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# DECREASING THE COSTS OF JURISDICTIONAL GRIDLOCK: MERGER OF THE SECURITIES AND EXCHANGE COMMISSION AND THE COMMODITY FUTURES TRADING COMMISSION

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Mark Frederick Hoffman\*

*Jurisdictional conflict exists between the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), primarily due to the language of the 1974 CFTC Act. This Act grants the CFTC exclusive jurisdiction to regulate certain financial instruments which, given the increasing complexity and "hybrid" nature of such instruments, might simultaneously be subject to SEC regulation. This Note first explores the history of the two agencies and the statutory language giving rise to the jurisdictional conflict. This Note then examines several instances of jurisdictional conflict that resulted in extensive costs for the respective agencies and the United States' financial markets. Specifically, this Note addresses the impact of jurisdictional conflict in terms of litigation costs, lost financial innovation, offshore migration of financial instruments, and the corresponding decrease of the United States' share in the global financial marketplace. This Note further examines several other issues posed by interagency conflict and suggests that the solution to these real and potential costs is a merger of the CFTC into the larger, more experienced SEC. Finally, this Note suggests that the current political atmosphere presents the most favorable opportunity to merge the agencies that has existed since the creation of the CFTC. While a merger of the two agencies may not eliminate all of the inefficiencies of the current system, a single regulator could provide a lower-cost alternative to the present, anachronistic, dual regulatory system which is faced with problems of increasingly complex financial instruments and expanding global competition.*

The Commodity Futures Trading Commission (CFTC) was established by the Commodity Futures Trading Commission Act of 1974 (CFTC Act).<sup>1</sup> Since its formation, this federal regulatory commission has experienced constant jurisdictional conflict with the Securities and Exchange Commission (SEC). A source of

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1. Pub. L. No. 93-463, 88 Stat. 1389 (codified as amended at 7 U.S.C. § 4(a) (1988)).

conflict is the CFTC Act's grant of "exclusive jurisdiction" over the regulation of certain designated financial instruments<sup>2</sup> which previously were unregulated or which might have been subject to SEC regulation.

Anticipating the potential for overlapping jurisdiction between the SEC, which is charged with regulating the general field of "securities,"<sup>3</sup> and the CFTC, which is charged with regulating "commodities"<sup>4</sup> and "futures,"<sup>5</sup> Congress included a savings clause in the CFTC Act. This clause provides that, "[e]xcept as [otherwise] provided, nothing contained in [the Act] shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission . . . or (II) restrict the Securities and Exchange Commission . . . from carrying out [its] duties and responsibilities . . . ."<sup>6</sup>

This effort to avoid jurisdictional conflict has proven futile and has become "a source of uncertainty in the marketplace and rivalry between the agencies."<sup>7</sup> Indeed, the main problems with interagency conflict stem from the uncertain jurisdictional authority of each agency.<sup>8</sup> In an effort to solve this irreconcilable jurisdictional battle and preserve the ability of domestic

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2. 7 U.S.C. § 2 (1988 & Supp. V 1993).

3. See 15 U.S.C. § 78(b) (1994). A "security," generally speaking, is "an undivided interest in a common venture the value of which is subject to uncertainty." *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 543 (7th Cir. 1989). For a definition of "security" under the Securities Act of 1933, see 15 U.S.C. § 77b(1) (1994); for a definition of "security" under the Securities Exchange Act of 1934, see *id.* § 78c(a)(10).

4. See 7 U.S.C. § 5 (1994) (presenting the legislative findings which necessitate formation of the Commodity Futures Trading Commission).

5. A "futures" contract is a standardized contract in which the buyer agrees to purchase and the seller agrees to sell a specified quantity of a specified commodity at a specified future date. Jerry W. Markham & Rita M. Stephanz, *The Stock Market Crash of 1987: The United States Looks at New Recommendations*, 76 GEO. L.J. 993, 997 (1988). Commodity futures are traded only on exchanges designated by the Commodity Futures Trading Commission (CFTC) as "contract markets." 7 U.S.C. § 6(a) (1994). Commodity futures contracts are generally used for hedging, which allows consumers and producers to shield themselves from the risks of adverse price fluctuations. Markham & Stephanz, *supra*, at 1999. Such contracts are not to be confused with forward contracts in which the parties negotiate the quantity, time, and place of delivery, as well as the manner of payment and deposit or margin requirements. Jerry W. Markham, *Regulation of Hybrid Instruments Under the Commodity Exchange Act: A Call for Alternatives*, 1990 COLUM. BUS. L. REV. 1, 7.

6. 7 U.S.C. § 2 (1994).

7. Egon Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC-SEC Coordinated Jurisdiction Over Security/Commodities*, 28 AM. U. L. REV. 1, 4 (1978).

8. John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447, 461 (1995).

financial markets to compete globally, this Note supports a proposal to merge the CFTC into the more experienced SEC.

This proposal recognizes that altering statutory language has proven fruitless in curing the jurisdictional battles and that attempts at cooperation by the heads of the two agencies have proven only temporarily successful. Delegating plenary authority to the SEC through a CFTC-SEC merger, although not the only solution to the problems posed by jurisdictional conflict, would significantly increase the United States' ability to compete for capital, reduce the crippling effect of jurisdictional dispute on financial innovation, and limit the need for judicial resolution of complex financial matters.

Although many similar proposals for restructuring American financial markets have been raised since the dawn of the CFTC more than twenty years ago,<sup>9</sup> congressional oversight committees have tended to bury the issues once the enthusiasm has subsided and other executive or legislative matters divert attention from financial restructuring issues.<sup>10</sup> With the arrival of a new Republican majority, however, the possibility of a CFTC-SEC merger is very much alive.<sup>11</sup>

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9. For a discussion of proposals for consolidation of the agencies, see CHICAGO MERCANTILE EXCHANGE, MODEL FOR FEDERAL FINANCIAL REGULATION 2-15 (1993) [hereinafter CME PROPOSAL] and PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS, 1988 REPORT 59-68 [hereinafter BRADY REPORT]. The Brady Report, so called because it analyzed various market factors contributing to the 1987 stock market crash and recommended that a single regulatory agency, possibly the Federal Reserve, coordinate critical regulatory issues which have an impact across the related market segments. BRADY REPORT, *supra*, at 69. The CME Proposal recommends consolidating numerous federal agencies which currently possess financial regulatory authority into a single cabinet-level department. CME PROPOSAL, *supra*, at 2-4. Ultimately, however, the CME Proposal is aimed at protecting the interests of futures markets, because it recommends that trading in all "standardized offset instruments (whether overlying financial assets or obligations, foreign exchange, or agricultural or mineral commodities)" be regulated by a "Division of Risk-Shifting Markets," which would closely resemble the CFTC. *Id.* at 9. The CME Proposal also places responsibility for regulating all trading in security options in a "Division of Investment Securities Markets," *id.* at 8-9, thereby removing jurisdiction over security options from the SEC. For a more complete analysis of the CME Proposal, see Coffee, *supra* note 8, at 451-53.

10. *Id.* at 447-48; see also 5 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2497 n.61 (3d ed. 1990) (stating that "it is highly unlikely that any reasoned congressional review will occur as long as different congressional committees have oversight responsibilities").

11. In terms of recognizing the need to merge the financial regulators under a single agency, perhaps the most significant, recent political event is the rise of Dan Glickman (a Kansas Democrat and former Member of the U.S. House of Representatives) to the position of Secretary of Agriculture. Glickman has long been a strong advocate for a CFTC-SEC merger. With a Republican majority now in Congress, the theory behind a merger may well be put into practice. For further discussion of recent political changes, see *infra* Part III.B.

Although there are numerous theoretical and practical reasons favoring a merger of the two regulatory agencies, this Note will focus particular attention on: (1) the problem of determining which agency will regulate new financial instruments<sup>12</sup> which frequently defy traditional classifications as "securities" or "futures"; (2) the loss of the ability of American financial markets to compete globally because of overlapping regulatory jurisdiction; and (3) the need to curb inefficient litigation which forces judges, who are less experienced in complex financial issues than either the SEC or the CFTC, to classify financial instruments as falling under the jurisdiction of one of the two agencies.<sup>13</sup> Eradication of inter-jurisdictional conflicts, which is critical to domestic markets, is even more important on the international scene where "it is important to have one regulatory agency speak for [the United States] on regulatory matters."<sup>14</sup>

Part I of this Note explores the history of the CFTC and the SEC and the source of the ongoing jurisdictional battle, briefly explaining the financial instruments involved that contribute to the dispute. Part II examines the evolution of numerous disputes between the agencies concerning regulatory authority over various financial instruments and presents three examples of judicial intervention that attempt to resolve such disputes. Finally, Part III asserts that the jurisdictional disputes result in numerous practical and theoretical problems which impede financial innovation and global competition. This Note concludes that the current system of financial regulation of the securities and futures markets is untenable in a world of increasingly complex financial instruments and global competition. This Note recommends that the CFTC merge into the SEC to ameliorate the detrimental impact of the ongoing CFTC-SEC jurisdictional overlap.

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12. See NICHOLAS KATZENBACH, AN OVERVIEW OF PROGRAM TRAINING AND ITS IMPACT ON CURRENT MARKET PRACTICES 19 (1987). The rapid growth of financial instruments throughout the 1980s and 1990s already has spawned extensive, wasteful litigation and inhibited innovation of such instruments. See *infra* Part II. No amount of tampering with the statutory language is likely to solve such definitional problems, since the two agencies most likely will continue to fight over the right to regulate new instruments.

13. In addition to ameliorating these major issues, a merger of the agencies could result in numerous other efficiencies, such as a "unified system for settlement and clearance of securities, options, and stock index futures transactions." Coffee, *supra* note 8, at 479. For a discussion of other benefits which would result from a CFTC-SEC merger, including improved clearing and credit mechanisms and margin requirements, see BRADY REPORT, *supra* note 9, at 59.

14. KATZENBACH, *supra* note 12, at 15.

## I. HISTORICAL OVERVIEW AND JURISDICTIONAL CONFLICT

A. *Brief History of the SEC and the CFTC*

1. *Securities and Exchange Commission*—The SEC has a long history in the regulation of American financial markets. The SEC was established following the stock market crash of 1929 and the ensuing congressional calls for tighter regulation over financial markets.<sup>15</sup> Numerous congressional investigations followed the 1929 Crash, eventually identifying at least two causal factors in the Crash that needed tighter regulation: inadequate stock margin requirements and option abuses.<sup>16</sup> Congress found these factors to be “at the bottom of most manipulative [stock] operations . . . .”<sup>17</sup> These factors led to passage of the Securities Act of 1933<sup>18</sup> and the Securities Exchange Act of 1934<sup>19</sup> in order to give the SEC authority to regulate securities for the protection of the public.

