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THE STATES' TWO-FOLD COMMODITIES ENFORCEMENT ROLE:  
STATE PARENS PATRIAE SUITS TO UPHOLD THE  
COMMODITY EXCHANGE ACT  
AND  
STATE PROSECUTIONS UNDER GENERAL CRIMINAL  
ANTIFRAUD STATUTES\*

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I. COMMODITY FUTURES TRADING COMMISSION ENFORCEMENT  
POLICY: COOPERATIVE FEDERAL-STATE ACTION TO  
STOP ILLEGAL COMMODITY ACTIVITY

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With the passage late in 1974 of the Commodity Futures Trading Commission Act of 1974, 1/ state regulation of commodity futures trading and related activities has been preempted. 2/ But the states nevertheless have a challenging and vital role to play in protecting their citizens: they may take affirmative action to enforce the federal law and, consistent with the federal regulatory scheme, may continue to enforce their own general criminal antifraud statutes. The Commission has spoken clearly of the need for state help. In a September 9, 1975, speech before the North American Securities Administrators Conference, Commodity Futures Trading Commission Vice-Chairman John V. Rainbolt, II, on behalf of the Commission called upon the states to join in a campaign to help the Commission eradicate commodity fraud.3/ By this memorandum detailing the roles the state can assume in

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\* Memorandum of the Office of the General Counsel, Commodity Futures Trading Commission

- 1/ P.L. 93-463, 88 Stat. 1389 (1974) amending the Commodity Exchange Act, 7 U.S.C. §1, et seq.
- 2/ Section 2(a)(1) of the Commodity Exchange Act, as amended, 7 U.S.C. 2, grants "exclusive jurisdiction" to the Commodity Futures Trading Commission of all "accounts, agreements . . . and transactions involving" commodity futures, commodity options and certain commodity leverage arrangements (Section 4c(b) of the Commodity Exchange Act, as amended, 7 U.S.C. 6c(b), and Section 217 of the Commodity Futures Trading Commission Act, 7 U.S.C. 15a). See Conference Report, S. Rep. 93-1194, 93d Cong., 2d Sess. at pp. 35-36 (1974).
- 3/ [Current] CCH Commodity Futures L. Rep. ¶20, 075. In a speech at a Federal Bar Association meeting in Atlanta, Georgia on September 10, 1975, Howard Schneider, General Counsel to the Commission, reaffirmed the policy of the Commission to encourage state efforts to combat illegal commodity activities.

this important area.<sup>4/</sup> the Office of General Counsel reiterates the Commission's enthusiastic call to the states to engage in a cooperative effort to protect the integrity of the futures markets and commodity customers, in general.

Of course, whether general state criminal antifraud provisions or the provisions of the Commodity Exchange Act <sup>5/</sup> are relied upon, the states should coordinate their enforcement programs with the Commission.

Particularly if advance notice of impending action is given to the Commission and if it is made aware of pending investigations, the Commission will be able effectively to help coordinate joint enforcement efforts among the states and between the Commission and state agencies. Of course, in some cases of widespread commodities fraud affecting the citizens of many states, it may be most effective, as a matter of litigation strategy and to promote judicial economy, for the Commission to sue in a single suit to seek redress in cases of multi-state wrongdoing rather than to have a patchwork of suits by several states. In addition, the Commission will offer advice to the states on novel legal issues of federal law and, in appropriate cases, may file *amicus curiae* briefs in support of the right of the states to bring enforcement suits against commodity law

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<sup>4/</sup> The courts have acknowledged the propriety of state and federal cooperation to ensure public welfare. Thus, it is "well settled," as the Court of Appeals for the Ninth Circuit has recognized,

. . . [t]hat under our dual form of government there may be a pooling of state and federal power for cooperative action to the end that the public welfare of both state and nation may be simultaneously promoted, where both have a common concern . . .

*Duncan v. Madigan*, 278 F. 2d 695, 696 (9th Cir. 1960), cert. denied, 368 U.S. 905 (1961). The Court of Appeals for the Tenth Circuit stated in *United States v. Chadwick*, 415 F. 2d 167, 171 (1969): "Active cooperation between state and federal authorities in the enforcement of criminal laws . . . should be encouraged." Violations of the Commodity Exchange Act are, criminal as well as civil offenses. See Sections 9(b) and 9(c) of the Act, 7 U.S.C. 13(b) and 13(c).

