Testimony of

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Regarding

Excessive Speculation in the Natural Gas Futures Market

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My name is Michael Greenberger.

I want to thank the committee for inviting me to testify on the important issue that is the subject of today's hearings.

After nearly 24 years in private legal practice, I served as the Director of the Division of Trading and Markets ("T&M") at the Commodity Futures Trading Commission ("CFTC") from September 1997 to September 1999. In that capacity, I supervised approximately 135 CFTC personnel in CFTC offices in DC, New York, Chicago, and Minneapolis, including lawyers and accountants who were engaged in overseeing the Nation's futures exchanges. During my tenure at the CFTC, I worked extensively on regulatory issues concerning exchange traded energy derivatives, the legal status of over-the-counter ("OTC") derivatives, and the CFTC authorization of computerized trading of foreign exchange derivative products on computer terminals in the United States.

While at the CFTC, I also served on the Steering Committee of the President's Working Group on Financial Markets ("PWG"). In that capacity, I drafted, and oversaw the drafting of, portions of the April 1999 PWG Report entitled "Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management," which recommended to Congress regulatory actions to be taken in the wake of the near collapse of the Long Term Capital Management ("LTCM") hedge fund, including Appendix C to that report which outlined the CFTC's role in responding to that near collapse. As a member of the International Organization of Securities Commissions' ("IOSCO") Hedge Fund Task Force, I also participated in the drafting of the November 1999 IOSCO Report of its Technical

Committee relating to the LTCM episode: "Hedge Funds and Other Highly Leveraged Institutions."

After a two year stint between 1999 and 2001 as the Principal Deputy Associate Attorney General in the U.S. Department of Justice, I began service as a Professor at the University of Maryland School of Law. At the law school, I have, *inter alia*, focused my attention on futures and OTC derivatives trading, including academic writing and speaking on these subjects. I have also served as a media commentator on the role of unregulated financial derivatives in recent major financial scandals, including the failure of Enron and the now infamous Western electricity market manipulation of 2001-2002 caused by market manipulation of Enron and others. Besides addressing these issues in a variety of commercial and financial regulatory law courses, I have designed and now teach a course entitled "Futures, Options, and Derivatives," in which the collapse of the hedge fund Amaranth Advisors LLC ("Amaranth") is featured as a case study of the way in which unregulated or poorly regulated futures and derivatives trading causes dysfunctions within those markets and within the U.S. economy as a whole, including causing the needlessly high prices which energy consumers now pay because of excessive speculation and illegal manipulation within unregulated OTC energy derivatives markets.

The Permanent Subcommittee on Investigations ("PSI") is to be congratulated on its excellent work in shedding light on these opaque markets and on the substantial economic damage that the lack of regulation has caused America's energy consumers. The bipartisan June 2006 PSI staff report, *The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat*, [1] is the most complete analysis of the manner in which excessive speculation in the oil and gasoline futures and derivatives markets is, by the estimation of many prominent analysts, almost certainly adding approximately 20% to the prevailing price of crude oil, which was in June 2006 (and which is again today) hovering in the $70 per barrel range – a price that far exceeds the approximately $18 a barrel price as recently as January 2002.[2]

The authors of that June 2006 report were quick to recognize, however, that that it was based only on publicly available information and that the staff therefore had "gaps in available market data."[3] Those kinds of gaps were eliminated in the bipartisan report released by the PSI staff today: "*Excessive Speculation in the Natural Gas Market*."[4] Today's report is the result of accessing all encompassing data pertaining to the natural gas futures and derivatives markets, including the analysis of "millions of natural gas

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[1] Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, THE ROLE OF MARKET SPECULATION IN RISING OIL AND GAS PRICES: A NEED TO PUT THE COP BACK ON THE BEAT (June 27, 2006) [hereinafter Permanent Subcomm. June 2006 Report].
[2] Jad Mouawad & Heather Timmon, *Trading Frenzy Adds to Jump in Price of Oil*, N.Y. TIMES, Apr. 29, 2006, at A1.
[3] Permanent Subcomm. June 2006 Report, *supra* note 1, at p. 6.
[4] Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, EXCESSIVE SPECULATION IN THE NATURAL GAS MARKET, (June 25, 2007) [hereinafter June 25 Report].

transactions from trading records" and "numerous interviews of natural gas market participants."[5]

Not only is today's report a thorough analysis of the destabilization in the natural gas markets caused by a lack of adequate regulation; it is the most complete and scholarly description of the way in which futures and derivatives markets operate as a whole and the critical role appropriate regulation plays in allowing those markets to operate consistent with basic free market principles.

