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. COMMODITY FUTURES TRADING COMMISSION, Defendant.	Civil Action No. 1:11-CV-2146-RLW

BRIEF FOR SENATORS LEVIN, BEGICH, BLUMENTHAL, BOXER, SHERROD BROWN, CANTWELL, CARDIN, FEINSTEIN, HARKIN, LEAHY, MANCHIN, MCCASKILL, MENENDEZ, MIKULSKI, BILL NELSON, SANDERS, SHAHEEN, WHITEHOUSE, AND WYDEN AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT COMMODITY FUTURES TRADING COMMISSION

This *amici curiae* brief is submitted in support of Defendant Commodity Futures Trading Commission ("CFTC" or "the Commission").

INTEREST OF *AMICI CURIAE*

Amici Senators are committed to protecting United States commodity prices from the distortions caused by excessive speculation and market manipulation. *Amici* include 19 current United States Senators, many of whom played leadership roles in the development of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank"). *Amici* are also members of Senate committees with jurisdiction over commodities, energy, banking, commerce, and related issues. Having spent nearly a decade investigating excessive speculation and price manipulation in U.S. commodities markets, we seek to assist the Court in analyzing the legislative history to determine what Congress intended to accomplish by the position limits provisions of Dodd-Frank.

Amici have a significant interest in ensuring that independent agencies such as the CFTC carry out the law. Our interest would be adversely affected if this Court were to adopt Plaintiffs' theory that Dodd-Frank does not require the CFTC to establish position limits. A lengthy, burdensome, and expensive legislative effort would be required to amend Dodd-Frank to reinforce Congress' intent to make position limits mandatory. Furthermore, adopting Plaintiffs' theory would distort the plain meaning of the statutory language and subvert the clear intent of Congress.

SUMMARY OF ARGUMENT

This brief attempts to provide the Court with an account of the legislative history of Dodd-Frank's position limits requirement. Plaintiffs have asked this Court to resolve, *inter alia*, the question of whether the position limits provision of the Commodity Exchange Act ("CEA"), codified at 7 U.S.C. § 6a(a), mandates that the CFTC establish position limits or instead gives the CFTC discretion over whether or not to impose them. The plain text of section 6a(a), as well as "the language and design of the [Dodd-Frank] statute as a whole[,]" demonstrate that Plaintiffs' view of position limits as discretionary is wholly at odds with Congressional intent. *K Mart Corp. v. Cartier, Inc*., 486 U.S. 281, 291 (1988).

This interpretation is confirmed by the statutory development of Dodd-Frank, as well as Senate investigations showing how excessive speculation and price manipulation affect commodity prices to the detriment of American consumers and businesses, and how mandatory position limits are needed to diminish and prevent those problems. After seven years of Congressional studies finding excessive speculation and price manipulation in the commodities markets due in part to regulatory loopholes and CFTC waivers of position limits, Dodd-Frank was designed and intended to make those position limits mandatory.

ARGUMENT

A. The Dodd-Frank Text Evinces a Clear Intent to Make Position Limits Mandatory

This controversy centers on the meaning of section 6a(a), which provides that "the Commission *shall* by rule, regulation, or order establish limits on the amount of positions, as appropriate, . . . that may be held by any person with respect to contracts of sale for future delivery or . . . options on the contracts or commodities traded on or subject to the rules of a designated contract market" or "swaps that are economically equivalent to [futures or options] contracts." *See* Dodd-Frank, Pub. L. No. 111-203, § 737, 124 Stat. at 1722-25 (now codified at 7 U.S.C. § 6a(a)(2),(5) (emphasis added)). The CFTC contends that Congress intended Dodd-Frank to mandate that the agency impose position limits. Plaintiffs assert that these provisions merely authorize the CFTC to establish position limits, but *only* if it finds that they are "necessary to diminish, eliminate, or prevent" "excessive speculation." *See* Complaint, Dkt. No. 1 (Dec. 2, 2011), at ¶ 5 (quoting 7 U.S.C. § 6a(a)(1)).

"As in all statutory construction cases, [the Court must] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The language of Dodd-Frank alone is sufficient to demonstrate Congress' intent to make position limits mandatory.

Most obvious is the statute's direction that the CFTC "shall . . . establish" position limits. Notwithstanding the fact under certain rare circumstances "shall" has been interpreted as permissive, federal courts have repeatedly recognized the normally uncompromising directive that it carries. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied. . . ."); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); *Black's Law Dictionary* 1375 (9th ed. 2009) ("1. Has a duty to; more broadly, is required to. . . . This is the mandatory sense that drafters typically intend and that courts typically uphold."). As discussed in Part B below, Congress' choice to use "shall" instead of "may" was deliberate, not inadvertent, and it reflected Congress' considered decision to impose a duty upon the agency to establish position limits.

Congress' belief that the CFTC was required to establish position limits is further supported by the statute's repeated references to position limits as "required." *See, e.g.*, 7 U.S.C. § 6a(a)(2)(B) ("[T]he limits *required* under subparagraph (A) shall be established within 180 days after July 21, 2010. . ." (emphasis added)); *id.* § 6a(a)(2)(C) ("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. . ." (emphasis added)). Plaintiffs' brief simply does not address these references.

Courts have long recognized that the use of the word "required" is different from the word "permitted." *See, e.g., In re Boyd*, 213 F. 774, 775-76 (2d Cir. 1914) ("The words 'require' and 'permit' express different ideas; in the ordinary use of the English language the one does not include the other. Presumably Congress knew what these words meant and used them to express such meaning. Presumably, . . . it did this intentionally and not by some oversight."); *see also M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1297 n.19 (D.C. Cir. 1971) (discussing the difference between a contractual term setting a "desired" delivery schedule and a "mandatory . . . 'required'" one); *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (8th Cir. 1966)

("'Required' implies something mandatory, not something permitted by agreement"), *rev'd on other grounds*, 386 U.S. 162 (1967).

