Journal of Law and Policy

Volume 3 | Issue 1 Article 8

1994

The Regulation of Derivatives and the Effect of the Futures Trading Practices Act of 1992

Rebecca Leon

THE REGULATION OF DERIVATIVES AND THE EFFECT OF THE FUTURES TRADING PRACTICES ACT OF 1992

Rebecca Leon[*]

INTRODUCTION

What are derivatives and what should regulators do about them? If you cannot answer this question, then you understand as much about derivatives as many top financial executives.[1] Because so few people understand the risks[2] inherent in derivatives, many believe that derivatives may be more effectively monitored by regulatory agencies. As derivatives have recently been introduced on foreign exchanges[3] and over-the-counter ("OTC") markets[4] at

---

[*] Brooklyn Law School Class of 1995. The author wishes to thank Ron Filler, Esq., Conrad Bahlke, Esq. and Richard Miller, Esq. for their assistance in the preparation of this article.

[1] Carol J. Loomis, *The Risk That Won't Go Away*, FORTUNE, Mar. 7, 1994, at 40.

[2] "Risk" is the probability that an investment will earn the projected return. R. J. SHOOK & ROBERT L. SHOOK, THE WALL STREET DICTIONARY 359 (1990).

[3] An "exchange" is "the physical location where brokers transact business for their clients." *Id.* at 131. The Chicago Board of Trade ("CBOT") is the largest exchange for trading futures in the United States. *Id.* at 62.

[4] OTC markets are "widely scattered telecommunications networks through which the buyers and sellers" of certain products can be brought together. LAWRENCE J. GITMAN & MICHAEL D. JOEHNK, FUNDAMENTALS OF INVESTING 34 (4th ed. 1990). The OTC market is comprised of sophisticated end users, typically corporations and sovereign entities who negotiate directly with industrial corporations, financial institutions, or money center banks. (Money center banks are located in one of the world's major financial centers and have large lenders, money-market buyers and securities purchasers. SHOOK & SHOOK, *supra* note 2, at 248.) OTC markets offer greater contractual freedom than organized exchanges because contracts are individually negotiated rather than standardized. However, there is no clearing house (which is the place where deals

an unprecedented rate, questions about derivatives regulation have intensified.[5]

Derivative instruments are financial contracts which allow or obligate the investor to buy or sell an underlying asset, such as stocks, commodities,[6] stock indexes,[7] or currencies.[8] Changes in the underlying asset's value affect the value of the contract. When a derivatives dealer, generally a large commercial bank or major securities firm, enters into a contract, it transacts with an end user. End users generally consist of "smaller banks, industrial companies, insurers and other financial services firms, pension funds and governmental units, such as municipalities."[9] End users hedge[10] market risks by investing in derivatives, which counter adverse price movements.[11] Additionally, end users can arbitrage[12]

---

between members are executed and settled) guaranteeing payment by the other party as there is with an organized exchange. The parties involved must trust each other to honor the contractual obligations. Henry T.C. Hu, *Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementalism,* 102 YALE L.J. 1457, 1465 (1993).

[5] Hu, *supra* note 4, at 1457, 1458.

[6] A "commodity" is a movable article of value that can be bought and sold. BLACK'S LAW DICTIONARY 274 (6th ed. 1990). Examples of commodities are grains, oils, soybeans, cotton, all other goods and articles, and all services, rights and interests in which contracts for future delivery are presently or in the future dealt. *See* 7 U.S.C. § 1a(3) (Supp. V 1993).

[7] A "stock index" is a measure of the value changes in a basket of similar securities which is used to predict possible future price movements. SHOOK & SHOOK, *supra* note 2, at 398. The Dow Jones Industrials Average and Standard & Poor's 500 Index are examples of stock indexes.

[8] Hu, *supra* note 4, at 1460, 1464. Some examples of derivative products are futures, forwards, options, swaps and index participations.

[9] Loomis, *supra* note 1, at 41.

[10] A "hedge" is "a measure used to offset losses or potential losses." SHOOK & SHOOK, *supra* note 2, at 180.

[11] Hu, *supra* note 4, at 1466. "Market risk" is the risk that prices fluctuate, "with all movements being beyond the investor's control." SHOOK & SHOOK, *supra* note 2, at 239. An example of effective hedging of market risks is investing in a derivative that rises in value if oil prices fall to insulate a sheikdom, while investing in a derivative that rises along with oil prices will protect an airline. Hu, *supra* note 4, at 1466.

[12] "Arbitrage" is the buying and selling of stocks, foreign currency, precious metals, bonds, or other commodities from one market to be sold at a profit on

between the price of the derivative and the market price of the underlying asset or between prices in different capital markets.[13] Furthermore, derivatives are useful because investments in derivatives have lower transaction costs[14] than investments in the underlying asset.[15] While derivatives have many functions, hedging[16] is a major cause of regulatory concern.[17]

Theoretically, the end user hedges risk, thereby transferring the risk to the dealer. The dealer may hedge one contract with a second dealer, who may hedge that contract with another contract and so on.[18] There are many global interconnections at the end of the line that could lead to the remote, yet horrific threat of systemic risk, the danger that trouble in one market might spread uncontrollably.[19] If, for example, one major dealer defaults on its contracts, other financial institutions could collapse because they fail to receive an expected payment on the derivatives contract. Ultimately, the taxpayers would assume the liability for the failure

---

a separate, but related market. SHOOK & SHOOK, *supra* note 2, at 15. For example, if a derivative product which has oil as its underlying asset is selling at $95.00 and the market price of oil is $100.00, an arbitrageur can make $5.00 with no risk if he buys the oil-based derivative and at the same time sells oil. Essentially, the arbitrageur bought oil at $95.00 and sold the oil at $100.00. Because both the $95.00 and $100.00 prices were available at the same time, there was a guaranteed $5.00 profit.

[13] Hu, *supra* note 4, at 1466.

[14] "Transaction costs" are the costs associated with making an investment. GITMAN & JOEHNK, *supra* note 4, at 53. The cost represents money paid on both purchase and sale transactions to compensate the broker for executing the transaction. *Id.*

[15] Hu, *supra* note 4, at 1466.

[16] *See supra* notes 10 and 11 and accompanying text.

[17] Loomis, *supra* note 1, at 41.

[18] Loomis, *supra* note 1, at 41.