2. *Commodity Exchange Act*—Although the abuses of stock margins and options were the primary cause of the 1929 Crash, commodity options also were the object of numerous abuses.<sup>20</sup> Speculation on commodities and options were blamed for the collapse of the wheat market during the Great Depression.<sup>21</sup> In response to President Franklin Roosevelt’s demand for greater regulation of commodity exchanges, Congress passed the

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15. ANNE M. KHADEMIAN, *THE SEC AND CAPITAL MARKET REGULATION* 23 (1992); see JOEL SELIGMAN, *THE SEC AND THE FUTURE OF FINANCE* 220–21 (1985) (noting that between 1920 and 1929, prior to the establishment of the SEC, “incomplete, careless or false representations” had cost investors \$25 billion).

16. See, e.g., H.R. REP. NO. 1383, 73d Cong., 2d Sess. 10–11 (1934). A “margin” is an amount deposited up front which differs somewhat for a security and a futures contract. Jerry W. Markham & David J. Gilberg, *Stock and Commodity Options—Two Regulatory Approaches and Their Conflicts*, 47 ALB. L. REV. 741, 786 (1983). A “futures margin” is a deposit which guarantees the performance of both parties to a futures transaction, while a “securities margin” is the lowest percentage of the purchase price by which a purchaser can take possession of a security. *Id.*

17. Markham & Gilberg, *supra* note 16, at 747 (citing H.R. REP. NO. 1383, 73d Cong., 2d Sess. 10–11 (1934); S. REP. NO. 1455, 73d Cong., 2d Sess. 45 (1934); S. REP. NO. 792, 73d Cong., 2d Sess. 9 (1934)).

18. Securities Act of 1933, ch. 38, title I, § 1, 48 Stat. 74 (1933) (current version at 15 U.S.C. § 77 (1994)).

19. Securities Exchange Act of 1934, ch. 404, title I, § 1, 48 Stat. 881 (1934) (current version at 15 U.S.C. § 78 (1994)).

20. Markham & Gilberg, *supra* note 16, at 759.

21. *Id.*

Commodity Exchange Act (CEA)<sup>22</sup> in 1936, which banned trading of any options in the agricultural commodities then regulated by the CEA.<sup>23</sup> The stated purpose of the CEA was to "insure fair practice and honest dealing on the commodity exchange, and to provide some measure of control . . ."<sup>24</sup> The CEA and the commodities markets existed in relative peace until the 1970s, when commodity prices soared and scandals rocked the markets.<sup>25</sup>

3. *Commodity Futures Trading Commission*—Congress created the CFTC largely in response to regulatory gaps in the CEA that left certain transactions unregulated.<sup>26</sup> Although they ultimately lost millions, several market participants were able to manipulate the gaps to their temporary advantage during the early 1970s.<sup>27</sup> The most significant scandal of this period was the Goldstein-Samuelson options abuses of 1972.<sup>28</sup> Goldstein, a twenty-six-year-old trader, manipulated a loophole in the CEA that did not expressly prohibit the trading of options on certain commodities such as coffee, silver, and platinum.<sup>29</sup> Starting with only \$800 in 1971, Goldstein's firm established offices worldwide and earned forty-five million dollars in income by the end of 1972.<sup>30</sup> Disaster quickly followed, however,

22. Ch. 545, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–26 (1994)).

23. Markham & Gilberg, *supra* note 16, at 760. The CEA stated that [i]t shall be unlawful for any person to offer to "enter into, or confirm the execution of, any transactions involving any commodity . . . if such transaction is, is of the character of, or is commonly known to the trade as a 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty' . . ." Commodity Exchange Act, ch. 545, § 6c(b), 49 Stat. 1491, 1494. This ban lasted for more than thirty years. Markham & Gilberg, *supra* note 16, at 760. Commodities options now may be traded pursuant to 7 U.S.C. § 6c(b) (1994).

24. U.S. CONGRESS, HOUSE, AMEND GRAIN FUTURES ACT, H.R. REP. NO. 1637, 73d Cong., 2d Sess. 1 (1934).

25. See Markham & Stephanz, *supra* note 5, at 2005–06; see also Markham & Gilberg, *supra* note 16, at 760–61 (discussing a loophole in the CEA, discovered in the early 1970s, that resulted in large price increases and million dollar losses).

26. See Markham & Gilberg, *supra* note 16, at 760, 762–63.

27. See *id.* at 760–63.

28. See *id.* at 760–61; see also SEC v. Goldstein, Samuelson, Inc., Fed. Sec. L. Rep. (CCH) ¶ 93,800 (C.D. Cal. Oct. 11, 1973); *In re* Goldstein, Samuelson, Inc., Samuel Brokerage, Inc. [1971–1978 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,095 (Okla. Dep't of Securities Feb. 23, 1973).

29. Markham & Gilberg, *supra* note 16, at 761. In addition to coffee, silver, and platinum, the CEA did not regulate options on sugar, foreign currencies, cocoa, copper, lumber, mercury, palladium, plywood, propane gas, or silver coins. Philip F. Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 VAND. L. REV. 1, 3 n.71 (1976).

30. Markham & Gilberg, *supra* note 16, at 760.

as Goldstein was selling naked options<sup>31</sup> and was unable to cover his positions as prices increased. By 1973, he had left behind \$85 million in unpaid options, and many other firms who had followed his lead similarly had lost millions of dollars of investors' money.<sup>32</sup>

Following this debacle, Congress enacted the CFTC Act in 1974, amending the CEA to include "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."<sup>33</sup> Thus, in addition to the "regulated commodities" under the CEA, Congress also sought to regulate previously unregulated commodities and markets on which they were traded.<sup>34</sup>

### B. Statutory Language and Jurisdictional Conflict

The CFTC Act<sup>35</sup> gave birth to an agency with broad regulatory oversight of commodity futures.<sup>36</sup> The CFTC is subject to a "sunset provision" that requires congressional reauthorization of the agency every two years.<sup>37</sup> The most controversial aspect of the CFTC is the congressional grant of "exclusive jurisdiction" over futures regulation, thereby preempting the field.<sup>38</sup>

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31. "Naked options are options not backed by any physical commodity or other means to cover the obligation. When the owner of a naked option has to cover the contract, he must enter the market to purchase the commodity in question." Markham & Stephanz, *supra* note 5, at 2006 n.71.

32. Markham & Gilberg, *supra* note 16, at 761.

33. Pub. L. No. 102-546, § 404a, 106 Stat. 3625 (codified at 7 U.S.C. § 1a(3) (1994)).

34. Guttman, *supra* note 7, at 24. For a list of previously unregulated commodities covered by the CFTC Act, see *supra* note 29.

35. 7 U.S.C. § 4a (1994).

36. Coffee, *supra* note 8, at 461 (noting that "[i]n creating the CFTC in 1974, Congress seemed to preempt the field of commodity futures regulation by conferring exclusive jurisdiction on the CFTC").

37. 7 U.S.C. § 16(d) (Supp. IV 1992). Prior to 1986, the reauthorization period was four years, but between 1986 and 1992, the period was reduced to three years. Compare 7 U.S.C. § 16(d) (1976) with *id.* § 16(d) (1988).

38. Specifically, 7 U.S.C. § 2 provides:

The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . or any other board of trade, exchange, or market . . .

7 U.S.C. § 2(i) (Supp. V 1993).



The CFTC Act also contains an SEC savings clause that has further exacerbated the jurisdictional dispute between the SEC and the CFTC by protecting and preserving SEC authority.<sup>39</sup> Despite the "savings" language, the distinct jurisdictional boundaries of the CFTC and the SEC are very unclear.<sup>40</sup> The only clear language of the CFTC Act is the so-called "Treasury Amendment,"<sup>41</sup> which "preclude[s] the CFTC from asserting jurisdiction over the cash market in the . . . 'specified financial instruments . . . which generally are [traded] between banks and other sophisticated institutional participants' "<sup>42</sup> from both

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The CFTC asserts its exclusive jurisdiction through § 5(g) of the CEA, which permits the CFTC to "designate any board of trade as a 'contract market' . . ." 7 U.S.C. § 7 (1994). The CFTC thus has the power to designate a contract market, "thereby asserting exclusive jurisdiction, that has led to CFTC-SEC tensions." Guttman, *supra* note 7, at 7.

39. See *supra* note 6 and accompanying text; see also Board of Trade v. SEC, 677 F.2d 1137, 1145 (7th Cir.) (noting Congress' awkward attempt to divide jurisdiction between the CFTC and the SEC with the proviso clauses in § 2), *vacated as moot*, 459 U.S. 1026 (1982).

40. 120 CONG. REC. 34,736 (1974) [hereinafter Poage Statement] (statement of Rep. Poage). Even prior to the passage of the CFTC Act, members of Congress themselves anticipated the possibility of jurisdictional overlap given the unclear and broad language of the Act:

I further understand . . . that the Securities and Exchange Commission has jurisdiction over other types of securities, including investment contracts, and that the term investment contract includes a broad category of arrangements and contracts relating to investments. In this area, *there may be some apparent overlap* between the jurisdiction of the Securities and Exchange Commission and the intended jurisdiction of the Commodity Futures Trading Commission over trading in futures contracts relating . . . to tangible commodities. It was not intended that the jurisdiction of the Securities and Exchange Commission with respect to investment contracts be superseded, except to the extent that jurisdiction is granted to the CFTC with respect to contracts for future delivery or options relating, or purporting to relate, to tangible commodities . . . . [T]he act . . . is not intended to create any regulatory gaps.

*Id.* at 34,737 (emphasis added). It seems that Congress did not, in 1974, anticipate the tremendous growth in the market for financial derivative and hybrid products which later would develop and which now are the source of the most serious jurisdictional disputes. See *id.*

41. The "Treasury Amendment" reads:

Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. § 2(ii) (Supp. V 1993).

42. Guttman, *supra* note 7, at 18 (quoting S. REP. NO. 1131, 93d Cong., 1st Sess. 49-50 (1974)).

SEC and CFTC regulation. This Amendment prevents dual regulation of such instruments by the CFTC and bank regulatory agencies.<sup>43</sup>

As a result of the CFTC's grant of exclusive jurisdiction, a grant which does not exemplify legislative clarity,<sup>44</sup> the jurisdictional conflict first alluded to in congressional hearings has come to fruition.<sup>45</sup> As former SEC Chairman Roderick Hills first noted in 1975, "it is relatively easy to suggest that the most basic examples of what is unambiguously a security, such as a share of GM or AT&T, are literally within the definition of a 'commodity' . . . ."<sup>46</sup> Another former SEC Chairman, Harold M. Williams, recognized the ramifications of the broad language included in the CEA, stating that "[t]he definition of the term commodity . . . as used in the legislation, w[as] broad—so broad, in fact, that traditional securities and traditional securities transactions could be construed as falling within the terms of the statute."<sup>47</sup>

While the jurisdictional language has caused problems in the past and will continue to do so, future problems posed by new financial instruments, ranging from innovative derivative instruments<sup>48</sup> to other hybrid instruments,<sup>49</sup> cannot be solved by

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43. See COMMODITY FUTURES TRADING COMM'N, OTC DERIVATIVE MARKETS AND THEIR REGULATION 15 (1993).

