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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

September 21, 2007

The Honorable Walter Lukken  
Acting Chairman  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> St., NW  
Washington, DC 20581

Dear Chairman Lukken:

I would like to commend the Commodity Futures Trading Commission (CFTC) Commissioners and staff for conducting an informative and balanced hearing earlier this week on the issue of whether electronic markets for energy and other commodities should continue to be exempt from CFTC oversight.

Based on the findings in the Subcommittee's report on *Excessive Speculation in the Natural Gas Market* released this summer, the testimony at the Subcommittee's hearings, and now the testimony of most of the witnesses at the CFTC's hearing, it is beyond doubt that legislation is needed to enable the CFTC to prevent manipulation and excessive speculation in commodity markets that are currently exempt from CFTC oversight under the "Enron loophole." Purchasers of natural gas and other energy commodities, numerous market analysts, and three major U.S. exchanges—the Chicago Mercantile Exchange, the Intercontinental Exchange, and the New York Mercantile Exchange—have all stated legislation should be enacted to close this loophole.

On Monday of this week I introduced legislation to do just that by providing the Commission with the authority to conduct needed oversight of unregulated energy markets that operate in essentially the same manner as a regulated futures exchange. Under the "Close the Enron Loophole Act" (S. 2058), the CFTC would be provided with the same authority to oversee these markets, utilizing the same core principles, as it currently exercises for other types of futures markets. This bill is based upon a simple premise: if a facility for trading energy commodities looks like a futures exchange and operates like a futures exchange, then it should be regulated like a futures exchange.

This legislation also addresses the issue extensively discussed at your hearing on the appropriate level of oversight that should be applied to various types of lesser-traded commodity contracts. It would provide both the CFTC and covered exchanges with the

same flexibility already afforded in the Commodity Futures Modernization Act to tailor the level of oversight for a particular commodity or contract with the degree of risk presented. I believe it is more appropriate for the exchanges in consultation with the CFTC to be given the authority to determine, on an ongoing basis, the appropriate level of monitoring and surveillance for a particular commodity contract than for Congress to specify in legislation which categories of contracts should be covered and which should be exempted based, as some have proposed, on market factors prevailing at a single point in time, such as current trading volume or explicit linkages in contract specifications to other contracts, no matter how these commodity markets or contracts may subsequently evolve. Seven years of unsatisfactory experience with the Enron loophole teaches us the folly of fixing exclusions and exemptions in statute based upon a static snapshot of the commodity markets.

Indeed, Congress long-ago abandoned the clumsy pick-and-choose approach to commodity regulation when it created the CFTC in 1974, and expanded the scope of CFTC oversight to include not just the previously listed agricultural commodities but “all other goods and articles . . . and service, rights and interests in which contracts for future delivery are presently or in the future dealt in.” I hope you will agree that the CFTC must have the flexibility to adjust its oversight programs as markets evolve.

I am encouraged that the Commission has quickly moved to consider many of the issues discussed in the Subcommittee’s report and hearings in July. I look forward to any findings and recommendations that the Commission may offer to Congress on how best to address these issues legislatively. While your staff provided valuable technical assistance in the drafting of S. 2058, we would appreciate any additional suggestions the Commission may have on how to further improve the bill.

Please include this letter as well as the enclosed materials regarding the “Close the Enron Loophole Act” into the Commission’s hearing record.

Thank you for your consideration and assistance on this critical matter.

Sincerely,

A handwritten signature in black ink that reads "Carl Levin". The signature is written in a cursive, flowing style.

Carl Levin  
Chairman  
Permanent Subcommittee on Investigations