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INTRODUCTION

IN recent years there has been increasing governmental interest in foreign commercial participation in commodity futures contracts,[1] traded on United States contract markets,[2] and in other related transactions. This interest has been aroused because deceptive and manipulative practices in trading futures contracts can be employed as effectively by foreign participants as by domestic participants, and such acts may directly affect the United States economy.[3] A principal objective of the Commodity Exchange Act (CEA) is to preclude such practices,[4] and the Commodity Futures Trading Commission

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1. "A futures contract is a legally binding commitment to deliver or take delivery of a given quantity and quality of a commodity, at a price agreed upon when the contract is made, with delivery at the seller's option sometime during the specified future delivery month." Chicago Board of Trade, Commodity Trading Manual 8 (1973); *see* Commodity Futures Trading Commission, Glossary of Some Terms Commonly Used in the Futures Trading Industry 13 (1978). *See generally* Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity For Future Delivery" in the Commodity Exchange Act*, 27 Emory L.J. 1175 (1978).

2. Futures contracts may be traded on boards of trade designated as "contract markets" by the Commodity Futures Trading Commission (CFTC) when such boards of trade have met requirements designed to insure that the contract markets will regulate the activities of their members. 7 U.S.C. § 7 (1976). *See generally* 44 Fed. Reg. 13,494 (1979); Markham & Schobel, *Commodity Exchange Rule Approval—Procedural Mishmash or Antitrust Umbrella?*, Antitrust & Trade Reg. Rep. (BNA) (Special Supp.) (No. 746, Jan. 13, 1976); Markham & Schobel, *Self-Regulation Under the Commodity Exchange Act—Can the CFTC Make It Work?*, Sec. Reg. & L. Rep. (BNA) (Special Supp.) (No. 368, Sept. 1, 1976) [hereinafter cited as *Self-Regulation*]; Schneider, *The CFTC: Initial Actions and Future Priorities*, 27 Ad. L. Rev. 369, 373-75 (1975). The Commodity Exchange Act prohibits commodity futures transactions except through a member of a contract market. 7 U.S.C. §§ 6, 6h (1976).

3. S. Rep. No. 850, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087, 2097. For a discussion of manipulation cases under the Commodity Exchange Act see Campbell, *Trading in Futures Under the Commodity Exchange Act*, 26 Geo. Wash. L. Rev. 215, 233-47 (1958); Hieronymus, *Manipulation in Commodity Futures Trading: Toward a Definition*, 6 Hofstra L. Rev. 41 (1977); Schief & Markham, *The Nation's "Commodity Cops"—Efforts by the Commodity Futures Trading Commission to Enforce the Commodity Exchange Act*, 34 Bus. Law. 19, 34-39 (1978).

4. 7 U.S.C. §§ 1-17a (1976). One of the most important provisions of the CEA as originally enacted was that it made price manipulation a criminal offense. Commodity Exchange Act, ch. 545, §§ 2, 11, 49 Stat. 1491, 1501 (1936) (current version at 7 U.S.C. § 13 (1976)). Prior to the enactment of the CEA, commodity transactions were governed by the Grain Futures Act of 1922 (the Act). Act of Sept. 21, 1922, ch. 369, 42 Stat. 998. The Act provided for a federal licensing system pursuant to which the exchanges were required to obtain federal designation as contract

(CFTC),[5] the agency which presently administers the CEA,[6] has issued regulations designed to assure strict federal control of trading in commodity futures contracts.[7] It is not always clear, however, whether and to what extent the CEA and CFTC regulations apply to international transactions.

In 1974, in creating the CFTC, Congress substantially amended the CEA.[8] One of the principal considerations behind this amendment, the

markets in each commodity on which futures were traded. A condition for such designation was that contract markets regulate their members' conduct to prevent market price manipulation. The Act, however, dealt only with the exchanges, and not with individual traders. If an exchange failed to regulate its members, therefore, the government's only recourse was to suspend or revoke its designation. As a practical matter, however, such action could not be taken because of the economic chaos that would ensue. S. Rep. No. 1131, 93d Cong., 2d Sess. 13, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5854-55. The Agriculture Department, pursuant to powers derived from the Act, conducted investigations into market activities. *Id.* at 14, *reprinted in* [1974] U.S. Code Cong. & Ad. News at 5855. These investigations "pointed to the sources and patterns of excessive speculation and price manipulation, and clearly showed that the limited regulatory powers authorized [by the Act] were inadequate in dealing with these and other market abuses." *Id., reprinted in* [1974] U.S. Code Cong. & Ad. News at 5855. The enactment of the CEA was the congressional response to these findings.

5. The CFTC has exclusive jurisdiction over all futures transactions, commodity options, and certain leverage transactions. 7 U.S.C. § 2 (1976); *see* CFTC Interpretative Letter No. 77-2, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,257 (Jan. 14, 1977), CFTC Interpretative Letters Nos. 76-19, 76-20, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶¶ 20,213, 20,214 (Sept. 29, 1976); [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,117 (Nov. 13, 1975). *See generally* Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions,* 1 J. Corp. L. 217 (1976); Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy,* 29 Vand. L. Rev. 1 (1976); Lower, *State Enforcement of the Commodity Exchange Act,* 27 Emory L.J. 1057 (1978); Russo & Lyon, *Exclusive Jurisdiction of the Commodity Futures Trading Commission,* 6 Hofstra L. Rev. 57 (1977). The Futures Trading Act of 1978 amended the CEA to permit the states to investigate violations and to bring injunctive actions. Public Law No. 95-405, 92 Stat. 865, 872-73 (1978); *see* Metals Depository Corp. v. Abrams, 2 Comm. Fut. L. Rep. ¶ 20,787 (Sup. Ct. 1979).

6. Before the CFTC was created, the CEA was administered by the Commodity Exchange Commission, composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General. Commodity Exchange Act, ch. 545, § 3(b), 49 Stat. 1491 (1936). The Commission was authorized "to curb excessive speculation by the large market operator, and to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud, and fictitious transactions in futures, which were seriously impairing the services of the market." S. Rep. No. 850, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087, 2096. To accomplish this goal, the Commodity Exchange Commission was empowered to suspend or revoke the designation of an exchange as a contract market, issue cease and desist orders, and establish speculative limits, which are limits on the amount of daily trading and number of positions that can be held by speculators in futures transactions. H.R. Rep. No. 975, 93d Cong., 2d Sess. 36 (1974). Additionally, the Secretary of Agriculture was given day-to-day regulatory authority over the trading of futures contracts, which were subject to the terms of the CEA. *Id.* The Secretary of Agriculture, however, delegated much of this authority to the Commodity Exchange Authority, an agency established within the Department of Agriculture to administer the CEA. *Id.* The Secretary retained authority to designate contract markets, promulgate regulations, and issue complaints. *Id.*

7. 17 C.F.R. §§ 1-180 (1979).

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

Commodity Futures Trading Commission Act (CFTC Act), was the so-called "Russian grain robbery" of 1972[9] in which the Soviet purchase of millions of tons of United States grain ultimately resulted in explosive price rises for grain and related consumer products in the United States.[10] It was feared that "[w]ithout new controls there [would be] nothing to prevent foreign nations from manipulating commodity futures."[11] A Senate investigation concluded that in the past the Commodity Exchange Authority (the Authority), a commission which formerly administered the CEA and which was replaced by the CFTC,[12] had relied too heavily on the individual exchanges to regulate trading,[13] and was far too small to provide adequate monitoring and supervision of the activities in all the commodities markets.[14]

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9. *See Soviet Grain Deal is Called a Coup,* N.Y. Times, Sept. 29, 1972, at 1, col. 3; *Prices of Wheat at 9-Year Record,* N.Y. Times, Sept. 30, 1972, at 39, col. 1; *Farm Prices Rose to October Record on Gains by Wheat,* N.Y. Times, Nov. 1, 1972, at 57, col. 4; *Agency Criticizes Soviet Grain Deal,* N.Y. Times, Nov. 4, 1972, at 43, col. 1.

10. "The 'grain robbery' of 1972 was one of those economic events that, like the OPEC oil embargo . . . can truly be said to have changed the world." D. Morgan, Merchants of Grain 121 (1979). *See generally Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations,* 94th Cong., 2d Sess. (1976).

11. 120 Cong. Rec. 10,741 (1974) (remarks of Rep. Adams). *See generally id.* at 10,736-37 (remarks of Rep. Poage); H.R. Rep. No. 975, 93d Cong., 2d Sess. 47-48 (1974). It was stated in the debates that "[b]y dealing with four or five companies simultaneously the way the Russians did . . . foreign [entities] can sometimes buy more of one commodity at a fixed price than [can] possibly be delivered. They can indirectly speculate in huge volumes on our market. The grain companies who sell to [these foreign entities] would not know at the time they sign the contract for a fixed price the extent to which other dealers are also obligating themselves for the same kind of grain. This happened in the Russian grain deal. They bought 50 percent more wheat than they needed. [A]lthough [the dealers] assumed the Russians were negotiating with others, [the dealers] had no idea [the Russians] were buying the quantity of grain which they bought. [The Russians] then transferred the huge risk involved onto the backs of the unsuspecting American producers and processors. By overbuying their needs, [the Russians] could later sell part of it at a much higher price and profit from a manipulation which would be prohibited for domestic traders. I think it is inevitable that such a huge manipulation or distortion in some commodities will occur if steps are not taken to prevent it." 120 Cong. Rec. 10,751 (1974) (remarks of Rep. Smith). The Senate subsequently found no evidence to support the allegation that the Russians deliberately engaged in market manipulation. *See* S. Rep. No. 1033, 93d Cong., 2d Sess. 60-61 (1974).

12. The Commodity Exchange Commission, the Secretary of Agriculture, and the Authority were the former administrators of the CEA until the creation of the CFTC. *See* note 6 *supra.*

13. S. Rep. No. 1033, 93d Cong., 2d Sess. 61 (1974). The Authority's reliance on the self-regulatory structure of the exchange was described as " 'fox in the chicken coop' regulation." *Id.* *See generally Self-Regulation, supra* note 2.

