the Senator from Wisconsin, that any agreement that is being talked about will call for a vote tomorrow anyway. That is my understanding.

Mr. FEINGOLD. That is correct.

Mr. REID. I think we can look forward to a cloture vote tomorrow on this bill, regardless of what happens.

I hope there will be some progress on the energy bill. In addition to the work of Senator FEINSTEIN, we also have the alternative fuels problem we wish to have resolved. I hope Senator KYL will come over as soon as possible today to offer his amendment. That would pretty much do for the alternative fuels problems we have with this legislation.

So it is contemplated there will be rollcall votes in relation to the energy bill throughout the day.

The Senate will recess from 12:30 to 2:15 p.m. today for our weekly party conferences. I appreciate everyone's courtesy, waiting while I made this brief announcement. I do hope, though, that everyone understands we are going to try to move forward on the legislation we have before us, campaign finance reform, and it is my understanding we can only get to the energy bill today after having moved off campaign finance reform. Is that true?

The ACTING PRESIDENT pro tempore. That is correct.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

BIPARTISAN CAMPAIGN REFORM ACT OF 2002

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now resume consideration of H.R. 2356, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 2356) to amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform.

Mr. REID. Mr. President, what is the regular order?

The ACTING PRESIDENT pro tempore. The Senate is now considering H.R. 2356.

Mr. REID. I ask we now move to the energy bill—that is the regular order? Is my understanding correct that calling for the regular order would call up the energy bill at this time?

The ACTING PRESIDENT pro tempore. Calling for the regular order with respect to the energy bill would bring the energy bill to the floor.

NATIONAL LABORATORIES PARTNERSHIP IMPROVEMENT ACT OF 2001—Resumed

Mr. REID. Mr. President, I maybe misspoke. I ask for the regular order as it relates to the energy bill that Senator BINGAMAN has been marshaling the last several days.

The ACTING PRESIDENT pro tempore. The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 517) to authorize funding for the Department of Energy to enhance its mission areas through technology transfer and partnerships for fiscal years 2002 through 2006, and for other purposes.

Pending:

Daschle/Bingaman further modified amendment No. 2917, in the nature of a substitute.

Feinstein amendment No. 2989 (to amendment No. 2917), to provide regulatory oversight over energy trading markets.

Kerry/McCain amendment No. 2999 (to amendment No. 2917), to provide for increased average fuel economy standards for passenger automobiles and light trucks.

Dayton/Grassley amendment No. 3008 (to amendment No. 2917), to require that Federal agencies use ethanol-blended gasoline and biodiesel-blended diesel fuel in areas in which ethanol-blended gasoline and biodiesel-blended diesel fuel are available.

Bingaman amendment No. 3016 (to amendment No. 2917), to clarify the provisions relating to the Renewable Portfolio Standard.

Lott amendment No. 3028 (to amendment No. 2917), to provide for the fair treatment of Presidential judicial nominees.

Mr. REID. Mr. President, on the energy bill, what is the pending amendment?

The ACTING PRESIDENT pro tempore. The pending amendment is the Lott amendment, No. 3028.

Mr. REID. I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

AMENDMENT NO. 2989, AS MODIFIED

Mrs. FEINSTEIN. Mr. President, I call for the regular order with respect to my amendment.

The ACTING PRESIDENT pro tempore. The amendment of the Senator from California is now pending.

Mrs. FEINSTEIN. Mr. President, I send a modification to the desk.

The ACTING PRESIDENT pro tempore. The amendment is so modified.

The amendment, as modified, is as follows:

At the end, add the following:

DIVISION ___—MISCELLANEOUS

TITLE I—ENERGY DERIVATIVES

SEC. ___1. JURISDICTION OF THE COMMODITY FUTURES TRADING COMMISSION OVER ENERGY TRADING MARKETS AND METALS TRADING MARKETS.

(a) FERC LIAISON.—Section 2(a)(8) of the Commodity Exchange Act (7 U.S.C. 2(a)(8)) is amended by adding at the end the following:

''(C) FERC LIAISON.—The Commission shall, in cooperation with the Federal Energy Regulatory Commission, maintain a liaison between the Commission and the Federal Energy Regulatory Commission.''.

(b) EXEMPT TRANSACTIONS.—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended—

(1) in subsection (h), by adding at the end the following:

''(7) APPLICABILITY.—This subsection does not apply to an agreement, contract, or transaction in an exempt energy commodity or an exempt metal commodity described in section 2(j)(1).''; and

(2) by adding at the end the following:

''(j) EXEMPT TRANSACTIONS.—

''(1) TRANSACTIONS IN EXEMPT ENERGY COMMODITIES AND EXEMPT METALS COMMODITIES.—An agreement, contract, or transaction (including a transaction described in section 2(g)) in an exempt energy commodity or exempt metal commodity shall be subject to—

''(A) sections 4b, 4c(b), 4o, and 5b;

''(B) subsections (c) and (d) of section 6 and sections 6c, 6d, and 8a, to the extent that those provisions—

''(i) provide for the enforcement of the requirements specified in this subsection; and

''(ii) prohibit the manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market;

''(C) sections 6c, 6d, 8a, and 9(a)(2), to the extent that those provisions prohibit the manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market;

''(D) section 12(e)(2); and

''(E) section 22(a)(4).

''(2) BILATERAL DEALER MARKETS.—

''(A) IN GENERAL.—Except as provided in paragraph (6), a person or group of persons that constitutes, maintains, administers, or provides a physical or electronic facility or system in which a person or group of persons has the ability to offer, execute, trade, or confirm the execution of an agreement, contract, or transaction (including a transaction described in section 2(g)) (other than an agreement, contract, or transaction in an excluded commodity), by making or accepting the bids and offers of 1 or more participants on the facility or system (including facilities or systems described in clauses (i) and (iii) of section 1a(33)(B)), may offer or may allow participants in the facility or system to enter into, enter into, or confirm the execution of any agreement, contract, or transaction under paragraph (1) (other than an agreement, contract, or transaction in an excluded commodity) only if the person or group of persons meets the requirement of subparagraph (B).

''(B) REQUIREMENT.—The requirement of this subparagraph is that a person or group of persons described in subparagraph (A) shall—

''(i) provide notice to the Commission in such form as the Commission may specify by rule or regulation;

''(ii) file with the Commission any reports (including large trader position reports) that the Commission requires by rule or regulation;

''(iii) maintain sufficient capital, commensurate with the risk associated with the transaction, as determined by the Commission;

''(iv)(I) consistent with section 4i, maintain books and records relating to each transaction in such form as the Commission may specify for a period of 5 years after the date of the transaction; and

''(II) make those books and records available to representatives of the Commission and the Department of Justice for inspection for a period of 5 years after the date of each transaction; and

''(iv) make available to the public on a daily basis information on volume, settlement price, open interest, opening and closing ranges, and any other information that the Commission determines to be appropriate for public disclosure, except that the Commission may not—

''(I) require the real time publication of proprietary information; or

''(II) prohibit the commercial sale of real time proprietary information.

''(3) REPORTING REQUIREMENTS.—On request of the Commission, an eligible contract participant that trades on a facility or system described in paragraph (2)(A) shall provide to the Commission, within the time period specified in the request and in such form and manner as the Commission may specify, any information relating to the transactions of the eligible contract participant on the facility or system within 5 years after the date of any transaction that the Commission determines to be appropriate.

''(4) TRANSACTIONS EXEMPTED BY COMMISSION ACTION.—Any agreement, contract, or transaction described in paragraph (1) (other than an agreement, contract, or transaction in an excluded commodity) that would otherwise be exempted by the Commission under section 4(c) shall be subject to—

''(A) sections 4b, 4c(b), 4o, and 5b; and

''(B) subsections (c) and (d) of section 6 and sections 6c, 6d, 8a, and 9(a)(2), to the extent that those provisions prohibit the manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market.

''(5) NO EFFECT ON OTHER FERC AUTHORITY.—This subsection does not affect the authority of the Federal Energy Regulatory Commission to regulate transactions under the Federal Power Act (16 U.S.C. 791a et seq.) or the Natural Gas Act (15 U.S.C 717 et seq.).

''(6) APPLICABILITY.—This subsection does not apply to—

''(A) a designated contract market regulated under section 5; or

''(B) a registered derivatives transaction execution facility regulated under section 5a.''.

(c) CONTRACTS DESIGNED TO DEFRAUD OR MISLEAD.—Section 4b of the Commodity Exchange Act (7 U.S.C. 6b) is amended by striking subsection (a) and inserting the following:

''(a) PROHIBITION.—It shall be unlawful for any member of a registered entity, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made on or subject to the rules of any registered entity, or for any person, in or in connection with any order to make, or the making of, any agreement, transaction, or contract in a commodity subject to this Act—

''(1) to cheat or defraud or attempt to cheat or defraud any person;

''(2) willfully to make or cause to be made to any person any false report or statement, or willfully to enter or cause to be entered any false record;

''(3) willfully to deceive or attempt to deceive any person by any means; or

''(4) to bucket the order, or to fill the order by offset against the order of any person, or willfully, knowingly, and without the prior consent of any person to become the buyer in respect to any selling order of any person, or to become the seller in respect to any buying order of any person.''

(d) CONFORMING AMENDMENTS.—The Commodity Exchange Act is amended—

(1) in section 2 (7 U.S.C. 2)—

(A) in subsection (h)—

(i) in paragraph (1), by striking ''paragraph (2)'' and inserting ''paragraphs (2) and (7)''; and

(ii) in paragraph (3), by striking ''paragraph (4)'' and inserting ''paragraphs (4) and (7)''; and

(B) in subsection (i)(1)(A), by striking ''section 2(h) or 4(c)'' and inserting ''subsection (h) or (j) or section 4(c)'';

(2) in section 4i (7 U.S.C. 6i)—

(A) by striking ''any contract market or'' and inserting ''any contract market,''; and

(B) by inserting '', or pursuant to an exemption under section 4(c)'' after ''transaction execution facility'';

(3) in section 5a(g)(1) (7 U.S.C. 7a(g)(1)), by striking ''section 2(h)'' and inserting ''subsection (h) or (j) of section 2'';

(4) in section 5b (7 U.S.C. 7a–1)—

(A) in subsection (a)(1), by striking ''2(h) or'' and inserting ''2(h), 2(j), or''; and

(B) in subsection (b), by striking ''2(h) or'' and inserting ''2(h), 2(j), or''; and

(5) in section 12(e)(2)(B) (7 U.S.C. 16(e)(2)(B)), by striking ''section 2(h) or 4(c)'' and inserting ''subsection (h) or (j) of section 2 or section 4(c)''.

SEC. ____2. RECRUITMENT AND RETENTION OF QUALIFIED PERSONNEL AT THE COMMODITY FUTURES TRADING COMMISSION.

(a) IN GENERAL.—Section 2(a)(6) of the Commodity Exchange Act (7 U.S.C. 2(a)(6)) is amended by adding at the end the following:

''(G) PERSONNEL MATTERS.—

''(i) IN GENERAL.—The Chairman may appoint and fix the compensation of any officers, attorneys, economists, examiners, and other employees that are necessary in the execution of the duties of the Commission.

''(ii) COMPENSATION.—

''(I) IN GENERAL.—Rates of basic pay for all employees of the Commission may be set and adjusted by the Chairman without regard to the provisions of chapter 51 or subchapter III of chapter 53 of title 5, United States Code.

''(II) ADDITIONAL COMPENSATION.—The Chairman may provide additional compensation and benefits to employees of the Chairman if the same type and amount of compensation or benefits are provided, or are authorized to be provided, by any other Federal agency specified in section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b).

''(III) COMPARABILITY.—In setting and adjusting the total amount of compensation and benefits for employees under this subparagraph, the Chairman shall consult with, and seek to maintain comparability with, any other Federal agency specified in section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b).''.

(b) CONFORMING AMENDMENTS.—

(1) Section 3132(a)(1) of title 5, United States Code, is amended—

(A) in subparagraph (C), by striking ''or'';

(B) in subparagraph (D), by adding ''or'' at the end; and

(C) by adding at the end the following:

''(E) the Commodity Futures Trading Commission.''.

(2) Section 5316 of title 5, United States Code, is amended—

(A) by striking ''General Counsel, Commodity Futures Trading Commission.''; and

(B) by striking ''Executive Director, Commodity Futures Trading Commission.''.

(3) Section 5373(a) of title 5, United States Code, is amended—

(A) in paragraph (2), by striking ''or'' at the end;

(B) by redesignating paragraph (3) as paragraph (4); and

(C) by inserting after paragraph (2) the following:

''(3) section 2(a)(6)(G) of the Commodity Exchange Act.''.

(4) Section 1206 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b) is amended by inserting ''the Commodity Futures Trading Commission,'' after ''the Farm Credit Administration, ''.

SEC. ____3. JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION OVER ENERGY TRADING MARKETS.

Section 402 of the Department of Energy Organization Act (42 U.S.C. 7172) is amended by adding at the end the following:

''(i) JURISDICTION OVER DERIVATIVES TRANSACTIONS.—

''(1) IN GENERAL.—To the extent that the Commission determines that any contract that comes before the Commission is not under the jurisdiction of the Commission, the Commission shall refer the contract to the appropriate Federal agency.

''(2) MEETINGS.—A designee of the Commission shall meet quarterly with a designee of the Commodity Futures Trading Commission, the Securities Exchange Commission, the Federal Trade Commission, and the Federal Reserve Board to discuss—

''(A) conditions and events in energy trading markets; and

''(B) any changes in Federal law (including regulations) that may be appropriate to regulate energy trading markets.

''(3) LIAISON.—The Commission shall, in cooperation with the Commodity Futures Trading Commission, maintain a liaison between the Commission and the Commodity Futures Trading Commission.''.