[19] Loomis, *supra* note 1, at 41. Most central bankers agree that there is only a small probability that mispricing derivative's risks could lead to a systemic shock. John Plender, *Through a Market, Darkly: Is the Fear That Derivatives Are a Multi-Billion Accident Waiting to Happen Justified?*, FIN. TIMES, May 27, 1994, at 17. Moreover, evidence suggests that derivatives actually have a beneficial effect on underlying markets and may even reduce volatility in such markets. Dennis Weatherstone, *Coping with Change Through Derivatives*, RISK MGMT., July 19, 1994, at 50.

of the derivatives industry.[20] Concerns over derivatives and what some consider inadequate disclosure on financial statements[21] have caused recent congressional response to derivatives. [22]

---

[20] Loomis, *supra* note 1, at 41.

[21] Loomis, *supra* note 1, at 41. Derivatives are off balance sheet instruments. *Id.* The balance sheet of a company which has invested in derivatives, may, therefore, not provide an accurate picture of the company's financial situation.

[22] Rep. James A. Leach of Iowa, the ranking Republican on the House Banking Committee, introduced a bill that proposes the creation of a Federal Derivatives Commission ("FDC") to exert extensive authority over derivatives contracts. Loomis, *supra* note 1, at 41. It would be extremely difficult to create the FDC. Perhaps the greatest problem would be determining over which existing and new products the commission would have jurisdiction. Based on the definition that a derivative is an instrument which derives its value from an underlying asset, a futures contract is a derivative. If futures contracts fall under the jurisdiction of the FDC, the Commodity Futures Trading Commission ("CFTC") would be near extinction. Moreover, an additional commission with new policies would undoubtedly chase products and investors, unable to determine what regulations would be imposed on derivatives, further away from U.S. exchanges.

In May 1994, the U.S. General Accounting Office issued a report which is designed to stimulate new forms of financial regulation. Rep. Henry Gonzalez (D-Tex.) filed one bill and Rep. Edward J. Markey (D-Mass.), chairman of the House Telecommunications and Finance Subcommittee, filed a broader bill affecting the regulation of derivatives. Loomis, *supra* note 1, at 41. Markey's bill gives the Securities and Exchange Commission ("SEC") oversight over derivatives. John Connor & Stephen Power, *Markey Bill Would Give SEC Oversight Over Unregulated Derivatives Dealers*, WALL ST. J., July 14, 1994, at C22. More recently, the SEC began working with large securities firms to develop voluntary standards of oversight for derivatives trading. Jeffrey Taylor & Steven Lipin, *SEC, Six Firms Work to Set Derivatives Rules*, WALL ST. J., July 6, 1994, at C1.

These proposals have been fueled by recent losses in OTC derivatives at large corporations. David Warsh, *Derivatives: The Ball Is In Markey's Court*, BOSTON GLOBE, May 31, 1994, at 33. For example, in April 1994 the U.S. firms of Procter & Gamble Co. and Gibson Greetings, Inc. put recent losses of derivatives at $102 million and $19.7 million, respectively. Richard Waters, *Bankers Trust Sees Cut In Use of Financial Derivatives*, FIN. TIMES, Apr. 21, 1994, at 39. In addition, Japan's Kashima Oil Co. Ltd. reported $1.5 billion in derivatives losses. *Commodities and Derivatives: Risky World of Leveraged Swaps*, INDEPENDENT, Apr. 18, 1994, at 26. Earlier in 1994, Germany's Metallgesellschaft uncovered more than $1 billion in derivatives losses. *Id.* These examples fail to make clear that for every loser of $1 million dollars in derivatives transactions, there is a winner of $1 million on the other side of the trade.

To ward off regulators, dealers have expended great resources to perfect their risk management systems,[23] thus allowing dealers to avoid a collapse of the derivatives market.[24] Regulators are quick to recognize that there are great hedging benefits with derivatives.[25] Derivatives contracts are also an increasing source of profits for dealers with growth rates of forty percent.[26] In fact, large profits from the trading of derivatives have helped banks recover from troublesome loans to less developed countries, real estate deals and highly leveraged companies.[27]

Although American commercial banks are currently the

These multinational corporations are merely upset that they made bad trades. Rita Koselka, *Safe When Used Properly*, FORBES, Aug. 15, 1994, at 47, 48. These corporations, and almost anyone who transacts in complex derivative products, are either sophisticated enough or wealthy enough to hire experts to monitor their derivatives transactions. Companies that reported earnings from derivatives in 1993 include: W.R. Grace & Co. ($20.3 million), Oglethorpe Power Corp. ($9.1 million), Coca-Cola Enterprises ($7 million), McDermott International ($7 million) and Schlumberger Industries ($5 million). *Id.* at 47. The government must not step in and regulate to protect corporations that can protect themselves. Unnecessary regulation stunts the growth of U.S. exchanges. *See infra* note 30 and accompanying text.

[23] Loomis, *supra* note 1, at 42. Indeed, most of the large derivatives trading institutions follow the risk management recommendations of the Group of 30 banking think-tank and have invested heavily in systems and skills. Plender, *supra* note 19; *see also* Weatherstone, *supra* note 19, at 50.

[24] Loomis, *supra* note 1, at 42. This does not mean that in-house monitoring of derivatives trading is foolproof. At the investment house of Kidder, Peabody & Co., Inc., one trader manipulated derivatives books to create nonexisting profits to cover losses and bulk up his bonus. Douglas Frantz & Sylvia Nasar, *The Ghost in Kidder's Money-Making Machine,* N.Y. TIMES, Apr. 29, 1994, at D1. However, the Kidder situation resulted from the company's failure to monitor a trader's activity with sufficient care, not from the risk associated with derivatives transactions. Michael Siconolfi, *Jettisoned: With Scandal Report Due Today, Kidder Ousts Another Official*, WALL ST. J., Aug. 4, 1994, at A1. Moreover, while the risk of financial fraud is significant, it is neither unique to derivatives nor is it likely to begin a trend which would collapse the financial industry.

[25] Loomis, *supra* note 1, at 41.

[26] Loomis, *supra* note 1, at 41.

[27] Loomis, *supra* note 1, at 41.

worldwide leaders in derivative contracts,[28] U.S. commodities exchanges are failing to attract many derivatives because of onerous regulatory restrictions.[29] The exchanges' competitiveness in derivatives is directly affected by the regulatory constraints imposed by the Commodity Futures Trading Commission ("CFTC") because:

> As competition from abroad increases the availability of substitutes . . . it will be increasingly likely that a minor tightening of regulation in the United States will result in volume moving overseas . . . . One regulatory mistake can be sufficient to create a permanent setback in global

---

[28] Loomis, *supra* note 1, at 41.

