Senate Democratic Policy Committee Hearing

"Lessons from Enron: An Oversight Hearing on Gas Prices and Energy Trading"

Michael Greenberger
University of Maryland School of Law

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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. During my tenure at the CFTC, I worked extensively on regulatory issues concerning exchange traded energy derivatives, the legal status of OTC derivatives, and the CFTC authorization of computerized trading of foreign exchange derivative products on computer terminals in the United States.

I now serve as a Professor at the University of Maryland School of Law. At the law school, I have, *inter alia*, focused my attention on financial derivatives, including academic writing and speaking on this subject, as well as serving as a media commentator on the role of financial derivatives in major recent financial scandals, including the failure of Enron and the Western electricity market manipulation of 2001-2002. Besides addressing these issues in a variety of commercial and financial regulatory law courses, I have designed a new course focused exclusively on financial derivatives, which I will teach at the law school this coming academic year.

In examining the question of the cause of the high gasoline products, it is useful to remember that as of January 2002, the cost of oil, the major component of gasoline, was @ $18 a barrel[1]; by the end of 2005, it had risen to @ $50[2]; and, by April 21, 2006, the price had reached an all time high of $75.17.[3] The resulting $3.00 plus per gallon cost of gas (with prospects for a further dramatic rise) has clearly been a source of anxiety and hardship to the American people, especially aggravated by the prediction of many prominent analysts that that price of oil could soon rise to over $100 a barrel.[4]

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[1] Jad Mouawad & Heather Timmon, *Trading Frenzy Adds to Jump in Price of Oil*, N.Y. TIMES, Apr. 29, 2006, at A1.
[2] *Id*.
[3] E.S. Browning, *Stocks Take a Pause on Weak Profits, While Oil Futures Pull Back, Near $72*, WALL ST. J., May 4, 2006, at C1 (noting "the April 21 close of $75.17, which was the highest level since crude futures began trading on the New York Mercantile Exchange in 1983.").
[4] Peter A. McKay, *Goldman Analysts Deliver Oil Shock: Prediction of 'Super Spike' as High as $105 a Barrel Puts Jolt in Crude Futures*, WALL ST. J., Apr. 1, 2005, at C4.

A fierce debate now rages about whether this price increase is caused exclusively by economic fundamentals or whether some form of market manipulation, having nothing to do with market fundamentals, is contributing substantially to this sudden price spike.

The arguments on behalf of the "economic fundamentalists" have been well rehearsed: e.g., the price of oil has gone up because there is an oil shortage due to, *inter alia*, the lack of refinery capacity and oil reserves in the United States; the negligible pace of developing alternative supplies of fuel or conserving the use of oil; the phenomenal growth of China's and India's economies (and thus their corresponding increased dependence on oil); and destabilizing world events, including the decline in oil production in Iraq caused by the insurgency and international difficulties with such major oil producing countries as Iran and Venezuela.

No one now seriously disputes the fact that these economic circumstances are a significant contributor to the increase in the price of oil and the corresponding increase in gasoline. What is troubling, however, is the argument that has been vigorously advanced in many quarters that market manipulation has *nothing* to do with this price spike.

The "economic fundamentalists" not only argue that market manipulation plays no role in these phenomenal price increases, but, despite the absence of complete and meaningful data, they assert that this question is so frivolous that it bears no comprehensive factual investigation.

It is my judgment that much can be discerned by the stakeholders that support each side of these arguments. It is the oil industry[5], the banks and the hedge funds[6], and free market-oriented financial regulators who contend that market manipulation plays no role in this price run up.[7] Of course, the private institutions arguing against manipulation (or even a meaningful factual inquiry into possible manipulation) have much to gain from these rapid price increases.