14. In the post-Authority era, the dollar value of the commodities for which commodity futures contracts are traded has increased from $676 billion in 1976 to more than $1.5 trillion in 1978. *Compare* CFTC, 1976 Annual Report 12 (1977) *with* Wall St. J., Jan. 9, 1979, at 38, col. 5. It should be noted, however, that these figures are "somewhat theoretical" because they represent the value if deliveries had been made on all contracts traded. In actuality, delivery is made only on a small percentage of the contracts traded. 1 Comm. Fut. L. Rep. (CCH) ¶ 318 (1977); *see* Powers & Tosini, *Commodity Futures Exchanges and the North-South Dialogue,* 1977 Am. J. Agr. Econ. 977.

It was thought, therefore, that a new commission with strengthened powers, independent of the Agriculture Department and special interests, was needed to assure adequate regulation in the event of future attacks on United States markets by foreign governments.[15] Congress also wanted to bring the previously unregulated futures trading in world commodities[16] under a "single regulatory umbrella."[17]

To increase regulatory control, the term "commodity"[18] was made applicable to transactions in futures and options,[19] not only on the

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15. S. Rep. No. 1033, 93d Cong., 2d Sess. 65 (1974). *See generally Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry,* 93d Cong., 2d Sess. (pt. 3) 758 (1974); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Committee on Agriculture,* 93d Cong., 2d Sess. 77-78 (1974) (statement of Kally Simiris).

16. Although there was significant opposition to the regulation of world commodities, in enacting the CFTC Act Congress determined that "[w]hether a commodity is grown or mined, or whether it is produced in the United States or outside, makes little difference to those in this country who buy, sell, and process the commodity or to U.S. consumers whose prices are affected by the futures market in the commodity." H.R. Rep. No. 975, 93d Cong., 2d Sess. 82 (1974); *accord,* S. Rep. No. 1131, 93d Cong., 2d Sess. 19, 47, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5859, 5885; 120 Cong. Rec. 30,463-64 (1974) (remarks of Sen. Clark); *id.* at 10,740 (remarks of Rep. Brown); *id.* at 10,745-49 (remarks of Rep. Thone); *id.* at 10,749-51 (remarks of Rep. Smith). Congress recognized, however, that regulation of world commodities presented some "special problems" and the CFTC was given flexibility to distinguish between different commodities. *Id.* at 30,458-62 (remarks of Sen. Talmadge). *See generally* Greenstone, *The Foreign Commodity Trader: A Regulatory Dilemma,* 30 Ad. L. Rev. 535 (1978).

17. H.R. Rep. No. 975, 93d Cong., 2d Sess. 42 (1974).

18. Originally, the CEA applied only to commodity futures trading in wheat, corn, oats, barley, rye, flaxseed, grain sorghums, cotton, mill feeds, butter, eggs, potatoes, and rice. Commodity Exchange Act, ch. 545, § 2, 49 Stat. 1491 (1936). Although Congress often amended the CEA to encompass additional commodities, H.R. Rep. No. 975, 93d Cong., 2d Sess. 35 (1974), this expansion was insufficient because the number of commodities on which futures were traded increased at a more rapid pace. For example, trading commenced in futures contracts on various international currencies including Canadian dollars, pounds sterling, Mexican pesos, and in other commodities including silver, copper, platinum, industrial fuel oil, heating oil, palladium and gold. *See* S. Rep. No. 850, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087, 2097; H.R. Rep. No. 975, 93d Cong., 2d Sess. 41 (1974). To eliminate the need for an amendment every time trading began in a commodity not specifically enumerated in the CEA, the CFTC Act expanded the definition of a commodity to include, in addition to previously regulated commodities, "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 2 (1976). This grant of jurisdiction encompassed all futures trading including the world commodities such as coffee, sugar, and cocoa. *See* note 16 *supra.*

19. A commodity option is "a unilateral contract which gives the buyer the right to buy or sell a specified quantity of a commodity at a specific price within a specified period of time, regardless of the market price of that commodity." CFTC, Glossary of Some Terms Commonly Used in the Futures Trading Industry 19-20 (1978). *See generally* Schief & Markham, *supra* note 3, at 21; Schobel & Markham, *Commodity Options—A New Industry Or Another Debacle?,* Sec. Reg. & L. Rep. (BNA) (Special Supp.) (No. 347, Apr. 7, 1976). In addition to commodity options and commodity futures trading, the CFTC regulates leverage transactions. *See generally* Bor, *Some Issues Arising in Consideration of the Futures Trading Act of 1978,* 34 Rec. A.B. City N.Y. 278,

United States contract markets, but also on "any other board of trade, exchange, or market."[20] In the Senate debates it was noted that these words were added to expand the CFTC's jurisdiction to include futures contracts purchased and sold in the United States but "*executed on a foreign board of trade, exchange, or market.*"[21] This jurisdiction, coupled with existing provisions of the CEA which define interstate commerce to encompass commerce with foreign nations,[22] indicates that the congressional intent is to include international transactions within the regulatory sweep of the CEA.[23]

Shortly after its creation, the CFTC established several advisory committees to recommend appropriate policies in a number of areas.[24] One of these advisory committees concluded that futures markets possess much of their current utility because they are, in effect, world markets, and that the price discovery processes of futures trading can only be carried out in a worldwide context.[25] This committee also expressed the view that, while foreign trading entities should have the broadest possible access to United States markets, nevertheless "foreign traders must be bound by the same rules as domestic traders—in terms of reporting positions, the requirement for orderly markets, and in all other aspects."[26]

280-85 (1979); Greenstone, *Leverage Transactions: On Creating A Regulatory Theme*, 27 Emory L.J. 909 (1978).

20. 7 U.S.C. § 2 (1976).

21. 120 Cong. Rec. 34,997 (1974) (remarks of Sen. Talmadge) (emphasis added); *accord, id.* at 34,737 (remarks of Rep. Poage).

22. Section 2(a)(1) of the CEA defines interstate commerce as: "Commerce between any State, Territory, or possession, or the District of Columbia, and *any place outside thereof*. . . ." 7 U.S.C. § 2 (1976) (emphasis added). Section 2(b) of the CEA further declares that "[f]or the purpose of this section the word 'State' includes Territory, the District of Columbia, possession of the United States, and *foreign nation*." *Id.* § 3 (emphasis added). Finally, in setting forth legislative findings of the effects of futures trading, § 3 of the CEA notes that such transactions are affected with a "national public interest," and that prices in such transactions "are generally quoted and disseminated throughout the United States and in *foreign countries* as a basis for determining the prices to the producer and the consumer . . . and to facilitate the movements thereof in interstate commerce." *Id.* § 5 (emphasis added).

23. Because this legislation is remedial, 120 Cong. Rec. 34,997 (1974) (remarks of Sen. Talmadge); *id.* at 34,737 (remarks of Rep. Poage), it is to be broadly construed to effectuate its remedial purposes. Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 103 (7th Cir. 1977); *see* CFTC v. British Am. Commodity Options Corp., 560 F.2d 135, 143 (2d Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); CFTC v. United States Metals Depository Co., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,807, at 23,284 (S.D.N.Y. 1979).

24. 40 Fed. Reg. 32,866 (1975).

25. Commodity Futures Trading Commission Advisory Committee, Report on the Economic Role of Contract Markets 24 (1976).

26. *Id.* In a dissent to the majority report, one of the committee members noted, however, that actions by foreign governments have "tremendous" impact on United States markets, and that some of those countries are totalitarian societies which allow little or no access to United States citizens. *Id.* at 24 n.1. The dissenter believed that the large market power of such countries

The CFTC's current view on foreign trader policy, therefore, is that there should be parity of treatment between foreign and domestic traders.[27] The theoretical notion of parity, however, creates problems in application. For example, CFTC Commissioner David Gartner has questioned whether parity of treatment requires foreign traders to maintain records in the United States, or whether it means that they should be permitted to maintain the required records in their domiciles or places of incorporation.[28] Nevertheless, this parity of treatment concept, while not universally applied, has been adopted by the CFTC as a basis for determining appropriate regulatory requirements for international transactions. In the face of "increased interest in the use of futures markets in recent years by foreign participants, [and] increased price volatility and public sensitivity to possible foreign disruption of U.S. futures markets,"[29] examination of the scope of CFTC regulation of foreign involvement in commodity trading affecting the United States is timely.

I. THE CEA AND CFTC AS LEVERS AGAINST FOREIGN ABUSE OF UNITED STATES MARKETS

A. *Reporting Requirements*

One of the most important devices for regulating foreign participation in United States markets is the CEA's reporting requirements.[30]

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could disrupt the United States markets, and that foreign traders should have access to the United States futures markets only to the extent that United States traders have access to commodity cash markets and futures markets in the foreign country. He also expressed the view that foreign traders "should be subject to additional CFTC reporting, monitoring, and surveillance beyond that required for domestic traders." *Id.*

27. This policy was recently expressed in a CFTC release proposing additional requirements for foreign traders. 44 Fed. Reg. 28,678 (1979).

28. Remarks of Commissioner David G. Gartner before the ABA Comm. on Commodities Regulation, *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,695, at 22,822 (1978) [hereinafter cited as Gartner Address].

29. 42 Fed. Reg. 62,147, 62,150 (1977).

30. 7 U.S.C. § 6i (1976); 17 C.F.R. §§ 15-20 (1979). The reporting requirements are applicable both to domestic personnel and to foreign brokers, *id.* § 15, and are the CFTC's "basic tool for market surveillance in the detection and prevention of market congestion and price manipulation and distortion." 1 Comm. Fut. L. Rep. (CCH) ¶ 8,001 (1979). For example, under the CFTC's reporting device known as the Large Trader Reporting System, a person is required to file an initial report, 17 C.F.R. § 18.00 -.07 (1979), when his futures transactions on contract markets equal or exceed specified levels for each commodity established by the CFTC. *Id.* § 15.03. Once these reportable levels are reached, domestic and foreign professionals are also required to file a report disclosing both background information on, and market transactions of, their customer. *Id.* § 17.00 -.01. The transaction section of this report duplicates and acts as a check on the report filed by the customer pursuant to the Large Trader Reporting System. In addition to filing these reports, the professionals involved are also required to keep books and records of their reportable transactions and related cash commodity transactions, inventories, and purchase and sale commitments. 7 U.S.C. § 6i (1976).

