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AGENCY EXPERTISE, CRISIS MANAGEMENT AND INNOVATION: THE CFTC EXAMPLE

PAEAN OR PROVOCATION?

*By Andrea Maharam Corcoran**

Prologue. The conjunction of the U.S. Supreme Court overruling the 40-year-old Chevron[1] doctrine of agency deference and the 50th anniversary of the creation of the Commodity Futures Trading Commission (CFTC) is a fitting moment to reflect on how regulatory authorities use their expertise and discretion when overseeing complex products, markets and market operations. It is evident, using the example of the CFTC, that the U.S. Congress cannot itself operate complex regulatory systems, manage crisis events or resolve every ambiguous issue of legal interpretation.

Nor are courts typically experts in the highly technical matters and systems expert agencies are expected to run.[2] Nonetheless, the Court found in *Loper-Bright Enterprises v. Raimondo*, together with the non-delegation and major questions rulings,[3] that the demise of "Chevron deference" to reasonable agency interpretations[4] in a case or controversy involving statutory construction was necessary to reign in agency over-reach.

This opinion on interpretative purity, however, may inhibit expert agency use of technical experience and reasonable discretion to apply its intricate legislation for the public good—that is, to confront unforeseeable events, under circumstances where the value of subordinating judicial theory to agency practice is unclear.[5] It is also odd that just as favor for specialist agencies may be diminishing, the U.S. financial regulatory community is celebrating the history of CFTC's expert oversight of its especially complex products and markets.[6]

CFTC. This article submits that judicial interpretation of agency enabling statutes in specific cases and controversies impacts the execution of agency powers in general. Analyses of the impact of *Loper-Bright* should consider whether, and how, judicial interpretations inconsistent with agency experience can delay or preempt urgent matters committed to specific agency attention. Market supervision and product development functions are delegated to expert agencies precisely because they cannot be timely taken by legislators or the courts, but are elemental to market integrity, public protection and, as importantly, to market growth and innovation.[7]

The CFTC is an exemplar of the "expert agency:"

(i) Its mandated specialist powers are immensely broad;[8]

(ii) The type of products within its "ex-

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clusive" jurisdiction are complex and virtually open-ended, limited primarily by the jurisdictional complexity of U.S. financial market regulation with its broad and sometimes conflicting mandates;[9]

(iii) Congress itself has acknowledged and deferred to its expertise in certain situations;[10] and,

(iv) Its enabling Act supersedes and preempts application of other federal and state laws to any product right or service conducted on or subject to the rules of its registered entities or that prohibits or regulates gambling or bucket shops, even for an entity that is excluded or exempt under certain of the Act's provisions.

Some history. The 1970's law creating what would become today's CFTC totally transformed the limited mission of a division, which reported to the Secretary of Agriculture, in the executive branch of the Department of Agriculture (known as the Commodity Exchange Authority or "CEA" created in 1936). The CEA was empowered to address manipulative activity in statutorily "enumerated" domestic agricultural commodities traded on markets primarily located in the Mid-West and required position reporting and segregation of funds subject to such trading.[11] In 1974, the Commodity Futures Commission Act converted the CEA into an "independent" agency, with a chairman and four commissioners overseen by Congress (via the Senate and House agriculture committees), modeled on, and with powers of global scope that surpassed, even those of that 1930's behemoth, the Securities and Exchange Commission (SEC).

The CFTC's mandate was materially expanded because Congress found Department of Agriculture powers insufficient to administer the landscape of futures trading in 1974 or to combat emerging bucket shops or Ponzi schemes in metals and options. Markets in unenumerated commodities had proliferated in the 1970s. These then-unregulated markets included financial hedging products developed in response to multiple contemporaneous events: the end of fixed exchange rates at Bretton Woods and the de-pegging of the dollar, the invention of financial futures, the Black Scholes model for mathematically pricing options, the elimination of state usury provisions due to Volcker's strict monetary policy resulting in double digit interest rates, concern as to financial disruptions in so-called world futures affecting metals and coffee, sugar and cocoa traded in New York, and manipulations in U.S. futures markets originating from abroad or based on foreign cash markets.[12] Commodities traded on futures markets subject to CFTC jurisdiction, in response, were expanded from particular specified commodities to any potentially tradable interest now or in the future (except in the original statute "onions," and later movie receipts and still later certain predictive markets), limited only by specific jurisdiction granted over cash markets to other financial services regulators, such as the U.S. Treasury (exempt securities), the multiple banking authorities (forex) and the SEC (equity securities).[13]

Congressional awareness of need for specialist expertise in complex commodity financial markets. The expansive powers granted to the CFTC reflected both the complexity and highly technical nature of futures markets[14] as well as the public policy of permitting hedging products in multiple markets subject to appropriate regulation. Financial futures could impair or improve underlying cash markets and vice versa. Hence, the reference prices on which futures were based were as important to Wall Street as to the heartland. In bestowing CFTC's comprehensive powers, legislators explicitly acknowledged the complexity and global nature of commodity markets and implicitly recognized how critical the U.S. dollar, as the reserve currency for pricing world commodities as varied as oil and gas, metals, wheat, soybeans and government debt, was to economic stability, global supply chains, and indeed national security.[15]