The report makes clear that the failure to regulate these markets properly has distorted and sabotaged free market principles. It has cut those markets off from the moorings of economic fundamentals. It has turned them into nothing more than casinos serving neither those who need them to hedge for commercial purposes nor those who wish to speculate based on honest fundamentals.[6]

Today's report is so complete that it is difficult to find anything to add. It may be worth restating, however, its basic findings.

First, even though these markets were established principally to afford commercial hedging, the natural gas futures markets from sometime in 2004 through at least mid-September 2006 were overwhelmingly dominated by a single institution, which had no commercial stake in natural gas. The staff dramatically describes the dominance of a single hedge fund, Amaranth, as follows:

> "[T]he CFTC defines a 'large trader' . . . in the natural gas market as a trader who holds at least 200 contracts; . . . Amaranth held as many as 100,000 natural gas contracts in a single month, representing 1 trillion cubic feet of natural gas, or 5 % of the natural gas used in the entire United States in a year. At times Amaranth controlled 40% of all of the outstanding contracts on NYMEX [(one of the two major exchanges on which natural gas is traded in the U.S.)] for the winter season (October 2006 through March 2007), including as much as 75% of the outstanding contracts to deliver natural gas in November 2006."[7]

Second, Amaranth's dominance of this market caused extensive price volatility. As recently January 2002, the spot price of natural gas was approximately $3 MMBtu.[8] By late July, 2006, the futures price of the October 2006 natural gas contract was at a yearly high of $8.45 MMBtu. After Amaranth collapsed in September 2006, the futures

[5] June 25 Report at p. 2.
[6] Today's report is also fully corroborated by a sophisticated economic study conducted during the 2006 natural gas futures market destabilization period. See AN ANALYSIS OF SPOT AND FUTURES PRICES FOR NATURAL GAS: THE ROLES OF ECONOMIC FUNDAMENTALS, MARKET STRUCTURE, SPECULATION, AND MANIPULATION (August 2006), *available at* http://www.pulp.tc/Nat_Legal_Policy_Center_Gas_Manip_August_29_2006.pdf.
[7] June 25 Report at p. 2.
[8] FEDERAL ENERGY REGULATORY COMMISSION (FERC), NATURAL GAS MARKET OVERVIEW (2007) [hereinafter MARKET OVERVIEW], *available at* www.ferc.gov ("Market Oversight" to "Natural Gas Markets, National Overview," then "Henry Hub Spot Prices").

price dropped "to just under $4.80 per MMBtu . . ., the lowest level for that contract in two and one-half years. . . The Electric Power Research Institute described this price collapse as 'stunning . . . one of the steepest declines ever.' . . . Throughout this period, the market fundamentals of supply and demand were largely unchanged."[9]

Third, the staff makes clear that "[t]he price of natural gas directly affects every segment of the U.S. economy, from individual households to small businesses to large industries. 'Natural gas is used in over sixty million homes. Additionally, natural gas is used in 78% of restaurants, 73% of lodging facilities, 51% of hospitals, 59% of offices, and 58% of retail buildings.'"[10]

Fourth, because of the heavy correlation between futures and spot prices (i.e., the prices actually paid for natural gas), "end users were forced to purchase natural gas at inflated prices," i.e., "they were forced to purchase contracts to deliver natural gas in the [2006] winter months at prices that were disproportionately high when compared to the plentiful supplies in the market."[11]

Fifth, as reflected in substantial commentary presented to the staff by end users of natural gas, including, *inter alia*, the Minnesota Municipal Utilities Association, the staff concluded that "'the lack of transparency in the over-the-counter (OTC) market for natural gas and the extreme price swings surrounding the fallout of Amaranth have, in their wake, left bona fide hedgers reluctant to participate in the markets for fear of locking in prices that may be artificial[ly high].'"[12]