[29] "Exchanges . . . face substantial entry barriers when they decide to introduce a new product such as a new futures contract." Daniel R. Fischel, *Regulatory Conflict and Entry Regulation of New Futures Contracts*, 59 J. BUS. S85 (1986). For example, to get a new futures contract approved, parties must file an application and pay a fee to the CFTC. The application must include (1) a description of the cash market; (2) a justification of individual contract terms; and (3) a stipulation of conformity to the cash market. First, the cash market description must include information on the production and consumption of the commodity, how the price is determined during different stages of marketing and sufficient statistical data to show accurate historical patterns of production, consumption and marketing. Second, in the justification section, the party must include information on the existence of a deliverable supply of the commodity which is not conducive to price manipulation or evidence that cash settlement will not be subject to the same, a description of the relationship between delivery months and cyclical variations of deliverable quantities of the commodity and, when applicable, an analysis of the consistency of speculative position limits. Finally, the application must stipulate that the terms of the proposed contract are consistent with prevailing cash market practices or demonstrate why different terms are necessary. 17 C.F.R. § 5 (1982).

One study showed that the average number of days from submission of a contract to first comment is 124. After this period, it takes an average of 223 more days to get approval and another 41 days from approval until trading begins. In total, it takes over one year, on average, to introduce a new product onto a U.S. exchange. William Silber, *Innovation, Competition, and New Contract Design in Futures Markets*, J. FUTURES MKTS. 143 (1981).

For example, the CME exemption application for Rolling Spot Contracts (*see supra* note 130 and accompanying text) was made almost two years ago and the CFTC still has not responded. Jeffrey Taylor, *Politics Delays Naming of Schapiro to Head CFTC*, WALL ST. J., Aug. 24, 1994, at C1, C14.

> competitiveness for U.S. financial services and products . . . . No public purpose could possibly be served by driving the large institutional users of our own well-established and efficient exchanges into foreign hands.[30]

Many derivatives contracts are being introduced on OTC and foreign markets. U.S. commodities exchanges must attract derivatives[31] to compete with these markets.[32]

Part I of this Note discusses the recent history of derivatives regulation by focusing on the Commodity Exchange Act ("CEA") and relevant case law prior to the enactment of the Futures Trading Practices Act of 1992 ("1992 Act").[33] In part II, this Note explains the 1992 Act, its legislative history and its effect on the regulation of derivative products. Finally, part III analyzes recent interpretations of the 1992 Act and the implications of its effect on derivative products. The author asserts that the 1992 Act has filled a statutory gap by empowering the CFTC to exempt exchange-traded derivatives from CEA regulation. If the CFTC fails to exempt derivatives liberally from CEA regulation, U.S. exchanges will continue to have difficulty competing with foreign and OTC markets.

---

[30] Christopher L. Culp, *Stock Index Futures and Financial Market Reform: Regulatory Failure or Regulatory Imperialism*, 13 GEO. MASON U. L. REV. 517, 577 (1991).

[31] Derivative products which are traded on exchanges generally have standardized contractual terms and generate sufficient trading activity to support a liquid market. Hu, *supra* note 4, at 1457, 1465. Options on futures contracts are an example of a derivative traded on a commodities exchange.

[32] *See infra* notes 42 and 43 and accompanying text.

[33] Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590. The Futures Trading Practices Act of 1992 is an amendment to the Commodity Exchange Act.

I. THE COMMODITY EXCHANGE ACT PRIOR TO 1992

A. Futures Contracts

The CEA states that futures contracts[34] can only be lawfully transacted through a member of a contract market,[35] on a board of trade,[36] designated by the CFTC as a contract market.[37] Under the CEA, the CFTC has exclusive jurisdiction to regulate futures transactions.[38] Derivatives that are not futures contracts may be

---

[34] A futures contract is . . . a fungible promise to buy or sell a particular commodity at a fixed date in the future. Futures contracts are fungible because they have standard terms and each side's obligations are guaranteed by a clearing house. Contracts are entered into without prepayment, although the markets and the clearing house will set margin to protect their own interests. Trading occurs in 'the contract,' not in the commodity.

CME v. SEC, 883 F.2d 537, 542 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). Most futures contracts, except for those based on financial instruments, may be performed by the delivery of a commodity. Unless the parties cancel their obligations by buying or selling offsetting positions, as is often done, the buyer must pay the price stated in the contract and the seller must deliver. *Id.*

[35] A member of a contract market is "an individual, association, partnership, corporation or trust owning or holding membership in or admitted to membership representation on a contract market or given members' trading privileges." 7 U.S.C. § 1a(15) (Supp. V 1993). Boards of trade, such as the CBOT, are contract markets for different contracts. Members of a board of trade are members of that contract market.

A "contract market" is a market so designated by the CFTC in accordance with 7 U.S.C. § 2a (1988 & Supp. V 1993).

[36] A board of trade is any exchange or association of persons, whether incorporated or unincorporated, who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment. 7 U.S.C. § 1a(1) (1992).

[37] 7 U.S.C. § 2a.

[38] The CFTC has exclusive jurisdiction over "transactions involving contracts of sale of a commodity for future delivery" traded on a contract market. 7 U.S.C. § 2 (1988 & Supp. V 1993). The CFTC, however, is not authorized to regulate transactions in "foreign currency, security warrants, security rights, resales of

derivative securities,[39] which are regulated by the Securities and Exchange Commission ("SEC").

This jurisdictional conflict over derivatives between the CFTC and the SEC creates uncertainty as to which regulations will be applied to a new product,[40] making it difficult to introduce effectively new products on U.S. exchanges. Once it is determined that a transaction constitutes a futures contract, the CEA imposes regulatory burdens[41] on the instrument which are not found on the OTC and foreign markets. Consequently, U.S. commodities exchanges are at a competitive disadvantage when introducing new products. This disadvantage has led to a strong increase in the introduction of derivative products on the OTC markets[42] and overseas exchanges rather than on U.S. commodities exchanges.[43]

B. *Index Participations*

Once the CFTC or a court determines that a derivative instrument falls under the jurisdiction of the CFTC, dealers and end users must endure regulatory burdens which may make it more desirable for the dealer to introduce the product on the less-regulated OTC

---

installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2.

[39] "Derivative securities" are securities which derive value from the price behavior of an underlying financial asset. GITMAN & JOEHNK, *supra* note 4, at 464. Puts and calls are examples of derivative securities. *Id.* A call option, for example, is the right to buy a specified number of shares of stock, at a stated price, before a defined date in exchange for a premium. The value of the option is "derived" from the value of the stock. The value of the option rises as the value of the stock rises. SHOOK & SHOOK, *supra* note 2, at 50.

[40] *See infra* notes 44-60 and accompanying text.

[41] *See supra* note 29 and accompanying text.