Section 12(a) of the Commodity Exchange Act, as amended, 7 U.S.C. 16(a), expressly provides: "The Commission may cooperate with . . . any State . . . department, agency or political subdivision thereof . . ." The Commission intends to cooperate with state enforcement agencies to the fullest extent authorized by law. See limitations contained in Section 8 of the Act, 7 U.S.C. 12 and 12-1.

<sup>5/</sup> While the Commodity Exchange Act, as amended, will prevent state securities administrators and other regulatory officials from implementing and enforcing state regulatory programs affecting matters that are within the exclusive jurisdiction of the Commodity Futures Trading Commission, nothing in that Act suggests that it should be a matter of federal concern which state official is assigned responsibility for enforcing general state criminal fraud provisions or for pursuing relief under the Commodity Exchange Act under the doctrine of *parens patriae*, which is discussed below. However, in many states it has historically been the securities administrator rather than some other official who has been entrusted with the responsibility to make criminal references concerning commodity fraud and to pursue appropriate civil remedies in connection with commodity activities. In view of the expertise of these state regulators concerning these matters, some states may wish to resolve any ambiguity concerning which state official may now act in these areas by enacting legislation expressly assigning responsibility to those officials who have previously dealt with these matters.

violators or to explain the impact of particular provisions of the Commodity Exchange Act.<sup>6/</sup> The Office of General Counsel will recommend that the Commission file amicus curiae briefs in the critical first few parens patriae suits brought by states. Joint enforcement action or intervention by the Commission in state proceedings may be appropriate in especially important actions under state law or cases of far-reaching consequence under the Commodity Exchange Act.

The coordination by the states of their efforts with the Commission's own enforcement program will greatly enhance the ability of the Commission to act as the central clearinghouse to monitor enforcement actions across the country, gather and disseminate enforcement information, and improve the effectiveness of enforcement of the Act.

## II. CONTINUING STATE ENFORCEMENT OF STATE CRIMINAL ANTIFRAUD STATUTES

Although the Commodity Futures Trading Commission is expressly charged with the primary responsibility of protecting the public against commodity frauds through enforcement of the Commodity Exchange Act 7/, Congress has recognized that proceedings by state enforcement agencies under state criminal antifraud laws must play a part if the citizens of the several states are to be fully protected against fraud in connection with commodity transactions. Thus, the Senate Committee on Agriculture and Forestry has stated

" . . . that the preemption of the regulation of commodity futures trading by the Commodity Futures Trading Commission Act of 1974 does not prevent the States from enforcing their criminal anti-fraud statutes. The Committee realizes that many fraudulent schemes are devised to prey on the unsuspecting and unsophisticated investor. In many case[s], these schemes purport to deal in commodities trading. The States are encouraged to continue to utilize their criminal anti-fraud statutes to discourage such schemes."<sup>8/</sup>

Accordingly, commodity fraud perpetrators can be prosecuted under general state criminal antifraud laws.

Moreover, since activities that are crimes under general criminal antifraud statutes injure the pecuniary rights of the victims and may well constitute

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<sup>6/</sup> The Commission also intends to arrange for regional conferences to promote, plan and coordinate a vigorous state-federal enforcement program and to create an advisory committee composed mostly of state securities commissioners who will aid in the coordination of federal-state enforcement under the Commodity Exchange Act and make appropriate recommendations to the Commission.

<sup>7/</sup> See Section 6c of the Commodity Exchange Act, as amended, which empowers the Commission to seek injunctions in federal courts to ensure compliance with the Act.

<sup>8/</sup> S. Rep. No. 94-73, 94th Cong., 1st Sess. at pp. 5-6 (1975) (emphasis added).

public nuisances, it follows that an appropriate state official may seek to enjoin those activities.<sup>9/</sup> To be sure, Congress appears to have specifically addressed the continuing rights of the states to enjoin fraudulent activity in connection with commodity transactions. It would be anomalous, however, if the states were found powerless to prevent behavior which, if consummated, would violate their criminal laws; and it is unreasonable to suppose that Congress could have intended such a result.

