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## **Hedge to Arrive Contracts and the Commodity Exchange Act: A Textual Alternative**

by

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Originally published in DRAKE LAW REVIEW  
47 DRAKE L. REV. 319 (1999)

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# HEDGE TO ARRIVE CONTRACTS AND THE COMMODITY EXCHANGE ACT: A TEXTUAL ALTERNATIVE

*Glenn L. Norris,\* George F. Davison, Jr.\*\* & David N. May\*\*\**

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## I. INTRODUCTION

Since late 1995,<sup>1</sup> the grain industry has suffered “continuing agony”<sup>2</sup> because of conflicts over “Hedge to Arrive” (HTA) contracts. These conflicts have resulted in a “plethora of cases”<sup>3</sup> between farmers and elevators throughout both state<sup>4</sup> and federal courts<sup>5</sup> in the Midwest. In addition, HTA contract dis-

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1. See, e.g., *Andersons, Inc. v. Horton Farms, Inc.*, No. 96-2287, 1998 WL 879662, at \*1 (6th Cir. Dec. 17, 1998) (dispute arose in last few months of 1995); Associated Press, *Hedge-to-Arrive Issue Spawns 59 Co-op Suits*, (July 12, 1996) (visited Jan. 7, 1999) <<http://www.wcinet.com/th/News/1996/th0712/stories/17901.htm>> (noting that “[s]ix northern Iowa grain elevator cooperatives [sued] 59 area farmers for nearly \$14 million in damages connected with controversial hedge-to-arrive grain contracts”).

2. *Top of Iowa Coop. v. Schewe*, 6 F. Supp. 2d 843, 846 (N.D. Iowa 1998).

3. See, e.g., *Barz v. Geneva Elevator Co.*, 12 F. Supp. 2d 943, 946 (N.D. Iowa 1998).

4. See, e.g., *Hutting Elevator Co. v. Biwer*, No. C9-98-548, 1998 WL 747170 (Minn. Ct. App. Oct. 27, 1998); *Champaign Landmark, Inc. v. Prince*, No. 97-CA-28, 1998 WL 735914

putes have troubled the Commodity Futures Trading Commission's (CFTC) adjudicatory system.<sup>6</sup>

One contention raised by farmers is that HTA contracts violate the Commodity Exchange Act's<sup>7</sup> (CEA) prohibition on off-exchange futures contracts.<sup>8</sup> The elevators counter that HTA contracts fit within 7 U.S.C. § 1a(11), the CEA's narrow exemption for "any sale of any cash commodity for deferred shipment or delivery."<sup>9</sup> These competing arguments have raised "very technical questions of fact" and difficult questions of law.<sup>10</sup>

The CEA states that "it shall be unlawful for any person . . . to enter into . . . any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future *delivery* . . . unless," among other things, "such transaction is conducted on or subject to the rules of a board of trade."<sup>11</sup> Thus, by its terms, the CEA's prohibition against off-exchange futures trading targets contracts that *do* require "delivery." Moreover, it is indisputable that the futures contracts traded on the Chicago Board of Trade *do require delivery*.<sup>12</sup> Therefore, it is

(Ohio Ct. App. Oct. 23, 1998); *Farmers Comm'n Co. v. Burks*, No. 16-98-02, 1998 WL 682274 (Ohio Ct. App. Sept. 30, 1998).

5. See, e.g., *Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388 (N.D. Iowa 1998); *Lachmund v. ADM Investor Servs., Inc.*, No. 2-97-CV-92, 1998 WL 757976 (N.D. Ind. Sept. 24, 1998); *Nagel v. ADM Investor Servs., Inc.*, No. 96-CV-2675, 1998 WL 381978 (N.D. Ill. July 6, 1998); *Andersons, Inc. v. Crotser*, 7 F. Supp. 2d 931 (W.D. Mich. 1998); *Herwig v. Hahnman-Albrecht, Inc.*, No. 96-C-6107, 1997 WL 72079 (N.D. Ill. Feb. 13, 1997); *Hodge Bros. v. DeLong Co.*, 942 F. Supp. 412 (W.D. Wis. 1996).

6. See, e.g., *In re Grain Land Coop.*, CFTC No. 97-1 (Nov. 6, 1998) (ordering Grain Land to cease and desist from violating Commodity Exchange Act).

7. Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1-25 (1994)).

8. The Commodity Exchange Act, codified at 7 U.S.C. §§ 1-25, provides, *inter alia*, that "it shall be unlawful for any person . . . to enter into . . . any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery . . . unless," among other things, "such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a 'contract market' for such commodity." 7 U.S.C. § 6(a). See generally William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 VAND. L. REV. 473 (1988) (discussing the development and current state of federal futures regulation).

9. 7 U.S.C. § 1a(11). This provision is often referred to as the "forward contract exclusion," see, e.g., *In re Grain Land Coop.*, 978 F. Supp. 1267, 1273 (D. Minn. 1997), although the term "forward contract" is not contained in the definition. Traditionally, 7 U.S.C. § 1a(11) has been interpreted as a "narrow" provision. See, e.g., *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 579 (9th Cir. 1982).

10. *In re Buckeye Countrymark, Inc.*, 227 B.R. 498, 500 (Bankr. S.D. Ohio 1998); see also *id.* at 501 (refraining from adjudicating the validity of the HTA contracts pending decision in the CFTC proceeding). See generally *infra* notes 22-28 (describing the factual complexity of HTA contracts).

11. 7 U.S.C. § 6(a) (emphasis added); see *supra* note 8.

12. See *infra* note 56.

ironic that several courts have held that 7 U.S.C. § 1a(11) excludes any contract that requires delivery from the regulatory purview of the CEA.<sup>13</sup> Accordingly, several courts have rejected farmers' arguments that the CEA applies to HTA contracts.<sup>14</sup>

Conversely, the CFTC<sup>15</sup> —the independent agency entrusted by Congress “with sweeping power to implement the CEA”<sup>16</sup>—has sided with the farmers. In its adjudicatory decisions,<sup>17</sup> its quasi-legislative statements,<sup>18</sup> and its enforcement activities, the CFTC has rejected any categorical view that the CEA does not apply to HTA contracts.<sup>19</sup>

Neither the CFTC nor the courts, however, have focused on the specific language of 7 U.S.C. § 1a(11).<sup>20</sup> Rather, the focus has been on a number of judi-

13. See *infra* notes 29-37 and accompanying text.

14. Many, but not all, courts have rejected the farmers' CEA arguments. Compare, e.g., *In re Grain Land Coop.*, 978 F. Supp. at 127 (granting summary judgment to elevator on producers' CEA claims), and *Top of Iowa Coop. v. Schewe*, 6 F. Supp. 2d 843, 853 (N.D. Iowa 1998) (same), with *Eby v. Producers Coop.*, 959 F. Supp. 428, 430 (W.D. Mich. 1997) (denying elevator's motion to dismiss producers' CEA claims), and *Farnhamville Coop. Co. v. Eslick*, No. LACV305567 (Iowa Dist. Ct. Dec. 24, 1998) (overruling Farnhamville's motion for summary judgment as to Eslick's CEA claims).

15. The CFTC was “established as an independent agency of the United States Government,” 7 U.S.C. § 4a, by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389. See also *Rivers v. Rosenthal & Co.*, 634 F.2d 774, 779 (5th Cir. 1980) (discussing 1974 amendment to the Commodity Futures Trading Commission Act).

16. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 836 (1986); see *id.* at 844 (stating that “considerable weight” must be accorded “the CFTC's contemporaneous interpretation of the statute it is entrusted to administer”); see also *In re Bybee*, 945 F.2d 309, 314-15 (9th Cir. 1991) (“We give ‘great deference to the Commission's interpretation of the Commodity Exchange Act.’ . . . Not only is the CFTC charged generally with administering the CEA, . . . but the field of commodities regulation is complex, and responsive to a rapidly changing market.”).

17. *In re Competitive Strategies Agric., Ltd.*, CFTC No. 98-4 (Aug. 24, 1998) (Order of Dismissal on Settlement); *In re Grain Land Coop.*, CFTC No. 97-1 (Nov. 6, 1998) (Initial Decision).

18. CFTC Interpretive Ltr. No. 96-41 (Division of Economic Analysis Statement of Policy in Connection with the Unwinding of Certain Existing Contracts for the Delivery of Grain and Statement of Guidance Regarding Certain Contracting Practices), Comm. Fut. L. Rep. (CCH) ¶ 26,691 (May 15, 1996).

19. See *infra* notes 39-42 and accompanying text. This pattern continues even now as this Article moves toward publication. Commodity Futures Trading Commission, *CFTC Files Administrative Complaint Against Farmers Cooperative Company and Three Employees Charging Violations of the Commodity Exchange Act and Regulations*, Press Release No. 4230-99, CFTC No. 99-6 (Jan. 13, 1999) (visited January 13, 1999) <<http://www.cftc.gov/opa/enf99/4230-99.htm>>; Commodity Futures Trading Commission, *CFTC Finds that the Andersons, Inc. of Maumee, Ohio, Offered to Enter and Entered into Illegal Futures and Option Contracts*, Press Release No. 4229-99, CFTC No. 99-5 (Jan. 12, 1999) (visited Jan. 13, 1999) <<http://www.cftc.gov/opa/enf99/4229-99.htm>>.

