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COMMENT

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VIA FACSIMILE AND REGULAR MAIL
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Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
Attention: Office of the Secretariat

Re: Regulatory Reinvention

In a concurrence to A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 Fed. Reg. 14262, 14289 (2001) ("Proposed Rulemaking"), Commissioner Erickson implicitly criticized the Commission's failure to propose a "comprehensive" anti-fraud rule. Apparently hoping that popular sentiment might succeed where personal efforts failed, Commissioner Erickson solicited comments on the issue of whether a "comprehensive" anti-fraud regulation would serve the public interest.[1] This letter is submitted in response to that invitation.[2]

Before determining whether the Commission should enact a new anti-fraud rule, it should consider whether a regulation is the preferred mechanism for action. There is reason to believe that it is not. Under the entire scheme of federal commodities law, Commission regulations tend to be the poor cousins of a sort. While an alleged violation of Commission regulations may form the basis of an administrative enforcement action, a reparation action or an injunctive action, it cannot form the basis of a private action in federal court. Section 22(a) of the Commodity Exchange Act, as

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[1] In other words, it appears that, in his capacity as a quasi-legislator, the Commissioner has asked the public to engage in the administrative equivalent of calling one's congressman in hope that manifestations of public opinion will move swing votes in his direction.

[2] The letter reflects my views only, and not those of Henderson & Lyman or any other organization of which I am a member.

amended ("CEA"), 7 U.S.C. § 25(a), defines the scope of private rights of action in Article III courts. Section 22(a) authorizes suits based on alleged violations of the CEA but not alleged violations of Commission regulations.[3] See, e.g., Fustok v. Conticommodity Servs., Inc., 618 F. Supp. 1069, 1073-74 (S.D.N.Y. 1985); Bennett v. E.F. Hutton Co., Inc., 597 F. Supp. 1547, 1554-55 (N.D. Ohio 1984). Because Commission regulations cannot form the basis of as many types of actions as can CEA provisions ceteris paribus,[4] they would appear to pose a lesser deterrent than a CEA prohibition of identical wording. As a result, the CEA would appear to be the preferable location for a new regulatory requirement, especially one of non-technical nature, if in fact the new regulatory requirement is merited.

Any regulation comes at a cost. Substantive regulations must comply with the procedural dictates of the Administrative Procedure Act, the requirements imposed within the CEA and self-imposed procedures. See Proposed Rulemaking at 14267 (discussing the requirement to engage in cost-benefit analysis); 17 C.F.R. part 13. In addition, new regulations may impose indirect societal costs that have little to do with

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[3] Section 4c(b) essentially incorporates Commission regulations into the CEA with respect to option trading. 7 U.S.C. § 6c(b). Accordingly, a person complaining of an options regulation could bring a Section 22(a) action.

[4] For a reason other than the obvious ones, they are not equal. A general practitioner with a plaintiffs' practice is more likely to consult the United States Code in his legal research than he is the Code of Federal Regulations ("CFR"). To the degree the practitioner has resources at his disposal, this difference is likely to disappear. However, at the margin, the United States Code is more readily available and less intimidating than the CFR. Thus, the path of least resistance will lead there. In addition, a general practitioner is more likely to become aware of decisions resulting from Article III proceedings than those resulting from administrative adjudications.

the regulations' dictates or the risks addressed.[5] Because regulatory costs are certain, the potential benefit should be carefully considered.[6]

The benefit of a regulation cannot be properly considered outside of the context of other applicable law. In other words, one of the first inquiries should include the issue of whether current regulations leave a gap.[7] If there is no appropriate regulatory gap, then a "comprehensive" regulation would impose those costs associated with any substantive regulation while providing no additional protection. In other words, if there is no gap, then a "comprehensive" regulation would be "comprehensively cumulative." Thus, it would amount to nothing more than a symbolic act, meaningful to the ill-informed only. In the case of the CEA and Commission (enacted and proposed) regulations, there is reason to believe that the various anti-fraud provisions do not leave any activity over which the Commission exercises jurisdiction uncovered.

Commissioner Erickson seems to labor under the impression that, with the exception of the proposed foreign currency measure, Section 4b of the CEA, 7 U.S.C. § 6b, sets forth the sole anti-fraud provision that applies to futures and options trading. See Proposed Rulemaking at 14289 (referring to Section 4b and no other currently-enacted provision). The impression would be incorrect. In addition to Section 4b, anti-fraud measures reside in: (1) Section 4o, 7 U.S.C. § 6o;[8] (2) Rule 4.41, 17 C.F.R. § 4.41; (3)

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[5] For example, when compared to federal tax and securities law, federal commodities law is characterized by its compactness. Prior to the December 2000 amendments, the entire body of codified, federal commodities law could be reprinted in a single volume that was approximately the size of popular novel. See Commodity Exchange Act As Amended and Regulations Thereunder (1997). The same could not be said for other bodies of law such as federal securities law and federal tax law. This feature has helped practitioners, industry participants and even Commission staff to identify and/or resolve issues. The expansion of federal commodities law provisions would compromise its the efficiency-producing compactness. By reducing this type efficiency, expansion would impose societal costs.

[6] Of course, Congress now requires cost benefit analysis. See Proposed Rulemaking at 14289.

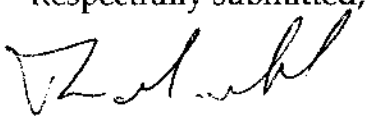
[7] Commissioner Erickson suggests that a gap exists. However, as discussed below, he considered less than 10 percent of the currently-enacted anti-fraud measures contained in federal commodities law.

[8] As Commissioner Erickson correctly observed, the Seventh Circuit held that Section 4b did not apply to publishing commodity trading advisors. Proposed Rulemaking at 14289 n.4 (citing Commodity Trend Serv., Inc. v. CFTC, 223 F.3d 981 (7th Cir. 2000)). However, it also held that the anti-fraud provisions of Section 4o and Rule 4.41 apply to

Rule 33.3, 17 C.F.R. § 33.3; (4) Rule 31.3, 17 C.F.R. § 31.3; (5) Rule 36.9, 17 C.F.R. § 36.9; (6) Rule 33.10, 17 C.F.R. § 33.10; (7) Rule 32.9, 17 C.F.R. § 32.; (8) Rule 31.19, 17 C.F.R. § 31.19; (9) Rule 31.3, 17 C.F.R. § 31.3; (10) Rule 30.9, 17 C.F.R. § 30.9; (11) Rule 4.16, 17 C.F.R. § 4.16; (12) Rule 4.15, 17 C.F.R. § 4.15; (13) Section 4c(a), 7 U.S.C. § 6c(a); and others. In short, Congress and the Commission have fashioned numerous anti-fraud provisions that may cover every aspect of Commission jurisdiction.

Because the current law may be "comprehensive" as a whole, a new comprehensive measure may be nothing more than cumulative. Accordingly, the regulation that Commissioner Erickson would enact may not offer anything in terms of public benefit while imposing certain costs. If that is so, it would appear to fail any reasonable policy test, including cost-benefit analysis.

Respectfully submitted,



Thomas M. Muth

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the providers of impersonal trading advice. Commodity Trend Serv., Inc. v. CFTC, 223 F.3d 981, 991 (7th Cir. 2000).