ORAL ARGUMENT NOT YET SCHEDULED
12-5362

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL SWAPS AND DERIVATIVES ASS'N, and
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASS'N,
Plaintiffs/Appellees,
v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT COMMODITY FUTURES TRADING COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The Commodity Futures Trading Commission was the defendant in the district court and is the appellant in this Court. The International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association were the plaintiffs in the district court and are the appellees in this Court.

The following appeared as amici in the district court:

Senator Mark Begich
Senator Richard Blumenthal
Senator Barbara Boxer
Senator Sherrod Brown
Senator Maria Cantwell
Senator Ben Cardin
Senator Dianne Feinstein
Senator Tom Harkin
Senator Patrick Leahy
Senator Carl Levin
Senator Joe Manchin, III
Senator Claire McCaskill
Senator Robert Menendez
Senator Barbara Mikulski
Senator Bill Nelson
Senator Bernie Sanders
Senator Jeanne Shaheen
Senator Sheldon Whitehouse
Senator Ron Wyden

House Democratic Conferees on H.R. 4173:
Representative Barney Frank
Representative Luis Gutierrez
Representative Maxine Waters

Representative Carolyn Maloney
Representative Melvin Watt
Representative Gregory Meeks
Representative Gary Peters
Representative Nydia Velazquez
Representative Heath Shuler
Representative Collin Peterson
Representative Leonard Boswell
Representative Henry Waxman
Representative Bobby Rush
Representative John Conyers, Jr.
Representative Howard Berman
Representative Edolphus Towns
Representative Elijah Cummings

Better Markets, Inc.

There were no intervenors in the district court and to date there are no intervenors in this Court. On March 15, 2013, this Court granted motions filed by Senator Carl Levin on behalf of a group of as yet unidentified members of the United States Senate, and by the Commodity Markets Oversight Coalition, for leave to participate as amicus curiae.

(B) Ruling Under Review

The ruling under review is the September 28, 2012, Memorandum Opinion and Order of the United States District Court for the District of Columbia (Wilkins, J.) vacating the Commission's Rule Regarding Position Limits for Futures and Swaps, 17 C.F.R. Part 151. *Int'l Swaps & Derivatives Ass'n, et al. v. United States Commodity Futures Trading Comm'n,* 887 F. Supp. 2d 259 (D.D.C. 2012).

(C) Related Cases

The Rule, which is the subject of this appeal, was previously before this Court in *Int'l Swaps & Derivatives Ass'n, et al. v. United States Commodity Futures Trading Comm'n,* No. 11-1469. That petition for review was dismissed by this Court for lack of jurisdiction on January 20, 2012. Counsel for appellant is unaware of any related cases pending in this Court or any other.

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GLOSSARY

CEA -	Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*
CEC -	Commodity Exchange Commission
CFTC -	Commodity Futures Trading Commission
Dodd-Frank -	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010)
ISDA -	International Swaps and Derivatives Ass'n
SIFMA -	Securities Industry and Financial Markets Ass'n

JURISDICTION

Appellees International Swaps and Derivatives Association ("ISDA") and the Securities Industry and Financial Markets Association ("SIFMA")[1] challenged the Commodity Futures Trading Commission's ("CFTC" or "Commission") Rule regarding Position Limits for Futures and Swaps, 17 C.F.R. Part 151 ("Rule") in the United States District Court for the District of Columbia. ISDA alleged that the Rule violated, *inter alia*, the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.* ("CEA"). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

On September 28, 2012, the district court granted ISDA's summary judgment motion in part and vacated the Rule. The district court's order is final and therefore appealable. 28 U.S.C. § 1291. The Commission filed its timely Notice of Appeal on November 15, 2012. Fed. R. App. P. 4(a)(1)(B)(ii).

STATEMENT OF THE ISSUES PRESENTED

1. Whether provisions of the CEA added by Dodd-Frank, which provide that the Commission "shall" establish position limits within short deadlines, and repeatedly refer to those limits as "required," mandate the imposition of such limits.

[1]Appellees ISDA and SIFMA are collectively referred to as "ISDA."

2. Whether, despite Congress' mandate that the Commission impose position limits, the Commission is nonetheless required, pursuant to 7 U.S.C. § 6a(a)(1), first to make findings that such limits are necessary.

STATEMENT OF THE CASE

A. Nature of the case, the course of proceedings, and the disposition below

This appeal concerns the Commission's authority to impose limits on speculative positions – *i.e.*, limits on the number of derivatives contracts that any person engaged in speculation may hold or control. As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), Congress amended the CEA's position limits provision, which since 1936 has authorized the Commission (and its predecessor) to impose limits on speculative positions to prevent the harms caused by excessive speculation. Concerned that excessive speculation in derivatives has led to spikes in the price for oil, natural gas, and other physical commodities, Congress required the Commission to impose, for all physical commodities, limits on speculative positions. Congress also mandated that the Commission impose these limits promptly, and required the Commission, within one year, to submit a report to Congress as to the effects – if any – of those limits.

Congress mandated limits because it determined that excessive speculation can burden interstate commerce by causing adverse price fluctuations, and that

position limits are an effective tool to prevent such potential harm. 76 Fed. Reg. 71626, 71662-63 (Nov. 18, 2011) (A.xxx-xxx).[2] Accordingly, it did not make limits contingent on the Commission first finding that excessive speculation was occurring, or was about to occur, in any particular market. *Id.*; *see also id*. at 71626-29 (A.xxx-xxx). The Commission complied with this mandate by promulgating the Rule and setting limits on speculative positions with respect to 28 commodity derivatives. The Rule also incorporated account aggregation standards (which determine when certain traders are sufficiently interconnected so that their positions must be combined), and contained exemptions for certain transactions, such as bona fide hedging.

ISDA challenged the Rule and sought to have it vacated. It alleged, *inter alia*, that the Commission had misinterpreted the CEA, and that it could not impose any limit until it first made a finding that the limit was necessary. *See ISDA v. CFTC*, 887 F. Supp. 2d 259, 265 (D.D.C. 2012) (A.xxx).

The district court rejected the Commission's interpretation of the Dodd-Frank amendments. It held that one provision of the CEA, 7 U.S.C. § 6a(a)(1),[3] which pre-dated the Dodd-Frank amendments, unambiguously required the Commission to make necessity findings before implementing position limits. It

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[2] Citations to the deferred Appendix are set forth as "A.xxx."

[3] References to U.S. code sections of the CEA will be to the section number only.

then held that it was ambiguous whether the Dodd-Frank amendments mandated position limits for physical commodity derivatives and obviated the necessity finding of section 6a(a)(1). Accordingly, the court vacated the Rule, and remanded so that, if the Commission took any further action with respect to position limits, it could "bring its experience and expertise to bear" in resolving the ambiguity the court found in section 6a(a).

B. Facts and proceedings below

1. Background

a. Derivatives

A derivative is a financial contract whose value is derived from the value of something else, such as an asset, a rate, or a currency. The CEA gives the Commission jurisdiction over not only agricultural commodities such as wheat, corn, or cotton, but also any "service, right or interest" for which a futures contract is available. § 1a(9). The CEA groups commodities into three categories: (1) agricultural commodities, *see id.*; 17 C.F.R. § 1.3(zz); (2) excluded commodities, which consist of such financial intangibles as interest rates, or currency exchange rates, § 1a(19); and (3) exempt commodities, which encompass metals and energy, § 1a(20).

The Rule applies only to agricultural and exempt commodities (all of which are physical commodities), and to three types of commodity derivatives: futures

contracts, swaps, and options A commodity futures contract is a standardized agreement to buy or sell a fixed quantity, quality, and grade of an identified commodity at some specific time in the future. *Strobl v. N.Y. Mercantile Exch.*, 768 F.2d 22, 24 (2d Cir. 1985). Although the terms of a futures contract usually require the seller (the holder of the "short" position) to make delivery of a commodity, and require the buyer (the holder of the "long" position) to take delivery, most such contracts do not proceed to delivery and are settled through offsetting futures transactions. *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 674 (7th Cir. 2009). That is, before the designated delivery date, the holder of a short position enters into an offsetting long position, and the holder of a long position enters into an offsetting short position. *See id.*

A swap traditionally was an agreement between parties to exchange sequences of cash flows based on the value of an underlying asset. For example, a swap may be based on the price of a commodity – one party's obligation may be based on a fixed price, and the other party's obligation may be based on the price of that commodity as it fluctuates over time. Dodd-Frank established a broader definition. § 1a(47). A swap is often cash-settled.

A third type of derivative is the option. An option is an instrument in which the buyer purchases from the seller the right, but not the obligation, to buy or sell an agreed amount of a commodity or another derivative, such as a futures contract,

at a set rate at any time before the option's expiration. *See Dunn v. CFTC*, 519 U.S. 465, 469 (1997).

The derivatives subject to the Rule can be used to shift or manage the risk of price fluctuation in an underlying commodity, a practice known as hedging. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 358-60 & n.11 (1982). Producers and manufacturers frequently use derivatives for this purpose. But derivatives can also be used to speculate – that is, to profit from those price fluctuations. *Id*. at 359 & n.11. The Rule imposes limits only on speculative positions.

Commodity derivative contracts have designated expiration dates. Although the overwhelming majority of derivatives – even those that call for physical delivery – are cash settled, they play an important role in setting and discovering prices for the underlying commodity. In particular, futures prices and spot prices (*i.e.*, the current cash price of a commodity) are linked throughout the life of a futures contract. The two prices should converge as the futures contract expires (*i.e.*, as its delivery date approaches). *See In re Indiana Farm Bureau Cooperative Ass'n*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,796, 27,288 n.2 (CFTC Dec. 17, 1982).

However, this convergence can be disrupted by the actions of derivatives traders. For example, a trader who accumulates market power in the deliverable

supply of the underlying commodity while also acquiring a substantial position in long futures contracts (*i.e.*, contracts entitling the holder to receive delivery of the underlying commodity) has cornered the market, and is in a position to disrupt normal price convergence.[4] *See Kohen*, 571 F.3d at 674-75. A market squeeze also frustrates price convergence.[5] By limiting the ability of speculative traders – acting alone or in concert – to amass a dominant position, speculative position limits can help prevent some of the conditions that facilitate corners, squeezes, and other forms of market manipulation.

b. The History of Speculative Position Limits

Congress began regulating commodity derivatives in 1922 when it enacted the Grain Futures Act, in which it noted that "sudden or unreasonable fluctuations in the prices of commodity futures ... frequently occur as a result of speculation, manipulation, or control ... ." Grain Futures Act of 1922, Ch. 369 § 3, 42 Stat. 998, 999 (1922).

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[4] A corner can be considered a form of monopolization of a physical commodity. The holder of a sufficiently large amount of the deliverable supply of a commodity disrupts orderly convergence by insisting on delivery pursuant to its long futures contracts. At the same time, that holder demands high prices from holders of short positions when those short position holders attempt to purchase the physical commodity to satisfy their obligations under their short futures contracts. *See Kohen*, 571 F.3d at 674-75.

[5] A squeeze occurs when a trader "has a dominant long position but does not have an actual monopoly of the cash commodity; rather, the cash supply is limited due to ... forces that are not necessarily within the [trader's] control." *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1034 (N.D. Ill. 1995).