Sixth, the Commodity Exchange Act ("CEA") bars excessive market speculation or the "sudden or unreasonable fluctuations or unwarranted changes" in the price of commodities traded on a regulated exchange.[13] However, the staff aptly concluded that there are two critical problems in enforcing that prohibition. First, the PSI staff found that the CFTC's enforcement of that prohibition has been very limited in its focus and "the CFTC and energy exchanges need to reinvigorate the CEA's prohibition against excessive speculation."[14] Second, even to the extent that the limited enforcement of the excessive speculation ban was applied to Amaranth in August 2006 by the NYMEX exchange, "Amaranth moved those [NYMEX] positions to [the Intercontinental Exchange or "ICE"].[15] Because of the infamous "Enron loophole"[16] enacted in December 2000 as part of the Commodity Futures Modernization Act, "ICE, [unlike NYMEX,] operates with no regulatory oversight, no obligation to ensure its products are traded in a fair and orderly manner, and no obligation to prevent excessive speculation."[17] "As a result, NYMEX's instructions to Amaranth did nothing to reduce Amaranth's size,

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[9] June 25 Report at pp. 1-2 (internal citations omitted).
[10] *Id*. at 11 (internal citations omitted).
[11] *Id*. at 114.
[12] *Id*. (inside citations omitted).
[13] 7 U.S.C. §6a(a) (2006).
[14] June 25 Report at p. 120.
[15] *Id*. at p. 120.
[16] *Id.* at p. 119. *See* 7 U.S.C. §2(h)(3), (g) (2006).
[17] June 25 Report at p. 119.

but simply caused Amaranth's trading to move from a regulated market to an unregulated one."[18] Thus, "[a]lthough both NYMEX and ICE play an integral role in natural gas price formation, the two exchanges are subject to vastly different regulatory restrictions and government oversight under current federal law"[19] even though "NYMEX and ICE are functionally equivalent markets."[20]

Seventh, the bipartisan June 25, 2007 staff report recommends that: (1) the "Enron loophole" be abolished and that the similarly situated NYMEX and ICE exchanges both be subject to the protections afforded hedgers and other traders under the CEA; (2) the excessive speculation ban within the CEA be upgraded and be applied vigorously to both NYMEX and ICE; and (3) CFTC staffing and technological resources be upgraded to meaningfully apply the protections of the CEA.[21]

Again, the June 25, 2007 bipartisan report submitted by the PSI staff is thorough and complete. I would add only the following few comments:

First, it should be emphasized that the "Enron loophole" adopted in December 2000 – which allows energy futures trading facilities to be unregulated even though they are functionally equivalent to those exchanges which are regulated – was far from a carefully considered legislative measure. The loophole was added at the last minute to a 262 page bill, which was itself belatedly and quite suddenly attached in a lame duck session on the Senate floor by then Senate Finance Chairman Gramm to an 11,000 page consolidated appropriation bill for FY 2001.[22] Over the express and emphatic opposition of the President's Working Group on Financial Markets (including Fed Chairman Alan Greenspan, Treasury Secretary Lawrence Summers, and SEC Chairman Arthur Levitt),[23] the Enron loophole exempted OTC energy derivative markets (even though functionally equivalent to the regulated exchanges) from CFTC and all other federal regulation.[24] This exemption was called the "Enron loophole" because Enron (upon whose board, Wendy Gramm, Senator Gramm's wife, then sat) at that time was seeking to authorize retroactively its now defunct Enron Online energy trading facility, which began operation even in advance of the passage of the CFMA.[25] While this legislation retained CFTC authority to investigate fraud and manipulation (but not excessive speculation) in OTC energy markets,[26] the CFTC, as a practical matter, read this legislation as generally

