or loss on offset is essentially the same as if actual delivery had occurred at that time. The owner of a contract to buy the commodity will profit if the value has increased since that contract was entered. For instance, if a buyer (long) acquires a futures contract at $2 per bushel, and thereafter the worth of that contract increases to $2.50, he will have a gain of about 50 cents per bushel. When he offsets by selling a new contract at $2.50, the result is the same as if he had taken delivery at the original contract price of $2 and resold at the current value of $2.50. Conversely, if a seller (short) acquires a futures contract at $2, and thereafter the worth of that contract increased to $2.50, he will have a loss of about 50 cents per bushel. He loses because he has contracted to sell at a price below what it would now cost him to acquire the commodity to fulfill that sale. His offsetting long contract at $2.50 has the same effect as if it were his purchase of the actual commodity to deliver on the original "short" contract. By the same token, declining prices will produce losses for a buyer (long) because his contract price is higher than the current market, and a seller (short) would benefit because he could acquire the commodity for delivery at less than the contract price. Hence, although actual delivery does not occur under the offset process, the economic gain or loss is measured as if delivery had in fact occurred.

The unique features of a futures contract and the need for an offset process are best explained by the economic function that futures serve. A main economic purpose of futures trading is to provide price protection to persons dealing in the actual commodity or in related products. Businessmen must necessarily plan ahead. In doing so, they must make numerous assumptions about what their costs will be, and what prices they will be able to charge months in the future. If those assumptions are wrong, they may face financial crisis or even bankruptcy. In most industries today, it is only prudent to assume that production costs may exceed expectations and that sale prices may weaken in later months. Frequently, businessmen will try to soften the risk of a cost-price squeeze by setting current prices higher than they might otherwise be. When this occurs, the consumer ultimately bears a significant part of the cost of protecting the businessman against cost or pricing miscalculations. With futures contracts, however, the businessman need not make guesses about costs or prices in later months and, therefore, has far less need to charge a higher present price to customers.

The process of mitigating price uncertainty is called "hedging". Hedging is a long standing and well respected practice in the agribusiness community and, increasingly, is being used to provide price certainty outside the farm products industry. In its simplest form, hedging involves acquiring either long or short futures in a commodity that is important to the participant's business operations. If, for example, a manufacturer will need a certain raw material for production in June,

and does not wish to buy it now, he faces the risk that its cost will increase, perhaps dramatically, in the interim. The manufacturer can determine that cost fairly accurately by acquiring long futures contracts to buy the raw material in June. And, if there is a futures contract in the manufacturer's end product, he can also acquire a short futures contract to sell that product. In both instances, a futures price is established.

The manufacturer, however, will rarely take actual delivery of the raw material in his long futures or deliver the end product in his short futures. He wants price protection, but he also wishes to continue buying raw materials from his regular suppliers and selling the end product to his established customers. He can do both. The futures contracts which the manufacturer has acquired will change in price roughly as the actual or spot price for the commodity increases or declines. If the cost of the manufacturer's raw materials increases, so should the value of his long futures in those materials. He will buy the raw materials, as needed, from his regular suppliers and offset his futures. The added cost of the raw materials should be roughly equal to the profit received from the offset. The manufacturer therefore will have insulated himself from a major part of the risk of spiraling costs. Conversely, if the price received by the manufacturer should decline, the value of his short futures should also decline. Consequently, when he sells his merchandise at lower prices, he should make up most of the difference by his profit from offsetting the futures. Accordingly, a cardinal and frequently misunderstood benefit of hedging is that delivery need not be made or taken in order to realize the benefits of price protection in the futures market.

II. The Evolution of Federal Regulation

The first successful attempt by Congress to impose external federal regulation upon the commodity futures markets occurred in 1921 with the short-lived Futures Trading Act. In 1922, the Supreme Court held the Act unconstitutional because Congress had attempted to use its taxing power as a regulatory tool.[7] Undaunted, Congress enacted a substantially identical law, the Grain Futures Act, in late 1922, based upon the hearings and findings of the earlier effort but relying, this time, on the commerce clause as the basis for federal jurisdiction.[8] The Grain Futures Act of 1922 survived an attack upon its constitutionality in 1923.[9]

These early legislative efforts, unlike the later statutes of the 1930's regulating securities and stock exchanges, were not primarily designed

7. Hill v. Wallace, 259 U.S. 44 (1922).
8. Act of Sept. 21, 1922, ch. 369, 42 Stat. 998.
9. *See* Board of Trade of the City of Chicago v. Olsen, 262 U.S. 1 (1923).

to protect or benefit market investors. Instead, Congress sought to eliminate certain alleged abuses that were blamed on speculators and to assure fair dealing in the futures market for the agricultural community using futures as an adjunct to food production or marketing.[10] In order to assure loyalty to farmers' interests, Congress chose the Secretary of Agriculture to administer the Act.[11] The Grain Futures Act, as its name indicates, applied only to the staples of farm production at the time: wheat, corn, oats, barley, rye, flax, and sorghum. A licensing system was adopted to designate exchanges as "contract markets" if they met certain conditions, and futures in those grains could lawfully be traded only on designated contract markets and only through members of those markets. In addition to the use of designations to end the alleged manipulations, corners, false rumors, and other wrongdoing blamed on speculators, the Act required the location of exchanges at terminal markets for grains. It also required that exchanges grant agricultural cooperatives full privileges of exchange membership. The predominant theme of the Grain Futures Act, therefore, was to maintain the futures market as an instrument of the agricultural economy by curbing practices that Congress perceived to be converting those markets into "gambling" institutions for speculators who lacked agricultural roots. The statute had not yet evolved into a program for investor protection.

The Great Depression and, of special importance, the stock market crash occurred between the enactment of the Grain Futures Act and the next major legislative development affecting futures.[12] Because of these crises, Congress focused upon the need for greater investor protection and enacted the Securities Act of 1933 and the Securities Exchange Act of 1934 to assure fair dealing in the sale and trading of securities.[13] Two years later, when Congress made numerous amendments to the Grain Futures Act, greater protection of public investors was predictable.