44. Guttman, *supra* note 7, at 27.

45. See Coffee, *supra* note 8, at 460–66 (chronicling the struggles for jurisdiction between the CFTC and the SEC from 1979 to the present); *infra* Part II.B–D (discussing specific instances of jurisdictional disputes).

46. Letter from SEC Chairman Roderick M. Hills to CFTC Chairman William T. Bagley [1975–1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,117 (Nov. 13, 1975).

47. *Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 185 (1978) [hereinafter Williams Statement] (statement of Harold M. Williams, Chairman, SEC).

48. "A 'derivative' is a contract that either allows or obligates one of the parties . . . to buy or sell an asset." Henry T.C. Hu, *Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementalism*, 102 YALE L.J. 1457, 1464–65 (1993). Its value "derives from the value of the 'underlying [asset],' be it a specific stock, commodity, stock index, interest rate, or exchange rate." *Id.*

49. A "hybrid" is a fairly recent financial development that cannot be classified as either a futures or an options contract as it combines elements of both. RICHARD W. JENNINGS ET AL., *SECURITIES REGULATION* 25 (7th ed. 1992). If an instrument is a commodities future or option contract, it is subject to CFTC jurisdiction; if it is categorized as a security, it is subject to SEC jurisdiction. See 7 U.S.C. § 2a(i)–(ii) (1994). Such classification problems force courts to determine, in the words of one Seventh Circuit judge, "whether tetrahedrons belong in square or round holes." *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989).

current regulatory framework which determines jurisdiction primarily on the basis of confusing statutory classifications.<sup>50</sup>

Further supporting the merger argument is the fact that, since the stock market crash of 1987,<sup>51</sup> market professionals and investors have recognized that the markets for stocks, futures, and options are inextricably linked and thus constitute a single market.<sup>52</sup> Numerous factors link the various markets together, including the increasing use of portfolio insurance<sup>53</sup> and program trading,<sup>54</sup> both of which were implicated in the 1987 Crash and both of which link the securities and futures markets by attempting to limit losses in one market through activity in the other.<sup>55</sup>

The securities and futures markets also are considered to constitute a single market because of the nature of the instruments traded there. As former SEC Chairman Harold Williams has noted, futures on financial securities are directly comparable to options on securities, because "both [are] devices for risk management in relation to price fluctuations in the underlying securities."<sup>56</sup> Recognizing the uniformity of the securities and

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50. See Coffee, *supra* note 8, at 461.

51. Between October 13 and October 19, 1987, the New York Stock Exchange suffered its worst decline since the Great Depression, losing more than one trillion dollars in value. Markham & Stephanz, *supra* note 5, at 1993. For a more detailed examination of the causes and impact of the 1987 Crash on financial regulatory policy from the viewpoints of the various financial markets, see CHICAGO BD. OF TRADE, RESPONSE TO THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS (1987); CME, PRELIMINARY REPORT OF THE COMMITTEE OF INQUIRY APPOINTED BY THE CHICAGO MERCANTILE EXCHANGE TO EXAMINE THE EVENTS SURROUNDING OCTOBER 19, 1987 (1987); DIVISION OF ECONOMIC ANALYSIS & DIVISION OF TRADING AND MARKETS, CFTC, FINAL REPORT ON STOCK INDEX FUTURES AND CASH MARKET ACTIVITY DURING OCTOBER 1987 (1988); DIVISION OF MARKET REGULATION, SEC, THE OCTOBER 1987 MARKET BREAK (1988); GOVERNMENT ACCOUNTING OFFICE, FINANCIAL MARKETS: PRELIMINARY OBSERVATIONS ON THE OCTOBER 1987 CRASH, GGD-88-38 (1988); NICHOLAS DEB. KATZENBACH, NEW YORK STOCK EXCH., AN OVERVIEW OF PROGRAM TRADING AND ITS IMPACT ON CURRENT MARKET PRACTICES (1987).

52. See BRADY REPORT, *supra* note 9, at vi; Jeffrey Taylor, *Support Grows for SEC, CFTC Merger*, WALL ST. J., Feb. 6, 1995, at C1, C16.

53. "Portfolio insurance," or "dynamic hedging," as it is sometimes called, is a "computer-driven strategy of index-futures sales in a declining market and purchases in a rising market." Markham & Stephanz, *supra* note 5, at 2000 n.31. Essentially, the purchase of index futures offsets the losses suffered in a declining market, thereby creating a floor on such losses. *Id.* at 1999-2000. For a discussion of portfolio insurance, see LOSS & SELIGMAN, *supra* note 10, at 2650-52.

54. "Program trading" generally refers to trading systems, including portfolio insurance, which are computer-driven. LOSS & SELIGMAN, *supra* note 10, at 2650-52.

55. *Id.* For further discussion on the causes behind the 1987 Crash and proposed market responses, see *id.* at 2491-2505.

56. Williams Statement, *supra* note 47, at 193. Williams noted further that "securities futures and securities options raise similar policy concerns from the perspective of their impact on the American economy. Neither securities futures nor

futures markets, the Presidential Task Force on Market Mechanisms, chaired by Nicholas F. Brady, concluded that a single market regulator should oversee American financial markets because the "guiding objective should be to enhance the integrity and competitiveness of U.S. financial markets."<sup>57</sup> Similarities between the two markets, combined with the need to avoid the intermarket disjunction which precipitated the 1987 Crash, suggest the need to merge the SEC and CFTC, or to at least unify certain mechanisms across both sets of markets.

## II. CONSEQUENCES OF JURISDICTIONAL OVERLAP AND HISTORY OF SEC-CFTC JURISDICTIONAL BATTLES

### A. Consequences of Jurisdictional Overlap

The existing system of confused, overlapping regulation between the SEC and the CFTC has resulted in significant costs to domestic financial markets. The overlap has unnecessarily increased administrative and transaction costs, as well as stifled financial innovation in the United States and forced such innovation overseas.<sup>58</sup> Interagency efforts at cooperation have failed, leaving a merger of the agencies as the most logical means of coordinating regulatory policy and protecting domestic markets from losing more of the global market share.

Overlapping jurisdiction and the conflicts resulting from obscure jurisdictional lines have increased the administrative costs of regulating the markets.<sup>59</sup> For instance, the lack of

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options on securities lead directly to new capital formation." *Id.* at 193-94. "At the most basic level, the prices of both futures on securities and options on securities are primarily dependent on the same factor—the price of the underlying security." *Id.* at 194-95.

57. BRADY REPORT, *supra* note 9, at vi.

58. SEC/CFTC Jurisdictional Issues: Hearings on H.R. 4477 Before the House Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 34 (1991) [hereinafter *Merger Hearings*]. Agriculture Secretary Dan Glickman, then Representative Glickman (D-KS), stated at the hearings that "[t]he competition should not be between the agencies, it is between us and Japan, us and Europe, and us and the rest of the world." *Id.* at 39. See also Merton H. Miller & Christopher L. Culp, *Why the CFTC is an Anachronism*, WALL ST. J., Sept. 5, 1995, at A17 ("Congress should move quickly to rethink the . . . [CFTC's] mandate before the costs and uncertainties generated by that obsolete agency drive even more of the financial services industry abroad.")

59. See *Merger Hearings*, *supra* note 58, at 245-47.

coordination across the securities and futures markets has led to surveillance and enforcement difficulties.<sup>60</sup> As a result, one market may be manipulated to benefit a position held in the other market, leading former SEC Chairman Williams to note that "[surveillance and enforcement] can only be effective if both markets are regulated by the same agency."<sup>61</sup>

Dual and undefined regulatory authority also increases costs through duplicative efforts in the two agencies.<sup>62</sup> Besides the absence of a single regulator with an overview of the intermarket positions of market participants,<sup>63</sup> there also is no single clearing corporation.<sup>64</sup> Such a void can impede lenders' assessment of risk exposure and "affect[] the willingness of lenders to finance market participants."<sup>65</sup> Margins are not coordinated across securities and futures markets and, as noted by reports analyzing the 1987 Crash, should be rationalized across all markets.<sup>66</sup>

A single market regulator would benefit from the economies of scale generated through a unified system of settlement, clearance, and other standardized rules.<sup>67</sup> The willingness of the Chicago Mercantile Exchange (CME) and other market administrators to propose alternative, consolidated, regulatory structures suggests that at least some of these various factors are increasing the markets' costs and decreasing their global market share.<sup>68</sup> To the extent that a single agency benefits from economies of scale and can avoid such overlapping jurisdictional confusion and related costs, a merger of the agencies would effectively reduce such administrative and surveillance costs.

Interagency battles over which agency will regulate a new financial instrument stifle financial innovation, increase costs, and provide advantages to overseas markets.<sup>69</sup> Interagency

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60. See Richard Breeden, *Federal Regulation of Financial Services: Time for a Change*, 30 FED. B. NEWS & J. 316, 317-19 (1983).

61. Williams Statement, *supra* note 47, at 196; see also Breeden, *supra* note 60, at 318 (arguing that intermarket manipulation requires coordinated surveillance and enforcement).

62. CME PROPOSAL, *supra* note 9, at 3.

63. BRADY REPORT, *supra* note 9, at 64.

64. *Id.*

65. *Id.*

66. *Id.*

67. Coffee, *supra* note 8, at 479.

68. See *id.* at 451-52.

69. *Id.* at 465; see also *infra* Part II.B-D (discussing several jurisdictional battles and providing examples of financial instruments that, due to jurisdictional fighting, have moved overseas).

disputes over *which agency* should regulate a new instrument frequently lengthen the normal delay in gaining regulatory approval for the instrument.<sup>70</sup> Assuming that the instrument is permitted to reach financial markets at all, such time delays chill financial innovation and impede new product development.<sup>71</sup> The victorious agency is left with the dubious honor of winning the jurisdictional battle by stifling the creation of new financial products.<sup>72</sup>

When the interagency jurisdictional battles result in lost innovation, the stifled financial instruments do not disappear but merely move overseas. Between 1986 and 1991, the domestic share of the world's futures trading fell from eighty percent to less than fifty percent.<sup>73</sup> This significant increase in international competition and corresponding loss in the United States' share of the world market is largely the fault of U.S. regulators and regulatory conflicts.<sup>74</sup> For example, the Toronto Stock Exchange successfully began trading an "index participation product"<sup>75</sup> during the same period in which the two agencies

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70. See Coffee, *supra* note 8, at 465; Michael Peltz, *Days of Futures Past?*, INSTITUTIONAL INVESTOR, June 1994, at 183-84.