In 1936, Congress strengthened the government's authority by providing for limits on speculative trading in commodity derivatives when it enacted the CEA. The CEA authorized the CFTC's predecessor, the Commodity Exchange Commission ("CEC"), to establish limits on speculative trading. In doing this, Congress reaffirmed that "[e]xcessive speculation in [physical commodity derivatives] causing sudden or unreasonable fluctuations or unwarranted changes in the price of [physical commodities] is an undue and unnecessary burden on interstate commerce[.]" § 6a(1) (Supp. II 1936). Accordingly, Congress empowered the CEC to "fix such limits on the amount of trading ... as the [CEC] finds is necessary to diminish, eliminate, or prevent such burden." *Id.*

Soon thereafter, the CEC set position limits. The CEC held a hearing to consider position limits for grain derivatives on December 1, 1937, and, in December 1938, it issued its first speculative position limits. 3 Fed. Reg. 3145 (Dec. 24, 1938). When it imposed these limits, the CEC found that "trading in any one grain for future delivery … by a person who holds or controls a speculative position of more than 2,000,000 bushels … tends to cause sudden and unreasonable fluctuations and changes in the price of such grain not warranted by changes in the condition of supply or demand." *Id.* at 3146. Thus, the CEC concluded that position limits were "necessary" to "diminish, eliminate, or prevent the undue burden of excessive speculation in grain futures which causes

unwarranted price changes." *Id*. The CEC accordingly set the limits at 2,000,000 bushels for all grains. *Id*. at 3146-47. Over time, the CEC imposed additional speculative position limits following a similar formulation, and continued to set such limits until the 1970s.

c. The CFTC and Position Limits Pre-Dodd Frank

In 1974, Congress amended the CEA in two significant ways. First, it greatly broadened the coverage of the CEA so that it applied not only to a few enumerated commodities, but also to all "services, rights, and interests" as to which "contracts for future delivery are presently or in the future dealt in." § 2 (1976). Second, Congress established the CFTC as an independent agency, and vested it with the authority to administer the CEA, including setting position limits. § 4a & Note (1976); *Hunter v. FERC,* __F.3d ___; 2013 WL 1003666 at * 2 (D.C. Cir. 2013).

In its early years, the Commission grappled with a number of crises, including a massive manipulation and eventual default in potato futures contracts, *Curran*, 456 U.S. at 369-71, attempts at manipulating the market for soybean futures, *CFTC v. Hunt*, 591 F.2d 1211, 1214 (7th Cir. 1979), and a crisis in the silver market, 45 Fed. Reg. 79831, 79833 (Dec. 2, 1980) (A.xxx). The Commission responded to this turbulence in the commodity markets by overhauling its position limits regime.

i. The 1981 Rulemaking

Noting that many exchanges had already instituted position limits, the Commission proposed to direct that exchanges set limits for any remaining derivatives contracts that lacked them. *Id.* at 79832 (A.xxx). The Commission explained that it was pursuing this objective because the concentration of extraordinarily large speculative futures positions in the hands of a few traders "was responsible for certain adverse consequences arising from the collapse in the silver market." *Id.* at 79833 (A.xxx). Accordingly, the Commission determined that speculative position limits can "serve to decrease the potential for positions to influence the general price level," and "to diminish the possibility of accentuating price swings if large positions must be liquidated abruptly in the face of adverse price movements or for other reasons." *Id.* The Commission therefore proposed a rule requiring that each exchange promptly establish speculative position limits for all futures contracts traded on that exchange. *Id.*

The Commission finalized the rule in 1981. It concluded that multiple provisions of the CEA vested it with authority to direct that exchanges impose position limits. 46 Fed. Reg. 50938, 50939-40 (Oct. 16, 1981) (A.xxx-xxx). The Commission explained that section 6a "represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure." *Id.* at 50940 (A.xxx).

Relying on those Congressional findings, the Commission directed exchanges to impose speculative position limits on all futures contracts subject to their jurisdiction. *Id*. at 50945 (A.xxx).

In adopting this prophylactic approach, the Commission explained that comments it had received during the rulemaking that questioned "the general desirability of [position] limits are contrary to Congressional findings in [sections 5, 6a] and considerable years of Federal and contract market regulatory experience." *Id*. at 50940 (A.xxx). The Commission also explained that:

> the prevention of large and/or abrupt price movements which are attributable to extraordinarily large speculative positions is a Congressionally endorsed regulatory objective of the Commission. Further ... this objective is enhanced by speculative position limits since it appears that the capacity of any contact market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of the positions, i.e., the capacity of the market is not unlimited.

Id. Citing the recent disruption in the silver market, the Commission insisted that position limits be imposed prophylactically for all futures and options contracts, *irrespective* of the unique features of the cash market underlying a particular derivative.[6] *Id*. at 50940-41 (A.xxx-xxx). Thus, the Commission concluded that "speculative limits are appropriate for all contract markets," *id.* at 50941 (A.xxx),

[6] The Commission stated it would consider the particular characteristics of the cash markets in setting limit levels, but required that all futures contracts have position limits. 46 Fed. Reg. at 50941 (A.xxx).

and directed exchanges to impose them on an "omnibus basis, " *id.* at 50939 (A.xxx) – that is, on all futures contracts. *See* 17 C.F.R. § 1.61(a)(1) (1982).

The Commission directed exchanges to set speculative position limits pursuant to appropriate standards. The Commission specified that the exchange limits should specify maximum net long or net short positions any person may hold or control, *id.*, and could apply different limit levels to "different futures" or "different delivery months" and could exempt certain transactions, *id.* The Commission further instructed that exchanges consider setting position limit levels using customary speculative position sizes as the standard, but permitted exchanges to supplement or consider other standards if they believed doing so was appropriate. *Id.* at § 1.61(a)(2).

ii. Congressional Response

Congress had an opportunity to consider the Commission's universal, prophylactic position limits regime soon thereafter, when it enacted the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2294 (1983). Presented with competing proposals from the Commission and industry to amend the position limits statute, Congress was clearly aware that the Commission had "promulgated a final rule requiring exchanges ... to submit speculative position limit proposals for Commission approval for all futures contracts traded as of that date." S. Rep. No. 97-384, at 44 (1982). Because Congress believed that the Commission's

authority to set speculative position limits is "important to ensure orderly trading and to prevent market excesses[,]" Congress made several changes to the CEA "to clarify and strengthen the Commission's authority in this area[,]" *id.*, including authorizing the Commission to prosecute violations of exchange-set position limits as if they were violations of the CEA. *Id.*

Equally important were the proposals that Congress rejected. Futures industry groups urged Congress to require the Commission, before exchanges imposed limits, to make specific findings, after a hearing on the record, that limits were necessary to prevent manipulation, corners, or squeezes. *Id.* at 44, 79. Another proposal would have stripped from the CEA the language in section 6a that was the principal basis for requiring exchanges to establish speculative position limits on all futures contracts as a prophylactic measure: the congressional finding regarding the harmful effects of excessive speculation. *Id.* at 44. Congress rejected both proposals. *Id.* at 45.

iii. Congressional investigations

During the 1990s, the Commission began permitting exchanges to experiment with an alternative to position limits, known as position accountability. Exchange-set accountability levels permit a trader to hold large positions subject to reporting requirements and give the exchange the right to order the trader to hold or reduce its position. 75 Fed. Reg. 4144, 4147 (Jan. 26, 2010); 64 Fed. Reg.

24038, 24048-49 (May 5, 1999) (§150.5(e)). Generally, position accountability for most physical commodity derivatives was only available outside the spot-month.[7] *See* 64 Fed. Reg. at 24049 (§150.5(e)(3)). Position accountability was initially developed for excluded commodity derivatives, but was eventually extended to some highly liquid physical commodity derivatives. *See id.* (§§ 150.5(e)(2), (3)).

But subsequent congressional investigations concluded that unchecked speculation accounted for significant volatility and price increases in several energy markets. A congressional investigation determined that prices of crude oil had risen precipitously and that "[t]he traditional forces of supply and demand cannot fully account for these increases." *The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat,* Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate, S. Prt. No. 109-65 at 1 (June 27, 2006). The investigation found evidence suggesting that speculation was responsible for an increase of as much as $20-25 per barrel of crude oil, which was then at $70. *Id.* at 12; *see also Excessive Speculation in the Natural Gas Market*,

[7] Derivative positions are often divided into spot-month and non-spot-month positions. *ISDA v. CFTC*, 887 F. Supp. 2d at 262 (A.xxx). The spot month is a specific period of time, which varies by commodity, that immediately precedes the specified delivery date for a particular futures contract. *See id.* Non-spot month refers to any particular period outside the spot month or to all such months combined. *See id.*

Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate at 1 (June 25, 2007) *available at* http://www.levin.senate.gov/imo/media/doc/supporting/2007/PSI. Amaranth.062507.pdf (last visited Apr. 3, 2013) ("Gas Report"). Subsequently, Congress found similar price volatility stemming from excessive speculation in the natural gas market. Gas Report at 1-2.

d. Dodd-Frank

Against this backdrop of heightened concern about the impact of large speculative positions on price volatility in physical commodity markets, Congress enacted Dodd-Frank and directed the Commission to set position limits on physical commodity futures and options and economically equivalent swaps. Congress significantly expanded section 6a(a), adding several new subsections. The biggest change is the addition of section 6a(a)(2), in which Congress insisted that the Commission assume responsibility for position limits on all physical commodity derivatives. In particular, Congress instructed the Commission to impose federal speculative position limits on futures contracts and options for all agricultural and exempt commodities:

> In accordance with the standards set forth in [section 6a(a)(1)] ... , with respect to *physical commodities other than excluded commodities*[,]... the *Commission shall* ... establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts... .

§ 6a(a)(2)(A) (emphases added). Congress stated that position limits for these physical commodity futures were "required," and specifically provided that the "required" limits be imposed within 180 days after enactment for exempt commodities, and within 270 days after enactment for agricultural commodities. § 6a(a)(2)(B). To ensure that speculators could not evade these "required" position limits, Congress insisted that economically equivalent swaps also be subject to these limits. § 6a(a)(5). To guide the Commission in setting limit levels, Congress specified several criteria for the Commission to balance: (i) diminish, eliminate, or prevent excessive speculation; (ii) deter and prevent market manipulation, squeezes, and corners; (iii) ensure sufficient market liquidity for bona fide hedgers; and (iv) ensure that the price discovery function of the underlying market is not disrupted. § 6a(a)(3). Congress also mandated that the limits apply in the aggregate across all exchanges to all positions in derivatives whose value derives from the same commodity. § 6a(a)(6). Finally, Congress required the Commission to furnish it with a study regarding the effects of the new limits within 12 months of their imposition, and Congress committed to reviewing this study within 30 legislative days of its receipt. 15 U.S.C. § 8307(a).

e. The Rule

As instructed by Congress, and after notice and comment, the Commission, on October 26, 2011, adopted the Rule by a three-to-two vote. The Rule was

published in the Federal Register on November 18, 2011. 76 Fed. Reg. 71626 (A.xxx).

The Rule represents the first step toward fulfilling the congressional mandate to set federal position limits on physical commodity derivatives. The Commission imposed speculative limits in the spot month and non-spot months on 28 physical commodity derivatives "of particular significance to interstate commerce." *Id*. at 71665 (A.xxx); *see also id* at 716629-30 (A.xxx-xxx). The Commission further explained that it made sense to start with these contracts because they were already subject to at least a Commission- or exchange-set speculative position limit. *Id*. at 71669 (A.xxx). To facilitate the changeover to Commission-administered position limits, the Rule uses formulas for calculating limit levels that are similar to the formulas used to calculate previous Commission- and exchange-set position limits. *Id*. at 71632-33 (transition) (A.xxx-xxx), 71668-70 (spot-month limit) (A.xxx-xxx), 71671 (non-spot month limit) (A.xxx). The Rule contains a number of other provisions implementing the statutory exemption for bona fide hedging. *Id.* at 71643-51 (A.xxx-xxx). The Rule also provides account aggregation standards to determine which positions to attribute to a particular market participant.[8] *Id.* at 71651-55 (A.xxx-xxx).