Consistent with the Supremacy Clause of the United States Constitution, Article IV, Clause 2, the general criminal fraud provisions of state law that will be applied in these criminal and injunctive proceedings must be interpreted in a manner that is entirely consistent with the federal regulatory scheme.<sup>10/</sup> Activities permitted under the federal act or by federal regulation may not be impeded through an unreasonably broad interpretation of what might constitute fraud under state law. By the same token, however, any activity which is proscribed as deceptive or fraudulent under the Commodity Exchange Act, as amended, or under rules and regulations adopted by the Commission, may be punished or enjoined by the states enforcing their own criminal antifraud laws. In this regard, it is significant that the Commodity Exchange Act and the antifraud rules that the Commission has adopted contain sweeping prohibitions against all deceptive activities in or in connection with

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<sup>9/</sup> See In re Debs, 158 U.S. 564 (1895); National Ass'n of Letter Carriers v. Independent Postal Sys., 470 F. 2d 265 (10th Cir. 1972); People v. Tool, 35 Colo. 225, 86 P. 224 (1905).

In the Commission's view, SEC v. Univest, Inc., 405 F. 2d 1057 (N.D. Ill. 1976), and State v. Monex Int'l, Ltd., 527 S.W. 2d 804 (Tex. Civ. App. 1975), application for writ of error refused (Tex. Sup. Ct. No. B-5658 December 17, 1975) and Clayton Brokerage Co. v. Mower, 520 S.W. 2d 802 (Tex. Civ. App. case dismissed per curiam as moot on motion for rehearing, 531 S.W. 2d 805 (Tex. Sup. Ct. February 11, 1976) do not stand for any conflicting principle.

The Univest decision involved only the question whether a federal agency other than the CFTC may take enforcement action with respect to commodity-related activities. The district court found that Congress has expressly spoken to this issue and has granted the CFTC "exclusive jurisdiction." The decision has no relevance to the continuing right of the states to enforce general criminal antifraud provisions.

The Monex and Clayton Brokerage Co. cases both involved whether the State of Texas may now obtain an injunction against commodity option trading or the offer of leverage transactions by persons who do not comply with a state regulatory program. Since the states are now without power to impose registration or other regulatory obligations with respect to transactions that became subject to the exclusive jurisdiction of this Commission on April 21, 1975, the Supreme Court of Texas held in those cases that it has become moot whether the state of Texas might previously have been entitled to compel compliance with such requirements.

See also People v. Monex Internat'l, Ltd., 380 N.Y.S. 2d 504 (N.Y. Sup. Ct. N.Y. Co. 1976) (refusing to vacate a preliminary injunction entered under state law prior to the effective date of the Commodity Futures Trading Commission Act).

<sup>10/</sup> See, e.g., Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967).

commodity futures transactions, commodity option transactions and commodity leverage transactions subject to commission jurisdiction.<sup>11/</sup>

### III. THE STATES AS PARENS PATRIAE ENFORCERS OF THE COMMODITY EXCHANGE ACT

In any event, the states have the right to bring actions to enjoin violations of the Commodity Exchange Act under the doctrine of parens patriae. Furthermore, since a parens patriae suit under that Act seeks to uphold the new federal law, there will be no question of preemption of state action; parens patriae suits are viable without regard to the federal preemption.

Even before the recent statutory amendments, which created the Commodity Futures Trading Commission and augmented the remedial provisions of the Commodity Exchange Act, it was recognized that enforcement of the Commodity Exchange Act was not limited to the federal agency entrusted with its administration.<sup>12/</sup> To the contrary, it was "undisputed that a private cause of action may be maintained under the Commodity Exchange Act."<sup>13/</sup> Thus, in the seminal case of Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), the district court found that defrauded customers of a commodities broker had a right to obtain damages for violation of the antifraud provision of Section 4b of the Act. The court reasoned that the statute had been enacted to protect the class of which plaintiffs were members from the harm they alleged; hence, upon a general tort theory of liability, plaintiffs were held to have a federal civil remedy although the Act contained no express provision to that effect.<sup>14/</sup> Since Goodman the

<sup>11/</sup> See Section 4b of the Commodity Exchange Act, as amended, 7 U.S.C. 6b (fraud in connection with commodity futures transaction); Section 4o, 7 U.S.C. 6o (fraud by commodity trading advisors or commodity pool operators); Rule 17 CFR 30.01 (fraud in connection with commodity options--40 Fed. Reg. 26,505, June 24, 1975); Rule 17 CFR 30.03 (fraud in connection with transactions in futures contracts other than on domestic contract markets--40 Fed. Reg. 26,506, June 24, 1975); Rule 17 CFR 30.03 (fraud in connection with certain transactions in silver or gold bullion or bulk coins--40 Fed. Reg. 26,506, June 24, 1975).