Upon its establishment, in April 1975, all "enumerated" products were transferred from the Department

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of Agriculture to the CFTC, which also designated all previously un-regulated U.S. markets as regulated designated contract markets (DCMs). Volume in these new products, especially financial products, like U.S. treasuries and Eurodollars and later new commodities such as oil, exploded vastly exceeding that of enumerated products under the department of agriculture's remit. New products were tested in the market. Many failed the test. The CFTC made significant data on market participation, volume and financial integrity on previously unregulated private markets freely available to the public. The terms and conditions of traded futures contracts and exchange rules were also made more readily accessible as were data on market disciplinary actions.

In comparison, the securities/portfolio markets regulated in the 1930s after the Wall Street crash of 1929, overseen in the U.S. by the SEC, and in other countries, by markets' authorities overseeing "mobile assets," were typically governed by domestic mandatory law interpreted by conflicts law to be immutable by contract. Equity securities prospectuses described the particularities of a business in exquisite detail, which later might provide a defense of "but I told you so" to customers. Financial contracts on commodities, in comparison, were based on the characteristics of contracts used in the underlying spot (and terminal) markets using transparent terms and conditions that bound participants and customers, and mirrored cash market conventions, in some cases of 100-year standing.[16] Futures customers were warned in a short mandated disclosure document provided in advance of trading that all futures contracts were financially risky.

Securities markets had a significant amount of retail participation leading to a multiplicity of private litigations, while listed derivatives were used almost exclusively by commercial end-users and speculative professionals. In the listed derivatives markets, solutions to arising issues and disagreements of application of the law were worked out between the designated market, stakeholder participants, market business conduct committees, and the regulator.[17] Legislators and market operators took into account that commercials using these markets for price discovery and hedging purposes, often represented politically-important cash market interests and were more munificently capitalized than the intermediaries, then called futures commission merchants (FCMs), through whom they transacted.

Is it any wonder then that the focus of the SEC was on customer protections and the CFTC, on market integrity?[18]

Congressional assignment to agency expertise of determination that new products were in the public interest and not readily subject to manipulation. The legislation creating the Commodity Futures Commission Act, while assuming the potential benefit of hedging and central price reporting in many products not available at the time of its passing, originally required that for designation, a contract market demonstrate that trading futures on the proposed reference price had an "economic purpose" and was not unduly susceptible to manipulation. The early CFTC expected the markets to canvas market demand prior to seeking designation, though most had in-house "designers." The CFTC itself employed different experts to address wheat, metals, and oils due to the particularity of their contract terms. That is, the amount of basis risk; differences in trading restrictions, delivery arrangements, storage facilities, delivery locations, and related guarantees; profiles of end-users and active brokers; expectations of end users: and the specific types of exception reports from each market that were necessary for proper oversight. Adoption by Congress of an expansive umbrella for CFTC oversight, effectively validated new uses of such markets deemed within the public interest using an expertise-related test as to their economic purpose and susceptibility to manipulation as well as their proper regulation under market and CFTC rules.

As jurisdictionally important, the Act pre-empted state and Federal law relative to trading on commodities exchanges authorized under its jurisdiction later

expanding this preemption to certain over-the-counter instruments.[19] Note, that this preemption provision was a major factor attracting promoters of new speculative products to petition for CFTC oversight.

It is within this framework that the magic of expertise plus invention merged to meet day-to-day challenges.

Some examples. Current discussions of the proper architecture of statutory construction are like those of philosophers deciphering Platonic principles. It is only in the context of specific agency operations that one can test these principles of construction against fact. The following are four early examples of how CFTC employed its expertise, regulatory acumen, and knowledge of stakeholders to do just that—to apply its practice to unique or unforeseeable circumstances.

REFINING A BROAD, COMPLEX MANDATE

***The Johnson Shad or Shad Johnson Accord*. Negotiating potentially conflicting jurisdiction with respect to new products rather than contesting potentially disputed jurisdiction by litigation.**

The breadth of the term "commodity" as understood by Congress and the CFTC led to many instances in which interpretation was required. In the early 1980s, the Kansas City Board of Trade market developers had the brilliant idea to create a product to trade an index of securities (then, the Value Line Composite Index, compiled by Value Line, Inc.), believing that such an index would be attractive to customers, enhance the overall equity securities market, and grow their business in Kansas. This idea led ultimately to legislation for determining what was within and without the CFTC's mandate, that is, what was a permitted underlying reference product/price—in a word commodity—for which a futures contract on equity securities was permitted.