20. See *infra* Part IV (criticizing current state of the law).

cially- or administratively-created factors.<sup>21</sup> Undaunted, this Article advances a textual interpretation of 7 U.S.C. § 1a(11). The argument is organized as follows: Part II provides a brief description of HTA contracts; Part III canvasses the current state of the law; Part IV offers a critique of the courts' CEA jurisprudence; Part V outlines a view of 7 U.S.C. § 1a(11) that focuses on the text of that provision; Part VI offers conclusions.

## II. HEDGE TO ARRIVE CONTRACTS: AN OVERVIEW

Like the diverse law suits that they have generated, the individual contracts known collectively as "Hedge to Arrive" contracts are not identical.<sup>22</sup> Despite this diversity, many HTA contracts seen in actual litigation have shared certain salient characteristics. As with most generalizations, the following paragraphs may or may not fit a particular case.

HTA contracts make reference to certain commodities, typically corn or soybeans. The HTA contracts of interest here involve "delivery"—in some sense or another—at some unknown time in the future of a commodity that may or may not currently exist. Thus, the quantity of the commodity was determined at the outset, but the time and price for delivery were not. Rather, a *tentative* time and price for delivery were initially established.<sup>23</sup> The initial time and price were determined by the price and delivery month of a futures contract traded on the Chicago Board of Trade (CBOT).

Then, the time for delivery could be *rolled* from one month to a later month.<sup>24</sup> These *rolls* correspond to intervals that separate delivery months for

21. See *infra* Part III (discussing current state of the law).

22. This point was well described by Judge Mark W. Bennett in *Barz v. Geneva Elevator Co.*:

As these "hedge-to-arrive" contract cases march through the state and federal courts, seemingly endless as the rows of corn in Iowa in July, they may appear to a casual glance to be as uniform as kernels of corn. However, like kernels of corn, upon closer inspection, they show tremendous variety, not in size, shape, color, moisture content, etc., of course, but in the language of the contracts and circumstances of the parties.

*Barz v. Geneva Elevator Co.*, 12 F. Supp. 2d 943, 945 (N.D. Iowa 1998).

23. For example, if a hypothetical corn HTA contract with an initial delivery date of December 1998 had been entered at end of the Chicago Board of Trade's (CBOT) trading hours on January 2, 1998, the initial price for that HTA contract would have been \$2.796 per bushel. This is because the price for the December 1998 corn futures contract was \$2.796 per bushel at the close of trading on January 2, 1998. Chicago Board of Trade (Daily Futures File) (visited Jan. 11, 1999) <<http://www.cbt.com/mri/bot01028.txt>>.

24. As an illustrative example, consider Mr. Oeltjenbrun's Contract No. 453, which he initially entered on June 6, 1995. *Oeltjenbrun v. CSA Investors, Inc.*, 3 F. Supp. 2d 1024, 1029 (N.D. Iowa 1998). Apparently, HTA contract No. 453 had an initial delivery date in December of 1995. *Id.* However, Mr. Oeltjenbrun's HTA contract included a right to roll. *Id.* By rolling the

futures contracts on the CBOT. The delivery months for CBOT corn contracts are March, May, July, September, and December. For example, on January 13, 1999, the following corn contracts were traded on the CBOT:

- “C H1999” (March 1999)
- “C K1999” (May 1999)
- “C N1999” (July 1999)
- “C U1999” (September 1999)
- “C Z1999” (December 1999)
- “C H2000” (March 2000)
- “C K2000” (May 2000)
- “C N2000” (July 2000)
- “C Z2000” (December 2000)<sup>25</sup>

Therefore, a single *roll* could change the HTA contract delivery month from, for example, March 1999 to May 1999, or from March 1999 to September 1999, or from March 1999 to December 2000. The contract, however, could not be *rolled* from March 1999 to October 1999 because no CBOT corn contract is traded for October delivery.

With each *roll*, the price of the contract would change. The magnitude of that change would depend upon the *spread* between the prices of certain futures contracts on the CBOT.<sup>26</sup> In a roll from March 1999 to March 2000, for exam-

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HTA contract, Mr. Oeltjenbrun changed the date on which delivery was required from December 1995 to March 1996. *Id.* Restated, the roll extinguished the requirement to deliver in December 1995, and replaced it with a requirement to deliver in March 1996. *Id.* Later, Mr. Oeltjenbrun rolled the same HTA contract again, this time from March 1996 to May 1996. *Id.* Later still, Mr. Oeltjenbrun rolled the same HTA contract three more times: to July of 1996, to September of 1996, and to December of 1996. *Id.* Each time he rolled the HTA contract, the previous delivery obligation was replaced with a new one. *Id.*

25. Chicago Board of Trade (Daily Futures File) (visited Jan. 14, 1999) <<http://www.cbt.com/mri/bot01139.txt>>.

26. The *spread* is the difference at the time of the roll between (X) the price of the futures contract associated with the initial delivery date and (Y) the price of the futures contract associated with the newly established delivery date. If this *spread*, (Y-X), is positive, then the HTA contract price is increased by that amount. If the *spread* is negative, then the HTA contract is decreased by that amount.

An example may help to explain the spread concept. Returning to our hypothetical, *supra* note 23, as of January 2, 1998, our HTA contract had (a) a delivery date of December 1998 and (b) an initial price of \$2.796. Let us assume that, at the close of trading on April 1, 1998, our hypothetical farmer chose to roll the HTA contract from December 1998 to July 1999. On that day, the December 1998 corn futures contracts—the initial position—closed at \$2.710. Chicago Board of Trade (Daily Futures File) (visited Jan. 11, 1999) <<http://www.cbt.com/mri/bot04018.txt>>. On the same day, the July 1999 corn futures contract—the target position—closed at \$2.864. *Id.* Therefore, the *spread*, (Y-X), for the roll from December 1998 to July 1999 was \$2.864 minus \$2.710, or \$0.154. Therefore, our hypothetical HTA contract gained \$0.154 from the *spread*. Without

ple, the *spread* would be the difference between the price of the March 2000 CBOT contract and the March 1999 CBOT contract. That *spread* would be added to or subtracted from the HTA contract's value.

In response to the right to roll delivery into farther and farther removed months—and the chance to make money from the fluctuations of the CBOT<sup>27</sup>

accounting for other factors, our HTA contract is now worth \$2.95 per bushel. And, for each subsequent roll, a new *spread* would be added to or subtracted from that value.

Another element of the price of an HTA contract is the *roll fee*. This is a relatively simple element: Each time the producer rolls his contract, he is assessed a roll fee, usually between \$0.01 and \$0.05 per bushel. Elevator policies vary as to whether this is due at the time of the roll or at delivery.

The final element of the price of an HTA contract is *basis*. Basis reflects certain costs of the elevator such as "storage costs (including interest and insurance), handling costs (the expenses of loading and unloading), [and transportation]." CHICAGO BOARD OF TRADE, UNDERSTANDING BASIS: THE ECONOMICS OF WHERE AND WHEN 16 (1990). Basis also reflects a profit margin for the elevator. *Id.* at 16.

In sum, the pricing mechanism for HTA contracts may be expressed mathematically as follows:

Where  $P$  is the initial futures option price for the HTA contract,  
 $Y$  is the CBOT price for the futures option month into which the HTA contract is rolled;  
 $X$  is the CBOT price for the futures option month from which the HTA contract is rolled;  
 $f$  is the roll fee charged by the Elevator;  
 $V$  is the price to be received by the Producer for corn after setting basis on the HTA contract;  
 $B$  is the basis offered by the Elevator at the time the Producer sets basis; and,  
 the rolls are numbered sequentially as 1, 2, 3, . . .  $n$ ,

then:  

$$V = P - nf + [(Y_1 - X_1) + (Y_2 - X_2) + \dots + (Y_n - X_n)] - B$$

or,

$$V = \sum_{i=1}^n (y_i - x_i) + P - B - nf$$

27. At least three types of price volatility impact HTA contracts. These three types of price volatility will be referred to here as *intraday price volatility*, *interday price volatility*, and *month-to-month price volatility*. As described below, each of these three sources of volatility is to some degree associated with the roll characteristic of HTA contracts and the concomitant spreads.

*Intraday price volatility* refers to the fact that, for any given pricing within any given day, the spread may vary depending upon the time of day at which the price is set. For example, consider a roll on April 1, 1998, from December 1998 delivery to July 1999. If the roll had been executed at the opening prices, the spread would have been \$2.894 minus \$2.754, or a positive \$0.14 per bushel. Chicago Board of Trade (Daily Futures File) (visited Jan. 12, 1999) <<http://www.cbt.com/mri/bot04018.txt>>. If the same roll had been executed at the close of business, the spread would have been wider: \$2.864 minus \$2.71, or a positive \$0.154. *Id.* This difference in spreads, \$0.014, may appear to be insignificant. However, such differences become significant when multiplied over tens of thousands or hundreds of thousands of bushels.

