

EXTENSIONS OF REMARKS

IN MEMORY OF CHRISTINE VEST

HON. DENNIS J. KUCINICH

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Monday, October 23, 2000

Mr. KUCINICH. Mr. Speaker, my colleague, Mr. LATOURETTE, and I are saddened to learn of the passing of Christine Vest, a tireless advocate for railroad safety. Mrs. Vest passed away last Thursday, October 19, 2000, at the age of 42.

Mrs. Vest turned a personal tragedy into a public crusade. About 3 years ago, her 16-year-old son Jeffrey Vest was tragically killed by a train. Christine Vest became relentless in her effort to bring railroad safety to the forefront of public consciousness. She played an important role in ensuring that the acquisition of Conrail by CSX and Norfolk Southern railroads incorporated safety features that were essential to the people of the Greater Cleveland area, the State of Ohio, and the nation.

Along with her daughter Stephanie, Christine Vest could be found wherever there was an opportunity to spread the word about train safety. She and Stephanie volunteered with a national rail safety program called Operation Lifesaver, an organization that provides public education about railroad safety. Mrs. Vest spoke in schools and rode specially chartered trains to inform students, public officials, and community workers about steps they can take to make railroad tracks safer to the general public. She spoke before the Ohio House of Representatives, successfully urging approval of funding for railroad crossing gates.

Mrs. Vest was born in Eastlake, Ohio, and graduated from Eastlake North High School in 1975. She was active in the Harvey High School Booster Club. In addition to her daughter Stephanie, she is survived by her husband Charles, a son Matthew, her mother, Gerrie Smith, two grandchildren, three brothers, and a sister.

Mr. Speaker, I ask our colleagues to join me in remembering Christine Vest. Our thoughts and prayers are with the Vest family at this time.

COMMODITY FUTURES MODERNIZATION ACT OF 2000

SPEECH OF

HON. JAMES A. LEACH

OF IOWA

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 19, 2000

Mr. LEACH. Mr. Speaker, last year, after nearly two decades of work, the United States Congress passed the Financial Modernization Act to bring our Nation's banking and securities laws in line with the realities of the marketplace. In the few days left for legislation in this Congress, an analogous opportunity presents itself to modernize the Commodity Exchange Act that governs the trading of futures and options.

At issue is the question of whether an appropriate regulatory framework can be established to deal not only with certain problems that confront today's risk management markets, but new dilemmas that appear on the horizon.

Legislation of this nature involves different committees with different concerns and sometimes competitive jurisdictional interests. From the perspective of the Committee on Banking and Financial Services, I would like to express my respect for the initial Committee on Agriculture product. That Committee's product, led by the gentleman from Texas (Chairman COMBEST) and the gentleman from Illinois (Mr. EWING), reflected a credible way of dealing with a number of concerns that have developed during much of the last decade as derivatives-related products have grown. Nonetheless, the Committee on Banking and Financial Services believes that some modifications to H.R. 4541, the Commodity Futures Modernization Act, were in order and in July, a number of clarifying approaches were adopted on a bipartisan manner.

The fact is that the CEA, or Commodity Exchange Act, is an awkward legislative vehicle designed in an era in which financial products of a nature now in place were neither in existence nor much contemplated. Indeed, the Commodities Future Trading Commission was fundamentally designed to supervise agriculture and commodities markets, not financial institutions.

Because of anachronistic constraints established under the Commodity Exchange Act, legal uncertainty exists for trillions of dollars of existing contractual obligations. This bill resolves this uncertainty for the benefit of customers of many of these products, but it does not fully resolve the legal certainty issue for some kinds of future activities.

While I would have wished that more could have been achieved, it should be clear that no additional legal uncertainty is created under this bill and progressive strides have been made on fundamental aspects of the legal certainty issue.

Here, I think it particularly appropriate to thank the staffs of the committees of jurisdiction and express my appreciation for the work of professionals at the Fed, Treasury and SEC who have added so much to the legislative process. But, above all, I believe this body owes a debt of gratitude to Mr. EWING whose dedication and hard work have reflected so well on this Congress.

While not all of the additions offered by the Banking Committee were adopted, the bill includes a number of provisions added by the Committee. These include a new section that excludes from the CEA nonagricultural swaps if the swap is entered into between persons who are eligible participants and the terms of the swap are individually negotiated and a new section to clarify that nothing in the CEA implies or creates any presumption that a transaction is or is not subject to the CEA or CFTC jurisdiction because it is or is not eligible for an exclusion or exemption provided for

under the CEA or by the CFTC. In addition, other amendments have been added to conform this proposal to last year's financial modernization law.

With regard to Section 107 of the proposed legislation, this provision excludes transactions done among eligible contract participants, where the material economic terms of the agreement are individually negotiated between the parties thereto.