<sup>12/</sup> Prior to passage of the Commodity Futures Trading Commission Act, amending the Commodity Exchange Act, the Commodity Exchange Authority administered and enforced its provisions.

<sup>13/</sup> Case & Co., Inc. v. Board of Trade of the City of Chicago, 523 F.2d 355, 360 (7th Cir. 1975).

<sup>14/</sup> Similar reasoning was applied in the parallel field of securities in Kardon v. National Gypsum Co., 69 F Supp. 512 (E.D. Pa. 1946), which is generally understood to be the first case recognizing an implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 and the antifraud provisions of Rule 10b-5 thereunder. See Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 1 (1972) (recognizing the private right of action under Rule 10b-5). See also J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (private right under proxy solicitation provisions of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and Rule 14a-9 thereunder, 17 CFR 240.14a-9).

Courts of Appeals for the Seventh and Eighth Circuits and district courts in the Second, Third and Fifth Circuits have uniformly recognized rights of action under other sections of the Act.<sup>15/</sup>

The right of action recognized in these cases may be pursued not only by private parties who have been injured by statutory violations but also by the states litigating as parens patriae in the public interest to protect their citizens from the harm the statute was intended to prevent.<sup>16/</sup> The United States Supreme Court has repeatedly recognized the standing of a state to sue as parens patriae to seek equitable relief for the benefit of its citizens, whether or not

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<sup>15/</sup> See Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973) (Section 9(b)), rev'd on other grounds sub nom. Chicago Merchantile Exch. v. Deaktor, 414 U.S. 113 (1973); Booth v. Peavey Co. Commodity Serv., 430 F.2d 132 (8th Cir. 1970) (alternate holding, Section 4b(A)); Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974) (Section 5(d)); Arnold v. Bache & Co., Inc., 377 F. Supp. 61 (M.D. Pa. 1973) (Section 4b); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764 (S.D.N.Y. 1972) (Section 4b(A)); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1339 (E.D. La. 1972) (Section 4b(B)); United Egg Producers v. Bauer Int'l Corp., 311 F. Supp. 1375 (S.D.N.Y. 1970) (Section 9(b)); and Anderson v. Francis I. duPont & Co., 291 F. Supp. 705 (D. Minn. 1968) (fraud). Cf., Bartley v. P.G. Commodities Associates, Inc., [Current] CCH Commodity Futures L. Rep. ¶20,123 (S.D.N.Y. December 23, 1975) (case acknowledging private right of action in general, but not in that case) and Gould v. Barnes Brokerage Co., Inc., 345 F. Supp. 294 (N.D. Tex. 1972).

Since the amendment of the Commodity Exchange Act in 1974 an even stronger case can be made for the existence of implied private rights of action. A new Section 14 of the Act, 7 U.S.C. 18, sets up an administrative reparation procedure pursuant to which any person injured by violations of the Act by registered persons "may" seek an administrative remedy. In addition, Section 5a(11) of the Act, 7 U.S.C. 7a(11), requires futures contract markets to "provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims . . .," the use of which by a customer "shall be voluntary." These provisions implicitly recognize that a private remedy also exists in court.

<sup>16/</sup> See Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972); Cf., e.g., Louisiana v. Texas, 176 U.S. 1 (1900); Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 185 U.S. 125 (1902); Kansas v. Colorado, 206 U.S. 46 (1907); New York v. New Jersey, 256 U.S. 296 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); North Dakota v. Minnesota, 263 U.S. 365 (1923).

Lower federal courts have also recognized the propriety of the states' parens patriae suits. See In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied sub nom. Morgan v. American Manufacturers Ass'n, 414 U.S. 1045 (1973); and West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), cert. denied sub nom. Cotler Drugs, Inc. v. Chas Pfizer & Co., 404 U.S. 871 (1971).

the state has itself directly suffered a proprietary injury.<sup>17/</sup> These Supreme Court decisions set the guidelines for state parens patriae suits under the Commodity Exchange Act, as amended.