Mrs. FEINSTEIN. Mr. President, I rise on behalf of Senators FITZGERALD, CANTWELL, CORZINE, WYDEN, LEAHY, BOXER, and DURBIN in modifying our amendment on energy derivatives.

As you know, we discussed this issue on the floor before, and the senior Senator from Texas had some concerns. So we spent a good deal of time talking with him and his staff. We have also kept in touch with our cosponsors. We have agreed on some modifications. There are some modifications that the Senator from Texas sought that the cosponsors and I could not agree to. So this modification represents where we agree and not where we disagree.

I begin by explaining two terms in the amendment. The first term is ''a derivative.'' A derivative is a financial instrument traded on or off an exchange, the price of which is directly dependent upon an underlying commodity, such as natural gas or electricity. An ''over-the-counter'' or ''swap'' contract is an agreement whereby a floating price is exchanged for a fixed price over a specified period. It involves no transfer of physical energy, and both parties settle their contractual obligations in cash.

Although energy derivatives make up only 4 percent of all derivative transactions, energy swaps make up 80 percent of all energy derivatives. So these are important terms.

What our amendment does is subject electronic exchanges, such as Enron Online, Dynegydirect, and IntercontinentalExchange—these exchanges trade energy derivatives—to the similar oversight reporting and capital requirements as other exchanges, such as the Chicago Mercantile Exchange, the New York Mercantile Exchange, and the Chicago Board of Trade. However, since the vast majority of energy derivative transactions are over the counter, the Commodity Futures Trading Commission has insufficient authority, at present, to investigate and prevent fraud and price manipulation, and parties making these trades are not required to keep records of their trades. In other words, there is no transparency. There is no record and there is no oversight of these particular trades.

So our amendment simply requires these parties to keep records of their transactions, which is what most companies do in any event.

If it turns out there is a fraud allegation, the CFTC will have a record to review. This is the same fraud and manipulation authority the Commodity Futures Trading Commission has for every other commodity and it is the same authority they had until Congress passed the Commodity Futures Modernization Act in 2000. That act exempted energy and metals trading from regulatory oversight, and excluded it completely if the trade was done electronically. Before this act, it was all included. Following the act, it was excluded. That was around June of 2000.

The problem and why we need this legislation: Presently, energy transactions—those about which I am not speaking, but the other energy transactions—are regulated by the Federal Energy Regulatory Commission when there is actually a delivery of the energy commodity.

What do I mean? If I buy natural gas from you, and you deliver that natural gas to me, the Federal Energy Regulatory Commission has the authority to ensure that this transaction is both transparent and reasonably priced. In other words, FERC has regulatory authority when the energy is actually delivered. However, energy transactions have become increasingly complex over the past decade. So, today, energy transactions do not always result in a direct delivery, and thus a giant loophole has opened where there is no transparency, no records, and no oversight. And that is not when I sell it to you to deliver it but when I sell it to you and you sell it to somebody else, who sells it to somebody else, who sells it to somebody else, and then it is delivered. Those interim trades are in no way, shape, or form transparent. They are done in secret. There is no oversight and there is no record.

So I can purchase from you a derivatives contract, which is a promise that you will deliver natural gas to me at some point in the future. I may never need to physically own that gas, so I can at a small profit sell that gas to someone, who can then turn around and sell it yet to someone else, and so on and so forth, as I have just pointed out. The promise of a gas delivery can literally change hands dozens of times before the commodity is ever delivered. Even then, it may never get delivered if the spot market price is lower than the future price that comes due on that day. That is what I meant about saying it is very complicated.

In fact, about 90 percent of the energy trades represent purely financial transactions, not regulated by either the Federal Energy Regulatory Commission, or the CFTC. So as long as there is no delivery, there is no price transparency. We do not know the price or the terms for 90 percent of the energy transactions. Let me repeat that. Today, no one knows the price or the terms for 90 percent of the energy transactions.

Again, this lack of transparency and oversight only applies to energy. It does not apply if you are selling wheat or pork bellies or any other tangible commodity. As I said, there is a very big loophole here. What we seek to do is simply close that loophole.

How did this happen? The answer is, the Commodity Futures Modernization Act, signed into law in 2000, exempted energy and minerals trading from regulatory oversight and also exempted electronic trading platforms from oversight. That is the online trading that occurs. In a sense, what the legislation did was set up two different systems: treating electronic trading platforms differently from other platforms, and treating energy commodities different from other commodities.

Up until 2000, energy derivative transactions were regulated in a similar fashion to other transactions, and all energy transactions were subject to antifraud and antimanipulation oversight. Electronic trading platforms were treated like all other platforms. These were the standards that were in place until June of 2000. Up until that time, if a gas or electricity commodity was delivered, FERC had oversight, and there was transparency; if there was not delivery, the CFTC had the authority. So the loophole arose just 2 years ago.

At the time of the 2000 legislation, no one knew how the exemptions would affect the energy market. It was a new market. They wanted to see growth. So they kind of unleashed it and said: All this can go on without the light of day.

We have a much better idea today because of what we have learned since then. It didn't take long for Enron Online and others in the energy sector to take advantage of this new freedom—and, to an extent, secrecy—by trading energy derivatives absent any regulatory oversight or transparency. Thus, after the 2000 legislation was enacted, Enron Online began to trade energy derivatives bilaterally, over the counter, in a one-to-one transaction, without being subject to any regulatory oversight whatsoever.

It should not surprise anyone that, without transparency, prices went right up. Was Enron and its energy derivatives trading arm, Enron Online, the sole reason California and the West had an energy crisis 18 months ago? Of course not. Was it a contributing factor to the crisis? I believe it was.

Unfortunately, because of the energy exemptions in the 2000 Commodities Futures Modernization Act, which took away the CFTC's authority to investigate, we may never know for sure since there are no records.

For me, this issue comes down to some fundamental questions. Why shouldn't there be transparency in the energy market? Why should the CFTC not have antifraud, antimanipulation authority when there is fraud and manipulation in the market? And why shouldn't California's energy ratepayers and customers and consumers and ratepayers in other States enjoy the same CFTC protections as ranchers and farmers do today?

The modification of our amendment results from the discussions my cosponsors and I had with Senator PHIL GRAMM, who approached us to express his concern that our bill could inadvertently impact financial derivatives. We made several changes to accommodate Senator GRAMM's concerns, and we were hopeful we could reach agreement with him. However, there are four additional points where we did not reach agreement: exempting energy swaps from CFTC antifraud and antimanipulation authority; deleting all public price-transparency requirements; exempting all electronic exchanges from requirements that they maintain sufficient capital to carry out their operations, based on risk; and finally, eliminating metal derivatives from oversight.

As I said before, energy swaps—this is a point of contention between us—comprise as much as 80 percent of energy derivatives transactions so this change would have taken the teeth out of our amendment. We consulted with our cosponsors. They did not want to agree to it. I believe Senator FITZGERALD is coming to the Chamber to speak to this.

Additionally, our amendment states that electronic trading forums should hold capital commensurate with the risk, which seems a reasonable expectation to me. The public can already access information from nonelectronic exchanges simply by picking up the business section of a daily newspaper. I don't understand the rationale for wanting to limit the public's access to data on electronic exchanges.

There is ample evidence that fraud and manipulation can occur and have already occurred in the metal sector.

This was borne out by several scandals over the past decade, including the 1996 Sumitomo case. In Sumitomo, it was found that U.S. consumers were overcharged $2.5 billion because of a Japanese company's manipulation of the copper markets. These were changes that we simply could not agree to.

Why do my cosponsors and I feel so strongly about the need to pass this amendment? First, the debate is nothing new. In November of 1999, the Federal Reserve, the Department of Treasury, the SEC, and the CFTC issued a report on derivatives titled ''Over the Counter Derivative Markets and the Commodity Exchange Act, A Report of the President's Working Group on Financial Markets.'' This report was signed by the Federal Reserve Chairman, the then-Secretary of Treasury, the then-SEC Chairman, and the then-CFTC Chairman.

What the report found was the case had not been made that energy or other tangible commodities should be exempted from CFTC oversight. In fact, the report found that because of the immaturity of the energy market, the lack of liquidity in the market and finite supplies in energy markets, energy markets were more susceptible to manipulation than the deep and liquid financial markets.

Recent history has certainly borne that to be correct. These commodities are more subject to manipulation.

On June 21, 2000, shortly after the President's working group issued its report, the Banking Committee and Agriculture Committee held a hearing on the report and Senator LUGAR's Commodity Futures Modernization Act. Let me read from the committee report:

The Commission has reservations about the bill's exclusions of OTC derivatives from the Commodities Exchange Act. On this point the bill diverges from the recommendations of the President's Working Group, which limited the proposed exclusions to financial derivatives. The Commission believes the distinction drawn by the Working Group between financial (nontangible) and non-financial transactions was a sound one and respectfully urges the Committees to give weight to that distinction.

Eight days later, Chairman LUGAR marked up his CFMA bill in conference. This is what he had to say:

The Chairman's Mark also addresses concerns regarding this bill's exclusion of institutional energy transactions from the act. Our bill no longer excludes those transactions from the act. With the resolution of this provision, the CFTC has indicated it will fully support our legislation.

Much to his credit, Chairman LUGAR eliminated the exemption for energy transactions to accommodate the CFTC and the President's working groups. But—and this is a big ''but''—Enron and others lobbied in the House and, as it turned out, this was never reflected in the final provision that passed Congress as part of a much bigger bill at the end of the 106th Congress. There is already a legislative history.

More recently, the Senate Energy and Natural Resources Committee held a hearing on January 29 on energy derivative trading, where CFTC Chairman Jim Newsome and FERC Chairman Pat Wood both testified and explained the regulatory burdens that prevent them from fully investigating Enron Online.

Let me be candid; I am truly amazed at the opposition to this amendment. Why should anyone be able to set up an online trading platform without any reporting, disclosure, or capital requirements and without any regulatory oversight whatsoever? Why should companies that are engaging in an over-the-counter transaction not have to keep a record of this transaction? Everyone else does. And why, if there is fraud or market manipulation, should there not be a regulatory agency that can investigate and cite wrongdoing?

What I cannot understand is how this amendment is somehow antibusiness. On the contrary, the amendment is all about making markets work.

I call your attention to the recently released report by the Cambridge Energy Research Associates Study and Accenture titled ''Energy Restructuring at a Crossroads, Creating Workable Competitive Power Markets.''

The report cites 12 recommendations for making energy markets function effectively, including having the CFTC expand its oversight to include energy derivative trading, as it did before 2000.

The report recognizes that transparency, disclosure, and reporting requirements instill confidence in markets and provide assurances for investors that there will not be fraud and manipulation.

This is also why the amendment is supported by the Chicago Mercantile Exchange, the New York Mercantile Exchange, Cambridge Energy Research Associates, Mid-America Energy Holding Company, PG&E, and Southern California Edison. They have to pay the higher prices for energy if it is traded back and forth. They want to know if these trades increase prices for the purposes of manipulation. Calpine, the American Public Gas Association, the American Public Power Association, the Texas Independent Producers and Royalty Association, the California Municipal Utilities Association, the Consumers Union, the Consumer Federation of America, the Derivatives Institute, U.S. PIRG, the Transmission Access Policy Study Group, and all four FERC Commissioners.

I would like to read into the RECORD the letter from the Chairman of the Federal Energy Regulatory Commission, Mr. Pat Wood, III, dated March 7:

Thank you for calling to my attention your proposed amendment to clarify federal oversight of financial transactions involving energy commodities. Your amendment would clarify that these transactions are within the jurisdiction of the Commodity Futures Trading Commission, thus revoking current exemption for such transactions under the Commodity Exchange Act and extending the Act to apply comprehensively to financial transactions based on energy commodities.

From our first meeting last Spring, you know how strongly I feel about customers having access to the broadest range of useful market information. Information on financial as well as physical transactions is a key part of market transparency. Billions of dollars are now at stake in these markets. The consequences of a major participant's collapse are illustrated by the Enron bankruptcy. Federal oversight of such trading is appropriate. Your amendment can ensure greater transparency in these markets, and this transparency can help provide an early warning signal to those charged with protecting the public interest.

Mr. President, I ask unanimous consent to print other letters in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

EDISON INTERNATIONAL,
March 7, 2002.

Hon. DIANNE FEINSTEIN,
U.S. Senate, Washington, DC.

DEAR SENATOR FEINSTEIN: Thank you for asking Edison International for our views on your amendment to S. 517, the Senate Energy Policy Act of 2002. As you know, Edison shares your concern over possible manipulation of the California electricity market by some market participants, which helped contribute to the serious problems the state faced from out of control energy prices. Your amendment would provide for transparency in the electric derivatives trading market, an industry that is currently exempted from regulation under the Commodity Futures Modernization Act of 2000 (CFMA).

I support your amendment, with a suggestion for your consideration to further refine it. Our company and others use energy derivatives trading to protect and hedge their actual physical assets, as opposed to companies that conduct trading with no or few physical assets. There should be guidance in the final language which recognizes the difference between these two types of businesses, particularly regarding any further capital requirements. Otherwise companies that trade in order to hedge physical assets may be required to pay twice—once in order to obtain capital for the assets and a second time in order to meet any capital requirements to back their trades.

Thanks again for all your efforts on behalf of California consumers and businesses.

Sincerely,

JOHN F. BRYSON,
Chairman of the Board and Chief Executive Officer.

PG&E CORPORATION,
Washington, DC, March 6, 2002.

Hon. DIANNE FEINSTEIN,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: We are writing today in reference to the amendment you will be offering to the Senate Energy bill, containing the substance of legislation you and several of your colleagues introduced earlier to provide regulatory oversight over energy trading markets, as amended.