[42] Innovation has been particularly strong in the OTC derivatives market, which has seen enormous growth. The market for selected OTC derivatives reached four trillion dollars by the end of 1991, which is eight times the 1986 level. Hu, *supra* note 4, at 1459.

[43] Daily volume at the CBOT, for example, grew by only 95% from 1984-89 as compared to volume on foreign futures exchanges which grew by 300%. The U.S. market share in the futures industry has declined from 80.6% to 70% since 1984. Culp, *supra* note 30, at 577.

and foreign markets. In *Chicago Mercantile Exchange v. Securities and Exchange Commission,*[44] several exchanges[45] applied to the SEC for the right to trade different varieties of index participations ("IPs").[46] Various parties, including two designated contract markets, supported by the CFTC,[47] requested that the SEC deny the applications on the grounds that IPs were futures and outside the jurisdiction of the SEC. The SEC, nevertheless, granted the stock exchanges' request[48] and trading of IPs began on the Philadelphia and American Stock Exchanges. The Chicago Board of Trade ("CBOT")[49] and Chicago Mercantile Exchange ("CME")[50] brought suit, seeking review of the SEC's decision.[51] The Seventh Circuit held that IPs are considered futures contracts.[52]

Relying on legislation passed after the Johnson-Shad Agreement[53] and on an earlier Seventh Circuit decision that Government National Mortgage Association options[54] are futures

---

[44] 883 F.2d 537, 539 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

[45] The Philadelphia Stock Exchange, Inc., Options Clearing Corporation, American Stock Exchange and Chicago Board Options Exchange, Inc. were intervening-respondents in this case against the SEC. *Id.*

[46] "Index Participations are contracts of indefinite duration based on the value of a basket (index) of securities." *Id.*

[47] The CME and the CBOT were the two designated contract markets in this action. *Id.*

[48] Order Approving Proposed Rule Changes Relating to the Listing and Trading of Index Participations, No. 34-26709, 54 Fed. Reg. 15,280 (1989).

[49] *See supra* note 3.

[50] The CME is "the second largest commodities exchange in the United States." SHOOK & SHOOK, *supra* note 2, at 62.

[51] CME v. SEC, 883 F. 2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

[52] *Id.*

[53] The Johnson-Shad Agreement, also known as the Shad-Johnson Agreement, was an agreement between the CFTC and SEC which provided that jurisdiction over options follow jurisdiction over the underlying instrument. The CFTC received jurisdiction over options on futures contracts and the SEC received jurisdiction over options on securities. *Id.* at 544.

[54] The Government National Mortgage Association ("GNMA") guarantees securities backed by a pool of mortgages issued by private lenders. GNMA is guaranteed by the full faith and credit of the U.S. government. GNMA sold pass-through certificates representing proceeds of mortgage notes and options written

contracts, the court held that any instrument containing the characteristics of both securities and futures contracts would fall under the exclusive jurisdiction of the CFTC.[55] Therefore, IPs, which have characteristics of both securities[56] and futures contracts,[57] must be exclusively regulated by the CFTC. This means that IPs are subject to the onerous restrictions of the CEA and the CFTC, including the lengthy application process required to introduce a new product onto U.S. commodities exchanges.[58] To avoid these restrictions, no dealers applied to trade IPs on U.S. contract markets, trading of IPs on U.S. securities exchanges ceased[59] and IPs were introduced in Toronto.[60]

C. *Forwards versus Futures before the 1992 Act*

A forward contract[61] is similar to a futures contract, except that the purpose of a forward is to enable businesses to buy

---

on them to allow hedging against interest rate changes. Board of Trade of Chicago v. SEC, 677 F.2d 1137 (7th Cir.), *vacated*, 459 U.S. 1026 (1982).

In the *Board of Trade* case, the court held that the agencies could not agree to alter their jurisdiction as they did in the Johnson-Shad Agreement and that if an instrument is both a security and a commodity, then the CFTC's jurisdiction is exclusive. *CME*, 883 F.2d at 537, 544. The legislation implementing the Johnson-Shad Agreement (15 U.S.C. § 78c(a)10 (1982), 7 U.S.C. § 2a (1988 & Supp. V 1993) and 7 U.S.C. § 6n (1988)) left the courts determination in place. *Id.*

[55] CME v. SEC, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

[56] IPs resemble an interest in a stock portfolio because they last indefinitely, change in value with the market, pay dividends, are sold like stock and can be used to secure margin and other loans. *Id.* at 545.

[57] Sales of IPs have some of the characteristics of futures contracts. Sellers of IPs pledge to pay the value of an index on a specified day. The IP has an obligation to the clearing house rather than to the buyer. The IP may be settled by an offsetting obligation after which the clearing house cancels both sides of the transaction. *Id.*

[58] *See supra* note 29.

[59] Culp, *supra* note 30, at 580.

[60] Culp, *supra* note 30, at 581.

[61] A forward contract is an agreement to buy an asset for future delivery at a price determined today. SHOOK & SHOOK, *supra* note 2, at 155. Forwards are traded on the OTC market and are not regulated by CEA.

commodities from and sell commodities to each other.[62] Unlike futures contracts, forwards are not financial investments, but instead, are a means to assist businesses in acquiring necessary commodities.[63] If it is determined that a derivative product is a futures contract, even though the product was designed as a forward contract, the product will be subject to the provisions of the CEA and the CFTC. These unanticipated regulatory burdens make it commercially impracticable to introduce the product on U.S. exchanges.[64]

A forward contract entitles the parties involved to expect future delivery of a commodity.[65] Forwards are exempt from CFTC jurisdiction under the CEA[66] in order "to facilitate commodities transactions within the commercial supply chain."[67] Exemption of forwards from the exclusive jurisdiction of the CFTC is predicated upon the actual, albeit future, delivery of the underlying commodity.[68] Contracts that are speculative in nature or used only as investment tools (i.e., there is no contemplation of delivery by the parties, are not considered forward contracts).[69] Courts have found that it is not always easy to discern whether the parties actually contemplated future delivery, and hence, whether the contract is a forward contract.[70]

In *Commodity Futures Trading Commission v. Co Petro Marketing Group, Incorporated,*[71] the Ninth Circuit held that where there is an obligation to perform offsetting agreements,

---

[62] CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 576 (9th Cir. 1982).

[63] *Id.*

[64] *See supra* note 29 and accompanying text.

[65] Transnor (Bermuda) Ltd. v. B.P. N. Am. Petroleum, 738 F. Supp. 1472, 1490 (S.D.N.Y. 1990).

[66] 7 U.S.C. § 2 excludes contracts for the sale of any cash commodity for deferred shipment or delivery.