71. See Coffee, *supra* note 8, at 464-66, 481.

72. See *id.* at 481.

73. Peltz, *supra* note 70, at 183. The French, German, and English markets were up between 65% and 115% during the same period that American exchanges, specifically the Chicago Board of Options Exchange (CBOT) and the CME were up only 39% and 36%, respectively. *Id.*; see also Coffee, *supra* note 8, at 481 (noting the significant increase in foreign markets, particularly in Asia, Canada, and Europe, resulting in the United States having a minority share in the global market).

Some of the increase in market shares by foreign markets can be attributed to an increase in American investing abroad. In 1992, U.S. investors owned \$190 billion in foreign equities, as compared to \$19 billion in 1982. Edward F. Green et al., *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413, 413-14 (1995). For a discussion of the globalization of the financial marketplace and the significant inroads that foreign markets are making in the global marketplace, see Joseph A. Grundfest, *Internationalization of the World's Securities Markets: Economic Causes and Regulatory Consequences*, 4 J. FIN. SERVICES RES. 349 (1990).

74. See Peltz, *supra* note 70, at 185; see also CME PROPOSAL, *supra* note 9, at 1 (stating that the existing regulatory structure has resisted changes in financial markets due to international competition and thus has undermined its own effectiveness).

75. An "index participation" is a contract of indefinite duration "based on the value of a basket (index) of securities." Chicago Mercantile Exch. v. SEC, 883 F.2d 537, 539 (7th Cir. 1989). "The seller of an [index participation] promises to pay the buyer the value of the index as measured on a [certain] 'cash-out day'." *Id.* The buyer pays for the participation contract in cash and may purchase on margin at the same rate as the Federal Reserve sets for stocks, currently 50%. *Id.* at 540. See also Coffee, *supra* note 8, at 462 (discussing the "murky territory" represented by index participations, which have qualities similar to both options and futures on indexes).

prevented introduction of the product on domestic exchanges through fighting over the right to regulate the instruments.<sup>76</sup>

If there is any value in regulatory competition, "the significance of the benefits it promises are being eclipsed by the rapid globalization of all major financial markets."<sup>77</sup> Given the increased costs and decreased innovation produced by the jurisdictional overlap between the CFTC and the SEC, it may be easier for a single, consolidated agency to address pressing global issues than it would be for two agencies.<sup>78</sup> The homogeneity of financial markets and the need for a single regulatory authority have been apparent since the 1987 Crash. Thus, Congress should seize the politically favorable window of opportunity presented by the current Republican majority in Congress to enact merger legislation.<sup>79</sup>

### B. Government National Mortgage Association Disputes

The first major battle between the SEC and the CFTC relating to overlapping jurisdiction occurred in 1975, less than one year after the CFTC's creation. The Chicago Board of Trade (CBOT) had applied to the CFTC for designation as a contract market for trading futures contracts on Government National Mortgage Association (GNMA) certificates.<sup>80</sup> In September 1975, the CFTC granted the CBOT's request, and trading on GNMA

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76. See Coffee, *supra* note 8, at 465-66; see also *infra* Part II.D (discussing the dispute between the agencies over the issue of regulation of index participations). Another battle between the two agencies, stemming from regulation of futures on individual stocks, similarly moved trade in such futures to foreign markets. Coffee, *supra* note 8, at 466; see also *Merger Hearings*, *supra* note 58, at 257 (SEC Chairman Breeden noting the time and cost savings for Japanese, German, French, and British issuers who are subject only to a single regulatory authority).

Another harmful consequence of the SEC-CFTC jurisdictional dispute is the creation of new products introduced for the purpose of avoiding regulatory constraints. Breeden, *supra* note 60, at 316.

77. Coffee, *supra* note 8, at 457.

78. See *id.* at 479-80; see also Ivy Schmerken, *Merging the Regulators*, WALL ST. & TECH., Mar. 1993, at 29. Schmerken notes that acting with a single voice on international matters fosters international competitiveness and our ability to act efficiently in the global market. *Id.* at 30-34.

79. For a discussion of the current favorable political environment, see *infra* Part III.B.

80. Markham & Gilberg, *supra* note 16, at 773.

futures began in October 1975.<sup>81</sup> The SEC formally objected to the CFTC's action, asserting that "GNMA certificates and Treasury bills were securities and thus should be subject exclusively to SEC jurisdiction" and that contracts for future delivery of such securities were still securities.<sup>82</sup> The SEC lost this first battle, and the CFTC granted the CBOT permission and issued a memorandum describing the CFTC's justification for their assertion of exclusive jurisdiction over GNMA futures.<sup>83</sup> In response, SEC Chairman Roderick M. Hills sent a letter to the CFTC detailing fourteen areas of CFTC jurisdiction that the SEC felt were unresolved.<sup>84</sup>

Although the SEC lost this battle, it retaliated three years later in 1978 by granting an application by the Chicago Board Options Exchange (CBOE) to trade options on GNMA certificates, thereby authorizing the CBOE to "trade a derivative instrument largely paralleling the futures contract on GNMA certificates already traded on the CBOT."<sup>85</sup> The CBOT objected to this action, arguing in part that the GNMA option closely paralleled a futures contract and that the SEC was without authorization to permit trading of GNMA options.<sup>86</sup> The CBOT sued the SEC and won an injunction pending trial in the Seventh Circuit.<sup>87</sup> This injunction remained in place until the

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81. *Id.*

82. Coffee, *supra* note 8, at 461.

83. Markham & Gilberg, *supra* note 16, at 773-74.

84. Letter from SEC Chairman Roderick M. Hills to CFTC Chairman William T. Bagley [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH), ¶ 20,117 (Nov. 13, 1975). Among the fourteen questions posed were those regarding the differences between securities options contracts and futures contracts on securities, rights of private action under the SEC and CFTC statutes, enforcement jurisdiction, disclosure and licensing requirements, delivery problems, and the relationship between futures and cash markets in securities. *Id.* Hills further stated:

We have previously advised [the CFTC] of our view that GNMA certificates and Treasury Bills are securities, as that term is defined in the federal securities laws. We also believe it to be quite clear that contracts for future delivery of those securities are also 'securities.' . . .

We therefore have a situation where two distinct statutory and regulatory schemes appear applicable, in a manner not yet precisely determined, to a variety of transactions and relationships involving securities.

*Id.* This problem still has not been resolved.

85. Coffee, *supra* note 8, at 461-62.

86. *Id.*

87. See *infra* notes 96-106 and accompanying text (discussing Board of Trade v. SEC, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982)).



Shad/Johnson Accord in 1982 resolved the interagency dispute regarding GNMA options trading.<sup>88</sup>

In 1978, the CFTC survived a second series of reauthorization hearings, despite vocal SEC opposition to reauthorization. The SEC took the opportunity to place the ongoing SEC-CFTC jurisdictional dispute before Congress, asking it to give the SEC full jurisdiction over all derivative products,<sup>89</sup> whether options or futures.<sup>90</sup> SEC Chairman Williams capitalized on the hearings by expressing the SEC's position regarding CFTC jurisdiction over GNMA certificates and the more substantive problems regarding the disputes arising from the CFTC's claim of exclusive jurisdiction.<sup>91</sup>

Williams also brought to the attention of Congress another evolving jurisdictional problem that concerned the Kansas City Board of Trade's (KCBT) petition to the CFTC to trade a futures contract on a 500 Composite Stock Index based upon the Standard & Poor's Index.<sup>92</sup> The KCBT's petition ultimately

88. See *infra* Part II.C (discussing the Accord and resolution of the GNMA options issue).

89. For a definition of a derivative instrument, see *supra* note 48.

90. Coffee, *supra* note 8, at 461.

91. Williams, in lengthy and assertive testimony, recommended that the "regulatory and enforcement authority for futures trading on securities and trading in the underlying securities should be vertically integrated in one agency." Williams Statement, *supra* note 47, at 183. Williams further commented on the CFTC's assertion of exclusive jurisdiction over trading of GNMA futures, stating:

[Exclusive jurisdiction] ignores the close connection between the futures market for these debt securities and the markets for the underlying debt securities. Since the [SEC] has a significant role in regulating the markets for these underlying debt securities, there is no reason to maintain a legal scheme in which the CFTC's jurisdiction serves only to hamper the operation of an integrated regulatory approach to these important markets.

*Id.* at 197. Even in 1978, Williams recognized the close connection between the securities and futures markets, implying that they are essentially a single market. *Id.* at 199.

92. Guttman, *supra* note 7, at 21. The KCBT originally intended to use the Dow Jones Industrial Stock Average (DJISA) as its stock index, but Dow Jones refused to allow the KCBT to use its name. Jerry Knight, *KC Board of Trade Proposes Dealing Futures on Standard & Poor's Average*, WASH. POST, Nov. 11, 1978, at D1. The KCBT essentially was proposing to trade a futures contract on a stock index. See Williams Statement, *supra* note 47, at 188. Williams' concern was less focused on this particular KCBT proposal than on the potential ramifications of allowing stock index futures to be traded:

[W]e are concerned that the CFTC might grant [the KCBT application], or, in any event, might later decide to permit trading of a futures contract on traditional equity securities, such as GM or AT&T common stock . . . that the CFTC's staff has recognized . . . may not come within the literal definition of 'commodity' . . .

resulted in a four-year moratorium on trading of stock index futures, during which time the agencies struggled to resolve their differences.<sup>93</sup>

In the end, the House of Representatives voted to maintain the CFTC's exclusive jurisdiction over futures contract trading, refusing the SEC's request that it be granted regulatory authority over derivative products.<sup>94</sup> Congress did enact a provision, however, requiring that the CFTC maintain communications with the SEC, the Treasury Department, and the Federal Reserve regarding areas of overlapping jurisdiction and consider the views of the latter two agencies when approving applications for trading in futures on government securities.<sup>95</sup> Congress did place some new requirements on the CFTC regarding communication with other agencies during the 1978 reauthorization hearings, but it did not resolve the ongoing GNMA conflict.

In *Board of Trade v. SEC*,<sup>96</sup> the Seventh Circuit addressed the CBOE's 1978 application to the SEC for permission to trade options on GNMA certificates.<sup>97</sup> This case presents a prime example of the significant costs accompanying the SEC-CFTC jurisdictional dispute. After the CBOE's application in 1978, the CBOT, which had in 1975 won the right to trade futures contracts on GNMA certificates, won an injunction preventing the SEC from authorizing the CBOE's trading on

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*Id.* For further discussion of the KCBT proposal, see *Kansas City Bomber?*, *ECONOMIST*, Oct. 28, 1978, at 118; Aimee L. Morner, *There May Be a Future for Stock-Index Futures*, *FORTUNE*, Mar. 26, 1979, at 107. For further discussion of the function of stock index futures, see LOSS & SELIGMAN, *supra* note 10, at 2635-39.