The market for swap agreements has grown exponentially over the past decade, but this growth has been restrained by legal uncertainty in the U.S. stemming from confusion as to whether the Commodity Exchange Act, which was designed to regulate floor-traded fungible contracts, should also apply to the individually tailored swaps. Section 107 makes it clear that swap agreements are not futures contracts. When parties negotiate and enter into a swap agreement under the provisions of Section 107, such a contract will not be subject to the Commodity Exchange Act. Furthermore, this provision makes it clear that such contracts are excluded without regard to whether the parties use a master agreement, confirmation, credit support annex, or other standardized forms to establish the legal, credit, or other terms between them. As long as the eligible parties have the ability to alter the material economic terms of the agreement, the contract is excluded from the Commodity Exchange Act.

Finally, included in the bill are provisions written by the Banking Committee concerning the clearing of derivatives by banks and other regulated entities. Some of these provisions amend the Bankruptcy Code and I thank Chairman HYDE for allowing these provisions to move forward. Inserted below is an exchange of letters between the two Committees on this matter.

For all the reasons stated above, Mr. Speaker, I urge my colleagues to support the legislation before us. Although not perfect, this proposal is far superior to current law, and I urge its adoption.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY
Washington, DC, September 6, 2000.

Hon. James A. Leach,
Chairman, Committee on Banking and Financial Services, U.S. House of Representatives,
Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN LEACH: I am writing in regard to H.R. 4541, the Commodity Futures Modernization and Financial Contract Netting Improvement Act of 2000, which your Committee ordered to be reported on July 27, 2000.

It is my understanding that H.R. 4541, as ordered to be reported, contains language in Section 116(d) and in Title 2 of the bill that comes within the Judiciary Committee's jurisdiction over bankruptcy law pursuant to Rule X of the House Rules. It is also my understanding that Section 116(d) makes technical and conforming changes to the Bankruptcy Code with respect to certain multilateral clearing organizations and that the language in Title 2 of the bill is substantively similar to Title X of H.R. 833, the Bankruptcy Reform Act of 1999, which the House

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

passed, as amended, on May 5, 1999. Therefore, in view of this language and in the interest of expeditiously moving H.R. 4541 forward, the Judiciary Committee will agree to waive its right to a sequential referral of this legislation. By agreeing not to exercise its jurisdiction, the Judiciary Committee does not waive its jurisdictional interest in this bill or similar legislation. This agreement is based on the understanding that the Judiciary Committee's jurisdiction will be protected through the appointment of conferees should H.R. 4541 or a similar bill go to conference. Further, I request that a copy of this letter be included in the Congressional Record as part of the floor debate on this bill.

I appreciate your consideration of our interest in this bill and look forward to working with you to secure passage.

Sincerely yours,

HENRY J. HYDE,
Chairman.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON BANKING AND FINANCIAL
SERVICES,
Washington, DC, September 6, 2000.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary, U.S.
House of Representatives, Rayburn House
Office Building, Washington, DC.*

DEAR HENRY: This letter responds to your correspondence, dated September 6, 2000, concerning H.R. 4541, the Commodity Futures Modernization and Financial Contract Netting Improvement Act of 2000, which the Committee on Banking and Financial Services ordered to be reported on July 27, 2000.

I agree that the bill, as reported, contains matter within the Judiciary Committee's jurisdiction and I appreciate your Committee's willingness to waive its right to a sequential referral of H.R. 4541 so that we may proceed to the floor.

Pursuant to your request, a copy of your letter will be included in the Congressional Record during consideration of H.R. 4541.

Sincerely,

JAMES A. LEACH,
Chairman.

COMMODITY FUTURES
MODERNIZATION ACT OF 2000

SPEECH OF

HON. EDWARD J. MARKEY

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Thursday, October 19, 2000

Mr. MARKEY. Mr. Speaker, I rise in support of the motion to suspend the rules and pass the bill, H.R. 4541.

I reluctantly intend to vote for this bill today, despite the fact that I have some very serious concerns about both the process that has brought this bill to the floor and some of its provisions.

Let me speak first to the process. In the Commerce Committee, Democratic members worked cooperatively with the Republican majority to craft a bipartisan bill that addressed investor protection, market integrity, and competitive parity issues raised by the original Agriculture Committee version of the bill. As a result, we passed our bill with unanimous bipartisan support. Following that action, we stood ready to work with members of the Banking and Agriculture Committees to reconcile our three different versions of the bill and prepare it for House floor action. But after just a few bipartisan staff meetings, the Democratic staff was told that Democrats would henceforth be

excluded from all future meetings, and that the Republican majority leader was going to take the lead in drafting the bill. What's more, we were also told the chairman of the Senate Banking Committee was invited into those negotiations—despite the fact that this bill comes within the Agriculture Committee's jurisdiction over in the Senate and the Senate has not even passed a CEA bill. In fact, the Senate Agriculture Committee decided not to include the swaps provisions sought by the chairman of the Senate Banking Committee when the committee reported S. 2697, because these proposals were viewed as so controversial.