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10. For years previous to the present crisis in the agricultural industry the men frequently referred to by orators as the "backbone of the Nation" have averaged barely more than a decent living by working their wives and children as well as themselves, and have realized no return for their capital. The real job we have on our hands is to find out how farming can be made as safely profitable as any other American occupation. . . . The one vital industry on which the Nation's welfare and prosperity depend, must have its chance to live and prosper if the rest of us expect to, and if it is to have this chance, the grain gambler must go.

61 CONG. REC. 4768 (1921) (remarks of Senator Capper).

11. The Secretary organized a bureau within the Department of Agriculture to perform administrative functions. Originally known as the Grain Futures Administration, its name eventually became the Commodity Exchange Authority ("CEA"). Headed by an Administrator, the CEA was headquartered at the Department of Agriculture in Washington but maintained regional offices and staffs in New York, Chicago, Kansas City, and sub-offices in Minneapolis and San Francisco.

12. The dramatic crash of the securities markets in 1929 was not paralleled by the commodity exchanges, although the downward trend in the economy as well as the government controls during the Depression affected the futures markets.

13. Securites Act of 1933, *as amended*, 15 U.S.C. §§ 77a-78hh (1970); Securities Exchange Act of 1934, *as amended*, 15 U.S.C. §§ 77aa-78a (1970).

The 1936 amendments to the Grain Futures Act included, as an initial step, changing the name to the Commodity Exchange Act. The name change came about because Congress expanded the purview of the Act beyond grains to include specified agricultural products, such as cotton, butter, and eggs.[14] Along with the change in name, the amendments also tended to transform the character of the Act from a farm bill to a statute for the regulation of commodity exchanges as investment institutions. Various new provisions designed for the protection of all market users, including speculators, further evidenced this change in emphasis. For example, federal licensing requirements were established for brokers handling futures accounts for public investors. In addition, the new Act required brokers to segregate customers' funds from their own. It likewise required licensing of persons executing orders for others on the exchange floor. It also contained antifraud provisions.[15]

The agricultural tone of the original Act was not lost entirely in 1936, however, since the Act continued to apply only to futures in enumerated farm products. The Secretary of Agriculture remained the Act's administrator. The Commission was empowered to limit the amount of futures trading in which speculators could engage and the number of futures that speculators could control. These limitations did not, however, apply to agricultural users who hedged in the market. Another amendment extended an agricultural cooperative's right to exchange membership, to include federations of such co-ops, and created procedures for reviewing an exchange's decision denying membership to co-ops. On the other hand, Congress relaxed the requirement that an exchange be located at a terminal market, permitting trading if delivery were to occur at a location and on terms acceptable to the Secretary. In addition, Congress imposed a series of substantive new requirements upon designated "contract markets," such as filing their rules, allowing inspection by federal officials, maintaining records, and setting certain terms for contracts and warehouses.

In the years following 1936, the futures industry continued to expand, and the exchanges added more agricultural commodities to their trading lists. Because the Act specifically identified each commodity to which it applied, the expanding nature of the industry necessitated repeated amendments to the Commodity Exchange Act in order to extend it to new contracts. Over time, Congress amended the Act to reach futures trading in wool, wool tops, soybeans, oils and fats, cottonseed, and certain by-products of the foregoing. Then, in 1968, came the

14. Act of June 15, 1936, ch. 545, § 1, 49 Stat. 1491.

15. The speculator's image had evidently improved somewhat since 1922. Whereas he was commonly accused of being a "gambler" in 1922, Congress now referred to speculators as "that class of citizens who have a fondness, and perhaps some aptitude, for speculative investment in commodities and who like to test their judgment concerning values and price trends by occasional and moderate speculation therein." H.R. REP. No. 421, 74th Cong., 1st Sess. 3 (1935).

third major change in the Act. In addition to extending the Act to include livestock and orange juice concentrate, which were then being traded on certain exchanges, the 1968 amendments moved the Act even closer to a program of investor protection.[16]

In 1968, licensing was extended to include certain floor brokers not previously subject to federal supervision. The amendments made the antifraud provision applicable to a broader class of persons. They further restricted the uses that licensed brokers could make of customers' funds by limiting brokers' freedom to invest customer funds. Congress added a further requirement that banks and clearing organizations, which act as depositories of such funds, segregate them. In order to regulate further the handling of customer funds, Congress directed the Secretary of Agriculture, or the exchanges themselves, subject to the Secretary's approval, to establish minimum financial requirements for licensed brokers handling customer funds. These brokers are known as "futures commission merchants."

Perhaps of greatest importance, however, was the addition of new provisions authorizing the Secretary to disapprove any exchange rule in violation of the Act and to act against an exchange that failed to enforce certain of its rules pertaining to contract terms and trading requirements. Although the clear purpose of these amendments was to induce exchanges to aggressively enforce those rules most directly concerned with the protection of the investing public, some courts implied a right to damages for enforcement deficiencies.[17] Those decisions had a recognized negative impact upon the achievement of public protection.[18]

Paralleling, and frequently exceeding, the growth of futures trading in those agricultural products identified in the Commodity Exchange Act has been the growing popularity of futures in "nonregulated" commodities—that is, futures in products not listed in the Act and consequently not regulated at the federal level.[19] Beginning in the

16. Act of February 19, 1968, Pub. L. No. 90-258, § 6, 82 Stat. 27 *amending* scattered sections of the Commodities Exchange Act, 7 U.S.C. §§ 1-17b (1970).

17. *See, e.g.*, Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304 (1973).

18. In the few years this provision has been in the present Commodity Exchange Act, there is growing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several boards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce exchange rules is a violation of the Act which will support suits by private litigants.

H.R. REP. No. 975, 93d Cong., 2d Sess. 46 (1975). *See also* Johnson, *Self-Regulation: A Primer on the Perils*, 27 ADMIN. L. REV. 387, 389-90 (1975).

19. "Nonregulated" futures are not to be confused with so-called commodity "options." The latter are a different species of speculative investment and have not been under exchange auspices or supervision. Such options are illegal under the Commodity Exchange Act for futures in the agricultural commodities listed in the Act. 7 U.S.C. § 6c (Supp. 1974).

