

ADMINISTRATION STATEMENTS REGARDING THE "EXCLUSIVITY CLAUSE"

Testimony of R.R. Glauber, Under Secretary of the Department of Treasury for Finance, before the Senate Committee on Agriculture, Nutrition, and Forestry, February 7, 1991:

"[R]egulatory fragmentation also is creating a serious impediment to innovation."

"[J]urisdictional squabbles . . . can strangle innovation. This is precisely what happened to Index Participation Certificates, which litigation, prompted by the 'exclusivity clause' of the Commodity Exchange Act, has prevented from trading in the United States."

"[T]he [Administration] bill modifies the 'exclusivity clause' of the Commodity Exchange Act to end costly anticompetitive legal disputes over what constitutes a 'futures contract.' Hybrid equity securities like Index Participation Certificates could trade in both the futures markets (under the framework of the Commodity Exchange Act) and the securities markets (under the securities laws). Institutional swaps would similarly be excepted from exclusive CFTC jurisdiction under limited circumstances. The bill would also allow the CFTC to exempt other financial instruments under certain circumstances."

Testimony of N.F. Brady, Secretary of the Department of the Treasury, before the Senate Committee on Banking, Housing, and Urban Affairs, July 12, 1990:

"[T]he [Administration] bill modifies the 'exclusivity' clause of the Commodity Exchange Act to end costly and anticompetitive legal disputes over what constitutes a futures contract."

"Apart from major market disruptions and intermarket enforcement, regulatory fragmentation also is creating a serious impediment to innovation. For example, . . . jurisdictional litigation has prevented index participation certificates from trading in the United States."

"[R]egulatory competition can also cause jurisdictional squabbles that can strangle innovation. This is precisely what happened to Index Participation Certificates, which litigation, prompted by the 'exclusivity clause' of the Commodity Exchange Act, has prevented from trading in the United States."

Testimony of Under Secretary Glauber before the Subcommittee on Telecommunications and Finance of House Committee on Energy and Commerce, May 24, 1990:

"[A] failure to [pass the Administration bill] will impede

innovation; drive new financial instruments to overseas markets; and thwart enforcement of intermarket abuses."

"[R]egulatory fragmentation is now creating a serious impediment to innovation."

"[R]egulatory competition also begets jurisdictional squabbles, which can strangle innovation. New products are not merely stifled; they quickly move to overseas markets."

"This is particularly true with respect to the so-called 'exclusivity' clause of the Commodity Exchange Act. As a result of regulatory disputes, the courts currently interpret this provision to require that any financial instrument with any degree of 'futures' must be traded on a futures exchange. But certain of the new 'hybrid' products are simply not amenable to trading in this manner. The result has been protracted litigation over what constitutes a 'future'; an inability to trade in the U.S. markets most suited to the product; and the shifting of business to more hospitable overseas markets. This is precisely what happened to Index Participation Certificates, which now trade in Toronto rather than the United States."

"The proposal the Administration will submit will . . . [m]odify the 'exclusivity clause' of the Commodity Exchange Act in order to end pointless litigation and remove barriers to innovation that are driving new products to foreign markets"

Letter dated May 8, 1990 from Secretary Brady to Senator Leahy:

"[T]he 'exclusivity' clause has stifled innovation by preventing the development of new 'hybrid' products that are simply not amenable to trading on a futures exchange. The result has been protracted litigation over what constitutes a 'future'; an inability to trade in U.S. markets; and the shifting of innovative products to foreign markets. This is precisely what happened to Index Participation Certificates, which now trade in Toronto rather than in the United States."

Testimony of Under Secretary Glauber before the Senate Committee on Agriculture, Nutrition and Forestry, May 8, 1990:

"Recent cases involving cash index participation contracts . . . and 15-day Brent oil contracts . . . raise serious concerns about the potential for exposure by participants in over-the-counter trading of products having an element of futures."

"[T]he CFTC in the past has tried to interpret the Treasury Amendment more narrowly than the words would permit, i.e., by reading an institutional market limitation into the scope of the exclusion."

"We are aware of the benefits of the exclusivity clause. What we would recommend is that it not be eliminated, but modified to retain some of those benefits but at the same time allow competition to develop between financial instruments on different exchanges."

"What we really would propose is that there be open competition between exchanges on instruments, that if two exchanges want to trade similar instruments, that they get to trade them on each exchange under their particular trading rules, and that let the market judge what is the most effective venue for that instrument."

"What we would propose in the legislation is to relieve the exclusivity clause of [the requirement that futures trade on a board of trade] so that . . . these instruments could trade either on a board of trade or on a stock exchange, trade under their particular trading rules and allow competition."

"The decision was made 8 years ago to push [stock index futures] one way, toward futures. I think we would likely draw the line on the other side today if we were doing it again, knowing what we know now. And indeed faced with the information that they now have, other countries, when they designed their regulatory structures, have chosen to push stock-index futures toward the regulator that does stocks."

Testimony of Under Secretary Glauber before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs of the Senate, March 29, 1990:

"[R]egulatory competition also causes jurisdictional squabbles, which can strangle innovation. New products are not merely stifled; they quickly move to overseas markets. This is demonstrated only too well by the recent court battle over a new 'hybrid' product called index participations. Meanwhile, trading of the new product has stopped in the United States. It has begun trading in Toronto, with London soon to follow."

"We believe the minimum course of action would be to unify regulation of stocks, stock options and stock index futures under the agency with the greatest overall expertise in the combination of these products -- the SEC. . . . In addition, it is imperative that we end the jurisdictional disputes over the regulation of new products that simply drive them to overseas markets. This would require elimination of the so-called 'exclusivity' clause in the Commodity Exchange Act, which currently requires exclusive CFTC regulation of any instrument that has an element of 'futuresity.'"

"[Regarding effects of exclusivity clause] I think again the potential for driving away business from these markets in instruments other than IP's -- commodity swaps and swaps in general -- would be one of them."