At the outset, we applaud your efforts to ensure public and consumer confidence in the operation and orderly functioning of the energy marketplace. As you know, the industry relies heavily on these markets and products to manage risk for the benefit of consumers of electricity. We thus appreciate your willingness to work with us and other market participants to address areas of interest and concern as the provisions of your amendment have been debated and refined. As presently drafted, we view your amendment as providing an increased level of oversight, while ensuring the continued ability of market participants to utilize these instruments as part of overall risk management strategies. We therefore support your amendment.

Thank you for your hard work in this area, and we look forward to continuing to work with you and others on matters of national energy policy.

Sincerely,

STEVEN L. KLINE,
Vice President, Federal Governmental & Regulatory Relations.

MIDAMERICAN ENERGY HOLDINGS CO.,
Omaha, NE, March 5, 2002.

Hon. DIANNE FEINSTEIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR FEINSTEIN: I am writing in support of your effort to ensure that there is transparency and appropriate federal oversight of energy futures trading markets.

As I testified before the Senate Energy and Natural Resources Committee last month, I have long been concerned that the type of exchange run by Enron before its collapse offered opportunities for manipulation. Enron was the largest buyer, the largest seller and the operator of an unregulated exchange. In view of the revelations of the last several months regarding Enron, the unregulated nature of these markets has raised serious concerns regarding the ability of the federal government to ensure that energy trading and futures markets are operating in the interest of the public and market participants.

As the Senate addresses this issue, it is important to remember that electric and gas markets as a whole responded to the Enron collapse without disruption, so legislation should not compromise the liquidity of these markets. I applaud your determination to keep your amendment focused on oversight and transparency and am encouraged that you, along with Senators Cantwell and Wyden, have pledged to work with market participants to continue to perfect this proposal as debate on the comprehensive energy bill continues.

Ensuring public confidence in the integrity of energy futures markets is a critical component of establishing a modernized regulatory framework for the electric and natural gas industries. I am pleased to support your effort and commend you on your work on this important issue.

Sincerely,

DAVID L. SOKOL,
Chairman and CEO.

AMERICAN PUBLIC POWER ASSOCIATION,
Washington, DC, March 7, 2002.

Hon. DIANNE FEINSTEIN,
Senate Hart Building,
Washington, DC.

DEAR SENATOR FEINSTEIN: On behalf of the American Public Power Association (APPA), an association representing the interests of more than 2000 publicly owned electric utility systems across the country, I would like to express support for your amendment regarding the regulatory treatment of energy derivative transactions which is expected to be offered during consideration of S. 517, the Energy Policy Act of 2002.

As we understand it, your amendment repeals exemptions and exclusions from regulation, originally granted by the Commodity Futures Trading Commission, for bilateral derivatives and multi-lateral electronic energy commodity markets. Further, your amendment helps ensure that entities involved in running on-line trading forums maintain open books and records for investigation and enforcement purposes. Ensuring sufficient regulatory oversight and market transparency are critical steps towards helping prevent market abuses and protecting consumers.

As you are aware, on December 3rd Enron filed for Chapter 11 bankruptcy protection. At the same time, forward markets on the West Coast fell by 30% despite the fact that no other changes in operations, hydroelectric supply, or fossil fuel prices took place at the time. This has led some to believe that Enron may have been using its market dominance to "set" forward prices. Your amendment will help avoid such potential abuses in the future.

APPA commends you for taking a leadership role on this critical issue. We look forward to working with you on this and other amendments aimed at providing effective and sustainable competition while protecting consumers from market abuses.

Sincerely,

ALAN H. RICHARDSON,
CEO & Executive Director.

CALPINE CORP.,
Washington, DC, March 7, 2002.

Hon. DIANNE FEINSTEIN,
Hart Senate Office Building, U.S. Senate, Washington, DC.

DEAR SENATOR FEINSTEIN: I am writing to let you know of Calpine's support for additional oversight of certain energy derivative markets, as intended by your proposed amendment to S. 517. While we have not seen any evidence that energy trading was the cause of either the California energy crisis or Enron's demise, we do believe there is a crisis of confidence in the energy markets and that your amendment will assist in restoring much needed public confidence in the energy sector.

We support the amendment's strengthening of the CFTC's anti-fraud and anti-manipulation authority and its provision for increased cooperation and liaison between the CFTC and the FERC. We are also pleased that your amendment addresses concerns about the oversight and transparency of the electronic trading platforms. It is important that such facilities, which play a significant price discovery role in the energy trading markets, be subject to appropriate reporting and oversight by the CFTC.

However, I also understand that typical over the counter bilateral trading operations, such as those that operate from a trading desk where various potential counterparties are separately contacted by phone or email, are not intended to be treated as electronic trading facilities under your amendment. This is an important distinction and one that I understand you intend to further clarify in report language.

Calpine would like to thank you for your efforts to advocate reasonable measures to ensure the integrity of the important energy trading markets and we stand ready to provide you with any information or assistance that you may need.

Sincerely,

JEANNE CONNELLY,
Vice President—Federal Relations.

Austin, TX, March 6, 2002.

Hon. DIANNE FEINSTEIN,
U.S. Senator, Hart Senate Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: We understand that later today, you will introduce an important measure designed to bring greater transparency to natural gas markets. We believe that improved transparency will reduce price-markups charged in transactions that take place after natural gas leaves the wellhead and before it reaches the burner tip. Thus your measure will benefit both consumers and producers. We support the modified version of S. 1951 that you intend to offer as an amendment to the Senate Energy Bill.

We understand that the amendment:

(1) will not grant any price control authority under the Federal Power Act or Natural Gas Act;

(2) will continue to allow energy commodities (actually all commodities other than agricultural commodities) to be traded on electronic trading facilities that currently qualify as exempt commercial markets, provided that the trading facilities register, meet net capital requirements, file reports, and maintain books and records;

(3) will require participants in such markets to maintain books and records; and

(4) will apply these requirements to electronic trading facilities which permit execution with multiple parties and non-binding bids and offers, and will require books and records to be kept by participants in facilities that permit bilateral negotiations.

TIPRO believes that this measure will tend to improve price transparency in natural gas markets, leading to a more efficient and stable marketplace. The relatively modest requirements outlined above should not unduly reduce liquidity for gas traders. Accordingly, TIPRO endorses your amendment.

Sincerely,

GREGORY MOREDOCK,
National Energy Policy Committee Chairman.

AMERICAN PUBLIC GAS ASSOCIATION,
Fairfax, VA, March 5, 2002.

Re: S. 517

Hon. DIANNE FEINSTEIN,
Hart Senate Office Building, U.S. Senate, Washington, DC.

DEAR SENATOR FEINSTEIN: The American Public Gas Association (APGA) is very pleased that you have taken the lead to amend the Commodity Exchange Act (CEA). You revisions to S. 517, which amends the CEA, brings the trading of energy products, including natural gas spot and forward prices, under the appropriate jurisdiction of Commodity Futures Trading Commission (CFTC). As a result, your amendment will reduce the various risks imposed on consumers by a partially unregulated energy trading market.

As you know, Enron operated in what was essentially an unregulated environment. While there will be much more to come in the wake of Enron, one thing is perfectly clear today—our federal government has an obligation to make sure that no important trading activities fall between the cracks leaving some energy markets without a federal agency with oversight authority. Your amendment remedies this glaring deficiency.

APGA is fully committed to support your effort to reverse the action Congress took just 15 months ago in the Commodities Futures Modernization Act (CFMA). The CFMA amended the CEA by allowing some energy contracts to be traded with no government oversight. We firmly believe that the CFTC must have at its disposal the necessary jurisdiction and authority to protect the operational integrity of energy markets so that (1) transactions are executed fairly, (2) proper disclosures are made to customers, and (3) fraudulent and manipulative practices are not tolerated.

In December of 2000, when the CFMA was under consideration in the Senate, APGA submitted a Statement for the Record to the U.S. Senate Committee on Energy and Natural Resources during a hearing on the "Status of Natural Gas Markets." In the statement, we expressed a concern that the proposed legislation would codify an exemption for energy commodity transactions that would shield those energy transactions from the oversight and review of the CFTC. Enron took advantage of this gap in regulatory oversight. Your amendment will close that gap. Consumers across the country will benefit from your efforts because they are less likely to be victimized by activities that occur in a market where the CFTC exercises oversight.

Again, public gas utilities and the hundreds of communities that we serve commend you for your thoughtful and deliberate leadership on this very important issue. While there may be some who will oppose this amendment, one need not look far to see whether the opposition is looking out for the best interests of Wall Street or Main Street. We pledge to work with you in any way we can to pass this much-needed amendment. Please let me know how I can assist you.

Sincerely,

BOB CAVE,
President.

U.S. COMMODITY FUTURES
TRADING COMMISSION,
Washington, DC, March 7, 2002.

Hon. DIANNE FEINSTEIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR FEINSTEIN: Thank you for calling to ask that I provide you with my views of your proposed amendment to the energy bill pending before the Senate. The amendment would bring transparency to markets and provide Congress and the public with the assurance that no exchange offering energy commodity derivatives transactions would go completely unregulated. Moreover, it would restore to the federal government those basic tools necessary to detect and deter fraud and manipulation. Therefore, I strongly support the amendment.

In my previous correspondence with you, I indicated that under the current law none of our federal regulators could give you any definitive assurance that there was no manipulative or fraudulent activity in energy markets in the wake of the Enron collapse. This is due, in part, to the lack of transparency demanded of energy markets and more significantly to the fact that certain exchange markets such as EnronOnline are completely unregulated.

Consumers are the ultimate beneficiaries of properly functioning derivatives markets, whether those markets are private—like EnronOnline—or public—like the New York Mercantile Exchange. By the same token, consumers are the ultimate victims when markets are manipulated, or otherwise affected by unlawful behavior.

I am a firm believer in the efficiencies that derivatives markets bring to bear on cash commodity markets and the consequent benefits to market users and to consumers. However, such derivatives markets should, in the public interest, adhere to certain, minimal regulatory obligations. Your amendment is a prudent response to the issues highlighted by the Enron episode.

Sincerely,

THOMAS J. ERICKSON,
Commissioner.

Mrs. FEINSTEIN. I thank the Chair.

To summarize, if the western energy markets over the past 2 years have shown us anything, it is that the light of day and records must be available on all transactions. If the western energy markets and California have shown us anything, it is that there must be Federal oversight. And if what has happened in the last 2 years tells us anything, it is that the trading of these particular commodities should not be in secret.

Mr. President, this amendment aims to clear up those three points. It does so. I recognize there is opposition. I recognize the banks oppose it. Why do the banks oppose it? Because they have set up an online trading exchange, the IntercontinentalExchange, to do just what Enron Online did. Dynegy opposes it. Williams opposes it because they are doing the same thing now.

There is this burgeoning market of trading up the price of energy in secret. It is wrong. The light of day must be shed on it, and it should be treated as are all other aspects of trades. My cosponsors and I feel very strongly about this.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Chair recognizes the Senator from Texas.

Mr. GRAMM. Mr. President, how can a case be more overwhelming than the case of the Senator from California? Who could possibly be in favor of a situation where transactions could be undertaken and no records kept? Who could possibly be in favor of granting a license for fraud and manipulation? The answer is no one.

The problem is that each of these points that is outlined has no factual basis in the law. The plain truth is that there is extensive recordkeeping currently required under law. That recordkeeping was strengthened in the 2000 extension of the authorization of the Commodity Exchange Act. I will read from the legislation as we get to it.

The 2000 Act provided specific antifraud authority for the CFTC in exactly the areas for which the Senator from California calls. It provided authority to intervene in the case of price manipulation. In fact, everything that the proponents of this amendment claim they are for is part of current law as amended by the 2000 Act.

I have offered and we have negotiated—and I thank the Senator from California for the negotiations—to try to work out an agreement so that we can have an amendment go forward with broad support. We have failed to succeed in that effort, and I will outline in a moment why we have failed to do that.

Before I do, let me start at the beginning. This amendment has as strong a coalition of opponents as any amendment that has been offered, and not one of them opposes what the proponents of the amendment say they want to do. Not one of them opposes required recordkeeping. Not one of them opposes the granting of antifraud authority. Not one of them opposes granting the ability to intervene in the case of price manipulation. Every opponent of this amendment favors what the proponents of the amendment say that it does, but they oppose what the amendment in fact does.

I will read from the list of the opponents: Alan Greenspan, testifying twice before committees of Congress—the Financial Services Committee in the House and the Banking Committee in the Senate. In as strong words as Alan Greenspan ever utters and in as clear a form as he could possibly pronounce it, he opposes this amendment, not because he opposes the intent of the Senator from California, but because he opposes what the amendment, if adopted, would do—the unintended consequences—which is what this debate is about.

The Secretary of the Treasury is adamantly opposed to this amendment and has joined Chairman Greenspan in talking about the potential impacts on the American economy of a decision we would make in this proposal that has nothing to do with energy futures but everything to do with a swap industry which is now $75 trillion in annual volume and which has become part of virtually every business in America where that business tries to insure itself against risk.

These swaps are tailored transactions between two economic entities that are able, through their transaction, to provide greater certainty in providing jobs, growth, and opportunity for the American economy. In fact, Chairman Greenspan has said that the growth in the derivatives markets may very well be a major factor in the resilience of the American economy today and why we, in fact, did not have a recession.

I urge my colleagues to read the letter which the Secretary of the Treasury and the Chairman of the Board of Governors of the Federal Reserve System sent to the two leaders.

I ask unanimous consent the letter to which I just referred be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

MARCH 12, 2002.

Hon. TRENT LOTT,
U.S. Senate,
Washington, DC.