1960's, futures in nonregulated commodities came into their own. These futures have come to include a variety of metals, such as silver, gold, copper, platinum, palladium, and mercury; building materials, such as studs, lumber, and plywood; and other items, such as coins, foreign currencies, GNMA certificates, Treasury Bills, petroleum, and propane. During 1975, the commodity in which trading volume increased the most, nearly 55 percent, was silver.[20]

III. The Commodity Futures Trading Commission Act of 1974

On April 11 and September 9, 1974, the House of Representatives and the Senate, respectively, voted to make sweeping changes in the Commodity Exchange Act. After the House Agriculture Committee conducted hearings in October of 1973,[21] H.R. 11955 was introduced in the House. The bill bore the title of "Commodity Futures Trading Commission Act of 1974." After further hearings in January, 1974, the House Agriculture Committee reported out a revised version of H.R. 11955, now numbered H.R. 13113. The bill was transmitted to the Senate Agriculture and Forestry Committee, where H.R. 13113 joined several other bills pending on the subject of amending or replacing the Commodity Exchange Act.[22] The Senate Committee held further hearings in May. A significantly different text of H.R. 13113 emerged from the Senate, and ultimately the Conference Committee reconciled it with the House version. As finally agreed upon by both Houses of the Congress, the new Act is an addition to rather than a replacement of the basic Commodity Exchange Act, whose provisions remain intact except to the extent specifically amended or revoked.

A. Title I: The New Commission

The principal focus of both the House and Senate versions of H.R. 13113 was the reorganization of the federal regulatory agency. The House version called for a new Commodity Futures Trading Commission (CFTC) comprised of five individuals who would include the Secretary of Agriculture, or his designee, as well as four "public" members, who would serve on a part-time basis and who would receive compensation on a per diem rate. The President would make all appointments to the new CFTC, subject to Senate confirmation, and after

20. CFTC Release No. 120-76 (Feb. 7, 1976).

21. During the summer and early fall of 1973, hearings had been held by the Subcommittee on Special Small Business Problems of the House Permanent Select Committee on Small Business on the subject of commodity marketing. The Subcommittee's chairman, Rep. Neal Smith (D.-Iowa) subsequently introduced a bill numbered H.R. 11195 which was assigned to the House Agriculture committee.

22. S. 2485, 93d Cong., 2d Sess. (1973); S. 2578, 93d Cong., 2d Sess. (1973); S. 2837, 93d Cong., 2d Sess. (1973).

an initial staggering of the Commissioners' terms, each would serve for 5 years. The facilities, personnel, and services of the Department of Agriculture would be available to the CFTC at cost. In these various ways, the House Agriculture Committee sought to preserve a link between futures regulatory policy and the operations of the Department of Agriculture. In addition to assuring a valuable liaison between the two government agencies, the direct involvement of the Department of Agriculture in the affairs of the new CFTC would dispel any doubt that the House Agriculture Committee is the proper Congressional body to oversee the CFTC's operations. This approach, despite the support of most members of the House Agriculture Committee, was vocally opposed by other members of the Committee, who felt that the involvement of the Secretary of Agriculture, particularly if the other Commissioners would not serve on a full-time basis, would result in the Department of Agriculture's domination of the CFTC. An attempt by some representatives to amend H.R. 13113 in this respect failed on the House floor.

The Senate Agricultural and Forestry Committee seemed inclined from the start to favor disassociating the new CFTC from the Department of Agriculture. Three members of the Senate Committee (Sens. Humphrey, McGovern, Clark) had introduced separate bills on this subject, and each bill advocated a new Commission wholly independent from the Department of Agriculture. Thus, not surprisingly, the Senate Committee reported out a revised H.R. 13113 which created a wholly independent five-man CFTC with no formal links to the Department of Agriculture. After noting that the Department of Agriculture is responsible for protecting and promoting farm income, whereas the futures markets are passive instruments designed to reflect rather than influence food prices, the Senate Committee concluded that separation of the CFTC from the Department of Agriculture would best maintain the "neutral role" of the futures markets.[23]

The House's position, in favor of ties with the Department of Agriculture, was certainly defensible. The USDA had, after all, developed considerable expertise in its 50 years of regulating the futures markets. In addition, most futures trading still centered on agricultural commodities. On the other hand, a wholly independent CFTC might tend to become a largely unmanageable and basically unanswerable entity swollen with bureaucrats and red tape. Because of the quality of the arguments advanced by each side on this issue, the conferees appointed to resolve the differences between the House and Senate versions of H.R. 13113 decided to hold two sessions. The first meeting would seek to reconcile a large number of differences between the two versions, except for the critical issue of the CFTC's independence. A separate session was to be devoted to that question.

23. S. REP. No. 1121, 93d Cong., 2d Sess. 21 (1974).

At the conclusion of the second Conference Committee meeting, a compromise had been fashioned acknowledging the better arguments of each side. The Senate prevailed with respect to the CFTC's basic independence. However, the House got its wish that the Department of Agriculture be consulted closely on issues affecting American agriculture. The compromise established a five-man Commission; it included neither the Secretary of Agriculture nor his designee as a member, but instead, created a liaison office to assure that the Department of Agriculture has input on matters of direct interest to it. The Conference Committee may well have written the final chapter in the long-standing dispute within Congress regarding whether futures market regulation should serve primarily the farmer or the investor. The compromise reached by the conferees on that date was a decisive step toward the latter.

As passed, the Commodity Futures Trading Commission Act of 1974 contained four titles amending the Commodity Exchange Act ("CEA").[24] Beyond reorganizing the present regulatory agency, title I, now CEA section 18, empowers the Commission to adjudicate investor damage claims against brokers and others. The Commission is now empowered to approve, disapprove, or require changes in contract market rules,[25] and, in doing so, it must weigh the regulatory need for such rules against their anti-competitive impact.[26] The claims procedure is designed to reduce the need for expensive court action by injured persons, although it appears to be excessively complicated.[27] The directive to weigh antitrust policy against regulatory needs in reviewing, approving, or requiring exchange rules has the salutory effect of providing a formal, pre-approval review of unnecessarily anticompetitive requirements[28] before the Commission, the exchanges, or others have relied to their serious detriment upon them.