[67] *See* CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 576 (9th Cir. 1982).

[68] *Transnor*, 738 F. Supp. at 1490.

[69] *Co Petro*, 680 F.2d at 573.

[70] *See, e.g., id.*; *Transnor*, 738 F. Supp. 1472; CFTC v. Comercial Petrolera Internacional S.A., [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,222 (S.D.N.Y. June 26, 1981).

[71] 680 F.2d 573 (9th Cir. 1982).

satisfying contractual duties without delivery, there is no contemplation of delivery and the contract is a futures contract, not a forward. Similarly, in *Commodity Futures Trading Commission v. Comercial Petrolera Internacional S.A.*,[72] the district court held that contracts to purchase a specified amount of oil at a fixed price or to notify the broker to sell the oil contracts at the going price on or before a specified future date were not forwards.[73] The court reasoned that having the right to sell the oil before the specified date made delivery unnecessary.[74] The court also found that unnecessary delivery means that there is no clear intent of delivery.[75]

Courts have consistently held that the lack of a forced burden of delivery indicates a speculative transaction which is not a forward contract.[76] The delivery requirement was reexamined in *Transnor (Bermuda) Limited v. B.P. North America Petroleum,*[77] a case involving fifteen-day Brent oil contracts.[78] In *Transnor,* the district court held that the mere opportunity to offset, coupled with an expectation and common practice of offsetting, is sufficient to deem a transaction a futures contract and not a forward. Because most fifteen-day Brent oil contracts did not result in delivery and offsetting was facilitated by the high degree of standardization of terms, the court held that the investors, most of whom were

---

[72] [1980-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,222 (S.D.N.Y. June 26, 1981).

[73] *Id.*

[74] *Id.* at ¶ 25,098.

[75] *Id.*

[76] NRT Metals, Inc., v. Manhattan Metals Non-Ferrous, Ltd., 576 F. Supp. 1046, 1051 (S.D.N.Y. 1983) (offsetting purchases disavow intentions of delivery); *e.g.*, Habas v. American Bd. of Trade, Inc., Comm. Fut. L. Rep. (CCH) ¶ 23,500 (CFTC 1987) (holding that a contract is a futures contract where company literature implied opportunity to offset and the company permitted offsetting before maturity of the contract).

[77] 738 F. Supp. 1472 (S.D.N.Y. 1990).

[78] Fifteen-day Brent oil contracts are contracts to deliver Brent oil in a future month. In this case, the seller of the fifteen-day cargo had to give the purchaser at least fifteen days notice of the three day period during the delivery month in which the cargo must be lifted by the purchaser's vessel. CFTC Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188 (CFTC 1990).

institutional, used the contracts for speculative purposes without contemplating delivery.[79] Thus, the court found that Brent oil contracts were futures contracts.[80]

As futures contracts, both IPs and Brent oil contracts must be traded on designated contract markets if they are to be traded in the United States.[81] Because investors take their business to exchanges on which the products they seek are traded, any U.S. exchange's loss of a product contributes to the decreasing U.S. market share over exchange-traded instruments.[82] Under the CEA before the 1992 Act, the sometimes long and costly process of establishing jurisdiction and the unpredictability of the applicable regulations discouraged the introduction of derivative products on U.S. commodities exchanges.[83] First, an unanticipated determination that a product falls under CEA regulation could result in the product no longer being financially worthwhile.[84] Second, U.S. exchanges lost money and the opportunity to attract new customers by not carrying "desirable products."[85] IPs, for example, were desirable because they were new products offering new risk-return mixtures. Such mixtures are valuable to investors because they have different attributes from the products already on the market,[86] thus providing investors with greater flexibility to structure financing at

---

[79] *Transnor*, 738 F. Supp. 1472.

[80] *Id.*

[81] *See supra* notes 35-38 and accompanying text.

[82] CME v. SEC, 883 F. 2d 537, 549 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). The United States's competitiveness in world financial markets has been threatened because trading firms either take their innovative products overseas or do not offer new products to avoid the CEA's burdens and potential litigation by futures exchanges. Additionally, when innovative products are introduced in overseas markets rather than on U.S. exchanges, "[United States's] participants lose control of the innovative process and sacrifice their self-determination." Thomas A. Russo & Marlisa Vinciguerra, *Financial Innovation and Uncertain Regulation: Selected Issues Regarding New Product Development*, 69 TEX. L. REV. 1431, 1439 (1991).

[83] *See supra* note 29 and accompanying text.

[84] Legal disputes over new products have delayed the introduction of new products, imposing costs on investors. *See* Culp, *supra* note 30, at 585.

[85] *See CME*, 883 F.2d at 549.

[86] *Id.*

the lowest possible costs.[87] Indeed, financial markets work best when they offer every possible combination of risk and return so that investors can construct a portfolio to meet their financial objectives.[88] Therefore, U.S. markets lost the ability to increase effectiveness by offering greater investment alternatives. This loss could have been avoided if there was greater certainty as to which regulations would be applied to a new product.

II. The Statutory History of the 1992 Act

A. *The 1992 Act*

The 1992 Act substantially changed the CEA by adding a provision which allows the CFTC to exempt products from the CEA.[89] One purpose of the exemption is to promote financial innovation and fair competition.[90] The CFTC *must* interpret the 1992 Act liberally for U.S. exchanges to become more competitive. Broad grants of exemptions will remove regulatory burdens and encourage more products to be traded on these exchanges. While the CFTC has used its exemptive authority in several cases,[91] it has not yet determined whether it will grant the commodities exchanges broad exemptions for derivative products.

B. *Exclusions to CFTC Jurisdiction*

In 1989, the CFTC recognized an exclusion for certain hybrid

---

[87] Culp, *supra* note 30, at 585.

[88] *CME*, 883 F.2d at 544.

[89] The exempt product must be consistent with the public interest, traded only between "appropriate persons," (defined as knowledgeable or institutional investors), and not have any material adverse effects on the CFTC's regulatory duties. The exemption also allows financial instrument to be exempt from any and all parts of the CEA except § 2a, which delineates CFTC versus SEC jurisdiction and gives the CFTC power to designate contract markets. 7 U.S.C. § 6(c) (1988 & Supp. V 1993).

[90] *Id.*

[91] Certain hybrids, swaps and energy contracts have been exempt. *See infra* notes 93, 95, 142 and accompanying text.

instruments[92] that have some characteristics of futures contracts and meet certain other specifications.[93] Similarly, the CFTC ruled that swap[94] transactions with specified characteristics were not futures contracts under the CEA.[95] In 1990, the CFTC concluded that certain commercial transactions, such as fifteen-day Brent oil contracts, were excluded from CEA regulation.[96] These decisions show that the CFTC was authorized to exclude, though not exempt, products from the CEA regulations even before the 1992 Act.