Just as prices for a given commodity option month—and the spreads between those months—vary within any given day, so too do the prices on the CBOT vary from day to day. This principle is referred to here as *interday price volatility*. For example, consider two HTA contracts, each for 10,000 bushels of corn, that were both associated with July 1996 delivery as of the Spring of 1996. Suppose also that during the calendar month of June 1996, both were rolled from the July 1996 futures option month to the December 1996 futures option month. The impact of this roll on the two HTA contracts' respective prices may not have been uniform if they were not rolled on the same day. On June 13, 1996, the price for December 1996 corn on the CBOT was about \$1.24 lower than the price of July 1996 corn. Chicago Board of Trade (Daily Futures File) (visited Jan. 12, 1999) <<http://www.cbt.com/mri/bot06136.txt>>. Thus, if the first HTA contract was rolled on June 13, its price was changed by a spread of negative \$1.24. By June 20, 1996, however, the spread had narrowed: The price for December 1996 corn on the CBOT was only about \$1.22 lower than the price for July 1996 corn. Chicago Board of Trade (Daily Futures File) (visited Jan. 12, 1999) <<http://cbt.com/mri/bot06206.txt>>. Thus, by waiting seven additional days to roll, the farmer lost approximately \$0.02 per bushel less on the second HTA contract. In other words, by waiting a week, the farmer saved about \$0.02 per bushel times 10,000 bushels, or about \$200.00.

The third type of price volatility, *month-to-month price volatility*, is a product of the same market phenomenon that causes spreads. Namely, at any given time, it is likely that the price for a given commodity will vary depending on its delivery month. This phenomenon carries double weight, however, because producers are often presented with a choice of months into which they could roll. Consider two hypothetical HTA contracts, HTA *alpha* and HTA *beta*. As of late Spring 1996, *alpha* and *beta* both referenced the delivery month of July 1996. On June 13, 1996, the farmer rolled both of them, but he did not roll both HTA contracts into the same new month. The HTA *alpha* was rolled into December 1996. This resulted in a spread of about negative \$1.24 because, as the chart below demonstrates, December 1996 corn was trading around \$1.24 lower than was July 1996 corn.

<b>C N1996</b>	<b>06/13/1996</b>	<b>4774</b>	<b>4800</b>	<b>4744</b>	<b>4766</b>
<b>C U1996</b>	<b>06/13/1996</b>	<b>4052</b>	<b>4060</b>	<b>3934</b>	<b>3966</b>
<b>C Z1996</b>	<b>06/13/1996</b>	<b>3550</b>	<b>3564</b>	<b>3494</b>	<b>3516</b>

Chicago Board of Trade (Daily Futures File) (visited Jan. 12, 1999) <<http://www.cbt.com/mri/bot06136.txt>> (emphasis added).

Our hypothetical farmer did not, however, roll all of his July 1996 positions into December 1996. Instead, HTA *beta* was rolled into September 1996. Here the spread was much narrower:

<b>C N1996</b>	<b>06/13/1996</b>	<b>4774</b>	<b>4800</b>	<b>4744</b>	<b>4766</b>
<b>C U1996</b>	<b>06/13/1996</b>	<b>4052</b>	<b>4060</b>	<b>3934</b>	<b>3966</b>

*Id.* (emphasis added).

Thus, by rolling from July to September, the spread was only about a negative \$0.76. This negative spread was about \$0.48 less than the \$1.24 associated with the roll of HTA *alpha* from July to December. However, unless the farmer could afford to deliver on HTA *beta* in September, see text accompanying notes 27-28, he would have to roll HTA *beta* again. Thus, he gambled that the *sum* of the spreads for two rolls—from July to September and from September to a farther removed futures month—would be “less negative” than the negative \$1.24 associated with the single roll from July to December.



without paying margins and commissions<sup>28</sup>—some farmers entered into a great many HTA contracts. Indeed, many committed a number of bushels to HTA contracts that exceeded their annual grain production by three, four, or more times. And, in many cases, the ratio of HTA bushels to actual bushels did not decrease over time: The right of the producer to roll the HTA contract and sell his crop for cash, combined with favorable cash prices, encouraged farmers to roll the HTA contracts rather than deliver on them.

### III. THE CURRENT STATE OF THE LAW

Both the scope and size of this Article preclude thorough treatment of all previous Hedge to Arrive opinions. Nonetheless, it is fair to state generally that delivery, in one sense or another, has determined the courts' decisions on whether contracts fall within the 7 U.S.C. § 1a(11) exception.<sup>29</sup> In HTA contract

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That was indeed the case. On August 15, 1996, our hypothetical farmer rolled HTA *beta* from September 1996 to July 1997. Here are the CBOT prices he faced on August 15, 1996:

<b>C U1996</b>	<b>08/15/1996</b>	<b>3776</b>	<b>3816</b>	<b>3740</b>	<b>3754</b>
C Z1996	08/15/1996	3502	3544	3484	3492
C H1997	08/15/1996	3554	3600	3550	3554
C K1997	08/15/1996	3640	3644	3600	3602
<b>C N1997</b>	<b>08/15/1996</b>	<b>3614</b>	<b>3644</b>	<b>3600</b>	<b>3604</b>

Chicago Board of Trade, Daily Futures File (visited Jan. 12, 1999) <<http://www.cbt.com/mri/bot08156.txt>> (emphasis added).

As the chart above demonstrates, the spreads had narrowed considerably by August 15, 1996. Our farmer rolled HTA *beta* from September 1996 to July 1997 and lost a mere \$0.17. When combined with the first roll for HTA *beta*, the sum of these negative spreads equaled \$0.76 plus \$0.17, or negative \$0.93. Thus, even after two rolls, HTA *beta* lost about \$0.31 cents per bushel *less* than HTA *alpha*.

28. The HTA contracts discussed in *Top of Iowa Cooperative v. Schewe* used a very typical form and provided that the elevator "shall be responsible for commissions and margin requirements of this transaction." *Top of Iowa Coop. v. Schewe*, 6 F. Supp. 2d 843, 848 (N.D. Iowa 1998). The issue of margins and commissions arose because, from the elevators' perspective, the HTA contracts often involved two contracts: the HTA contract itself, and a futures contract position held by the elevator on the Chicago Board of Trade. *Brown v. North Central F.S., Inc.*, 987 F. Supp. 1150, 1154-55 (N.D. Iowa 1997) (stating that the producers had asserted that "[i]n its April 13, 1996, letter to all holders of HTA contracts, [the elevator] announced that the [farmers] would have to pay any unfavorable margin on the futures position in order to roll the contract forward").

29. See, e.g., *Barz v. Geneva Elevator Co.*, 12 F. Supp. 2d 943, 953 (N.D. Iowa 1998) ("In *Oeltjenbrun*, this court noted that the focus of judicial determinations of whether or not a contract is a valid cash forward contract was whether there was any obligation to make actual physical delivery of the commodity in question.") (citing *Oeltjenbrun v. CSA Investors, Inc.*, 3 F. Supp. 2d 1024, 1045-46 (N.D. Iowa 1998) (citing in turn *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 773 (9th Cir. 1995); *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 971 (4th Cir. 1993); *In re Bybee*, 945 F.2d 309, 313 (9th Cir. 1991); *Commodity Futures Trading*

cases, each enunciation of the delivery criterion has manifested one or more of four identifiable—albeit practically indistinguishable—emphases: *Objective obligation* to deliver,<sup>30</sup> *subjective intent* to deliver,<sup>31</sup> *legitimate expectation* of delivery,<sup>32</sup> and *contemplation of delivery*.<sup>33</sup> In addition, courts have discussed a number of “secondary considerations,”<sup>34</sup>

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Comm’n v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 578 (9th Cir.1982))). *But see* Eby v. Producers Coop., Inc., 959 F. Supp. 428, 433 (W.D. Mich. 1997) (noting that the CFTC had recently “listed proof of potentially infinite rolling of HTAs as a factor in deciding that they should institute public administrative proceedings”; refusing to grant rule 12(b)(6) motion as to producer’s CEA claims).

30. *See, e.g.*, Johnson v. Land O’ Lakes, Inc., 18 F. Supp. 2d 985, 994 (N.D. Iowa 1998); *In re* Bybee, 945 F.2d at 313; *see also* MG Refin. & Mktg. Inc. v. Knight Enters., Inc., 25 F. Supp. 2d 175, 182 (S.D.N.Y. 1998) (discussing objective test).

31. *See, e.g.*, Johnson v. Land O’ Lakes, 18 F. Supp. 2d at 994; *In re* Bybee, 945 F.2d at 313.

32. *See, e.g.*, Andersons, Inc., v. Horton Farms, Inc., No. 96-2287, 1998 WL 879662, at \*6 (6th Cir. Dec. 17, 1998) (holding “that in determining whether a particular commodities contract falls within the cash forward exception, courts must focus on whether there is a legitimate expectation that physical delivery of the actual commodity by the seller to the original contracting buyer will occur in the future”); *In re* Grain Land Coop., 978 F. Supp. 1267, 1275 (D. Minn. 1997) (noting that the Ninth Circuit had found contracts to be outside the cash forward exception where there was no legitimate expectation that the customers would take actual delivery of the purchased commodity) (citing Commodity Futures Trading Comm’n v. Noble Metals Int’l, Inc. 67 F.3d at 773).