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[8] A central feature of any position limits regime is determining which positions to attribute to a particular trader. The CEA requires the Commission to attribute to a person all positions that the person holds or trades, as well as positions held or

2. Proceedings Below

ISDA alleged that the Commission had violated the CEA by failing to find that the position limits it imposed were necessary, and by failing to conduct an adequate analysis of the Rule's costs and benefits. ISDA also alleged that the Rule was arbitrary and capricious, thereby violating the Administrative Procedure Act. ISDA sought to have the Rule vacated.

The district court resolved the case on cross-motions for summary judgment, but it addressed only one of the grounds alleged by ISDA – that the Commission had violated the CEA by imposing position limits without first making findings of, necessity. *ISDA*, 887 F. Supp. 2d. at 261 (A.xxx). The court began its analysis by parsing the language of section 6a(a)(1), the provision that has long authorized the Commission to impose position limits "as the Commission finds are necessary to diminish, eliminate, or prevent" the burden on interstate commerce arising from excessive speculation. *Id*. at 268-69 (A.xxx-xxx). Citing CEC orders entered between 1938 and 1956, the court noted that, before 1981, "the Commission made necessity findings." *Id*. at 269-70 (A.xxx-xxx). The court then determined that,

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traded by anyone else that such person directly or indirectly controls. 7 U.S.C. § 6a(a)(1). This is referred to as account aggregation. In addition to account aggregation, Congress required the Commission to set limits on all derivative positions in the same underlying commodity that a trader may hold or control across all derivative exchanges. 7 U.S.C. § 6a(a)(6). The Commission refers to this as position aggregation.

consistent with this earlier Commission practice, section 6a(a)(1) "unambiguously requires" necessity findings. *Id*. at 270 (A.xxx).

The court went on to reject the Commission's arguments 1) that the phrase "finds are necessary" in section 6a(a)(1) was ambiguous, *see id*.; 2) that, in its 1981 rulemaking, the Commission had interpreted section 6a(a)(1) as authorizing it to impose limits when it determined, in its judgment, that such limits would provide a reasonable means for achieving Congress' goals as described in that section; and 3) that Congress ratified that interpretation in the Futures Trading Act. *Id*. at 272-74 (A.xxx-xxx). The court asserted that the Commission's current interpretation was not based on "any longstanding agency interpretation," because the 1981 rulemaking did not "speak[] directly" to whether a necessity finding was required. *Id.* at 273 (A.xxx). The court concluded that "[t]he fact that the CFTC did not make a necessity finding in its 1981 rulemaking does not constitute an interpretation from which this [c]ourt can infer congressional ratification." *Id.* The court further stated that it could not "find that Congress ratified by silence an interpretation of [s]ection 6a(a)(1) that the CFTC made by silence." *Id*. at 273-74 (A.xxx-xxx). Finally, the court pointed to the Commission's decision in the 1990s to permit exchanges to use position accountability levels as evidence that the Commission "has not even consistently followed its purported 1981 interpretation." *Id*. at 273 n.5 (A.xxx).

The court next rejected the Commission's contention that provisions added by Dodd-Frank mandated that the Commission impose position limits on all physical commodity derivatives without first making antecedent necessity findings. *Id*. at 274-79 (A.xxx-xxx). Even though the Dodd-Frank amendments repeatedly state that "the Commission shall" establish limits, that the limits are "required," and that they be imposed in no more than 270 days, the court held that it was "ambiguous" as to whether the amendments required the Commission to make necessity findings before imposing limits. *Id*.; *see also id*. at 279-80 (A.xxx-xxx).

The court noted that section 6a(a)(2) requires that position limits be imposed "in accordance with the standards set forth in [section 6a(a)(1)]" and concluded that the phrase was ambiguous. *Id*. at 274-76 (A.xxx-xxx). Because the court had already determined that section 6(a)(1) required antecedent "necessity" findings, the court then held that it was ambiguous whether such findings are part of the "standards" to which Congress was referring in section 6a(a)(2). *Id*. The court noted that Congress did not identify the "standards," and it further reasoned that, unless "standards" encompasses a necessity finding, a portion of section 6a(a)(1) would be rendered surplusage. *Id.* at 275-76, 279-80 (A.xxx-xxx, xxx-xxx).

The court also concluded that Congress' use of the phrase "as appropriate" was ambiguous. *Id.* at 276 (A.xxx). The phrase might refer to the discretion the Commission was permitted to exercise with respect to the level of the position

limits it was required to impose, but it might also restrict the Commission to imposing only those limits that it first finds to be appropriate. *See id*. at 276-77 (A.xxx-xxx).

Finally, the court said that it "must attempt to give effect to all words in the statute." *Id*. at 279 (A.xxx). The court concluded that, while the Commission's interpretation was plausible, that interpretation did not "give any meaningful effect" to the phrase "in accordance with the standards" in section 6a(a)(2). *Id*. at 279-80 (A.xxx-xxx). The court held that ISDA's interpretation – that the Commission must "gather evidence relating to whether excessive speculation was harming commodity markets" and must determine whether a limit is "necessary and appropriate" – was also "plausible," *id*. at 278 (A.xxx), even though the court recognized that some of the Dodd-Frank provisions "taken in isolation seemingly create a mandatory regime," *id*. at 279 (A.xxx). As a result, the court held that section 6a(a) as a whole was ambiguous as to whether Congress mandated that the Commission impose limits.

STANDARD OF REVIEW

A *de novo* standard of review applies because this appeal seeks review of an order that was entered in response to a motion for summary judgment, *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 440 (D.C. Cir. 2012),

and because it only seeks review of issues of law, *CLS Bank Int'l v. Alice Co.*, 685 F.3d 1341, 1345 (D.C. Cir. 2012).

SUMMARY OF ARGUMENT

A court must interpret a statute "as a symmetrical and coherent regulatory scheme, ... and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citations omitted). The "regulatory scheme" of section 6a, as amended by Dodd-Frank, is clear. The section repeatedly states that the Commission "shall" impose limits on physical commodity derivatives, that those limits are "required," and that they must be established within tight time deadlines. Plainly, the "regulatory scheme" of section 6a(a) is a mandate from Congress directing the Commission promptly to impose position limits on speculative positions in physical commodity derivatives.

Instead of looking for a coherent scheme, the district court interpreted section 6a(a) by focusing on phrases in isolation, divorced from their context. As a result, the court concluded that it was plausible to interpret section 6a(a) as *precluding* the Commission from imposing limits until and unless the Commission first makes findings that limits are necessary. For example, section 6a(a)(2) is titled "Establishment of Limitations," and states that the Commission "shall" establish limits within short deadlines. Viewed as a whole, the section dovetails

with other provisions that refer to the limits as "required" and direct the Commission promptly to conduct a study of the limits and report to Congress on their effects. The court, however, concentrated on the section's opening phrase, which provides that position limits shall be established "[i]n accordance with the standards set forth in [section 6a(a)(1)]." The court held that it was "wholly unclear" whether an antecedent finding of necessity was a "standard set forth in section 6a(a)(1)," but it was concerned that, unless the Commission made such a finding, that "standard" would be surplusage. Thus, it concluded that section 6a(a)(2) could be read to require that, before the Commission imposes any position limit, it must first make a finding of necessity.

The court's interpretation ignores the mandatory words ("required" and "shall") in section 6a(a). It also ignores that Congress required the Commission to impose limits for all physical commodity derivatives within tight time deadlines. Given those deadlines, it would be impossible for the Commission to make the sorts of findings urged by ISDA. And the court's concern that the necessity language in section 6a(a)(1) would be surplusage is meritless because that language would still apply to those commodities not covered by Congress' mandate (*i.e.*, excluded commodities). Thus, the Commission's discretionary judgment as to the need for limits, which it must exercise when imposing limits on

commodities not covered by the mandate, is not a "standard" that it must apply when imposing limits required by Dodd-Frank.

Finally, the district court ignored that its supposedly "plausible" alternative reading strips the Dodd-Frank amendments to section 6a(a) of any practical significance: the Commission already possessed the authority in section 6a(a)(1) to impose position limits when it deems them necessary. The only plausible reading of section 6a(a), as amended by Dodd-Frank, is the Commission's, because that reading, unlike the court's, gives meaning to all provisions of the statute and allows them to operate as a harmonious whole.

In concluding that the opening phrase of section 6a(a)(2) plausibly requires the Commission first to make a finding of necessity prior to imposing position limits, the district court also misinterpreted section 6a(a)(1). It was "unambiguous[ly]" clear to the district court that section 6a(a)(1) requires the Commission to make some sort of substantive finding prior to imposing limits. The court relied on the fact that, in the 1940s and 1950s, the CEC stated that each position limit it imposed was necessary. But the court ignored that the "finds as necessary" language is inherently ambiguous and, as a result, it misconstrued the section's more recent and relevant history. Indeed, it referred to the Commission's first explicit interpretation of the section in 1981 as "silence." In fact, the Commission's 1981 interpretation of the section was loud and clear. In a 1981

rulemaking, it explained that Congress had made findings regarding both the harm caused by excessive speculation and the efficacy of position limits. In light of those congressional findings and its own experience, the Commission required exchanges to impose position limits on all futures contracts without making particularized necessity findings.

And since 1981, the Commission has interpreted section 6a(a)(1) to allow it to impose position limits based on its reasoned judgment that such limits would effectuate the section's goals – preventing the harms that may result from unchecked speculative trading. This judgment does not require any substantive findings because it incorporates determinations already made by Congress. Because the Commission's longstanding interpretation of the ambiguous phrase "finds as necessary" is reasonable, it is entitled to deference.

The district court further erred in failing to recognize that Congress unequivocally ratified the Commission's 1981 interpretation. In the immediate aftermath of the Commission's 1981 rulemaking, Congress amended the CEA to give the Commission the authority to enforce the exchange-set position limits required by the rule. Despite the express nature of this ratification, which rendered the Commission's interpretation of section 6a(a)(1) "virtually conclusive," *CFTC v. Schor*, 478 U.S. 833, 846 (1986), the district court stated without explanation that the Commission was relying on congressional "silence." Thus, the court's

misinterpretation of section 6a(a)(1) provides another basis for rejecting its conclusion that the Dodd-Frank amendments are ambiguous as to whether Congress required limits on physical commodity derivatives or conditioned them on Commission findings of their necessity.

ARGUMENT

I. DODD-FRANK MANDATES THE IMPOSITION OF POSITION LIMITS

A. Sections 6a(a)(2), (3), and (5) require the Commission to impose position limits

As explained in greater detail in Part II, *infra*, section 6a(a)(1) gives the Commission the discretion to impose position limits. Section 6a(a)(2), (3), and (5), which were added to the CEA by Dodd-Frank, make those limits mandatory for physical commodity derivatives. Section 6a(a)(2), provides, in relevant part:

> (A) In General – In accordance with the standards set forth in [section 6a(a)(1)] ... with respect to physical commodities other than excluded commodities ... the Commission *shall* ... establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.
>
> (B) Timing – (i) Exempt Commodities – For exempt commodities [energy and metals], the limits *required* under [section 6a(a)(2)(A)] *shall* be established within 180 days after the date of the enactment of this paragraph. (ii) Agricultural Commodities – For agricultural commodities, the limits *required* under [section 6a(a)(2)(A)] *shall* be established within 270 days after the date of the enactment of this paragraph.