Here, Congress repeatedly referred to the limits as "required" because it intended to make them so. Had Congress intended to make position limits discretionary, it is inexplicable that it would have referred to them as "required" rather than, for example, as "permitted" or "authorized." Congress' drafting choice thus points only to the conclusion that Congress believed position limits to be "required."

Moreover, Congress' decision to impose tight—and *unconditional*—deadlines is also illuminating. The statute provides that "[f]or exempt commodities, the limits required under subparagraph (A) shall be established within 180 days after July 21, 2010." *See* 7 U.S.C. § 6a(a)(2)(B). For agricultural commodities, the Commission has 270 days. *Id*. Were Plaintiffs' theory as to Congressional intent correct, these timing provisions would have been drafted differently. For example, Congress might have said "*if* the Commission imposes limits pursuant to subparagraph (A), they shall be established within. . ." or "limits imposed pursuant to subparagraph (A), *if any*, shall be established within. . . ." Instead, Congress chose to direct the agency to establish position limits within a set period, chose to do so unconditionally, and chose to describe those limits as "required." Plaintiffs' reading of the statute would nullify all of those deliberate choices by Congress and substitute a permissive regime that Plaintiffs may prefer but that the text drafted by Congress forecloses.

Further textual proof that the position limits were intended to be mandatory comes from section 719 of Dodd-Frank, which requires the agency "[w]ithin 12 months after the imposition of position limits pursuant to the other provisions of this title," to conduct "a study of the effects (if any) of the position limits imposed pursuant to the other provisions of this title on excessive speculation and on the movement of transactions from exchanges in the United States to trading venues outside the United States" and to report to Congress on the results of that study. *See* Dodd-Frank, Pub. L. No. 111-203, § 719, 124 Stat. at 1655 (now codified at 15 U.S.C. §§ 8307(a), (b)). Plaintiffs contend that "the reporting provision would be phrased precisely the same way whether Congress believed position limits to be mandatory or discretionary." *See* Motion for Summary Judgment at 21. Not so. A Congress that believed that position limits were discretionary would have adopted language that entertained the possibility that no position limits would be imposed by the CFTC and hence that no report would be necessary. Such a Congress, for example, would have phrased the provision this way: "*if* the Commission imposes limits pursuant to the other provisions of this title, it shall conduct a study. . ." or "within 12 months after the imposition of position limits, *if any*, the Commission shall conduct a study. . . ."

The Dodd-Frank Congress, however, used language evincing the view that the imposition of limits was an unconditional requirement and not some uncertain eventuality that might or might not come to pass. In fact, the only uncertainty expressed by Congress in the reporting provision concerns whether the limits that it required the Commission to impose would, upon *post-imposition* study, prove to have any effect on excessive speculation. That is why Congress asked the Commission to report on "the *effects* (if any) of the position limits imposed pursuant to the other provisions of this title on excessive speculation" and did *not* ask the Commission to decide for itself whether position limits should be imposed in the first instance.

Finally, Plaintiffs improperly seize on the statute's direction that the Commission shall establish "limits on the amount of positions, *as appropriate*[.]" Given the placement of "as appropriate" immediately after the phrase "limits on the amount of positions," Congress plainly meant it to modify the noun "limits," rather than the verb "shall." Plaintiffs suggest that the phrase "as appropriate" means that the CFTC may establish position limits only if it first deems their establishment "appropriate." But Congress did not say that "the Commission shall, *if* *appropriate*, establish limits on the amount of positions. . .” or “*if* the Commission deems the establishment of position limits appropriate, it shall impose limits.” Congress made a different drafting choice in section 6a(a)(2). That choice—particularly when read in conjunction with the cognate provisions of Dodd-Frank reviewed above, including those referring repeatedly to the limits as “*required*,” those setting *unconditional* deadlines for the CFTC to impose position limits, and those instructing the CFTC to report, *post-imposition,* on how the limits were working—establishes that the only reasonable interpretation of section 6a(a)(2) is that when the CFTC imposes the “required” limits, it should set them at an “appropriate” level. In sum, the text of Dodd-Frank, read as a whole, leaves no room for an interpretation that would allow the CFTC to refrain from imposing any limits at all.

B. Dodd-Frank’s Legislative History Confirms Congress’ Intent to Make Position Limits Mandatory

1. Legislative History is an Appropriate Tool To Construe Congressional Intent

“As in all cases of statutory construction, [the Court’s] task is to interpret the words of the[ ] statute[ ] in light of the purposes Congress sought to serve.” *Chapman v. Houston Welfare Rights Org*., 441 U.S. 600, 608 (1979). It is well-settled that judicial consideration of a statute’s legislative history is an appropriate means of discerning that purpose. *See, e.g.*, *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (“Our precedents demonstrate that the Court’s practice of utilizing legislative history reaches well into its past.”).

An examination of legislative history is appropriate even where, as here, the statute at issue is unambiguous, as it can be helpful in removing any doubt that Congress meant what it said. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993) (examined legislative history of provision of Soldiers’ and Sailors’ Civil Relief Act even after concluding that provision was “unambiguous” and “unequivocal”); *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 179 (1967) (“recourse to legislative history to determine the sense in which Congress used the words is not foreclosed" even where it is assumed that the language contains no ambiguities). To the extent that the statute is viewed as ambiguous, legislative history is of particular help in ensuring that the statute is interpreted consistent with legislative intent. *See Chapman*, 441 U.S. at 608; *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

Legislative history can also be useful to "show the circumstances under which the statute was passed, the mischief at which it was aimed, and the object it was supposed to achieve." 2A Norman J. Singer & J.D. Shamble Singer, *Sutherland Statutory Construction* § 48.3 (7th ed. 2011) ("Sutherland"); *see also United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951) ("The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent.").