33. *See, e.g.*, Andersons, Inc. v. Horton Farms, Inc., 1998 WL 879662, at \*6 (“The purpose of this ‘cash forward’ exception is to permit those parties who contemplate physical transfer of the commodity to set up contracts that (1) defer shipment but guarantee to sellers that they will have buyers and vice versa, and (2) reduce the risk of price fluctuations, without subjecting the parties to burdensome regulations.”); Lachmund v. ADM Investor Servs., Inc., No. 2-97-CV-92, 1998 WL 757976, at \*11 (N.D. Ind. Sept. 24, 1998) (“Most important, both parties to contracts deal in and contemplate future delivery of the actual grain.”); Barz v. Geneva Elevator Co., 12 F. Supp. 2d at 953 (“This contract plainly contemplates actual physical delivery of a specified amount of grain to a specified location at a specified price during a specified period of time.”) (citing Commodity Futures Trading Comm’n v. Noble Metals Int’l, Inc., 67 F.3d at 773 (considering contemplation of actual physical delivery of grain as a characteristic of a cash forward contract); Salomon Forex, Inc. v. Tauber, 8 F.3d at 971 (same); *In re* Bybee, 945 F.2d at 313 (same); Commodity Futures Trading Comm’n v. Co Petro Mktg. Group, Inc., 680 F.2d at 578-79 (same)). This emphasis can be seen as an amalgam of the objective obligation and the subjective intent. Johnson v. Land O’ Lakes, Inc., 18 F. Supp. 2d at 994 (stating that “the factors the court must consider are, first and foremost, whether the contracts contemplate actual physical delivery of grain, measured by an objective obligation to deliver grain and a subjective intent to deliver grain”).

34. Johnson v. Land O’ Lakes, Inc., 18 F. Supp. 2d at 994. Be advised that other courts have made somewhat different articulations of the factors to be considered. For example, in *Andersons, Inc.*, the Sixth Circuit stated:

In the well-reasoned opinion of *In re Grain Land Cooperative*, 978 F. Supp. 1267 (D. Minn. 1997), the district court listed the following factors in support of its finding that the HTA contracts before it fit within the cash forward contract exclusion: (1) the grain elevator (Grain Land) entered into these contracts

including whether the contracts are between persons engaged in the business of buying and selling grain for actual physical delivery; whether the contracts are between parties capable of making or receiving actual physical delivery of the subject goods; whether the contracts have inherent value to the parties; and the "nature" of the contracts viewed as a whole.<sup>35</sup>

These considerations are, however, truly secondary. They merely assist the inquiry into "the ultimate focus," *i.e.*, "actual, physical delivery of the commodity."<sup>36</sup> And, although courts routinely state that they "must view each transaction or group of transactions separately,"<sup>37</sup> the focus on delivery has yielded largely uniform results—where the record suggests a delivery obligation of any sort at any time, no matter how vague or indefinite, the court usually finds that no fact issue exists as to the producers' CEA claims and illegality defense.<sup>38</sup> Stated otherwise, a scintilla of a delivery obligation will permit the HTA contract to fall within the "forward contract" exception.

The adjudicatory decisions of the CFTC in *Competitive Strategies*<sup>39</sup> and *Grain Land*<sup>40</sup> have utilized the inverse analysis, holding that if an HTA contract *does not* require delivery, then it *does not* fit within the 7 U.S.C. §1a(11) exception. However, it is apparently the CFTC's position that some HTA contracts that *do* require delivery *do not* fit within the 7 U.S.C. § 1a(11) exception. In 1996, for example, the CFTC implied that those HTA contracts that fit within the 7 U.S.C. §1a(11) exception must:

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only with farmers and producers of grain—not with speculators from the general public; (2) each plaintiff was a farmer in the business of growing grain and had the ability to make delivery on the contracts; (3) Grain Land was in the business of obtaining grain under contracts for resale and relied on actual delivery of that grain to carry out its business; (4) Grain Land had the capacity to take delivery of the grain subject to the HTAs; (5) on their faces, the contracts were clearly grain marketing instruments, tools to accomplish the actual delivery of grain in exchange for money; (6) it was undisputed that delivery and payment routinely occurred between the parties in past dealings; and (7) the plaintiffs received cash payment on the contracts only upon delivery of the actual commodity. *Id.* at 1273-74. We agree with the *Grain Land* Court that these characteristics exemplify the types of transactions that Congress intended to exclude from the CEA.

Andersons, Inc. v. Horton Farms, Inc., 1998 WL 879662, at \*7-8 (footnote omitted).

35. Johnson v. Land O' Lakes, Inc., 18 F. Supp. 2d at 994.

36. Andersons, Inc. v. Horton Farms, Inc., 1998 WL 879662, at \*7; *see also supra* note 29 and accompanying text.

37. Oeltjenbrun v. CSA Investors, Inc., 3 F. Supp. 2d 1024, 1038 (N.D. Iowa 1998).

38. Andersons, Inc. v. Horton Farms, Inc., 1998 WL 879662, at \*7.

39. *In re Competitive Strategies Agric., Ltd.*, CFTC No. 98-4 (Aug. 24, 1998) (Order of Dismissal on Settlement).

40. *In re Grain Land Coop.*, CFTC No. 97-1 (Nov. 6, 1998) (Initial Decision).

1. require mandatory delivery, absent an intervening event such as a crop failure, of a specified quantity and grade of grain at a specified location and reference price by a specified date within the crop-year during which the crop is harvested;
2. be for a quantity to be delivered which is reasonably related to the producer's annual production, not committed elsewhere and normally available for merchandizing and at a location whereby delivery can be made by the producer under normal merchandizing practices;
3. specify a delivery date and futures contract month reference price which coincides with the crop-year during which the grain will be harvested; and
4. permit, where such contracts include provisions allowing the "rolling" of reference prices, that reference prices only be rolled sequentially from a nearby to a more deferred futures contract month in the same crop-year within which the grain is, or will be, harvested, to reflect the production and inventory-carrying nature of the cash position.<sup>41</sup>

Clearly, some HTA contracts *could* state some indefinite delivery obligation—all that is required by 7 U.S.C. § 1a(11) as interpreted by the district courts—but *not* fit within the CFTC's criteria for the 7 U.S.C. § 1a(11) exception.<sup>42</sup> Thus, it is fair to say that a split now exists between the views of the CFTC and those of the majority of district courts.

#### IV. CRITICISM OF THE COURTS' VIEWS

This Article provides two criticisms of the courts' decisions. First, the district courts' analysis leads to *absurd consequences*, and second, the *method* by which the courts have interpreted 7 U.S.C. § 1a(11) is incorrect.

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41. CFTC Interpretive Ltr. No. 96-41 (Division of Economic Analysis Statement of Policy in Connection with the Unwinding of Certain Existing Contracts for the Delivery of Grain and Statement of Guidance Regarding Certain Contracting Practices.), Comm. Fut. L. Rep. (CCH) ¶ 26,691 (May 15, 1996).

42. The court in *Grain Land* stated as follows:

A chance to hedge price risk is exactly what the Flex HTA contract was marketed as able to do, and the fact that actual delivery may have occurred on a portion of the Flex HTA contracts is not inconsistent with this. As the [Commodity Futures Trading] Commission has noted, "a party to a commodity futures contract may eventually perform on the contract, that is, make or take delivery, at the maturation of the contract, thereby using the futures market to make or take delivery of actual commodities in exchange for money."

*In re Grain Land Coop.*, CFTC No. 97-1, at 40 (Nov. 6, 1998) (quoting *In re Stovell*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,777 (Dec. 6, 1979)).

### A. *The Courts' Analysis Leads to Absurd Consequences*

It is rudimentary that statutes should not be applied in ways that lead to absurd results.<sup>43</sup> The delivery criterion currently employed by the district courts would certainly lead to absurdity: A contract entered today to sell 10,000 bushels of corn for delivery on the last day of the year 2235 would fall within the 7 U.S.C. § 1a(11) exception and would not be a "contract for the purchase or sale of a commodity for future delivery."<sup>44</sup> *Reductio ad absurdum*.<sup>45</sup> Similarly, because of the HTA contracts' rolling feature, an HTA contract entered in 1995 may not actually result in delivery until 2235. Still, under the district courts' current view, that HTA contract would fall within the 7 U.S.C. § 1a(11) exception and would not be a "contract for the purchase or sale of a commodity for future delivery."<sup>46</sup> *Reductio ad absurdum*.<sup>47</sup>

### B. *The Method by Which the Courts Have Interpreted 7 U.S.C. § 1a(11) Is Incorrect*

More than a decade before the HTA contract controversy, the Ninth Circuit was called upon to interpret the 7 U.S.C. § 1a(11) exception in *Co Petro*.<sup>48</sup> The *Co Petro* court noted that "[t]he statutory language [of the CEA] provides little guidance as to the distinctions between regulated futures contracts and excluded cash forward contracts and, to our knowledge, no other court has dealt with this question."<sup>49</sup> Then, without carefully examining the *words* of the statute itself, the *Co Petro* court effectively threw up its hands and declared that the CEA is "ambiguous on its face."<sup>50</sup> With this revelation, the *Co Petro* court granted itself the opportunity to focus on legislative history and to ignore the statute's words.<sup>51</sup> Accordingly, after a detailed discussion of statements found in the legislative record, the *Co Petro* court stated that "a cash forward contract is one in which the parties contemplate physical transfer of the actual commodity."<sup>52</sup>

43. "Nothing is better settled than that statutes should receive a sensible construction . . . and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892).

44. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 502 F. Supp. 806, 809 (C.D. Cal. 1980).

45. *Shango v. Jurich*, 681 F.2d 1091, 1101 (7th Cir. 1982).

46. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 502 F. Supp. at 809.

47. *Shango v. Jurich*, 681 F.2d at 1101.

48. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 577 (9th Cir. 1982).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 578.