The difference between an exclusion and an exemption is that

---

[92] A hybrid instrument, as used in this Note, is an equity, debt, or depository instrument with one or more commodity-dependent components that have payment features similar to commodity futures, commodity options contracts, or a combination thereof. Regulation of Hybrid Instruments, 17 C.F.R. § 34 (1993).

[93] Hybrids are excluded if they are debt or depository instruments indexed to a commodity at no greater than a one to one basis, limit the maximum loss on the instrument, have a significant commodity-independent yield, do not have a commodity component which is severable from the debt or depository instrument, do not call for delivery of a commodity by means of the rules of a designated contract market and are not marketed as being or having the characteristics of a futures contract. CFTC Statutory Interpretation Concerning Certain Hybrid Instruments, 54 Fed. Reg. 1139 (CFTC 1989).

[94] A swap is "an agreement between two parties to exchange a series of cash flows measured by different interest rates, exchange rates or prices with payments calculated by reference to a principal payment." CFTC Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30,695 (CFTC 1989).

[95] To be excluded, the swap must (1) have material terms negotiated by the parties, be based upon individual credit determinations and be documented in an agreement that is not fully standardized; (2) create obligations that may be terminated, absent default, only with the consent of the counterparty; (3) not be supported by the credit of a clearing organization and not primarily or routinely supported by a market-to-market margin and variation settlement system designed to eliminate individualized credit risk; (4) be undertaken in conjunction with the parties' line of business; and (5) not be marketed to the public. CFTC Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30,694 (CFTC 1989).

[96] The CFTC held that fifteen-day Brent oil contracts that "are entered into between commercial participants in connection with their business, which create specific delivery obligations imposing substantial economic risks of a commercial nature on these participants, but which may involve, in certain circumstances, string or chain delivers . . . are within the scope of § 2(a)(1)'s exclusion from the Commission's regulatory jurisdiction." CFTC Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188 (CFTC 1990).

an exempt product may be a futures contract,[97] while an excluded product may not.[98] Congress considered exclusions to add unnecessary confusion to the issue of CFTC jurisdiction over new products that were not clearly defined as futures contracts.[99] Congress also found that this jurisdictional uncertainty possibly inhibited the development of markets because many derivatives instruments are useful to commerce and vital to maintaining the competitiveness of U.S. markets in the global environment.[100] As a result, Congress decided that the CFTC may exempt products whether or not they have been classified as futures.[101] By giving the CFTC broad power to grant exemptions from CEA regulation, Congress and the judiciary will avoid having to determine the jurisdiction for every new derivative instrument, as they were forced to do with IPs, Brent oil contracts, swaps and hybrid instruments.

C. IPs and Forwards: After the 1992 Act

Congress specifically considered IPs and Brent oil contracts when determining the exemption provision of the 1992 Act.[102] Ultimately, Congress did not decide whether IPs and forwards should be exempt from the CEA; it left this decision to the CFTC.[103]

The 1992 Act contained a proposal that IPs approved or proposed to the SEC before December 31, 1990, may be traded on securities markets, and that all other IPs may be traded on futures markets.[104] While this delineation would have solved the jurisdictional questions, it does not bring back the money and opportunity

---

[97] Products are excluded because they do not fit into the statutory description of 7 U.S.C. § 2. *See supra* note 38.

[98] 7 U.S.C. § 6(c).

[99] S. REP. NO. 22, 102d Cong., 1st Sess. 6 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3103, 3108.

[100] *Id.*

[101] H.R. CONF. REP. NO. 978, 102d Cong., 2d Sess. 83 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3179, 3208.

[102] *E.g.*, S. REP. NO. 22 at 9; H.R. CONF. REP. NO. 978 at 83.

[103] 7 U.S.C. § 6(c).

[104] S. REP. NO. 22 at 10.

lost by U.S. commodities exchanges when IPs ceased to be traded on U.S. exchanges and were introduced in Toronto. More significantly, this solution would cloud the jurisdictional issue over new products by basing jurisdiction over a financial instrument on the date of proposal rather than on whether the instrument is a security or a futures contract. Congress, ultimately, did not pass the proposed solution, leaving the court decision that IPs are futures contracts intact. Under the enacted exemption provision, the CFTC can now exempt IPs and other instruments traded among institutional traders if it believes that such trading would be in the public interest.[105] This provision can significantly reduce regulatory burdens and attract derivatives to U.S. exchanges. Unfortunately, Congress passed nothing to help guide the CFTC and SEC in determining which agency has jurisdiction over new derivative products.

Similarly, Congress did not overturn either the court decision that Brent oil contracts are futures,[106] or the CFTC interpretation that Brent oil contracts are excluded from the CEA.[107] Congress, nevertheless, suggested that the CFTC should consider exempting Brent oil contracts[108] because such an exemption would settle the opposing interpretations by the court and the CFTC.[109] Furthermore, an exemption may be particularly appropriate for Brent oil contracts because they are traded in other countries without CEA-type restrictions.[110] Exemptions, such as one for Brent oil contracts, will enable U.S. exchanges to compete with less regulated foreign markets.[111] Congress also realized that the competitive disadvantage suffered by U.S. commodities exchanges would be diminished only by loosening the regulatory restraints on the

---

[105] *See supra* note 89 and accompanying text.

[106] Transnor (Bermuda) Ltd. v. B.P. N. Am. Petroleum, 738 F. Supp. 1472 (S.D.N.Y. 1990); *see* discussion *supra* notes 77-80 and accompanying text.

[107] CFTC Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188 (CFTC 1990); *see supra* note 96 and accompanying text.

[108] H.R. CONF. REP. NO. 978 at 82.

[109] *See supra* notes 106 and 107 and accompanying text.

[110] H.R. CONF. REP. NO. 978 at 82.

[111] *Id.*

trading of derivative instruments.[112] The CFTC must follow congressional intent and lessen regulatory burdens on derivatives by using its exemptive authority broadly.

III. EXISTING AND PROPOSED EXEMPTIONS

A. *Exemptions for Swaps and Hybrid Instruments*

The CFTC has exercised its authority to exempt some swaps[113] and hybrid instruments[114] from most parts of the CEA. These exemptions enable U.S. commodities exchanges to compete in the trading of these products with OTC and foreign markets,

---

[112] *Id.*

[113] Swaps are exempt from all provisions of the CEA "(except in each case the provisions of sections 2(a)(1)(B), 4b, 4o, . . . 6(c) and 9(a)(2) . . . to the extent these provisions prohibit manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market)" provided the swap agreement (1) is entered into solely between eligible swap participants; (2) is not part of a fungible class of agreements with standardized material economic terms; (3) creditworthiness of any potential obligee would be a material consideration in entering into or determining the terms of the agreement; and (4) is not traded on or through a multilateral transaction execution facility. Exemption of Swap Agreements, 17 C.F.R. § 35 (1993).