DEAR SENATOR LOTT: We are writing to express our serious concerns with an amendment to be offered by Senator Feinstein and others to S. 517, the national energy policy bill. We are committed to ensuring the integrity of the nation's energy markets. However, we question whether it is necessary to reopen the Commodity Futures Modernization Act of 2000 (CFMA) to achieve that objective. Amending the CFMA as proposed by Senator Feinstein could re-introduce legal uncertainties into off-exchange derivatives markets and other markets—uncertainties that were thought to have been settled as a result of the CFMA's enactment.

Accordingly, we urge Congress to defer action on Senator Feinstein's proposal until the appropriate committees of jurisdiction have a change to hold hearings on the amendment and carefully vet the language through the normal committee processes.

The CFMA expressly maintained the Commodity Futures Trading Commission's (CFTC) anti-fraud and anti-manipulation authority with respect to off-exchange energy derivatives markets covered by the Commodity Exchange Act (CEA). Thus, it appears that the CFTC may have sufficient current authority to address instances of fraud or price manipulation in energy derivatives markets. Congress should carefully evaluate the adequacy of the CFTC's current authority before it attempts to re-open the CFMA.

The CFMA was the culmination of a long, difficult process, which provided much needed clarification regarding the scope of the CEA for all off-exchange derivatives instruments, not just energy products. Any effort to undo the delicate compromises achieved in that legislation should be undertaken only after careful reflection. Otherwise, such legislation could jeopardize the contribution that off-exchange derivatives have made to the dispersion of risk in the economy. These instruments may well have contributed significantly to the economy's impressive resilience to financial and economic shocks and imbalances.

Similar letters have been sent to Senators Harkin, Lugar, Sarbanes, Gramm, and Daschle.

Sincerely,

PAUL H. O'NEILL,
Secretary, Department of the Treasury.
ALAN GREENSPAN,
Chairman, Board of Governors of the Federal Reserve System.

Mr. GRAMM. This amendment is also opposed by the Securities and Exchange Commission, which has the principal responsibility in the American economy for antifraud and antimanipulation enforcement with regard to securities transactions. If their whole purpose in existing, if their major mandate, is to deal with exactly the problems which the amendment proposes to deal with, why is the SEC adamantly opposed to this amendment? Because of unintended consequences, because the amendment, in fact, does not achieve its stated goals, but it does other things that are potentially very harmful to the economy.

The Chairman of the Commodity Futures Trading Commission, the very Commission that would be empowered by this amendment, has come out in very strong opposition to the amendment. This amendment is opposed by the International Swaps and Derivatives Association, the American Bankers Association, the ABA Securities Association, the Financial Services Roundtable, the Futures Industry Association, the Securities Industry Association, and the Chamber of Commerce of the United States.

Why would the Chamber of Commerce of the United States be opposed to this amendment? Are they in favor of fraud, manipulation, and the absence of recordkeeping? No. They are concerned that the amendment will have a harmful effect outside the futures area as it relates to natural gas and electricity, and, in the process, will do harm to the entire economy.

This amendment is strongly opposed by the National Mining Association. I can understand bringing Enron into the debate as it relates to natural gas and electricity, but why we should bring in mining I do not understand. There will at some point in this debate be an amendment which is part of our disagreement, to focus the provisions of this amendment on natural gas and electricity. If that is the concern, then why not focus the attention on that concern rather than getting into areas such as metals? I have seen no evidence—in fact, I will point out that Chairman Greenspan has seen no evidence—that derivatives trading by Enron, or by anybody else, had anything to do with the energy spike in prices in California.

Going back to the beginning, first of all, this is a debate I was pulled into when the 2000 bill was written. The provision relating to energy was written in the House, and the version of those provisions that finally passed in the House and came to the Senate was never changed again. My concern about the bill at the time, that held the bill up for 3 months and almost killed the bill at the end of 2000 in the final session of that Congress, the lameduck session of that Congress, had to do with exactly the issue which is before us, and that is unintended consequences.

Nobody in the Senate knows what a derivative is, and I speak for myself in saying that deep down I have a conception of what a derivative is. I might pass a freshman course in finance in college in giving a definition of derivative, but these are very complicated, tailored instruments, each instrument being unique, which is why it has, from the very beginning of its trading, been deregulated.

One of the arguments that has been made over again, as the debate on this amendment has started, is that somehow the 2000 legislation exempted these derivatives and swaps from regulation. That is totally false, totally inaccurate. They have never been regulated. In fact, Congress acted in passing the Futures Trading Practice Act in 1992 to give the CFTC specific power to exempt these derivatives and swaps as being inappropriate for regulation under the CFTC, which has the job of regulating futures, not tailored swaps between sophisticated customers. The Congress passed the Futures Trading Practice Act in 1992 that directed the CFTC to grant these exemptions. Those exemptions were granted. The exemption for energy was granted under the Clinton administration with a Democrat Chairman of the CFTC. That issue has never been controversial before. Nor have these swaps and derivatives ever come under Federal regulation in terms of an ongoing regulatory process.

In fact, the 2000 Act, far from exempting something which had never been subject to regulation, added to the strength of the CFTC exactly the powers that the proponents of this amendment would like us to believe their amendment does, and they believe their amendment does. There is no bad faith on this amendment. It is simply trying to understand very complicated issues when no Member of the Senate knows what a derivative is. It is very difficult to understand what swaps are, impossible to comprehend a $75 trillion industry. Unless one is directly involved in mining, banking, or securities, it is very difficult for me to comprehend what this whole market is about.

All I know is, it has grown to $75 trillion. It is the envy of the world, and Alan Greenspan, who is not the embodiment of God's voice on Earth, when it comes to financial matters in the U.S. economy, speaks with more knowledge and more authority than anybody else when he says that disturbing these markets could have a detrimental impact on the economy and that the resilience of the economy in the face of the recession might very well have been due to the growth of this derivatives market. I say at least let's put a little sign up that says: Danger, high voltage. Do not be fooling around in here if you do not know what you are doing.

Let's talk about these issues. As we have listened to these speeches and been moved by them—I have been moved by them to support the intent of the amendment—we are really not far apart, and I will outline where we differ.

First of all, let me quote from the 2000 Act that the Congress adopted in the waning days of the session in the year 2000. I will go to page 43 of the Senate companion bill, S. 3283. This is in paragraph (4) of section 2(h) of the Commodity Exchange Act. Paragraph (4)(B) gives the Commodity Futures Trading Commission the power to intervene and enforce any action where fraud is present.

In listening to the proponents of this amendment, one would believe there is no power whereby the CFTC can intervene in cases of fraud. Not only does that power exist, but it was strengthened in the 2000 legislation, a provision written in the energy section of the bill in the House of Representatives.

In paragraph (4)(C), we have the provision relating to price manipulation, and the Commission is given the power to intervene in cases where price manipulation occurs.

As we have listened to this debate, we have heard the question, well, how can you do anything if these markets are conducted with no records?

I will read the language of the bill in paragraph (4)(D):

> . . . such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions . . .

It then goes on and specifically outlines the power of the Commission. Now, let me make it clear that I am in favor of, and will support, strengthening these provisions. I am in favor of giving the CFTC the power to require that records be kept, to require that they be kept to the level so that you can reconstruct the transaction, to require that the data under the Commodity Exchange Act be kept for 5 years so that you can reconstruct individual transactions. I am willing to support—and so are all the opponents of this bill, as far as I am aware—strengthening antiprice manipulation and strengthening the anti-fraud provisions.

The point I want to make is these provisions are already law, and they are in the 2000 Act. To the extent they can be strengthened without affecting other markets that are in no way related to electricity and natural gas so that we can deal with what the proponents of this amendment intend to achieve, I am in favor of it. The problem is the amendment, as now written, does many things that go beyond this.

If we can focus it on electricity and natural gas, if we can limit it to these provisions, we would have an agreement, and I assume we would get a unanimous vote.

But here are some problems, and let me outline them. First of all, everybody needs to understand that we have a wholesale market for swaps and derivatives, tailor-made products. These are products that are not sold on exchanges. Let me make it clear. I have been chairman of the Banking Committee. I have worked with the exchanges in Chicago and New York. As we say in our business, I have many friends who are associated with the exchanges in Chicago and New York. But when they go to bed every night and they say their prayers, they say: God, please kill the $75 trillion swaps industry and make those people buy these derivatives and swaps on my market and pay me a commission and buy them in thousand-unit lots. If you love me, God, please do this for me. Now, it may hurt the American economy, but it would be so good for me.

Now, there is an element of that going on here. There was an element of it going on in the 2000 Act. There has been an element of it going on forever. People try to promote their own interests, we understand that. There is no issue where all the special interests are on one side. There seems to be a conception that we try to perpetrate that there is good and there is evil and there are special interests and public interests and they are competing against each other. The plain truth is normally there are special interests all over the ballpark. And that is not all bad. I will note that I have always felt if you are going to catch hell no matter what you do, even lawmakers will do the right thing.

There has been an ongoing effort, since the emergence of derivatives and swaps, to force them on to the futures exchanges. I could give you a long and, in this case, happy history. It will suffice to simply say this: First of all, these swaps have never been sold on market exchanges such as the Chicago Mercantile Exchange, Chicago Board of Trade, the New York Mercantile Exchange. They sell standardized products at both the wholesale and retail level. When we are talking about swaps, we don't have a retail swap industry in America. When the 2000 bill was written—and I was involved in those sections of that legislation that had to do with banking products—we simply allowed the swaps business as it related to wholesale users, namely banks, securities companies, manufacturers, et cetera, to function on an over-the-counter basis. We agreed that the case would be different should a retail market ever occur in these products—that is, a situation where individuals would buy them; your aunt might buy one. I can't imagine, and I would not advise that, I would not do it—but we agreed in the 2000 bill, in the bank products section of the bill that if a retail market ever came into existence, at that point a decision would be made as to who would regulate it and how.

Now, these products have never been under regulation, are not sold on exchanges; they are individually negotiated instruments, highly sophisticated and, obviously, they yield great value because people buy and sell them—$75 trillion worth. Alan Greenspan, as I said, said these have now become a mainstay and a stabilizing influence in the American economy.

Here are the problems that I see with the amendment as it is written. I will elaborate some on each of them. First of all, it permits the CFTC to regulate contracts regardless of whether they are futures contracts. The CFTC has jurisdiction over futures. It does not have, never has had, and I hope never will have jurisdiction over non-futures derivatives or swaps at the wholesale level. As the amendment is now written, it would impose CFTC regulations on companies operating electronic bulletin boards, where bids and offers are posted for various commodities—facilities such as Blackbird, as one example—even if futures contracts are not traded on those bulletin boards. My view is, if our objective is to provide more information—and I am for more information—why should we be taking action to kill off bulletin boards that are simply providing purchase and sale prices to customers?

Another point, this amendment—and I don't quite understand why it does it—would make the use of advanced technology a trigger for CFTC regulation, so that if a bank or an insurance company, or an investment company sets up an electronic computer system whereby people can come together, negotiate, purchase, and sell a swap or a derivative, if they use the computer to do it, they could come under regulation. If they do the same transaction over the phone, they don't come under CFTC regulation.

This amendment brings under the Commodity Exchange Act and under the jurisdiction of the CFTC instruments that are not futures. The CFTC is an agency that is trained and has expertise in futures; that is, say that I am contracting to deliver natural gas at the hub in Louisiana on a certain date, and so I sell a future for that delivery, and someone buys it. That is the kind of transaction that the CFTC is chartered to regulate. It is not chartered, nor has it ever been chartered, nor has it ever regulated, these tailored swaps and derivatives.

Let me quote Alan Greenspan because he has gone out of his way to make statements on this, and he has been asked questions about this. Since this has been raised in relation to energy and to California, in particular, let me just, if I can, go through some of the things Alan Greenspan has said without wasting everybody's time in reading huge volumes of statements. Chairman Greenspan of the Federal Reserve Board on March 7, 2000, stated before the Senate Banking, Housing, and Urban Affairs Committee that with respect to the existence of a nexus between energy derivatives and Enron's demise: ''I haven't seen any.''

Alan Greenspan said, when questioned before the Banking Committee, that he saw no relationship between derivatives and the demise of Enron. In fact, the derivatives part of Enron has subsequently been sold to another company that is in the process of reinvigorating it, creating 800 jobs, and paying off some of the debt of Enron, including debt to employees. This is a part of Enron that is alive and well, though not under the control of Enron, which as we know is in bankruptcy.

Chairman Greenspan stated before the House Banking Committee on the same issue:

> What I sense happened is that they ran [why Enron failed] into losses which they basically endeavored to obscure. It had nothing to do with derivatives.

I could go through the quotes in greater detail, but when asked, Did derivatives have anything to do with the price hike in California? Chairman Greenspan said no. When asked if they had anything to do with the failure of Enron, he said it had nothing to do with derivatives.

He also stated before the Senate Banking Committee on March 7:

> We've got to allow for that system to work because if we step in as government regulators we will remove a considerable amount of caution.

In other words, not only did he say he was concerned about us getting into other areas, but he was concerned, if we had more Government regulation of these sophisticated instruments, people would come to rely on the Government and actually might be less cautious in financial matters.

I quote the following:

> I think that act [the 2000 commodity exchange reauthorization] in retrospect was a very sound program, passed by the Congress, and I don't see any particular need to revisit any of the issues that were discussed at length at this time.