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[18] *Id*. at p. 3.
[19] *Id*. at p. 40.
[20] *Id*. at p. 3.
[21] *Id*. at pp. 119-132.
[22] *See* Sean Gonsalves, Opinion, *Enron Exemplifies 'Genius of Capitalism'*, SEATTLE POST-INTELLIGENCER, Jan. 22, 2002, at B5; PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, COMMODITIES REGULATION § 1.01, at 3 (3d ed. Supp. 2002).
[23] *See* PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, OVER-THE-COUNTER DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE ACT 16 (1999).
[24] Edward J. Rosen & Geoffrey B. and Goldman, *SWAPs & Other Derivatives in 2001*, *in* THE COMMODITY FUTURES MODERNIZATION ACT OF 2000, PLI article at 581-88 (PLI Corporate Law and Practice, Course Handbook Series No. B0-0168, 2001).
[25] *See* Jeff Gosmano, *Electronic Trading Could Change; Enron Situation Rolls Markets*, NATURAL GAS WEEK, Nov. 12, 2001, *available at* WLNR 8879099 (noting Enron Online's launch in November 1999).
[26] Rosen & Goldman, *supra* note 24, at 585.

constricting its authority to call for regular OTC energy reporting in the absence of pre-existing demonstrative evidence of fraud or manipulation. Needless to say, given the last minute nature of this amendment, there were no hearings, committee reports, or floor debates justifying this legislation or the reason it should have been passed over the contrary guidance of Messrs. Greenspan, Summers, and Levitt.

The "Enron loophole" almost immediately caused havoc in energy markets. It is now beyond doubt that manipulation of futures and derivatives contracts pursuant to that loophole dramatically increased the market price of electricity in the Western United States during 2001-2002. This resulted in needless widespread and rolling blackouts, along with a surge in corporate bankruptcies during that time period.[27] Enron and others, using such unregulated trading facilities as Enron Online, "gamed" the energy derivatives markets to drive up the cost of electricity in a manner that bore no relationship to underlying economic fundamentals.

Between 1999 and 2001, California's electricity bill rose by more than $40 billion.[28] Because the explanation at that time – as it often is today with the price of oil and natural gas – was that this sudden and highly disruptive price spike was caused by economic fundamentals, California and other Western states, as well as energy dependent public authorities and industries within those states, entered into long term supply contracts. These contract prices vastly exceeded what history would prove was the market's fundamental equilibrium: long term supply contracts costing $700 million during the electricity crisis would only cost $350 million by March 2002.[29]

Only after internal Enron memos that outlined manipulation strategies were uncovered in unrelated proceedings did the CFTC begin serious investigations into the then recently deregulated OTC energy derivatives market. The CFTC ultimately assessed hundreds of millions of dollars in damages and fines for what it found to be widespread, devastating, and costly futures and derivatives market manipulation in this otherwise unregulated market.[30]

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[27] *See* Press Release, Sen. Dianne Feinstein, Sens. Feinstein, Cantwell Press for Public Release of Enron Evidence, Citing Implications for Oil Markets (May 2, 2006), *available at* http://feinstein.senate.gov/06releases/r-enron-evidence.pdf.

[28] Peter Navarro & Michael Shames, *Aftershocks—And Essential Lessons—From the California Electricity Debacle*, 24 ELECTRICITY J. 2003, at 24.

[29] 148 CONG. REC. March 7, 2002, p. S1653 (daily ed. Mar. 7, 2002) (statement of Sen. Cantwell); Senators Propose Bill Regulating OTC Markets, ENERGY COMPASS, Feb. 14, 2002; *see also e.g.* Navarro *supra* note 28, at 24 ("[T]he state remains saddled with almost $40 billion of long-term contracts that are roughly twice the actual market value of the electricity and that will institutionalize high electricity rates in the state for years to come."). Similarly, the rising cost of natural gas in the summer of 2006 caused utility companies to hedge at inflated costs; these costs were then passed on to consumers. *See* text accompanying notes 8-9 *supra*.

[30] U.S. GENERAL ACCOUNTING OFFICE, REPORTS & TESTIMONY NO. GAO-04-420T, NATURAL GAS: FACTORS AFFECTING PRICES AND POTENTIAL IMPACTS ON CONSUMERS 21 (2006), *available at* http://www.gao.gov/new.items/d06420t.pdf.

http://www.bloomberg.com/apps/news?pid=20670001&refer=&sid=aHAgHb.3Gdzg.