It is the large industrial users of energy related commodities,[8] including the agriculture community, consumer groups[9], and the state attorneys general and governors,[10] who are

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[5] *See, e.g.*, Mouawad & Timmons, *supra* note 1.
[6] *Id.*
[7] *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.
[8] *See, e.g.*, Press Release, New England Fuel Institute, New England Fuel Institute Asks President and Congress to Initiate Greater Oversight and Data Collection of Energy Futures Trades, May 4, 2006, http://www.nefi.com/pdfs/NEFI_CFTC_PressRelease.pdf; *APPA Calls for Long-Term Strategy to Stabilize Natural Gas Prices, Tighter Oversight of Energy Trading*, FOSTER ELECTRIC REP., Apr. 19, 2006, at 14 (citing the position taken by the American Public Power Ass'n); John V. Kulik, Opinion, *Gas Price Fluctuations Start with Commodity Exchange*, PATRIOT-NEWS (Harrisburg, Pa.), Apr. 30, 2006, http://www.pennlive.com/columns/patriotnews/review/index.ssf?/base/opinion/1146253208137110.xml&coll=1 (the author is an executive vice president with the Pennsylvania Petroleum Marketers and Convenience Store Ass'n); Letter from Paul N. Cicio, President of Industrial Energy Consumers of America, to Sens. Saxby Chambliss & Tom Harkin (Apr. 5, 2006), *available at* http://www.ieca-us.com/downloads/natgas/Senate_CFTC_letter040506.doc.

either convinced of, or seriously concerned about, the role that market manipulation plays. These groups, of course, are either paying for the cost of the price spikes or are hearing from constituents who find these prices intolerable.

Moreover, recent history suggests that the question of market manipulation is ripe for investigation.

It is the now established beyond doubt that manipulation of futures and derivatives contracts dramatically increased the market price of electricity in the Western United States during 2001-2002, including the needless cause of widespread blackouts or rolling blackouts and a surge in corporate bankruptcies during that time period.[11]

The May 2002 legislative record pertaining to Senators Feinstein's and Cantwell's unsuccessful attempt to enact legislation that would have allowed governmental access to manipulation data in these otherwise largely opaque markets succinctly summarizes the regulatory and economic record. It shows that "gaming" energy derivatives markets drove up the cost of electricity in a manner that bore no relationship to underlying economic fundamentals.

For example, in 1999 the cost of electricity within the State of California was @ $7 billion.[12] Yet, by 2000 the state-wide cost had risen to @ $27 billion and @ $26.7 billion in 2001.[13] "The state's electricity bill rose by more than $40 billion, the state budget was stripped of another $6 billion, and the state's two major utilities—Pacific Gas & Electric

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[9] *See, e.g.*, *Meeting America's Natural Gas Demand: Are We in a Crisis?: Hearing Before the Subcomm. On Energy & Resources of the H. Comm. On Government Reform*, 109th Cong. 59, 59 (2005) (statement of Tyson Slocum, Research Director, Energy Program, Public Citizen); Consolidation in the Energy Industry: Raising Prices at the Pump?: Hearing before the S. Comm. on the Judiciary, Feb. 1, 2006, *available at* http://judiciary.senate.gov/testimony.cfm?id=1743&wit_id=4956 (prepared testimony of Tyson Slocum, Research Director, Energy Program, Public Citizen); Velvel on National Affairs, http://velvelonnationalaffairs.blogspot.com/2006/04/re-price-of-gasoline.html (Apr. 25, 2006, 14:35 EDT); Press Release, Consumers Union & Consumer Federation of America, Consumer Groups Urge Senate to Act Now to Address Skyrocketing Gas Prices (Apr. 26, 2006), *available at* http://www.consumersunion.org/pub/core_other_issues/003388.html (seeking congressional action on "illegal trading of energy futures," among other things).

[10] *See, e.g.*, Mike Sunnucks, *Renzi Pushes Energy Research as Gas Prices Keep Climbing*, BUS. J. (Phoenix), Apr. 25, 2006, http://www.bizjournals.com/phoenix/stories/2006/04/24/daily21.html?from_rss=1; Mike Sunnucks, *Napolitano Calls for Investigations into Oil, Gas Price Hikes*, BUS. J. (Phoenix), Apr. 19, 2006, http://phoenix.bizjournals.com/phoenix/stories/2006/04/17/daily32.html; *Attorneys General from Four Midwestern States Challenge Natural Gas Market Assumptions that They Claim Are Half-Baked and Perpetrated by Washington Lawmakers and Regulators: Over-the-Counter Trading is Identified as Significant Factor Affecting Price Volatility*, FOSTER NAT. GAS. REP., Mar. 10, 2005, at 5.

[11] *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.

[12] 148 CONG. REC. S1651 (daily ed. Mar. 7, 2002) (statement of Sen. Feinstein).