B. Title II: New Regulation

Most new provisions governing the regulation of trading and exchange operations appear in title II. The first major change is the extension of the Commodity Exchange Act to include all futures trading. The definition of "commodity" in CEA section 2 contains the following

24. 7 U.S.C. §§ 1-22 (Supp. IV 1974). In the remainder of this article, the 1974 amendments will be referred to by their section numbers in 7 U.S.C. ch. 1, the Commodity Exchange Act.

25. *Id.* §§ 7a(12), 12a(b).

26. *Id.* § 19.

27. *See* CFTC Rules Relating to Reparation Proceedings, 17 C.F.R. §§ 12.1-12.102; 41 Fed. Reg., No. 18, 3994-4010, Jan. 27, 1976.

28. *See* Johnson, *Antitrust Under the CFTC Act: An Ounce of Prevention. . . .*, 20 ANTITRUST BULL. 441 (1975); Markham & Schobel, *Commodity Exchange Rule Approval—Procedural Mishmash or Antitrust Umbrella?*, BNA ANTITRUST & TRADE REG. REP., No. 746, Jan. 13, 1976 (Spec. Supp.).

catch-all clause: "and all other goods and articles, except onions as provided in Public Law 85-839, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." In this manner, Congress eliminated the need repeatedly to amend the Act as new futures are traded. Of even greater long-range importance, the all-inclusive definition of commodity refocused the emphasis of federal regulation upon the supervision of a broad investment activity in which the nature of the particular product is of minor importance.

The broader definition of commodity, of course, means that the new CFTC will become responsible for the regulation of futures trading in some products or instruments within the technical jurisdiction of another federal or state agency. Conceivably, the Treasury Department as well as the Departments of Commerce and Interior might, for example, have an interest in domestic sale of futures in precious metals such as silver and gold. The Department of Housing and Urban Development could express interest in the sale of futures in housing construction materials such as lumber and plywood. And, some instruments, which were being considered at the time of the hearings as potential commodities for futures trading, may have some characteristics resembling a security within the traditional purview of the Securities and Exchange Commission or the states' "blue sky" commissions.[29] The amendments recognized both the potential for jurisdictional conflicts among federal or state agencies and the necessity of avoiding them. Accordingly, CEA section 2 now provides that the CFTC's jurisdiction over regulation of trading in futures contracts and commodity options in these items on exchanges is exclusive, whereas other federal and state agencies will retain their rights with respect to other activities involving those commodities.[30]

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29. Higher federal courts have held that discretionary commodity accounts are not securities subject to SEC regulation. *See* Wasnowic v. Chicago Bd. of Trade, 352 F. Supp. 1066 (M.D. Pa. 1972), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973), *cert. den.*, 416 U.S. 994 (1974). *See also* 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.*, Berman v. Orimex Trading, Inc., 291 F. Supp. 701 (S.D.N.Y. 1968); Marshall v. Lamson Bros. & Co., 368 F. Supp. 486 (S.D. Iowa 1974); *cf.*, SEC v. Continental Commodities Corp., 497 F.2d 516 (5th Cir. 1974). In addition, testimony was received that at least one commodity exchange was developing a futures contract grounded in an instrument—mortgages—which has sometimes been treated as a security. *See generally* H.R. REP. No. 975, 93d Cong., 2d Sess. 41 (1974). That contract, the Chicago Board of Trade's GNMA futures contract, began trading in October, 1975. Subsequently, the Chicago Mercantile Exchange has inaugurated futures trading based on another interest-rate financial instrument—U.S. Treasury Bills.

30. *See* Bromberg, *Commodity Law and Securities Law—Overlaps and Preemptions*, 1 J. CORP. LAW 217 (1976); Johnson, *The Perimeters of Regulatory Jurisdiction Under the Commodity Futures Trading Commission Act*, 25 DRAKE L. REV. 61 (1975); Johnson, *The Commodity Futures Trading Commission Act: Preemption As Public Policy*, 29 VAND. L. REV. 1 (1976). The CFTC's exclusive jurisdiction also extends to so-called "leverage contracts" involving gold and silver bullion or bulk coins, which is currently a relatively small industry.

One of the most controversial features of the amendments is found in CEA section 6j, which directs CFTC to determine whether, or on what terms, persons executing orders for customers should be allowed to trade also for their own accounts or for controlled accounts. This inquiry focuses on two pivotal persons: the "floor broker" and the "futures commission merchant." A floor broker is a member of a contract market who stations himself on the exchange trading floor and who, for a fee, will execute orders for other people. Typically, the orders he receives will have come to him from a brokerage firm or another member and not directly from a customer, so that he rarely deals directly with the public as such. A futures commission merchant, on the other hand, is usually a firm doing a direct public brokerage business, receiving orders directly from customers through its various offices. Either the futures commission merchant's own salaried floor brokers or an independent floor broker executes these orders on the floor. Both futures commission merchants and floor brokers are presently allowed to trade for their own accounts while handling customer orders as well, although exchange rules require that customer orders be given priority when both activities are engaged in.

Statistics gathered by the Commodity Exchange Authority indicate the potential impact of section 6j. In February, 1972, 278 floor brokers on the Chicago Board of Trade handled both customer orders and also traded for their own accounts. An additional 112 floor brokers traded entirely for themselves. These 390 floor brokers doing personal trading provide a sharp contrast with the 14 floor brokers who traded only for customers in the same period.[31] In addition, many futures commission merchants are known to have "house accounts" through which firms and their principals engage in trading for their own benefit. Accordingly, if the CFTC were to exercise its authority by restricting or banning personal trading by floor brokers and futures commission merchants, a major upheaval in present business methods within the futures industry would occur.[32] So drastic a change in the business methods of an industry is usually made in response to a major scandal or incident, but the hearings and reports on the amendments offer nothing to indicate that the risk or incidence of abuse is any greater today than during the many preceding decades of the practice's existence.

Under section 6j, of course, the Commission is not directed to ban floor brokers and futures commission merchants from personal trading, nor is it obliged to impose severe restrictions. The section acknowl-

31. "Trading in Commodity Futures Contracts on the Chicago Board of Trade," Marketing Research Rep. No. 999, at 7, USDA Commodity Exch. Authority (July, 1973).