[114] "A hybrid instrument is exempt from all provisions of the [CEA] . . . (except in each case section 2(A)(1)(B), provided" that (1) the instrument is an equity or debt security or a demand deposit or transaction account offered by an insured depository institution, an insured credit union, or a federal or state branch or agency of a foreign bank; (2) the sum of the commodity-dependent values of the commodity-dependent component is less than the commodity-independent values of the commodity-independent component; (3) the instrument is not marketed as a futures contract or a commodity option, except as necessary to describe the instrument or comply with disclosure requirements; and (4) the instrument is initially issued or sold subject to applicable federal or state securities or banking laws to persons permitted thereunder to purchase or enter into the hybrid instrument. Furthermore, the issuer must receive full payment of the purchase price and the holder may not be required to make additional payments to the issuer during the life of the instrument or at maturity. Finally, settlement must not be in the form of a delivery instrument that is specified as such in the rules of a designated contract market. 17 C.F.R. § 34 (1993).

which do not place restrictions similar to those contained in the CEA on these products.

Even though the CFTC had excluded certain swaps from regulation in 1989, the 1990 Brent oil case[115] raised fears among traders that there would be similar rulings in the swaps area,[116] since Brent oil contracts are forward contracts according to the CFTC[117] and a swap is a forward-based derivative.[118] The determination by the court that Brent oil contracts are futures contracts[119] could mean that many swaps and other forward-based products are also considered to be futures contracts, and thus subject to CEA regulation. The proposed amendment to the CEA excluded certain swaps from the CEA and directed the CFTC to exempt other swaps.[120] The 1992 Act does not order the exemption of any swaps, but merely provides the CFTC with the authority to exempt certain swaps.[121] Nevertheless, this grant of authority permits the CFTC to grant broad exemptions in the swaps area, resulting in more trading efficiency on U.S. exchanges.[122]

Similarly, Congress proposed a specific provision which requires an exemption from the CEA for hybrid instruments if the commodity-based portion of the return on the instrument is less

---

[115] Transnor (Bermuda) Ltd. v. B.P. N. Am. Petroleum, 738 F. Supp. 1472 (S.D.N.Y. 1990).

[116] S. REP. NO. 22 at 9.

[117] *See supra* note 96.

[118] Two basic types of contracts are used to create a wide array of derivatives: "option based products" and "forward based products." Hu, *supra note* 4, at 1466-67.

[119] *Transnor*, 738 F. Supp. 1472.

[120] S. REP. NO. 22 at 9.

[121] Swaps which may be considered futures can be exempt if they are not part of a fungible class of agreements that are standardized as to their material economic terms. 7 U.S.C. § 6(c)(5)(B).

[122] Swaps can be traded more efficiently post-exemption because the legal uncertainty (that the agreements would be unenforceable) is removed. Removing legal risk "should promote innovation in the swaps market by allowing participants to negotiate and structure transactions that most effectively address their economic needs." 17 C.F.R. § 35 (1993). Furthermore, the U.S. market will be able to compete better with foreign markets which have not been plagued by regulatory uncertainty as the U.S. market has. *Id.*

than 50%.[123] The 1992 Act, however, is broader than the proposed provision because it does not contain the 50% requirement and thus confers greater discretion on the CFTC to exempt hybrid instruments.[124] Exempting hybrids from some or all of the CEA will reduce regulatory restrictions imposed by the CEA, allowing hybrids to be traded more efficiently on U.S. exchanges.

Subsequent to the 1992 Act, the CFTC exempted certain swaps[125] and hybrids[126] from the CEA. By granting these exemptions, the CFTC recognized the U.S. regulatory system's failure to both encourage new product innovation and facilitate entry of new products into U.S. markets.[127] By granting more exemptions, the CFTC will remove the obstacles which deter the introduction of additional new products on U.S. exchanges. The CFTC has recognized that wide-scale exemptions have a positive effect on the competitiveness of U.S. exchanges and should therefore, be eager to exempt novel derivative products.

B. *Proposed Exemptions*

Pursuant to the 1992 Act, the CME[128] and the CBOT[129] each submitted an application to the CFTC to have various futures contracts exempt from the CEA. These applications share several similar characteristics. The CME's application seeks an exemption for "Rolling Spot Contracts"[130] traded by "Eligible Rolling Spot

---

[123] S. REP. NO. 22 at 61.

[124] Hybrids which are predominantly securities or depository instruments and which may be subject to regulation under the CEA may be exempt. 7 U.S.C. § 6(c)(5)(A).

[125] 17 C.F.R. § 35 (1993).

[126] 17 C.F.R. § 34 (1993).

[127] 17 C.F.R. § 35 (1993).

[128] *See supra* note 50.

[129] *See supra* note 3.

[130] "Rolling Spot Contracts" are "Rolling Spot Futures Contracts"™ and options on those contracts. An example of a Rolling Spot Contract is where on Monday, A offers to buy foreign currency from B on Wednesday at $1.50 /£. A decides that he wants to hold his position one more day and hence roll the position over until Thursday. A calls C and does a "spot/next" swap trade to defer the purchase of pounds until Thursday. B agrees to the "spot/next" trade

Participants."[131] According to the CME, Rolling Spot Contracts are similar to some instruments traded on OTC markets, and if exempt, they receive the benefits of trading on a commodities exchange without the concomitant regulatory burdens.[132]

The CBOT, similarly, petitioned the CFTC for the establishment of a "professional trading market exemption"[133] from the CEA. This exemption would apply to trading in any instrument on a board of trade,[134] provided the applicable board of trade sends written notice to the CFTC, and the board of trade limits the trading in exempt instruments to "professional traders."[135] The CBOT believes that a professional market exemption would afford

---

at $1.55/£. In effect, A is selling pounds that he would have received on Wednesday at $1.50/£ and buying it back Thursday at $1.55/£. Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,422 (CFTC 1993). "The CME does not seek exemption from . . . sections 4b, 4o, 6(c), 6(d), 6c, 9(a), 9(b) [of the CEA]" prohibiting "fraud, embezzlement, manipulation or attempted manipulation." The trades would still be cleared through the CME clearing house. Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed Reg. 43,414 (CFTC 1993).