(Emphasis added.) This section constitutes a mandate. It states that the Commission "shall" establish limits. It sets specific short time deadlines for those limits.[9] And it refers to the limits as "required."

Section 6a(a)(3) further demonstrates that Congress mandated position limits:

> In establishing the limits *required* in [section 6a(a)(2)], the Commission, as appropriate, *shall set limits* – (A) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions that may be held by any person for all months; and (B) to the maximum extent practicable, in its discretion – (i) to diminish, eliminate, or prevent excessive speculation ...; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted.

(Emphasis added.) Again, the section refers to the limits as "required," and provides that the Commission "shall" set those limits to further four congressional objectives.

The mandate is also evident in section 6a(a)(5):

> Notwithstanding any other provision of this section, the Commission *shall establish limits* on the amount of positions, including aggregate position limits, as appropriate ... that may be held by any person with respect to swaps that are economically equivalent to contracts of sale for future delivery or to options... subject to [section 6a(a)(2)].

[9] Although the Commission did not meet these deadlines, it completed the rulemaking as expeditiously as possible under the circumstances.

(Emphasis added.)[10] Congress further mandated that the limits on economically equivalent swaps "shall" be established "simultaneously" with the limits imposed on physical commodity futures and options. § 6a(a)(5)(B)(ii).[11]

Finally, Section 719 of Dodd-Frank (codified at 15 U.S.C. § 8307) further confirms the mandate. It provides that the Commission "shall conduct a study of the effects (if any) of the position limits imposed" pursuant to section 6a(a)(2), that "[w]ithin 12 months after the imposition of position limits," the Commission "shall" submit a report of the results of that study to Congress, and that, within 30 days of the receipt of that report, Congress "shall" hold hearings on that report. Congress would not have required the Commission to conduct a study of the effects, "if any," of position limits, and would not have imposed a hearing requirement on itself, if the Commission might not have implemented any position limits at all.

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[10] This provision addressed Congress' concern that, if limits are imposed on speculative positions in futures and options, traders will switch their positions to economically equivalent swaps. *See Gas Report*, at 4-6.

[11] Similarly, section 6a(a)(6) states that the Commission "shall" establish limits on the aggregate number of positions that may be held by any person. This is the one provision that the district court found clearly established a mandate. *ISDA*, 887 F. Supp. 2d at 278 (A.xxx). But it would be anomalous for Congress to impose such an unqualified requirement with respect to position aggregation if it were possible that the Commission might not impose any position limits at all.

Read together, as they must be, these sections require the Commission to impose position limits, and to do so promptly. These sections state six times that the Commission "shall" set or establish limits. "It is also fixed usage that 'shall' means something on the order of 'must' or 'will.'" *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009). On four occasions, the sections refer to the limits as "required." Further, the deadlines Congress imposed and the post-Rule study requirement reinforce that the Commission had no choice but to impose limits to effectuate Congress' objectives.

Most important, the many subsections of section 6a(a) added by Dodd-Frank would serve little purpose if Congress had not intended to mandate position limits. *See Marx v. General Revenue Corp.* 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme"). The Commission has long had the authority under section 6a(a)(1) to impose limits when it decided they were needed, and to set those limits with respect to futures and options on exempt, agricultural, and excluded commodities at an appropriate level. And, as a result of amendments to section 6a(a)(1), the Commission now has the authority to impose limits on swaps. There would be no need for all the subsequent subsections added by Dodd-Frank if Congress had wanted to leave it up to the Commission to decide whether position limits were necessary. When section 6a(a) is considered as a

whole and in light of the surplusage canon, only one interpretation is plausible: Congress required the Commission to impose position limits.

B. The district court erred when it held that the mandate set forth in sections 6a(a)(2), (3), and (5) is ambiguous

The district court identified three phrases in the Dodd-Frank amendments as its basis for concluding that sections 6a(a)(2), (3), and (5) are ambiguous, but the court's analysis relied on its misreading of section 6a as a whole. First, the court held that, because section 6a(a)(2) states that the Commission shall establish limits "[i]n accordance with the standards set forth in [section 6a(a)(1)]," "it is wholly unclear to what extent the CFTC's authority in Section 6a(a)(2) is dependent on the statutory requirement in subsection 6a(a)(1) that the agency find position limits 'necessary.'" *ISDA*, 887 F. Supp. 2d at 274 (A.xxx). As explained in Part II, *infra*, section 6a(a)(1) does not require the Commission to make antecedent, particularized findings that position limits are necessary to diminish, eliminate, or prevent a particular threat of excessive speculation. But even if it did, Congress trumped that requirement (as to agricultural and exempt commodities) when it added sections 6a(a)(2), (3), and (5) to the CEA.

As the district court noted, the word "standards," as used in section 6a(a)(2), is open to several interpretations. *See ISDA*, 887 F. Supp. 2d at 274-76 (A.xxx-

xx). But clarity comes from the text of section 6a(a)(1),[12] which contains "standards" that guide the imposition of position limits. It contains an account aggregation standard, which provides that, if one person controls the positions of another, or if those persons coordinate their trading, then those positions must be aggregated. § 6a(a)(1). And it contains a flexibility standard, providing the Commission with the flexibility to impose different limit levels for different commodities, markets, delivery months, transactions, etc. *Id*. Because these are "standards" that apply to position limits *being imposed* (*i.e.*, they apply when "determining whether any person has exceeded [position] limits," *see* § 6a(a)(1)), they are the "standards" to which Congress was referring when it mandated that position limits be imposed "in accordance with the standards" of section 6a(a)(1).[13]

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[12] The full text of section 6a(a)(1) appears in the Statutory Addendum to this brief at Add. 1.

[13] These standards are the same ones that the Commission applied in the 1981 position limits rulemaking, the rulemaking that is most analogous to the rulemaking mandated by Dodd-Frank. In 1981, the Commission instructed the exchanges to impose position limits on all futures contracts in accordance with "the standards and purpose for setting speculative limits set forth in paragraph 1.61(a)." 46 Fed. Reg. 50942 (A.xxx). Section 1.61(a) required the exchanges to set limits on the number of positions any trader "may hold or control" and further defined this "aggregation standard." 46 Fed. Reg. 50943, 50945 (A.xxx, xxx). Section 1.61(a) also explained that the exchanges could apply different limit levels to "different futures" or "different delivery months" and could exempt certain transactions. 46 Fed. Reg. 50945 (A.xxx). At no point in 1981 did the Commission refer to necessity findings as a "standard" that either it or the exchanges had to apply when setting limits.

The district court focused on the fact that section 6a(a)(1) also provides that the Commission shall impose position limits "as the Commission finds are necessary to diminish, eliminate, or prevent such burden" on interstate commerce. The court believed that this clause also constituted a standard. *ISDA*, 887 F. Supp. 2d at 275-76 (A.xxx-xx). According to the district court, unless section 6a(a)(2) incorporated that clause as a "necessity standard," then the clause would be rendered surplusage, *i.e.*, it would serve no purpose in the CEA.[14] *ISDA*, 887 F. Supp. 2d at 275 (A.xxx). The court was mistaken. Even if the "finds are necessary" clause in section 6a(a)(1) constituted a "standard," it would not be rendered surplusage by the mandate. The court failed to recognize that sections 6a(a)(2), (3), and (5) only mandate position limits with respect to *physical commodity derivatives* (*i.e.*, agricultural commodities and exempt commodities). The mandate does not apply to excluded commodities (*i.e.*, intangible commodities such as interest rates, currencies, and credit instruments). As a result, although the so-called necessity standard does not apply with respect to commodities as to which Congress has mandated position limits, it would still apply to any limits the Commission may choose to impose with respect to excluded commodities. Thus,

[14] The court never explained the nature of the necessity finding that section 6a(a)(1) would require the Commission to make. However, ISDA would have the Commission first determine that excessive speculation is likely to pose a problem in a particular market and that position limits would curtail the problem without imposing undue costs. *See ISDA*, 887 F. Supp. 2d at 273 (A.xxx).

contrary to the district court's view, the mandate of sections 6a(a)(2), (3), and (5), does not render the "finds are necessary" clause surplusage.

Further, Congress could not have contemplated that, as a prerequisite to imposing the limits it mandated, the Commission would first make necessity findings. The district court notes that "the Commission made necessity findings in its rulemakings establishing position limits for 45 years after the passage of the CEA." *ISDA*, 887 F. Supp. 2d at 269 (A.xxx). The court then cites several orders issued by the CEC between 1940 and 1956 establishing limits. But each of those orders imposed limits with respect to no more than a small number of commodities, and the court failed to recognize the amount of time and effort that it took the CEC to make the findings with respect to each of those commodities. *See*, *e.g.*, 5 Fed. Reg. 3198 (Aug. 28, 1940) (final order setting position limits for cotton, entered after five days of hearings, and more than 11 months after the notice of the hearings); 16 Fed. Reg. 8106 (Aug. 16, 1951) (final order setting position limits for eggs, entered after three days of hearings and more than six months after the notice of hearings); 21 Fed. Reg. 5575 (July 25, 1956) (final order setting position limits for onions, entered after one day of hearings, and more than four months after the notice of hearings). Dodd-Frank requires the Commission to impose limits on all exempt commodities within 180 days, and on all agricultural

commodities within 270 days.[15] Because of these stringent time limits, and because of the amount of time that it takes for the Commission to make the sort of necessity determination that ISDA would have the Commission make, Congress cannot possibly have contemplated that the Commission delay the imposition of the "required" limits until it had first made necessity findings.

The district court was thus wrong to conclude that the statute was ambiguous as to whether the reference to "standards" included a requirement to make antecedent necessity findings. When a word carries two possible meanings, one that makes the statute operate as a "harmonious whole" and another that would deprive numerous statutory provisions of all practical significance, then that word does not render the entire statute ambiguous.[16] As the Supreme Court has stated, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, in the context of the Dodd-Frank amendments, it is clear that "standards" refers to the standards set out in section 6a(a)(1) that the Commission applies to position limits *being imposed*, not to standards the Commission might apply to the antecedent question of *whether* to

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[15] Presumably, Dodd-Frank required that the Commission impose position limits on exempt commodities more quickly because, unlike agricultural commodities, exempt commodities were not already subject to federal position limits. *See* 17 C.F.R. Part 150.

[16] The Commission's interpretation of "standards" is based on its context, not, as the district court suggests, "solely on dictionary definitions." *See ISDA*, 887 F. Supp. 2d at 275 (A.xxx).

impose limits. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect").

The district court also mistakenly faulted the Commission for arguing an interpretation of section 6a(a)(2) that it believed was inconsistent with positions the Commission took during the rulemaking. *See ISDA*, 887 F. Supp. 2d at 275 (A.xxx). The court quoted from the Rule's Notice of Proposed Rulemaking, and claimed that the Commission had interpreted section 6a(a)(2) in the same way that it (and ISDA) interpreted it when the Commission stated that section 6a(a)(2) "reaffirm[ed] the Commission's authority to establish position limits as it finds necessary in its discretion to address excessive speculation." *Id.*, quoting 76 Fed. Reg. 4752, 4755 (Jan. 26, 2011) (A.xxx). But this paraphrasing of the Commission's authority under section 6a(a)(1) did not purport to identify the "standards" the Commission would apply in establishing position limits. Another sentence in the same paragraph, not quoted by the court, made clear that the Commission believed that Congress had instructed the Commission to apply its "historical approach to setting limits" – the approach reflected in the 1981 rulemaking. 76 Fed. Reg. 4755 & n.21 (citing 46 Fed. Reg. 50938 (the 1981 rule)) (A.xxx). As noted above (p. 31 at n.13), the Commission in 1981 expressly

discussed the "standards" that must be followed in setting position limits in both the rule release and rule text, and those "standards" did not include antecedent necessity findings.

