bill and strengthens it, keeping in mind that our first priority should be the people right now who need the help. We can do that if we are willing to work together.

I yield the floor.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Nevada.

ORDER OF BUSINESS

Mr. REID. Madam President, I know the Senator from New Jersey wishes to speak. There is a unanimous consent request that will be propounded which will help people understand what will happen. We are waiting for someone on the other side to read the request, and then we can agree to it. If the Senator will withhold for a moment.

Mr. LAUTENBERG. Without losing my opportunity to the floor.

Mr. REID. I have the floor. Madam President, we are shortly going to enter into an agreement to have a vote late today for two more judges. This will make 131 judges—I think that is the number—we have approved during the time the present President Bush has been President.

I am really not certain as to the number, but I believe it is 36 or 37 circuit court judges. The vacancy rate, as we discussed yesterday, is extremely low. There has been a lot of agitation and talk about how poorly the administration is being treated with their judicial nominees. Even the President can understand that a count of 131 to 2 is a pretty good record for him.

The PRESIDING OFFICER. The Senator from New Hampshire.

UNANIMOUS CONSENT AGREEMENT—EXECUTIVE CALENDAR

Mr. SUNUNU. Madam President, I ask unanimous consent, as in executive session, that at 2:15 p.m. today, the Senate proceed to executive session for the consideration of Calendar No. 221, the nomination of J. Ronnie Greer to be a U.S. District Judge for the U.S. District of Tennessee; provided that the Senate then proceed immediately to a vote on the confirmation of the nomination, with no intervening action or debate; provided, further, that immediately following that vote, the Senate proceed to the consideration of Calendar No. 222, the nomination of Mark Kravitz to be a U.S. District Judge for the District of Connecticut; that there then be 5 minutes for debate equally divided between the chairman and ranking member or their designees; and that following the use of that time, the Senate proceed to vote on the confirmation of the nominees. Finally, I ask unanimous consent that following the votes, the President be immediately notified of the Senate's action and the Senate then resume legislative session.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Reserving the right to object, in the statement I just gave, I indicated there have been 36 circuit judges approved. It is 26 circuit judges approved. I misspoke. The 131 figure that will be completed about quarter to 3 today is an accurate number of judges who have been approved in this administration.

Also, Madam President, the chairman of the full Energy Committee, the manager of this bill, along with Senator BINGAMAN, is in the Chamber, and the record should reflect we on this side are not holding up this Energy bill. I have no objection to the unanimous consent request.

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

ENERGY POLICY ACT OF 2003—Continued

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Madam President, as a manager of the bill, our side is awaiting communication from the executive branch by way of explanation of the Feinstein amendment. That should be arriving shortly. When it arrives, we will be ready on our side for the conclusion of any discussion. So it should not be too long—probably after lunch—before we are ready on our side for a vote on the Feinstein amendment.

For those who are wondering, that is what is happening. There is no need to be in the Chamber on that amendment until that event occurs. I am certain nothing will happen on the Energy bill until that time because there is no concurrence that anything can happen. In other words, we cannot do anything because the Feinstein amendment cannot be set aside for any other amendments.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. REID. Madam President, I say to my friend from New Mexico, I am very appreciative of the statement he just made because I am going to do as he just did during this lull of time: Go get my hair cut.

Mr. DOMENICI. We hope it will be here shortly. I noted the presence a short time ago of the chairman of the Agriculture Committee, which has primary jurisdiction on the Feinstein amendment. He, too, was wondering what was happening. I want he and his staff to know that is exactly what is happening. It should not be too much longer until we then proceed in due course for a vote.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. Madam President, I ask unanimous consent to speak as in morning business.

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

(The remarks of Mr. LAUTENBERG are printed in today's RECORD under "Morning Business.")

The PRESIDING OFFICER. The Senator from Alabama.

AMENDMENT NO. 876

Mr. SHELBY. Madam President, I rise today to encourage my colleagues to oppose the amendment of the senior Senator from California, Mrs. FEINSTEIN.

First, I address the second-degree amendment the senior Senator from Nevada, Senator REID, is offering. I encourage my colleagues to oppose this second-degree amendment, also. The Reid second-degree amendment would exempt derivative contracts on precious metals from the new regulatory scheme the Feinstein amendment creates. We are told the Feinstein amendment is necessary to avoid the manipulation of markets for commodities that are in limited supply like oil or metals.

Underpinning the Feinstein amendment is the belief the Enron debacle and the California energy crisis occurred because there was insufficient regulation and wrongdoers were able to accomplish massive frauds and manipulation. The Feinstein amendment is intended to close the alleged regulatory loophole for off-exchange transactions for exempt commodities.