Historically, the term parens patriae ("parent of the country") reflected an English royal prerogative by which the King served as guardian for those under legal disabilities.<sup>18/</sup> By 1900 the United States Supreme Court recognized a modified type of parens patriae suit, brought by a state for the benefit of its citizens.<sup>19/</sup> Since that time, the Supreme Court has sanctioned several parens patriae suits to enjoin nuisance-type activities.<sup>20/</sup>

Significantly, the Supreme Court has also entertained a state parens patriae action seeking relief under provisions of federal statutory law. In Georgia v. Pennsylvania R.R., 342 U.S. 439 (1945), the state of Georgia, as parens patriae, sought to obtain injunctive relief from railroads that were alleged to have conspired to fix rates in violation of federal antitrust laws.<sup>21/</sup> The Court held, among other things, that the state had alleged cognizable harm to the welfare of its citizens, and that it was a "person" entitled to maintain suit for injunctive

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<sup>17/</sup> A class action brought by a state in accordance with federal or state rules is another enforcement vehicle that merits consideration in the present context. The United States Supreme Court in Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 266 (1972), indicated in dicta that the states might bring class actions in appropriate cases. This might be especially appropriate when the state, in its proprietary capacity, has been harmed along with its citizens. Cf. Illinois v. Associated Milk Producers, Inc., 351 F. Supp. 436 (N.D. Ill. 1972); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Illinois v. Brunswick Corp., 32 F.R.D. 453 (N.D. Ill. 1963).

<sup>18/</sup> See Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 257 (1972).

<sup>19/</sup> Louisiana v. Texas, 176 U.S. 1 (1900) (concept of parens patriae endorsed but not properly invocable in the particular case.)

<sup>20/</sup> See, e.g., Missouri v. Illinois, 180 U.S. 208 (1901) (brought to enjoin sewage discharge into an upstream river); Kansas v. Colorado, 206 U.S. 46 (1907) (brought to enjoin water diversion from an interstate river); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (brought to enjoin fumes from a neighboring state); and Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (brought to enjoin impediments to natural gas flow).

<sup>21/</sup> Georgia also sought relief in its proprietary capacity but the Court termed this allegation a "makeweight." 324 U.S. at 450. The state's additional request for monetary damages was held to be precluded by Interstate Commerce Commission approval of the railroad rates at issue. 324 U.S. at 453.

relief under Section 16 of the Clayton Act, 15 U.S.C. 26. 22/ The Court, 324 U.S. at 449, quoting from Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923) (emphasis added), noted:

"The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law."

22/ In contrast to the Supreme Court recognition of the propriety of parens patriae actions seeking injunctive relief, state parens patriae suits for damages do not appear to have been favored by the courts. See Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) (disapproving damage remedy while approving equitable remedy); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir. 1973) (decision holding state could not sue as parens patriae under Section 4 of Clayton Act for treble damages against alleged conspiracy by snack food manufacturers to fix prices), cert. denied, 412 U.S. 908 (1973) and Pennsylvania v. National Association of Flood Insurers, 520 F.2d 11 (3rd Cir. 1975) (case holding, inter alia, that state could not maintain a parens patriae suit for damages for its uninsured citizens allegedly harmed by failure of defendants to properly publicize flood insurance; state held to be seeking to recover for injury to individual citizens, the real parties in interest).

The Hawaii case was based upon a close reading of the statutory language of Section 4 of the Clayton Act:

Any person who shall be injured in his person or property by reason of anything forbidden in the antitrust laws may sue .... 405 U.S. at 260.

The high Court contrasted this provision with Section 16 of the Clayton Act, the section entitling any person to seek injunctive relief against antitrust law violations. The Court clearly sanctioned the right of Hawaii to seek injunctive relief based on the differing language of Section 16 and the fact that no effective threat of duplicative remedies against the defendants could exist as to injunctive relief since to use the Court's words, "100 injunctions are no more effective than one." 405 U.S. at 261. The Court assessed the threat of multiple recovery as to the damages claim in Hawaii, especially since the recovery under Section 4 is for three times the actual injury. The Supreme Court summed up the difference between the two sections by stating, 405 U.S. at 262:

... there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages.