Let me read what he said in particular in response to a question by Senator MILLER of Georgia who asked the following question, and I am reading from the raw transcript. In response to Senator MILLER of Georgia who asked whether there is a nexus between energy derivatives, including their regulation and the California energy crisis, here is what Chairman Greenspan said:

> We don't need to revert to derivatives to get a judgment as to why prices did what they did. My recollection is that 2 years ago or so the sort of capacity buffer that the California electric power system has was the typical 15 percent for its summer back loads, which is what generally a regulated industry has because you respectively guarantee a rate of return on capability which is not being used, but that 15 percent kept prices down. As the years went on, the demand went up in California and no new capacity came on stream. That 15 percent gradually

dissolved because there's no way to have inventory of electricity—there are battery systems—but they are just inadequate. You get into a situation where the demand load, if it is running up against a limited capacity and the demand tends to be price inelastic, you can get some huge price spikes. So you don't need derivatives to explain what happened to price.

Now, let me try to sum up because I have covered a lot of areas.

Mr. LOTT. Will the Senator yield?

Mr. GRAMM. I am happy to yield.

Mr. LOTT. With all due respect to the Senators in the Chamber who perhaps understand this issue, I have serious doubts how many Senators really understand what we are talking about here. I was trying to understand what the Senator was saying, and it sounds pretty complicated to me. I hope we won't do a test here to ask Senators to define what a derivative is. In fact, we have been checking Webster's, trying to make sure we understand the definition of derivative. After having read the definition, I don't think it clears up anything.

Who has jurisdiction of this? Is it the Agriculture Committee or is it the Banking Committee?

Mr. GRAMM. They both have jurisdiction. The Agriculture Committee has jurisdiction as it relates to fundamental commodities. The Banking Committee has jurisdiction as it relates to financial products. You have a problem in that the amendment applies not just to futures but to other derivatives and to swaps, which are under the jurisdiction of the Banking Committee.

The problem is, the last time we dealt with this area, we spent 4 months dealing with it in committee. We dealt with it extensively in debate and conference and ended up, in total, taking about 7 months to deal with it.

Mr. LOTT. Has this amendment been considered or had hearings in Banking, or in Agriculture, as to its implications and what the impact would be?

Mr. GRAMM. No.

Mr. LOTT. Isn't this clearly an extremely complicated area with which we are dealing?

Mr. GRAMM. There are two approaches, it seems to me, that make sense. One is to call on the major agencies—the Fed, the SEC, and the CFTC—to take a look at the amendment on a truncated basis, say 45 days, and give a comprehensive report and definition. That would be one approach.

The other approach would be to try to work out the concerns that the SEC and the Federal Reserve have raised. Those concerns are trying to narrow this down to electricity and natural gas, which is the real concern.

Mr. LOTT. If the Senator will yield, I was under the impression there had been serious and extended negotiations between yourself and Senator FEINSTEIN and perhaps others in trying to work out a compromise.

Mr. GRAMM. There were serious negotiations. I think Senator FEINSTEIN made a good effort on her part. Senator FITZGERALD was involved. When it got right down to it, an agreement could not be reached on the narrowing of this to include futures but not swaps and or other derivatives, to focus it just on electricity and natural gas, which is where the concern is.

The reason Chairman Greenspan has chosen to speak out on this on three different occasions, the reason he has talked to Members, and when they called him, called them back, is that he is very concerned about unintended consequences. The problem is it is hard to debate unintended consequences.

Mr. LOTT. One final point and I will let the Senator give his summation. This is a very complicated area that could have unintended consequences, no question. We should not be trying to write legislation in this area in the Senate without very careful thought and consideration by committees. I think it is a very serious mistake to be considering this amendment in this way.

Just so Senators will understand, Webster's defines ''derivative'' as:

> The limit of the ratio of the change in a function to the corresponding change in its independent variable as the latter change approaches zero.

I am sure you got that. That makes my point. We don't know what we are doing here, and we should not be acting in this area.

Mr. DORGAN. Will the Senator from Texas yield for a question?

Mr. GRAMM. I am happy to yield for a question.

Mr. DORGAN. Mr. President, the minority leader was asking about the definition of a derivative. I ask the Senator from Texas, could he not find the definition of a derivative by talking to people who used to run Long Term Capital Management? As the Senator from Texas will recall, it lost a fortune sufficient so that it almost took down the American economy.

The Fed had to have a Sunday night rescue package to try to prevent LTCM from collapsing. I would expect an awfully good definition of derivatives. They are risks that are now falling through the cracks of regulators, which come from an understanding of Long Term Capital Management.

Mr. GRAMM. If the Senator will yield, I would respond that, if we had a hearing, I do not think they would be the people we would call on to give us advice. I was thinking of the Chairman of the SEC, perhaps former Chairmen, the Chairman of the Commodity Futures Trading Commission, the Chairman of the Board of Governors of the Federal Reserve System.

I might say about Long Term Capital, that they went broke by making bad decisions. They didn't go broke because of the existence of financial instruments. They went broke because they made bad choices in the use of those instruments. You cannot blame the instrument. It is like blaming thermometers—saying I hate thermometers because every time they register above 100 degrees it is hot. It is not the thermometer's fault. So it is clear that we have had people go broke. I guess my feeling is that we simply need to know more about this.

As I have said from the beginning, if we can make some simple changes in this I could be for it, and I believe everybody who I quoted here today would be for it. Let me just tell you what the amendments would be.

First of all, the focus of this amendment is supposed to be on natural gas and electricity. The problem is, when you get into energy in general, and also into metals, you cast a very wide net. And while the plain truth is—and I believe it—that there is no evidence to substantiate any claim that the price spike in California had anything to do with the existence of derivatives on natural gas and on electricity, under the circumstances and especially given the precedent set in the 2000 law, I am in favor of, and I believe everyone who opposes the amendment is in favor of, strengthening the provisions of law related to antimanipulation, antifraud, and recordkeeping. That much we agree to. That part of the amendment is agreed to.

But I believe, and all these other groups from the bankers to the Federal Reserve Board, to the SEC, to the CFTC believe, that one of the ways you could improve this—they are all still very nervous about this amendment, even if we made all these changes—but if you could narrow it just to electricity and natural gas they would see that as an improvement.

The amendment is about the CFTC, and it ought to be about futures, not about swaps. That is getting into another agenda, and that agenda is basically expanding markets on exchanges. And we should not be getting involved in deciding where a product is bought and sold and who ought to be buying and selling and who should benefit economically and who should not.

This whole question of capital is a very important issue. At the risk of just overstating the case and oversimplifying, this is the problem. Many of these mechanisms, whereby trades are sold—or undertaken—just bring buyers and sellers together. They never take ownership of the derivative or the swap. So to make them put up capital based on the transactions, if they don't ever take ownership, how does it make any sense to make them put up some part of $75 trillion when none of their own money is at risk?

So that requirement, if you are not very careful, ends up killing off the market for no purpose. If you are not taking ownership, if all you are doing is bringing a bank and an insurance company together, why should you have to put up capital based on the transaction?

Then you have the toughest of the issues, and I admit this is a hard one. If you look at it one way, it seems like how can anybody be against it. If you look at it another way, it makes little sense. This is the point.

What we have agreed to in this amendment, sitting down—and again I thank the Senator from California for being willing to sit down and try to work it out—what we have agreed to is extensive recordkeeping, under the Commodity Exchange Act. Any of these platforms that bring together buyers and sellers of these instruments would have to keep records for 5 years—which is the same thing that any futures dealer has to do. They would have to keep them at a level where the individual transaction could be reconstructed. They would have to make it available to the CFTC when the CFTC is looking at a potential for fraud and a potential for price manipulation. And they have to provide it in whatever form the CFTC wants: price, trading volume, other trading data to the extent appropriate, which the Commission determines as being appropriate.

The question is, Should they have to make it public? This is the question. When you are talking about the prices that you and I see every day when we go to Wal-Mart or when we go to buy a pair of tennis shoes, we are used to dealing in the world we deal in as consumers where people not only want to make prices public, but they pay money to publish them in the newspaper. But Wal-Mart does not make public what it pays for the things it buys. Wholesale transactions in America are proprietary information.

So that is part of the reason you have this tremendous opposition from the entire financial structure of the country. Everyone has agreed to the CFTC having the data in whatever form they want, and the ability to intervene. But when you are dealing with wholesale proprietary information as to how people are brought together in these transactions, where if I am a trading floor, or if I am one of these people who is a middle man, bringing buyers and sellers together, and I have a way of doing it, I don't want to share my trade secrets with somebody else.

So we are not talking about retail prices. The CFTC has total access if there is fraud, price manipulation—they can intervene. But in terms of these wholesale transactions requiring that these prices be made public, and that these transactions would be made public, it would be like requiring a shoe store to make public what it paid Nike for tennis shoes.

That is something we do not do in any industry in America of which I am aware. Granted, if you are choosing which side to be on in the debating club in high school, you want to be on the side of disclosure of wholesale prices. But if you are trying to have efficiency in the running of the greatest economy in the history of the world, you want retail prices to be public, you want the Government to have access to data so, if somebody is engaged in an illegal, fraudulent, or manipulative activity, you can intervene, but to make people make public wholesale prices is something we do not do because that is proprietary information. How people put their business together, what kind of deals they make with Nike—that is private information.

So I urge my colleagues, again: Can we focus this down on electricity and natural gas to be sure we do not have these unintended consequences?

Second, can we focus it just on futures?

Third, can we at least require that capital requirements are not based on the transactions that come through your purview but on any risk you take or ownership you take? Can you imagine if you had some job collecting money and consummating transactions for somebody, and you had to put up capital based not on what you invested or the risk you have, but of your gross and net volume? No company in America that has a huge volume could possibly deal with the problem. When you are dealing with a $75 trillion industry, it becomes even more important.

And, finally, any information that Government needs to prevent wrongdoing in wholesale transactions—if there is something we have not agreed to that would make people feel more confident, I am willing to sit down to try to see if we can work it out. But proprietary information on a wholesale level is something that we do not do in other places.

So I urge my colleagues, if we can, there are two ways of working this out, it seems to me: One, to do an amendment to send the matter to these three agencies for evaluation on an expedited basis. Let them report back. Let the committees of jurisdiction hold a hearing so we can hear from people who know something about this area, rather than simply talking among ourselves. That is one approach.

Another approach is to go back one more time and see if we can deal with these concerns. When the people who have been entrusted by us to make these markets work, and work fairly, and work efficiently—such as Chairman Greenspan—when they and their staff have raised an issue, it seems to me we have an obligation to try to see if we understand it and to see if we can fix the concern.

So my guess is we are probably agreed on 90 percent of the things that are in this amendment. But the 10 percent we differ on is very important.

Finally—and I will conclude because I see the leader, with the right of prior recognition, in the Chamber—let me say if we could work something out, I think we would serve the public's interest. I think having a series of votes, where we really do not understand what we are doing, is not in the public's interest. You feel uncomfortable as a Senator saying that, but these are complicated issues.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Republican leader.

Mr. LOTT. Mr. President, a further definition of ''derivative'': ''A financial instrument whose characteristics and value depend upon the characteristics and value of an underlying instrument or asset, typically a commodity, bond, equity, or currency. Examples are futures and options.''

I am sure that further clarifies the earlier definition that was read.

AMENDMENT NO. 3033 TO AMENDMENT NO. 2989

Mr. President, I send a second-degree amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Mississippi [Mr. LOTT] proposes an amendment numbered 3033 to amendment No. 2989.

Mr. LOTT. Mr. President, I ask unanimous consent reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place, add the following:

SEC. . FAIR TREATMENT OF PRESIDENTIAL JUDICIAL NOMINEES.

(a) FINDINGS.—The Senate finds that—

(1) the Senate Judiciary Committee's pace in acting on judicial nominees thus far in this Congress has caused the number of judges confirmed by the Senate to fall below the number of judges who have retired during the same period, such that the 67 judicial vacancies that existed when Congress adjourned under President Clinton's last term in office in 2000 have now grown to 96 judicial vacancies, which represents an increase from 7.9 percent to 11 percent in the total number of Federal judgeships that are currently vacant;

(2) thirty one of the 96 current judicial vacancies are on the United States Courts of Appeals, representing a 17.3 percent vacancy rate for such seats;

(3) seventeen of the 31 vacancies on the Courts of Appeals have been declared ''judicial emergencies'' by the Administrative Office of the U.S. Courts;

(4) during the first 2 years of President Reagan's first term, 19 of the 20 circuit court nominations that he submitted to the Senate were confirmed; and during the first 2 years of President George H. W. Bush's term, 22 of the 23 circuit court nominations that he submitted to the Senate were confirmed; and during the first 2 years of President Clinton's first term, 19 to the 22 circuit court nominations that he submitted to the Senate were confirmed; and

(5) only 7 of President George W. Bush's 29 circuit court nominees have been confirmed to date, representing just 24 percent of such nominations submitted to the Senate.

(b) SENSE OF THE SENATE.—It is the Sense of the Senate that, in the interests of the administration of justice, the Senate Judiciary Committee shall hold hearings on the nominees submitted by the President on May 9, 2001, by May 9, 2002.

Mr. LOTT. Mr. President, I have made the point here—and Senator GRAMM was making the point very strongly—that this first-degree amendment clearly needs additional work, additional consideration. The committees of jurisdiction should have an opportunity to work on it. I had hoped that some accommodation could be worked out. I am still hopeful of that. But I do not think we are ready to go forward at this time.

Having said that, I also think it is very important the Senate take a position with regard to judicial nominations. This second-degree amendment is the resolution that was offered last week. There has been no indication of how we would proceed on that. All it would say is the first nine circuit judge nominations that were offered last May—May of 2001—would have a hearing—just a hearing—by May 9, 2002.

This issue is very important to our country, and it needs to be considered in the order in which it was pending before we came back to the Feinstein amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

AMENDMENT NO. 2989, AS MODIFIED

Mr. FITZGERALD. Mr. President, I am pleased to rise in support of Senator FEINSTEIN's amendment. I want to address and rebut a number of things my good friend from Texas said.