The court was further mistaken when it claimed that the Commission had "failed to confront or interpret" its statutory obligation. *See ISDA*, 887 F. Supp. 2d at 275 (A.xxx). In the preamble to the final rule, the Commission elaborated on its interpretation of section 6a(a):

> [T]he Commission construes the amended CEA to mandate the Commission to impose position limits at the level it determines to be appropriate to diminish, eliminate, or prevent excessive speculation and market manipulation. In setting such limits, the Commission is not required to find that an undue burden on interstate commerce resulting from excessive speculation exists or is likely to occur. Nor is the Commission required to make an affirmative finding that position limits are necessary to prevent sudden or unreasonable fluctuations in prices. Instead, the Commission must set position limits prophylactically, according to Congress' mandate in [section 6a(a)(2)], and, in establishing the limits Congress has required, exercise its discretion to set a limit that, to the maximum extent practicable, will, among other things, "diminish, eliminate, or prevent excessive speculation."

76 Fed. Reg. 71627 (footnotes omitted) (A.xxx). As this passage reflects, and as the Commission demonstrated throughout the rulemaking, the Commission has interpreted section 6a(a) to require it to impose position limits without any obligation to make antecedent findings that any specific limit is necessary, but with the obligation to set the required limits at the appropriate level to further Congress'

objectives to prevent excessive speculation and manipulation, ensure sufficient liquidity for bona fide hedgers, and protect the price discovery function. § 6a(a)(3).[17]

Second, the court focused on the words "as appropriate" in sections 6a(a)(2), (3), and (5), and concluded that those words created ambiguity with respect to whether the Commission had a mandate. In the context of the Dodd-Frank amendments, it is clear that the phrase conveys Congress' intent to have the Commission bring its expertise to bear on the *levels* – the "amount of positions" – at which to set the "required" limits. The court agreed with ISDA, however, that the phrase could be construed to confer discretion on the Commission to impose no limit at all if the Commission determined a limit was not appropriate. *ISDA*, 887 F. Supp. 2d at 276-78 (A.xxx-xx).

Here again, the court failed in its duty to interpret the statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole." *Brown & Williamson*, 529 U.S. at 133. If "as appropriate" applies to the Commission's obligation to impose limits, then there is no mandate –

[17] It may be that the court was faulting the Commission for failing to state that the "standards" referred to in section 6a(a)(2) consist of the aggregation and flexibility standards in section 6a(a)(1). What is more important, however, is that the Rule promulgated by the Commission addresses both of those standards and thus implemented the mandate. *See*, *e.g.*, 76 Fed. Reg. 71651-55 (aggregation) (A.xxx-xxx); *id.* at 71638-43 (setting limits based on the nature of the commodity, and on whether the contract is cash-settled) (A.xxx-xxx).

the Commission could impose position limits only if *it* first comes to the conclusion that limits are appropriate. That is, the Commission's authority to impose limits post-Dodd-Frank would be no different from its authority pre-Dodd-Frank. But such a result would clash with Congress' repeated insistence in the same provisions that the limits are "required" and "shall be established" within tight time deadlines. Had Congress wanted the Commission to satisfy itself that position limits were appropriate before imposing them, it would not have amended the statute as it did.[18]

The court also misunderstood the legislative history cited in the amicus brief of House Democratic members of the Dodd-Frank conference committee. *ISDA*, 887 F. Supp. 2d at 277 (A.xxx-xx). The report of the House Committee on Agriculture stated that "Section 6(a) requires the Commission to set appropriate position limits for all physical commodities other than excluded commodities."

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[18] The district court criticized the Commission's application of the rule of the last antecedent, *ISDA*, 887 F. Supp. 2d at 276-77 (A.xxx-xx), but it misused the same rule when it analyzed the introductory phrase of section 6a(a)(3). *See ISDA*, 887 F. Supp. 2d at 277 (A.xxx). The court concluded that the phrase "as appropriate" in that section "is closest to the verb 'shall' and, as such, modifies it." In fact, the rule of the last antecedent provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase *that it immediately follows*," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphasis added), *i.e.*, not a verb that it precedes. Moreover, the court's analysis ignores that section 6a(a)(3) includes a clause that specifically refers to "the limits required in [section 6a(a)(2)]." Because the mandate is so clearly set forth at the outset of section 6a(a)(3), the words "as appropriate" can only refer to the level of limits that the Commission imposes.

H.R. Rep. 111-385 Part 1 at 19 (2009). This report accompanied HR 977, which was a bill to amend the CEA. Although HR 977 was never enacted, section 6(a) of that bill included language that was adopted verbatim into Dodd-Frank, and was enacted as sections 6a(a)(2) and (3). As the court recognized, the committee report explains that sections 6a(a)(2) and (3) require the Commission to set limits, and also makes clear that the "as appropriate" language refers only to the level of the limits the Commission sets. However, the court completely discounted this history because "that is not the final language used by Congress." *See ISDA*, 887 F. Supp. 2d at 277 (A.xxx). It is true that Congress did not enact the language of *the committee report*, which is what seemed to trouble the court. But Congress did enact the exact language that the report explained. Thus, the court erred by ignoring the legislative history, particularly since that history answered the very question that confounded the court. *See Shays v. Federal Election Comm'n*, 414 F.3d 76, 105 (D.C. Cir. 2005) ("In undertaking our *Chevron* step one inquiry ..., we employ the traditional tools of statutory construction, ... including examination of the ... legislative history...") (internal quotation marks and citations omitted).[19]

[19] Other portions of the legislative history confirm that Congress had no intention of requiring the Commission to find that position limits were necessary before replacing and/or strengthening exchange-set limits (or accountability levels) that *already* existed. Thus, Senator Levin urged passage of Dodd-Frank to ensure "a cop on the beat in all commodity markets where U.S. commodities are traded ... that can enforce the law to prevent excessive speculation and market manipulation." 156 Cong. Record S. 4064 (daily ed. May 20, 2010). Senator

Third, the district court based its finding of ambiguity on section 6a(a)(5)(A), a section that requires the Commission to establish limits for swaps that are economically equivalent to physical commodity futures contracts or options. The court focused on the opening phrase of that section, "[n]otwithstanding any other provision of this section ...," and concluded that this phrase shows that "Congress knew how to divorce subsections of Section 6a from each other." *ISDA*, 887 F. Supp. 2d at 278 (A.xxx). That is, the court interpreted section 6a(a)(5)(A) to mean that the Commission was free to ignore the standards of section 6a(a)(1) when it imposed limits on economically equivalent swaps, even though the Commission was restricted by section 6a(a)(1) when it imposed limits on futures and options. The court stated that this reading "would undermine the CFTC's argument that subsection (a)(2)(A) operates as a standalone mandate, as it is clear from the 'notwithstanding' language in subsection (a)(5)(A) that Congress knew how to divorce subsections of Section 6a from each other." *ISDA*, 887 F. Supp. 2d at 278 (A.xxx).

But the Commission has not argued that subsection (a)(2)(A) (*i.e.*, section 6a(a)(2)(A)) is a "standalone mandate" – we agree that the Commission has to

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Dianne Feinstein observed that "[p]osition limits provide an important restriction on market manipulation and the amount of risk that can build up in any one market participant," and that Dodd-Frank would build on this by "requir[ing] speculative position limits to be set in the aggregate for each commodity ... ." 156 Cong. Rec. S 2699 (daily ed. April 27, 2010).

impose limits on futures and options "in accordance with the standards" in section 6a(a)(1). That the mandate to establish limits on swaps does not contain that same language in no way undermines the Commission's view that the Dodd-Frank amendments require the Commission to establish position limits on physical commodity futures, options, and economically equivalent swaps. Indeed, if anything, the "notwithstanding" language *reinforces* the Commission's interpretation that the "standards" to which Congress referred in section 6a(a)(2) do not include antecedent necessity findings. There is no reason to believe Congress would have conditioned one set of limits (on futures and options) on the Commission's determination that they were necessary while, at the same time, mandating limits on economically equivalent swaps without any such determination.[20]

In the end, the district court got it exactly backwards. It stated that sections 6a(a)(2) and (3) and 15 U.S.C. § 8307 (the study requirement) "*taken in isolation* seemingly create a mandatory regime." *See ISDA*, 887 F. Supp. 2d at 279 (A.xxx) (emphasis added). In fact, however, it is these provisions – and the rest of the Dodd-Frank amendments to section 6a(a) – that, *taken as a whole,* clearly create a

[20] The "[n]otwithstanding any other provision of this section" clause of section 6a(a)(5) addresses the fact that the mandate in sections 6a(a)(2) and (3) does not refer to swaps. "Notwithstanding" those provisions, section 6a(a)(5) requires the Commission to impose limits with respect to a subgroup of swaps, *i.e.*, those that are economically equivalent to futures or options for agricultural or exempt commodities.

mandatory regime. The mandatory language, time limits, and study requirement make little sense if Congress had intended position limits to be discretionary. Indeed, section 6a(a)(1) (as amended by Dodd-Frank) gives the Commission discretionary authority to impose position limits on futures, swaps, and options. Sections 6a(a)(2), (3), and (5) add nothing meaningful to that authority if they are construed to restrict the Commission to imposing only those limits that it first finds to be necessary. For that reason, the court's conclusion that ISDA's interpretation of the statute is plausible is wrong and should be reversed. *See United States v. Corley*, 556 U.S. 303, 314 (2009) (rejecting interpretation that is "at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...") (internal quotation marks and citations omitted).[21]

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[21] The court referred to the Commission's interpretation of section 6a(a) as "rigid" because the Commission represented at argument that it intended eventually to implement limits for all physical commodities. *See ISDA*, 887 F. Supp. 2d at 279 n.6. But that is what the Congress required the Commission to do by enacting section 6a(a)(2) – to adopt a regime similar to the one imposed by the Commission in 1981, when it required the exchanges to set limits on all futures contracts. Although the Rule imposes federal limits on only 28 commodities, the Commission indicated that it would impose additional limits as practicable. 76 Fed. Reg. 71659-60 (A.xxx-xx). Further, the Commission required swap execution facilities and exchanges to monitor positions with respect to all other commodities. *See* 17 C.F.R. § 151.11.

II. THE DISTRICT COURT MISINTERPRETED SECTION 6a(a)(1)

A. The district court erred when it held that section 6a(a)(1) requires the Commission to make a finding of necessity as a prerequisite to imposing position limits

The district court mistakenly concluded that section 6a(a)(1) unambiguously requires that, before the Commission imposes position limits, it must first make a finding of necessity (although the court never explained what sort of finding would be required). As discussed in Part I, it is inconsistent with the mandatory scheme of the Dodd-Frank amendments to make the imposition of limits subject to the Commission's discretion. Further, if the Commission had to make such findings, it could not possibly impose limits within the time deadlines set by Congress. The district court's interpretation of section 6a(a)(1) is wrong also because the language of that section is inherently ambiguous, because the Commission has long interpreted that section *not* to require antecedent findings, and because Congress ratified that interpretation.

Congress enacted what is now section 6a(a)(1) in 1936, following violent fluctuations in commodity prices.[22] Congress attributed these fluctuations to "excessive speculation" – the amassing of very large speculative positions. *See* 75 Fed. Reg. 4145-46. It determined that limits on the sizes of positions were an

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[22] Section 6a(a)(1) was originally enacted as section 6a(1). It has remained substantially unchanged since then. For convenience, we refer to it as section 6a(a)(1).

effective regulatory tool to prevent burdensome disruptions that could result from those positions. And it authorized the CEC, and now the Commission, to impose limits "from time to time" in its discretion as it "finds are necessary" to prevent those disruptions.