Thereafter, other courts—almost always citing to *Co Petro*—jumped on the legislative history bandwagon.<sup>53</sup> The *Co Petro* decision planted the seeds

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53. This pattern has certainly predominated HTA contract cases. See, e.g., *Andersons Inc. v. Horton Farms, Inc.*, No. 96-2287, 1998 WL 879662, at \*6 (6th Cir. Dec. 17, 1998) (citing *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d at 577); *Lachmund v. ADM Investor Servs., Inc.*, No. 2-97-CV-92, 1998 WL 757976, at \*10 (N.D. Ind. Sept. 24, 1998) (same); *Johnson v. Land O' Lakes, Inc.*, 18 F. Supp. 2d 985, 996 (N.D. Iowa 1998) (same); *In re Grain Land Coop.*, 978 F. Supp. 1267, 1272 (D. Minn. 1997) (same); *Countrymark Coop., Inc. v. Smith*, No. 5-97-21, 1997 WL 762813, at \*3 (Ohio Ct. App. Dec. 8, 1997) (same); see also *Farmers Comm'n Co. v. Burks*, No. 16-98-02, 1998 WL 682274, at \*3 (Ohio Ct. App. Sept. 30, 1998) (citing *Countrymark Coop., Inc. v. Smith*, 1997 WL 762813, at \*3).

The same pattern has, to borrow a phrase from Professor Keith C. Miller, “infected the DNA” of non-HTA contract cases. See, e.g., *In re Bybee*, 945 F.2d 309, 313 (9th Cir. 1991) (citing *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d at 580-81); *Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 738 F. Supp. 1472, 1490 (S.D.N.Y. 1990) (stating that “[t]he legislative history of the forward contract exclusion, fully set forth by the Ninth Circuit Court in *Commodity Futures Trading Comm. v. Co Petro Marketing Group, Inc.*, 680 F.2d 573 (9th Cir. 1982), reveals its narrow purpose”); *NRT Metals, Inc. v. Manhattan Metals (Non-Ferrous) Ltd.*, 576 F. Supp. 1046, 1050 (S.D.N.Y. 1983) (citing *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d at 578).

Parenthetically, it should be noted that the Ninth Circuit appears to have jumped on a bandwagon that had already been unleashed by the California district court in *Co Petro*. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 502 F. Supp. 806 (C.D. Cal. 1980). In its own *Co Petro* decision, the district court addressed the issue of whether certain contracts fit within the cash forward exception, then codified at 7 U.S.C. § 2. *Id.* at 810. The court stated that “[r]esolution of this issue requires a careful parsing of the language and legislative history of this statute.” *Id.* The court then set out the relevant sections of the statute, but offered no “careful parsing” of that language. *Id.* Then, because “[t]he exact nature of the distinction . . . present[ed] a rather novel question” and because “[n]either party [was] able to cite any case law that delineates this distinction,” the court declared that it “must return to the legislative history of the Commodity Exchange Act to examine the underlying rationale for the exclusion of ‘sales of cash commodities for deferred delivery’ from the general aegis of regulation of ‘commodity futures contracts.’” *Id.* at 811 (emphasis added). So, even though the word “sale” was staring the district court in the face, *id.*, the court ignored the word and relied wholly on legislative history to interpret the cash forward exception. *Id.* at 817-18.

More speculatively, it seems that the idea of using a delivery criterion to distinguish legal contracts from illegal contracts may have originally arisen from early gambling law. For example, Iowa used to have a statute “designed to prohibit ‘bucket shopping,’ to provide a penalty for keeping same, and to make invalid certain contracts entered into by or on behalf thereof.” *Lamson Bros. v. Mensen*, 174 N.W. 688, 689 (Iowa 1919). The Iowa Supreme Court approved an instruction that “informed the jury, in substance, that, if neither the plaintiff nor the defendant at the time the contract was made intended there should be an actual sale and delivery of the corn, then the contract in law would be a gambling contract and void [under the statute].” *Id.*; see also *Counselman v. Reichart*, 72 N.W. 490, 491 (Iowa 1897) (“Contracts for grain, where the intention is to merely speculate on the chances of a rise or fall of the market, and no delivery is intended, are gambling contracts, and void.”); *People's Sav. Bank v. Gifford*, 79 N.W. 63, 63 (Iowa 1899) (“It was well settled, prior to the enactment of chapter 93 of the Acts of the Twentieth General Assembly, that an executory contract for the sale of property is void where delivery of the property was neither made nor contemplated, and where settlement was to be made by the payment of the differ-

from which the delivery criterion and “secondary considerations” upon which the courts rely today have grown. Unsurprisingly, the tests now used have no relationship to the language of the statute. Indeed, the use of “*delivery*” as the shibboleth for separating regulated “contract[s] for the purchase or sale of a commodity for future *delivery*”<sup>54</sup> from unregulated “sale[s] of any cash commodity for deferred shipment or *delivery*”<sup>55</sup> seems directly contrary both to the statute and to common sense.<sup>56</sup>

ence between the contract price and the market price of the property at the time fixed for settlement.”) (citing *Counselman v. Reichart*, 72 N.W. at 490; *Bank v. Carroll*, 45 N.W. 304 (Iowa 1890); *Shipley v. Reasoner*, 45 N.W. 1077 (Iowa 1890); *Osgood v. Bander*, 39 N.W. 887 (Iowa 1888); *First Nat'l Bank v. Oskaloosa Packing Co.*, 23 N.W. 255 (Iowa 1885); *Gregory v. Wattowa*, 12 N.W. 726, 727 (Iowa 1882) (“The option as to the time of delivery of merchandise purchased is not illegal, if there be an agreement to make actual delivery. The optional contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered.”). Minnesota law shows a similar history. *Mohr v. Miesen*, 49 N.W. 862, 863 (Minn. 1891) (“Contracts for the purchase or sale of grain or other commodities to be delivered at a future time are not *per se* unlawful if the parties intend in good faith to perform them by the actual delivery of the property according to their terms.”). This focus on delivery in early gambling cases raises at least an inference that gambling law influenced the choice of delivery as the criterion for legality under the CEA. If, indeed, the unspoken root of the courts’ narrow focus on delivery in 7 U.S.C. § 1a(11) cases is the common law gambling tradition, then that focus is even more clearly ill-founded than one picked from legislative history. At least the comments of the CEA’s drafters have *some* relevance to the CEA, whereas ancient gambling prohibitions do not.

54. 7 U.S.C. § 6(a) (1994) (emphasis added).

55. *Id.* § 1a(11) (emphasis added).

56. Moreover, the use of a delivery obligation to distinguish between futures and forward contracts is contrary to the understandings of commodity experts. In the real world, futures contracts—the sort that are unquestionably governed by the CEA—do include an affirmative obligation to deliver the commodity in question *even when executed on a board of trade*. See, e.g., MARK J. POWERS, *STARTING OUT IN FUTURES TRADING* 6 (5th ed. 1993) (“Generally, you have to get out of a commodity position within a matter of months after you first make the commitment, or you are legally bound to accept or give delivery.”); NEW YORK INSTITUTE OF FINANCE, *FUTURES: A PERSONAL SEMINAR* 7-8 (1989) (noting that, although “less than 2% of all futures contracts . . . actually result in delivery, . . . [c]ontracts that remain at the time trading ends must be honored through delivery”). The requirement of delivery is also reflected by the rules of the Chicago Board of Trade. CHICAGO BOARD OF TRADE, *RULES AND REGULATIONS* ¶ 1035.00 (“Commodities bought or sold for future delivery under Exchange contracts shall be delivered and accepted in accordance with the provision of this Chapter.”); *id.* ¶ 1046.00 (“Where any commodity is sold for delivery in a specified month . . . delivery must be made upon [or before] the last business day of the specified month.”). See generally *id.* ch. 10 (detailing rules for delivery on CBOT futures contracts). In addition, courts have acknowledged that futures contracts on the boards of trade do include a true delivery obligation. See, e.g., *Cargill v. Hardin*, 452 F.2d 1154, 1156-61 (8th Cir. 1971) (discussing situation in which Cargill was required to take actual delivery on wheat futures contract); *Strobl v. New York Mercantile Exch.*, 582 F. Supp. 770, 776 (S.D.N.Y. 1984) (defendants defaulted on a number of futures contracts by failing to deliver upon or otherwise satisfy them).

It has been observed, however, that most futures contracts do not actually end in delivery. *Utesch v. Dittmer*, 947 F.2d 321, 324 (8th Cir. 1991) (“Relatively few futures contracts result in

The *Co Petro* court's disregard for the language of the CEA was contrary to the fundamental rules of statutory interpretation. Courts "are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."<sup>57</sup> The United States Supreme Court's iterations of this principle are legion,<sup>58</sup> and the Eighth Circuit has clearly agreed:

Before we can examine and give weight to Congressional debates in construing this statute we are met by certain established rules of construction. The first of these is that *in seeking the meaning of a statute resort must first be made to the language of the statute and this must be done*

actual deliveries of cattle."). This phenomenon does not, however, negate the obligation to deliver under a futures contract. *Id.* at 323 ("A cattle futures contract is an agreement by which a person agrees to make or accept delivery of a stated amount of cattle in a designated future month at a specified price. One who sells a contract agrees to make delivery in a designated month, and one who buys a contract agrees to accept delivery."). The initial obligation is often offset through a second transaction. The individual obligated by a futures contract *cannot*, however, *unilaterally offset*. Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and a Proposed Alternative*, 51 WASH. & LEE L. REV. 945, 949 (1994). Instead, that individual must find a willing buyer or seller in order to close his position. *Id.* If no such second party is found, the individual remains obligated to perform by delivering or taking delivery. *Id.* Additionally, as the Eighth Circuit's *Cargill* decision demonstrates, there may be situations in which no such second party can be found. *Cargill v. Hardin*, 452 F.2d at 1156-61. Therefore, it is erroneous to suggest that futures contracts do not carry an obligation to deliver. *See also supra* note 42 and accompanying text (quoting CFTC statement that delivery is a requirement of futures contracts).