93. KATZENBACH, *supra* note 12, at 15. The interagency dispute regarding the trading and regulation of stock-index futures ultimately was resolved in the Shad/Johnson Accord. See *infra* Part II.C (discussing the interagency jurisdictional agreement regarding stock index futures).

94. Markham & Gilberg, *supra* note 16, at 775-76.

95. The United States Code provides:

The [CFTC] shall maintain communications with the Department of the Treasury, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission for the purpose of keeping such agencies fully informed of Commission activities that relate to the responsibilities of those agencies, for the purpose of seeking the views of those agencies on such activities, and for considering the relationships between the volume and nature of investment and trading in contracts of sale of a commodity for future delivery and in securities and financial instruments under the jurisdiction of such agencies.

7 U.S.C. § 4a(g)(2)(i) (1994).

96. 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982).

97. *Id.* at 1138; see also Markham & Gilberg, *supra* note 16, at 776.

GNMA options.<sup>98</sup> Thus, for four years, until 1982, when this case was finally decided, the jurisdictional battle prevented the trading of GNMA options. The dispute forced the Seventh Circuit judges to resolve a case “which present[ed] the complexity of [a] ‘Gordian Knot’ and which, once having been submitted, must be resolved by the court.”<sup>99</sup> This case highlights the inadequacy of a judicial solution to complex financial questions which should be addressed by congressional action.

The issue before the court was whether the SEC has authority to regulate options trading in GNMA's, given that GNMA's are both “commodities” and “securities.”<sup>100</sup> The CBOE argued that GNMA options fall within the CFTC's exclusive jurisdiction over commodity options,<sup>101</sup> while the SEC argued that the trading of options on securities is not covered under the CEA and thus is not within the jurisdiction of the CFTC.<sup>102</sup> The court decided the case despite Congress' ongoing deliberation of

98. Coffee, *supra* note 8, at 461–62.

99. *Board of Trade*, 677 F.2d at 1168 (Campbell, J., concurring). Judge Campbell further scolded the two agencies for their inability to maintain communications as they are statutorily required to do and for forcing the judiciary to resolve an enormously complex issue:

Not only are we expected to become expert in securities and commodities, master a complex mass of regulatory legislation and historical development, but we must also discern Congressional intent and apply it to a market of financial instruments which did not exist at the time the relevant legislation was enacted. The difficulty of this task would not disturb me if I did not perceive our role in this matter as inappropriate. . . . The fact that Chief Judge Cummings and Judge Cudahy [dissenting] were able to fashion coherent and expert solutions to the problem is not due to the suitability of the task to judicial resolution, but to the individual brilliance and dedication of those men.

*Id.*

100. *Id.* at 1138. The court noted the similarity of the GNMA options to futures contracts, stating that with GNMA options, like futures, the option holder may “offset” one position by purchasing or selling an equal and opposite position. *Id.* at 1139.

101. Compare 7 U.S.C. § 2 (1994) (providing that “[t]he [CFTC] shall have exclusive jurisdiction . . . with respect to accounts [and] agreements (including any transaction which is of the character of, or is commonly known to the trade as, an ‘option’ . . . .)”) with *id.* § 6c(b) (providing that “[n]o person shall offer to enter into, enter into or confirm the execution of, any transaction . . . which is of the character of, or is commonly known to the trade as, an ‘option’”).

102. 677 F.2d at 1142. “The dispute arises primarily because GNMA's are both ‘securities’ under [the Securities Exchange Act of 1934], 15 U.S.C. § 78c(a)(10), and ‘commodities’ under CEA § 2(a)(1), 7 U.S.C. § 2.” *Id.* Recall that Congress ratified the ban on options trading when it created the CFTC in 1975, stipulating that the ban will remain until the CFTC proposes to lift it. *Id.* at 1143. Thus, the CFTC argued, and the court agreed, that “[t]he CFTC has not lifted the ban on GNMA options trading and therefore the CBOE cannot trade GNMA options.” *Id.* at 1144 (footnote omitted).

the Accord. The court held that the CFTC has jurisdiction over GNMA options<sup>103</sup> because GNMA options are not securities, and thus are not subject to SEC regulation.<sup>104</sup> The dissenting opinion sharply criticized the majority's holding.<sup>105</sup> This case, however, later was rendered moot by Congress' adoption of the Accord.<sup>106</sup>

*C. Shad/Johnson Accord of 1982 and  
the 1984 Compromise*

In the midst of the debate over which agency ultimately would regulate options on GNMA certificates, and during the protracted litigation previously described, the head of the SEC, John Shad, and the head of the CFTC, Philip Johnson, agreed to settle their jurisdictional dispute with regard to the certificates<sup>107</sup> and adopted the Shad/Johnson Accord<sup>108</sup> (Accord). Under the Accord, the two agencies divided jurisdiction over options, with the SEC obtaining regulatory authority over options on securities, including those generally exempted from federal securities laws,<sup>109</sup> and "jurisdiction over options on groups or indexes of securities and options on foreign currency

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103. *Id.* at 1138.

104. *Id.* at 1146.

105. Judge Cudahy stated that "the majority fails at almost every turn to meet the tests of plain language, congressional intent, historical context and practical result." *Id.* at 1168 (Cudahy J., dissenting). He further noted that, in the Accord, the SEC and the CFTC

have now resolved their differences in a way which is consistent with almost any decision by us *except* the strained conclusion of the majority. . . . Not only have we done our best to frustrate the efforts of the concerned regulatory agencies . . . but we have managed to conclude that an agency of long experience and high reputation must fully abandon its field of expertise in favor of a new and relatively untested regulatory body of uncertain prospects.

*Id.* at 1184 (footnote omitted).

106. *See infra* Part II.C.

107. *See CFTC and SEC Jurisdictional Agreement: Proposed Legislation*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,332 (Feb. 2, 1982).

108. *See KATZENBACH*, *supra* note 12, at 15.

109. *See Don L. Horwitz & Jerry W. Markham, Sunset on the Commodity Futures Trading Commission: Scene II*, 39 BUS. LAW. 67, 73 (1983). GNMA certificates and certificates of deposit are examples of securities generally exempted from federal securities laws. *Id.*

traded on securities exchanges."<sup>110</sup> The CFTC obtained jurisdiction over futures contracts on exempted securities and groups of securities or indexes, over options on futures contracts for such indexes, and over options on foreign currency traded on commodity exchanges.<sup>111</sup> In addition, the Accord prohibited trading of futures contracts and options on futures contracts on individual corporate and municipal securities.<sup>112</sup> Thus, the CFTC ultimately was free to authorize futures contracts, option contracts on commodities, and currencies, but could not authorize options or futures contracts on equity securities.<sup>113</sup>

Despite the questionable power of the two agencies to divide up jurisdictional authority,<sup>114</sup> Congress ratified the Accord with only minor changes.<sup>115</sup> As later developments demonstrated,<sup>116</sup> the Accord "addressed a symptom rather than the problem," as

110. *See id.*

111. *See id.*

112. *See id.*

113. Coffee, *supra* note 8, at 462 (noting that the CFTC still could authorize futures on securities indexes); *see also infra* notes 120–22 and accompanying text (discussing the 1984 compromise between the CFTC and the SEC regarding limits on the CFTC's ability to trade stock index futures).

114. *See Board of Trade v. SEC*, 677 F.2d 1137, 1142 n.8 (7th Cir.) (stating that "[w]e cannot allow the CFTC and SEC to reapportion their jurisdictions in the face of a clear, contrary statutory mandate"), *vacated as moot*, 459 U.S. 1026 (1982); Coffee, *supra* note 8, at 462.

115. Coffee, *supra* note 8, at 462. In 1982, the CEA was amended to reflect the Accord. Horwitz & Markham, *supra* note 109, at 76. The Accord provides for the following:

(i) . . . [T]he [CFTC] shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities . . . including any group or index of such securities, or any interest therein or based on the value thereof.

. . . .

(ii) . . . [T]he Commission shall have exclusive jurisdiction with respect to accounts . . . for future delivery of a group or index of securities . . . .

(iv)(I) The Commission shall consult with the Securities and Exchange Commission with respect to any application . . . for designation as a contract market with respect to any contract of sale (or option on such contract) for future delivery of a group or index of securities.

7 U.S.C. § 2a (1994).

116. *See infra* notes 120–22 and accompanying text (discussing the 1984 agreement between the CFTC and the SEC); *infra* Part II.D (discussing developments which occurred after the stock market crash of 1987).

options are but one among many financial instruments having attributes of both securities and futures contracts.<sup>117</sup>

The Accord also was not the final word on stock index futures contracts. Under the Accord, the CFTC was restricted in the types or composition of the stock indexes "on which it could permit futures contracts to be traded."<sup>118</sup> The Accord, however, contained the "Substantial Segment Criterion," which prevented trading in certain subindexes "that [amounted] to only a thinly-disguised 'surrogate' for trading in individual stocks."<sup>119</sup>

Given the disparate interests of the two agencies, conflict was inevitable. In 1984, the CFTC approved a proposal for a subindex futures contract of the CME.<sup>120</sup> Avoiding further litigation, the two agencies reached a compromise, agreeing to a set of five minimum criteria for "applications by boards of trade [i.e. futures exchanges] for designation as a contract market for futures contracts on a non-diversified stock index."<sup>121</sup> The criteria are: (1) an index must contain at least twenty-five domestic securities; (2) the aggregate capitalization of the securities must be at least seventy-five billion dollars; (3) no single security can represent more than twenty-five percent of the index's aggregate capitalization; (4) no three securities can account for more than forty-five percent of the index; and (5) special rules must be applied to link weights to firm capitalization for noncapitalization weighted indexes.<sup>122</sup>

While the agencies may have thought that this compromise would avert potentially extensive litigation, the compromise criteria were not well-received by the CFTC's clientele. Following the agreement, the CBOT sued the two agencies over both

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117. *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 544 (7th Cir. 1989). Given the hybrid nature of options, the 1980-1982 dispute over options could be played out with every new financial instrument. *Id.*

118. Coffee, *supra* note 8, at 463.

119. *Id.* The CFTC amendment to the CEA states that "[s]uch group or index of securities shall be . . . a widely published measure of, and shall reflect, the market for all publicly traded equity or debt securities, or a substantial segment thereof." 7 U.S.C. § 2a(ii)(III) (1994) (emphasis added).