Assume, only for argument's sake, that Senator FEINSTEIN is correct. Assume the regulatory regime established only 2½ years ago is insufficient and that we must close a so-called regulatory loophole. If you believe this and support the Feinstein amendment, you must necessarily oppose the Reid second-degree amendment, which will carve a vast number of derivative contracts out of the regulatory scheme the Feinstein amendment creates.

I don't believe we can have it both ways. What is necessary for the energy markets is necessary for the metals markets. I encourage my colleagues to oppose both the Reid second-degree amendment and the Feinstein amendment as unnecessary, redundant, and potentially destabilizing to our financial markets. I encourage my colleagues who feel compelled to support the Feinstein amendment to not support the Reid amendment, which is at direct cross-purposes to the underlying amendment.

Less than 3 years ago, in December 2000, Congress enacted the Commodity Futures Modernization Act of 2000, which was landmark legislation that provided legal certainty regarding the regulatory status of derivatives. Passage of the modernization act was the result of many months of analysis of the role that derivatives play in the marketplace and the consequences of increased regulation. In fact, because the modernization act addressed derivative products pertaining to commodities and financial products, both the Agriculture Committee and Banking Committee held numerous hearings to help Members and the public better understand the role the various derivative financial instruments and contracts played in our economy and what regulatory landscape, if any, is appropriate.

Now, only 3 years after enactment of the modernization act, Senator FEINSTEIN's amendment proposes fundamental changes to the law. I believe

this amendment could create many regulatory problems, including creating jurisdictional confusion between the Federal Energy Regulatory Commission, FERC, and the Commodity Futures Trading Commission, CFTC, imposing problematic capital requirements on facilities trading derivatives, and impugning the legal certainty of OTC derivatives put in place in 2000.

I am concerned this body does not have full appreciation of these consequences and potential unintended consequences that will likely follow if we were to adopt the Feinstein amendment.

I also believe it is premature to adopt this amendment because we have simply not had enough time to review the results of the modernization act. We have not received any reports from the CFTC detailing shortfalls in the regulatory authority conferred by the modernization act or recommendations requesting broader authority over derivatives. In fact, the CFTC had brought several major cases involving market manipulation since the passage of the modernization act. Congress should have more than a 2-year record before it decides to make rash but fundamental changes to legislation that was the product of so much deliberation a short time ago.

Proponents of the Feinstein amendment argue that the collapse of Enron and the disruption of the California energy market are prime examples of the need for greater regulation of derivatives. This assertion is simply not true. Enron collapsed as a result of deceptive accounting practices involving special purpose entities and poor corporate governance practices that permitted abusive business practices. Congress addressed such abuses in last year's Sarbanes-Oxley Act. More importantly, Enron's derivative business was in operation prior to enactment of the Modernization Act and was one of the business lines that retained value for sale after the collapse when most others didn't.

Further, FERC, the Federal Energy Regulatory Commission, recently concluded a year-long review of potential manipulation of electric and natural gas prices in the Western markets. Although FERC did find market manipulation, it also concluded:

> Significant supply shortfalls and a fatally flawed market design were the root causes of the California market meltdown.

In short, it was lack of energy supplies and poor State regulations that caused the disruption. I fear that the adoption of the Feinstein amendment could lead to uninformed and premature changes to the carefully considered provisions of the Modernization Act.

I believe the Feinstein amendment proposes unnecessary regulatory measures and significantly undermines the legal certainty achieved in the Modernization Act. Therefore, I strongly urge my colleagues to vote against the Feinstein amendment.

The President's Working Group on Financial Markets, which is comprised of the Secretary of the Treasury, the Chairman of the Federal Reserve Board, the Chairman of the Securities and Exchange Commission, and the Chairman of the CFTC, will be sending a letter today expressing its concerns with this amendment and urging Congress to carefully consider the potential unintended consequences of the amendment before acting. I intend to submit this letter for the RECORD when I receive it. I anticipate this letter will raise the same concerns that were raised in the working group's letter last year.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. SUNUNU. Madam President, I rise to join my colleague, Senator SHELBY, my committee chairman on the Banking Committee as well, in opposing the Feinstein amendment. This amendment was debated at length about a year ago during the previous Senate Energy bill debate. At that time, Senator Phil Gramm raised a number of issues, a number of concerns with the legislation. He said a great many wise and commonsense things. One of the perspectives that he pointed out that stuck with me was noting that, in raising concerns about failures, companies that had gone bankrupt such as Long Term Capital Management, or perhaps closer to home for the Senator from California, the bankruptcy of Orange County, CA, that involved to a certain extent derivatives and then called for regulation—we were, in effect, blaming the instrument itself, blaming the derivative, which is a little bit like blaming a thermometer for a warm day. That is not the right approach for legislation and I think it will lead us to bad conclusions in trying to structure legislation that will strengthen financial markets.