57. *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879); *see United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929) (stating that "legislative history may not be used to support a construction that adds to or takes from the significance of the words employed").

58. *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470 (1997) ("[A]bsent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the [Commodity Exchange Act] as Congress wrote it."). *See, e.g., Bailey v. United States*, 516 U.S. 137, 144-45 (1995) ("We start, as we must, with the language of the statute."); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text."); *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990) ("Our construction of the term 'debt' is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself."); *Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language."); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 175 (1989) (holding that interpretive regulation was invalid because it was contrary to the plain language of the statute); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) ("Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ."); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'").



“whatever may have been in the minds of individual members of Congress.” In examining that language we are to take words in their common meaning, and are to examine all of the language of the statute. If that language is plain and, as so construed, the law is within the power of Congress, “the sole function of the courts is to enforce it according to its terms”; it is the “duty” of the courts so to do, and they “have no choice but to follow it, without regard to the consequences.” In that situation, “the duty of interpretation does not arise,” and this is true, even though reliance is placed upon reports of committees of the Congress.<sup>59</sup>

Moreover, the rules requiring strict fidelity to the statute’s text “are not mere academic precepts.”<sup>60</sup> Rather, these rules “go as deeply as the division of our form of government into three branches.”<sup>61</sup> “It is the duty of the legislative branch to write the law. It is the duty of the judicial branch to take the law as so written.”<sup>62</sup>

By disregarding these principles, the *Co Petro*<sup>63</sup> court “change[d] that law,” “invad[ing] a domain prohibited to it and reserved solely for the legislative branch.”<sup>64</sup> Clearly, the *Co Petro* court erred. Those courts that have followed *Co Petro* have multiplied that error.

## V. A TEXTUAL ALTERNATIVE

The courts’ repeated reliance upon the same, flawed subjective analysis in interpreting 7 U.S.C. § 1a(11) exception has made it necessary for farmers in HTA contract cases to both criticize the courts’ methods<sup>65</sup> and to offer

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59. *Lansdown v. Faris*, 66 F.2d 939, 942-43 (8th Cir. 1933) (emphasis added) (citing *Commissioner of Immigration v. Gottlieb*, 265 U.S. 310, 313 (1924); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356 (1922); *Railroad Comm’n v. Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 589 (1922); *United States v. Standard Brewery*, 251 U.S. 210, 217 (1920); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *McBroom v. Scottish Inv. Co.*, 153 U.S. 318, 323 (1894); *Merritt v. Welsh*, 104 U.S. 694, 702 (1881); *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 116 (1879)); *see also* IOWA R. APP. P. 14(f) (listing “propositions so well established that authorities need not be cited in support of any of them”); *id.* R. 14 (f)(13) (“In construing statutes the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said.”).

60. *Lansdown v. Faris*, 66 F.2d at 943.

61. *Id.*

62. *Id.*

63. *Commodity Futures Trading Comm’n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 577-78 (9th Cir. 1982).

64. *Lansdown v. Faris*, 66 F.2d at 943 (emphasis added).

65. *See generally supra* Part IV (criticizing the courts’ analysis).

alternatives.<sup>66</sup> The following paragraphs describe one of the alternatives that is being advanced before the courts.<sup>67</sup>

The issue is whether HTA contracts fit within the 7 U.S.C. § 1a(11) exception. Each of the words of a statute must be given effect.<sup>68</sup> The words of 7

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66. Although this Article focuses on only one alternative, several others have been developed. For example, in *Dunn*, the United States Supreme Court defined “forward contracts” as “agreements that anticipate the actual delivery of a commodity on a specified future date.” *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 472 (1997). Under this definition, HTA contracts that involve rolling could not be “forward contracts” because no “specified” date for delivery can be anticipated. Rather, the date is repeatedly changed as the farmer decides to roll. Thus, under *Dunn*, HTA contracts that involve rolling would not fit within the forward contract exclusion.

Another alternative theory is based upon tax law and, particularly, the Supreme Court’s decision in *Arkansas Best Corp. v. Commissioner*, 485 U.S. 212, 219-23 (1988). “Futures contracts” can be distinguished from “forward contracts” on the basis of their tax treatment. Under federal law, commodity futures contracts are capital assets. *See* 26 U.S.C. § 1221 (1994); *see also* *Swartz v. Commissioner*, 876 F.2d 657, 659 (8th Cir. 1989). Only contracts involving “the taxpayer’s stock in trade or other property properly included in the taxpayer’s inventory” may be excepted from capital-asset treatment. *Dial v. Commissioner*, 968 F.2d 898, 901 (9th Cir. 1992) (citing *Arkansas Best Corp. v. Commissioner*, 485 U.S. 212, 219-23 (1988)). Therefore, the question of whether an HTA contract is a futures contract or a forward contract can be answered by determining whether the HTA contract referenced stock in trade or inventory. In other words, the issue is whether the HTA contracts sold “stock in trade or inventory,” not whether the HTA contracts would require the delivery of now-hypothetical goods at some point in the future.

This theory finds support from at least two sources. First, the use of tax law to interpret the CEA is consistent with the legislative history of the CEA. *See infra* note 75. Second, from a practical standpoint, a judicial determination as to whether the HTA contracts are futures contracts or forward contracts may have serious tax consequences for the farmer. *See generally* Neil E. Harl, *Hazards of Hedge-to-Arrive Contracts*, 7 AGRIC. L. DIG. 77 (1996) (discussing tax aspects of HTA contracts).

67. For example, the Brief for Appellants in *Haren v. Conrad Cooperative*, No. 98-3803, was filed in the United States Court of Appeals for the Eighth Circuit on December 23, 1998.

68. *See supra* notes 57-64. Restated, no word in a statute should be treated as superfluous. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2290 (1998) (rejecting as “untenable” a reading of Title VII that would render a section superfluous); *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (“Our cases consistently have expressed ‘a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.’”) (quoting *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); citing *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991)); *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (citing *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)); *Brent v. Bank of Washington*, 35 U.S. 596, 603 (1836) (“The fundamental rule for expounding statutes is, that if it can be prevented, no clause, sentence, or word should be deemed superfluous, void, or insignificant.”).

This principle is particularly applicable to the word “sale” in the CEA. The CEA specifically acknowledges that there is a difference between a “sale” and other arrangements such as “agreements of sale” and “agreements to sell.” 7 U.S.C. § 1a(6) (1994). So, it is presumed that Congress purposefully chose the word “sale” in 7 U.S.C. § 1a(11) over any other terms such as “agreements of sale,” “agreements to sell,” “contract to sell,” or “contract of sale.” *United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992) (“Where language is included in one section of a statute

U.S.C. § 1a(11) are these: "The term 'future delivery' does not include any *sale* of any cash commodity for deferred shipment or delivery."<sup>69</sup> Therefore, to give effect to the words of 7 U.S.C. § 1a(11), a court must give effect to the word "sale." Restated, the word "sale" must "narrow the universe"<sup>70</sup> of contracts that fall within 7 U.S.C. § 1a(11). Thus, to fit within the 7 U.S.C. § 1a(11) exception, a contract must be a "sale."

The term "sale" is not specifically defined by the CEA.<sup>71</sup> Therefore, it is appropriate to define the term "sale" by reference to article 2 of the Uniform

but omitted in another section of the same statute, it is generally presumed that the disparate inclusion and exclusion was done intentionally and purposely."). Therefore, Congress's use of the term "sale" must be viewed as a deliberate choice and must be accorded significance in interpreting 7 U.S.C. § 1a(1). *See Downer v. United States ex rel. United States Dep't of Agric. & Soil Conservation Serv.*, 97 F.3d 999, 1009 (8th Cir. 1996) ("Congress must be presumed to be using the definitions it provides for a statutory scheme."); *Schooler v. United States*, 231 F.2d 560, 563 (8th Cir. 1956) (stating that "where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout").

69. 7 U.S.C. § 1a(11) (emphasis added).

70. This phrase is borrowed from preemption decisions. *See, e.g., Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2261 (1996) (noting that inclusion of word "specific" within federal regulation's preemption clause "does narrow the universe of federal requirements that the agency intends to displace at least some state law"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) (noting that "each phrase within that clause limits the universe of common-law claims pre-empted by the statute"). The same idea is, however, equally applicable to interpretation of 7 U.S.C. § 1a(11), a narrow exemption from the broad purview of the CEA. The enactment of the CEA "establishe[d] an ambitious scheme for the regulation of commodities trading." *Kerr v. First Commodity Corp.*, 735 F.2d 281, 288 (8th Cir. 1984). Indeed, throughout the 77 years of congressional regulation of commodity trading, each reenactment has broadened that regulation's scope. *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 360-68 (1982) (detailing the Act's history). Today, the CEA is "'a comprehensive regulatory structure' creating a coherent uniform system of federal control over the entirety of the national futures trading industry." *Rivers v. Rosenthal & Co.*, 634 F.2d 774, 779-80 (5th Cir. 1980). Therefore, courts must heed the rule of statutory interpretation that, where Congress has sought to establish a comprehensive regulatory scheme, exclusions from that scheme should be read narrowly. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993). Therefore, no court should extend the exemption of 7 U.S.C. § 1a(11) beyond the precise terms that Congress used. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within [the statute's] terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). Accordingly, each particular term should narrow the universe of contracts that fall within 7 U.S.C. § 1a(11). *See generally supra* Part IV (criticizing court decisions that ignore the plain language of the CEA).