Prior to the CFTC Act, the Authority expressed the view that the reporting requirements "relate to acts which take place in this country and which have an effect upon markets intended to be regulated."[31] Persons trading on contract markets are generally "subject to the reporting requirements regardless of residence, and for their failure to comply the [g]overnment has the right to deny [such persons] trading privileges on all contract markets."[32] The Authority also determined that a foreign broker was required to disclose the identity of foreign customers holding reportable futures positions,[33] and that both foreign and domestic inventories or purchase and sale commitments[34] were to be included in the cash grain reports required by the Authority's regulations.[35]

After its creation, however, the CFTC noted that it had not had uniform success in obtaining information from foreign traders because of communication difficulties and the failure of some foreign brokers[36] to identify their customers and to provide other information required by CFTC regulations.[37] The CFTC was concerned with the possible consequences of inadequate reporting from foreign traders. It was thought, for example, that foreign government traders, "because of their relative size, might be more inclined [than private traders] to act to acquire market positions that would result in a threatened or actual market manipulation or corner, and that a foreign government might attempt to use the United States futures markets as a means of acquiring scarce supplies."[38] The CFTC also recognized, however, particularly in the case of the world commodities, that unduly restricting foreign participation in United States futures markets could have an adverse effect upon the United States economy.[39]

To deal with this problem of potential foreign government abuse, the reporting requirements for futures commission merchants,[40] for-

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31. Administrative Determination No. 51, at 2. (Mar. 17, 1938) (on file with the *Fordham Law Review*).

32. *Id.*

33. Administrative Determination No. 207 (June 29, 1967) (on file with the *Fordham Law Review*).

34. Administrative Determination No. 196 (Aug. 25, 1964) (on file with the *Fordham Law Review*).

35. 17 C.F.R. § 19.00 (1979).

36. A foreign broker is "any person located outside of the United States or its territories who carries an account in commodity futures on any contract market for any other person." 17 C.F.R. § 15.00(a) (1979).

37. 42 Fed. Reg. 62,147-48 (1977).

38. *Id.* at 62,150.

39. *Id.*

40. Futures commission merchants are defined as: "individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or

eign brokers,[41] and large traders[42] were expanded to require information identifying foreign government agencies and instrumentalities trading on United States futures markets.[43] The CFTC's ability to regulate transactions of foreign government entities within the United States should also be viewed in light of the Foreign Sovereign Immunity Act of 1976, which provides that a foreign state, its agencies or instrumentalities are not immune from the jurisdiction of the courts of the United States when the cause of action is based upon the foreign state's commercial activity in the United States.[44]

The CFTC's concern over market manipulation by foreign interests is applicable not only to foreign government entities but also to foreign brokers trading on United States markets. In fact, the failure of a foreign broker to comply with CFTC reporting requirements may result in an enforcement action.[45] In a recent case, *In re Wiscope, S.A.*,[46] the CFTC charged Wiscope, a Swiss-based foreign broker, with failing to respond to a CFTC special call[47] requesting the identity of the broker's customers. Wiscope argued that as a Swiss entity it was subject to Swiss customer confidentiality laws, that under those laws it could not release the identity of its customers without their consent,

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property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom." 7 U.S.C. § 2 (1976).

41. *See* note 36 *supra*.

42. *See* note 30 *supra*.

43. 17 C.F.R. § 18.04 (1979); 43 Fed. Reg. 60,146 (1978). The CFTC eliminated a proposal that would have required futures commission merchants to provide detailed information identifying foreign government agencies or their instrumentalities. Instead, the CFTC required the disclosure of that information by the trader itself. The CFTC noted that shifting the disclosure requirement was necessary because governments might not have been willing to provide such identification to a futures commission merchant but would provide it to a government agency such as the CFTC. *Id.* at 60,147.

44. 28 U.S.C. § 1605 (1976); *see* 42 Fed. Reg. 62,147, 62,159 n.6 (1977).

45. The CFTC has broad enforcement powers. For example, the CFTC is authorized to institute administrative proceedings to revoke or suspend the registration of persons registered under the CEA, 7 U.S.C. § 9 (1976), to prohibit persons from trading on or subject to the rules of any contract market, *id.*, to issue cease and desist orders against violators, *id.* § 13b, and to impose civil penalties of up to $100,000 for each violation, *id.* § 9. In addition, the CFTC is authorized to seek injunctive relief to restrain violations of the Act. *Id.* § 13a-1. *See generally* Markham, *Injunctive Actions Under the Commodity Exchange Act*, Sec. Reg. & L. Rep. (BNA) B-1 (May 23, 1979).

46. No. 79-14 (CFTC Mar. 19, 1979), *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,785.

47. 17 C.F.R. § 21.00-.02 (1979). The information which may be sought by such calls includes the names and addresses of the persons who exercise trading control over a customer account, and "[t]he name, address and principal occupation of all traders, including house accounts, holding open contracts on the records of such futures commission merchant . . . or foreign broker; . . . [t]he open contracts held or controlled by such traders in each future; and . . . [t]he classification of such traders' open contracts as speculative, spreading (straddling), or hedging, or as 'futures commission merchant' or 'foreign broker,' if such trader is another futures commission merchant or foreign broker." *Id.*

and that it was unable to obtain this consent from its customers.[48] The CFTC held that Wiscope could not interpose Swiss law as a basis for refusing to answer a special call and stated:

[B]y attempting to have both the use of American commodity futures markets and the protection of Swiss law *vis-a-vis* its transactions here, Wiscope implicitly seeks an extra-territorial sweep for the Swiss law. But any conflict between the laws of Switzerland and the [CEA] arises solely from Wiscope's deliberate choice to effect transactions on a United States contract market and therefore to subject itself to the full rigor of regulation by this Commission. Respondent could have avoided any conflict with Swiss law by either obtaining consent from its customers before it accepted their orders, an act not in conflict with Swiss law, or by not implementing those orders. Regardless of whether it was by design or neglect, it was Wiscope's own conduct which has created its apparent dilemma, and we will not permit it to demand special treatment on that basis. The Swiss laws to which it points are not an absolute defense to the violation charged.[49]

The CFTC also rejected the claim that it lacked personal jurisdiction over Wiscope and held that Wiscope's activities in trading on United States contract markets constituted a sufficient nexus for CFTC jurisdiction.[50]

The CFTC prohibited Wiscope from further trading on contract markets in the United States until such time as Wiscope demonstrated that it would be able to comply with the provisions of the CEA and regulations promulgated thereunder.[51] On appeal, the Second Circuit reversed the CFTC's decision but sidestepped the issue of the extent of the CFTC's authority by holding that the CFTC had impermissibly relied on information outside the record before the Administrative Law Judge in considering Wiscope's claim that the special call had not been properly made.[52]

In another administrative proceeding, *In re Compania Salvadorena de Cafe, S.A.*,[53] the CFTC charged a Brazilian company and its subsidiary with violating a CFTC regulation requiring traders who

48. 2 Comm. Fut. L. Rep. (CCH) ¶ 20,785, at 23,194-95.

49. *Id.* at 23,200 (footnotes omitted). A similar view had previously been expressed by the CFTC General Counsel, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,120 (Dec. 12, 1975), and by an official of the Authority, Administrative Determination No. 207 (June 29, 1967) (on file with the *Fordham Law Review*). *See also* Montship Lines Ltd. v. Federal Maritime Bd., 295 F.2d 147, 156 (D.C. Cir. 1961) (prior to determining whether a foreign law bars disclosure of documents ordered to be produced by the Board, the proper procedure is to require the individual to "make a good faith attempt to obtain a waiver" of the restriction from his government).

50. 2 Comm. Fut. L. Rep. (CCH) ¶ 20,785, at 23,198-99.

51. The CFTC refused a request by Wiscope to modify the sanction. *Id.* ¶ 20,813 (Apr. 24, 1979). The CFTC's position on requiring foreign traders to comply with its reporting requirements "has caused a great deal of friction [with] members of the international commodities business." Ass'n of the Bar of the City of N.Y., The Extraterritorial Implications of the Commodity Exchange Act 5 (1977) [hereinafter cited as Extraterritorial Implications].

52. Wiscope, S.A. v. CFTC, No. 79-4077 (2d Cir. Aug. 6, 1979).

53. No. 79-34 (CFTC, filed Mar. 12, 1979).

hold reportable positions[54] in a commodity to "keep books and records showing all details concerning all positions and transactions for future delivery in the commodity on all contract markets," and to furnish this information to the CFTC upon request.[55] The complaint charged that the company and its subsidiary had refused to respond to a CFTC request for disclosure of the terms and conditions of transactions with foreign entities involving coffee traded on the New York Coffee and Sugar Exchange.[56]

This action is still pending, but its ultimate resolution should provide an indication of the measure of the CFTC's authority to require large foreign traders to submit to CFTC investigations. If the CFTC requirement of disclosure of records maintained abroad as a condition of trading on United States contract markets is upheld by the courts, the CFTC will have broad authority to regulate foreign involvement in United States markets.

Following its ruling in *Wiscope* and the issuance of the complaint in *In re Compania Salvadorena de Cafe, S.A.*, the CFTC proposed additional rules designed to enhance the effectiveness of its jurisdiction over foreign traders.[57] These proposals would require foreign brokers or traders to designate a person in the United States as an agent to accept service and communications from the CFTC. Such designation would be required to be filed with the CFTC and with the domestic futures commission merchant used by the foreign broker or trader. A futures commission merchant who did not receive a copy of this designation would be prohibited from executing transactions for the

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54. 17 C.F.R. § 15.03 (1979); *see* note 30 *supra*.

55. 17 C.F.R. § 18.05 (1979). *See also* Montship Lines Ltd. v. Federal Maritime Board, 295 F.2d 147, 154 (D.C. Cir. 1961) (the investigatory powers of the Board, including the power to compel reports and disclosure of information by foreign carriers, is not limited to the territorial confines of the United States).

56. Complaint at 13, *In re* Compania Salvadorena de Cafe, S.A., No. 79-34 (CFTC, filed Mar. 12, 1979). The complaint also charged domestic futures commission merchants and certain of their officers with manipulating, attempting to manipulate, or aiding and abetting the manipulation of the July 1977 "C" Contract on the New York Coffee and Sugar Exchange, a contract market. *Id.* at 10-11. The merchants and their officers were charged with aiding and abetting the alleged manipulation by, among other things, entering sell orders at prices substantially above the market, by stopping delivery notices, and by taking delivery of the contracts for the foreign accounts "when they knew or should have known that [the foreign entities] were acting for the purpose and with the intent of causing prices of the July 1977 'C' Contract to be artificially high and, in fact, caused the prices to be artificially high." *Id.* at 10.