In addition to malpractices in the Western United States electricity markets, last year's PSI staff report corroborated independent economic analysis demonstrating that excessive speculation on unregulated OTC energy trading facilities has caused (and almost certainly is causing) an estimated unnecessary 20% increase in the cost of crude oil.[31]

Finally, the overwhelming influence of Enron on these unregulated markets is evidenced by the June 25, 2007 staff report's finding that when Amaranth in 2002 "added energy trading to its slate of strategies" to boost its earnings, "it hired several former Enron traders to its staff."[32] Doubtless those former Enron traders were well educated in the school for scandal that constituted the Western United States electricity manipulation.

In short, there is every evidence that the hastily enacted and poorly examined Enron loophole has done nothing but add billions of dollars to prices charged the American consumers for such important everyday commodities as electricity, heating oil, natural gas, and gasoline. As the staff has recommended, the Enron loophole should be repealed.

Second, there is an additional chapter that might be added to this subcommittee's June 25, 2007 bipartisan staff report. As mentioned above, today's report notes that Amaranth drove October 2006 natural gas contract up to the 2006 high of $8.45 per MMBtu and then down to a $4.80 per MMBtu – a two and one half year low – upon that hedge fund's failure.[33] Yet, the spot price of natural gas now hovers around $7.00 per MMBtu. One might well ask about the reason for this increase. Again, market fundamentals have not changed. Of course, the staff investigation leading to today's exhaustive report stopped in October 2006 shortly after the Amaranth failure. It does not require a great leap of logic to wonder if that investigation had examined trading data well into 2007, one might have found that other large financial institutions with deep pockets have picked up Amaranth's "torch" and that the natural gas market is still being driven by excessive speculation – but on exempt or unregulated OTC markets. In the absence of regulation and in the presence of opaque markets, we are left to speculate why the price of natural gas has almost returned to the highs seen when Amaranth dominated these markets.

In this regard, and as the June 25, 2007 staff report points out, those who oppose further regulation in this area are quick to contend that there was no systemic risk associated with the Amaranth failure. As the staff report so rightly demonstrates,[34] however, this argument overlooks the billions of dollars American consumers (including industrial consumers) had to pay trying to lock in prices based on the "price discovery" function NYMEX and ICE were purportedly playing in the summer of 2006. Moreover, the contentment over the lack of systemic problems does not take into account that just as the collapsed Enron provided a template for Amaranth, a collapsed Amaranth may be

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[31] *See supra* note 2 and accompanying text.
[32] June 25 Report at p. 57.
[33] *See supra* p. 3-4.
[34] June 25 Report at p. 21.

providing a template for one or more large financial institutions in today's natural gas markets. This complacency also overlooks those investors who were badly hurt by the Amaranth fiasco. The San Diego County Employees Retirement Association is suing Amaranth for over $150 million in lost retirement savings invested with the hedge fund.[35] Finally, and perhaps most importantly, it takes great optimism to conclude that repetition of these kinds of exorbitant losses incurred by Amaranth in just a few days in September 2006 will not, especially if several funds were to implode at the same time, cause systemic risk to the economy. It is now undisputed that the near failure of Long Term Capital Management, which lost less money than Amaranth, raised the prospect of systemic financial collapse.[36] Within the last few weeks, the Bank of Montreal (certainly not a commercial hedger in these markets) experienced "trading losses of between $313 million and $403 million as a result of natural gas trading strategies that went awry."[37] Policy makers have to ask themselves whether they are prepared to allow this kind of excessive speculation fueled in large part by borrowed funds continue to go unmonitored merely because Amaranth's failure did not cause the collapse of the American economy. No less a free marketeer than Alan Greenspan counseled against allowing this kind of opaque and unregulated energy futures trading which is the result of the Enron loophole.