32. *See* Johnson, *The Commodity Futures Trading Commission: Newest Member of Each Exchange's Management Team*, 34 FED. B.J. 173, 179-81 (1975).

edges that the desirability of strictures will depend upon the particular contract market (presumably, the exchange's own ability to police against abuses) and upon the need for market liquidity. The latter is of critical importance because, as noted earlier, the ability of futures markets to absorb the massive trades frequently made by commercial hedgers would suffer greatly if completion of those trades were dependent entirely upon the amassing of opposite orders from the public at large.

A second controversial feature of Title II, CEA section 13a-1, authorizes the Commission to seek injunctions. The principal focus of debate between the House and Senate was upon the circumstances entitling the Commission to injunctive relief. The House version of the amendments would have allowed this remedy not only if actual violations of the Act were present, but also if someone were "about to" violate the Act, were "in a position" to do so, or if there were a "danger" of violation. Industry spokesmen contended that the Commission should not have this anticipatory power because of the high risk of erroneous prediction and the potential for abuse. Opponents also referred to other federal regulatory agencies and their lack of such broad powers.[33] The Senate, on the other hand, concluded that the House version gave the new CFTC "unprecedented" power and consequently modified the injunction provisions by eliminating the power to enjoin a person for merely being "in a position to" violate the Act.[34] The Senate version retained the other subjective language, however, and the Conference Committee adopted the modified Senate provision.

CEA section 6(c) also precipitated debate over whether the Commission should be empowered to procure injunctions in its own name and on its own initiative, or whether the Commission must petititon the Attorney General to bring the action. In the Conference Committee, the Senate's position, granting the Commission independent power to seek injunctions, prevailed over the House's more conservative approach.

Another controversial provision, now CEA section 12a(9), defines and expands the powers of the federal regulator in cases of market emergencies. The available remedies were set forth in that section of

33. The family of federal securities laws permits injunctions when a violation is "about to" occur, but none of them extends that power to include those who are merely "in a position to" commit a violation or where there is simply a "danger" of violation. *See, e.g.*, Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (1970); Securities Exchange Act § 21(d); *id.* § 78u(d). Even under those Acts, however, no decisions have been found authorizing an injunction absent proof that an actual violation is either underway or has been threatened by the respondent.

34. On the other hand, the Committee did feel that the "in a position to" language in the House bill was unprecedented in Federal statutes. The Committee did not feel that the Commission should be authorized to obtain an injunction against a person merely because he has the *ability* to effectuate a squeeze or corner or to restrain trading, even though he might not have the slightest intention of abusing his power.
S. REP. No. 1131, 93d Cong., 2d Sess. 25 (1974).

the House version with great particularity and included: confining trading to the close-out of existing contracts; extending the life of a contract beyond its official termination date; requiring the liquidation of all or part of existing contracts; suspending trading; or terminating trading and fixing a final settlement price for all contracts. The House's version, however, left virtually open-ended the circumstances in which those remedies might be invoked, because the House did not provide a clear definition of an "emergency."

Section 12a(9), as adopted by the House, raised a very fundamental issue regarding the proper role of the futures market. Traditionally, those markets have served as quite reliable barometers of economic conditions, of supply and demand, and of worldwide pressures generated by famine, government policies, strife, or population growth. The story told by the futures markets has not always been well received despite its accuracy—witness the reaction of some public officials to the rise of futures prices in response to spiraling food prices in 1973. That rise has been attributed to the passing of America's era of agricultural overabundance: the dominant role of America as food supplier to the world; the fickleness of weather; the congestion in transportation; and numerous other problems which in any free market are part of the true supply-demand equation. The section, as adopted in the House, would have authorized the new Commission to impose restrictions on the futures markets or even to close them in the event of any significant disruption within the commercial world. Such a disruption, according to the House version, might include government-imposed restrictions that directly affect the supply-demand equation, as, for example, an embargo upon exports of a commodity. The exercise of emergency powers in those circumstances would appear to accomplish nothing more than to mask from public view the true economic significance of the government's other actions.

When the amendments reached the Senate Agriculture and Forestry Committee, it received testimony urging that the declaration of an emergency in the futures market occur only if some external force actually *prevents* the market from reflecting the commodity's true value. Under this formulation, an export embargo would not be grounds for emergency action, since the futures markets can and will react to that change in the supply-demand equation. Price controls, on the other hand, might restrain the futures market from performing its function of valuing commodities, especially if the controls were to extend to futures prices as well as to "spot" transactions. Similarly, prices responding to intentional corners or manipulations rather than to economic conditions would undermine the market's reliability as a barometer of actual supply-demand factors. According to this approach, recognition for emergency measures exists if government or other action blocks the pricing functions. The Senate Agriculture and Forestry Committee, recogniz-

ing the need to define emergency more narrowly,[35] revised the text of section 8a(9) to define an emergency as either a threatened or actual manipulation or as any other market disruption "which prevents the market from accurately reflecting the forces of supply and demand for such commodity."[36]

Rounding out title II of the amendments are a variety of provisions designed, in the main, to augment existing powers under the Commodity Exchange Act. CEA section 6e empowers the new Commission to license certain persons now exempt, such as trading advisors and operators of investment pools. The Act expanded the Commission's screening of presently licensed persons, including floor brokers and futures commission merchants, to cover employees dealing with the public (commonly called "registered commodity representatives"), as well as to include fitness and proficiency examinations.[37] Contract markets must demonstrate that their futures are either used in commercial channels for pricing or hedging, or that the contracts are not contrary to the public interest.[38] The Commission may also compel markets to amend their futures if they fail, after notice, to select delivery points that are adequate to assure an orderly market.[39] Before contract market rules relating to contract terms and trading requirements take effect, the Commission must review and approve them.[40] The Commission can order the market to adopt, rescind, or change its rules.[41] Every contract market must have arbitration or similar voluntary procedures for adjudicating customer claims of $15,000 or less that are brought against a member or member firm.[42] Congress increased maximum fines for violation of the Act to $100,000 from $10,000, and empowered the Commission to assess civil penalties up to $100,000 in administrative actions.[43] In addition, as a result of Senate amendments adopted by the Conference Committee, the Commission can review disciplinary actions and denials of membership by the exchanges, and take any such action under the exchange's rules if it fails to do so.[44] In addition, the Commission can, pursuant to CEA section 217, impose requirements

35. *Id.*

36. *See* Johnson, *The Commodity Futures Trading Commission: Newest Member of Each Exchange's Management Term*, 34 FED. B.J. 173, 177-79 (1975).