As the Senator from Alabama indicated, at the root is our concern that we not pass legislation that has unintended consequences, not pass legislation that is counterproductive, and rather than strengthen the markets or increase confidence in markets, actually has the opposite effect.

This legislation would give a great deal of new power to FERC, which is a concern to me because that would be power given over to the FERC not just to regulate but really to arbitrate, to refer claims to different regulatory authorities. On its face, I ask whether FERC has the expertise or the knowledge in all of these sophisticated markets to make such decisions. It is, perhaps, a power best not given to FERC. But it is also a power, in referring and making these decisions as to which regulatory body a particular claim or complaint would go, that would have the effect of creating uncertainty, uncertainty as to which organization had regulatory oversight.

The Commodity Futures Trading Commission and FERC already coordinate their enforcement with respect to the energy markets. The CFTC has subpoena power. I think, as a number of other speakers indicated, in the year 2000 there was a Commodity Futures Modernization Act that was passed that was a good piece of legislation. A lot of work went into that. It drew from recommendations made by the President's working group. In particular, it strengthened the CFTC's hand in regulation in a number of areas.

I certainly do not think offering an amendment at this time on this particular bill is the appropriate way to modify that legislation, the Commodity Futures Modernization Act, that was a product of extended negotiations. The piece of legislation such as being offered by the Senator from California ought to go through the regular committee process. We ought to have hearings on it and certainly we ought to have an opportunity to debate it in the key area of the Banking Committee and Agriculture Committee jurisdictions.

Of particular interest as well is the fact that this amendment is opposed by a number of organizations, a number of the regulators themselves who are most concerned with stability and confidence in the markets—by the Fed, by the SEC, and by the CFTC. Even though this bill gives additional powers to the CFTC, they still oppose it. It is not often in Washington you have someone opposing an effort to give them more power and more jurisdiction, but these very organizations are worried every day about safety and soundness, about regulatory clarity, about ensuring a greater degree of stability and solvency in the marketplace. Why would they oppose this effort, to give more regulatory power to them or to their sister organizations?

I believe it is in part because of their concern that this might have unintended consequences, that this, unfortunately, might add uncertainty to the markets, that this might stifle transactions that so often act to reduce the risk in the marketplace.

Particularly telling is the fact that an amendment is being offered to strike the coverage of various metals from this provision. Obviously, someone recognizes that this might not be good, might not be healthy for a particular area of our economy, of the derivatives exchanges, and therefore wants to protect them from the uncertainty and the instability I have described.

Unintended consequences, we have to be so careful about exactly in an example such as this. These derivative markets are so complicated so the potential to have unintended consequences is effectively magnified by our collective lack of knowledge. There are some Senators who know more than others about these markets. The Senator from California has spent more time than others debating and discussing these issues. But any time we venture into

an area of such complexity we enhance the risk that a piece of legislation will have unintended consequences.

I certainly do not fault the intentions or question the intentions or the motives in offering the legislation. We share the goals of ensuring that we have good regulatory agencies with appropriate enforcement powers, but we also should be careful that we not disturb a market which I believe functions extremely efficiently. As complex as it is, and as large as it is—I have seen estimates of the size of the global derivatives market as high as $75 trillion—as large as that market is, it works very effectively.

These are not products that are sold on any exchanges and there is a reason for that. The principal reason is that they are unique. They are unique to the organizations that seek them out. The vast majority of these organizations seek out a particular swap or derivative transaction in order to reduce the risk they are exposed to at any given day. That is why these instruments were developed and exist in such great numbers in the first place. Companies, institutions, financial service companies, banks—they seek out these derivatives to reduce their exposure to risk. When they are able to do that, they ensure greater stability, they ensure greater certainty for their investors, and it has the effect of, obviously, making our markets stronger. And helping our economy to grow.

We have exercised great caution before stepping forward and trying to substitute some kind of new regulatory regime when a market is functioning this effectively and arguably enforcing its own level of discipline in the way that it functions. What kind of discipline is that? If I am going to engage in an interest rate swap, or some other derivative transaction with a financial institution, rest assured that I as an investor or as a counter-party to that transaction am going to want to know a great deal about the solvency, the exposure to other risks, exposure to interest rate changes, and exposure to different portions of our economy with which that institution I am engaging with in a transaction is dealing.

There is a level of inspection and a level of due diligence that takes place in this marketplace every single day, which I might argue is more detailed and more thorough and more consistent than any government regulatory agency could ever provide.