Section 6a(a)(1) provides, in part:

> "[e]xcessive speculation in any commodity [futures or swap contract traded on or subject to the CEA] causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time … proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person … as the Commission finds are necessary to diminish, eliminate, or prevent such burden.

The district court failed to recognize the ambiguity in section 6a(a)(1), ambiguity that is apparent from the words of the provision. When Congress gave the Commission authority to prevent "sudden or unreasonable fluctuations or unwarranted changes in the price" of commodities, it used language that this Court has held to be ambiguous: it instructed the Commission to impose limits as it "finds are necessary." *See AFL-CIO v. Chao,* 409 F.3d 377, 387 (D.C. Cir. 2005) (the term "necessary" in enabling statute was "inherent[ly]" ambiguous[]"); *Cellco P'ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) ("the term 'necessary' is a chameleon-like word"); *NRDC, Inc. v. Thomas*, 838 F.2d 1224, 1238 (D.C. Cir. 1988) ("we find the statute's use of the term 'necessary' to be completely

ambiguous").[23]

The district court noted that, for 45 years, prior to imposing position limits, the CEC made findings of necessity. *See ISDA*, 887 F. Supp. 2d at 269-70 (A.xxx). Although the similarly worded orders listed by the court refer to language in section 6a(a)(1), none of the orders explicitly interprets the section. *See, e.g.* 5 Fed. Reg. 3198 (cotton); 16 Fed. Reg. 8106 (eggs); 21 Fed. Reg. 5575 (onions). In any event, this does not indicate that the section is unambiguous. It merely shows how the CEC implicitly resolved that ambiguity.[24] And it in no way precluded the Commission from altering its interpretation of the section. *See Brown & Williamson*, 529 U.S. at 156 ("[c]ertainly, an agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone'").

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[23] The district court mistakenly suggested that the Commission analyzed the word "necessary" out of the context of the phrase "finds are necessary." *ISDA*, 887 F. Supp. 2d at 271 (A.xxx). But even if the Commission had done so, it would make no difference because the word "necessary" is ambiguous, and, therefore, the phrase "finds are necessary" is also ambiguous.

[24] The district court quotes from a 1935 House Report to support its contention that section 6a(a)(1) requires the Commission to make a finding of necessity before imposing position limits. *ISDA*, 887 F. Supp. 2d at 269 n.4 (A.xxx). It may be that, when the CEA was originally enacted, Congress intended to require "'due notice and opportunity for hearing and a finding of a burden on interstate commerce caused by such speculation'" as a prerequisite to the imposition of specific position limits on the individual agricultural commodities that the CEC then regulated. *Id.* However, as explained *infra*, by 1983, when Congress amended § 6a(a)(1), it no longer intended that the section require those types of findings.

B. The district court erred when it failed to defer to the Commission's longstanding interpretation of section 6a(a)(1)

The district court mistakenly claimed that the Commission's longstanding interpretation of section 6a(a)(1) has been expressed only through "silence." *See ISDA*, 887 F. Supp. 2d at 274 (A.xxx). In fact, for more than 30 years, the Commission has interpreted section 6a(a)(1)'s authorization to establish limits "as [it] finds are necessary" as authorizing it to impose position limits when, in its reasoned judgment, it determines that such limits would effectuate the purpose of the section – preventing the harms that could result from unchecked speculative trading. At no time during that period has the Commission interpreted section 6a(a)(1) as requiring more than a reasoned judgment that limits will effectuate the purposes of the statute.

The Commission's interpretation has evolved through time. *Brown & Williamson*, 529 U.S. at 156 ("agencies 'must be given ample latitude to adapt their rules and policies to the demands of changing circumstances'"). When section 6a(a)(1) was enacted in 1936, the jurisdiction of the CEC was limited to a handful of agricultural commodities. At that time, the CEC was required to provide notice and an opportunity for a public hearing before setting limits. As a result, it proceeded incrementally, setting limits on individual commodities on a case-by-case basis.

Meanwhile, exchanges began voluntarily implementing their own limits for

many commodities. By the mid-1970s, "position limits were in effect for almost all actively traded commodities then under regulation, and [] limits for positions in about one half of these actively traded commodities had been specified by the contract markets." 45 Fed. Reg. 79832 (A.xxx); 46 Fed. Reg. 50940 n.6; 75 Fed. Reg. 4146 (A.xxx).

"[A] confluence of events in the early 1970s – including a drastic surge in commodities trading, rapidly rising food costs, and a highly publicized and costly futures trading scandal – led Congress to modernize and fortify the CEA and fill some fairly significant regulatory gaps." *American Agric. Movement, Inc. v. Board of Trade of City of Chicago*, 977 F.2d 1147, 1156 (7th Cir. 1992). The 1974 amendments to the CEA established the CFTC, and extended the CEA's reach so that it encompassed not just agricultural commodities but also futures contracts for virtually all commodities. And in the late 1970s and early 1980s, a few speculative traders controlled an extraordinarily large number of futures contracts for silver, contributing to a rapid increase in the price of that commodity, followed by an equally rapid plunge. 45 Fed. Reg. 79833 (A.xxx).

In response, in 1981, the Commission issued a rule requiring contract markets to "close the existing regulatory gap" by imposing position limits for *all* futures contracts. 46 Fed. Reg. 50939 (A.xxx). (At that time, there were nearly 40 contracts that had neither Commission- nor exchange-set limits. 45 Fed. Reg. at

79835 (A.xxx).) In promulgating the 1981 rule, the Commission effectively rejected an interpretation of section 6a(a)(1) that would require the Commission to make particularized necessity findings. The 1981 rule required exchanges to establish limits for *all* contracts, without regard to whether there was or would likely be excessive speculation as to *any* of them, whether speculation had caused or was likely to cause price volatility, whether position limits were required to combat price volatility, or whether there was even trading data for the commodities to which limits would apply. 46 Fed. Reg. at 50940 (A.xxx); 17 C.F.R. § 1.61(a)(1).[25]

In ordering limits "on all contract markets irrespective of the characteristics of the underlying cash market," the Commission reasoned that "[section 6a(a)(1)] represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure." 46 Fed. Reg. at 50940-41 (A.xxx). The Commission also determined that "[t]he prevention of large and/or abrupt price movements which are

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[25] *See also* the testimony of former Commission Chair Johnson. Citing a Commission report, he explained that "it seems clear from the silver crisis that the orderly imposition of speculative limits *before a crisis develops* is one of the more promising means of solving such difficulties in the future... . It was [w]ith this in mind[] [that] the Commission adopted [the] 1981 rule which ensures that *each* futures and options contract traded on [an exchange] will be subject to speculative position limits." *Futures Trading Act of 1982: Hearings on S. 2109 before the S. Subcomm. on Agricultural Research,* 97th Cong. 44 (1982) (emphasis added, internal quotation marks omitted).

attributable to extraordinarily large speculative positions is a Congressionally endorsed regulatory objective of the Commission." *Id.* at 50940 (A.xxx). It further found, based on its experience, that "this objective is enhanced by speculative position limits since it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited." *Id.* Finally, the Commission determined that, while it *would not consider the characteristics of particular contract markets in requiring omnibus limits*, it would consider those characteristics "in reviewing the *levels* proposed by the exchanges." *Id.* at 50941 (emphases added) (A.xxx).

The Commission reiterated this interpretation of section 6a(a)(1) in a rulemaking notice it issued in 2010, and again in 2011, in connection with the Rule. It stated that section 6a(a)(1) did not require it to make "factual determination[s]" as to whether excessive speculation or an undue burden from excessive speculation is likely to, or actually had, occurred. The Commission further stated that the section does not require it to "prove that such limits will in fact prevent such burdens," or "prove that position limits are an effective regulatory tool." 76 Fed. Reg. 71629 n. 30, 71663 (A.xxx, xxx); *see also* 75 Fed.

Reg. 4148, 4164.[26] Rather, the Commission concluded that section 6a(a)(1) only required that it make a reasoned judgment, informed by Congress' findings and its own experience, that position limits would effectuate the preventative purposes of the statute. As the Commission explained, "[r]equiring a specific demonstration of the need for position limits is contrary to [section 6a(a)(1)] ... ." 75 Fed. Reg. 4146 n.13 (A.xxx).

Because section 6a(a)(1)'s authorization to the Commission to establish limits as "[it] finds are necessary" is ambiguous, the district court should have interpreted the provision by applying the second step in the two-part test set forth in *Chevron*. That is, it should have deferred to the Commission's interpretation so long as it concluded that the interpretation was based on a permissible construction of the statute.[27] This deference applies with even greater force to a statute that, like

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[26] The Commission issued the 2010 rulemaking notice while Congress was considering the Dodd-Frank amendments. Congress is presumed to be aware of the Commission's contemporaneous interpretation. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009). (The Commission withdrew the 2010 rule proposal when Dodd-Frank was enacted. 75 Fed. Reg. 50950 (Aug. 18, 2010).)

[27] The court stated that the Commission never treated section 6a(a)(1) as "ambiguous on this point." *ISDA*, 887 F. Supp. 2d at 270 (A.xxx). That is, the court believed that the Commission had never indicated that section 6a(a)(1) was ambiguous as to whether it required necessity findings prior to the imposition of position limits. But the court missed the point, because the ambiguity in section 6a(a)(1) arises from the nature of the finding the Commission had to make (pre-Dodd-Frank) prior to imposing limits. Moreover, the Commission is entitled to *Chevron* deference with respect to its interpretation even if it has not explicitly described the extent of the ambiguity in section 6a(a)(1). Courts have routinely

section 6a(a)(1), authorizes an agency to promulgate preventative rules. As Judge (now Chief Justice) Roberts explained:

> [T]he statute speaks in terms or what is "necessary" to prevent circumvention or evasion of the reporting required under the statute. This is an inherently discretionary standard that clearly invites further definition by the Secretary... . [T]he delegation at issue here is to the Secretary to promulgate rules she finds necessary "to prevent" a future contingency – circumvention or evasion of required reporting. ... The delegation necessitates a predictive judgment about risk, and "an agency's predictive judgment regarding a matter within its sphere of expertise is entitled to 'particularly deferential' review."

Chao, 409 F.3d at 393 (Roberts, J., concurring in part and dissenting in part) (internal citations omitted).

Under the deferential *Chevron* standard, the Commission's construction of the provision is entirely reasonable. In the 1981 rule, the Commission provided a reasoned explanation as to how it was effectuating the goals of section 6a(a)(1) when it required the imposition of omnibus position limits without any particularized findings of necessity. The court should have deferred to this interpretation.

The district court mistakenly held that it could ignore the Commission's 1981 rulemaking because it believed that any Commission interpretation of section 6a(a)(1) was made only through "silence." *ISDA*, 887 F. Supp. 2d at 274

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afforded *Chevron* step-two deference to agency interpretations of ambiguous statutory terms without first determining that the agency had specifically stated that the terms were ambiguous. *See, e.g. Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101-02 (D.C. Cir. 2009).

(A.xxx). In the court's view, the preamble to the 1981 rule merely indicates that the Commission believed it could impose limits without finding that such limits are necessary to diminish or eliminate *ongoing* excessive speculation. But, according to the court, the Commission had left open the question as to whether the Commission still had to find that limits were necessary to prevent speculation that was *likely* to occur. *Id.* The court was wrong.