37. 7 U.S.C. §§ 6k, 6p (Supp. IV 1974).

38. *Id.* § 7(g). The House version of H.R. 13113 established an economic purpose test which each new futures contract must meet, namely, that it is used in commercial circles as a hedging device or as a basis for pricing. The Senate and Conference Committees liberalized the requirement to a flexible standard of "not contrary to the public interest" but made the House's economic purpose test a relevant consideration. S. REP. No. 1131, 93d Cong., 2d Sess., 36 (1974).

39. 7 U.S.C. § 7a(10) (Supp. IV 1974).

40. *Id.* § 7a(12).

41. *Id.* § 12a(7).

42. *Id.* § 7a(11).

43. *Id.* §§ 8, 9, 13b, 15.

44. *Id.* § 12c.

upon leverage transactions in silver and gold bullion as well as bulk silver and gold coins.

C. *Title III: National Futures Associations*

Title III of the amendments, now 7 U.S.C. section 21, enables the formation of "national futures associations," which, presumably, would function in the futures industry as self-regulatory bodies akin to the National Association of Securities Dealers. The latter organization, however, evolved from the need to regulate the over-the-counter markets where the national securities exchanges lacked jurisdiction. Under the CEA, on the other hand, all futures trading must be conducted through members of a designated contract market. Because no over-the-counter equivalent will exist in the futures industry, a major motivation for national self-regulatory associations is apparently lacking. Conceivably, self-regulatory organizations might prove useful for commodity option or "leverage contract" dealers if the CFTC allows them to conduct business off an exchange. Or, if given adequate legal authority, a national futures association might succeed in developing a more uniform regulatory program on a national scale than the individual exchanges can now produce. The danger, however, is that any such structure might also result in merely another layer of conflicting and incompatible requirements for the industry.[45]

D. *Title IV: Miscellaneous Provisions*

Title IV contains the principal housekeeping provisions. The new Commission's members and personnel are subject to criminal prosecution for engaging in futures trading, or in the spot sale of any regulated commodity (except in his own farming or ranching operations), or for disclosing confidential information to assist another person who is trading in the spot or futures markets. Investments in puts or calls and the like will remain prohibited for those agricultural commodities previously listed in and covered by the Act, but such investments may be allowed by the CFTC in the new commodities added by the amendments unless the Commission acts affirmatively to prohibit or restrict such activity. Title IV rescinded the existing definition of a "bona fide hedge" and the Commission will adopt its own definition of that term. The Commission will require each exchange and its clearing organization to maintain daily trading records containing information the Commission may prescribe. The Commission will also expect each exchange to pub-

45. The creation of such associations would be an abdication of the regulatory role to be carried out by the Commission. Such associations would create an unnecessary layer of regulation, would tend to become pressure organizations forcing all in the commodity industry to join, and could make effective regulation by the Commission more difficult.

Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. 18-19 (1974) (testimony of Assistant Secretary of Agriculture Clayton Yeutter).

lish trading volume figures, if practicable, before the market opens on the following day. Finally, this title transferred pending proceedings and operations of the Commodity Exchange Authority and of the existing Commodity Exchange Commission to the new CFTC, and the amendments were scheduled to take effect 180 days after enactment.

An early version of the House bill contained a title creating a Federal Commodity Account Insurance Corporation to insure commodity customers against loss of their funds if the brokerage house carrying their accounts became bankrupt or insolvent. The proposal was closely patterned after a bill (S. 1921) developed by the Chicago Board of Trade and the Commodity Exchange Authority that was introduced in the Senate during 1971, and which was similar to the Securities Investor Protection Act (SIPC),[46] which has provided similar protection for securities customers since the end of 1970. The basic structure of the program was a corporation with a board of directors comprised of representatives from both government and the futures industry. It would have administered an insurance reserve contributed by the industry but augmented, if necessary, by an emergency line of credit from the Treasury Department. The House Committee on Agriculture, however, deleted the program from its final bill.

When the Senate Agriculture and Forestry Committee considered the House bill, the advocates of a SIPC-type program for the futures industry questioned the House's deletion of that provision and urged that the Senate either reinstate it or order the new Commission to conduct a study of the proposal and report back to the Congress by a date certain. The Senate adopted the latter approach, the Conference Committee concurred, and the Commission must now present a detailed report to the Congress by June 30, 1976.

IV. Some Special Challenges to Agriculture

A journey through the history of commodities regulation in the United States leads almost inevitably to the conclusion that the futures markets are no longer viewed simply as tools of the agribusiness community. Rather, Congress now sees the commodity exchanges also as public investment markets. This development makes it advisable for farmers, merchandisers, and processors of agricultural products to reexamine their relationship with both the markets and the Government. The remainder of this article will endeavor to isolate and discuss some of the potential areas of change.

A. New Constituencies

In 1922, when Congress adopted the Grain Futures Act, the "constituency" of the futures markets was rather clearly identifiable. In

46. 15 U.S.C. §§ 78aaa-*lll* (1970).

no uncertain terms, Congress declared that the commodity exchanges existed for the benefit and protection of agriculture. The agriculture committees of the Congress would write the legislation, and the Secretary of Agriculture would administer it. Congress would not tolerate practices on an exchange, such as barring farm cooperatives from membership, that interfered with agriculture's full enjoyment of benefits. As a result, the relationship between agribusiness, the exchanges, and the Government was thus fixed from 1922 until very recent years.

Today, the constituencies of the commodity exchanges and of the Government regulators are much more complex. Agriculture remains very prominent and important, but other industries and other products now demand attention from both the exchanges and the Government. Dozens of non-agricultural products are now traded on the futures markets, and, by reason of the all-inclusive new CEA section 2(a) definition of "commodity," that list will almost certainly lengthen in the years ahead. Each new commodity brings with it an industry seeking to be heard in the board rooms of the exchanges, the offices of the CFTC, and the halls of Congress.