120. Edward J. Kane, *Regulatory Structure in Futures Markets: Jurisdictional Competition Between the SEC, the CFTC and Other Agencies*, 4 J. FUTURES MARKETS 267, 375 (1984).

121. *Id.*

122. *Id.* at 379-80; see Designation Criteria for Futures Contracts and Options on Futures Contracts Involving Non-Diversified Stock Indexes of Domestic Issues, 49 Fed. Reg. 2884 (1984); Coffee, *supra* note 8, at 464. Noting the cost in terms of lost competition abroad, Professor Coffee has stated that "[f]oreign futures exchanges have begun to trade futures on individual stocks, thus underscoring the cost of the SEC's 'substantial segment' criterion." *Id.* at 466.

the substance of the new agreement and the informal administrative procedures the agencies followed in promulgating the agreement.<sup>123</sup>

Thus, the Accord and the 1984 compromise, while representing positive steps in cooperation between the two agencies, were the result of a jurisdictional dispute that promises to continue unless more substantive action is taken. The Accord is problematic because although it put an end to the costly delay in permitting the trading of GNMA options, it also prohibited any futures trading on individual equities. This action did not eliminate such trading but merely moved it overseas. Furthermore, the Accord, while attempting to resolve the issues surrounding stock index futures, failed to do so to the satisfaction of the SEC. This failure has further restricted financial innovation because it has resulted in questionable interagency collusion, such as the 1984 compromise, and threats of more litigation by the regulatory clients themselves.

#### *D. The 1987 Crash, the Index Participation Dispute, and the Future*

In the wake of the 1987 Crash, the SEC again petitioned Congress to obtain greater regulatory authority over financial markets, noting that the connections between all financial markets effectively create a single market requiring more concentrated regulatory authority.<sup>124</sup>

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123. Kane, *supra* note 120, at 375. The CFTC's clientele were upset because, they argued, "these criteria surrender stock index opportunities for futures exchanges that had been reserved in the 1982 legislation . . . . In effect, the CFTC's regulatory clientele is asking the courts to force the agency to protect its statutory turf." *Id.* For a more detailed description of the agency's battles over stock index futures, see *id.* at 377-80.

124. Coffee, *supra* note 8, at 460-63. SEC Chairman David S. Ruder asked Congress to "transform the [SEC] into a regulatory superpower by vastly expanding its authority over the nation's stock, options and futures markets" and to transfer from the CFTC to the SEC authority to regulate stock index futures contracts. See David A. Vise, *Chairman Urges Expanded SEC Role in Markets*, WASH. POST, Feb. 4, 1988, at A1. Ruder also voiced the commonly accepted opinion that the securities and futures markets really constitute a single market and stated that it was "inappropriate for the CFTC to have regulatory authority over stock index futures" due to their impact on the securities markets. *Id.* For a discussion of various exchange proposals in the aftermath of the 1987 Crash, see *supra* note 51.

In 1989, another jurisdictional dispute brought the issue of allocation of regulatory authority before the judges of the Seventh Circuit, this time in a debate over which agency should regulate index participations (IPs).<sup>125</sup> *Chicago Mercantile Exchange v. SEC*<sup>126</sup> involved requests to trade IPs by the Philadelphia Stock Exchange, the American Stock Exchange (AMEX), and the CBOE, all of which the SEC had granted in April 1989.<sup>127</sup>

The court recognized several of the past resolutions concerning financial instruments with mixed security-futures attributes,<sup>128</sup> and noted that the problem was that "the statute [7 U.S.C. § 2] does not define either 'contracts . . . for future delivery' or 'option.'"<sup>129</sup> The court stated that the subject would continue to plague the courts "[u]nless Congress changes the allocation of jurisdiction between the agencies."<sup>130</sup> After a lengthy review of the various factors comprising a "security" and a "futures contract," the court concluded that "[t]he only thing of which we are sure is that an IP is not an option on a security."<sup>131</sup> The court noted that the case was merely an analog to the 1982 litigation concerning GNMA options and apparently was frustrated by the agencies' or Congress' inability to solve these persistent jurisdictional disputes.<sup>132</sup>

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125. For a definition of "index participation," see *supra* note 75.

126. 883 F.2d 537 (7th Cir. 1989).

127. *Id.* at 540-41.

128. *Id.* at 539. If an instrument is both a security and a futures contract, the CFTC has jurisdiction, whereas if the instrument is both a futures contract and an option on a security, the SEC has jurisdiction. *Id.*

129. *Id.* The opinion also indicated that the courts may not be the proper forum for solving such interagency jurisdictional disputes, noting that this case is merely another example of the circumstances giving rise to the 1982 litigation and the subsequent Accord, which would be played out in the future, as in this case, about each new financial instrument. See *id.* at 544. The court concluded that "[o]nly merger of the agencies or functional separation in the statute can avoid continual conflict." *Id.*

130. *Id.* at 545.

131. *Id.* at 546. The court noted the agencies' own confusion over the proper jurisdictional domain, stating:

When we asked the SEC's Solicitor during oral argument whether the CFTC could have granted such an [IP] application [before the SEC], he said yes . . . . When we persisted with the question whether the CFTC could grant the identical application, filed by the CBOT and CME in 1989 (after the SEC's decision), the Solicitor said no . . . . Yet this principle of first-come-first-served finds no support in the '34 Act or the CEA. Either IPs are futures contracts or they aren't.

*Id.* at 548.

132. See *id.* at 549-50.



More recently, the question of whether particular hybrid instruments in the oil industry are forward or futures contracts was the subject of a judicial ruling in *Transnor Ltd. v. BP North America Petroleum*.<sup>133</sup> The court held in favor of CFTC jurisdiction, finding that 15-day Brent transactions<sup>134</sup> constituted futures contracts.<sup>135</sup> In response to the numerous inquiries that the CFTC received in response to this holding, former CFTC Chairwoman Wendy Gramm announced the agency's disagreement with the court's finding, stating that "the Commission's Off-Exchange Staff Task Force has taken the view that the 15-day Brent contracts are not within the Commission's jurisdiction over futures contracts because they are within the category of transactions covered by the so-called forward contract exclusion of the Commodity Exchange Act."<sup>136</sup>

Cases such as *Chicago Mercantile* and *Transnor* fail to recognize the severely disruptive aftershocks in the affected markets and thus exemplify the inability of the judicial system to interpret and categorize the jurisdiction of existing and developing hybrid instruments. Furthermore, placing the categorization of

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133. 738 F. Supp. 1472 (S.D.N.Y. 1990). In *Transnor*, the plaintiff purchased two cargos of North Sea Crude Oil in December 1985 for delivery in March 1986. *Id.* at 1474. The plaintiff refused to take delivery of the oil because the oil's value had declined subsequent to entering into the contract. *Id.*

134. A "15-day Brent" contract "refers to cargoes which were sold for delivery during a specific forward month, on 15-days notice to the buyer of the date on which the cargo should be lifted." *Id.* at 1485-86. The court struggled with the issue of whether a contract for purchase of oil for delivery from the Brent Oil fields in the North Sea was a forward contract, which is left undefined under the CEA, or a futures contract subject to CFTC jurisdiction. *Id.* at 1475, 1489. The particular contract in question was "a hybrid of a futures contract and a forward contract." *Id.* at 1489. Relying on prior judicial determinations that forward contracts are contracts "in which the commercial parties intend and can accommodate physical transfer of the actual commodity," and determining that no such intent existed between these parties, the court held that the contract involved was a futures contract. *Id.* at 1489, 1493. Thomas Russo has stated that "[i]f you read the [*Chicago Mercantile*] decision together with the *Transnor* decision, it is very hard to imagine something out there that isn't the futures contract." *Merger Hearings, supra* note 58, at 124. Russo criticized the holding, stating that "if the definition of a futures contract is so broad as to include any contract where there is any element of futurity, and the forward contract exclusion from the CEA is so narrow, then many markets that exist today are illegal." *Id.* at 131.

135. 738 F. Supp. at 1493.

136. *Merger Hearings, supra* note 58, at 237. Although *Transnor* does not directly address the jurisdictional overlap between the SEC and the CFTC, it nonetheless reveals a significant definitional shortfall of the CEA and represents a broadening of CFTC jurisdiction through judicial action, a broadening which the CFTC itself argued was unwarranted. *Id.* Such a broad definition of a "futures contract" could result in further SEC/CFTC jurisdictional conflict as the agencies, the courts, and the markets struggle to adapt the dual and incomplete regulatory system to a wide range of hybrid financial instruments.

new hybrid instruments in the hands of the courts leaves the agencies to fix the detrimental market effects,<sup>137</sup> and, as shown in *Transnor*, results in a disjuncture between the views of the agency and the judiciary.

The main question posed by *Transnor* is whether the courts provide an appropriate forum for deciding issues of such magnitude, given the frustration of the courts in asserting responsibility which they view as properly residing elsewhere.<sup>138</sup> Such costly and protracted litigation raises other serious issues, such as negative impact on financial innovation,<sup>139</sup> loss of market share to foreign markets,<sup>140</sup> and inept results.<sup>141</sup> One commentator has stated that the CFTC's success in impeding the introduction of IPs through the SEC and the SEC's victory in barring non-diversified stock index futures are "dubious milestones in the history of agency warfare. In the end, the capital markets would be freer . . . if both agencies had lost."<sup>142</sup> As the court noted in *Chicago Mercantile*, a merger of the two agencies would solve the jurisdictional battles.

Indeed, several new, potentially explosive financial instruments may soon create additional jurisdictional battles between the two agencies. While the SEC and the CFTC have, after two years, resolved the immediate threat to the agencies' fragile

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137. Thomas Russo noted the ambiguity of the phrase "contracts for future delivery" and the resulting potential problems: "[First,] it enables an exchange through litigation to prevent any new product from happening. The second thing it does . . . as it is doing with the present oil market as we speak, it gets to disrupt existing markets." *Id.* at 124; *see also id.* at 258 (SEC Chairman Richard Breeden noting that current law permits a futures exchange to sue repeatedly to block new products, thereby further hampering competition and stifling innovation).

138. *See supra* note 99.

139. Professor Coffee, summing up the jurisdictional battles between 1980 and 1989, stated that,

[o]n one hand, the CFTC blocked the index participations that both the CBOE and the Philadelphia Stock Exchange sought to trade, and, on the other, the SEC severely restricted non-diversified stock index futures. Neither side stands out as the villain or the hero in this story; rather, each side generated a regulatory penumbra around its core statutory jurisdiction within which it was able to bar firms regulated by the other from entering.

Coffee, *supra* note 8, at 465-66.