This case will no doubt be an important test of the CFTC's ability to regulate foreign traders and to assess liability on domestic futures commission merchants handling such accounts. *See generally Rising Coffee Prices and the Federal Response: Joint Hearings Before Certain Subcomms. of the House Comm. on Government Operations, and the House Comm. on Agriculture,* 95th Cong., 1st Sess. 72 (1977).

57. 44 Fed. Reg. 28,678 (1979). These proposals stemmed from earlier CFTC proposals for foreign traders. *See* 42 Fed. Reg. 62,147 (1977).

foreign broker or trader. The foreign broker would also be required to obtain the consent of its customers to permit the foreign broker's agent to act as the customer's agent in receiving communications and service from the CFTC.[58]

These proposals are designed to preclude circumvention of CFTC regulations by persons trading through a chain of foreign brokers; for example, a "trader . . . placing an order through a foreign broker, who then places the same order in its name, rather than the trader's name, with another foreign broker."[59] In order to preclude such conduct, the CFTC's proposed rules explicitly recognize that a foreign broker's customer may also be a foreign broker with its own customers, and that disclosure of the identity of those customers may also be required.[60] These proposals should also eliminate the conflict of laws problem faced by the foreign broker in the *Wiscope* case because, in the words of the CFTC, "since a foreign broker will be required to obtain the consent of its customers to disclose their identity, market positions and any other required information, any potential problems with local financial privacy laws should be resolved in advance of a Commission request for information."[61]

It has been suggested that the CFTC's foreign agent proposal could cause problems in the United States relations with other countries.[62] A similar proposal had previously been made in Congress for the Federal Maritime Commission, but was stricken from the legislation when several foreign governments protested and the State Department objected that such a requirement would be detrimental to United States foreign relations.[63] Because Congress objected to giving such extraterritorial authority to the Federal Maritime Commission, an agency which generally deals with foreign commerce,[64] it is possible those same considerations may preclude the enactment or, if enacted, the enforcement of the CFTC's foreign agent proposal.[65]

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58. 44 Fed. Reg. 28,678 (1979).

59. *Id.* at 28,680.

60. *Id.*

61. *Id.* In making these proposals the CFTC stated that it was "informed that certain nations impose restrictions on the ability of a foreign government or agency thereof to send communications directly to citizens or firms of that nation. For example, the Commission has been advised that it may be inappropriate under Swiss law for the Commission to send any form of communication directly to firms or traders domiciled in Switzerland; rather, the Commission may be requested to address all such communications through diplomatic channels. Certain types of communications that may be necessary to meet the requirements of the Commodity Exchange Act and due process may be perceived as offensive by Swiss officials because of their 'threatening' tone and, for this reason, would not be delivered to the traders." *Id.* at 28,679.

62. *See* Gartner Address, *supra* note 28.

63. *Id.* at 22,823.

64. 46 U.S.C. §§ 1111-1126(d) (1976).

65. *See* Gartner Address, *supra* note 28, at 22,823.

B. *Emergency Action*

Another major weapon against foreign abuse of United States markets is the CFTC's ability to take immediate action in an emergency.[66] Emergency is defined as including actions of "a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity."[67] This power was intended to be used by the CFTC "in the case of another Russian grain deal [to stop] the Russians [from] going into the market and using the exchanges as a means of making a double profit on a deal with the United States."[68]

The CFTC's emergency power was recently challenged in *Board of Trade v. CFTC.*[69] In that action a district court preliminarily enjoined the CFTC from exercising its authority to compel the Chicago Board of Trade to terminate trading in March 1979 wheat futures. The district court believed that "[a]n emergency is something that is dramatic and obvious, ordinarily obvious, critical, and about which reasonable people ordinarily would not disagree," and found no evidence that such an emergency existed.[70] The court apparently overlooked the statutory definition of emergency power which includes threatened as well as actual market disturbances.[71]

In denying a stay of the district court's order, the Seventh Circuit[72] stated that, while the CFTC's expertise in such matters is entitled to great deference,

> [t]he failure of the Commission to present countervailing evidence, the purport of which would in essence be to demonstrate that its action was not arbitrary, overcomes in this case the customary deference accorded to the administrative determination of emergency. We do not say that the Commission would have been required to produce substantial countervailing evidence; we do say that the complete absence of any

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66. 7 U.S.C. § 12a(9) (1976). Contract markets themselves are authorized to take emergency action without first obtaining CFTC approval. *Id.* § 7a(12). The CFTC has recently issued guidelines to be used by contract markets in such emergency situations. CFTC Interpretative Letter No. 79-2, *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,860 (July 25, 1979).

67. 7 U.S.C. § 12a(9) (1976).

68. 120 Cong. Rec. 10,767 (1974) (remarks of Rep. Poage); *see* note 9 *supra.*

69. 2 Comm. Fut. L. Rep. (CCH) ¶ 20,780 (N.D. Ill. 1979). The emergency was based on a large concentration of ownership of wheat futures by a small number of speculators. *Id.* ¶¶ 20,783-84. While it appears that only domestic speculators were involved in this case, the same kind of emergency could arise by reason of foreign interests in the market.

70. 2 Comm. Fut. L. Rep. (CCH) ¶ 20,780, at 23,185-6.

71. 7 U.S.C. § 12a(9) (1976).

72. Board of Trade v. CFTC, No. 79-1278 (7th Cir. Mar. 19, 1979) *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,781.

support for its emergency determination leaves the plaintiff's claim of arbitrary action undisputed.[73]

Subsequently, however, in the CFTC's appeal on the merits, the district court was reversed.[74] The Seventh Circuit, in holding that Congress had committed the determination of the existence of an emergency to the discretion of the CFTC, stated:

> The legislative history amply demonstrates a congressional purpose to establish a Commission with broad regulatory and enforcement powers, and with the capability and expertise of taking swift and effective action when the Commission has reason to believe an emergency exists. Congress recognized that regulation of the volatile futures markets could be accomplished effectively only through the use of an expert Commission, that situations could occur suddenly for which the traditional enforcement powers would be an inadequate response, and that therefore the Commission should have emergency powers, the exercise of which is committed to the expertise and discretion of the Commission. Judicial review of the Commission's emergency determination would thwart the very purpose for which Congress authorized the emergency powers.[75]

This decision appears to be correct if its import is to preclude a full-scale hearing before the CFTC can act in an emergency. Indeed, under the restrictions applied in the earlier Seventh Circuit opinion the important remedial purposes of the CFTC's emergency power would have been rendered ineffectual. The emergency power is a preventive measure to be used in emergency situations, often on short notice and in highly volatile markets, and a delay caused by court hearings could neutralize the CFTC's ability to act in exigent circumstances.[76] For example, a government on a hit and run raid on a United States market could be in and out of the market before the CFTC could take effective action.

While the Seventh Circuit's current decision should preclude any undue interference in the flexibility of the CFTC's action, protection is needed against arbitrary and capricious governmental action. In this regard, it was assumed by Congress that the emergency power would be used only with extreme caution.[77] It should be applied flexibly to allow the CFTC to act, for example, when the CFTC "is of the

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73. *Id.* at 23,186.

74. Board of Trade v. CFTC, No. 79-1278 (7th Cir. Sept. 12, 1979).

75. *Id.*, slip op. at 16. The court concluded that the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), precludes judicial review where an action is committed to the discretion of an agency. Board of Trade v. CFTC, No. 79-1278, slip op. at 17 (7th Cir. Sept. 12, 1979); *see* Equitable Trust Co. v. CFTC, 2 Comm. Fut. L. Rep. ¶ 20,892 (W.D. Tex. 1979).

76. In the Senate debates it was noted that recordkeeping by the exchanges was inadequate, and that it would take considerable time to identify the traders on any particular day. *See* 120 Cong. Rec. 34,998 (1974) (remarks of Sen. Clark). Such a delay would also be fatal to any meaningful preventive measure.

77. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 8, *reprinted in* [1974] U.S. Code Cong. & Ad. News, 5843, 5849-50; H.R. Rep. No. 975, 93d Cong., 2d Sess. 4, 30 (1974).

opinion that any foreign nation is stepping into the futures market and so manipulating it as to endanger the values of American commodities."[78] The appropriate standard should be that the government must act in good faith, which is the standard applied to contract markets in undertaking emergency action.[79] The Seventh Circuit viewed the CFTC's emergency authority as being limited to those actions specified in the statute: "actual or threatened market manipulations and corners, acts of government affecting a commodity, and any other major market disturbance which prevents the market from accurately reflecting the sources of supply and demand for such commodity."[80] The CFTC conceded, and case law supports the proposition, that "agency action committed to agency discretion is nevertheless judicially reviewable where such action is challenged on constitutional grounds, or upon a claim that the agency has acted in bad faith or in a manner plainly repugnant to its statutory authority."[81]

Because cases arising under the federal securities laws are often used as analogies in CFTC actions,[82] the extent of the CFTC's emergency power should also be viewed in light of the Supreme Court's recent decision in *SEC v. Sloan.*[83] This case involved a challenge to the SEC's authority to summarily suspend trading in any security for up to ten days if, in the opinion of the SEC, such action is required for the protection of investors and the public interest.[84] The Court held that the SEC was exceeding its emergency powers by imposing successive ten day summary suspensions of trading based on a single set of circumstances.[85] The Court noted that if after the initial ten days additional relief was needed, an injunction or other relief should be sought.[86] Although the provisions of the CFTC and the Securities Exchange Act of 1934 (the Exchange Act) differ materially in that broader powers are conferred upon the CFTC,[87] the *Sloan* case appears to evidence a judicial distaste for summary actions such as those authorized by the CFTC's emergency power, and may signal that the courts will scrutinize closely the statutory limitations on such authority.

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78. 120 Cong. Rec. 34,750 (1974) (remarks of Rep. Poage).

79. Compania de Salvadorena de Cafe, S.A. v. CFTC, No. 77 Civ. 5820 (S.D.N.Y. Mar. 14, 1978), *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,571, at 22,324.