What prompted what became a consensual allocation of jurisdiction permitting the Value Line to trade on the KCBOT[20] was the application by Kansas City Board of Trade (KCBOT) to the SEC to trade its proposed index as a security. The SEC, at the time, declined. Having been rejected by the SEC, KCBOT in a spark of invention approached the CFTC for authorization to trade the Value Line Index as an index future. (At that time KCBOT was primarily a CFTC-regulated contract market for hard red wheat).

The CFTC Chair, Philip McBride Johnson, who previously had been general counsel to the Chicago Board of Trade and was a listed derivatives market patriot approached the SEC Chair, then John Shad, the first Wall Street Executive to head the SEC in 50 years, about the KCBOT request and the SEC's refusal to grant it. Johnson's objective was to determine whether the two Chairs might be able to reach a means to resolve a potentially contested area of jurisdiction between the CFTC and the SEC in a specific as opposed to a hypothetical case, within the context of the CFTC and SEC enabling statutes.

In an exercise combining market expertise and legal agility, the Chairmen agreed on a joint proposal to Congress to permit the offer of a broad-based securities index product on the futures market. The resulting Accord, known as Johnson-Shad or Shad-Johnson depending on your regulatory persuasion,[21] was presented to Congress, after the Chairs' back-channel negotiations, as effectively a *fait accompli*. The Accord's idea of an agreed self-allocation of jurisdiction was unprecedented. In fact, the agencies did not have any authority under federal administrative law, or otherwise, to alter their statutory jurisdictional scope. But what the agency chairmen initiated, and the two authorities accomplished, and the world welcomed at that time was a sensible and efficiently executable proposed reconciliation of two extremely broad, complex, and potentially conflicting mandates. This permitted a product to go forward on CFTC-regulated markets, with CFTC financial protections, under CFTC trading rules with both SEC and Congressional assent.

Over the years, this type of "negotiated" process has

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been used to address other issues between affected stakeholders as to what is within and without the term "commodity" under the Commodity Exchange Act.

The Futures Trading Act of 1982. **Advising Congress as to gaps in its authority rather than waiting for Congressional direction or a jurisdictional contest to test its legal capacity.**

The Accord was just part of a CFTC-proposed reauthorization package. At its inception, the CFTC was constituted as a so-called "sunset" agency. That is, it had exceptionally broad and impactful jurisdiction, but due to mandated reauthorization, a potentially short life. Based on its experience as an independent—as opposed to an executive—agency, CFTC used its reauthorization submission to ask Congress to further clarify certain of its broad regulatory powers to close gaps and to ensure as both a practical and a legal matter that these powers could be exercised effectively.

The CFTC's reauthorization request was embodied in the 1982 Futures Trading Act. The exchanges and their members were shocked that the CFTC had deigned to submit its own legislative proposal and had even seconded CFTC staff to its oversight committees to help explain agency experts' thinking. In hindsight, this process of rethinking legislation based on its practical application demonstrated the efficiency of using expertise gained from agency experience developing internal regulatory processes to refine and update legislation. In consequence, as amended over time the agency's enabling legislation continued to make agency operations workable in practice and consistently applied when interpreted by courts. The reauthorization process was also a discipline on overreach.

Among other things, the Futures Trading Act[22] reauthorization proposal (i) split jurisdiction over forex options between the SEC and CFTC depending on who licensed the exchange on which the options were traded, (ii) added CFTC oversight to non-bank managed investment funds that included futures products, (iii) provided CFTC authority to apply domestic rules to foreign brokers reaching U.S. customers trading locally, (iv) permitted *post hoc* limited judicial review of the CFTCs broad summary emergency powers and review by CFTC subject to court approval of certain exchange actions, (v) required licensing of advisory professionals and floor brokers, (vi) specified statutory disqualifications for awarding licenses, (vi) permitted the CFTC to share confidential information with self-regulatory organizations (SROs) which included contract markets. The Futures Trading Act also provided for compulsory membership of futures commission merchants in an overseer SRO for intermediaries (that ultimately became the National Futures Association (NFA)[23] supported by member contributions with powers with respect to auditing intermediaries for proper protection of customer funds, and licensing). Critically important, the legislation proposed by the CFTC enabled the CFTC to cooperate in enforcement and surveillance matters subject to appropriate confidentiality by providing and receiving information with foreign and domestic authorities as necessary to fulfill its responsibilities pursuant to the broad geographic reach of its powers.

Jurisdictional gaps and overlaps continue to afflict the federal system for the oversight of financial services products and markets where technology has materially altered the means of effecting transactions and products and services have proliferated. The early days of the CFTC are an example of leveraging agency and market expertise coupled with Congressional support to reduce jurisdictional ambiguity and permit product innovation subject to regulatory prudence and oversight.