Hawaii and its progeny have no adverse implications with respect to the right of a state to obtain injunctive relief under the doctrine of parens patriae. The Hawaii Court merely found that a Section 4 damages suit may be maintained only by a person harmed in the commercial business or property sense, not one injured, as the state is in a parens patriae suit, by injury to the general economy. See In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied sub nom. Morgan v. American Manufacturers Ass'n, 414 U.S. 1045 (1973) (suit for damages and injunctive relief under the Clayton Act by, inter alia, states as parens patriae alleging violation of conspiracy among automobile producers in research, development and installation of devices to control air pollution holding that state cannot maintain damages



Violation of the remedial Commodity Exchange Act is also a matter of grave public concern since it is a blow to the integrity of the futures markets which affects, directly or indirectly, the economy of the state and thus a substantial portion of the citizens of the states.<sup>23/</sup> Congressional concern for the integrity of these vital markets has been expressed in the major overhaul of the Commodity Exchange Act undertaken in the Commodity Futures Trading Commission Act of 1974.

In addition, a state parens patriae suit under the Commodity Exchange Act, as amended, at least an injunction suit, should not be subject to dismissal on the ground that it merely represents an attempt to circumvent the real party in interest doctrine, for the state has a legitimate quasi-sovereign interest of its own, apart from that of its individual citizens who are harmed, in preserving compliance with federal commodity law which has an effect on the agriculture and livestock industries as well as the lumber, precious metals, government-backed mortgages, foreign exchange and other primary markets upon which futures contracts are predicated. Furthermore, the states have an interest in preventing harm in the future to their citizens as a result of present violations of the Commodity Exchange Act. The need to protect from harm in futuro makes injunctive relief particularly appropriate.

An action to obtain relief under provisions of the Commodity Exchange Act, as amended, pursuant to the doctrine of parens patriae, may be brought either in state courts of general jurisdiction or in federal district courts.

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22/ (footnote continued)

suit but noting the continuing availability of injunctive suits after Hawaii).

Nor is the Hawaii line of cases necessarily the standard for all damage suits; it is rather a decision based on the precise wording of the damages section (§4) of the Clayton Act and the serious impact of treble damage suits on potential defendants. See also S. 1284 and H.R. 8532, 94th Cong., 1st Sess. (bills proposing to authorize state attorneys general to seek damages remedy under the Clayton Act) and West Virginia v. Chas. Pfizer & Co., 440 F. 2d 1079 (2d Cir. 1974) cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971), (approving right of state to bring class act seeking treble damages on behalf of its citizens allegedly harmed by antitrust violations.

Thus, the holdings in the above mentioned cases do not cast doubt upon the right of a state acting as parens patriae to obtain all appropriate equitable relief for violation of the Commodity Exchange Act, including injunction, rescission of unlawful commodity trading transactions, disgorgement and restitution of fraudulently obtained funds to the victims of commodity fraud. Cf. J.I. Case Co. v. Borak 377 U.S. 426, 435 (1964) (plaintiff suing in an implied civil action under Section 14(a) of the Securities Exchange Act of 1934 held entitled to rescission and all other necessary remedial relief); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); SEC v. Manor Nursing Centers, Inc., 458 F. 2d 1082 (2d Cir. 1972) (SEC suit charging antifraud and prospectus delivery violations, district court decision ordering disgorgement of illicit profits to perfect relief upheld); and Loss, L. Securities Regulation (2d ed. 1961), Vol. III at 1805-1807.

23/ In dealing with other remedial federal legislation, the antitrust laws, the United States Supreme Court stated in the Hawaii case that:

Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. 405 U.S. at 262

State courts not only have the right but the duty to decide state parens patriae suits brought to uphold the requirements of federal law. In Testa v. Katt, 330 U.S. 386 (1947), the United States Supreme Court held that Rhode Island courts could not refuse to enforce a provision of federal law. The Court stated that if a Congressional act creates a penalty for the benefit of an aggrieved party the policy of Congress, in effect, becomes the policy of all the states; under the Supremacy Clause found in Article VI, Clause 2 of the United States Constitution conflicting state policy could not bar enforcement of the federally-created right. Thus state courts must open their doors to persons seeking redress under federal law. 24/

Neither the Commodity Exchange Act nor any other federal statute grants exclusive jurisdiction of violations of that Act to federal courts or bars redress of violations of the Act in state courts. To the contrary, Section 2(a)(1) of the Act states, "[n]othing in this section shall supercede or limit the jurisdiction conferred on courts of . . . any State." 25/ Thus, under the rationale of Testa, state courts of general competence have the duty to invoke their general jurisdiction to hear the state parens patriae commodity enforcement suits.