80. Board of Trade v. CFTC, No. 79-1278, slip op. at 11 (7th Cir. Sept. 12, 1979) (quoting 7 U.S.C. § 12a(9) (1976)).

81. *Id.*, slip op. at 9 n.6.

82. *See* note 100 *infra* and accompanying text.

83. 436 U.S. 103 (1978).

84. 15 U.S.C. § 78ℓ(k) (1976).

85. 436 U.S. at 111.

86. *Id.* at 115.

87. *See* notes 66-67 *supra* and accompanying text.

II. THE EXTRATERRITORIAL REACH OF THE CEA AND CFTC REGULATIONS

A. *Antifraud Provisions*

One of the CFTC's first acts was to adopt an antifraud rule[88] to govern the "solicitation or acceptance in the United States of orders for commodity futures contracts that are traded or executed upon boards of trade, exchanges or markets located outside the United States."[89] This rule is a needed extension of the antifraud provisions of the CEA,[90] which are directed to transactions on contract markets designated as such by the CFTC, and which, therefore, may not encompass transactions executed on a foreign market.[91]

The validity of this antifraud rule was recently questioned in *Palmer Trading Co. v. Shearson Hayden Stone, Inc.*,[92] in which a district court held that the CFTC had exceeded its authority in adopting the rule.[93] The court reasoned that because the language of the CEA's antifraud provisions for futures contracts was directed only to domestic contract markets,[94] the CFTC did not have authority to extend its antifraud regulations to foreign futures transactions.[95] Apparently, however, the court did not consider the effect of CEA § 12a(5), which empowers the CFTC to make any rules or regulations it deems necessary to carry out the purposes of the CEA.[96] This general rulemaking authority, coupled with the statutory expansion of the

88. 17 C.F.R. § 30.02 (1979). The language of the antifraud rule as adopted is patterned after the language of § 4b of the CEA, 7 U.S.C. § 6b (1976), except that the rule eliminates the requirement of willfulness in order to avoid restrictive interpretations given to that requirement by various courts. 40 Fed. Reg. 26,505 n.2 (1975). As originally proposed, the CFTC antifraud rule tracked the language of SEC rule 10b-5. 17 C.F.R. § 240.10b-5 (1979). The CFTC, however, subsequently determined to use the language in § 4b of the CEA as a model in order to avoid the blind application of principles governing securities cases to cases arising under the CEA. 40 Fed. Reg. 26,505 (1975). The CFTC's general authority to issue rules and regulations is found in 7 U.S.C. § 12a(5) (1976).

89. 40 Fed. Reg. 26,505 (1975).

90. 7 U.S.C. § 6b (1976). Among other things, the CEA makes it unlawful, in connection with the purchase or sale of contracts for future delivery, for any person to cheat or defraud, or attempt to cheat or defraud another person, or willfully to make or cause to be made false reports or statements, or willfully to employ deceptive practices. 7 U.S.C. § 6b (1976). While the statutory language requiring the conduct to be "in connection with" futures transactions, *id.*, could be interpreted as limiting the scope of the antifraud provisions, at least one court has held that such provisions are to be given broad application and can apply to conduct which occurs prior to opening a trading account. Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 104 (7th Cir. 1977).

91. 40 Fed. Reg. 18,187-88 (1975).

92. 2 Comm. Fut. L. Rep. (CCH) ¶ 20,890 (N.D. Ill. 1979).

93. *Id.* at 23,655.

94. 7 U.S.C. § 6b (1976).

95. 2 Comm. Fut. L. Rep. ¶ 20,890, at 23,654-55 (N.D. Ill. 1979).

96. 7 U.S.C. § 12a(5) (1976).

CFTC's jurisdiction to include transactions on foreign exchanges,[97] appears to grant the CFTC authority to promulgate antifraud rules for international transactions.

The CFTC also adopted an antifraud rule for commodity options,[98] and instituted several suits under that rule against dealers selling London commodity options[99] to the public in the United States.[100] In one such case,[101] the Fifth Circuit rejected a claim that provisions in the CEA governing commodity options[102] did not apply to London commodity options because they involved "*foreign* commerce."[103] The court, relying upon the interstate commerce provisions of the CEA,[104] held that in reading the sections of the CEA together it is "apparent that the jurisdiction of the Commission is sufficiently broad to encompass transactions involving foreign commerce, such as the London [commodity] options."[105]

97. *See* notes 21-23 *supra* and accompanying text.

98. 17 C.F.R. § 32.9 (1979).

99. "A 'London commodity option' is a contractual right to buy ('to go long,' referred to as a 'call option') or to sell ('to short,' referred to as a 'put option') a specified futures contract traded on the London Markets for a particular commodity, at a specified price (referred to as the 'strike' price) within a specified period of time (on or before the 'declaration date')." CFTC v. J.S. Love & Assoc. Options, 422 F. Supp. 652, 654 n.6 (S.D.N.Y. 1976). *See generally* British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482, 484-85 (2d Cir.), *cert. denied,* 434 U.S. 938 (1977); CFTC v. United States Metals Depository Co., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,807, at 23,286 (S.D.N.Y. 1979); Kelley v. Carr, 442 F. Supp. 346, 348-49 (W.D. Mich. 1977); CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 913-14 (S.D.N.Y. 1977).

100. CFTC v. United States Metals Depository Co., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,807 (S.D.N.Y. 1979); CFTC v. British Am. Commodity Options Corp., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,662 (S.D.N.Y. 1978); Kelley v. Carr, 442 F. Supp. 346 (W.D. Mich. 1977); CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911 (S.D.N.Y. 1977); CFTC v. J.S. Love & Assoc. Options, 422 F. Supp. 652 (S.D.N.Y. 1976); *see* Schief & Markham, *supra* note 3, at 21-26.

101. CFTC v. Muller, 570 F.2d 1296 (5th Cir. 1978).

102. 7 U.S.C. § 6c(b) (1976).

103. CFTC v. Muller, 570 F.2d 1296, 1299 (5th Cir. 1978) (emphasis added).

104. 7 U.S.C. §§ 2-3 (1976); *see* note 22 *supra.*

105. CFTC v. Muller, 570 F.2d 1296, 1299 (5th Cir. 1978). The CFTC had adopted rules that would have imposed special requirements on London commodity options sales in the United States. *See* Extraterritorial Implications, *supra* note 51, at 7. Those rules were upheld by the Second Circuit in British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482 (2d Cir.), *cert. denied,* 434 U.S. 938 (1977). The CFTC, however, subsequently determined to suspend all option sales, 17 C.F.R. § 32.11 (1979), except dealer options which are options "offered to a producer, processor, or commercial user of, or a merchant handling . . . the commodity which is the subject of the commodity option transaction . . . solely for purposes related to its business as such. *Id.* at § 32.4; *see* 43 Fed. Reg. 16,153 (1978). In 1978, the CEA was amended to provide that the CFTC could not allow commodity options to be traded in the United States without prior notification to Congress. Futures Trading Act of 1978, Pub. L. No. 95-405, [1978] U.S. Code Cong. & Ad. News 867 (to be codified in 7 U.S.C. § 6c(c)). An exception to this prohibition authorizes the CFTC to allow the offer and sale of domestic dealer options which meet certain requirements. *Id.* at 867-69, (to be codified in 7 U.S.C. § 6c(d)). Another exemption applies to persons "not domiciled" in the United

Although the CFTC has not tested the extraterritorial limits of its antifraud provisions for domestic futures contracts, guidance as to their ultimate scope may be drawn from cases arising under the federal securities laws; such cases are often used as precedent in considering the scope of similarly-worded sections of the CEA.[106]

Under traditional standards of international law, the interest of a state in applying its law is legitimized by conduct which has occurred within its territory,[107] effects of the conduct upon the state,[108] and the role played by nationals of the state.[109] In accordance with these standards, courts have frequently given extraterritorial application to the federal securities laws. Generally speaking, extraterritorial jurisdiction of the Exchange Act has been held to attach when a fraud has been perpetrated in the United States in connection with the purchase or sale of securities. For example, misrepresentations made in the United States to induce an American corporation to purchase the stock of a British corporation at inflated prices on a foreign exchange have been held to be remediable under the Exchange Act.[110] Similarly, defendants who use the United States as a base for their fraudulent activity abroad have been held subject to the Exchange Act, even though there were few violative effects on American investors,[111] or even though only foreign investors were defrauded.[112]

Extraterritorial jurisdiction also attaches where significant activity

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States who meet conditions substantially equivalent to those required for domestic dealer options. *Id.* at 869 (to be codified in 7 U.S.C. § 6c(d)). This provision also authorizes the CFTC to suspend the sale of foreign dealer options prior to a hearing where such sales "in the Commission's judgment present a substantial risk to the public interest." *Id.* (to be codified in 7 U.S.C. § 6c(d)). The CFTC has not as yet authorized foreign dealers to sell options in the United States, but has authorized domestic "dealer" options and has proposed a pilot option program for United States contract markets. 17 C.F.R. § 32.12 (1979); 44 Fed. Reg. 22,088 (1979).

106. *See* CFTC v. British Am. Commodity Options Corp., 560 F.2d 135, 141 n.11 (2d Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); CFTC v. United States Metals Depository Co., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,807, at 23,292 (S.D.N.Y. 1979); CFTC v. British Am. Commodity Options Corp., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,662, at 22,703 (S.D.N.Y. 1978); Auditore v. Rosenthal & Co., 2 Comm. Fut. L. Rep. (CCH) ¶ 20,658, at 22,668 (N.D. Ga. 1978); Kelley v. Carr, 442 F. Supp. 346, 354 (W.D. Mich. 1977); CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 919 (S.D.N.Y. 1977); CFTC v. J.S. Love & Assoc. Options, 422 F. Supp. 652, 661 (S.D.N.Y. 1976).

107. Restatement (Second) of Foreign Relations Law of the United States § 17 (1965).

108. *Id.* § 18.

109. *Id.* § 30.

110. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1335 (2d Cir. 1972).

111. IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975).

112. United States v. Cook, 573 F.2d 281, 283 (5th Cir. 1978); SEC v. Kasser, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); Straub v. Vaisman & Co., Inc., 540 F.2d 591, 595 (3d Cir. 1976).

designed to further a fraudulent scheme occurs within the country.[113] Although courts have indicated that such jurisdiction ordinarily would not attach if the fraudulent acts in the United States are merely of a preparatory nature,[114] such preliminary acts may trigger extraterritorial application of the Exchange Act when the injury is to American citizens residing abroad.[115] This rationale may have been extended by a recent Eighth Circuit decision.[116] The sole victim in this case was a foreign corporation, and the securities involved "were not traded on any American exchange, had no measurable effect on domestic markets, and had only a minimal effect, if any, in the United States."[117] The Court nevertheless concluded that the conduct in question—nondisclosure of a claim to stock—was sufficient to confer jurisdiction because the fraudulent scheme was devised and completed in the United States and then exported to Australia.[118]

Courts also consider the use of the mails or other instrumentalities of interstate commerce in determining whether defendant's conduct in the United States is sufficient to justify the exercise of jurisdiction.[119] One case before the Eighth Circuit concerned misrepresentations made by a Canadian corporation in connection with a tender offer for the shares of another Canadian corporation. The offeror mailed a form letter to its United States shareholders and made other contacts by mail and telephone. The court held the conduct sufficient for subject matter jurisdiction to attach "even though the securities [were] foreign ones that had not been purchased on an American exchange."[120]

While an examination of the applicable cases reveals some general principles concerning the extraterritorial application of the federal securities laws, resolution of a particular issue will probably turn on the particular facts of each case, weighed in light of the standards adopted by the various circuits and the views expressed by the SEC and its staff. The proposed Federal Securities Code[121] may add more

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113. Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979).

114. IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. 1975); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 n.24 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975).

115. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975).

116. Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979).

117. *Id.* at 415.

118. *Id.* at 420.

119. *Id.* at 421; SEC v. United Financial Group, Inc., 474 F.2d 354, 356 (9th Cir. 1973); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 526 (8th Cir. 1973).

120. Travis v. Anthes Imperial Ltd., 473 F.2d 515, 524 (8th Cir. 1973).

121. ALI Fed. Sec. Code § 1905 (Proposed Official Draft 1978).

certainty to this area. It would establish specific statutory standards for application of the federal securities laws to international transactions. For example, the Code would apply to conduct which takes place outside the United States and has a substantial effect within the United States as a direct and reasonably foreseeable result of the conduct. The Code would also apply to acts initiated within the United States which cause a prohibited act outside the United States.[122]

B. *Commodity Options*

As noted, the CFTC has concluded that its authority to regulate commodity options extends to United States transactions in options traded on foreign exchanges.[123] In so concluding, the CFTC determined that "[a] contrary interpretation would emasculate the decision of Congress to ban trading in the United States in options in those commodities specifically enumerated in . . . the Act."[124] For example, the CFTC has issued a public announcement expressing its view that transactions in commodity options on foreign futures involving contracts in wool are prohibited by the CEA.[125]

It remains an open question whether the CFTC would construe its regulatory authority to extend to options traded on foreign exchanges but offered to American citizens outside the territorial jurisdiction of the United States. Prior to the existence of the CFTC, the Authority several times expressed the view that such foreign options transactions would not violate the CEA.[126] Because of the CFTC's expanded

122. For a thorough analysis of § 1905 see Liftin, *The Extraterritorial Reach of the Federal Securities Code: An Analysis of Section 1905*, 32 Vand. L. Rev. 495 (1979).

123. 41 Fed. Reg. 26,606 (1976). This determination is based on the CEA's broad definition of interstate commerce to include commerce with a foreign nation. *See* notes 22, 105 *supra* and accompanying text.

124. 41 Fed. Reg. 26,606 (1976).

125. *Id.*

126. For example, an official of the Authority stated that the solicitation of commodity option orders "in Canada for Canadian customers even by American firms who may be members of a contract market in the United States" would not violate the CEA. Administrative Determination No. 5 (Sept. 21, 1936) (on file with the *Fordham Law Review*). On another occasion an official noted: "The only way that any person, American or foreigner, and regardless of his place of residence, can offer to enter into, enter into, or confirm the execution of such a[n] [options] deal without violating the [CEA] is for that person to be physically outside of the territorial jurisdiction of the United States when he does so." Administrative Determination No. 38 (Dec. 17, 1937) (on file with the *Fordham Law Review*).

Administrative Determinations were a series of interpretations of the CEA issued by the Authority while it administered the Act. Because Administrative Determinations are the early interpretations of the agency charged with enforcing the statute, courts may accord them great weight. *See* statutory power,[127] however, it is uncertain whether the CFTC will adhere to the Authority's determination.

C. *Arbitration Requirements*

The CEA requires contract markets to "provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances."[128] Shortly after its creation, the CFTC issued an interpretation of this provision[129] and promulgated rules to govern contract market arbitration procedures.[130] One of these rules restricts the practice in which customers of futures commission merchants agree, upon opening their account, to submit to arbitration any disputes arising from that account.[131] The CFTC prohibits such predispute agreements unless the customer gives his informed consent to such an arrangement. In addition, the customer can never be required to waive his right to seek reparations before the CFTC.[132]

E.I. Dupont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); United States v. Consumer Life Ins. Co., 430 U.S. 725, 751-52 (1977); United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719 (1975); Chemeheuvi Tribe of Indians v. FPC, 420 U.S. 395, 409-10 (1975); Saxbe v. Bustos, 419 U.S. 65, 74 (1974); NLRB v. Boeing Co., 412 U.S. 67, 75 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971); Zemel v. Rusk, 381 U.S. 1, 11 (1965); Udall v. Tallman, 380 U.S. 1, 16-18 (1965); Hofmayer v. Dean Witter & Co. Inc., 459 F. Supp. 733, 738 (N.D. Cal. 1978). *See also* Kixmiller v. SEC, 492 F.2d 641, 644 n.13 (D.C. Cir. 1974) (less weight is to be given to interpretations of officials who are not agency heads). The Supreme Court, however, has several times rejected the statutory interpretations of administrative agencies such as the SEC. SEC v. Sloan, 436 U.S. 103, 117-19 (1978); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 n.27 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212-14 (1976); United Hous. Foundation, Inc. v. Forman, 421 U.S. 837, 858 n.25 (1975); Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 425-27 (1972). The possibility of such rejection exists because the Court's deference to agency action must be constrained by the Court's "obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." International Bhd. of Teamsters v. Daniel, 99 S. Ct. 790, 800 n.20 (1979). In the future, the views of the CFTC may be accorded greater weight than the views of the Authority because of the CFTC's expanded statutory role. The CFTC, however, considers the Administrative Determinations of the Authority very important and has sought public comment before overturning them. *See* 44 Fed. Reg. 33,839 (1979); 43 Fed. Reg. 32,092 (1978). *See generally* Securities Exchange Act Release No. 15984 (July 2, 1979), *reprinted in* [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,122; *see also* 15 U.S.C. § 78cc(a) (1976).

127. *See* notes 18-23 *supra* and accompanying text.

128. 7 U.S.C. § 7a(11) (1976).

129. 40 Fed. Reg. 29,121 (1975).

130. 17 C.F.R. § 180.1-.6 (1979).

131. 17 C.F.R. § 180.3 (1979).

132. *Id.* § 180.3(b). *See generally* Rosen, *Reparation Proceedings Under the Commodity Exchange Act,* 27 Emory L. J. 1005, 1011-14 (1978); Schneider, *Commodities Law and Predispute Arbitration Clauses,* 6 Hofstra L. Rev. 129 (1977). Section 14 of the CEA provides a procedure for

In determining the application of these rules to international transactions, cases arising under the federal securities law again provide helpful analogies. In *Wilko v. Swan,*[133] the Supreme Court held an arbitration agreement invalid insofar as it required a domestic customer of a securities brokerage firm to waive a private right of action for violation of the federal securities law. The Court stated that, despite the provisions of the Federal Arbitration Act,[134] section 14 of the Securities Act of 1933[135] prohibited such a waiver.[136] In *Scherk v. Alberto-Culver Co.,*[137] however, the Court refused to extend *Wilko* to international transactions. The Court distinguished *Scherk* on the ground that the transactions in question involved an international agreement made by an American corporation investing in a foreign business, and held that the requirements of international commerce necessitate broad recognition of international arbitration agreements.[138]

Policy considerations such as those set forth in *Scherk* may also apply to international commodity futures transactions. If so, CFTC regulations may be ineffective to deal with predispute arbitration agreements in such transactions.[139] The reparation provision of the CEA,[140] however, clearly intends protection for nonresidents.[141] The reach of the CEA, therefore, may be found to be sufficiently broad to offer protection in international transactions.

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an administrative hearing before the CFTC to adjudicate and award damages for violations of the Act by registered persons. 7 U.S.C. § 18 (1976).

133. 346 U.S. 427 (1953).

134. 9 U.S.C. §§ 1-208 (1976).

135. 15 U.S.C. § 77n (1976).

136. 346 U.S. at 434-35.

137. 417 U.S. 506 (1974).

138. *Id.* at 517-20; *see* 9 U.S.C. § 201 (1976). The Court also suggested that the provisions of the Exchange Act may be distinguishable from the provisions of the Securities Act of 1933 that were in issue in *Wilko.* 417 U.S. at 513-15.

139. One could conceivably argue that the policy considerations in *Scherk* could also apply to a *Wiscope* conflict of laws situation. *See* notes 46-52 *supra* and accompanying text. It seems likely, however, that *Scherk* will not be read that broadly because of the significant sovereign interest in protecting United States markets.

140. 7 U.S.C. § 18 (1976). This provision was added in 1974 to provide a forum for customers damaged because of violations of the CEA or CFTC regulations. Only registered persons—associated persons, floor brokers, futures commission merchants, commodity trading advisers and commodity pool operators—are subject to damages in reparations proceedings, although such registered persons can make counterclaims related to the transactions involved in the proceeding. *Id.* §§ 18(a), (d); 17 C.F.R. § 12.23(b)(2) (1979). *See generally* Hudson, *Customer Protection in The Commodity Futures Market,* 58 B.U.L. Rev. 1 (1978); Rosen, *supra* note 32.

141. 7 U.S.C. § 18(d) (1976).

