

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL SWAPS AND)
DERIVATIVES ASSOCIATION and)
SECURITIES INDUSTRY AND FINANCIAL)
MARKETS ASSOCIATION,)
)
Plaintiffs,)
)
v.)
)
COMMODITIES FUTURES TRADING)
COMMISSION,)
)
Defendant.)

No. 11-CV-2146 (RLW)

AMICUS BRIEF FILED BY HOUSE DEMOCRATIC MEMBERS OF THE
CONFERENCE COMMITTEE ON HR 4173
IN SUPPORT OF COMMODITY FUTURES TRADING COMMISSION MOTIONS

Dated: April 10, 2012

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U.S. House of Representatives
Washington, D.C. 20515

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FOR THE DISTRICT OF COLUMBIA**

INTERNATIONAL SWAPS AND)
DERIVATIVES ASSOCIATION and)
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MARKETS ASSOCIATION,)
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We the undersigned are the Democratic House members of the Conference Committee on HR 4173 remaining in the House in the 112th Congress. The Conference Committee was established to bridge the differences between the House and the Senate to create what became the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“the Act”). All Democratic House members of the conference committee supported and voted in favor of the conference bill ultimately passed by both the House and the Senate and signed into law on July 21, 2010.

Position limits historically have been established prophylactically to prevent the price distortions caused by trading by non-users of commodities, rather than in response to an already identified problem. Such limits were required in order to prevent possible harm, not merely to address harm that has already occurred.

It has been suggested that Congress did not require the establishment of position limits. During the process of creating the final language for the Act, we considered language requiring the Commodity Futures Trading Commission (CFTC) to adopt position limits with respect to positions related to certain physical commodities. This language has been referenced as Section 4a(a)(2)(A) of the Commodity Exchange Act (“CEA”), as amended by the Act. As adopted initially twice by the House Committee on Agriculture (for both H.R. 977 and HR 3795), then by the House itself, and subsequently by Congress in the Act, the cited language required the CFTC to establish position limits expeditiously on specified commodities, covering both futures and swaps transactions. The CFTC was not required or even expected to analyze and determine whether or not it considered position limits to be efficacious in addressing possible harm from speculative trading.

Evidence of this can be found in the legislative history regarding the position limit provisions. The provisions were considered by the U.S. House of Representatives Committee on Agriculture on February 12, 2009, when it voted for H.R. 977, the Derivatives Markets Transparency and Accountability Act of 2009. In its report accompanying this bill (H.Rept. 111-385), the Committee in its section on “Purpose and Need” appropriately characterized the provisions as such: “Mandated the CFTC to set speculative position limits for trading in agricultural and energy commodities and establish conditions for the granting of hedge exemptions from such limits.”

Additionally, the Section-By-Section Analysis of H.Rept. 111-385 further demonstrates the obligation of the CFTC in its description of the relevant language: “Section 6(a) requires the CFTC to set appropriate position limits for all physical commodities other than excluded commodities.” As indicated by this language, the use of the word “appropriate” in the statutory

text was intended to describe the level of the position limit, not whether the limits themselves were appropriate.

During debate on H.R. 977, then Ranking Member Frank Lucas acknowledged the requirement being placed on the CFTC when he stated, “H.R. 977 greatly expands the imposition of position limits by requiring the CFTC to set position limits for all physical commodities.” He even attempted to roll back the expected imposition of these required limits given his view that “Putting position limits on out months, all months, and aggregate limits, however, would not serve the public interest we are trying to address.” His amendment however, did not pass.

When the House Agriculture Committee considered this language again in H.R. 3795, the understanding that these limits were required continued to permeate the debate. Rep. Halvorson acknowledged this stating: “...the bill as amended would require the CFTC to impose new position limits on exchange traded physical commodity products.” In fact, she offered an amendment to delay the implementation of position limits until corresponding aggregate position limits across competing swap markets were ready. As she described: “. . . if position limits are imposed on exchange trading and not alternative platforms simultaneously, the bill as amended would allow market participants to escape position limits by moving their trading to the swaps market or to foreign trading platforms where position limits would not yet apply.” Again, the expectation was that the limits were required and would be forthcoming soon. That amendment was adopted and became part of the Act.

The language of Section 4a(a)(2)(A) of the CEA was in Section 6(a)(1)(B) of H.R. 977. Those provisions were incorporated into H.R. 3795, which the House Agriculture Committee passed on October 21, 2009. The provisions of H.R. 3795 were subsequently added as an amendment on the floor to H.R. 4173, which ultimately became the Act. The only changes made

to the language in this subparagraph as it journeyed to H.R. 4173 was the removal in 6(a)(1)(B) of H.R. 977 of references of “derivatives transaction execution facility” and “electronic trading facility” and replaced with the newly created term “swap execution facility.”

In conference, the conferees substantially adopted the House language on position limits. When looking at the development of Section 4a(a)(2)(A), compare section 6(a)(1)(B) of H.R. 977, as reported by the Committee on Agriculture; section 113(a)(5) of H.R. 3795, as reported by the Committee on Agriculture; and section 737(a)(4) of H.R. 4173, as enacted (P.L. 111-517). The conferees did not change the pre-existing structure for adoption of position limits by the CFTC, under which the CFTC was not required to make a finding of necessity in adopting new position limits. Nor did the Conference Committee alter the House language requiring imposition of position limits in specified commodities. The intent of the language is clear: mandating the imposition of limits. Opinions to the contrary do not match the language or its legislative history.

The House ratified this position in adopting the final Conference Report on the bill on June 30, 2010.

Respectfully submitted on behalf of attached signatories,

Dated: April 13, 2012

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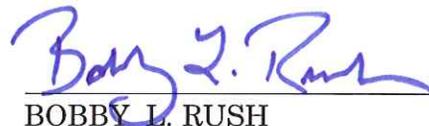
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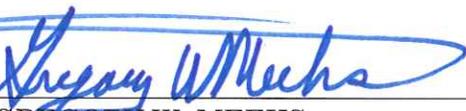
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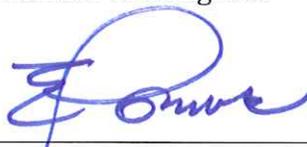
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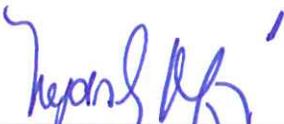
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