We then went through a period of several weeks in which the Republican majority staff caucused behind closed doors. The product that resulted from those negotiations was so seriously flawed that it was opposed by Treasury, the SEC, the CFTC, the New York Stock Exchange, the NASDAQ, and all of the Nation's stock and options exchanges, the entire mutual fund industry, and even some of the commodities exchanges. Democrats, the administration, the CFTC, and the SEC suggested a number of changes to fix the many flaws in this language, and over the last several days many of them have been accepted. That is a good thing. But I would say to the majority, if you had simply continued to work with us and to allow our staffs to meet with your staffs, we could have resolved our differences over this bill weeks ago. We shouldn't have had to communicate our concerns through e-mails and third parties. We really should be allowing our staffs to meet and talk to each other.

Having said that, let me turn to the substance of this bill. There are two principal areas I want to focus on—legal certainty and single stock futures.

With regard to legal certainty, I frankly think this whole issue is overblown. Congress added provisions to the Futures Trading Practices Act of 1992 that give the CFTC the authority to exempt over-the-counter swaps and other derivatives from the Commodity Exchange Act—without having to even determine whether such products were futures. I served as a conferee when we worked out this language, and it was strongly supported by the financial services industry.

Now we are told we need to fix the "fix" we made to the law back then. But, I would note that when former CFTC Chair Brooksley Born opened up the issue of whether these exclusions should be modified, she was quickly crushed. The other financial regulators immediately condemned her for even raising the issue and the Congress quickly attached a rider to an appropriations bill to block her from moving forward. The swaps industry was never in any real danger of having contracts invalidated on the basis of the courts declaring them to be illegal futures. They were only in danger of having the CFTC "think" about whether to narrow or change their exemptions. But the CFTC was barred from doing even that!

What we are doing in this bill is saying—O.K.—we are going to take OTC swaps between "eligible contract participants" out of the CEA. They are excluded from the act.

Now, I don't have any problem with that. If the swaps dealers feel more comfortable with a statutory exclusion for sophisticated counterparties instead of CFTC exemptive authority, and the Agriculture Committee is willing to agree to an exclusion that makes sense, that's fine with me. However, I am not

willing to allow "legal certainty" to become a guise for sweeping exemptions from the anti-fraud or market manipulation provisions of the securities laws. That is simply not acceptable.

While some earlier drafts of this bill would have done precisely that, the bill we are considering today does not. That is a good thing, and that is why I am willing to support the legal certainty language today. However, I do have some concerns about how we have defined "eligible contract participant"—that is, the sophisticated institutions that will be allowed to play in the swaps market with little or no regulation.

The bill before us today lowers the threshold for who will be an "eligible contract participant" far below what the Commerce Committee had allowed. I fear that this could create a potential regulatory gap for retail swap participants that ultimately must be addressed.

The term "eligible contract participant" now includes some individuals and entities, who should be treated as retail investors—those who own and invest on a discretionary basis less than \$50 million in investments. These are less sophisticated institutions and individuals, and they are more vulnerable to fraud or abusive sales practices in connection with these very complex financial instruments. If Banker's Trust can fool Procter and Gamble and Gibson Greetings about the value of their swaps what chance does a small municipal treasurer or a small business user of one of these products have?

For example, under one part of this definition, an individual with total assets in excess of only \$5 million who uses a swap to manage certain risks is an "eligible contract participant" for that swap. I think that threshold is simply too low.

I don't believe that removal of these retail swap participants from the protections of the CEA makes sense, unless the bill makes clear that other regulatory protections will apply.

To this end, the Commerce Committee version of H.R. 4541 would have required that certain individuals or entities who own and invest on a discretionary basis less than \$50 million in investments, and who otherwise would meet the definition of "eligible contract participant," would not be "eligible contract participants" unless the counterparty for their transaction was a regulated entity, such as a broker-dealer or a bank. That helps assure that they are not doing business with some totally fly-by-night entity, but with someone who is subject to some level of federal oversight and supervision. It is not a guarantee that the investor still won't be ripped off. But it helps make it less likely.

The bill we are considering today weakens this requirement. The Commerce provision only applies to governmental entities as opposed to individual investors; the threshold for application of the provision to such entities is lowered to \$25 million; and the list of permissible counterparties to the swap is expanded to include some unregulated entities.

I believe the original Commerce Committee investor protection provision should be fully restored. Moreover, the bill should clarify explicitly that counterparties who may enter into transactions with retail "eligible contract participants" are subject for such transactions to the antifraud authority of their primary regulators.