I have as much respect for Senator GRAMM as I do for anybody in this body. It is going to be a great shame that he is retiring this year because I will miss him dearly. I think this is, perhaps, the first time in my 3 years in the Senate that I have ever risen in opposition to Senator GRAMM, but I do disagree with him. I do not think this is a complicated issue.

I think it is a relatively simple issue. I think what it comes down to is that 2 years ago, when we passed the Commodity Futures Modernization Act, we patterned our bill after the recommendations of the Presidential Working Group, which included the Chairman of the CFTC, the Chairman of the SEC, and the Chairman of the Federal Reserve Board. And they had recommended that we create three categories of regulation.

One was a designated contract market which would be our Board of Trade and Mercantile Exchange in Chicago or the NYMEX in New York. There would be heavy regulation on those designated contract markets.

The other recommended level of regulation was the so-called DTEF, the derivatives transaction execution facilities. Those would be online bilateral trading facilities that could be trading derivatives online. They would be regulated but with lighter regulation than the full-blown regulation of designated contract markets.

And, finally, we created an exclusion for financial OTC derivatives. The opponents of this amendment have created the false impression that somehow the amendment by Senator FEINSTEIN and myself intrudes upon the now essentially excluded financial derivatives industry. There is no regulation by the CFTC to speak of for all the financial derivatives that are out there, mainly between banks. Our amendment would not impose any regulation on the banks in that regard or on others who engage in purely financial derivative transactions. This has nothing to do with that.

Instead, we are simply closing off an exemption that applied to just a handful of online trading companies that happen to be trading energy and metals. At the last minute, over in the House, they were exempted, not just from one or two levels but from all levels of regulation. And this exemption applied to literally just a handful of companies. It was a special carveout that is upheld by absolutely no public policy rationale.

The companies that benefited from this exemption included, of course, Enron Online. There is a company called ICE, the IntercontinentalExchange; they benefited from this exemption.

The reason banks are interested in this issue is not because they are worried we are imposing some kind of legal uncertainty on financial derivatives but, instead, because a couple of banks have a big ownership interest in this totally exempt energy online trading facility, ICE.

And, finally, there is another company called TradeSpark that is owned by a couple of energy companies.

So you have three companies that essentially got a special carveout from the whole scheme of regulation that originated with the President's Working Group.

The President's Working Group, in essence, said financial derivatives, interest rate swaps, for example, between banks would be exempt from regulation by the CFTC.

I take issue with Senator GRAMM when he says no Member of the Senate knows what a derivative is. I do. I grew up in a banking family. I was on the board of many banks. I was a general counsel of a publicly traded bank holding company. We used to enter into interest rate swaps. When our banks wanted to do a lot of fixed rate mortgages, we wanted interest rate protection. We would go protect ourselves against an increase in interest rates by entering a swap with another bank.

There should be no fear, whatsoever, out there that that market would be disturbed by our amendment because it has absolutely nothing to do with it. We would not impose any requirements on banks entering into interest rate swaps, for example. Instead, the intent of our amendment is to close off an exemption, a special carveout for online energy trading companies that makes no sense.

The President's Working Group distinguished between financial commodities of an infinite supply, such as interest rate swaps, and said those should be excluded. And they are excluded. We maintain that exclusion.

But they said: Finite commodities such as agricultural commodities—corn, soybeans, pork bellies—or metals—gold, silver—finite physical commodities such as that in which there is a finite supply and in which, theoretically at least, the market could be cornered, there should be some regulation for those markets.

The President's working group further said that there should be full-bore regulation if the trading is in an open outcry pit such as we have at the Board of Trade and the Mercantile Exchange in Chicago. There is full-blown regulation. But there is a lighter degree of regulation, some regulatory oversight, for online exchanges that trade those physical, finite-quantity commodities.

It is that level of regulation that we are seeking to impose on these now exempt online energy transaction facilities.

Senator GRAMM cited section 4(g) of the Commodities Act. He said we already have recordkeeping requirements in the CFMA; we already have the ability for the CFTC to go after fraud if they find it.

I looked at section 4(g). Guess what. Section 4(g) does say that the Commission shall adopt rules requiring that a contemporaneous written record be made, as practical, of all orders for execution on the floor or subjected to the rules of each contract market—a contract market is a board of trade like the Chicago Board of Trade—or a derivatives transaction execution facility. Those are the online transaction facilities we are talking about that are regulated.

The fact is, earlier in this act we created a special category for these online energy and metal firms such as ICE which is in turn owned by Morgan Stanley and Goldman Sachs. They have a rifleshot exemption in this code, and this section 4(g) that Senator GRAMM talked about does not apply to them because they are exempt from the definition of derivatives transaction execution facility. That is back earlier in the act.

What we need to do is close this loophole. What public policy rationale upholds the picking out of a couple of online firms and saying: You are going to be exempt from the requirements of the act? It doesn't make any sense.

Now, we did have good-faith negotiations with Senator GRAMM. He has proposed regulating natural gas and electricity contracts that are traded online but exempting metals and oil contracts. Why does that make any sense? Shouldn't everybody be playing on a level regulatory playing field? Why should some business have a regulatory advantage? That isn't what America is all about. We want all businesses to be playing on the same level playing field. If some succeed because they work harder, have better products, and they are smarter, that is great. But when they succeed or make a lot of money because the Government has sponsored some special advantage based on their power and their adeptness at playing the political game in Washington, that is not right. That is not what America is all about, giving a special carve-out to a few companies. It doesn't make sense.

Now, I happen to agree with Senator GRAMM on one point. I have seen no evidence that the trading by online energy trading firms had anything to do with the spike in oil or electricity prices on the west coast. I certainly doubt that is the case.

But that is not why I am here supporting this amendment. Instead, I am supporting this amendment because I think price discovery is very important to consumers.

Senator GRAMM was saying we never require retailers to disclose the wholesale prices they pay. That is true. But this is not really analogous to going to buy something at Wal-Mart. This is more analogous to buying a stock from a broker. You call up your broker, and you ask them to buy 100 shares of IBM stock. They can look up on the New York Stock Exchange and get one of the latest quotes, and they can tell you. Let's just say it is $100 a share. You go buy the 100 shares for $100 a share, and then your broker gets a commission.

The problem with this kind of trading is that the customer can't see the prices. In the case of your going to your broker and buying 100 shares of IBM, you can find out what the price was on the New York Stock Exchange. It is different with an online energy trading firm. You may call them up and say you want a contract for, let's say, natural gas or something, and you will pay $265 for the contract.

Well, what if the person from the online energy company looks up and he finds he can buy it at $263? But then he resells it to you at $265. You never would know the difference, would you, because you would never know the wholesale price at which he got it.

I am sure no one at Enron Online would ever cheat their customer in the way I just described. I am sure that would never happen, or that this would ever happen in ICE or TradeSpark—that they would use their superior knowledge of the wholesale market and the lack of knowledge of their customer to make a few extra points. I am sure that would never happen.

But let's just say that this could happen, that there could be some dishonest people in those companies. And in addition to wanting to make a commission for selling that contract at $265, they might want to take a little bit of markup, a little bit of kickback. It probably happens in the political business when we all buy our direct mail. You are always wondering how much your direct mail firm is actually paying for their printing and mailing. You know they are marking it up, and you try to guard against it.

But that very same thing could happen when you are trading with one of these online customers. That is why I do believe it is important for the CFTC to have the ability to require these companies to report their volumes and to report their prices. That is protection for the consumer.

Oddly, I think ICE, Enron Online, and TradeSpark would have more customers if they were regulated by the CFTC than they now have. I will tell you this: I would never go trade with them because I would have no idea at what wholesale prices they were buying. I wouldn't use them. I would go to a regulated board of trade where I could be sure there were some safeguards for me. I wouldn't trade with somebody such as that, an online energy company. And I believe their businesses are smaller than they otherwise would be if there were some protections for consumers.

It is much like our stock markets. Our capital markets have exploded in the last 50 or 60 years. We have the best capital formation markets in the world. I do believe that our securities laws have helped foster that strong capital market. If you go back to the 1920s and before, when there was really no regulation, or go back before the Federal Trade Commission, when there was absolutely no regulation of our stock markets, the little guys didn't get involved in that at all because they figured it was an insider game and that the deck was stacked against them. They were right; the deck was stacked against them.

Since we have put in protections for the consumer, we have banned insider trading and made a lot of manipulative practices illegal, more and more Americans have felt comfortable investing in the stock market to the point that we now have over 50 percent of Americans investing their own stocks directly or indirectly. If there were this light level of regulation that Senator FEINSTEIN and I are suggesting with our amendment, that would be good for these companies that want to uphold this special privilege that exempts them from all regulatory oversight.

Now, I also note that there is a Senator who probably knows as much as any of the derivatives experts in this country about derivative transactions, and that is Senator JOHN CORZINE of New Jersey. Senator CORZINE was chairman of Goldman Sachs, which is an owner of IntercontinentalExchange. He has joined us as a cosponsor of this amendment.

I think this is an outstanding amendment. I think it is very simple. We are closing off a special deal that just applies to a few firms. There is no public policy rationale that supports the special deal these firms have. We are making the treatment of all firms the same under the Commodity Futures Modernization Act. It makes perfect sense. We are doing so in a way that was originally recommended by the President's Working Group.

I appreciate the hard work of my colleague from California and also my colleague from Texas. We have had a lot of negotiations. I think one thing we have done is conclusively demolish any argument that this represents any threat at all to financial derivatives. They are not affected in any way.

Senator GRAMM initially said this was his primary concern. We worked on it, and we have modified the amendment to make it crystal clear that we have no intent of affecting the financial derivatives markets. Those are excluded and will continue to be excluded. We are simply trying to close off a special loophole that applies to a handful of companies. I think it is very good public policy. Let's close this exemption that was stuck in by the House at the last minute when they passed the CFMA.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GRAMM. Mr. President, might I ask if the Senator will give me about 3 minutes to respond to these points before they get cold in everybody's mind? Would that work for her?

Ms. CANTWELL. How long?

Mr. GRAMM. I think I can do it in 3 minutes.

Ms. CANTWELL. I will wait.

Mr. GRAMM. Mr. President, first of all, I thank the distinguished Senator for giving me 3 minutes. She did not have to do that.

Let me be brief. First of all, if you go back and read the Commodity Exchange Act, as amended, you will find that what I said, in fact, was correct. There are exempt commodities, which have always been exempt, have never been regulated, but they are exempt, except as provided in these paragraphs.

Then we go through a reference to anti-fraud, anti-price manipulation, and recordkeeping. So they are exempt from the normal process because these are huge wholesale markets among sophisticated dealers that have never come under regulation. But they are not exempt from anti-fraud, anti-price manipulation, and from recordkeeping. I wanted to be sure that we all knew that was true.

The Senator says the working group favored his amendment. There is only one problem with that. Every member of the working group has written a letter opposing the amendment. The Chairman of the Federal Reserve Board, the Secretary of the Treasury, the Chairman of the Commodity Futures Trading Commission, and the Securities and Exchange Commission Chairman are the members of the working group. The Senator takes a sentence from their report that he says bolsters his argument. But every member of the working group who wrote the report, and who is charged with it today, opposes the amendment. I have seen no evidence that anybody who held these positions during the Clinton administration supports the amendment either.

Special carve-out? There is no special carve-out. We are getting back to a myth. Let me remind my colleagues that, as I look at the 2000 bill as it was passed, Senator FITZGERALD was an original cosponsor of the bill. What this legislation did was simply clarify to a legal certainty something the President, the Secretary of the Treasury, and the Federal Reserve Board wanted to do, and that was that these sophisticated wholesale products that had never been regulated by anybody in the history of this country—and since we invented them, and nowhere else were they started, that I am aware of—that they were exempt from normal regulation, but they were subject to anti-fraud, anti-price manipulation, and recordkeeping.

In terms of buying a stock, that is where all this confusion comes from. The example is a good one, but it has nothing to do with the point. We are not talking about the same product. Every swap is not a future, it is a specific, custom contract. They are not homogeneous. If they are, then they are not exempt. These are individually negotiated contracts. They are not bought by individual, retail investors, such as our colleague from Illinois. They are bought by banks and mining companies and those businesses trying to protect themselves against risk.

I thank the Senator from Washington for yielding me this time.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Ms. CANTWELL. Mr. President, I rise to urge my colleagues to approve this amendment that we have been debating, which would subject energy derivatives trading to the same degree of regulatory scrutiny as many other commodities. Senator FEINSTEIN and others have worked hard to bring about a fair resolution to this issue, and to the chaos brought upon many Western States in the electricity crisis as it unfolded.

What I think is important to understand is exactly what this amendment does. First and foremost, my colleagues must recognize that this legislation is designed to close a specific loophole—the Enron loophole—that allowed Enron and other online traders to sell energy futures behind closed doors, without any form of safeguards for consumers or investors whatsoever.

At its core, our amendment would allow the Commodity Futures Trading Commission to treat energy futures similar to other regulated commodity futures. It does not give the CFTC any new powers that it does not already have over many other futures markets. This legislation deals specifically with energy futures, without tampering with regulation of financial derivatives as much of the floor debate would lead you to believe.

Some have claimed that by subjecting energy derivatives to the same level of regulatory scrutiny as other commodities, we would be imposing some sort of unacceptable level of ‘‘uncertainty’’ on these markets. I find that argument fundamentally flawed. How, then, does one explain the prominence and global importance of other American markets, such as NYMEX, already under the CFTC jurisdiction? They don’t seem to be struggling because of oversight and scrutiny by the CFTC.