140. For example, before 1989, when the Seventh Circuit decided the IP issue in *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537 (7th Cir. 1989), the Toronto Stock Exchange was successfully trading an IP product. Philip M. Johnson, *Reflections on the CFTC/SEC Jurisdictional Dispute*, in *REGULATING INTERNATIONAL FINANCIAL MARKETS: ISSUES AND POLICIES* 145 (Franklin R. Edwards & Hugh T. Patrick eds., 1992).

141. *See supra* notes 96-106 and accompanying text.

142. Coffee, *supra* note 8, at 481.

regulatory equilibrium posed by the Buy-write Option Unitary Derivatives (BOUNDS) instrument,<sup>143</sup> more threats are yet to come. According to one commentator, "[t]he dividing line between SEC and CFTC jurisdiction continues to blur, and some think it will fade completely."<sup>144</sup> The BOUNDS instrument, containing elements of both a security and a futures contract, "highlights the problems inherent in adapting an innovative hybrid product to a creaking regulatory structure."<sup>145</sup> Such problems cannot be remedied until Congress recognizes the tremendous practical and theoretical advantages of a single regulatory agency governing both the securities and futures markets.

### III. THEORETICAL CONSEQUENCES OF OVERLAP AND THE CURRENT POLITICAL ENVIRONMENT

Just as the interagency jurisdictional conflict has resulted in several costly and inefficient battles, there are more fundamental, substantive problems inherent in a bifurcated regulatory system. These problems cannot be solved merely by tampering with the statutory language or by encouraging greater communication between the two agencies.

#### A. Theoretical Consequences

Supporters of the current dual regulatory system argue that the presence of two agencies supports a favorable competitive environment, results in less costly and imposing regulation,

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143. *CBOE to Launch Index Options on Real Estate and Global Telecommunications Stocks*, SEC. WEEK, Feb. 20, 1995, at 6 (noting that the CBOE has filed with the SEC to trade BOUNDS). A BOUNDS instrument operates as the equivalent of "simultaneously writing a call option and purchasing the underlying stock." *Id.* For more than two years, the CFTC and the SEC have debated the jurisdictional authority over this derivative product, with the CFTC recently deciding that BOUNDS are not futures contracts. Hal Lux, *New Derivative Product Rises from a Regulatory Graveyard: Two Years After Design, 'BOUNDS' May Start Trading*, INVESTMENT DEALERS' DIG., Nov. 14, 1994, at 4, 4. Exchanges now will seek permission to trade BOUNDS from the SEC. *Id.*

144. Hal Lux, *Forgotten but Not Gone: Now Into Its Second Year Without a Leader, the CFTC Risks Becoming Irrelevant*, INVESTMENT DEALER'S DIG., Jan. 31, 1993, at 16, 19.

145. See Lux, *supra* note 143, at 9.

and encourages financial innovation. According to Professor Coffee, the theory of regulatory competition<sup>146</sup> rests on three pillars: (1) under certain assumptions, interjurisdictional competition produces a Pareto-optimal outcome;<sup>147</sup> (2) regulators, like corporate managers, seek to maximize the "value" of their agencies;<sup>148</sup> and (3) regulators represent their market clientele.<sup>149</sup> However, as Professor Coffee notes, the regulatory competition theory breaks down when used to support the SEC-CFTC dual regulatory system.<sup>150</sup>

Among the several theoretical problems with the current dual regulatory system are that it undermines public confidence in our system of financial regulation,<sup>151</sup> subjects the CFTC to agency capture,<sup>152</sup> results in collusive, oligopolistic conditions,<sup>153</sup> and produces a "race-to-the-bottom," or "forum shopping" for the markets subject to the least stringent regulation.<sup>154</sup>

First, the dual regulatory system has a negative impact on the public's perception of market regulation. Former SEC Chairman Philip Johnson has suggested that the movement to

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146. See Coffee, *supra* note 8, at 453-57. For more discussion of regulatory competition, see Steven Kelman, *The Ethics of Regulatory Competition*, REG., May-June 1982, at 39, 39-44 (discussing environmental and other federal regulations and the "race-to-the-bottom" argument of state and federal regulation); see also Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983) (discussing the coexistence of federal and state regulatory systems in the context of antitrust regulation).

147. Coffee, *supra* note 8, at 453 (citing Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (discussing national versus local methods of allocating public expenditures and comparing public and private markets)). "Pareto-optimality" generally refers to a condition in which no person can be made better off without making another person worse off; thus a "Pareto superior" alternative is one which leaves at least one person better off and "no one worse off." DAVID W. BARNES & LYNN A. STOUT, *CASES AND MATERIALS ON LAW AND ECONOMICS* 11-12 (1992). Professor Coffee discounts this regulatory competition pillar, however, arguing in part that its assumptions of no externalities and single variable (least costly) analysis are unrealistic. Coffee, *supra* note 8, at 453-54.

148. Coffee, *supra* note 8, at 454. Professor Coffee dismisses this regulatory competition pillar on the ground that it ignores principal/agent problems. *Id.*

149. *Id.* Professor Coffee argues that this third pillar of the regulatory competition model may lead to agency "capture." *Id.*

150. *Id.* at 453-57.

151. See Johnson, *supra* note 140, at 147-48; KATZENBACH, *supra* note 12, at 18.

152. Coffee, *supra* note 8, at 474-75; see also Louis J. Sirico, Jr., *Agencies in Conflict: Overlapping Agencies and the Legitimacy of the Administrative Process*, 33 VAND. L. REV. 101, 109-12 (1980) (discussing generally capture and administrative legitimacy).

153. See Coffee, *supra* note 8, at 471-72.

154. See *id.* at 475-77; Williams Statement, *supra* note 47, at 202.

merge the two agencies is due in part to the public antagonism toward futures exchanges and the many scandals in the futures markets in the early years of the CFTC.<sup>155</sup> Thus, the existence of two regulatory agencies overseeing essentially a single market may undermine public confidence in market safety and increase the possibility of certain financial instruments slipping between the cracks and avoiding regulation.<sup>156</sup>

While the public perception argument really only supports a transformation, or "tightening," of regulatory oversight, the agency capture argument lends stronger support to the idea of merging the SEC and the CFTC. The CFTC, newer and one-fourth the size of the SEC,<sup>157</sup> is more prone to agency capture than the SEC.<sup>158</sup> A member of the SEC's senior staff has stated that "the CFTC is [the futures markets'] regulator as well as the chamber of commerce and the promoter for the futures industry."<sup>159</sup> Agency capture happens when smaller groups prevail at the expense of larger, less organized groups.<sup>160</sup> Indeed, the CFTC's frequent demonstrations of its political muscle in many reauthorization hearings since 1974 have revealed the desire of the CFTC and the futures markets it regulates to remain independent of the SEC.<sup>161</sup>

Despite the significant costs of the SEC-CFTC jurisdictional conflict, Mary Schapiro, the Chairwoman of the CFTC, would likely support the cause of the "politically forceful Chicago futures markets" in actively resisting another round of merger or consolidation proposals.<sup>162</sup> Given that the smaller the agency, the more likely it is that capture will occur, a larger agency,

155. Johnson, *supra* note 140, at 147-48.

156. See Breeden, *supra* note 60, at 316.

157. The SEC, however, has more than three times the budget of the CFTC. Compare 15 U.S.C. § 78kk (Supp. V 1993) (SEC congressional authorization exceeded \$178 million in fiscal year (FY) 1990 and \$212 million in FY 1991) with 7 U.S.C. § 16(d) (Supp. V 1993) (CFTC authorization was exactly \$53 million in FY 1993 and \$60 million in FY 1994). See also Taylor, *supra* note 52, at C1 (quoting the statement by CFTC Chairwoman Schapiro, in response to the Leach/Wyden merger bill, that "[t]here aren't any significant savings to be achieved by merging the agencies . . . . We're already a small agency with . . . little administrative staff").

158. "Agency capture" occurs when a rent-seeking group, i.e., self-interested members of a particular constituency, tries to influence governmental processes to obtain gainful outcomes for the group. Coffee, *supra* note 8, at 35.

159. See KHADEMIAN, *supra* note 15, at 155.

160. Coffee, *supra* note 8, at 473-74.

161. See, e.g., Kane, *supra* note 120, at 375.

162. Taylor, *supra* note 52, at C1.

such as the SEC or a merged SEC/CFTC agency with a broader jurisdictional scope, could more effectively prevent capture of the CFTC.

The theory of regulatory competition also fails to recognize that the existence of two regulatory agencies may result not in a competitive market but rather in an environment more closely resembling an oligopolistic market where the two agencies can easily collude and "cooperate" to achieve, as Professor Coffee states, "the quiet life."<sup>163</sup> Given that the SEC and the CFTC are the only two agencies in the field, they can collude very easily and lawfully.<sup>164</sup> In fact, when the agencies reach an agreement, others applaud their cooperation for being "statesmanlike," and both the courts and Congress tend to adopt the agencies' agreement,<sup>165</sup> rather than subject the agreement to the scrutiny of antitrust laws that govern collusive activities in the private realm.<sup>166</sup>

This state of oligopolistic "competition," which really produces no competition at all, compounds the negative impact of a dual regulatory system, because markets and consumers are subjected to the increased costs associated with the SEC-CFTC jurisdictional disputes<sup>167</sup> and then further burdened by the accommodating solutions achieved between the two agencies.<sup>168</sup> A competitive environment cannot be achieved in a regulatory system comprised of only two agencies. Merger of the agencies into a single regulatory body, while effectively creating a monopoly over financial regulation, would not produce the negative impact and deadweight losses associated with monopolies in

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163. Coffee, *supra* note 8, at 472.

164. See, e.g., *supra* Part II.C (discussing the Shad/Johnson Accord of 1982, later adopted by Congress, in which the two agencies mutually agreed to settle a number of interagency jurisdictional disputes).

165. Coffee, *supra* note 8, at 471. Professor Coffee further notes:

In reality, the actual environment in which administrative agencies function resembles not the atomistic market of perfect competition but a heavily concentrated industry in which there are usually no more than two dominant firms. In such an environment, absent strict enforcement, oligopoly is highly likely in the private sector, and even more predictable in the public sector, where there is no legal barrier to such "cooperation."

*Id.* at 472.