2. Congress' Intent to Make Position Limits Mandatory is Supported by Commodities Regulation History and the Problems Dodd-Frank Aimed to Resolve

i. History Shows Position Limits Are a Favored Tool to Combat Excessive Speculation and Market Manipulation

The purpose of the CEA is to "to deter and prevent price manipulation or any other disruptions to market integrity; [and] to ensure the financial integrity of all transactions subject to this chapter and the avoidance of systemic risk. . . ." *See* 7 U.S.C. § 5(b). When it first enacted the CEA in 1936, Congress found that "[e]xcessive speculation" in the futures market for "any commodity . . . 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." *See* Pub. L. No. 74-675, ch. 545, 49 Stat. 1491, 1492 (June 15, 1936) (now codified at 7 U.S.C. § 6a(a)).

To avoid the price volatility associated with excessive speculation, the Commodity Exchange Commission, the CFTC's predecessor, was authorized to "fix such limits on the amount of trading . . . which may be done by any person as the commission finds is necessary to diminish, eliminate, or prevent such burden." *Id.* Not long after the passage of the CEA in 1936, the Commodity Exchange Commission established position limits for grains, including wheat, corn, oats, barley, flaxseed, grain sorghums, and rye. *See* 3 Fed. Reg. 3145 (Dec. 24, 1938). Since then, the agency has also established position limits for other commodities, including cotton, soybeans, and potatoes. Some commodities, such as butter, wool, and livestock have never had formal position limits established, in part because the exchanges have set and enforced their own accountability limits.[1] *See* 75 Fed. Reg. 4144, 4146 (Jan. 26, 2010) ("When the [CFTC] came into existence . . ., 'various contract markets [had] voluntarily placed speculative position limits on contracts involving commodities.' At that time, 'position limits were in effect for almost all actively traded commodities . . . and the limits for positions in about one half of these actively traded commodities had been specified by the contract markets[,]'" quoting 45 Fed. Reg. 79831, 79831-32 (Dec. 2, 1980)). For over 75 years, Congress has viewed position limits as a useful tool to prevent price distortions caused by excessive speculation and manipulation.

ii. Commodity Swaps Bypassed Position Limits Until Dodd-Frank

During the 1980s, commodity prices were increasingly affected, not only by futures trading, but also by trading in new financial instruments known as swaps, many of which were designed to mimic futures but were executed outside the futures markets in "over the counter"

[1] Unlike position limits, which set an absolute ceiling on the number of positions a trader may hold, accountability limits set "a level that . . . trigger[s] . . . reporting requirements by a trader at the request of the applicable exchange." *Excessive Speculation and Compliance with the Dodd-Frank Act*, S. Hrg. 112-___ (Nov. 3, 2011), Exhibit 3 (Testimony of CFTC General Counsel Dan M. Berkovitz) at 17. Once an accountability limit has been reached, the exchange may direct the trader to decrease its position, as the New York Mercantile Exchange did in the case of Amaranth, discussed below.

(OTC) transactions unregulated by the CFTC. Swaps are agreements between two parties which "call for one or both parties to make a stream of payments to the other party over a period of time" depending upon a specified event, such as changes in commodity prices. *See* U.S. Permanent Subcommittee on Investigations, *U.S. Strategic Petroleum Reserve: Recent Policy Has Increased Costs to Consumers But Not Overall U.S. Energy Security*, S. Prt. 108-18 (March 5, 2003) ("2003 Petroleum Report"), Appendix 2 ("History and Current Status of Commodity Market Regulation") (providing an overview of U.S. commodity regulation from 1848 to 2000) at 163.[2] In other words, parties use commodity swaps essentially to place bets on whether prices will rise or fall. At the time, commodity swaps were not subject to position limits.

Due to the similarity of commodity swaps to futures, concerns arose over whether they were legally enforceable if the trades took place outside regulated exchanges and the CEA. In 1989, "in response to a call for more legal certainty," "the CFTC issued a 'Swaps Policy Statement' to clarify that it would not seek to regulate certain OTC swap transactions." *Id.* at 163-64. The Swaps Policy Statement, however, "did not end the debate over the status of these types of contracts. The CFTC did not declare . . . that swap transactions were excluded from regulation . . .; it only stated the CFTC had chosen not to regulate them '*at this time*[,]' [leaving] open the possibility that swap transactions could be regulated . . . in the future." *Id*. at 164.

After pressure from industry to clarify the CEA's application to swaps, Congress enacted the Futures Trading Practices Act in 1992, which "established the principle that although a contract[,]" such as a swap, "may have some features of a futures contract, it does not necessarily have to be traded on a designated exchange." *Id*. at 174. The amendment "provided the CFTC with the flexibility to determine the appropriate level of regulation for novel types of financial instruments, such as swaps and derivatives, that were becoming popular in the market." *Id*.

[2] All Subcommittee reports cited in this brief are available on the website of the Permanent Subcommittee on Investigations, http://www.hsgac.senate.gov/subcommittees/investigations/hearings.