[13] *Id*.

and Southern California Edison—wound up seeking another $13 billion in relief from the courts."[14]

The contemporaneous explanation at that time – as it is today with the price of oil – was that this sudden and highly disruptive price spike was caused by economic fundamentals. As a result, California and other Western states, as well as pubic authorities and industries within those states dependent on electricity and natural gas supplies, entered into long term supply contracts for prices that vastly exceeded what history would prove was the market's fundamental equilibrium.

As Senator Cantwell showed during the May 2002 legislative debate, Bonneville Power Administration, for example, entered into long term supply contracts with Enron for $700 million during the electricity crisis, which by March 2002 "would only cost $350 million. That means BPA—and that means, ultimately, Washington state ratepayers, who have to pay for these energy costs are paying Enron $350 million more than the contract market value."[15]

Largely through voluntary disclosure by Enron's Portland attorneys (and not by any regulatory investigative efforts), December 2000 memos were uncovered outlining 11 trading strategies employed by Enron's Portland, Ore., office in the California power market.[16] The strategies, with nicknames such as ``Fat Boy'' and ``Death Star,'' involved manipulation within the then recently deregulated OTC energy derivatives market, including the notorious use of "wash trades," having no other economic purpose than driving up the spot price of electricity in the Western United States.[17]

Only after these memos were uncovered in April-May 2002 did the CFTC begin serious investigations into these markets. Prior to that time, that agency's leadership was assuring Congress and the public (as it is today in the case of soaring gas prices) that the rising price of electricity was purely a matter of market fundamentals.[18] Indeed, because much of the manipulation in that case occurred in the OTC energy derivatives market, which had been removed from CFTC jurisdiction by Congress in December 2000 with the CFTC's active encouragement, the CFTC in early 2002 had argued (in a manner that

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

[15] 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* n. 14 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.").

[16] *See* Peter Behr, *Papers Show that Enron Manipulated Calif. Crisis*, WASH. POST, May 7, 2002, at A1; Rochard A. Oppel, Jr. & Jeff Gerth, *Enron Forced Up California Prices, Documents Show*, N.Y. TIMES, May 2, 2002, at A1; Peter Behr, *Papers Show that Enron Manipulated Calif. Crisis*, WASH. POST, May 7, 2002, at A1.

[17] *See* Oppel & Gerth, *supra* note 16.

[18] *See* Oral Testimony of James E. Newsome Before the U.S. Senate Committee on Energy and Natural Resources, Jan. 29, 2002, *transcript available at* http://www.cftc.gov/opa/speeches02/opaoraltestimony.htm

ultimately turned out to be inaccurate in critical respects[19]) that it had no jurisdiction to investigate the manipulation.

As it turned out, despite the well-established understanding that electricity consumers in Western states lost tens of billions of dollars, the CFTC's resulting investigation led to the assessment of only $300 million in damages or fines for this widespread, devastating, and costly futures and derivatives market manipulation.[20]

Given the obvious parallels between the electricity price spikes of 2001-2002 and the current soaring price increases in oil and gasoline, it would seem to a matter of elementary logic to want to examine data relating that the super-heated oil futures and derivatives markets.

It should be added that the view of House and Senate Republicans appears to represent more than mild intellectual curiosity about these kinds of matters. On December 14, 2005, the House passed its version of the CFTC Reauthorization Act of 2005 (H.R. 4473), which included a Title II[21], mandating an aggressive regulatory posture by the CFTC in overseeing possible manipulation of "any contract market" engaged in the trading of natural gas futures and derivatives, including increased reporting of large trading positions involving natural gas. At that juncture, the cost of natural gas had "float[ed] at a high near $14 MMBtu."[22] (Their mere threat of aggressive disclosure in these markets may very well be responsible for the substantial decline in natural gas prices after that House action.[23])

Moreover, in Speaker Hastert's and Majority Leader Frist's April 24, 2006 letter to President Bush concerning high gasoline prices, they expressly "request[ed] that [the President] direct the Chairman of the [CFTC] to bring heightened scrutiny to the trading of energy futures and derivatives to determine whether spikes in prices of oil, gasoline and other petroleum distillates are a result of improper market manipulation by traders or energy firms."[24]

However, as was true with regard to the electricity manipulation in early 2002, the federal government is virtually placed in the position of begging most energy futures traders to provide the government with meaningful and relevant trading data.