III. Regulation of Foreign Professionals

A. *Futures Commission Merchants*

1. Registration Requirements

The Authority apparently considered a domestic broker acting for foreign customers but trading on United States markets to be subject to the CEA's registration requirements.[142] In one case, a futures commission merchant let his registration lapse and did not reapply for five years. During this five-year period the merchant traded on United States contract markets but only for foreign customers. The Authority held that the merchant violated the CEA by failing to register as a futures commission merchant.[143] Registration was not required, however, if all a broker did was solicit orders in the United States for execution on a foreign market.[144] Moreover, if a foreign broker solicited funds only in a foreign country, registration as a futures commission merchant was not required even if the foreign firm was a member of a contract market in the United States on which transactions were being executed.[145] Conversely, the Authority held that "a foreign branch of an American firm or a wholly owned foreign subsidiary of an American corporation or firm would be subject to the same requirements as a parent organization operating in this country."[146] The Authority also ruled that a futures commission merchant's

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142. Administrative Determination No. 42 (Jan. 17, 1938) (on file with the *Fordham Law Review*). The CEA requires futures commission merchants to register with the CFTC. 7 U.S.C. § 6d (1976). Registration as a futures commission merchant is also required for persons conducting transactions in commodity options. 17 C.F.R. § 32.3 (1979). Such transactions are, however, with limited exceptions, presently prohibited in the United States. *See* note 105 *supra*.

143. *In re* Garnac Grain Co., 8 Agric. Dec. 244 (1949).

144. Administrative Determination No. 6 (Sept. 28, 1936) (on file with the *Fordham Law Review*). Under the federal securities laws, however, registration is required when a foreign broker uses the mails or other instrumentalities of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security. Letter from David J. Romanski, Attorney, Office of the Chief Counsel, Securities and Exchange Commission, to Hugh Seymour, Hoare & Govett Ltd., London, England (Sept. 28, 1973) [hereinafter cited as Romanski Letter] (on file with the *Fordham Law Review*); *see* 15 U.S.C. § 78o (1976). Even if the broker does not recommend specific securities in the United States, for example, if he only mentions the name of a foreign broker and indicates that foreign securities may be purchased through that broker, registration would be required if such conduct could reasonably be viewed as inducing the purchase of securities. Romanski Letter, *supra*, at 4. Similarly, conferences conducted in the United States to induce American institutions or persons to invest abroad also requires broker registration. *Id.* at 5-6.

145. Administrative Determination No. 51 (Mar. 17, 1938) (on file with the *Fordham Law Review*).

146. *Id.* at 2. Compare the limitations on the applicability of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd(b) (1976), with transactions by foreign subsidiaries of United States companies. *See* S. Rep. No. 114, 95th Cong., 1st Sess. 11, *reprinted in* [1977] U.S. Code Cong. &

registration application need not include branch offices and correspondents located outside the United States, but must list such branch offices and agents if they are located within the United States.[147]

Although only this last interpretation has been expressly continued in effect by the CFTC,[148] current policy in this area may nevertheless be discerned from a CFTC staff interpretation in a related area. In an interpretative letter issued by the CFTC's Office of General Counsel (CFTC General Counsel)[149] the view was expressed that the CFTC's authority to prohibit a violator of the CEA from trading on or subject to the rules of a contract market did not extend to prohibit trading on exchanges located outside the United States.[150] The letter noted that the authority to order such a prohibition was comparable to the authority granted by section 4d of the CEA, which requires registration of persons soliciting orders for futures contracts on United States markets.[151] Accordingly, under the CFTC General Counsel's analysis it would appear that solicitation in the United States of futures contracts for foreign markets does not require registration as a futures commission merchant.[152]

Because CFTC regulations exempt from registration persons trading for proprietary accounts,[153] foreign entities trading on contract mar-

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Ad. News 4098, 4108-09; H.R. Rep. No. 831, 95th Cong., 1st Sess. 13-14, *reprinted in* [1977] U.S. Code Cong. & Ad. News 4121, 4125-26; H.R. Rep. No. 640, 95th Cong., 1st Sess. 11-12 (1977); 123 Cong. Rec. H12,825-26 (daily ed. Dec. 7, 1977) (remarks of Rep. Eckhardt).

147. Administrative Determination No. 219 (May 22, 1969) (on file with the *Fordham Law Review*).

148. 17 C.F.R. § 1.11, .14(1) (1979).

149. CFTC Interpretative Letter No. 75-19, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,113 (July 1, 1975). Because the courts may give such interpretations deference, *see* note 126 *supra*, the CFTC General Counsel has stated that "the opinions expressed by Commission employees do not necessarily reflect the views of the Commission itself; they are not binding upon the Commission, or, indeed, upon the persons who requested and obtained them. Of course, since the Commission employees have particular expertise concerning the requirements of the Commodity Exchange Act one would normally expect that an attorney such as yourself would give due consideration to these opinions when advising [your] clients." CFTC Interpretative Letter No. 77-17, *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,449 (Oct. 19, 1977). *But see* Kixmiller v. SEC, 492 F.2d 641, 644 n.13 (D.C. Cir. 1974).

150. CFTC Interpretative Letter No. 75-19, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,113, at 20,813 (July 1, 1975).

151. 7 U.S.C. § 6d (1976).

152. Recognizing the existence of a similar gap, the CFTC adopted a rule that required persons selling commodity options to register as futures commission merchants. 17 C.F.R. § 32.3 (1979). This rule was adopted by the CFTC pursuant to its plenary authority to regulate commodity options. 7 U.S.C. § 6c(b) (1976); *see* Extraterritorial Implications, *supra* note 51, at 17 n.29.

153. 17 C.F.R. § 1.7 (1979). Proprietary accounts are broadly defined by CFTC regulations, and range from those owned by a corporation to those owned by an individual, his spouse, or minor child. *Id.* § 1.3(y). *See generally* 2 Comm. Fut. L. Rep. (CCH) ¶ 20,705 (Dec. 5, 1978).

kets in the United States need not register as futures commission merchants if the trading is only for their own or related accounts.[154] Exemption from the registration requirement, however, does not preclude application of other requirements of the CEA such as recordkeeping requirements.[155]

There is a further exemption from registration of foreign entities:

> [T]he CFTC apparently takes the position that a foreign entity which performs all of the functions of [a futures commission merchant] except that it is located outside the United States and only has foreign customers is a 'foreign broker' and not [a futures commission merchant] . . . . Foreign brokers are not subject to registration but are subject to certain reporting requirements . . . .[156]

2. Segregation Requirements

Prior to the establishment of the CFTC, the Authority concluded that the segregation provisions of the CEA[157] would not apply to monies held by a futures commission merchant for margin trades on a Canadian exchange.[158] The Authority similarly determined that the CEA did not require foreign brokers to comply with provisions relating to the segregation of margin accounts.[159] Thus, the segregation provisions of the CEA apparently would not be applicable to a foreign broker soliciting and accepting business only in foreign countries. Conversely, if the soliciting organization was a foreign branch or a wholly-owned subsidiary of an American corporation or firm, the

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154. CFTC Interpretative Letter No. 75-20, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,119, at 20,847 (Dec. 5, 1975). The CFTC General Counsel concluded that registration was not required for a domestic subsidiary established by foreign companies to transact business for the foreign entities on United States contract markets. *Id.*

155. *Id.*

156. Extraterritorial Implications, *supra* note 51, at 15 n.13; *see* 17 C.F.R. § 15.00(a) (1979).

157. 7 U.S.C. § 6d(2) (1976); 17 C.F.R. § 1.20-.30 (1979). These segregation provisions require the futures commission merchant to separately maintain and account for customer funds. *Id.* § 1.20(a). Segregation requirements are also imposed in commodity options transactions including London commodity options. 17 C.F.R. § 32.6 (1979); *see* Extraterritorial Implications, *supra* note 51, at 7. Prior to the CFTC's ban on such transactions, *see* note 105 *supra*, these segregation requirements were upheld in British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482, 490 (2d Cir.), *cert. denied*, 434 U.S. 938 (1977). The CEA also provides minimum financial requirements for futures commission merchants. 7 U.S.C. § 6f(2) (1976). These have recently been amended to provide for audits by independent accountants and the contract markets rather than audits by the CFTC as had previously been the case. 17 C.F.R. § 1.17 (1979); 43 Fed. Reg. 39,956-57 (1978). *See generally*, Markham, *Investigations Under The Commodity Exchange Act*, 31 Ad. L. Rev. 285, 293-94 (1979).

158. Administrative Determination No. 20 (Aug. 14, 1937) (on file with the *Fordham Law Review*).

159. Administrative Determination No. 51 (Mar. 17, 1938) (on file with the *Fordham Law Review*); Administrative Determination No. 37 (Dec. 16, 1937) (on file with the *Fordham Law Review*).

Authority apparently would have applied the segregation requirements.[160] In this regard, however, it appears that the Authority has not been entirely consistent; the Authority also ruled that a futures commission merchant could not transfer domestically-segregated customer funds to its office in a foreign country because the CEA's segregation provisions would not be applicable to foreign depositories.[161]

The views expressed by the Authority with respect to segregation requirements for foreign brokers and foreign branch offices of futures commission merchants appear to be inconsistent. If such requirements are applied to branch offices of domestic futures commission merchants, then domestic concerns would be discriminated against in favor of foreign brokers. It may be argued that this disparity is necessary to protect the domestic operations of the futures commission merchants from, for example, the effects of a bankruptcy proceeding. The Bankruptcy Act, however, now provides specific protection for segregated funds.[162] Moreover, the purpose of segregation requirements is to protect identifiable funds of specific customers. By creating foreign branches in the form of foreign subsidiaries, domestic futures commission merchants can isolate their foreign operations.

B. *Associated Persons*

Employees of futures commission merchants who solicit commodity futures orders, or supervise the solicitation of such orders, are required to register with the CFTC as "associated persons."[163] Shortly after its creation, the CFTC adopted a short-form registration procedure for associated persons who confine their activities to areas outside the United States.[164] The CFTC General Counsel noted that in order to

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160. Administrative Determination No. 51 (Mar. 17, 1938) (on file with the *Fordham Law Review*). *See also* Administrative Determination No. 57 (Apr. 28, 1938) (on file with the *Fordham Law Review*).