Specifically, it "authorized the CFTC to exempt various swap and hybrid transactions from the exchange-trading regulations and other provisions of the CEA." *Id*. Six years later, due to rapidly expanding swap markets, the CFTC issued a "concept release" suggesting a reexamination of its approach to swaps. *Id*. at 184. To quell an industry outcry, in 1999, Congress enacted legislation barring a CFTC rulemaking on swaps for six months. *Id*.

In 2000, Congress went further and enacted the Commodity Futures Modernization Act ("CFMA"), Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000), which amended the CEA to prohibit the CFTC from exercising any authority over any swap transactions. The CFMA specifically exempted from CFTC regulation all energy and metal swaps traded on electronic exchanges open only to larger traders, on the theory that large traders had no need for government oversight. Congress also clarified that the CEA did not require swaps to be traded on regulated futures exchanges. *Id*. The CFMA ban on regulating swaps remained the law until Congress, recognizing that regulation was necessary, enacted Dodd-Frank in 2010.

iii. Congressional Investigations Over Seven Years Found Excessive Speculation in U.S. Commodities Markets and a Need to Strengthen Position Limits on Futures and Swaps

From 2002 until 2009, the U.S. Senate's Permanent Subcommittee on Investigations ("the Subcommittee"), a Senate investigative body known for lengthy investigations into complex matters, initiated a series of bipartisan studies and hearings examining the price of key commodities, such as gasoline, crude oil, natural gas, and wheat, and the role of excessive speculation in determining those prices. These investigations reflected the Subcommittee's "continuing concern over the sustained increases in the price and price volatility of these essential commodities, and . . . the adequacy of governmental oversight of the markets that set these prices." *See* U.S. Permanent Subcommittee on Investigations, *The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat*, S. PRT. 109-

65 (June 27, 2006) ("2006 Oil and Gas Report") at 1. The Subcommittee held hearings and released detailed, bipartisan staff reports on specific commodity markets.

Each investigation concluded that excessive speculation had increased consumer prices and price volatility for the commodity in question. For example, with regard to the wheat market, the Subcommittee released a 261-page bipartisan report, which found that "[t]he large number of wheat futures contracts purchased and held by commodity index traders on the Chicago futures exchange over the last five years *constituted excessive speculation* [and] . . . was a major contributing factor in the increasing difference between wheat futures prices and cash prices from 2006 to 2008." *See* Staff Report, U.S. Permanent Subcommittee on Investigations, *Excessive Speculation in the Wheat Market*, S. HRG. 111-155 (July 21, 2009) ("2009 Wheat Report") at 180 (emphasis added); *see also* Staff Report, U.S. Permanent Subcommittee on Investigations, *Excessive Speculation in the Natural Gas Market*, S. HRG. 110-235 (June 25 and July 9, 2007) ("2007 Natural Gas Report") at 207 (510-page, bipartisan report finding that the natural gas positions held by a hedge fund known as Amaranth "constituted excessive speculation" and that "Amaranth's actions in causing significant price movements in the natural gas market demonstrate that excessive speculation distorts prices, increases volatility, and increases costs and risks for natural gas consumers, such as utilities, who ultimately pass on inflated costs to their customers" (emphasis omitted)).

The Subcommittee investigations decried the lack of regulation of energy swaps, *see* 2007 Natural Gas Report at 209; 2006 Oil and Gas Report at 7, and commodity index swaps, *see* 2009 Wheat Report at 177-79. Specifically, with regard to energy, the Subcommittee investigation noted that until the 1990s, "U.S. energy futures were traded exclusively on regulated exchanges . . . subject to extensive oversight by the CFTC[.]" *See* 2006 Oil and Gas Report at 4. But U.S. energy markets then saw "a tremendous growth in the trading of contracts that look and are structured just like futures contracts, but which are traded on unregulated OTC electronic markets. . . . The only practical difference between [these] futures look-alike contracts and futures contracts is that the look-alikes are traded in unregulated markets whereas futures are traded on regulated exchanges." *Id*. After Congress formally exempted these look-alike energy swaps from CFTC regulation in the 2000 CFMA, in what became known as the "Enron loophole," energy traders, such as Amaranth, traded them on unregulated exchanges "so that [they] could trade without any restrictions on the size of [their] positions." *See* 2007 Natural Gas Report at 207. The Subcommittee investigation disclosed that when one regulated exchange directed Amaranth "to reduce its positions in September 2006 and October 2006 natural gas futures contracts, Amaranth simply transferred those positions to . . . an unregulated market, thereby maintaining its overall speculative position in the natural gas market." *Id*. To counteract this trading activity, the Subcommittee investigation advocated extending position limits to the unregulated swaps market, putting it in parity with the regulated markets. *Id*. at 209.

Similarly, in the wheat market, the Subcommittee investigation found that the CFTC's decision to "grant[ ] position limit exemptions to swap dealers selling commodity index swaps" had allowed six exempt index traders to hold up to 60% of all outstanding wheat contracts held by index traders from 2006 to mid-2008. *See* 2009 Wheat Report at 177-79. The investigation further found that "the large amount of index investments in the Chicago wheat futures market [had] been one of the major causes of 'unreasonable or unwarranted' changes in wheat futures prices relative to cash prices," and thus, "the granting of exemptions and waivers to index traders [was] inconsistent with the CFTC's statutory mandate to prevent excessive speculation on futures exchanges." *Id*. at 179. Instead, the Subcommittee investigation recommended "strict enforcement" of position limits in the wheat market. *Id*.