In fact, I believe that by subjecting trading platforms, such as Enron Online, to the same transparency and antifraud rules as other types of exchanges, we will actually be increasing the confidence of market participants. They can know with certainty that prices for energy derivatives are not the result of manipulation. And believe me, in my State, consumers have a lot of doubt about why they are paying a 50-percent rate increase in energy prices. Under this amendment, consumers can rest assured that they will not become the casualties of gaming in these markets. That is very important.

To quote the New York Mercantile Exchange, the world’s largest trader of energy futures:

> With numerous reports of reduced confidence in market integrity in the wake of the Enron bankruptcy, never has it been more important to restore faith in that great American resource, our competitive markets.

Some have suggested that there has not yet been conclusive evidence that Enron manipulated derivative markets and, they argue, that alone is reason enough not to proceed.

Mr. President, there never will be conclusive evidence of such market manipulation, if Enron Online and businesses like it are allowed to continue operating in secret. I ask the opponents of this amendment to think about the ramifications of this situation on the ongoing investigation into price manipulation in my home state. As I said, in my State, consumers have seen rates increase up to 50 percent in long-term contracts that they are going to have to live with for many years. In fact, Enron is still buying power at cheap prices, marking it up, and selling it to utilities at higher prices because of these long-term contracts. Yet, FERC’s investigation into these price hikes has been severely hampered by the lack of information surrounding swaps transactions done in secret.

The task of investigating Enron’s collapse and Enron Online’s impact on energy markets has been made infinitely more complex by virtue of the fact that no one was required to maintain books or records that would have shown this clear pattern of irregular trading. Instead, we are saddled with this post hoc investigation that may well last years.

Some colleagues talked a lot about the President’s Working Group recommendations, and some have suggested we delay this legislation. What is interesting is that many of the names thrown about this morning, Alan Greenspan, then-Secretary of Treasury Larry Summers, SEC Chairman Arthur Levitt, and CFTC Chairman Bill Ranier, were signatories to the President’s Working Group report given to Congress before passage of the Commodity Futures Modification Act of 2000. While it is true that the report supported exemptions for over-the-counter derivatives, the report included significant cautionary notes.

The President’s Working Group basically issued a warning saying: commodities with finite supplies are more easily subject to price manipulation.

Obviously, those of us from the West know how finite the energy supplies can be, as California, Washington, and other States experienced the unbelievable skyrocketing of prices.

What we, the cosponsors of this amendment, are talking about here is how to implement the Working Group’s recommendations on antifraud provisions. We are saying transaction information should be collected and kept. Then, if there is a suspicion of fraud, investigators will have something tangible to examine.

The Working Group unanimously recommended that there should be an exclusion for bilateral transactions between sophisticated counterparties, but it made specific note: Other than transactions that involve nonfinancial commodities with finite supplies.

The Working Group recommended an exclusion from the Commodity Exchange Act for derivatives traded on electronic trading systems provided systems limit participation to sophisticated counterparties trading for their own accounts and are not used to trade contracts that involve nonfinancial commodities—again culling out nonfinancial commodities with finite supplies.

The Working Group noted the danger of exempting these transactions, including energy derivatives, from regulatory scrutiny, and they did this in November of 1999. These are precisely the transactions that our amendment would put under the jurisdiction of the CFTC.

Unfortunately, these cautionary notes were not heeded by Congress and were instead translated into a statutory exemption for bilateral energy derivatives and electronic exchanges in the context of the Commodity Futures Modernization Act of 2000. I can tell you, my State has suffered greatly because of this exemption and has not been able to find out whether price manipulation has actually occurred.

I also suggest that my colleagues take note of the Working Group’s recommendation that the regulatory regime should be reevaluated from time to time. In the aftermath of Enron’s collapse, a reevaluation is certainly warranted.

Again, to quote from the President’s Working Group:

> Although this report recommends the enactment of legislation to clearly exclude most over-the-counter financial derivatives transactions from the Commodities Exchange Act, this does not mean that transactions may not, in some instances, be subject to a different regulatory regime or that a need for regulation of currently unregulated activities may not arise in the future.

Specifically, the Working Group recommends the enactment of a limited regulatory regime aimed at enhancing market transparency and efficiency may become necessary. That is what we are doing.

We are saying that these things may have come about because of the Enron collapse. We have seen, while Congress may have acted in 2000 thinking this exemption was the right thing to do, this exemption cost consumers—if not the high rates they are paying directly—it has at least cost them confidence in the system.

We must restore that confidence by opening up the energy derivatives market to transparency and oversight. I urge my colleagues to support this very important amendment and to tell the American public that Congress is acting to protect them from the kinds of loopholes that Enron was able to walk through and cost consumers higher energy prices in this country.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I thank the Senator from Washington. I do not know anyone who has been more concerned about what has been happening with electricity markets than Senator CANTWELL. She has really tried to help her constituents and the consumers in this area. I am very pleased she has been in the leadership of this amendment.

I particularly thank the Senator from Illinois, Mr. FITZGERALD, for straightening out the record from the perspective of somebody intimately involved in the banking industry.

Let me tell you how all of this boils down for me. It is this: Should some parts of this trading community essentially be exempt from any form of transparency, from recordkeeping or from oversight? That is the bottom line. We are not trying to do anything that is horrendous. All we are saying is they should have oversight, they should keep records, and there should be information for the public that the Commodity Futures Trading Commission would find to be nonproprietary. This is, in essence, all we are trying to do.

I have a hard time understanding how one has to have a large degree of sophistication in the industry to want to shed the light of day on some of these trades.

Maybe California was impacted by these trades and maybe California was not impacted by these trades, but I can tell you this: The price of electricity in California in 1999 was $7 billion. The price the next year was $27 billion. It went up fourfold. Something happened other than the fact there was a huge demand and no supply. There was trading.

We saw it with natural gas coming in to California. Natural gas prompts the price of electricity, and when it is $59 a decatherm in southern California and $8 a decatherm in New Mexico, when the cost of transportation from New Mexico to that place in California is only $1, one has to look at what has happened to boost that price way up.

So all we are saying is to put it back the way it was before. Give the CFTC jurisdiction.

It is being made light of that the CFTC does not support this action. The CFTC has three members. One of the members supports what we are trying to do, and his name is Thomas Erickson.

I will quickly read what he says.

> This amendment would bring transparency to markets and provide Congress and the public with the assurance that no exchange offering energy commodity derivatives transactions would go completely unregulated. Moreover, it would restore to the Federal Government those basic tools necessary to detect and defer fraud and manipulation. Therefore, I strongly support the amendment.

That is one member of the regulatory body out of three members to whom we are trying to give this responsibility. So there is nothing nefarious about the amendment.

As I pointed out, all members of the FERC support the amendment, as well as the Chairman of the FERC, whose letter I read into the RECORD. They know something about these matters. They know what derivatives are. They know the transparency and recordkeeping and oversight.

Whether there was a carve-out for two or three companies or not, I am not going to comment because I do not know. I do know there is this one narrow exemption whereby all of these online trades go on not in the light of day but in the dark of night, so to speak. Nobody knows what they are. There are no records kept of them. Therefore, whether the CFTC thinks it has some jurisdiction or not does not really make a difference because they cannot go back and look at records of trades, compare them wholesale versus retail prices, and know whether there was any price manipulation or not. So sure, investigate. If there are no records, there is no evidence. Therefore, there is not much that is going to come from the investigation.

So all we are trying to say is because this has become a huge, burgeoning online business, subject it to all of the same regulations and oversight that every other part of the trading community has. It does not take a Philadelphia lawyer to understand that. I do think it benefits consumers, I do think it benefits responsible trading, and I do think it benefits a level playing field for everyone who is trading in these markets. I think it provides that level of consumer protection. Some people, say, oh, there is a reason why the NYMEX and the Chicago Board of Trade want it. They want to force everybody on their exchanges. No, not true. If it is easier to trade online, you can trade online, no problem with it, but there should be a record kept of the trades. There should be transparency, and information that the CFTC deems is not proprietary but should be in the public domain can, in fact, be in the public domain, and that, finally, there is some regulatory body that when there is an allegation of fraud would step in.

For example, I would like the CFTC to take a look at the California situation, evaluate the record and tell us, was there price manipulation? Was online trading of natural gas manipulated to artificially raise prices? They might try to do it now, but they would have no records on which to base any investigation. Therefore, that is what this amendment is all about.

Sure, I know there are people who do not like it. There are people who have tried to obfuscate about it, but is the consumer going to be better off because the light of day is shed on these trades in a market that is billions and billions of dollars? I think so. I cannot understand how anybody feels disadvantaged because there is transparency, there is oversight, or there is recordkeeping that is required in every single level of trading on any market that exists in America today.

So if anyone takes the time to read these letters, I think they will find we are doing nothing nefarious. We are simply trying to bring the light of day to provide a record and to provide some regulatory oversight to a huge, burgeoning market.

When I talked to Mr. Greenspan, and I did on two occasions, what he was concerned with was financial certainty. What I would say to him is this brings financial certainty. This lets everybody who trades online know there is some regulation. Just as you have regulation with FERC, if you deliver natural gas directly to an entity, if you are trading gas in between the delivery, there also is certainty—a certainty that one must keep a record, a certainty that the record can become public, and a certainty that there is some Federal oversight as there is everywhere else.

I see no reason at all why there should be this widespread exemption, particularly at a time when we have seen these prices escalate beyond anyone's expectation. Nobody could think that someone could be selling electricity at $30 a megawatt and overnight have that price go to $300 and then $3,000 without the opportunity for the light of day to be shed on it, and also have some records and some oversight.

It is a very simple thing we are doing. It existed before the year 2000. All we are saying is give the CFTC this oversight. It is supported by FERC. It is supported by the New York Merchantile Exchange. It is supported by the Chicago Exchange. It is supported by people who deal in electricity and natural gas, the municipal systems. It may not be supported by the banks that want to run an exchange in this secret way. It may not be supported by some who would like to see this anonymity continue. But if my colleagues believe that light of day is important, then please vote for this amendment.

I yield the floor.

The PRESIDING OFFICER (Mrs. CARNAHAN). The Senator from Idaho.

Mr. CRAPO. Madam President, I appreciate the opportunity to rise in opposition to this amendment. We have heard a lot of debate today about a very complicated topic that has been discussed, that understanding derivatives is very difficult to do. Since this debate started and I began working on this issue, even in years previous as we tried to address the issue, I still have to go back again and again to the experts who help us to understand the issue.

The first point I want to make is: We spent the better part of a year, a couple of years ago, working on this entire issue of how transactions called derivatives are regulated as they deal with commodities. We had a Presidential Working Group with which then-President Clinton worked, and we relied on the advice of that working group in setting up the model we put forward to help us address how we in the United States should regulate and manage transactions in commodities known as derivatives.

I am going to try in a few minutes to give a little bit of structure to how we did that, but the first point is we spent a tremendous amount of time with congressional committees working on it over a long period of time, and with a Presidential panel working on it, and an advisory group, and we came together with an approach that we then brought forth as legislation which became law and which President Clinton signed into law, and which we have now been working under for a few short years.

This amendment will change that approach. Before I get into what we are talking about and try to put a little order to what the whole debate is about in terms of the structure of the law, let me state the conclusion that Alan Greenspan gave in answer to me in a Banking Committee hearing a few weeks ago when I said to the Chairman: Chairman Greenspan, is this amendment going to be good for America?

His answer to me—and I will read his words in a few minutes if I need to, but his answer, in essence, was he believed the way we had set it up was working, that it provided a resiliency to our markets in the United States and that resiliency was, in his opinion, probably one of the big factors in our ability to have the strength in our economy to rebound as fast as we did when the recessionary trends hit us.

In other words, the recessionary trends we are hopefully now starting to see ourselves grow out of were lessened, and the time we had to spend in that financial trough was reduced because we had the resiliency in our derivatives transactions that we put into place as a result of this very thorough study we went through just a few years ago.

This amendment seeks to change that. The arguments are in that act we passed a few years ago. There was a rifleshot created, a specific exemption for a few commodities that was not fair, and all commodities should be treated equally. The reality is the reverse. We created basic categories in the law we passed. This amendment is a rifleshot amendment to pick out just a couple commodity groups and say these commodity groups should have been treated differently.

How did the law we passed last time work? The question, again, is how are we going to regulate derivatives and commodities that are going to be marketed through derivatives transactions. First, there was an entire category we said we were going to exclude, we would not regulate. Those are called financial derivatives. This includes Treasury bonds, foreign exchange, interest rates, things that happen in the financial industry.

The Senator from Illinois discussed how banks and others deal in these transactions. They are totally excluded.

Another category of commodities included, because historically they have been included and traded on exchanges and derivatives transactions, was the agricultural commodities. They were included with full regulation, full coverage. They are now traded on these boards.

All other commodities were exempted. I use the word ''exempt'' as opposed to ''exclude'' because it is different than how we treat financial transactions. Financial derivatives were excluded; no regulation. Agricultural commodities were included; complete regulation. All other commodities were exempted, meaning they were not going to be regulated and forced on to the exchanges and forced to be traded in the ways that the agricultural commodities were, but they were still subject to very important regulatory controls. The Senator from Texas has already gone over those. Those were protections against fraud. They would be subject to the antifraud protections, the anti-price manipulation protections, and the recordkeeping protections. All other commodities, other than agricultural and financial transactions, are still subject to those types of fraud, price manipulation, and recordkeeping requirements under the act.

What has happened with this amendment? From that category called ''all other commodities,'' the amendment seeks to pick out just two commodity groups: Energy and minerals. That is the rifleshot, saying we do not like the categorization we did a few years ago; we need to take energy and minerals and move them to another category. The arguments given in favor of it are because we need more recordkeeping control and protection. That is included under the act.