161. Administrative Determination No. 238 (Sept. 4, 1974) (on file with the *Fordham Law Review*).

162. *See* White, *The Commodity-Related Provisions of the Bankruptcy Act of 1978*, 34 Rec. A.B. City N.Y. 262 (1979).

163. 7 U.S.C. § 6k (1976) An associated person is any person "associated with any futures commission merchant or with any agent of a futures commission merchant as a partner, officer, or employee (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged. . . ." *Id.*

164. 17 C.F.R. § 1.10b (1979). Regulation 1.10b was adopted by the CFTC in response to inquiries concerning whether foreign associated persons who were located outside the United States and who confined their activities to places outside the United States were required to register The CFTC stated that the language of CEA § 4k, 7 U.S.C. § 6k (1976), governing requirements for

qualify for such short-form registration, a foreign associated person must affirmatively state that his activities are confined to areas outside the United States, its territories, or possessions.[165] The CFTC General Counsel's statement was made in response to an inquiry by a registered futures commission merchant associated with two affiliated foreign companies, one located in Amsterdam and one in London. Both of the affiliates were commodity merchants which occasionally accepted and transmitted foreign customer orders to the United States futures commission merchant for execution on United States contract markets. The CFTC General Counsel expressed the view that, assuming all acceptances and transmissions by the employees of the foreign affiliates take place outside the United States, its territories, or possessions, the employees of the foreign affiliates would be qualified for the short-form registration.[166]

This action appears to be inconsistent with an earlier Authority ruling that the registration application of a futures commission merchant need not include information concerning correspondents located outside the United States.[167] This ruling also discriminates against domestic futures commission merchants in favor of foreign brokers. Because the foreign operations of a futures commission merchant are essentially the same as that of a foreign broker, such disparity does not appear to be justified by any actual distinction between the activities of the two professionals and penalizes domestic futures commission merchants by imposing additional regulatory requirements which a foreign broker may avoid. Foreign branches of domestic futures commission merchants and foreign brokers are competitors, and any additional regulatory burdens on the foreign operations of the futures commission merchant imposes a discriminatory burden that could impair such competition.[168]

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associated persons, appeared sufficiently broad to require registration of such persons; but concluded that because such registration was not practicable in some instances, a short form of registration was appropriate. The CFTC stated that futures commission merchants are responsible for transmitting such applications to their foreign associated persons, for renewing the registration, and for warranting that the information contained in such applications is correct to the best of their knowledge. Futures commission merchants are also required to inform the CFTC of any termination of the foreign associated person's employment and the reasons therefore. 40 Fed. Reg. 30,106 (1975).

165. CFTC Interpretative Letter No. 75-12, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,099 (Oct. 6, 1975).

167. *See* note 147 *supra* and accompanying text.

168. The CEA requires the CFTC to "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means" in adopting regulations. 7 U.S.C. § 19 (1976). Requiring registration of foreign branch offices of futures commission merchants and not of foreign brokers appears to be inconsistent with this statutory directive.

C. *Commodity Trading Advisers and Commodity Pool Operators*

The CEA requires persons acting as commodity trading advisers to register with the CFTC.[169] In an interpretative letter, the CFTC General Counsel considered whether a dealer in gold and silver bullion and other metals who rendered commodity advice to foreign and domestic manufacturers, institutions, and other dealers was required to register as a commodity trading adviser.[170] The dealer did not engage in business with the public generally and did not accept orders for futures contracts. The CFTC General Counsel concluded that it would not recommend enforcement action if the firm did not register as a commodity trading adviser. The CFTC General Counsel noted, however, that when analyses, comments, recommendations, and predictions with respect to commodities traded on foreign markets are made available to the public, registration as a commodity trading adviser may be required if such advice can be expected to encourage or discourage futures trading on a contract market in the United States.[171]

Registration may also be required even though the commodity trading advice is rendered solely to foreign customers. The CFTC General Counsel concluded that the registration provisions for commodity trading advisers in the CEA[172] and the absence of any contrary indication in the legislative history suggested that the registration requirements applied to persons who used "jurisdictional means" to render commodity trading advice.[173] In other words, in the view of the CFTC General Counsel, a commodity trading adviser who makes use of the mails or other instrumentalities of interstate commerce would be

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169. 7 U.S.C. § 6n (1976). A commodity trading adviser includes any person who, for compensation or profit, advises others "as to the value of commodities or as to the advisability of trading in any commodity [futures contracts] . . . on or subject to the rules of any contract market" or who, as part of their regular business, "issues or promulgates analyses or reports concerning commodities." *Id.* § 2. Exempted from this definition are, among others: "(i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees." *Id.* In addition, registration is not required for any commodity trading adviser who, "during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading adviser." *Id.* § 6m.

170. CFTC Interpretative Letter No. 76-5, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,147 (Apr. 12, 1976).

171. *Id.; see* 17 C.F.R. § 4.13(b)(1), (c) (1979).

172. 7 U.S.C. § 6n (1976).

173. CFTC Interpretative Letter No. 76-5, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,147, at 20,955 (Apr. 12, 1976).

required to register even if he were only advising foreign customers.[174] The CFTC General Counsel also concluded that a commodity trading adviser located outside the United States but utilizing jurisdictional means to render commodity trading advice to United States citizens would be subject to the registration requirements, even though the number of United States residents who were receiving this advice was less than the statutory minimum number of persons required for registration purposes.[175]

Commodity pool operators are also required to register with the CFTC.[176] The CFTC General Counsel has considered the problem of whether persons operating a commodity pool outside the United States are required to register as commodity pool operators. The commodity pool in question confined its activities to areas outside the United States. None of the participants were residents or citizens of the United States, and the funds and other capital in the pool came from foreign sources. The commodity pool traded through the London office of a United States futures commission merchant registered with the CFTC, and trades were executed on both foreign and United States contract markets. Other persons located outside the United States provided commodity adviser services on both foreign and United States contract markets. Under those facts, the CFTC General Counsel concluded that it would not recommend enforcement action if the persons operating the commodity pool failed to register as commodity pool operators or as commodity trading advisers.[177]

An unanswered question is whether registration as a commodity pool operator is required for a United States commodity pool trading in futures contracts on foreign exchanges. The definition of a commodity pool operator is limited to a pool "trading in any commodity for fu-

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174. *Id.*

175. CFTC Interpretative Letter No. 76-25, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,239 at 21,276 (Dec. 6, 1976). The CEA exempts a commodity trading adviser from registration if the adviser is rendering commodity trading advice to less than 15 persons in a one-year period. 7 U.S.C. § 6m (1976). The CFTC General Counsel noted that the adviser in this case was rendering commodity trading advice to less than 15 persons in the United States but to over 150 subscribers worldwide. Although the statutory definition of a commodity trading advisor is directed toward activities on United States contract markets, *see* note 169 *supra*, the CFTC General Counsel nevertheless believed that the minimum of 15 persons should be measured on a worldwide basis when the jurisdictional means were being used. [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,239 (Dec. 6, 1976).

176. 7 U.S.C. § 6n (1976). A commodity pool operator is a business which solicits, accepts or receives from others funds, securities, or property for the purpose of trading in any commodity for future delivery on or subject to the rules of a contract market. *Id.* § 2. The CFTC has authority to exempt persons from this definition, *id.*, and has exercised this authority to a limited extent. 17 C.F.R. § 4.13 (1979).

177. CFTC Interpretative Letter No. 76-21, *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,222 (Aug. 15, 1976).

ture delivery on or subject to the rules of any contract market."[178] Because "contract market" is the statutory term for domestic market, this provision may be interpreted to exclude commodity pools trading on foreign exchanges from the CEA's registration requirements. If so, this would conform to the interpretation that a broker soliciting in the United States only for foreign markets need not register with the CFTC.[179] In any event, the CFTC's antifraud provisions for foreign futures contracts sold in the United States would nevertheless apply.[180]

Conclusion

The CFTC policy of "parity of treatment"[181] for foreign traders is, in reality, a misnomer. The distinctive nature of many regulations for foreign traders simply does not establish a consistent policy of parity of treatment. Instead, from a review of the proposed and present regulatory policies of the CFTC, it appears that the actual policy has been to establish regulations for foreign traders which allow the CFTC to achieve its regulatory goals. For example, reporting requirements for foreign traders are designed to allow the CFTC to maintain surveillance over the trading activities of foreign participants that may have a substantial impact on United States markets.[182] The lack of registration requirements for foreign brokers, on the other hand, exhibits an assessment that the regulatory goals sought by registration are not directed at foreign persons. In both instances, the regulatory goals of the agency—realpolitik and not a concept of parity of treatment—established the basis for the CFTC's regulatory policy.

Regardless of the theory used to justify CFTC policies, however, it is clear, as evidenced by the *Wiscope* case,[183] that the CFTC intends to require foreign participants in United States markets to play by whatever rules the CFTC establishes. Of course, in instituting such regulations the CFTC must be mindful that it is establishing United States foreign policy with respect to foreign commercial interests engaged in commodity trading. The foreign relations of the United States and the reciprocal treatment of American traders in foreign markets may be directly affected by CFTC attempts to regulate foreign traders. The exigencies of international comity, however, do not militate against regulation of foreign participants. Rather, the CFTC

178. 7 U.S.C. § 2 (1976).

179. *See* note 147 *supra* and accompanying text.

180. *See* notes 88-97 *supra* and accompanying text.

181. *See* notes 27-29 *supra* and accompanying text.

182. *See* notes 42-56 *supra* and accompanying text.

183. *See* notes 46-52 *supra* and accompanying text. Recently the CFTC filed an administrative complaint against a Swiss bank for failing to respond to a special call for information. CFTC v. Suisse Banque Populaire, No. 80-8 (CFTC, filed Dec. 3, 1979); *see CFTC Seeks Ruling Broadening Disclosures By Foreign Traders,* Wall St. J., Dec. 4, 1979, at 39, col. 1.

must recognize that while its regulatory goals are salutory, it may be necessary at times to modify its procedures or use alternative measures to achieve its goals and to accommodate the international community. As CFTC Commissioner Gartner has noted, the CFTC regulatory structure cannot ignore "international economic policy and international political relations."[184] At the same time, however, foreign traders and their governments must recognize the CFTC's mandate to achieve effective regulation of futures transactions which have an impact on the economy of the United States.

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184. Gartner Address, *supra* note 28, at 22,824.