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[19] As shown below (*see infra* note 28), it was ultimately made clear that the CFTC has anti-fraud and anti-manipulation authority over OTC energy markets.
[20] 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.
[21] 151 CONG. REC. H11554 (daily ed. Dec. 14, 2005).
[22] 151 Cong. Rec. H11561 (daily ed. Dec. 14, 2005) (statement of Rep. Pombo).
[23] *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.
[24] Letter from Sen. Frist and Rep. Hastert to Pres. George W. Bush 1 (Apr. 24, 2006), *available at* http://www.cnsnews.com/ViewPolitics.asp?Page=/Politics/archive/200604/POL20060424b.html.

The reason for this weak regulatory posture was the passage in December 2000 of the Commodity Futures Modernization Act ("CFMA"), which was an over a 262 page bill added at the last minute on the Senate Floor by then Senate Finance Chairman Gramm to an over 11,000 page consolidated appropriation bill for FY 2001.[25]

Contrary to the express recommendation of the President's Working Group on Financial Markets,[26] the CFMA for all practical purposes exempted from CFTC and all other federal regulation the over-the-counter (OTC) energy derivative markets.[27] While this legislation retained CFTC authority to investigate fraud and manipulation in OTC energy markets,[28] the CFTC, as a practical matter, has read this legislation as constricting its authority to call for regular OTC energy reporting in the absence of pre-existing demonstrative evidence of manipulation.

While much attention has been paid to the CFMA's deregulation of the OTC derivatives markets, two further deregulatory measures within that statute are relevant for purposes of the present inquiry.

First, with regard to traditional future exchanges, the CFMA "replace[d] the CFTC's prior regulatory approach with one based on the satisfaction of a set of [18] core principles."[29] These principles are quite general in nature.[30] "The Act provides that the contract market has reasonable discretion in establishing the manner in which it complies with the core principles."[31] As a result, two distinguished commentators have observed:

> "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."[32]

Quite simply, rather than have the exchange seek approval for material changes in its activities, the new law obliged the exchange merely to notify the CFTC of such changes, placing a substantial evidentiary burden on the CFTC to enjoin wrongdoing after the fact.[33]

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[25] *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).
[26] *See* PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS, OVER-THE-COUNTER DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE ACT 16 (1999).
[27] 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).
[28] *Id*. at 585.
[29] *Id*. at 595.
[30] *Id*. at 596-97 (listing the set of "core principles").
[31] *Id*. at 598.
[32] PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION § 1.18 [5], at 323 (2004).
[33] *Id*.

Not satisfied with the substantial deregulation of the traditional exchanges, the drafters of the CFMA went on to offer the further deregulatory option of creating "designated transaction execution facilities" [('DTEF's'] with even less of a regulatory overseer than is the case with contract markets."[34] Suffice it to say for present purposes, by limiting slightly the kinds of customers eligible to trade on such a facility, as well as the kinds of contracts to be traded, the CFMA affords the CFTC even less regulatory control over DTEF's than applies to traditional contract markets. For example, DTEF's need comply with only eight highly general regulatory "core principles," rather than the 18 applicable to conventional markets.[35]

Second, besides the deregulatory effect of the CFMA and that statute's contribution to the opaqueness of the OTC energy futures and derivatives transactions, there is an informal CFTC process that has recently evolved into a further obstacle to market manipulation: CFTC staff no action letters permitting Foreign Boards of Trade ("FBOT's") the right to allow their members to trade FBOT products on computer terminals located in the U.S.

In February 1996, the CFTC Division of Trading and Markets ("T&M"), in what appeared at the time to be an action of little consequence, authorized the German futures exchange, then called the Deutsche Terminborse (DTB), to allow its members to trade DTB contracts on computer terminals within the U.S.[36] In what was a surprise to almost everyone, the privilege granted to DTB resulted in a substantial upsurge in that exchange's business. Shortly thereafter, virtually all of the world's FBOT's desired U.S. trading privileges similar to that of DTB.