The Subcommittee's work was repeatedly discussed in the Senate in the late 2000s, as Congress attempted to address "historical increases" in the price of oil, gas, and other commodities. *See, e.g.*, 153 Cong. Rec. S 15433, S15442 (daily ed. Dec. 13, 2007) (statement of Sen. Snowe) ("[S]avvy consumers strongly suspect these prices are being manipulated. Frankly, their analysis is supported by a Senate subcommittee report, leading economists, [and] the GAO. . . ."); 153 Cong. Rec. at S15443-44 (statement of Sen. Levin) (discussing the Subcommittee's work on excessive speculation and position limits); 153 Cong. Rec. at S15442 (statement of Sen. Feinstein) (same); 154 Cong Rec S4212, S4240-41 (daily ed. May 15, 2008) (statement of Sen. Levin) (same); *see also* Joint Hearing, U.S. Permanent Subcommittee on Investigations and U.S. Subcommittee on Energy, S*peculation in the Crude Oil Market*, S. HRG. 110-382 (Dec. 11, 2007).

Additionally, in light of the Subcommittee's findings, Senators Levin as Subcommittee Chairman, Bingaman as Chairman of the Committee on Energy and Natural Resources, and Harkin as Chairman of the Committee on Agriculture, Nutrition, and Forestry, introduced the Prevent Excessive Speculation Act of 2008, S. 3577, "to enact the strongest and most workable measures to prevent excessive speculation and price manipulation in U.S. energy markets" by "clos[ing] the loopholes in our commodities laws that now impede the policing of U.S. energy trades on foreign exchanges and in the unregulated over-the-counter market" to "ensure that large commodity traders cannot use these markets to hide from CFTC oversight or avoid limits on speculation." *See* 154 Cong. Rec. S9494-01, S9494 (daily ed. Sept. 25, 2008) (statement of Sen. Levin). Senator Levin stated that his bill "would *require* the CFTC to set limits on the holdings of traders in all of the energy futures contracts traded on regulated exchanges to prevent traders from engaging in excessive speculation or price manipulation." *Id.* at S9495 (emphasis added). Senator Levin introduced the bill again in 2009. Although neither bill was enacted on its own, section 6, which required the CFTC to set position limits for previously unregulated swap transactions, foreshadowed the position limits provisions of Dodd-Frank.[3]

Plaintiffs' brief mentions dozens of "'studies by institutional, academic, and industry professionals' relating to the need for and efficacy of position limits . . . that demonstrate[ ] 'virtually unanimous academic agreement that commodity price changes have been driven by fundamental market conditions, not by speculation.'" *See* Motion for Summary Judgment at 14 (citations omitted). The relevant question here is not what certain experts or academics may believe about excessive speculation and the efficacy of position limits, but what *Congress* understood and intended when enacting Dodd-Frank. Congress was well aware of the types of studies to which Plaintiffs refer, not all of which point to the same conclusions about commodity speculation and some of which warrant skepticism due to reliance on industry funding. The Subcommittee considered those studies and consulted a wide range of experts in connection with its own bipartisan investigative efforts in the years leading up to Dodd-Frank. Its investigative reports were unequivocal in finding that the lack of position limits for certain transactions and in certain markets contributed to "the sustained increases in the price and price volatility of these essential commodities[.]" *See* 2006 Oil and Gas Report at 1; *see also* 2009 Wheat Report at 181 ("waiv[ing] position limits for commodity index traders facilitated excessive speculation").[4]

[3] Other Senate bills at the time also sought to require the imposition of position limits. *See, e.g.*, S. 3248, 110th Cong. §4 (2008) (sponsored by Sens. Lieberman, Collins, Cantwell, Bond); S. 3185, 110th Cong. §2(f) (2008) (sponsored by Sens. Cantwell, Cardin, Clinton, Kerry, Klobuchar, Mikulski, Nelson, Sanders, Webb, Whitehouse, Wyden); S. 3131, 110th Cong. §6 (2008) (sponsored by Sens. Feinstein, Stevens, Wyden), explanation at 154 Cong. Rec. S5629-31 (daily ed. June 12, 2008) (statement of Sen. Feinstein).

[4] Investigations by other Congressional committees or members of Congress reached similar conclusions about excessive speculation in U.S. commodity markets. *See, e.g.*, Testimony of Representative Stupak, CFTC Hearing on Energy Position Limits and Hedge Exemptions (July 28, 2009), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing072809_stupak.pdf ("[S]upply and demand fundamentals are still not driving the oil market. . . .The driving factor contributing to an increase in the price of oil this year was the surge of funding from index investors back into the oil markets. . . .[E]xcessive speculation is a significant factor in the price Americans are paying for gasoline, diesel and home heating oil."); Testimony of Senator Sanders, CFTC Hearing on Energy Position Limits and Hedge Exemptions (July 28, 2009), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing072809_sanders.pdf ("I understand that there are some who still don't believe that speculation is responsible for driving up oil and gas prices. But, Mr.

In light of Congress' own work in this area, Plaintiff's suggestion that Congress wanted the CFTC to conduct duplicative studies regarding the existence of excessive speculation and the necessity of position limits rings hollow and is unsubstantiated by the record. A more logical conclusion, and one that is consistent with the statutory language, is that having determined that the level of speculation in the commodities markets was excessive, and that position limits were too often missing or waived, Congress directed the CFTC to impose mandatory position limits within a specified time period to address excessive speculation, and to report back to Congress within twelve months on any resulting effects.