I believe we should oppose this amendment because it hasn't gone through the regular order because it attempts to impose a level of regulation that might well be counterproductive, that might increase the level of uncertainty in certain areas where jurisdiction is concerned, and that springs from a concern that somehow the derivatives themselves—the instruments themselves—are to blame rather than managers who have made some very bad decisions.

Derivatives didn't cause the energy crisis in California. Derivatives didn't cause the collapse of Enron. Managers making bad decisions did. In some cases, managers engaging in fraudulent behavior did. Certainly the Commodity Futures Trading Commission has the power to go after cases where fraud or price manipulation are concerned. They are completely empowered to do just that.

I encourage my colleagues to vote against the amendment, and I yield the floor.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. FEINSTEIN. Madam President, I would like to use this time to respond to some of the comments that have been made.

It is really a misconception to think this is an amendment against derivatives. This isn't an amendment against derivatives. I have never said derivatives caused the western energy crisis. What I said was that there is a loophole in the law: Where all other finite commodities, except for energy and metals, have certain regulations with respect to transparency, these particular finite commodities do not; and that certain traders use this loophole to practice, if you will, a kind of fraud in their trading. The fraud was to artificially find ways to boost their products. I wish to respond to that.

Let's go into one of the ways they proceeded to do this—through what is called a round trip or a wash trade. Yesterday on the floor, Senator FITZGERALD and I, as well, very clearly pointed out what a wash trade is: I sell you a finite commodity, and you sell that same commodity back to me. On our balance sheets, we both carry a sale. Yet nothing ever changes hands. What we are saying is that this should be an illegal practice. What we are saying is that, at the very least, it ought to have transparency to it. We ought to be required to keep a record, to have an audit trail, and to have anti-fraud and anti-manipulation oversight of these practices by the Commodity Futures Trading Commission.

What we more fundamentally say is that a great deal of this was done in the western energy crisis through electronic trading.

Madam President, I understand I have the right to modify the amendment. Is that not correct?

The PRESIDING OFFICER. That is correct.

AMENDMENT NO. 876, AS MODIFIED

Mrs. FEINSTEIN. Madam President, I would like to send a modified amendment to the desk. That modified amendment contains an additional cosponsor, Senator KENNEDY. The modified amendment makes two changes to the amendment which I submitted before. The first change is to be absolutely crystal clear that this does not affect financial derivatives. I said that in my comments yesterday. I say it again today. To make it crystal clear, because some are concerned, and say, ''Oh, well, this will upset the financial derivatives marketplace,'' this is not the intent. It would only apply to finite commodities.

Right upfront, we are clearly saying that this title shall not apply to financial derivatives trading.

The other change to this amendment simply takes Senator REID's amendment to exclude metals and adds this to this bill.

If I may, I send that amendment, as a modified, to the desk at this time.

The PRESIDING OFFICER. The Senator has that right. The amendment is so modified.

Mrs. FEINSTEIN. I thank the Chair.

The amendment (No. 876), as modified, is as follows:

At the end, add the following:

TITLE ___—ENERGY MARKET OVERSIGHT

SEC. ___01. NO EFFECT ON FINANCIAL DERIVATIVES.

This title shall not apply to financial derivatives trading.

SEC. ___02. 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.—

''(1) REFERRAL.—

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

''(B) NO EFFECT ON AUTHORITY.—The authority of the Commission or any Federal agency shall not be limited or otherwise affected based on whether the Commission has or has not referred a contract described in subparagraph (A).

''(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, the Department of Justice, the Department of the Treasury, 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.''.

SEC. ___02. INVESTIGATIONS BY THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE NATURAL GAS ACT AND FEDERAL POWER ACT.

(a) INVESTIGATIONS UNDER THE NATURAL GAS ACT.—Section 14(c) of the Natural Gas Act (15 U.S.C. 717m(c)) is amended—

(1) by striking ''(c) For the purpose of'' and inserting the following:

''(c) TAKING OF EVIDENCE.—

''(1) IN GENERAL.—For the purpose of'';

(2) by striking ''Such attendance'' and inserting the following:

''(2) NO GEOGRAPHIC LIMITATION.—The attendance'';

(3) by striking ''Witnesses summoned'' and inserting the following:

''(3) EXPENSES.—Any witness summoned''; and

(4) by adding at the end the following:

''(4) AUTHORITIES.—The exercise of the authorities of the Commission under this subsection shall not be subject to the consent of the Office of Management and Budget.''.