Recognizing the substantial trading that would be done under these orders, the CFTC first tried to establish a Commission rule that would govern approvals of these foreign exchanges.[37] When the Commissioners could not promptly settle on such a rule and because of the need to level the playing field in terms of giving other foreign exchanges the rights given to DTB, it was decided that T&M would continue to oversee these approvals through the no action letter process.[38]

As a result, on July 23, 1999, I signed a no action letter that permitted the principal U.K. futures exchange, LIFFE, the same rights that had earlier been afforded to DTB.[39] There followed a series of similar no action letters (almost all signed after I left the Commission in September 1999) for other foreign exchanges, including the exchange most relevant to

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[34] *Id*. at 324-27.
[35] *Id*. at 326-27. The CFMA also created a wholly "exempt board of trade," i.e., a trading facility wholly outside the CFTC's jurisdiction except for fraud and manipulation. However, the nature of the trading permitted on such exchanges would not encompass energy futures. *Id*. at 327-28.
[36] Access to Automated Boards of Trade, 64 Fed. Reg. 14,159 (proposed Mar. 24, 1999) (to be codified at 17 C.F.R. pts. 1 and 30).
[37] *Id*.
[38] *Id*. *See also* Order of the CFTC Withdrawing Proposed Rules Regarding Access to Automated Boards of Trade, 64 Fed. Reg. 32,829 (June 18, 1999).
[39] LIFFE Administration & Management, CFTC No-Action Letter, 1999 CFTC Ltr. Lexis 38 (July 23, 1999).

the present enquiry: the U.K.'s International Petroleum Exchange ("IPE"),[40] subsequently purchased by the U.S.-based Intercontinental Exchange ("ICE") in 2001.[41]

It is important to stress that each of these no action letters were filled with standard conditions carefully confining the regulatory right afforded. Each of the FBOT's had to be regulated by a foreign governmental entity whose regulatory format was akin to that of the CFTC. [42] Assurances had to be received from the FBOT that meaningful information about trades would be provided the CFTC, especially in situations where there was a concern about market manipulation. Information sharing arrangements had to be in place assuring the CFTC that the foreign regulatory authority overseeing the FBOT would provide relevant information to the CFTC promptly upon request.[43] Even more important, a condition was written into these no action letters that the FBOT itself would "provide, upon the request of the [CFTC], the . . .Department of Justice, and, if appropriate the NFA, prompt access to original books and records maintained at their United States offices . . ."[44]

Moreover, in these no action letters, "the [CFTC's] ability to bring appropriate action for fraud or manipulation" was retained.[45] The no action letters also specified the contracts that could be traded under the approval.[46] Until quite recently, those contracts were always foreign based and not in direct conflict with contracts traded on U.S. exchanges. Under the original "no action" template, the FBOT had to seek affirmative approval of T&M before it could list new contract under the no action process.[47] In July 2000, that policy was changed to allow FBOT's to list new contracts upon simple notice to the CFTC.[48]

Finally, the CFTC authority was "retain[ed] to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in [the agency's] discretion."[49]

Two further points need to be emphasized about FBOT approval. When the no action approval process was instituted July 1999, there was considerable sensitivity to not undercut U.S. exchanges that were fully compliant and under the regulatory control of the CFTC. By requiring the foreign exchange to list the contracts it would market under the no action letter and by further requiring the exchange to return to the CFTC if it wanted to add new contracts, it was well understood that T&M was not going to allow a foreign

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[40] IPE, CFTC No-Action Letter, 1999 CFTC Ltr. LEXIS 152 (Nov. 12, 1999).
[41] *See* IPE, CFTC No-Action Letter, 2002 CFTC Ltr. LEXIS 90 (July 26, 2002).
[42] *See* LIFFE Administration & Management, CFTC No-Action Letter, *supra* note 39, at 24.
[43] *Id*.
[44] *Id*. at 29.
[45] *Id*. at 27.
[46] *Id*. at 25-26.
[47] *Id*.
[48] 65 Fed. Reg. 41641 (July 6, 2000). *See also supra* note 58, describing the CFTC's recent repeal of this regulation and assertion of a more aggressive stance toward the review of new contract designations by a FBOT.
[49] *See* LIFFE Administration & Management, CFTC No-Action Letter, *supra* note 42.

exchange to market contracts that were directly competitive to the those offered by U.S. exchanges. Second, it was further well understood that the no action process was for exchanges that were organized in foreign countries. It was never contemplated that the no action process would apply where a foreign exchange was owned by a U.S. entity.

Therefore, at least at the implementation of the FBOT no action process, either the introduction of products that were in direct competition with U.S. exchanges or the purchase of foreign exchanges by U.S. entities were understood to trigger the revocation of the no action approval and the requirement that those exchanges register as a U.S. exchange contract market fully regulated by the CFTC.