ELECTRONIC TRADING AND THE DEVELOPMENT OF PRINCIPLES-BASED OVERSIGHT ENABLING GLOBAL SCREEN-BASED LISTED DERIVATIVES MARKETS

IOSCO Principles for the Oversight of Screen-Based Trading Systems. **Using principles not prescriptions to open markets to cross border participation.[24]**

The advent and potential global reach of electronic trading platforms, in particular the development of GLOBEX—a U.S. system designed for screen-based futures trading—led to widespread competitive concern. Such concern was exacerbated because in many non-US jurisdictions, the extent of the power of the relevant authorities, that is, the government, regulators, supervisors, or self-regulatory authorities, over markets—if any at all—differed substantially from that in the U.S. The concerns about regulatory arbitrage due to innovation were brought to the attention of the International Organization of Securities Commissions (IOSCO), an organization established to work toward benchmarking standards for securities markets. IOSCO requested that the CFTC, which chaired the secondary markets committee of IOSCO (i.e., Working Party 7),[25] under implicit threat of loss of CFTC's Working Party chairmanship and hinted boycott of U.S. trading technology, to report on the elements of proper electronic derivatives markets oversight. June 1990 was the deadline for the Working Party to present its conclusions to the IOSCO Technical Committee with respect to the new technology's application to listed derivatives markets.

In its capacity as Chair, CFTC responded by creating a drafting group of authorities that had supervisory responsibilities for currently active derivatives markets.[26] In addition to the U.S. and the UK, the drafting group participants included Switzerland and France.[27]

CFTC's receipt and response to IOSCO's "demand," is an interesting example of how agency expertise (under the aegis of general government engagement in international "standard setting" discussions) works in practice. Together, each participating market's relevant regulatory authority's operational staff, acting as *sherpas,* developed a practical plan for its leadership to support based on that jurisdiction's experience with cross border access to its domestic market. The drafters' mission was to articulate principles for each relevant regulatory authority affected by the introduction of electronic markets. These principles were designed to apply to system sponsors (owners or operators of platforms) that execute trades pursuant to an algorithm (time price priority), system users (such as brokers/futures commission merchants) and system customers (end-users exposed to financial risk in the system).

The group developed a template of 10 principles for overseeing electronic (screen-based) derivative markets. These principles were drafted to address common risks and transparency concerns each jurisdiction considered relevant to granting access to a non-domestic market and its products by their domestic regulatory constituents, and acceptable means of such access. As in official diplomatic forums, the key was to find a compromise implementable under the rubric of each participant authority's domestic legislation.[28]

The Principles for Screen-Based Trading of Derivatives as presented to IOSCO addressed: price transparency, order execution, price formation algorithms, operational issues related to surveillance, financial integrity, security and system vulnerabilities, access (direct or intermediated locally), and the role and accountability of system, that is, platform, providers.

The report and principles for electronic trading were adopted by the Technical Committee of IOSCO in June 1990 in Montreal.[29] The IOSCO screen-based trading project informed CFTC's own review of foreign boards of trade seeking recognition in the U.S. and improved its inter-face with their relevant regulatory authorities.

The Principles for Oversight of Screen-based Trading of Derivatives preceded IOSCO Objectives and Principles for the Regulation of Securities Markets originally developed in 1998 and substantial later work on various market issues. Interestingly, the Principles for Screen-based Trading of Derivatives, which facilitated the growth of GLOBEX, also pre-dated use by CFTC of Principles for the designation and oversight of designated contract markets (DCM) and clearing organizations (DCO). Those CFTC Principles endorsed by the Commodity Futures Modernization Act of 2000

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permitted DCMs applying for designation of a specific product to certify that they complied with CFTC principles for designation and operation, rather than submit each proposed product market for agency review.[30] In January 2023, prompted by another disruptive commodity market event, IOSCO published a Board Report for the oversight of commodity derivatives products.[31]

Long after IOSCO developed its first principles for global oversight of screen based derivative markets, Congress in the Commodity Futures Modernization Act of 2000 expressly endorsed participation by CFTC in international forums as part of its mission. That Act reiterated, among other things, that derivatives markets serving the U.S. industry were increasingly global, that regulatory policy must be agile to deal with a rapidly changing industry and impediments that can compromise U.S. competitiveness, that cross border events that can disrupt domestic financial markets often require rapid regulatory and other responses in some cases coordinated across multiple international jurisdictions and that IOSCO membership and participation promoted prompt beneficial communication and regulatory cooperation among global markets. Acknowledging, that evolving data and communications technology may increase risks emanating from non-U.S. markets, the Act contained a provision stating that it was "the sense of Congress" that consistent with CFTC responsibilities and expertise, CFTC should continue to work toward international standards of best practice intended to improve the quality and timeliness of international information sharing for market and customer protection and to enhance cooperation in exercising crisis procedures.[32]

The concept of using principles with guidance as to their implementation rather than prescriptions is now a common process of CFTC and other regulatory authorities.[33] Note that by their very nature, principles-based processes depend on ongoing interpretation and guidance provided by the expert agency who developed and administers them, and, in the case of the CFTC, by the DCMs and DCOs that apply them. As such, principles inform day-to-day operational processes. Unlike enforcement actions, they are more often tested in practice than in the courts.