Even a cursory reading of the 1981 preamble makes clear that, in requiring position limits for all commodities, the Commission interpreted section 6a(a)(1) to authorize it to require limits on all futures contracts, based on congressional determinations and its own experience, not based on any contract-specific findings. *See* 46 Fed. Reg. 50940-50941 ("[T]he Commission believes that speculative limits are appropriate for all contract markets irrespective of the characteristics of the underlying cash market…") (A.xxx, xxx); *see Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise" and "need not suffer the flood before building the levee").[28] Moreover, the Commission's preventative approach is inherent in the rule itself, which requires exchanges to adopt limits "[f]or the purpose of *preventing* excessive speculation in any ...

[28] As noted *supra*, 31 at n.13, the Commission expressly discussed the "standards" it believed must be applied in imposing position limits, and particularized necessity findings were not among them.

[commodity futures contract].” 17 C.F.R. § 1.61(a)(1) (1982), 46 Fed. Reg. at 50945 (emphasis added) (A.xxx). Plainly, when, in 1981, the Commission required that limits be imposed for all contracts within 90 days, the Commission interpreted section 6a(a)(1) as it now does – limits may be imposed without any particularized finding of necessity.[29]

C. The district court failed to recognize that, in 1983, Congress ratified the Commission’s interpretation of section 6a(a)(1)

The district court was also mistaken when it stated that any congressional ratification of the Commission’s 1981 interpretation of section 6a(a)(1), like the Commission’s interpretation, occurred only through “silence.” *See ISDA*, 887 F. Supp. 2d at 274 (A.xxx). In fact, that ratification, which renders the Commission’s interpretation “virtually conclusive,” *see CFTC v. Schor*, 478 U.S. at 846, occurred through three Congressional actions, not through silence. First, Congress specifically rejected an industry proposal to amend section 6a so that it would no longer include Congress’ finding that excessive speculation places a burden on

[29] During the 1990s, the Commission allowed exchanges to replace position limits (for the most part, outside the spot month) with position accountability. *Supra*, 13-14. The court inferred from this that the Commission had somehow acted inconsistently, because, by allowing accountability, the Commission must have recognized that there were certain situations where position limits were not necessary. *See ISDA*, 887 F. Supp. 2d at 274 n.5 (A.xxx). But the fact that the Commission decided that there may be situations where position limits were *not* necessary in no way indicated that the Commission believed it was statutorily required to make a particularized finding of necessity as a prerequisite to imposing a position limit.

interstate commerce, the finding on which the Commission principally relied in justifying its 1981 approach to position limits. S. Rep. 97-384, at 44-45; 46 Fed. Reg. 50940. Second, Congress specifically rejected an industry proposal to require the Commission, before it imposed any limits, to hold on-the-record hearings, and to make evidentiary findings about the specific need for such limits. S. Rep. 97-384, at 44, 79.

Third, and most important, Congress affirmatively approved the interpretation in the 1981 Rule with "positive legislation": Congress added a new subsection to section 6a that authorized the Commission to bring enforcement actions against violations of the exchange-set limits that were set pursuant to the Commission's 1981 rule. *See* § 6a(5) (1983) (providing that "it shall be a violation of this chapter" to violate any rule of any exchange "fixing limits" on "positions" if the exchange rule "has been approved by the Commission." (This enforcement authority is currently codified at section 6a(e).) As the Supreme Court has explained, when "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with *positive legislation*, we cannot but deem that construction virtually conclusive." *CFTC v. Schor*, 478 U.S. at 846 (internal quotation marks omitted) (emphasis added). The district court erred by

ignoring this clear ratification.[30]

The Commission need not prove that Congress was actually aware of the Commission's 1981 interpretation to demonstrate ratification. *See Forest Grove*, 557 U.S. at 239-40 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (internal quotation marks omitted); *Sherley v. Sebelius,* 644 F.3d 388, 396-97 (D.C. Cir. 2011). Here, however, the legislative history confirms that Congress *was* aware of the Commission's 1981 Rule (and, *a fortiori*, of its interpretation of section 6a(a)(1)). The Senate Report for the 1982 amendments to the CEA expressly refers to the 1981 rule. S. Rep. 97-384, at 44 ("During 1981, the Commission promulgated a final rule requiring exchanges, by February 14, 1982, to submit speculative position limits proposals for Commission approval *for all futures contracts traded as of that date*") (emphasis added). Further, Commission Chair Johnson testified before Congress, and explained that the 1981 Rule required that there be speculative position limits for each and every futures contract traded on an exchange. *See supra*, 48 at n.25. Congress' actions cannot plausibly be considered to be ratification by "silence" of an interpretation

[30] The district court can claim that ratification occurred through "silence," only because it ignored both the 1981 rule and the 1982-83 legislative history and amendments to the CEA. Indeed, the ratification here is stronger than in other cases where the Supreme Court has found it. *See Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817, 827 (2013) (finding ratification of agency implementation of statute since "[a]t no time did Congress express disapproval").

that was never explicitly made.

By refusing to defer to the Commission's interpretation of ambiguous language, and ignoring the congressional ratification, the district court misinterpreted section 6a(a)(1). The district court then compounded its error by relying on that misinterpretation in concluding that it was "plausible" that Congress conditioned the establishment of "required" limits on findings by the Commission that such limits were in fact necessary. Nothing in the Dodd-Frank amendments suggests that Congress intended in § 6a(a)(2) to condition the limits it required on the Commission's judgment that limits are necessary or appropriate.

* * *

In sum, by focusing on individual words and phrases in isolation, the district court lost sight of the big picture. When the Dodd-Frank Congress amended section 6a(a), it "required" the Commission to impose position limits for physical commodity derivatives in no more than 270 days, to conduct a study of those limits within a year, and to provide the results to Congress. Although the limits must be imposed "[i]n accordance with the standards set forth in [section 6a(a)(1)]," any requirement that the Commission make a necessity finding before imposing limits conflicts with Congress' determination that the limits are "required." Contrary to the district court's conclusion, ISDA's reading is implausible because it would give the Commission discretion in an area Congress sought to control, and as a

result, the Dodd-Frank amendments to section 6a(a) would merely duplicate authority already long available to the Commission under section 6a(a)(1). Thus, even if this Court were to conclude that, pre-Dodd-Frank, section 6a(a)(1) conditioned the imposition of limits on a finding of necessity, Dodd-Frank trumped any such requirement with respect to limits on physical commodity derivatives.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2013, I filed the Proof Brief of Appellant Commodity Futures Trading Commission using this Court's CM/ECF electronic filing system. I will submit five copies of the Brief to this Court using an express overnight delivery service. Also on April 5, I served the Brief on the following counsel for Appellees using the CM/ECF system, and I will provide them with paper copies:

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 13,791 words, as counted by the Word 2010 word processing program.

s/ Lawrence DeMille-Wagman
Lawrence DeMille-Wagman

ADDENDUM

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7 U.S.C. § 6a(a) (2006 Supp. V 2012) ……..……………………………..Addendum 1

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15 U.S.C. § 8307(a) (2006 Supp. V 2012) ……………..…………….…...Addendum 4

Commission pursuant to subsection (c)" in introductory provisions.

Subsec. (b). Pub. L. 111–203, §738(a)(1)–(3), designated existing provisions as par. (2), designated the first to third sentences as subpars. (A) to (C), respectively, redesignated former pars. (1) and (2) as cls. (i) and (ii), respectively, of subpar. (C), inserted headings, in subpar. (B), substituted "Rules and regulations described in subparagraph (A)" for "Such rules and regulations", in the introductory provisions of subpar. (C), substituted "Except as provided in paragraphs (1) and (2), no rule or regulation" for "No rule or regulation" and "that—" for "that", and, in subpar. (C)(i), substituted "market; or" for "market, or".

Subsec. (b)(1). Pub. L. 111–203, §738(a)(4), added par. (1).

Subsec. (c)(1). Pub. L. 111–203, §721(d), substituted "except that—" for "except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest." and added subpars. (A) and (B).

Subsec. (c)(6). Pub. L. 111–203, §722(f), added par. (6).

Subsec. (e). Pub. L. 111–203, §738(b)(2), added subsec. (e).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§711–754) of title VII of Pub. L. 111–203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111–203, set out as a note under section 1a of this title.

§ 6a. Excessive speculation

(a) Burden on interstate commerce; trading or position limits

(1) In general

Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or swaps that perform or affect a significant price discovery function with respect to registered entities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, or swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity, as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (1) and (2) of subsection (b) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) Establishment of limitations

(A) In general

In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.

(B) Timing

(i) Exempt commodities

For exempt commodities, the limits required under subparagraph (A) shall be established within 180 days after July 21, 2010.

(ii) Agricultural commodities

For agricultural commodities, the limits required under subparagraph (A) shall be established within 270 days after July 21, 2010.

(C) Goal

In establishing the limits required under subparagraph (A), the Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits to be imposed by the Commission will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.

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(3) Specific limitations

In establishing the limits required in paragraph (2), the Commission, as appropriate, shall set limits—

(A) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions that may be held by any person for all months; and

(B) to the maximum extent practicable, in its discretion—

(i) to diminish, eliminate, or prevent excessive speculation as described under this section;

(ii) to deter and prevent market manipulation, squeezes, and corners;

(iii) to ensure sufficient market liquidity for bona fide hedgers; and

(iv) to ensure that the price discovery function of the underlying market is not disrupted.

(4) Significant price discovery function

In making a determination whether a swap performs or affects a significant price discovery function with respect to regulated markets, the Commission shall consider, as appropriate:

(A) Price linkage

The extent to which the swap uses or otherwise relies on a daily or final settlement price, or other major price parameter, of another contract traded on a regulated market based upon the same underlying commodity, to value a position, transfer or convert a position, financially settle a position, or close out a position.

(B) Arbitrage

The extent to which the price for the swap is sufficiently related to the price of another contract traded on a regulated market based upon the same underlying commodity so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the swaps on a frequent and recurring basis.

(C) Material price reference

The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a contract traded on a regulated market are directly based on, or are determined by referencing, the price generated by the swap.

(D) Material liquidity

The extent to which the volume of swaps being traded in the commodity is sufficient to have a material effect on another contract traded on a regulated market.

(E) Other material factors

Such other material factors as the Commission specifies by rule or regulation as relevant to determine whether a swap serves a significant price discovery function with respect to a regulated market.

(5) Economically equivalent contracts

(A) Notwithstanding any other provision of this section, the Commission shall establish limits on the amount of positions, including aggregate position limits, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to swaps that are economically equivalent to contracts of sale for future delivery or to options on the contracts or commodities traded on or subject to the rules of a designated contract market subject to paragraph (2).

(B) In establishing limits pursuant to subparagraph (A), the Commission shall—

(i) develop the limits concurrently with limits established under paragraph (2), and the limits shall have similar requirements as under paragraph (3)(B); and

(ii) establish the limits simultaneously with limits established under paragraph (2).

(6) Aggregate position limits

The Commission shall, by rule or regulation, establish limits (including related hedge exemption provisions) on the aggregate number or amount of positions in contracts based upon the same underlying commodity (as defined by the Commission) that may be held by any person, including any group or class of traders, for each month across—

(A) contracts listed by designated contract markets;

(B) with respect to an agreement contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, contracts traded on a foreign board of trade that provides members or other participants located in the United States with direct access to its electronic trading and order matching system; and

(C) swap contracts that perform or affect a significant price discovery function with respect to regulated entities.

(7) Exemptions

The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.