3. Evolution of the Dodd-Frank Provisions Further Demonstrates Congress' Intent to Make Position Limits Mandatory

The conclusion that Congress intended position limits to be a mandatory obligation of the CFTC—and that Congress acted deliberately in choosing the words used in both section 6a(a)(2) itself and in the various cognate provisions of the Dodd-Frank Act discussed in Part A above—is driven home with particular force by the development of the relevant provisions of the Dodd-Frank bill over the course of several drafts. Courts regularly rely on earlier drafts of a bill to ascertain Congressional intent. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("The evolution of these statutory provisions supplies further evidence [of Congressional intent]. . . .Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201-02 (1976) (examining the development of relevant statutory

Chairman, we know that in 2000 and 2001, energy traders at Enron were thrown in jail for manipulating electricity prices on the West Coast, causing prices to skyrocket by 300 percent. In February of 2004, we know that the CFTC fined BP $303 million for driving up the price of propane by purchasing 'enormous quantities of propane and withholding the fuel to drive prices higher.' And, we know that in 2006, the Amaranth Hedge Fund went bankrupt after federal regulators found that it artificially increased natural gas prices by controlling 75% of all of the natural gas futures contracts in a single month. In other words, we now know that speculators artificially drove up electricity prices on the West Coast in 2000; propane prices in 2004; and natural gas prices in 2006.").

language through four rounds of drafting); *see also Sutherland* § 48.3 ("Successive drafts of a bill may be helpful in construing a statute if the meaning of the statute is unclear").

i. The House Bill Text Shifted from Discretionary to Mandatory

Here, the evolution of the key provisions at issue in this litigation reveals Congress' intent to make the position limits mandatory. The primary question raised by this litigation is whether the following statutory language is meant to be mandatory or permissive: "the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, . . . that may be held by any person with respect to" futures, swaps, and options. *See* 7 U.S.C. § 6a(a)(2),(5).

When the House version of the bill that later became Dodd-Frank was first introduced, the language concerning the CFTC's role with respect to the adoption of position limits was in accord with Plaintiffs' view that position limits were discretionary. First, that draft, introduced in the House on December 2, 2009, authorized the CFTC to "proclaim and fix" position limits on "swaps that perform or affect a significant price discovery function with respect to a regulated market." *See* H. R. 4173, 111th Cong. (Dec. 2, 2009) ("Introduced Bill") at § 3113(a)(2) (Position Limits). It did so by adding a clause to 7 U.S.C. § 6a(a)(1), which is the section that sets out the CFTC's general authority to regulate. The Introduced Bill further provided that "[t]he Commission *may*, by rule or regulation, establish limits . . . on the aggregate number or amount of positions in contracts based upon the same underlying commodity . . . that may be held by any person" with regard to, *inter alia*, swaps. *See id*. § 3113(a)(5)(2) (emphasis added). "May," of course, is a "plainly permissive" term. *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000). Thus, the Introduced Bill provided the CFTC with the *authority* to establish position limits, but did not require the agency to do so.

By the time the bill passed the House on December 11, 2009, however, it had been modified in two significant ways. First, Congress changed the permissive "may" to "shall" in the aggregation provision, thereby requiring the CFTC to aggregate positions across markets. *See* H. R. 4173, 111th Cong. (Dec. 11, 2009) ("Engrossed Bill") at § 3113(a)(5) (Position Limits). The previous "use of the permissive 'may' . . . contrast[ed] with the legislators' use of a mandatory 'shall'. . . . Congress used 'shall' to impose discretionless obligations[.]" *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'the language of command.' And when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense — the one act being permissive, the other mandatory" (citations omitted)).

Second, Congress added two entirely new subsections, again using the imperative "shall," providing that "the Commission *shall* by rule, regulation, or order establish limits on the amount of positions, as appropriate," with regard to futures, options, and swaps. *See id*. (emphasis added). Those two new subsections of section 6a(a) supplemented the statute's general grant of authority in section 6a(a)(1) by providing that, in the case of the futures, options, and swaps dealt with in those two new subsections, the Commission was mandated to act in the manner specified and not merely permitted to do so. *See Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general").

In other words, at the same time Congress shifted from a permissive to mandatory regime with regard to aggregation, it also used the word "shall" in the specific controlling provisions regarding the establishment of position limits.

The proposition that use of the word "shall" marked the evolution of the Dodd-Frank bill from permissive to mandatory on the matter of position limits is reinforced by the evolution of the other cognate provisions of the bill. For example, while the final version of Dodd-Frank repeatedly refers to position limits as "required," *see supra* at p. 4, nowhere does the permissive version of the bill describe position limits as "required." Indeed, it was precisely when the statutory language shifted from "may" to "shall" in the version that passed the House, that the first provision referring to position limits as "required" appeared. *See* Engrossed Bill at § 3113(a)(5) ("In establishing the limits *required* in paragraph (2). . ." (emphasis added)). The final bill contains three additional references to the limits as "required," each of which was added by the Conference Committee, showing that both Houses intended to reinforce this point. *Compare* Engrossed Bill at § 3113 (Position Limits) *with* 7 U.S.C. § 6a(a)(2),(3).

Thus, while the use of the term "required" in the text of the enacted statute is, by itself, sufficient to defeat Plaintiffs' attempts to dismiss the relevance of that term, the legislative history confirms that point with unmistakable clarity, as it shows that Congress introduced the word "required" deliberately, not only when it made the change from a bill saying that the CFTC "may" institute and aggregate position limits to one saying that the CFTC "shall" do so, but again in conference, with repetitious force, when finalizing the position limits section.