The other argument is that we should not treat one group different from any other group. Frankly, as I indicated, we already have exemptions and exclusions and coverage in different categories. I ask this question: If the argument is that regulation is good and therefore we should not have any commodity derivatives transaction that is not regulated, why not, instead of having a rifleshot amendment that regulates only energy and mineral transactions, bring all the financial transactions in as well?

If people are at risk in America today because we are not regulating derivatives transactions, why shouldn't we have regulated derivatives transactions and Treasury bonds? People's retirement depends on their investment in Treasury bonds. Financial transactions, like foreign exchange and interest rates, are every bit as important to the investor in America as are energy or mineral transactions—and, in fact, probably more so if you look at the financial transactions and all of the other types of commodities not included when we did the act before.

If we do that, we take the resiliency out of the markets and make it harder for this Nation's financial system to work effectively. If you accept the argument that everybody should be under the same rules and nobody should be rifleshot out, we should cover everybody and have no exclusion for financial transactions and no exclusion for any commodities. Instead, that is not what the working group recommended.

I make another point. It has been argued somewhat subtly, but I think the point has been clearly argued, investors are at risk because they do not have information about these derivatives transactions. These transactions are not investor transactions. This is not a situation where an investor is looking at a transaction and saying: I think I will invest in that derivative or I will see if I can buy into this derivative transaction.

What is going on is the transfer of risk from those who hold a higher risk situation but do not want to maintain that risk or are not in a financial position to maintain that risk to someone in a better position to maintain risk. We talk about what derivatives transactions do. They transfer risk from one who cannot manage it as well to one who can manage it better. It helps our economy be resilient.

These are transactions between extremely sophisticated managers—whether they be people who are transacting in energy commodities or in minerals commodities. There is not a situation where an investor is being shown a document and being asked to invest in a particular instrument. This is not like a stock market sale or transaction. This is a negotiated contract between sophisticated buyers and sellers who are working in the marketplace to try to reduce risk, which brings strength and stability to the economy and, as Greenspan said, helped in this last recession to bring us back more rapidly.

What we are being asked to do is to shackle it and make it so that these transactions cannot occur except over the board. These transactions have to be regulated like the agricultural transactions.

There has been a lot of talk about who supports and who opposes this amendment. There is already in the RECORD a letter from our Secretary of the Department of Treasury and from the Chairman of the Board of Governors of the Federal Reserve System, Paul H. O'Neill and Alan Greenspan, who strongly say we should maintain the current system. I read from the very last part of their letter:

[Such legislation] could jeopardize the contribution that off exchange derivatives have made to the dispersion of risk in the economy. These instruments may well have contributed significantly to the economy's impressive resilience to financial and economic shocks and imbalances.

So you have the Secretary of the Treasury and the Chairman of the Federal Reserve saying: Do not shackle our economy this way.

We also have the Commodity Futures Trading Commission itself, the Chairman, representing the majority point of view, stating that there is no shown reason for us to change the structure we achieved after such careful debate previously.

We also have the Securities and Exchange Commission saying there is no need for this change and we should walk carefully.

We are talking about the Government regulators—the Department of Treasury, the Federal Reserve, the SEC, the CFTC—saying there is no need for this.

What is the private sector saying? Those opposed to this amendment are those who deal in these transactions: The International Swaps and Derivatives Association, the American Bankers Association, the ABA Securities Association, the Bond Market Association, the Financial Services Roundtable, the Futures Industry Association, the Securities Industry Association, and the U.S. Chamber of Commerce, the point being that those in our economy who deal with derivatives are saying to us: We don't want to have a rifleshot amendment that takes energy and mining transactions and moves them over.

Again, I want to go back and summarize a little bit. We have a situation here in which we had a Presidential working group that said we should set it up the way we did. We set it up the way we did. It worked. Those who deal with our financial markets in America have said it brings us and brought us the resilience we needed this last time when our economy had the shocks and turmoil we have faced in the last few years. It has been working.

There was also testimony in the hearings we held before the Banking Committee and elsewhere, where those who have tried to tie the failure to regulate derivatives transactions to some kind of problem in the energy markets in California, or to the Enron collapse, have been able to show no real evidence of that. If there were evidence of that, then I think that is something that would be a valid debate for us to have in the Senate.

Instead, I have sat here now for hours this morning, listening to the debate, and it has come down to basically two points, as I understand the reasons that have been put forth for this amendment.

They are that we need to have more information available for investors and those in the industry who might want to look at these transactions to see if there was fraud or whatever. And the response to that argument again is that they are already subject to the Act's anti-fraud provisions, their anti-price discrimination provisions, and their recordkeeping provisions, and that these are not investor transactions.

Then there are those who say it is just a good thing for us to have everybody under the same rules and nobody should get any exemptions. If that is the case, we should amend the amendment to bring in all commodities, including those that are excluded, such as the financial transactions, and those that are exempted, such as the commodities that are not agricultural.

Again, I am not recommending that. I am simply saying the argument that everybody should be under the same rules does not carry with regard to these kinds of transactions. If it did, then the amendment should be much broader than it is.

The bottom line here is this: If there is some basis for us to consider changing the law, which we worked so hard to put together a few years ago, then that process of determining the change that needs to be made and evaluating the facts and the arguments behind why such a change should be made should first go through the regular process of legislating here in this Congress; namely, the committees with jurisdiction should take jurisdiction over these issues and establish the analysis. We should hold hearings.

If there is an argument that somehow the Enron situation is connected to how we regulate derivatives transactions, then we should hold hearings. Those hearings should probably be in the Agriculture Committee, which is where the jurisdiction of this amendment lies. But somewhere we should have hearings to find out whether such a connection is real and, if so, what the connection is and why it occurred. That will guide us, then, in terms of figuring out how we might create a better regulatory mechanism.

The same is true if there are those who contend that somehow the California energy collapse and the circumstances that occurred there were caused by failure to properly regulate energy derivatives. Again, no connection has been made in the minds of those who work in the marketplace. But if there is an argument that such a connection is there and that it justifies a change in the law, then shouldn't we have a study of it? Shouldn't we evaluate it? Shouldn't we have a hearing—at least one? Shouldn't we let the committees of jurisdiction dig into this and go through the process we did before? Maybe we need another Presidential advisory board.

If the results of the last system are not adequate, we could add to them and supplement them. But we should study the issue and try to find out what facts justify such an argument and, if there is any validity to it, what caused it, so we can then understand how to regulate it better.

The bottom line is that we have had none of this. We have had no hearings. We have had no committee evaluation. We have had nothing, other than a several-hour debate in this Chamber. We had a couple hours of debate a week or so ago and now a couple of hours more today. But we have not had the opportunity to get to the bottom of all of these arguments, whether they be factual allegations or arguments about the proper mode of regulation.

I suggest what we need to do is to refer this amendment to the appropriate committees of jurisdiction and let them conduct the studies, conduct the evaluations. In fact, what might even be a better solution is to refer this issue to the appropriate regulators.

At some point in time I may submit an amendment to do just that, to let the CFTC and the other appropriate regulators have a period of time—the Senator from Texas suggested maybe a short period such as 45 days—to dig into this matter and give a report to Congress about what they have found out about all the alleged contacts between wrongs in our society that might be related to something here dealing with derivatives.

Again, if they find anything in that context, then the appropriate committees of jurisdiction can have hearings and review these issues, determine if there is any merit whatsoever in proceeding forward with changing our regulatory scheme, and then in a very effectively fine-tuned way figure out how we should change the law.

To me it seems very clear; if we do not have the kind of threat that some suggest we have, and if we do have the potential strength in our economy that is provided by having this flexible system of commodities transactions regulations, it would be very dangerous for us to move into a new regulatory system without understanding where we are heading.

This is one of those circumstances in which it is far too important for our economy for us to take a risk of unintended consequences.

One of the most significant things we will face with regard to this amendment, in my opinion, is the list of unintended consequences that could occur.

The Senator from Texas indicated earlier it is really hard to debate unintended consequences because we really don't know what they are, because they are unintended, uninformed—something of which we are unaware. It is something about which, if we held hearings and went through the regular legislative process on this issue, we would identify. Then whatever consequences flowed from what we were doing would be understood and supposedly intended by those who supported it.

Instead, we are being asked here on very short notice, without the kind of debate we need, to regulate in a way that is not necessary one section of our economy—the energy and the minerals transactions related to derivatives.

Again, if the argument is going to be made that we need to protect investors in America, it is hard to see that because these are not investor transactions; they are transactions between highly sophisticated individuals. If it is true that derivatives are somehow a threat to the investor community and the safety of the investments of the American public is at risk because of something wrong with the way we manage derivatives, then why don't we cover all commodities? As I said earlier, it seems to me the question of how we regulate Treasury bonds or foreign exchange or interest rates or other financial transactions is every bit as important to the American investor as is the question of how we regulate minerals or how we regulate energy transactions.

I know in today's climate, with the Enron collapse and with the energy troubles we faced a few years ago in California, there are those who want to look at every aspect of financial and other transactions relating to energy and see if there is some way we can improve it. But I suggest it does not necessarily mean that more regulation and more government bureaucracy is the best way to solve these problems, particularly when you have the Secretary of the Treasury and the Chairman of the Federal Reserve telling us we have to have the kind of resiliency in our economy that derivatives provide to us.

In conclusion, I believe the bottom line is that each side can point to those who support their positions and those who oppose them. Each side can come up with arguments about why what we are doing now is or is not working. But no side can say we have the background information necessary to make this decision, because we have not had the kind of hearings and congressional evaluation of this issue we should have had.

Because of that, I stand firmly opposed to the amendment. I believe ultimately the American people will be much better served if we do our jobs in the Senate the way our procedures are set up to do them. The procedures and the policies of the Senate have been established to make very clear that we can have the time to evaluate issues such as this and do the study necessary to have good, solid support.

I also believe, as has been indicated by those who debate here, if we went through that process I have suggested—having a study and then further congressional evaluation and then maybe propose legislation—we would probably have much more support for whatever came forth, if anything. We would build the collaboration, we would build the consensus, and we would come forward, because the one thing that there has been agreement on today is that nobody wants to have the problems we saw occur in California.

Nobody wants to see any kind of fraud or abuse from financial transactions or derivatives transactions. Everybody is willing to make sure that antifraud provisions and price protection provisions and the recordkeeping provisions are adequately available for derivatives transactions as necessary, so that we do not cause or increase any risk of problems in the economy.

If we will follow the procedures and the processes of the Senate, let this matter be handled by the committee of jurisdiction, which I believe is probably the Agriculture Committee, and then let other related committees handle their parts of it, with studies in support from the private sector and from our regulating agencies, I believe we can get the information necessary for us to do a good job, build consensus, and come forward with a solution that can be broadly supported on both sides of the aisle.

I thank the Chair very much for this time.

RECESS

The PRESIDING OFFICER. Under the previous order, the hour of 12:30 having arrived, the Senate will now stand in recess until the hour of 2:15 p.m.

Thereupon, the Senate, at 12:31 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mrs. CINTON).

NATIONAL LABORATORIES PARTNERSHIP IMPROVEMENT ACT OF 2001—Continued

AMENDMENT NO. 2989, AS MODIFIED

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Madam President, I rise again, as I did a week ago when we debated derivatives, in opposition to the derivatives amendment. It offers no solutions to problems that caused either Enron or the California energy crisis. In fact, the amendment we have is a solution looking for a problem.

I am glad we have had a little time to study the amendment further because we have asked a number of regulators what their position is regarding the additional regulation of this relatively new form of business. We have heard from two regulators who have jurisdiction over the trading markets. They both have come back with the same response: This is not needed at this time.

CFTC Chairman Newsome has said:

> This amendment would rescind significant advances brought about by the Commodity Futures Modernization Act.

In response to a letter I sent to the Securities and Exchange Commission, Chairman Pitt responded:

> The Securities and Exchange Commission believes this legislative change is premature at this time.

This amendment will disrupt a market that is working efficiently and providing important tools for energy companies. For instance, this amendment would require new capital requirements on electronic trading exchanges, even if they simply match buyers and sellers. These exchanges bear no risk associated with trading but this legislation could provide additional new taxes.

This amendment also provides new regulation on metals. I don't know of anyone who can point to how metals had anything to do with Enron or the California energy crisis. The regulatory model for metals has offered no problems. In fact, if you take a look at the derivatives market, there isn't a problem with any of the markets. I will speak about that in a moment.

Yet the supporters of this amendment believe we should quickly enact some new form of regulation to oversee the metals market. Enron was not caused by the trading of energy derivatives. As I said last week, Enron was not an energy trading problem. Enron was not an accounting problem. Enron was a fraud problem.

In fact, when the Chairman of the Federal Reserve, Alan Greenspan, was asked at a Senate Banking Committee hearing whether a nexus existed between energy derivatives trading and the collapse of Enron, he responded that ''he hadn't seen anything'' that would indicate that.

Why are we rushing to regulate an emerging business when the collapse of Enron was likely caused by potentially illegal acts by executives and, furthermore, that the collapse of Enron did not cause a blip on the scope of derivatives trading?

I know this is something everybody uses on a daily basis. In the example I gave a week ago, I cited some examples of things that might help to understand derivatives trading. I will not go into that again. I am kidding about this being something that everybody works with on a daily basis. In fact, we have been taking some classes in my office on how to spell ''derivatives.'' It isn't a common, ordinary thing, but it is a new market that we have looked at extensively, held hearings on, and have done work on in the past through the regular channels. Again, there was not a blip in that system when Enron went down.

We recently passed the Commodities Futures Modernization Act. Most of us in the Senate worked on this legislation extensively.

This legislation examined the regulation of energy derivatives. This legislation was debated at public hearings. It was negotiated. It was drafted over a significant period of time with full participation and input from members of the Clinton administration and the committees of jurisdiction. What