In addition, a new constituency—the consumer—has emerged as a powerful political force. Neither Congress nor the CFTC can afford to ignore those who buy the food and other products of American industry. They are becoming well organized and, despite the multitude of conflicting interests that exist within their ranks, consumer groups project a remarkably unified image. In many areas, notably in food production, the attitude of consumer organizations toward the producer and middleman is frequently suspicious, if not openly hostile. As a result, politicians are more reticent today to espouse what is "best for the farmer" because that rhetoric may alienate their growing urban constituencies. Consequently, both the futures markets and the Government must be mindful of the consumer perspective.

A third constituency clamoring for the attention of the commodity exchanges and the Government is the growing body of public investors. Commodity firms, through aggressive advertising and educational efforts, have sought to increase the public's participation in the futures markets. Although their share of trading (roughly 25 percent of volume on the Chicago Board of Trade) remains relatively low, public investors perceive themselves as more vulnerable to market risks due to lack of sophistication and greater dependency on others' skill and honesty than the commercial firms and vocational traders who account for the remaining trading activity.

Although the exchanges or the Government would make a serious mistake if either neglected the needs of public investors, a countervailing danger would be for regulatory policies to overstate the public's role in the markets. Notwithstanding increased participation by avocational investors, the commodity markets remain primarily tools for price hedg-

ing and price determination on behalf of American agricultural and industrial interests. The exchanges or the Government could impede this economic purpose if either curtailed or discouraged legitimate commercial use of futures trading for the sake of reducing legitimate market risks for public investors. In the separate but somewhat comparable securities industry, some have suggested that the SEC's pre-occupation with public investor protection has impaired the liquidity of the stock markets and has relegated to a secondary role the raising of capital for industry.[47] Agricultural interests, as well as all other industrial users of the futures markets, should be alert to the need for assuring the protection of the special interests of public investors by measures that are compatible with the markets' primary economic functions.

B. Hedger-Speculator Dichotomy

Since at least 1936, the Commodity Exchange Act has recognized a difference between the two classes of futures market users, hedgers and speculators. The focus of this differentiation has been section 4a of the Act, which declares that excessive speculation in futures imposes an undue and unnecessary burden on interstate commerce. That section authorizes the CFTC to proclaim and fix limits on the amount of trading that may be done or positions that a speculator may hold in any commodity futures contract. All transactions or positions "which are shown to be bona fide hedging transactions or positions" are expressly exempted from limitation.[48]

By reason of the 1974 Act, the CFTC has the burden of defining the meaning of "bona fide hedging transactions or positions." At this writing, the CFTC has not formally promulgated a final definition. It is fair to assume, however, that the CFTC's deliberations will run not only to the formulation of a definition but also to a re-assessment of the basic differentiation between hedgers and speculators.

The possibility that the CFTC may consider eliminating the differentiation emanates from various factors. First, although section 4a has authorized the CFTC and its predecessors to impose speculative limits on a wide variety of futures contracts, the Commission has not uniformly exercised this power. For example, the CFTC has no limits on speculation in soybean oil futures contracts despite nearly 1.5 million contracts traded in 1975 at an estimated dollar value of over $23.5 billion.[49] Likewise, the CFTC has not subjected cattle futures contracts to limits despite a 1975 volume of almost 2.5 million contracts valued at $41 billion.[50] Second, Congress used the differentiation between specu-

47. *See Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 165 (1974) (testimony of Frederick Uhlmann).

48. 7 U.S.C. § 6a (1970).

49. CFTC Release No. 120-76, Feb. 7, 1976, at 3.

50. *Id.*

lators and hedgers in the earlier years of federal regulation principally to reflect regional biases. The architect of the Grain Futures Act of 1922, Senator Capper, disparaged vocational futures traders as "grain gamblers."[51] The legislative history of that Act and its successive amendments contain similar rhetoric. The reality, however, has not supported the contention that speculators pose the greatest risk of market manipulation or distortion. The preponderance of manipulation or cornering cases reported in the courts since 1922 have been brought against commercial firms rather than professional speculators.[52]

The CFTC and its predecessor agency have recognized that hedgers as well as speculators can effect market distortions and manipulations. In addition to the numerous court cases the agency has brought against commercial firms for that violation, the CFTC regulations limiting speculation contain the following or comparable caveat after exempting hedgers from the limits:

> Nothing contained in this section shall be construed to affect any provision of the Act relating to manipulation or corners, nor to relieve any contract market or its governing board from responsibility under section 5(d) of the Act (7 U.S.C. 7(d)) to prevent manipulation and corners.[53]

Thus, from the beginning, the regulatory agency has acknowledged that vigilance against price manipulations or corners is required, whether or not the trader is labeled a hedger or a speculator.

Whether the trader is acting as a hedger or as a speculator is clearly not the main determinant of market manipulation or distortion. Rather, the determinant is the trader's ability and intention to influence the market. The ability to influence prices or to corner supply depends in large measure upon the amount of capital available to the trader. For example, the initial margin requirement on the Chicago Board of Trade to own soybean futures up to the CFTC's speculative limit of 3 million bushels would be more than $1 million.[54] Moreover, the CFTC calculated the limit of 3 million bushels to be well below the quantity needed in most instances to have an influence on market price or movement. Few speculators have sufficient capital to accumulate even the permissible position in a commodity, let alone the larger quantity generally needed to affect the market. On the other hand, large commercial firms frequently have ample capital to assume large positions in either futures or the physical commodities, and do so. These hedge positions can and

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51. *See* note 10 *supra.*

52. *See, e.g.*, Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971); Volkart Bros., Inc. v. Freeman, 311 F.2d 52 (5th Cir. 1962); Great Western Food Distrib., Inc. v. Brannan, 201 F.2d 476 (7th Cir. 1953); General Foods Corp. v. Brannan, 170 F.2d 220 (7th Cir. 1948).

53. 17 C.F.R. § 150.11(d) (1975). *See also id.* § 150.1(d).

54. Based upon CBOT initial margin requirement of 35¢ per bushel as of latest change December 1, 1975 (CBOT Monthly Letter to Members, at 11, Dec. 1, 1975).

sometimes do reach proportions that may enable them to influence the direction or speed of market movements, either accelerating or retarding price changes. Such effects do not constitute manipulation, of course, in the absence of proof of an intent to distort market prices.[55] Nevertheless, it is significant that, while Congress has condemned the speculator, the enforcement agencies have moved most frequently against the commercial firms.