[131] An "Eligible Rolling Spot Participant" is defined as a bank or trust company; a savings association or credit union; an insurance company or foreign person performing a similar role; a commodity pool, foreign person, corporation, partnership, proprietorship, organization, trust or other entity not formed for the sole purpose of becoming an eligible participant meeting specified financial criteria; certain employee benefit plans or foreign persons performing a similar role; a governmental entity; broker-dealers or foreign persons performing a similar role who meet specified requirements; certain futures commission merchants or foreign persons performing a similar role; any natural person with over $10,000,000 in assets; or an exchange member at the CME. Each category of persons is subject to additional limitations. Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,415 (CFTC 1993).

[132] Benefits of exchange trading include reduced costs, price transparency and counterparty credit exposure. *Id.* at 43,421.

[133] The CBOT sought an exemption from the entire CEA "(except section 2(a)(1)(B))." The petition further proposes that the CFTC adopt antimanipulation and antifraud rules specifically for the transactions which become exempt under this provision. The exempt transactions will also clear through a CFTC approved clearing system. *Id.* at 43,415.

[134] *See supra* note 36.

[135] A "professional trader" is essentially the same as an "Eligible Rolling Spot Participant." *See supra* note 131.

OTC market users the benefits of exchange markets,[136] without the burdens of general federal regulation, making it easier and less expensive to engage in derivative transactions on U.S. exchanges.[137] The "professional market" and "Rolling Spot Contracts" exemption proposals share two common characteristics: (1) they provide exemptions from CEA regulation for institutional or professional traders; and (2) they allow commodities exchanges to compete with OTC and foreign markets in the trading of derivatives.

Exemption from the CEA for institutional or "sophisticated investors" is not a new concept. The definitions of "Eligible Rolling Spot Participants" and "professional traders" under the respective CME and CBOT exemption applications are extremely similar to the definition of "appropriate persons" under the exemption provision of the 1992 Act.[138] Both proposed exemptions, therefore, seem to comply with the exemption provision of the CEA. This point is further supported by the decision in *Salomon Forex, Incorporated v. Tauber*,[139] which provides an exemption from the CEA for foreign currency futures which are traded by "sophisticated investors."[140] Moreover, the exemptions

---

[136] *See supra* note 132.

[137] Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,416 (CFTC 1993).

[138] Both the CBOT and CME exemption applications and section 6(c) of the CEA list a bank or trust company, a savings association, an insurance company, an investment company, a commodity pool, an employee benefit plan with assets exceeding $1,000,000, a governmental entity, a broker-dealer, and a futures commission merchant as eligible for exemptions. 7 U.S.C. § 6(c) and *supra* notes 131 and 135 and accompanying text.

[139] 8 F.3d 966 (4th Cir. 1993).

[140] *Id.* at 979. The court held that professional investors may individually negotiate sales of foreign currency futures off-exchanges without violating the CEA. Foreign currency futures contracts are exempt from the CEA provided they meet two requirements: (1) the futures are traded off-exchange; and (2) the traders are "sophisticated." *Id.* This holding refers to foreign currency contracts which the Treasury Amendment (7 U.S.C. § 2) excludes from CEA regulation. However, before the *Tauber* case, foreign currency contracts which are futures contracts have never been excluded from the requirement that they be exchange traded. *Id.*

of swaps[141] and certain contracts involving energy products[142] by the CFTC are limited to contracts traded between institutional or professional traders. Limiting the exemption proposals to these sophisticated traders seems to conform with the CEA, a recent court decision and previous CFTC exemptions.

The CFTC, in commenting on the exemption of energy contracts, took the position that the exemption was in the public interest because it reduced regulatory uncertainty.[143] This exemption allowed participants to negotiate and structure contracts in a manner most effectively suited to meet their economic needs, thereby enhancing the global competitiveness of U.S. businesses.[144] Exemptions will fulfill the congressional intent of the 1992 Act and encourage the introduction of derivative products on U.S. markets, making it easier for U.S. exchanges to compete in the global marketplace.[145]

Moreover, the fears that exempt instruments will be unregulated are unfounded because the boards of trade can themselves impose regulations and act as self-regulatory organizations for the proposed exempt futures contracts.[146] Exchanges will be motivated to self-regulate in order to ensure the efficiency of the exchange, protect the exchanges' customers and offer their customers competitive benefits without substantial increase in risks.[147] In fact, the CME, in its petition to the CFTC, stated that it intends to impose rules on the Rolling Spot Contracts which will be less restrictive than the CFTC rules but still protect key areas. The CME's rules seek to

---

[141] *See supra* note 113.

[142] Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21,289 (CFTC 1993).

[143] *Id.* at 21,292.

[144] *Id.*

[145] *See supra* notes 108-112 and accompanying text.

[146] Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,427 (CFTC 1993).

[147] *Id.* Competition is a substitute for regulation. The greater the competition the more likely it is that exchanges will promulgate rules that benefit and protect customers. Dennis Carlton, *Futures Markets: Their Purpose Their History,* 4 J. FUTURES MKTS. 259 (1984).

make the benefits of the regulation outweigh the costs.[148] Because the exchanges have ample business reasons to self-regulate, exemptions from the CEA will not lead to unregulated exchange transactions, but will result in self-regulation by exchanges thereby allowing the exchanges to compete with OTC and foreign exchanges, while keeping their customers satisfied.

CONCLUSION

The legislative history of the 1992 Act suggests that Congress reacted to the U.S. exchanges' competitive disadvantage in exchange-traded derivatives contracts by granting the CFTC broad jurisdiction to exempt derivative contracts from CEA regulation. The new exemption provision of the 1992 Act provides the CFTC with the ability to exempt IPs, Brent oil contracts and other types of derivative contracts from the CEA. Because Congress merely permits, but does not require the CFTC to grant exemptions, the statute will have little effect unless the CFTC grants these exemptions liberally. *If* the CFTC utilizes its exemptive authority, both Congress and the courts will avoid classifying new products as futures contracts.

Moreover, as a result of the 1992 Act, CEA restrictions no longer necessarily discourage derivative products from entering U.S. commodities exchanges. If the CFTC fails to grant broad exemptions, U.S. markets will decline in competitiveness. This decline will be attributed to the CFTC's inability to properly interpret the legislative history of the 1992 Act which suggests granting broad exemptions. In sum, U.S. commodities exchanges will benefit if the CFTC grants broad exemptions allowing competition and profit motive to mandate self-regulatory rules over futures trading by sophisticated investors. The CFTC has not determined whether it will take this course of action. Congress has done its part. Now the CFTC must do its part.

---

[148] Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,427 (CFTC 1993).