Third, the bipartisan nature of the June 25, 2007 staff report is reflective of the widespread adverse impact the high price of natural gas has had on all sectors of the economy all over the Nation. In this regard, it should be remembered that on December 14, 2005, the then Republican-controlled House led by conservative Republican Congressman Sam Graves of Missouri, passed, at the behest of the farming community then suffering from all time record high natural gas prices, a version of the CFTC Reauthorization Act of 2005 (H.R. 4473), which included a Title II,[38] mandating an aggressive regulatory posture by the CFTC in overseeing "any contract market" engaged in the trading of natural gas futures and derivatives. At that time, the cost of natural gas had "float[ed] at a high near $14 MMBtu."[39] Even though the CFTC reauthorization has yet to make it through Congress, the spot price of natural gas dropped by roughly one third after Congressman Grave's December 2005 action and there was considerable analysis at that time that the mere threat of aggressive regulation by a Republican controlled House markets may have been responsible for that price decline.[40] Similarly, adoption of the recommendations of the staff report at issue will almost certainly cause a similar decline, because the markets will then be controlled by commercial interests rather than by excessive speculation.

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[35] SDCERA v. Maounis, No. 07-CV-2618 (S.D.N.Y., complaint filed March 29, 2007).
[36] U.S. GENERAL ACCOUNTING OFFICE, REPORTS & TESTIMONY NO. GAO/GGD-00-3, LONG-TERM CAPITAL MANAGEMENT: REGULATORS NEED TO FOCUS GREATER ATTENTION ON SYSTEMIC RISK (1999), *available at* http://www.gao.gov/archive/2000/gg00003.pdf.
[37] *U.S. CFTC Wants to Adopt New Market Rules*, HOUSTON CHRONICLE, June 22, 2007, *available at* http://www.chron.com/disp/story.mpl./ap/fn/4912831.html.
[38] 151 CONG. REC. H11554 (daily ed. Dec. 14, 2005).
[39] 151 CONG. REC. H11561 (daily ed. Dec. 14, 2005) (statement of Rep. Pombo).
[40] *See, e.g.*, AMERICAN PUBLIC POWER ASS'N, LONG TERM STRATEGIES ARE KEY IN ACHIEVING STABLE NATURAL GAS PRICES 6 (2006), *available at* http://www.appanet.org/files/PDFs/NaturalGasPriceOutlook306.pdf.

Fourth, the bipartisan June 25, 2007 staff report lays to rest another argument often advanced by CFTC commissioners, as well as banking and hedge fund speculators, when fighting the regulation of the OTC energy markets. They contend that it will be impossible for either the regulated exchanges or CFTC staff to make sense out of the flood of market data that would result from re-regulating those markets.[41] However, the subcommittee staff, which has far fewer resources than even the now depleted CFTC, has been able to digest and cogently explain a multi-year trading period that is now widely recognized as one of the most volatile in natural gas market history. They have done so with a coherent narrative aided by the creation of numerous highly instructive charts. They have included a helpful history of these markets, a complete description of the relevant exchanges and traders, and a full explanation of the relevant statute, rules, and regulations. They have presented a report that far exceeds the investigative materials that would have been needed by CFTC staff to commence an enforcement action in these circumstances. Moreover, if the PSI staff's recommendations were adopted, the exchanges, in their capacity as self regulatory institutions, could put a stop to excessive speculation with far less data than has been collected for the instant report. The report adduced today gives a global multi-year history of a volatile trading period. A regulated exchange or the CFTC itself could put a stop to excessive regulation with information collected over a period of days, as evidenced by the actions NYMEX took in August 2006 in its attempt to limit Amaranth's excessive speculation.[42]

Finally, and perhaps most importantly, I have one concern about what might be a mistaken impression left by the report that was doubtless unintended by its authors. One could very well be left with the impression after reading the June 25, 2007 report that the CFTC, as presently constituted, is fully supportive of receiving the new statutory authority that the authors' recommendations would provide it. However, it must be remembered that two successive Chairmen of the CFTC, Messrs. Newsome and Jeffery, as well as (and perhaps most especially) the intervening Acting Chair, Ms. Brown-Hruska, have strongly resisted undoing the Enron loophole. Moreover, Mr. Newsome and Ms. Hruska, and until recently Mr. Jeffery, have proudly pointed to reduced Commission staffing as a worthy dividend of the CFMA[43], i.e., of deregulating both the OTC markets and substantially reducing regulation of the established exchanges, which now adhere to governing principles rather than a rule-based regime.[44] One has every

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[41] *CFTC Member Says Her Agency Can Provide Necessary Oversight of OTC Markets, Dismisses Claims About Excessive Market Speculation*, FOSTER ELECTRIC REP., Apr. 5, 2006, at 13.