71. Compare the Commodity Exchange Act, 7 U.S.C. §§ 1-25, which provides no definition of the term "sale," with other Acts that do include special definitions for "sale" and/or "sell," including the Securities Exchange Act of 1933, 15 U.S.C. § 77b(a)(3); the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(14); the Utility Holding Company Act of 1935, 15 U.S.C. § 79b(a)(23); and, the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(34).

Commercial Code (UCC),<sup>72</sup> the law of “sale[s].”<sup>73</sup> Under article 2, “a ‘sale’ consists in the passing of title from the seller to the buyer for a price.”<sup>74</sup> This

72. This proposition has met some resistance. See *Scallon v. U.S. Agric. Ctr., Inc.*, No. C96-3140-MWB (N.D. Iowa Sept. 14, 1998) (Memorandum Opinion and Order Regarding Austinville Elevator’s and United Supplier’s Motions for Partial Summary Judgment). Nonetheless, with regard to goods, article 2 of the Uniform Commercial Code has long defined the law of sales. *Flagg Bros. v. Brooks*, 436 U.S. 149, 161 n.11 (1978); *In re PFA Farmers Mkt. Ass’n*, 583 F.2d 992, 996 (8th Cir. 1978) (noting that “one should be most cautious in urging that article 2 [of the Uniform Commercial Code] is not a complete statement of the law of sales”). Because the Commodity Exchange Act does not provide a new meaning for the term “sale,” see *supra* note 71, the established legal meaning of the term “sale” can be presumed to apply. See *Midlantic Nat’l Bank v. New Jersey Dep’t of Envtl. Protection*, 474 U.S. 494, 501 (1986) (“The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”); *United States v. Hsu*, 155 F.3d 189, 200 (3d Cir. 1998) (“When Congress uses a common law term such as ‘attempt,’ we generally presume that it intended to adopt the term’s widely-accepted common law meaning.”); *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998) (“Given the uniform construction at common law of the ‘willful and malicious’ element, and the absence of evidence to the contrary, we must assume that Congress knew how the common law defined that phrase and intended to adopt that definition in enacting § 81.”); *Huber v. Moran*, 140 F.2d 823, 824 (8th Cir. 1944) (opining that Congress “comprehended and intended” the established legal meaning of the term “market value” to apply to the Bankruptcy Act). Thus, it is appropriate to look to article 2 as guidance in interpreting the term “sale” as it is used in the CEA. See *Brown v. Commissioner*, 380 U.S. 563, 570-71 (1965) (citing article 2 of the UCC in support of its definition of “sale” for purposes of the tax code); *Getty Oil Co. v. Department of Energy*, 478 F. Supp. 523, 528 (C.D. Cal. 1978) (defining “sale” in 10 C.F.R. § 212.31; citing article 2 of the UCC); see also *Barnhill v. Johnson*, 503 U.S. 393, 397-98 (1992) (employing the UCC to interpret 11 U.S.C. § 101(54)); *Langley v. FDIC*, 484 U.S. 86, 90-97 (1987) (employing the UCC to interpret 12 U.S.C. § 1823(e)); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (employing the UCC to interpret federal law); *FDIC v. Bowles Livestock Comm’n Co.*, 937 F.2d 1350, 1354-55 (8th Cir. 1991) (applying Nebraska’s UCC to FDIC’s security interests); *Justice v. Valley Nat’l Bank*, 849 F.2d 1078, 1084 (8th Cir. 1988) (noting that “the law of the state where the property is situated governs questions of property rights” for purposes of Bankruptcy Act); *Georgia Cas. & Sur. Co. v. United States*, 823 F.2d 260, 264 (8th Cir. 1987) (noting that “when federal common law applies the federal court may, under certain circumstances, apply the relevant state’s law as the federal rule, especially when the widely-accepted UCC is involved.”); *United States v. Landmark Park & Assoc.*, 795 F.2d 683, 686 (8th Cir. 1986) (“We have incorporated state law as the federal rule of decision when the state law is derived from a uniform statute such as the Uniform Commercial Code and to do so would therefore not hinder the ‘federal interest in uniformity of the law.’”); *United States v. Conrad Publ’g Co.*, 589 F.2d 949, 953 (8th Cir. 1978) (observing that “[t]he U.C.C. has become the source of general commercial law;” that the UCC “represents the latest attempt to achieve uniformity in commercial transactions;” and that “[t]he U.C.C. has become the source of federal common law in the area of commercial transactions”).

73. See *Flagg Bros. v. Brooks*, 436 U.S. at 161 n.11 (noting that “the Uniform Commercial Code . . . is the law in 49 States and the District of Columbia”); *In re PFA Farmers Mkt. Ass’n*, 583 F.2d at 996 (noting that “one should be most cautious in urging that article 2 [of the Uniform Commercial Code] is not a complete statement of the law of sales”).

74. U.C.C. § 2-106.

definition is indistinguishable from the ordinary or common meaning<sup>75</sup> of the word "sale."<sup>76</sup>

Title to goods cannot pass unless the goods are "both existing and identified."<sup>77</sup> Therefore, a contract cannot be a "sale" if the goods it purports to sell

75. In *Commissioner v. Brown*, the Court noted:

A "sale," . . . is a common event in the non-tax world; and since it is used in the [Tax] Code without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code. "Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words "sale" and "exchange" are not to be read any differently."

*Commissioner v. Brown*, 380 U.S. 563, 570-71 (1965) (citing *Hanover Bank v. Commissioner*, 369 U.S. 672, 687 (1962); *Commissioner v. Korell*, 339 U.S. 619, 627-28 (1950); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947); *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 249 (1941); *Lang v. Commissioner*, 289 U.S. 109, 111 (1933); *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932)); *accord Enercon GmbH v. International Trade Comm'n*, 151 F.3d 1376, 1381 (Fed. Cir. 1998) (noting that because "the term 'sale' is not defined within section 337 [of the Tariff Act of 1930] . . . [w]e therefore believe that Congress intended to give the term its ordinary meaning, thereby making an explicit definition unnecessary"); *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997) (stating that "'sale' should be given its ordinary meaning under the anti-dumping laws"). Indeed, students of legislative history may find the application of *Brown's* observations to 7 U.S.C. § 1a(11) particularly palatable because the CEA originated as a tax law, the Futures Trading Act. *Commissioner v. Brown*, 380 U.S. at 570-71 (interpreting Internal Revenue Code). See generally *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 361-63 (discussing the development of the CEA).

Moreover, if, in any context, a term is not defined by a statute, that term is given its ordinary meaning. See *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (interpreting the term "marketing" within Plant Variety Protection Act, 7 U.S.C. §§ 2541(3)-(4); stating that "[w]hen terms used in a statute are undefined, we give them their ordinary meaning"); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (interpreting term "cognizable" in 28 U.S.C. § 1346; stating that "[i]n the absence of . . . a definition [within the statute], we construe a statutory term in accordance with its ordinary or natural meaning"); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (noting that "[b]ecause 'delay' is not defined in [18 U.S.C. § 3501], we must construe the term 'in accordance with its ordinary or natural meaning.'"); *Smith v. United States*, 508 U.S. 223, 228 (1993) (interpreting term "use" in 18 U.S.C. § 924(c)(1); stating that "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning").

76. *Commissioner v. Brown*, 380 U.S. at 570-71 ("A sale, in the ordinary sense of the word, is a transfer of property for a fixed price of money or its equivalent."); *NSK Ltd. v. United States*, 115 F.3d at 975 (defining "sale" according to its ordinary and common meaning as "a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price, or sum of money, or loosely, for any consideration"); *Barry v. Barry*, 78 F.3d 375, 382 (8th Cir. 1996) ("A sale is defined as '[a] contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer' (or purchaser), by which the former, in consideration of the payment . . . of a certain price in money, transfers to the latter title and possession of the property.'") (quoting BLACK'S LAW DICTIONARY 1337 (6th ed. 1990)); *accord In re Hastie*, 2 F.3d 1042, 1045 (10th Cir. 1993).

77. U.C.C. § 2-105. Surely, this accords with the ordinary idea of a sale: One cannot sell that which does not exist. Just as one should not count one's chickens before they hatch, one

are not “both existing and identified.”<sup>78</sup> Such nonexistent or unidentified goods are called future goods, and no title in such future goods can pass.<sup>79</sup> Any purported sale of future goods is not a *sale*, but rather a *contract to sell*.<sup>80</sup>

Crops are not identified until they are planted.<sup>81</sup> Similarly, common sense would dictate that crops cannot “exist” as crops prior to planting.<sup>82</sup> Therefore, because crops cannot be “identified” or “existing” before they are planted, title to those crops cannot pass prior to planting.<sup>83</sup> Accordingly, no contract can be a

cannot sell those chickens before they hatch. What would be sold, if anything, would be eggs. Similarly, one cannot “sell” grain that is not yet even planted. Any purported sale of such grain would be either a nonsensical sale of seed or, more realistically, a *contract to sell* grain at a future time.