INTERNATIONAL EXCHANGE OF MARKET SURVEILLANCE INFORMATION

***The Boca Declaration*. Pre-specifying information needed for surveillance of related cross border markets[34] to be exchanged by relevant regulatory authorities to deter, detect, and mitigate market abuse and disruption.**

After the 1995 collapse of Barings Bank and relatively contemporaneous Sumitomo Copper manipulation, the CFTC and the Securities and Investment Board (SIB), the then market regulator in the UK, sought to reach a consensus position among related commodity markets on how better to deter, detect and address such events in the future. This work was accomplished via a number of meetings producing several consensus outputs, culminating with a multi-lateral Memorandum of Understanding (MOU) for sharing surveillance information titled the Boca Declaration. The Boca Declaration was signed by 16 participating jurisdictions in March 1996 at the annual regulators' meeting that traditionally is held before the annual Futures Industry Association conference in Boca Raton Florida.[35]

Among other things, the international discussions held in London concerning the Barings and Sumitomo fall out debated the specific types of surveillance information needed, and channels for its prompt exchange, in markets that traded similar products in different locations. Participating relevant regulatory authorities concurred that exchange of pre-specified information could materially increase their operational capacity to deter manipulations, to mitigate financial disturbances, and, if necessary, refine their rules or enabling law. The specifications, to which the CFTC contributed its agency expertise, helped craft the international pro-

active response that led to a draft MOU, to assist relevant regulatory authorities dealing with specialist commodity markets and products impacted by events emanating from abroad. Importantly, these measures also were responsive to immediate U.S. Congressional concerns and, at the time, held off further prescriptive action by Congressional oversight committees.[36]

Obtaining information from non-domestic relevant regulatory authorities, markets and market participants, subject to maintenance of confidentiality guard rails, requires explicit legislative power. As stated above, in 1982, and as enhanced from time to time thereafter, the CFTC requested and received such explicit authority from Congress, based on CFTC's experience seeking information for enforcement and surveillance purposes in practice. Use of this power has been embraced, enhanced and refined over time, including by privacy protections that among other things permit the return on request of certain surveillance information received from a foreign provider rather than directly passing it to other U.S. authorities.

While operational mechanisms for sharing surveillance information may differ by geographic jurisdiction, applicable privacy laws, and how and by whom enforcement of applicable market-related laws is conducted, the networks for information exchange and the components of the exchange are usually addressed through memoranda of understanding (MOUs). Under U.S. law an MOU is a non-binding statement of intent, which is permitted to be executed with non-US jurisdictions without Department of State, or indeed Department of Justice, concurrence in most instances. These statements facilitate bilateral information exchange and as importantly assist in establishing a network of designated contact persons that improve the speed, responsiveness and propriety of such exchanges between jurisdictions' regulators as well as their timely use in conducting surveillance and responding to market events. MOUs can also enhance the participating authorities' capacity to maintain confidentiality of information received or transmitted. What makes these arrangements work is the concurrence of multiple authorities in their usefulness based on experience with how they are used in practice. MOUs are typically more efficient, where permitted to address market conduct, than Mutual Legal Assistance Treaties.

In determining to draft a multilateral surveillance MOU based on existing bilateral enforcement models, the BOCA MOU discussants consulted agency and market experts on the types of information likely to be useful for their own surveillance purposes. Information considered included large exposure information, market business continuity plans and crisis procedures, markets' so-called waterfalls for redressing shortfalls in the case of market participant defaults,[37] and other information relative to deterring, detecting and mitigating market disruption. In conjunction with executing the Boca Declaration, the group drafted, and the IOSCO Technical Committee of IOSCO published, a 1989 report defining with more particularity specific information and its relevance to various types of surveillance inquiries and market events.[38]

The concepts embodied in the BOCA Declaration were adopted in companion documents entered by members of the Futures Industry Association (FIA) and the derivatives exchanges. In adhering to these documents, their respective members committed to share the information and maintain its confidentiality substantially in accordance with the same principles as the CFTC and Boca Declaration's signatory authorities and with the same objective to support better management of market disruptions. For many years acceding to these industry commitments was required as a condition of membership by both the exchanges and FIA. The FIA's and derivative exchange's commitment to the BOCA Declaration principles further enhanced access to information in an emergency by all relevant regulatory authorities, including market intermediaries and self-regulators.

The 9/11 attacks in 2001 (in which all NY commodity exchanges located in the World Trade Center and the NYSE and NASDAQ closed) impact on U.S. and

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world markets were met by many multi-jurisdiction emergency discussions and actions to keep the U.S. and related markets open. In some cases, these actions included moving trading to electronic means and even offshore to related markets to the extent possible based on shared information. International regulators' experience of having cooperated to design the Boca Declaration framework facilitated this cooperation in this emergency situation in practice—not least by having pre-established specified contacts, conduits and networks for such information exchange.

