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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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March 31, 2010

The Honorable Gary Gensler
Chairman
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington, D.C. 20581

Dear Chairman Gensler,

As the Ranking Member of the House Committee on the Judiciary, which has jurisdiction over federal criminal and intellectual property laws, I write to express my concern about recent reports that the Commodity Futures Trading Commission (CFTC) is considering the approval of a "Movie Futures Exchange," or "MFX," as a designated contract market pursuant to Section 5 of the Commodity Exchange Act.¹ Such approval may lead to a subsequent CFTC authorization to trade "movie futures contracts." In particular, I am concerned by the prospect that a MFX, if approved, might constitute a platform for the betting and wagering on the occurrence of future events in violation of federal criminal law rather than a legitimate market for the fair trading of commodity futures positions.

Federal law prohibits the use of wire communication facilities in betting and wagering transactions in the United States. Section 1084(a) of Title 18 of the United States Code provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

¹ *E.g.*, See Plambeck, J., "A Place to Bet Real Money on Movies," *New York Times*, March 11, 2010, p. B1 (NY Edition). Available at <http://www.nytimes.com/2010/03/11/business/media/11futures.html> (last visited March 24, 2010).

While one MFX applicant refers to its enterprise as a “stock exchange” wherein participants can purchase “virtual entertainment securities,” it is not readily apparent why a MFX would not constitute a platform for online betting and wagering.²

First, the contract positions that MFX participants would buy and sell do not appear to relate to an underlying commodity. Unlike a traditional futures contract to sell or take delivery of corn or pork bellies at a future date, the contracts or “securities” that a MFX would list do not contemplate the sale or delivery of an ownership interest in the motion picture upon whose success or failure the contract counterparties depend.³ Indeed, “movie futures contracts” appear to be thinly-veiled, “naked” bets because they provide no mechanism for physical settlement. Second, the value of such a contract appears to depend solely upon the occurrence (or not) of a specific event, such as whether a certain motion picture will generate some arbitrarily pre-determined amount of box office receipts during a given time frame. Such a “contract” appears indistinguishable from an online “over/under” bet on a sporting contest. Using a wire communication facility, like an online exchange platform, to send or receive information that relates to betting and wagering on events is expressly illegal. When Congress chooses to exempt specific platforms from the general prohibition against betting or wagering, it enacts special legislation to permit the activity.⁴

As the Ranking Member on the House Committee on the Judiciary, I am particularly concerned by any attempt to legitimize betting or wagering activities that might be in violation of long-standing federal law. I am also concerned by the possibility that the existence of such exchanges may provide disincentives or countervailing influences that could discourage future investments in and the creation of new film productions and thereby detrimentally affect the interests of domestic intellectual property creators.

In addition to my concerns about the CFTC’s possible approval of “movie futures contracts” and MFXs, other Members may have additional concerns that relate to the jurisdiction of the committees where they serve. To ensure all appropriate Congressional committees and the public have an opportunity to fully review and consider the public policy implications of this matter, I ask the CFTC to withhold final action until the concerns I have articulated and all other legitimate concerns can be appropriately taken into account and properly addressed. In this regard, I commend the CFTC for providing a public comment period on the pending application for an “Opening Weekend Motion Picture Revenue Contract.”

In the interim, I request that the CFTC promptly respond in detail and in writing to my concerns and provide a concise statement of the authority under which the CFTC might presumably rely to approve the registrations of such contracts and exchanges as well as an explanation of why they would not constitute illegal wagering.

² See <http://www.hsx.com/about> (last visited on March 24, 2010).

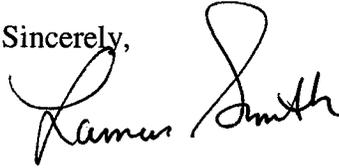
³ Even if ownership shares in a motion picture *were* the subject of these contracts, there is a question of whether a share of a unique movie’s intellectual property may be properly defined as a “commodity” under 7 U.S.C. § 1a, and thus whether the Commission would have any jurisdiction over such contracts pursuant to 7 U.S.C. § 2.

⁴ *E.g.*, the Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001 *et seq.*, as amended.

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Thank you in advance for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Lamar Smith". The signature is fluid and cursive, with the first name "Lamar" and the last name "Smith" clearly distinguishable.

Lamar Smith
Ranking Member

Cc: Honorable John Conyers, Chairman, House Committee on the Judiciary
Honorable Collin Peterson, Chairman, House Committee on Agriculture
Honorable Jerry Moran, Ranking Member, House Committee on Agriculture
Honorable Barney Frank, Chairman, House Committee on Financial Services
Honorable Spencer Bachus, Ranking Member, House Committee on Financial Services
Honorable Eric Holder, Attorney General of the United States
Honorable Michael Dunn, Commissioner, Commodity Futures Trading Commission
Honorable Jill E. Sommers, Commissioner, Commodity Futures Trading Commission
Honorable Bart Chilton, Commissioner, Commodity Futures Trading Commission
Honorable Scott D. O'Malia, Commissioner, Commodity Futures Trading Commission