It is also highly revealing that the Introduced Bill, which provided that the CFTC "*may*" establish and aggregate position limits, did not include the final bill's study and reporting provision, described in Part A *supra*, which, as noted, directed the agency "[w]ithin 12 months after the imposition of position limits pursuant to the other provisions of this title," to issue a report to Congress on the results of "a study of the effects (if any) of the position limits imposed pursuant to the other provisions of this title." *See* 15 U.S.C. §§ 8307(a), (b)). A report of that kind would have been out of place in the Introduced Bill, since in that bill, position limits were a mere possibility contingent on the CFTC's exercise of discretion to establish them versus the position limits required in the Engrossed Bill. And sure enough, the Engrossed Bill, the first version of Dodd-Frank to contain the mandatory "shall" language as to position limits, was also the first version of Dodd-Frank to contain the study and reporting requirement. *See* Engrossed Bill at § 3005 (Studies). In other words, once Congress decided to require the agency to establish position limits, it also added a provision requiring the agency to study and report their effects.

The same is true of the timing provisions. The Introduced Bill containing the permissive "may" formulation did not set any deadlines for establishing position limits. In contrast, both the Engrossed Bill and the final law containing the mandatory "shall" language set tight and unconditional deadlines for establishing the required position limits. *Compare* Introduced Bill at § 3113 (Position Limits) (no timing provisions), *with* Engrossed Bill at § 3113 (Position Limits) (limits on "exempt commodities" "shall be established within 180 days after" enactment; limits on "agricultural commodities" "shall be established within 270 days after" enactment), *and* 7 U.S.C. § 6a(a)(2)(B) (same).

These differences between the Introduced Bill and the Dodd-Frank law are stark. The former granted authority to the CFTC, but no more. It would have permitted the CFTC to establish position limits, but set no deadlines for their establishment, did not refer to them as "required," and contained no accountability mechanism to assess their effectiveness. The final law, by contrast, contains mandatory language ("shall . . . establish"), a tight timeline for their establishment (within 180 or 270 days), and a mandatory study and reporting requirement.

ii. The Bipartisan Peterson Amendment Strengthened the House Bill

These changes in the bill language are primarily the result of an amendment added to the bill on the House floor by Representative Collin Peterson on December 10, 2009. *See* 155 Cong. Rec. H14496, H14682 (daily ed. Dec. 10, 2009). The language in his amendment had previously been approved by the House Agriculture Committee ("the Committee"), which he chaired.[5] The Committee's discussion at an October 21, 2009 Business Meeting clearly shows that all members understood that the position limits provision, which was one section in legislation addressing multiple derivative issues, would make the imposition of position limits mandatory. The meeting began with an explanation by the Committee's counsel who stated that the provision "requires the CFTC to establish position limits on SWAPs that perform a significant price discovery function and require[s] aggregate limits across markets." *See* Exhibit B (DVD: October 21, 2009 Business Meeting (House Agriculture Committee 2009) ("Ag. Vd.") at 38:46).[6] Counsel noted that the provision "requires CFTC to establish position limits on futures transactions for physically-deliverable commodities that are applicable to spot month, each month, and all months aggregated." *Id*. at 38:57. Each Committee member also received a document containing a "section-by-section analysis" of the provision, with the same explanation. *See Over-the-Counter Derivatives Markets Act of 2009, Section-by-Section Analysis* (Oct. 21, 2009), http://agriculture.house.gov/inside/Legislation/111/hr3795_amdt_sbs.pdf.

In the discussion that followed, statements made in favor of and in opposition to the provision reflected an understanding that position limits would be mandatory. None indicates that any Member viewed the position limits provision as simply permissive. For example, Representative Halvorson proposed adding a provision that "would require the CFTC to develop and implement position limits for all trading venues simultaneously . . . to ensure that we do not

[5] The Agriculture Committee, which has sole legislative jurisdiction in the House over matters involving futures and derivatives, had approved the language on October 21, 2009, when it discussed, amended, and approved H.R. 3795, the Over-the-Counter Derivatives Markets Act of 2009. Then, in December, after the House Financial Services Committee reported H.R. 4713 to the House floor to serve as the primary legislative vehicle for what became Dodd-Frank, the Agriculture Committee re-fashioned the Committee-approved language in H.R. 3795 into the Peterson amendment and offered it to H.R. 4713.

[6] Exhibit B, a video recording of the Business Meeting, has been provided by the House Agriculture Committee and lodged with the Court. The citations herein identify the times at which the referenced statements appear on the video. The Committee has only agreed to provide a single copy of the video. All other parties and any member of the public may view the video at the offices of the Committee, located in the Longworth House Office Building.

incentivize market participants to escape the limits imposed by trading on venues where the limits do not apply." *See* Ag. Vd. at 1:09:24. The amendment was adopted by the Committee by voice vote and later became 7 U.S.C. § 6a(a)(5)(B). *See Halvorson Amendment* (Oct. 21, 2009), http://agriculture.house.gov/inside/Legislation/111/014Halverson.pdf.

Representative Goodlatte voiced serious concerns with the position limits requirement, explaining:

> It would have been my preference that we move forward with legislation that simply shines the light of day on these transactions, that increases the disclosure requirements and reporting requirements, and so on, but waited until we saw more clearly what was going on with these trades before we started imposing position limits because we simply don't know what impact the position limits are going to have in terms of the competiveness of U.S. exchanges.

See Ag. Vd. at 59:55. Acknowledging that he did not have enough votes for his preferred "approach of looking at transparency first or the approach of waiting to see what we can accomplish by way of international agreement," Representative Goodlatte proposed a "study . . . that requires a report back to the Congress by the [CFTC] within a year on the impact that these decisions that we make here today have on the competitiveness of the U.S. exchanges . . . ." *Id*. at 1:01:28. This way "if they report back and say, we are losing business, well, let us rescind these limits and start anew." *Id*. at 1:02:18. Had Representative Goodlatte believed the bill to merely authorize the CFTC to set position limits following a study of their necessity, there would be no reason to be as concerned with "decisions we make here today" or to provide a mechanism for *Congress* to "rescind these limits and start anew." The Goodlatte proposal was adopted by the Committee by voice vote and later became section 719 of Dodd-Frank. *See Goodlatte Amendment* (Oct. 21, 2009), http://agriculture.house.gov/inside/Legislation/111/023Goodlatte.pdf. After approving this and other amendments, the Agriculture Committee approved the legislation as a whole, on a bipartisan basis, by voice vote. *See* Ag. Vd. at 1:52:36 (moved for admission by the Committee's Ranking Republican Member Rep. Lucas).