As the oil futures and derivatives market is now postured, the New York Mercantile Exchange ("Nymex") and the Intercontinental Exchange ("ICE") are the major recognized futures and derivatives trading exchanges. Nymex is regulated by the CFTC as a traditional contract market under the relaxed standards established for those exchanges under the CFMA.[50] However, Nymex is required to provide large trading positions to the CFTC. Indeed, it is the daily assessment of the trading on Nymex that has been the basis of assurances by CFTC commissioners and Nymex itself that the CFTC has a complete grasp on data that would reveal manipulation in each of the oil futures markets.[51]

Unfortunately, however, despite being "Atlanta-based," ICE's domestic energy futures trading is authorized only by the FBOT no action letters.[52] Accordingly, as its no action letter specifies, ICE's principal regulator is the U.K. Financial Services Authority – not the CFTC.[53] When the IPE was purchased by the ICE in 2001, the CFTC, despite approving four subsequent ICE requested no action adjustments, never required that exchange to become a U.S. regulated contract market. Indeed, this is so even though it has been widely reported that ICE has transferred the bulk of its oil trading from open outcry pits in the U.K. to computerized trading terminals located in Atlanta.[54]

In February 2006, ICE began trading a futures vehicle in direct competition with what had theretofore been Nymex's signature and exclusive oil futures contract: the West Texas Intermediate crude oil contract ("WTI"). In a very short period, ICE has reportedly garnered a 25% market share of WTI volume.[55]

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[50] *See supra* notes 29-33 and accompanying text.
[51] *See* Christopher Faille, Witnesses: Energy Speculation Not Evil, HEDGEWORLD DAILY NEWS, Apr. 27, 2006, *available at* 2006 WLNR 7122701; Matt Piotrowski, *NYMEX, CFTC Deny Manipulation Claims*, OIL DAILY, Apr. 28, 2006 (LexisNexis, News & Business).
[52] IPE, CFTC No-Action Ltr., *supra* note 40.
[53] IPE, CFTC No-Action Ltr., *supra* note 40, at 12.
[54] *See* Gerelyn Terzo, *A Battle Royal: A Sleek Upstart and an Entrenched Giant Are Waging All-Out War for the Soul of the Energy Trading Market*, INVESTMENT DEALERS DIGEST, May 1, 2006, www.iddmagazine.com; Kevin Morrison, *Nymex 'Disadvantaged' by Future Rules*, FINANCIAL TIMES, Apr. 18, 2006, at 35.
[55] *Id*.

As a result of complaints by Nymex with regard to the regulatory disparity between it and ICE,[56] the CFTC staff informed ICE on January 31, 2006 that, while it would allow ICE to continue to function under the FBOT no action letter, the CFTC "will be evaluating the use of the no-action process in light of the significant issues raised by" the listing of its WTI contract, which "may impact whether ICE . . .will be able to rely on the . . . . . no action letter" in the future.[57] On April 26, 2006, the CFTC issued an order giving that agency more time to act upon future FBOT contract designation requests and repealing its earlier order requiring mere notice before the trading of new FBOT contracts.[58]

Whatever the status of Nymex and ICE, it is clear that what is indisputably a substantial segment of this market, OTC oil derivatives trading, is opaque to the federal government because of the CFMA. We know from the Western electricity manipulation that OTC energy markets can be the essential source of manipulation, because they are hidden from public view. Indeed, the OTC energy derivatives market is doubly opaque, because it has attracted hundreds of hedge funds,[59] i.e., lightly regulated financial institutions trading wholly unregulated financial products.

In this regard, the Industrial Energy Consumers of America ("IECA") has calculated that over 90% of the trading volume in these markets derives from individuals or entities that have no relationship to energy industries.[60] If IECA is right, that means the overwhelming part of this market is driven not by hedging, but by speculation.

Moreover, one major player in this market, ICE, who (like Nymex) would otherwise unmistakably fall under the regulatory ambit of the CFMA, is not even directly regulated by the U.S. government. The CFTC continues to allow this U.S. company, whose electronic trading facilities are largely based in Atlanta, to be regulated by U.K. authorities. Moreover, the CFTC is not even aggressively pursuing its rights under ICE's no action letter to obtain directly from ICE on a regular basis trading data pertaining to the oil markets; nor is the CFTC apparently using its information sharing agreement with the U.K. regulator, the FSA, to examine ICE oil trading.