The CFTC, with its independence from the Department of Agriculture and its growing sensitivity to the interests of consumers and public investors, may wish to re-assess the entire concept of special market restrictions for speculators. Any change in the long-standing and politically popular differentiation between hedgers and speculators may come gradually, if at all, but the agribusiness community should examine what impact such a change might have upon it.

C. Cash Market Surveillance

The Commodity Exchange Act contains certain provisions that one might interpret as authorization for the CFTC to engage in the affirmative regulation of cash or spot transactions in commodities. For example, it is a felony under CEA section 13 for any person "to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market. . . ." The same provision imposes criminal sanctions for cornering "any such commodity" or for knowingly disseminating false crop or market information that influences prices. In addition, the CFTC may take administrative action, under CEA section 9, including the imposition of civil penalties, against any person who is "attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market. . . ."

The foregoing sections of the Commodity Exchange Act have offered the futures regulator an opportunity, for many years, to get directly involved in at least some features of cash commodity marketing. The Commodity Exchange Authority, which preceded the present CFTC as administrator under the Act, made practically no use of its presumed authority to regulate the cash markets. In fact, when Congress held hearings to amend the Act in late 1973, the head of the CEA, Alex C. Caldwell, urged Congress to rescind much of its authority in the cash market area:

> I favor an amendment which would relieve CEA of the responsibility for investigating and prosecuting cash market price manipulations—except those related to operations in a commodities futures market. Such an amendment would enable us to con-

55. *See, e.g.*, Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971).

centrate our anti-manipulation effort in the area of regulating futures rather than defusing them over the broad spectrum of marketing which has no connection with futures trading.[56]

Significantly, Congress decided not to modify any of the sections in question, thus perpetuating the federal regulator's potential role in cash commodity surveillance. Indeed, Congress expanded that authority somewhat by authorizing the new CFTC to "conduct regular investigations of the markets for goods, articles, services, rights and interests which are the subject of futures contracts, and furnish reports of the findings of these investigations to the public on a regular basis."[57]

None of the provisions of the Act relative to cash market manipulations, corners, or false rumors contains any actual requirement that the CFTC develop positive or ongoing surveillance programs of cash markets. The sections are simply prohibitory, declaring certain conduct unlawful and prescribing penalties. The former CEA exercised what authority it had in a reactive way, bringing or recommending enforcement actions when evidence of violations reached it, but the CEA had neither the budget nor the personnel needed to undertake formal surveillance programs. Its only ongoing programs involved reviewing the local cash market for a commodity when a futures contract in that item was expiring. The CFTC must decide whether to do more.

Congress clearly contemplates that the CFTC will be larger, better staffed, and far better budgeted than the predecessor CEA. The possibility thus exists that the CFTC may commit more time and resources to surveillance of cash transactions in at least those commodities subject to futures trading. On the other hand, the new definition of commodity, embracing every conceivable tangible or intangible item of commerce,[58] means that the CFTC's world of cash markets is infinitely larger than the CEA's was, since the latter was confined to listed agricultural products. Consequently, the new meaning of commodity may be the CFTC's equivalent of the astronomer's "black hole in the universe" absorbing all resources that come near it while remaining eternally unfulfilled. In reality, the CFTC's dilemma may be even more acute and less soluble than its predecessor's.

The CFTC has other reasons to be concerned about exercising its cash market authority. First, the definition of a cash market is elusive, since the phrase might include a full spectrum of transactions ranging from an isolated sale between two persons to a central auction market with many thousands of bids and offers. The CFTC's ability to oversee more than a tiny fraction of these transactions is highly questionable,

56. *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 26 (1973) (Alex C. Caldwell, Admin. Comm. Ex. Auth.)

57. 7 U.S.C. § 20(a) (Supp. IV 1974).

58. *Id.* § 2.

and the CFTC's selection of certain cash markets over others for surveillance could produce public resentment. Second, one purpose of Congress in creating the CFTC as an independent federal agency was to "de-politicize" it. The predecessor agency, CEA, was a minor office within the USDA and, as a result, was exposed continuously to the USDA's commitment in favor of agriculture. It could not and did not escape the crises and political controversies surrounding food production and marketing in the early 1970's. The CFTC, on the other hand, is not a captive of any Government department or industry and need not be a spokesman for any particular Government policy or industry practice. Involvement in the regulation of the cash markets, however, could draw the CFTC into the inevitable squabbles that center on one or more commodities from time to time. The CFTC's role as referee of the marketplace could thus change to that of an activist extolling, condemning, or defending the cash markets in response to Congressional or statehouse attacks. Conversely, this role could complicate the CFTC's own policies and positions on regulatory matters, since political considerations would assume special importance. And, the cost to the CFTC of an advocate role could be prohibitive in light of the scores of different commodities and industries—from wheat to palladium to Treasury Bills—that could come under political attack in the future.

Nevertheless, the CFTC will be under some pressure from members of the Congress, consumer groups, and others to move aggressively into the surveillance of cash commodity markets, whether or not the venture is genuinely feasible as a regulatory measure. Because food prices and food marketing are a current political issue, the agribusiness community can expect the pressures on the CFTC to be especially severe in that area. The additional surveillance might take the form of increased reporting requirements or, less likely except in crises, some on-the-spot investigative work by the CFTC's staff. Because of the immense size of the effort, the agribusiness community could also expect Congress to design federal programs to transfer the bulk of expense to the private sector.

V. Conclusion

The Commodity Futures Trading Commission Act of 1974 amended the Commodity Exchange Act in ways that portend a fundamental change in the historical relationship between agribusiness, the futures markets, and the federal government. The amended Act has not impaired agribusiness' use of the futures markets in any way, but the farm and food industries must now compete more vigorously than ever for the attention of the Government and the markets. Other interests—new industries using futures for the first time, consumer groups, public investors—are advocating their own interests aggressively in the halls of Congress, statehouse, and, increasingly, the boardrooms of the ex-

changes. This changing environment will especially influence the still infant CFTC. The greatest challenge to the role of agribusiness in the futures markets in the latter half of the 1970's, therefore, may well be to preserve its position as many newcomers, including a new federal agency, enter the scene.