The states, may, of course, elect to bring parens patriae suits in federal courts. Two federal statutes grant jurisdiction to the district courts to hear such cases. Since the state civil action arises under the Commodity Exchange Act, which is an act of Congress regulating commerce, district court jurisdiction exists under 28 U.S.C. 1337. 26/ Alternatively, the general federal-question statute, 28 U.S.C. 1331(a), which grants district courts original jurisdiction of civil actions arising under the laws of the United States if the amount "in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs," may be relied upon. 27/

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24/ See also Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1912) (cause of action under Federal Employers' Liability Act, 45 U.S.C. 51, et seq.).

25/ This provision may be contrasted, for example, with the provision of Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa, which grants federal district courts exclusive jurisdiction of actions arising under the provisions of that Act.

26/ Gould v. Barnes Brokerage Co., Inc., 345 F.Supp. 294, 295 (N.D. Tex. 1972).

If 28 U.S.C. 1337 is invoked as the jurisdictional basis for a state enforcement suit under the Act, there is no minimum amount in controversy requirement. See Caulfield v. Department of Agriculture, 293 F. 2d 217 (5th Cir. 1961), cert. dismissed, 369 U.S. 858 (1962).

27/ "In injunctive actions, the amount in controversy is not the amount that the plaintiffs might recover at law, but the value of the right to be protected or the extent of the injury to be prevented." Scherr v. Volpe, 336 F. Supp. 882 (W.D. Wis. 1971), aff'd on other grounds, 466 F. 2d 1027 (7th Cir. 1972). See also Comprehensive Group Health Serv. Bd. of Directors v. Temple University, 363 F. Supp. 1069 (E.D. Pa. 1973). Cf. Glenwood Light & Power Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121 (1915).

## IV. CONCLUSION

The spirit of the new federal commodity law is one of active concern for the commodity trader and the integrity of the commodity futures trading industry. Though state regulation has been preempted, state criminal law and parens patriae enforcement remains a vital adjunct to federal enforcement. The Commodity Futures Trading Commission alone cannot do the job of ensuring fair and lawful operation of the commodity industry; the help of the fifty states and the District of Columbia is essential. This memorandum has attempted to provide a guide for continuing state enforcement. Together with the states, the Commission can achieve the goal expressed by Congress: full protection for the trader and full development of a free market system in the burgeoning commodity business. The task of assuring compliance with all applicable laws and preventing varied fraudulent schemes, particularly in the risk-prone areas of commodity options and commodity leverage transactions, is challenging, but with federal-state cooperation the enforcement operation will be successful.

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## Exhibit I

## Model State Statute

Authority to Enforce Commodity Exchange Act Requirements;  
Coordination of Enforcement with Commodity Futures Trading  
Commission

Section 101. Civil Actions

The [state securities commissioner]\* on behalf of the state as parens patriae for the benefit of its citizens, shall have authority to institute and prosecute such civil actions in appropriate courts of this state or of the United States as he may consider necessary or appropriate for the protection of the state or its citizens either to enjoin business activities within this state that are being conducted in violation of the United States Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq., or otherwise to enforce compliance by any person with the requirements of the Act.

Section 102. Venue

The civil actions may be brought in any court of this state of general competence in the district within which the defendant is found, is an inhabitant or transacts business or within which the act, practice or activity constituting the violation or non-compliance occurred, is occurring or is about to occur.

Section 103. Service of Process

Service of process may be effected in the district in which defendant is an inhabitant or wherever defendant can be found.

Section 104. Investigations

In aid of the institution and prosecution of authorized civil actions, the [state securities commissioner\*] shall have authority to investigate all pertinent matters, including authority to subpoena witnesses and documents.

Section 201. Coordination with the Commodity Futures Trading Commission

The [state securities commissioner\*] shall coordinate the institution and prosecution of civil actions, as well as the investigation thereof, with the Commodity Futures Trading Commission. As part of that coordination, he shall provide to and receive from the Commission such notices, reports and communications and arrange with the Commission for such conferences as may be appropriate.\*\*

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\* The brackets are included since some states may desire to designate another state officer, for example the state attorney general, to enforce the Commodity Exchange Act. Although in most states the securities commissioner is best qualified to serve as enforcer of the Act, the freedom to name another officer is naturally left to each state.

\*\* Editor's Note: A recent Washington Post article (April 4, 1978, p. D8) suggests the possibility that the states may be extended investigative and enforcement powers concurrent with the CFTC in order to combat fraud. If this becomes an actuality, this article will no longer be pertinent.



**END**