IOSCO recognizing the value of a multi-lateral surveillance arrangement in an unexpected disruption or otherwise, promulgated an IOSCO multilateral memorandum of understanding, known as the MMOU, as one response to the terrorist attacks in 2001 and to the growth of its widely dispersed membership and covered markets. The IOSCO MMOU has proved enormously useful in holding securities authorities to account to common standards for information exchange and confidential treatment in specific cases. When U.S. markets were affected by climate events, like 2012's superstorm "Sandy," information channels had been well-established.

MOUs among expert agency personnel also support further opening markets due to agreement as to fairly consistent conditions of information exchange. Since 2003, signature of the IOSCO multilateral MOU together with demonstration of the legal capacity to comply with its terms has been a condition of IOSCO membership.[39]

CONCLUSION

As these CFTC examples demonstrate, agency expertise is required to oversee increasingly complex markets and products. Such expertise informs the design of measures that help deter, detect, mitigate and respond to market disruptions and misconduct as well as to identify new areas of potential advantage or concern. Agency expertise enables Congressional oversight committees to better execute their own duties. Congress has supported and often mandated specific reports on complex issues, events or products from the CFTC's expert point of view.[40]

The legislative branch can provide expert agencies legal power, but effective execution of that power as part of day-to-day operations requires sufficient agency expertise and resources to react to operational matters in a timely manner. Expert agencies like the CFTC must continuously update their technical skills to oversee market and product evolutions and the application of market rules by the specialist markets committed to their supervision. It would be a pity if the outcome of overruling *Chevron* compromises the capacity of an expert agency to perform its mandate, revise its supervisory techniques, respond to rapidly moving market crises, or render it unable to design appropriate proportional approaches to overseeing new markets and products.[41]

The strength of the U.S. system has been its ability to have specialist independent agencies with specialized defined and settled mandates that can address matters unencumbered by the diverse missions and political upheavals of Congress and indeed the Executive branch or the duration of the typical judicial proceeding. The separation of powers issues can be interpreted in more than one way. And this factor too should be a matter of judicial skepticism and caution.

ENDNOTES:

[1]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 Env't. Rep. Cas. (BNA) 1049, 14 Envtl. L. Rep. 20507 (1984) (overruled by, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832, Fed. Sec. L. Rep. (CCH) P 101887 (2024)) announced the so-called agency deference principle. Deference to agency construction of its delegated authority depends on whether applicable statutory language commands a specific interpretation, which must be given effect or the agency's construction is a reasonable resolution of statutory ambiguity. It is interesting that Justice Scalia, a statutory purist originally supported Chevron but later changed his

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mind.

[2]Some have even been known to accept expert testimony on the law.

[3]*Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832, Fed. Sec. L. Rep. (CCH) P 101887 (2024).

[4]See, "non-delegation," *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430, 55 S. Ct. 241, 79 L. Ed. 446 (1935), *A.L.A. Schechter Poultry Corporation v. U.S.*, 295 U.S. 495, 541-542, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947 (1935), stating that Congress may not excessively delegate its authority to agencies or for "major questions" and *West Virginia v. EPA,* which bars agencies from resolving questions of "vast economic or political significance."

[5]*See*, *Loper-Bright, supra,* 87-89 dissent by Justice Kagan, joined by Justice Sotomayor, containing several examples.

[6]See, e.g., Commodity Exchange Act, Section 2(a)1, 7 U.S.C.A. § 2, which contains the expansive definition of commodities subject to CFTC jurisdiction enacted upon abandonment of statutory enumeration of covered commodities. See, also, later modifications of the initial "exchange trading requirement," in Section 4(c), 7 U.S.C.A. § 6(c)for commodity derivatives, and approval of cash-settled contracts.

[7]The CFTC may need to make on-the-spot decisions about market events. Consider, for example the so-called "Market Break" or Black Monday, October 1987, when there was a call to close the NYSE upon a sudden huge market drop argued to be caused by the fall in stock index futures prices. At the time, the CFTC also leveraged its supervisory powers *via* the use and oversight of futures exchanges which maintained detailed records down to individual traders of trading activity and that were self-regulating organizations with mandated contractual powers over their membership and the obligation to enforce their rules. Later a new group, the President's Working Group on Financial Markets, chaired by the Secretary of Treasury, was convened to discuss how the various U.S. financial authorities could best develop policy (eventually circuit breakers) to respond to that crisis and later to address growth and proper oversight of over-the-counter products. The President's Working Group continues to permit confidential discussions on emerging issues among authorities, prior to its member agencies proposing or adopting potential solutions pursuant to the Administrative Procedure Act and other applicable requirements; see Interagency Report on Stablecoins, https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf.

[8]See, among other things, Commodity Exchange Act, Section 8a et seq, 17 U.S.C.A. § 12a regarding powers of the CFTC and the discussion *infra*.

[9]Compare various definitions of securities and commodities as used by the CFTC and the U.S. Securities and Exchange Commission.