166. See Sherman Act, 15 U.S.C. §§ 1-7 (1994).

167. See *supra* notes 69-76 and accompanying text.

168. See *supra* Part II.C-D.

the private sector, because the benefits of a single regulatory monopoly accrues to the public. The benefits may include the elimination of costly court battles attempting to define inter-agency jurisdictional boundaries, a corresponding increase in financial innovation as new instruments either are permitted to enter or are banned from the market more rapidly, and a single regulatory voice representing American markets in the global environment.<sup>169</sup>

Finally, another problem of a dual regulatory environment is the "race-to-the-bottom" scenario, in which interagency competition, to the extent that it does exist, results in sub-optimal regulation as agencies seek to attract clients by lowering regulatory standards.<sup>170</sup> Under this scenario, when one market or regulator has achieved an "optimal" level of regulation, its competitor will lower its regulatory standards, thereby attracting the mobile population while externalizing the harms of the sub-optimal regulation onto the other market regulator.<sup>171</sup> In response, the first regulator will lower its own standards, and a downward spiral ensues.<sup>172</sup>

In the context of the SEC and the CFTC, the breakdown over clear interagency jurisdictional boundaries renders the financial markets vulnerable to intentional abuses of the regulatory gaps. A market actor "presented with a choice between either of two functionally similar markets . . . will seek the market representing the 'lowest common denominator' of regulation."<sup>173</sup> Thus, under the current regulatory regime, there is the potential for "forum shopping" and a sub-optimal level of regulation.<sup>174</sup> To the extent that the race-to-the-bottom scenario creates inefficient and sub-optimal regulation in financial

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169. Although a single regulatory authority might better oversee the financial markets, avoid or limit agency capture, and enhance the efficient workings of the market, such gains initially could be offset by internal wars between SEC and former CFTC personnel and by the practical impact of merging two separate bureaucratic cultures.

170. See Coffee, *supra* note 8, at 475.

171. See *id.* at 476-77.

172. *Id.*

173. Williams Statement, *supra* note 47, at 190.

174. For a further discussion of the "race-to-the-bottom" scenario, see Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (commenting that "any individual state . . . may rationally decline unilaterally to adopt high environmental standards that entail substantial costs . . . for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards").

markets, consolidation of regulatory authority into a single agency could solve the problem.<sup>175</sup>

One example of the race-to-the-bottom scenario in the SEC-CFTC jurisdictional conflict is the CFTC's unwillingness, even since the 1987 Crash, to increase margin requirements to bring them in-line with the requirements that the Federal Reserve currently imposes on securities markets.<sup>176</sup> Differing margin requirements in the securities and futures markets arguably undermine the safety and stability of the markets.<sup>177</sup> With the ever increasing number of hybrid instruments in the financial markets, the two agencies will undoubtedly continue to assert conflicting jurisdiction over such instruments, thereby encouraging this destructive scenario.

### *B. Current Political Environment*

The new Republican majority could have a substantial impact in favor of the consolidation of regulatory authority in a single agency. Recently, congressional oversight committees have posed an obstacle to any change in the financial regulatory structure, because such committees are extremely reluctant to relinquish any authority over the agencies that they oversee.<sup>178</sup> The House Agriculture Committee has refused to

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175. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992).

176. See Gene Ramos, *SEC, CFTC Chiefs Differ on Bill Seeking to Merge Two Agencies*, REUTER BUS. REP., Feb. 1, 1995, available in LEXIS, Nexis Library, BUSRPT File (discussing the recent Leach/Wyden bill and its proposal to consolidate the margin-setting function into a single regulatory agency).

177. See *Merger Hearings*, supra note 58, at 255. Former SEC Chairman Richard Breeden has stated that

[a] low margin encourages speculative trading . . . creat[ing] the illusion of liquidity in the stock index futures markets. When market conditions become extreme, however, these highly leveraged traders withdraw from the market and the mirage of liquidity disappears almost instantly. When that happens, prices fall rapidly in the futures markets. Those price declines are then transmitted to the stock market through index arbitrage.

*Id.* at 253.

178. See Coffee, supra note 8, at 447-48. The House and Senate Agriculture Committees have jurisdiction over the CFTC, while the Senate Banking Committee and the House Energy and Commerce Committee oversee the SEC. See Nathaniel C. Nash, *The Battle Over Regulation of the Futures Markets*, N.Y. TIMES, Mar. 18, 1990, at C12.



give up its power over the CFTC, and the commodity futures industry has been opposed to SEC oversight because the industry believes that the SEC is insensitive to its needs.<sup>179</sup> Republicans, however, generally have been strong proponents of some type of merger or regulatory reform proposal,<sup>180</sup> and their congressional majority could significantly aid an interagency merger. For example, in the first weeks of the new congressional session, Representatives Jim Leach (R-IA) and Ron Wyden (D-OR) introduced a bill, HR 718, that would effectively merge the SEC and the CFTC into a single regulatory agency to be called the "Markets and Trading Commission."<sup>181</sup>

Furthermore, support from key Democrats also may aid an interagency merger. Dan Glickman, a former Democratic member of the House of Representatives from Kansas who served on the House Agricultural Committee and is currently the Secretary of Agriculture,<sup>182</sup> has previously introduced legislation to merge the SEC and the CFTC into a single regulatory agency.<sup>183</sup> The new Treasury Secretary, Robert Rubin, also has voiced support for a merger proposal.<sup>184</sup>

179. Markham & Stephanz, *supra* note 5, at 2030; see also Taylor, *supra* note 52, at C1 (noting that the Chicago futures markets have vowed to strike down legislative attempts to merge the agencies).

180. The Bush Administration initially favored a merger proposal, or at least favored granting the SEC more authority over certain instruments based on securities. See *White House to Propose SEC Receive Jurisdiction Over Stock Index Futures*, 22 Sec. Reg. & L. Rep. (BNA) No. 19, at 731 (May 11, 1990); see generally SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, *THE MARKET REFORM ACT OF 1990*, S. REP. NO. 300, 101ST CONG., 2D SESS. (1990).

181. See Angela Droite, *GAO Official Urges Careful Weighing of Costs in Proposed CFTC/SEC Merger*, 27 Sec. Reg. & L. Rep. (BNA) No. 18, at 673-74 (May 5, 1995). For further discussion of the Leach/Wyden legislative merger proposal, see Cindy Skrzyzcki, *A Super-Agency for Markets; The SEC and the CFTC: Match With a Reluctant Bride*, WASH. POST, Feb. 3, 1995, at F1 (noting that the Leach/Wyden bill is being sent to the House Banking Committee, of which Representative Leach is a member, which "will make it possible to showcase the idea"). The CFTC, however, maintains its traditional position that any merger proposal is unnecessary, with Chairwoman Mary Schapiro going so far as to state that "[y]ou just couldn't find two agencies working more efficiently." *Id.* at F2.

182. *Agriculture Chief Confirmed*, CHI. TRIB., Mar. 31, 1995, at B1.

183. In 1991, Glickman introduced HR 4477, the predecessor to HR 718, which would have merged the SEC and the CFTC. H.R. 4477, 102d Cong., 2d Sess. (1991); see also H.R. 718, 104th Cong., 2d Sess. (1995). Glickman has called the current regulatory system "primitive" and "ill-equipped to deal with the evolution of investment products." *Glickman Calls for New Agency to Regulate Futures and Securities*, 24 Sec. Reg. & L. Rep. (BNA) No. 31, at 1162-63 (July 31, 1992). Glickman, testifying in favor of HR 4477 before the House Subcommittee on Telecommunications and Finance, stated that the bifurcated structure of American financial market regulation "stifles innovation, it drains resources into turf battles; it confuses overseas investors; and it leaves us ill-equipped for the pressures and stains [sic] our financial system is likely to face in the future." *Merger Hearings*, *supra* note 58, at 34.

184. *Securities and Futures-Related Bills to Make Their Debut in First Week of Congress*, SEC. WEEK, Jan. 2, 1995, at 1, 2.

The possibility of regulatory reform of the financial markets does seem to exist, perhaps for the first time since the creation of the CFTC. In early 1995, members of both parties in Congress introduced various pieces of legislation aimed at reforming the financial markets in general and the securities and futures markets in particular.<sup>185</sup> Glickman and Wyden together recently co-sponsored several bills aimed at merging the two agencies, demonstrating potential bipartisan support for such a measure.<sup>186</sup>

In the past, biennial reauthorization hearings have provided a forum for raising jurisdictional issues and arguing for increased SEC regulatory authority. Such hearings were scheduled to take place in May 1994,<sup>187</sup> but have been delayed indefinitely.<sup>188</sup> Given both that the Senate Agriculture Committee unanimously approved a bill on February 1, 1995, to renew the CFTC for five years, its longest reauthorization period ever,<sup>189</sup> and that no reauthorization hearings are presently scheduled, the Leach/Wyden bill and other legislative proposals may provide a more expedient route to change.

## CONCLUSION

The current system of financial regulation of the securities and futures markets is untenable in a world of complex financial instruments and global markets. New instruments which defy categorical definition are frequently created, and the current jurisdictional quagmire will continue to stifle

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185. *Id.* at 1-2. The article further notes the favorable political climate for a merger, which includes a Republican Congress, the ascendancy of Dan Glickman to the cabinet position of Agriculture Secretary, and support for a merger proposal from SEC Chairman Arthur Levitt. *Id.* at 2.

186. *Glickman, Wyden Introduce Bill to Consolidate SEC, CFTC Regulation*, DAILY REP. FOR EXECs. (BNA) No. 124, at A-15 (June 30, 1993).

187. *CFTC Reauthorization Hearings Expected to Begin Later This Month; No Surprises Anticipated*, SEC. WEEK, May 2, 1994, at 6, 6-7. Controversial issues, such as jurisdiction over certain financial products and fields, were to be left out of the reauthorization hearings. *Id.* at 6. The article cites the 1992 reauthorization hearings, in which such issues delayed final reauthorization for nearly two years and required two sessions of Congress to do so, as the reason for such omission. *Id.*

188. *Futures, Options: Senate Panel OKs Reauthorizing CFTC*, CHI. TRIB., Feb. 2, 1995, at B3 (noting that there are no hearings planned in the House on the issue of reauthorizing the agency).

189. *Id.*

innovation and increase costs as the agencies attempt but fail to resolve jurisdictional problems that merit a more substantive solution. Congress' past attempts to alleviate the jurisdictional disputes, through amendments to the CEA and by requiring the agencies to maintain communications and cooperate, have failed to solve the fundamental problems posed by hybrid instruments which cannot be classified as either "securities" or "futures contracts."

In addition, the courts are uncomfortable in their role as inter-agency referees and consider themselves ill-suited for resolving such complex financial disputes. Indeed, on the issue of jurisdictional authority over securities options, the Shad/Johnson Accord between the two agencies resulted in the exact opposite conclusion of the Court of Appeals for the Seventh Circuit on the same issue. Complex financial issues should not receive such arbitrary treatment. The solutions to the interagency jurisdictional dispute should not be left to a well-meaning but admittedly underqualified judiciary.

The problems which have plagued the agencies in the past promise to repeat themselves in an unending cycle. For the benefit of domestic financial markets and in the interest of the general public, the SEC and the CFTC should merge into a single regulatory agency, thereby eliminating costly jurisdictional disputes and restoring the international competitiveness of domestic markets.