78. *Id.*

79. *Id.*

80. *Id.* Accordingly, the United States Supreme Court defined “futures contracts” as “agreements to buy or sell a specified quantity of a commodity at a particular price for delivery at a set future date.” *Dunn v. Commodity Futures Trading Comm’n*, 117 S. Ct. 913, 914 (1997).

This distinction—“sale[s]” as forward contracts and “contracts to sell” as futures contracts—also accords with the understanding of commodity futures experts. For example, in his description of the difference between securities markets and futures markets, Mark J. Powers states that:

The stock exchanges act to bring people with extra capital together with those who need capital to develop a business. They facilitate the transfer of ownership of corporations which are engaged in various productive activities such as steel making, auto manufacturing, banking, etc. Property rights change hands.

The commodity futures markets act to bring people together to transfer the price risk associated with the ownership of some commodity, like wheat, or a service, like an interest rate. *No property rights to a physical commodity change hands at the time the futures contract is entered into. The transaction is a legally binding promise that at a later date a transaction will occur involving the property rights to the actual commodity.*

POWERS, *supra* note 56, at 381 (emphasis added); accord ROBERT W. HAMILTON, *FUNDAMENTALS OF MODERN BUSINESS* 484-85 (1989); Lewis D. Soloman & Howard B. Dicker, *The Crash of 1987: A Legal and Public Policy Analysis*, 57 *FORDHAM L. REV.* 191, 195 (1988).

Court decisions have also recognized that futures contracts, unlike sales, do not pass title to goods. In *United States v. Firestone Tire & Rubber Co.*, the district court interpreted section 3 of the Gold Reserve Act of 1934 and its regulations. *United States v. Firestone Tire & Rubber Co.*, 518 F. Supp. 1021, 1023 (N.D. Ohio 1981). The *Firestone* court was called upon to draw a distinction between contracts that passed ownership interests in gold, and those that did not. *Id.* In distinguishing contracts that involve “the acquisition of ownership rights in physical gold” from “the speculation in gold futures contracts,” the court provided the following definition of a futures contract: “Futures are contractual commitments to buy or sell commodities, but do not transfer any ownership rights to identifiable goods.” *Id.* at 1037; see also *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 542 (7th Cir. 1989) (“A futures contract, roughly speaking, is a fungible *promise to buy or sell* a particular commodity at a fixed date in the future.”) (emphasis added).

81. U.C.C. § 2-501(1)(c).

82. See *supra* note 77 and accompanying text.

83. See *supra* notes 77-80 and accompanying text.

“sale” of crops if the crops are not yet planted.<sup>84</sup> Consequently, no contract can be a “sale of any cash commodity for deferred shipment or delivery”<sup>85</sup> unless the “cash commodity” is planted when the contract is made. Thus, no contract can fit within 7 U.S.C. § 1a(11) unless the crops to which that contract relate are planted at the time the contract is entered.<sup>86</sup> Therefore, the fact that delivery at some point is required, intended, or contemplated would not *alone* place the contract within 7 U.S.C. § 1a(11).

## VI. CONSEQUENCES AND CONCLUSIONS

If adopted, the theory discussed here would not require reconsideration of decisions such as those of the CFTC in *Grain Land* and *Competitive Strategies*.<sup>87</sup> HTA contracts such as those in *Grain Land* do not require the farmer to give up ownership of property in return for money; therefore, those HTA contracts cannot be *sales*.<sup>88</sup> Accordingly, those HTA contracts cannot fit within the 7 U.S.C. § 1a(11) exception. So, under the theory discussed here, delivery would retain a role in the analysis of 7 U.S.C. § 1a(11), but that role would be changed: Delivery is a necessary *but not a sufficient* precondition for 7 U.S.C. § 1a(11) status.<sup>89</sup>

Second, many judicial decisions would merit reconsideration under this theory. Specifically, where an issue of material fact exists as to whether the quantities of grain designated by the HTA contracts were planted or otherwise

84. See, e.g., *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34, 38-39 (M.D. Ga. 1973) (holding, under Georgia’s UCC, that where no cotton had been planted at the time of the execution of contracts, contracts were “contract[s] to sell, as distinguished from an actual sale” because the commodity was not in existence at the time the contract was executed).

85. 7 U.S.C. § 1a(11) (1994).

86. *Id.* Of course, this does not mean that a strict reading of 7 U.S.C. § 1a(11) requires that *possession* pass at the time the contract is made. Indeed, “[i]t is common for a ‘sale’ to be completed even though delivery is to be made in the future.” *Enercon GmbH v. International Trade Comm’n*, 151 F.3d 1376, 1382 (Fed. Cir. 1998).

87. See *supra* Part III.

88. See *supra* note 75.

89. This rule is consistent with the early cash forward cases, *i.e.*, the cases that predate the HTA contract struggle. Indeed, *Co Petro* and its ilk merely stand for the undisputed proposition that where delivery is *not* legitimately to be expected, the contract does *not* fit within 7 U.S.C. § 1a(11). See *Commodity Futures Trading Comm’n v. Noble Metals Int’l, Inc.*, 67 F.3d 766, 772 (9th Cir. 1995) (upholding grant of summary judgment as to contentions that the “Forward Delivery Program” contracts were cash forward contracts); *Commodity Futures Trading Comm’n v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 579, 581 (9th Cir. 1982) (holding “that [the 7 U.S.C. § 1a(11)] exclusion is *unavailable* to contracts . . . which are *not* predicated upon the expectation that delivery of the actual commodity”; concluding that *Co Petro*’s contracts were “contracts of sale of a commodity for future delivery”) (emphasis added). *But see In re Bybee*, 945 F.2d 309, 315 (9th Cir. 1991) (holding that silver contracts were cash forwards because parties had the legal obligation to make or take delivery upon demand of the other).

owned by the farmer at the time the HTA contract was entered, summary judgment<sup>90</sup> should not be granted as to the farmers' CEA claims. Such a fact issue would arise, *inter alia*, where (a) the farmer could roll the delivery into far removed crop years; and/or (b) where the quantity of grain obligated under the HTA contracts exceeded the farmers' annual production. In either case, it is likely that the grain referenced by the HTA contracts had not yet been planted. Thus, those HTA contracts could not be *sales*, and could not fit within 7 U.S.C. § 1a(11).

These results are consistent with aspects of the CEA's legislative history that are more often written than given effect: "There is no indication that Congress drew [the 7 U.S.C. § 1a(11)] exclusion otherwise than to meet a particular need such as that of a farmer *to sell part of next season's harvest at a set price* to a grain elevator or miller."<sup>91</sup> Moreover, these results are consistent with those advocated by the CFTC,<sup>92</sup> the agency entrusted by Congress to administer the

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90. FED. R. CIV. P. 56. See generally *Barz v. Geneva Elevator Co.*, 12 F. Supp. 2d 943, 951 (N.D. Iowa 1998) (listing cases that discuss the summary judgment standard) (citing *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1229-32 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. No. 1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997); *Security State Bank v. Firststar Bank Milwaukee*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.*, 963 F. Supp. 805, 813-14 (N.D. Iowa 1997)).

91. *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d at 577-78 & n.5 (emphasis added) (citing *Hearings on H.R. 168, 231, 2238, 2331, 2363 and 5228 Before the House Comm. on Agric.*, 67th Cong. 1st Sess. 8, 16 (1921)). If a farmer plants his crop, and then sells it, this would meet the need to "sell" "next season's crop" at a set price. *Id.* Thus, such a sale would fit within 7 U.S.C. § 1a(11). If, however, one enters an HTA contract in 1995, but then can roll the HTA contract indefinitely, delivery would not be required in 1995 or 1996. Rather, it could occur in 1997, 1998, 1999, 2000, or beyond. Surely, such an HTA contract should not fit within 7 U.S.C. § 1a(11) as interpreted in *Co Petro* because, from the perspective of the HTA contract's entry in 1995, that eventual delivery would have nothing to do with "next season's crop." *Id.* at 577-78. Moreover, given the changes in price that accompany rolling, see *supra* notes 23-27 and accompanying text, such an HTA contract would not provide "a set price." *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 680 F.2d at 577-78.

92. See *supra* notes 15-19, 39-42, 87-89 and accompanying text. The analysis discussed in Part V is consistent with the four criteria set forth by the CFTC in 1996, see *supra* text accompanying notes 41-42. For example, CFTC's second criteria requires that the HTA contract "be for a quantity to be delivered which is reasonably related to the producer's annual production." CFTC Interpretive Ltr. No. 96-41, *supra* note 41. This criterion parallels the requirement that the quantities of grain designated by the HTA contract must have been planted or otherwise owned by the farmer at the time the HTA contract was entered. See *supra* text accompanying note 90. Similarly, the CFTC's fourth criteria, that the HTA contract must only permit rolling "sequentially . . . in the same crop-year within which the grain is, or will be, harvested" accords with the idea that a true cash forward contract will not allow "the farmer [to] roll the delivery into far removed crop years." CFTC Interpretive Ltr. No. 96-41, *supra* note 41; see also *supra* text accompanying note 90.



CEA.<sup>93</sup> Much more importantly, however, these results emanate from and defer to the *words* of the Act.<sup>94</sup>

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93. See *supra* notes 15-16 and accompanying text.

94. Those who dislike the results that emanate from a textual interpretation of the CEA should address their complaints to Congress rather than the courts: "We are . . . bound by the words employed [by the statute] and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. . . . Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation." *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 277-78 (1929).