Finally, while Nymex does provide the CFTC with large trader reporting data, an examination of market manipulation cannot completely overlook careful examination of that exchange. It must be remembered that Representatives Graves (R.-Mo.) and Barrow (D.-Ga.) convinced the House of Representatives to mandate in its own CFTC Reauthorization Act (H.R. 4473) aggressive CFTC scrutiny of the natural gas markets. That measure was driven in considerable part because of widespread complaints that

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[56] *Id.*
[57] Letter from Richard Shilts, Director, Division of Market Oversight, to Mark Woodward, Regulation and Compliance Policy Manager, ICE Futures, (Jan. 31, 2006) (on file with Michael Greenberger)
[58] *CFTC revises policy on listing new futures and options contracted by FBOTs*, HEDGEWEEK April, 2006, http://www.hedgeweek.com/SourceDocuments/NewsRelease/PDFs/22772D4A-84A8-447F-8B56-8FC3BB30D176.PDF
[59] See Mouawad & Timmons, *supra* note 1 ("Hedge funds have come roaring into the. . .market, and they are willing to take risks. . ."); Piotrowski, *Hedge Funds Become the New 'Market Makers' in Energy Markets*, OIL DAILY (Apr. 20, 2006).
[60] *See* Letter from Paul N. Cicio, *supra* note 8.

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 traders' and end users' complaints, encouraged extraordinary volatility in Nymex's natural gas futures contracts.[61] Again, as mentioned earlier[62], the CFMA encourages the most passive CFTC oversight of the even the most regulated contract markets, and the House bill as passed affirmatively addresses that problem insofar as natural gas trading is concerned.

Members of this Committee have proposed the introduction of an "Energy Market Transparency Amendment" to the Senate's pending "Commodity Exchange Authorization Act." That proposal would require the CFTC to order the reporting of positions relating energy commodity contracts (and the routine maintenance of data pertinent thereto) traded on any "electronic trading facility" (including contracts on the domestic terminals of FBOT's such as ICE). This proposal would substantially remedy the "loopholes" created either by the CFMA or by CFTC inaction that have made so much of the energy futures and derivatives transactions opaque to U.S. regulators and the American public. Again, it may very well be that "economic fundamentals" are exclusively causing soaring gasoline prices. But, a judgment about causation in this regard should not be left to guess work. Given the experience with the Western states electricity manipulation, any sensible person owes it to themselves to be sure that the American public is paying high gas prices because it is economically mandated and not because it is financially advantageous to isolated economic interests.

In closing, it is important to answer clearly arguments that have been advanced by the CFTC and financial institutions opposing this kind of common sense inquiry into energy futures and derivatives markets.

1. CFTC Commissioners have argued that they are already looking closely at Nymex data, which tells them all that they need to know about energy market manipulation.[63] But, as shown above, Nymex is only one piece of this puzzle. It appears that ICE data is not being sought on a systematic basis by the CFTC even though it has a right to do so. Certainly, OTC energy trading data is not regularly being made available to that agency.[64] It is more than obvious that if there is manipulation, the wrongdoing is least likely to take place on the one exchange that is providing the CFTC with trading data on a daily basis, i.e., Nymex. As the American Public Power Association has so aptly stated: "Affiliated traders can be active in the same set of markets, with one taking a position on Nymex while the other holds OTC contracts. For this reason, the CFTC cannot assess a given trader's overall level of investment in gas markets or positions take in one may affect the trader's overall position."[65]

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[61] *See, e.g.*, Alistair Barr, *Bill Limiting Natural Gas Speculation to be Introduced*, MARKETWATCH, (Apr. 13, 2005).
[62] *See supra* notes 29-33.
[63] Matt Piotrowski, *Nymex, CFTC Deny Manipulation Claims*, OIL DAILY (Apr. 28, 2006).
[64] *See* Letter from Paul N. Cicio*, supra* note 8 at p. 2.
[65] *APPA Calls for Long-Term Strategy To Stabilize Natural Gas Prices, Tighter Oversight of Energy Trading*, FOSTER ELECTRIC REP., Issue 453 (Apr. 19, 2006).