[10]The Congressional oversight committees often asked for the CFTC to specify where and what additional power was necessary to address new developments or failures. The hearing on the case of the so-called Chicago Sting (where the CFTC having aided the FBI actually declined to request new powers) anomalously resulted in multiple new statutory prescriptions). In connection with revision of 1940s-era bankruptcy legistlation, Congress adopted a rule giving the CFTC delegated authority to develop particularized bankruptcy provisions under the Bankruptcy Act of 1978-1983 to address its especially complex markets. See, Commodity Exchange Act, Section 20, 7 U.S.C.A. § 24, and more particularly *notes* 14 and 21 infra.

[11]See CFTC website: https://www.cft.gov, for history of the CEA from 1936 until the creation of The Commodity Futures Trading Commission Act, 94 P.L. 16; 89 Stat. 77 (1974).

[12]Richard Sandor was the father of financial futures. He has since created a model for voluntary carbon markets and for a domestic rates market (originally in lieu of LIBOR even before its discrediting) for U.S. banks. The old agriculture hands doubted the economic usefulness of financial futures and the designation of futures on them as usable for hedging testifying that they expected reference prices on agricultural commodities to constitute more than 3/4 of all futures products going forward. Their doubts proved wrong: agriculture products constitute less than 10% of trading today.

[13]Over the years much of discussion of CFTC powers and authority related to how its mandate interfaced with that of other U.S. financial authorities.

[14]Congress acknowledged the need for CFTC expertise to develop effective legislation in this area. For example, the Commodity Exchange Act, Section 20, 7 U.S.C.A. §§ 24 (at) et seq [] delegates power to the CFTC to write its own bankruptcy rules for futures markets defining what is a commodity, how futures commission merchants (commodity brokers) should be liquidated or positions including supporting margin should be transferred explicitly because of the specificities of futures contacts, deliveries, and clearing provisions. Later the CFTC went head-to-head with Alan Greenspan explaining mathematically how the variation or settlement margin applied in futures markets

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(also subject to Fed oversight at the time) provided equivalent protection to margin levels in other markets.

[15]*Petition for Certiorari amici brief* of Andrea Corcoran and Jeffrey Bandman, in *Atlantic Trading v. BP* (April 2020) Sup. Ct. No. 19-1141.

[16]Liverpool cotton, terminal markets in various U.S. locations (e.g., Memphis, Minneapolis, Illinois, Missouri.) Note that unlike, as is the case in securities markets which permit fails, in these financial markets, delivery defaults were not permitted and this among other contract differences affected basis (spread between cash and futures price) determinations and pricing.

[17]A major example of this were the discussions between non futures professionals (insurance, banks, securities brokers) who offered managed funds and their respective prime regulators defining how oversight should be shared when these funds carried futures. With some dually overseen products, participant users could elect to hold funds in a segregated futures account or opt to use the futures bankruptcy regime.

[18]In 1975, just as CFTC was commencing operations, there also was a clearing crisis on the securities markets, which led to the creation of the Securities Investor Protection Act (SIPA), coupled with mandating T+3 settlement. This was a distraction from other initiatives. For futures, risk in markets were settled daily paying the buyers and sellers multilaterally via a clearer which was the buyer to every seller and seller to every buyer facilitating efficient netting. Additionally, each day the loss or gain on a future was paid or collected resetting risk in open contracts to zero. In bankruptcies of futures brokers prior to the MF Global bankruptcy, billions of margin funds and related positions were expeditiously transferred to healthy brokers without loss. In the latter case, where the bankrupt was a dual registrant of the CFTC and SEC and bankruptcy was administered under the SIPA which provided no insurance for the 55,000 commodities accounts as opposed to its 500-some securities accounts, litigations are still continuing. The activist commodity trading public took direct action to cause adherence by SIPA trustee to commodity bankruptcy protocols as intended in such a dually registered market participant to effect transfers as expected at the time.

[19]The "economic purpose" test was eliminated in the 2000s, though some have questioned the wisdom of that change. The economic purpose test required that a contact could be used for hedging or price basing on more than an occasional basis. See Commodity Futures Modernization Act, Section 12 (e) of the Commodity Exchange Act, 7 U.S.C.A. § 16 (e)(1)(B) (i) preempting trading of a commodity product, right or interest, traded subject to rules of a registered entity or an exempt board of trade, and (ii) and 16 (e) (2) (A)—The Act shall "supersede and pre-empt the application of any Federal or State statute, including any rule or regulation that prohibits gaming or the operation of bucket shops (other than antifraud provisions of general applicability) in the case of an electronic trading facility excluded under section 2 (e) of the Act and certain other exclusions under the Act; See also, page 2 ¶ (iv) *supra*."