When Committee Chairman Peterson introduced the Committee-approved language through his amendment on the House floor on December 10, 2009, *see* 155 Cong. Rec. H14496, H14682 (daily ed. Dec. 10, 2009), he explained that "while much of the attention of this financial reform package is focused on the mortgage and credit crisis of last year, this amendment is the product of years of public debate about the regulation of derivatives markets in the United States." *See id*. at H14705 (statement of Rep. Peterson). He noted that as a result of the "price volatility we saw in energy futures markets," his Committee "looked at the relationship between what was occurring on the regulated markets and the even larger unregulated, over-the-counter market[,]" and found that "trillions of dollars in transactions affecting commodity prices were being conducted out of sight and out of reach of market regulators." *Id*. In order "to finally bring real accountability and oversight to the over-the-counter derivatives market," Chairman Peterson urged the adoption of his amendment, which "strengthens confidence in trader position limits on physically deliverable commodities as a way to prevent excessive speculation trading[,]" among other things. *Id*. Following debate, the House adopted the Peterson amendment by a voice vote. *See id*. at H14709. The House passed its version of Dodd-Frank, including the Peterson amendment, the following day.

iii. The Senate Accepted the House Approach

Meanwhile, the Senate went to work on its own version of the bill. As in the House, the Senate Committee on Agriculture, Nutrition, and Forestry approved, on a bipartisan basis, legislation addressing derivatives issues, including position limits, and the Committee-approved language was included in a Senate floor amendment which was agreed to by unanimous consent. *See* 156 Cong. Rec. S4034, S4077 (daily ed. May 20, 2010). On May 20, 2010, the Senate passed its version of Dodd-Frank, which contained mandatory language ("shall . . . establish"), but a much less detailed explication of the position limits requirement.[7] *See id*. at S4078 at § 737 (Position Limits). For example, the Senate version did not include deadlines for rulemaking or a study and reporting requirement. *Id*. The Senate then requested a conference to resolve the differences between the Senate and House versions of the bill. The House, unwilling to adopt the Senate version of the bill, agreed to conference.

From June 10 to June 29, 2010, a Conference Committee made up of representatives from both Houses met on numerous occasions to come to agreement on a final version of Dodd-Frank. Ultimately, the Conference Committee adopted the more detailed language of the House bill with regard to position limits, while adding three more references to the position limits as "required." *Compare* Enrolled Bill § 3113 (Position Limits) (one reference to position limits as "required") *with* 7 U.S.C. § 6a(a)(2),(3) (four references to position limits as "required"). On June 30, 2010, the language recommended by the Conference Committee passed the House; two weeks later it passed the Senate. The President signed the bill on July 21, 2010, and Dodd-Frank became law.

At each step in the legislative process, Congress made the position limits requirement stronger. It started with permissive language, which the House made mandatory when it adopted the Peterson amendment. Then, when faced with a choice between the House bill and a less detailed Senate bill that lacked deadlines for the establishment of position limits and contained no accountability mechanism to assess the limits' effectiveness, the Conference Committee chose the House language and further clarified that the position limits were "required."

[7] Statements of U.S. Senators make clear that the Senate was just as committed to the position limits requirement as the House. *See, e.g.*, Bipartisan Letter to Sen. Harry Reid from Sens. Cantwell, Feinstein, Nelson, Harkin, Snowe, Dorgan, and Brown (Apr. 23, 2010) ("Position limits provide an important restriction on market manipulation and the amount of risk that can build up in any one market participant. The CFTC . . . should be required to set and enforce strong position limits."), http://snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=2ccd7a1e-802a-23ad-434f-1689a468a4eb&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=4&YearDisplay=2010.

The CFTC, which would be responsible for implementing the position limits provision, closely followed the legislative process. All three CFTC Commissioners who voted to issue the rule imposing mandatory position limits under Dodd-Frank agree that Dodd-Frank required them to do so. As Senators who were personally involved with the enactment of Section 737, we, too, agree that the statutory requirement to impose position limits is not discretionary, but mandatory.

CONCLUSION

The language and structure of Dodd-Frank evince a clear intent on the part of Congress to make position limits mandatory. This conclusion is further supported by the development of the key provisions during the legislative process, especially when set against the backdrop of seven years of Congressional investigations and findings regarding the existence of excessive speculation and the need for mandatory position limits. *Amici* therefore urge the Court to deny Plaintiffs' motion for summary judgment, and enter judgment in favor of Defendant CFTC.

Respectfully submitted,

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Dated: April 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Senators Levin, Begich, Blumenthal, Boxer, Sherrod Brown, Cantwell, Cardin, Feinstein, Harkin, Leahy, Manchin, McCaskill, Menendez, Mikulski, Bill Nelson, Sanders, Shaheen, Whitehouse, and Wyden as *Amici Curiae* in Support of Defendant Commodity Futures Trading Commission, was served this 13th day of April, upon the following counsel for Plaintiffs International Swaps and Derivatives Association and Securities Industry and Financial Markets Association, by hand-delivery and via ECF:

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