(b) Prohibition on trading or positions in excess of limits fixed by Commission

The Commission shall, in such rule, regulation, or order, fix a reasonable time (not to exceed ten days) after the promulgation of the rule, regulation, or order; after which, and until such rule, regulation, or order is suspended, modified, or revoked, it shall be unlawful for any person—

(1) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets, or swap execution facility or facilities with respect to a significant price discovery contract, to which the rule, regulation, or order applies, any amount of such commodity during any one business day in excess of any

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trading limit fixed for one business day by the Commission in such rule, regulation, or order for or with respect to such commodity; or

(2) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market or swap execution facility with respect to a significant price discovery contract in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such rule, regulation, or order.

(c) Applicability to bona fide hedging transactions or positions

(1) No rule, regulation, or order issued under subsection (a) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission by rule, regulation, or order consistent with the purposes of this chapter. Such terms may be defined to permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs for that period of time into the future for which an appropriate futures contract is open and available on an exchange. To determine the adequacy of this chapter and the powers of the Commission acting thereunder to prevent unwarranted price pressures by large hedgers, the Commission shall monitor and analyze the trading activities of the largest hedgers, as determined by the Commission, operating in the cattle, hog, or pork belly markets and shall report its findings and recommendations to the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture in its annual reports for at least two years following January 11, 1983.

(2) For the purposes of implementation of subsection (a)(2) for contracts of sale for future delivery or options on the contracts or commodities, the Commission shall define what constitutes a bona fide hedging transaction or position as a transaction or position that—

(A)(i) represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;

(ii) is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(iii) arises from the potential change in the value of—

(I) assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(II) liabilities that a person owns or anticipates incurring; or

(III) services that a person provides, purchases, or anticipates providing or purchasing; or

(B) reduces risks attendant to a position resulting from a swap that—

(i) was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to subparagraph (A); or

(ii) meets the requirements of subparagraph (A).

[See main edition for text of (d)]

(e) Rulemaking power and penalties for violation

Nothing in this section shall prohibit or impair the adoption by any contract market, derivatives transaction execution facility, or by any other board of trade licensed, designated, or registered by the Commission or by any electronic trading facility of any bylaw, rule, regulation, or resolution fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery traded on or subject to the rules of such contract market or derivatives transaction execution facility or on an electronic trading facility, or under options on such contracts or commodities traded on or subject to the rules of such contract market, derivatives transaction execution facility, or electronic trading facility or such board of trade: *Provided*, That if the Commission shall have fixed limits under this section for any contract or under section 6c of this title for any commodity option, then the limits fixed by the bylaws, rules, regulations, and resolutions adopted by such contract market, derivatives transaction execution facility, or electronic trading facility or such board of trade shall not be higher than the limits fixed by the Commission. It shall be a violation of this chapter for any person to violate any bylaw, rule, regulation, or resolution of any contract market, derivatives transaction execution facility, or other board of trade licensed, designated, or registered by the Commission or electronic trading facility with respect to a significant price discovery contract fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery or under options on such contracts or commodities, if such bylaw, rule, regulation, or resolution has been approved by the Commission or certified by a registered entity pursuant to section 7a–2(c)(1) of this title: *Provided*, That the provisions of section 13(a)(5) of this title shall apply only to those who knowingly violate such limits.

(As amended Pub. L. 110–234, title XIII, §§ 13105(a), 13203(g), May 22, 2008, 122 Stat. 1434, 1439; Pub. L. 110–246, § 4(a), title XIII, §§ 13105(a), 13203(g), June 18, 2008, 122 Stat. 1664, 2196, 2201; Pub. L. 111–203, title VII, § 737(a)–(c), July 21, 2010, 124 Stat. 1722, 1725.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

AMENDMENTS

2010—Subsec. (a). Pub. L. 111–203, § 737(a)(1)–(3), designated existing provisions as par. (1), inserted heading, substituted "swaps that perform or affect a significant price discovery function with respect to registered entities" for "on electronic trading facilities with respect to a significant price discovery contract", inserted

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ties and Exchange Commission grant an exemption pursuant to section 78mm(a)(1) of this title with respect to a product that is the subject of a filing under paragraph (1); or

(ii) the Securities and Exchange Commission from requesting that the Commodity Futures Trading Commission grant an exemption pursuant to section 6(c)(1) of title 7 with respect to a product that is the subject of a filing under paragraph (1),

Provided, however, that nothing in this subparagraph shall be construed to require the Commodity Futures Trading Commission or the Securities and Exchange Commission to issue an exemption requested pursuant to this subparagraph; *provided further*, That an order granting or denying an exemption described in this subparagraph and issued under paragraph (3)(B) shall not be subject to judicial review pursuant to subsection (b).

(E) Withdrawal of request

A request under subparagraph (A) or (B) may be withdrawn by the Commission making the request at any time prior to a determination being made pursuant to paragraph (3) for any reason by providing written notice to the head of the other Commission.

(3) Determination

Notwithstanding any other provision of law, no later than 120 days after the date of receipt of a request—

(A) under subparagraph (A) or (B) of paragraph (2), unless such request has been withdrawn pursuant to paragraph (2)(E), the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall, by order, issue the determination requested in subparagraph (A) or (B) of paragraph (2), as applicable, and the reasons therefor; or

(B) under paragraph (2)(D), unless such request has been withdrawn, the Securities and Exchange Commission or the Commodity Futures Trading Commission, as applicable, shall grant an exemption or provide reasons for not granting such exemption, provided that any decision by the Securities and Exchange Commission not to grant such exemption shall not be reviewable under section 78y of this title.

(b) Judicial resolution

(1) In general

The Commodity Futures Trading Commission or the Securities and Exchange Commission may petition the United States Court of Appeals for the District of Columbia Circuit for review of a final order of the other Commission issued pursuant to subsection (a)(3)(A), with respect to a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) that it believes affects its statutory jurisdiction within 60 days after the date of entry of such order, a written petition requesting a review of the order. Any such proceeding shall be expedited by the Court of Appeals.

(2) Transmittal of petition and record

A copy of a petition described in paragraph (1) shall be transmitted not later than 1 business day after filing by the complaining Commission to the responding Commission. On receipt of the petition, the responding Commission shall file with the court a copy of the order under review and any documents referred to therein, and any other materials prescribed by the court.

(3) Standard of review

The court, in considering a petition filed pursuant to paragraph (1), shall give no deference to, or presumption in favor of, the views of either Commission.

(4) Judicial stay

The filing of a petition by the complaining Commission pursuant to paragraph (1) shall operate as a stay of the order, until the date on which the determination of the court is final (including any appeal of the determination).

(Pub. L. 111–203, title VII, § 718, July 21, 2010, 124 Stat. 1652.)

DEFINITION

For definition of "including" as used in this section, see section 5301 of Title 12, Banks and Banking.

§ 8307. Studies

(a) Study on effects of position limits on trading on exchanges in the United States

(1) Study

The Commodity Futures Trading Commission, in consultation with each entity that is a designated contract market under the Commodity Exchange Act [7 U.S.C. 1 et seq.], shall conduct a study of the effects (if any) of the position limits imposed pursuant to the other provisions of this title[1] on excessive speculation and on the movement of transactions from exchanges in the United States to trading venues outside the United States.

(2) Report to the Congress

Within 12 months after the imposition of position limits pursuant to the other provisions of this title,[1] the Commodity Futures Trading Commission, in consultation with each entity that is a designated contract market under the Commodity Exchange Act, shall submit to the Congress a report on the matters described in paragraph (1).

(3) Required hearing

Within 30 legislative days after the submission to the Congress of the report described in paragraph (2), the Committee on Agriculture of the House of Representatives shall hold a hearing examining the findings of the report.

(4) Biennial reporting

In addition to the study required in paragraph (1), the Chairman of the Commodity Futures Trading Commission shall prepare and submit to the Congress biennial reports on the growth or decline of the derivatives markets

[1] See References in Text note below.

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in the United States and abroad, which shall include assessments of the causes of any such growth or decline, the effectiveness of regulatory regimes in managing systemic risk, a comparison of the costs of compliance at the time of the report for market participants subject to regulation by the United States with the costs of compliance in December 2008 for the market participants, and the quality of the available data. In preparing the report, the Chairman shall solicit the views of, consult with, and address the concerns raised by, market participants, regulators, legislators, and other interested parties.

(b) Study on feasibility of requiring use of standardized algorithmic descriptions for financial derivatives

(1) In general

The Securities and Exchange Commission and the Commodity Futures Trading Commission shall conduct a joint study of the feasibility of requiring the derivatives industry to adopt standardized computer-readable algorithmic descriptions which may be used to describe complex and standardized financial derivatives.

(2) Goals

The algorithmic descriptions defined in the study shall be designed to facilitate computerized analysis of individual derivative contracts and to calculate net exposures to complex derivatives. The algorithmic descriptions shall be optimized for simultaneous use by—

(A) commercial users and traders of derivatives;

(B) derivative clearing houses, exchanges and electronic trading platforms;

(C) trade repositories and regulator investigations of market activities; and

(D) systemic risk regulators.

The study will also examine the extent to which the algorithmic description, together with standardized and extensible legal definitions, may serve as the binding legal definition of derivative contracts. The study will examine the logistics of possible implementations of standardized algorithmic descriptions for derivatives contracts. The study shall be limited to electronic formats for exchange of derivative contract descriptions and will not contemplate disclosure of proprietary valuation models.

(3) International coordination

In conducting the study, the Securities and Exchange Commission and the Commodity Futures Trading Commission shall coordinate the study with international financial institutions and regulators as appropriate and practical.

(4) Report

Within 8 months after July 21, 2010, the Securities and Exchange Commission and the Commodity Futures Trading Commission shall jointly submit to the Committees on Agriculture and on Financial Services of the House of Representatives and the Committees on Agriculture, Nutrition, and Forestry and on Banking, Housing, and Urban Affairs of the Senate a written report which contains the results of the study required by paragraphs (1) through (3).

(c) International swap regulation

(1) In general

The Commodity Futures Trading Commission and the Securities and Exchange Commission shall jointly conduct a study—

(A) relating to—

(i) swap regulation in the United States, Asia, and Europe; and

(ii) clearing house and clearing agency regulation in the United States, Asia, and Europe; and

(B) that identifies areas of regulation that are similar in the United States, Asia and Europe and other areas of regulation that could be harmonized[2]

(2) Report

Not later than 18 months after July 21, 2010, the Commodity Futures Trading Commission and the Securities and Exchange Commission shall submit to the Committee on Agriculture, Nutrition, and Forestry and the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Agriculture and the Committee on Financial Services of the House of Representatives a report that includes a description of the results of the study under subsection (a), including—

(A) identification of the major exchanges and their regulator in each geographic area for the trading of swaps and security-based swaps including a listing of the major contracts and their trading volumes and notional values as well as identification of the major swap dealers participating in such markets;

(B) identification of the major clearing houses and clearing agencies and their regulator in each geographic area for the clearing of swaps and security-based swaps, including a listing of the major contracts and the clearing volumes and notional values as well as identification of the major clearing members of such clearing houses and clearing agencies in such markets;

(C) a description of the comparative methods of clearing swaps in the United States, Asia, and Europe; and

(D) a description of the various systems used for establishing margin on individual swaps, security-based swaps, and swap portfolios.

(d) Stable value contracts

(1) Determination

(A) Status

Not later than 15 months after July 21, 2010, the Securities and Exchange Commission and the Commodity Futures Trading Commission shall, jointly, conduct a study to determine whether stable value contracts fall within the definition of a swap. In making the determination required under this subparagraph, the Commissions jointly shall

[2] So in original. Probably should be followed by a period.

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