[20]That is to define a broad-based security index as within the ambit of permitted "commodity" products. The idea of an index on securities gained popularity. Originally the owners of the Dow would not permit the use of the Dow Jones Industrial average as the basis for a futures product (though the then Chicago Board of Trade offered a fairly comparable index under another name). Later (even though the Value Line and indeed the CBOT indices were not a major success), the Standard & Poor's group agreed to license its index to permit a future on the S&P 500 which became a successful product at the CME. Of course, there are now multiple products (such as ETFs) which combine underlying securities for trading.

[21]Broad-based indices to the CFTC, narrow based, sector indexes to the SEC, and futures on individual securities prohibited.

[22]Proposals to Congress were also made in 1978.

[23]17 U.S.C.A. § 21 Futures Trading Act of 1982 amended in 1983, 1986, *et seq*.

[24]The CFTC maintains a list of certified foreign boards of trades and NFA a list of foreign brokers permitted to transact with U.S. customers on foreign designated boards of trade with deference to the foreign jurisdictions' requirements subject to foreign broker not being statutorily disqualified under U.S. law customer funds held in a particular way, and there being a specified information sharing arrangement with the CFTC and the ability to conduct arbitration through the NFA.

[25]International Organization of Securities Commissions, www.iosco.org, then based in Montreal. IOSCO headquarters moved to Madrid in 2004.

[26]The report defined "covered derivatives and markets products" as those where the market itself issues the product, subject to the rules of the issuing market and for which a clearing organization is used to settle profits and losses, make deliveries and guarantee settlement. Strictly speaking, U.S. futures markets at the time (unlike securities options markets) did not

consider themselves to be the issuer of designated products but the designer of the market thereon. Similarly, the market published its rules and trading data for the products it offered. The SEC participated because it was concerned about the potential impact of derivatives trading on stock index futures based on cash indices and options on equity securities and the related potential need for information on products based on U.S. domestic products offered in non-domestic jurisdictions.

[27]Other Working Party members were: Australia, Italy, Japan, and Germany. The Deutsche Terminboerse traded futures in Germany for the first time in 1990. German law had to be changed due to concerns that futures trading was prohibited wagering and because of rules then pertaining to permitted banking activities. Most non-US markets also did not have rules that made transfers in the clearing system final. Lack of finality was remedied by using the fact that futures products traded were contracts whose terms could make finality a part of the contract terms permitted or approved by the appropriate regulatory authority.

[28]Interpreted here as access by persons in their respective jurisdictions to the electronic market for non-domestic derivative contracts offered in a non-domestic electronic market and offer of local market products to non-domestic traders and their customers participating electronically.

[29]IOSCO reports: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD6.pdf; Principles https://www.iosco.org/library/pubdocs/pdf/IOSCOPD4.pdf.

[30]Section 5 (b) and 5 (d) DCMs and 5 b(b) and 5 (b) (c) DCOs et seq of the Commodity Futures Modernization Act of 2000, 7 U.S.C.A. §§ 7(b) et seq. Interestingly, where a product was particularly innovative despite the broad interpretation of what is a commodity under the CEA, its sponsor would seek specific CFTC approval, not least with respect to the question of undue susceptibility to manipulation. This standard re manipulability was applied for example at the time to forbid indices based on indications or quotes rather than actual trading.

[31]IOSCO public library, IOSCOPD726, January 2023.

[32]Commodity Futures Modernization Act of 2000, Section 126 (a) and (b).

[33]See, e.g., list of the foreign boards of trade recognized by the CFTC.

[34]Those trading common products or contracts or trading financial contracts based on cash markets in another jurisdiction.

[35]The then-overseer of the derivatives markets in the UK. The securities/derivatives market authority in the UK has gone through several iterations since then. There were a number of reports of interest based on meetings in London including the Windsor Accord and the Tokyo Communique. Originally the information considered was for commodity disruptions, but going forward the ideas were extended to financial derivatives as well.

[36]Japan later joined after an express reference to manipulation was added to the information sharing vehicle.

[37]In the United States this information on markets is usually part of exchange rules and is required to be public.

[38]See March 1998, *Guidance on Information Sharing,* enumerating types of information relevant to resolving specific types of events, published in IOSCO public reports as Technical Committee Report IOSCOPD86, and see, also, September 1999, *Application of the Tokyo Communique to Exchange-Traded Derivatives Markets,* IOSCO public reports. Discussions of the Boca Declaration's terms were also complex due to the need for discussants to consult often siloed surveillance personnel who had technical and "turf-related" concerns.

[39]See IOSCO website for a current list of its MMoU adherents.

[40]See e.g., the short silver report. And the interim report relating to clearing and settlement after the 1987 crash.

[41]See, *supra n5*, re examples in the *Loper-Bright*, dissent by Justice Kagan, joined by Justice Sotomayor. See, also, the interesting and instructive references to Justice Marshall, 18th Century law, and the Federalist papers, in Justice Gorsuch's 33-page concurrence as to the ideal of statutory parsing. The propositional sentence used by Justice Marshall with respect to *stare decisis* at page 54 thereof may recall to mind Jane Austen's first sentence in Pride and Prejudice.

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