[42] June 25 Report at p. 53.

[43] *See*, e.g., Peter A. McKay, *CFTC Chairman Opposes Plan to Broaden Regulators' Power*, WALL STREET JOURNAL, July 25, 2002 ("The futures industry's top government watchdog [, Chairman James E. Newsome,] said his agency has adequate authority and staff to regulate the nation's commodity markets, despite the Enron Corp. and Dynegy Inc. scandals. He warned against a proposal in Congress to broaden regulators' power.").

[44] PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION § 1.18 [2], at 323 (2004) ("The CFMA decreased significantly the degree of market regulation over designated contract markets. Rather than affirmative day-to-day regulation that was imposed under the former regulatory regime, under the . . . CFMA, the [CFTC] is charged with an oversight role with respect to contract markets."). Indeed, the House regulatory measure concerning the natural gas futures markets, *see* text at n. 38 *supra*, was driven in considerable part because of widespread complaints that NYMEX's daily trading "limits" rules (as well as the CFTC's oversight of them) were deemed to be unusually weak and, according to many

reason to worry that the CFTC would welcome that part of today's report that increases staffing and funding while resisting the bipartisan staff recommendation pertaining to additional regulatory responsibility concerning the OTC energy markets and more rigorous enforcement of the excessive speculation bar.

I should add that I do not draw complete comfort from the proposed rule issued by the CFTC late this last Friday afternoon making it clear, as I read it, that NYMEX should now have the authority to request from a trader all of its "other positions" in particular commodity, including positions in "over-the-counter" markets.[45] Under this proposal, Amaranth would have had to report to NYMEX its ICE natural gas positions. However, this proposed rule does not require anyone trading exclusively on an exempt OTC trading facility to report positions, i.e., a trader executing contracts almost exclusively on ICE would not have to report positions to the CFTC. Thus, even if adopted as a permanent rule after completion of the proposed rule's comment period, this suggested regulation does not address the heart of the problems caused by the Enron loophole (regulating exempt exchanges); nor does it reinvigorate the CEA's bar against excessive speculation.

In this regard, it is important to note that the CFTC now only has three of its full complement of five commissioners. After Chairman Jeffery is confirmed to become Undersecretary Secretary of State for Economic, Energy, and Agricultural Affairs, only two commissioners will remain. One proposed commissioner is a former high ranking lobbying employed by the International Swaps and Derivatives Association ("ISDA"). On the long list of financial industry associations which strongly oppose regulation of the OTC energy markets, ISDA is undoubtedly, at the very least, first among equals. If the Senate truly wants to protect the American consumer and to reduce the prices those consumers are paying for gasoline, heating oil, natural gas, and crude oil, it must exercise with care its advice and consent role with regard to the three new commissioners. The CFTC is in desperate need of new commissioners who represent the consumer interest. Congress can pass all of the laws it wants to ensure that the energy derivatives markets are not overrun and made dysfunctional by excessive speculation. If the CFTC commissioners do not believe in those laws, the American consumer will continue to take a back (and highly uncomfortable) seat to the large banks, hedge funds, and other market speculators.

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traders' and end users' complaints, encouraged extraordinary volatility in NYMEX's natural gas futures contracts. *See, e.g.*, Alistair Barr, *Bill Limiting Natural Gas Speculation to be Introduced*, MARKETWATCH, (Apr. 13, 2005). Because the CFMA encourages the most passive CFTC oversight of the even the most regulated contract markets, and the December 14, 2005 House amendment as passed affirmatively addresses that problem insofar as natural gas trading is concerned.

[45] Maintenance of Books, Records and Reports by Traders, 72 Fed. Reg. 120 (proposed June 22, 2007).