2. It is further argued that the CFTC is already undertaking a series of investigations of specific incidents within the broader oil futures and derivatives markets. It is claimed that those investigations make broader data collection unnecessary.[66] However, as the Industrial Energy Consumers of America have pointed out, looking at isolated complaints of manipulation does not substitute for a global understanding of these markets.[67] The CFTC would not exchange daily large trader reporting from Nymex for random and isolated investigations of individualized complaints on that exchange. CFTC officials proudly proclaim the importance of daily Nymex data collection.[68] In the present gas crisis, what is beneficial for Nymex surveillance is beneficial for the market as whole.

3. Another CFTC Commissioner cites the CFTC's collection of fines for electricity manipulation within the OTC energy markets as evidence of the "transparency" of those markets to the CFTC.[69] Again, as the ICEA points out, the electricity manipulation investigations were "*reactive*" and only undertaken when the manipulation "became an obvious problem."[70] Indeed, as shown above, the CFTC only agreed to undertake a thorough electricity manipulation investigation when private parties voluntarily disclosed Enron documents that evinced straightforward, widespread, and crass manipulation tactics.[71] Moreover, the fines ultimately collected by the CFTC were paltry compared to the economic damage suffered.[72]

4. The same CFTC Commissioner "worr[ies] a little bit about a data dump on the CFTC" emanating from trading inquiries into the OTC energy markets.[73] Having gone through an aggressive "special call" of hedge funds data relating to OTC forex markets during the Long Term Capital Management failure in October 1998, I can testify first hand to the ability of the CFTC staff to handle large amounts of data of this nature. Moreover, if these inquiries were to uncover manipulation or even provide assurance that there is no wrongdoing, responding to a "data dump" would have been a small price for the CFTC to pay.

5. Finally, opponents of OTC market investigations continually argue that regulatory oversight of these markets undercuts the underlying deregulatory purposes of the CFMA, which is cited as the underpinning for remarkable financial growth in these markets. While there can be no gainsaying that these markets have thrived on deregulation, it is also true that the public has paid a high price for this legislation. Since the CFMA has passed we have, for

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[66] *See supra* note 63.
[67] *See* Letter from Paul N. Cicio, *supra* note 8 at 2.
[68] *See supra* note 63.
[69] *See supra* note 7.
[70] *See* Letter from Paul N. Cicio, *supra* note 8 at p. 2.
[71] *See supra* notes 16-19 and accompanying text.
[72] *See supra* note 20.
[73] *See supra* note 7.

example, seen the failure of Enron (the foremost proponent and user of the exemptions within the CFMA) and many other major energy trading companies; the Western electricity crisis; and the collapse of the FCM Refco, causing the fourteenth largest bankruptcy in American history. The OTC energy markets have been so shaken that even the International Swaps and Derivatives Association was required to do a study entitled: "Restoring Confidence in U.S. Energy Trading Markets"[74] after the Enron and electricity manipulation debacles. Moreover, the New York Fed has informally mandated strict self regulation in other sectors of the OTC markets to overcome sloppy record keeping by OTC traders. [75] A recent high powered banking self study of that market was highly critical of this kind of careless and shoddy OTC record keeping.[76] In short, while the CFMA may have profited banks, brokers, and hedge funds, the American public has paid a high price for this deregulatory effort. The so-called "glories" of the CFMA should not interfere with ensuring the protection of the American consumer during this highly destabilizing gas price crisis.

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[74] Study conducted by the International Swaps & Derivatives Association, *Restoring Confidence in U.S. Energy Markets* (April 2003) (on file with Michael Greenberger).

[75] *N.Y. Fed, Wall Street Firms Mull Thorny Credit Derivatives Issues* 37 SECURITIES REG. & L. 1527 (Sept. 19, 2005); *see also* Reuters, *Fed Official Says More Needed to Fix CDS Trading* (Apr. 25, 2006) ("The post-trade processing and settlement infrastructure is still weak relative to the significance of these markets,. . .") (statement of Brian Peters, Sr. V.P., New York Fed).

[76] *See generally* Counterparty Risk Management Policy Group II, Toward Greater Financial Stability: A Private Sector Perspective § I & II (July 27, 2005), *available at* http://www.crmpolicygroup.org/docs/CRMPG-II.pdf (last visited May 5, 2006). *See also id*. at 19 ("Market participants recognize the immediate need to address the backlog of unsigned confirmations on an industry wide basis and are currently committing substantial resources to its resolution.").