(b) INVESTIGATIONS UNDER THE FEDERAL POWER ACT.—Section 307(b) of the Federal Power Act (16 U.S.C. 825f(b)) is amended—

(1) by striking ''(b) For the purpose of'' and inserting the following:

''(b) TAKING OF EVIDENCE.—

''(1) IN GENERAL.—For the purpose of'';

(2) by striking ''Such attendance'' and inserting the following:

''(2) NO GEOGRAPHIC LIMITATION.—The attendance'';

(3) by striking ''Witnesses summoned'' and inserting the following:

''(3) EXPENSES.—Any witness summoned''; and

(4) by adding at the end the following:

''(4) AUTHORITIES.—The exercise of the authorities of the Commission under this subsection shall not be subject to the consent of the Office of Management and Budget.''.

SEC. ____04. CONSULTING SERVICES.

Title IV of the Department of Energy Organization Act (42 U.S.C. 7171 et seq.) is amended by adding at the end the following:

''SEC. 408. CONSULTING SERVICES.

''(a) IN GENERAL.—The Chairman may contract for the services of consultants to assist the Commission in carrying out any responsibilities of the Commission under this Act, the Federal Power Act (16 U.S.C. 791a et seq.), or the Natural Gas Act (15 U.S.C. 717 et seq.).

''(b) APPLICABLE LAW.—In contracting for consultant services under subsection (a), if the Chairman determines that the contract is in the public interest, the Chairman, in entering into a contract, shall not be subject to—

''(1) section 5, 253, 253a, or 253b of title 41, United States Code; or

''(2) any law (including a regulation) relating to conflicts of interest.''.

SEC. ____04. LEGAL CERTAINTY FOR TRANSACTIONS IN EXEMPT COMMODITIES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended by striking subsections (g) and (h) and inserting the following:

''(g) OFF-EXCHANGE TRANSACTIONS IN EXEMPT COMMODITIES.—

''(1) DEFINITIONS.—In this subsection:

''(A) COVERED ENTITY.—The term 'covered entity' means—

''(i) an electronic trading facility; and

''(ii) a dealer market.

''(B) DEALER MARKET.—

''(i) IN GENERAL.—The term 'dealer market' has the meaning given the term by the Commission.

''(ii) INCLUSIONS.—The term 'dealer market' includes each bilateral or multilateral agreement, contract, or transaction determined by the Commission, regardless of the means of execution of the agreement, contract, or transaction.

''(2) EXEMPTION FOR TRANSACTIONS NOT ON TRADING FACILITIES.—Except as provided in paragraph (4), nothing in this Act shall apply to an agreement, contract, or transaction in an exempt commodity that—

''(A) is entered into solely between persons that are eligible contract participants at the time the persons enter into the agreement, contract, or transaction; and

''(B) is not entered into on a trading facility.

''(3) EXEMPTION FOR TRANSACTIONS ON COVERED ENTITIES.—Except as provided in paragraphs (4), (5), and (7), nothing in this Act shall apply to an agreement, contract, or transaction in an exempt commodity that is—

''(A) entered into on a principal-to-principal basis solely between persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and

''(B) executed or traded on a covered entity.

''(4) REGULATORY AND OVERSIGHT REQUIREMENTS.—

''(A) IN GENERAL.—An agreement, contract, or transaction described in paragraph (2) or (3) (and the covered entity on which the agreement, contract, or transaction is executed) shall be subject to—

''(i) sections 5b, 12(e)(2)(B), and 22(a)(4);

''(ii) the provisions relating to manipulation and misleading transactions under sections 4b, 4c(a), 4c(b), 4o, 6(c), 6(d), 6c, 6d, 8a, and 9(a)(2); and

''(iii) the provisions relating to fraud and misleading transactions under sections 4b, 4c(a), 4c(b), 4o, and 8a.

''(B) TRANSACTIONS EXEMPTED BY COMMISSION ACTION.—Notwithstanding any exemption by the Commission under section 4(c), an agreement, contract, or transaction described in paragraph (2) or (3) shall be subject to the authorities in clauses (i), (ii), and (iii) of subparagraph (A).

''(5) COVERED ENTITIES.—An agreement, contract, or transaction described in paragraph (3) and the covered entity on which the agreement, contract, or transaction is executed, shall be subject to (to the extent the Commission determines appropriate)—

''(A) section 5a, to the extent provided in section 5a(g)) and 5d;

''(B) consistent with section 4i, a requirement that books and records relating to the business of the covered entity on which the agreement, contract, or transaction is executed be made available to representatives of the Commission and the Department of Justice for inspection for a period of at least 5 years after the date of each transaction, including—

''(i) information relating to data entry and transaction details sufficient to enable the Commission to reconstruct trading activity on the covered entity; and

''(ii) the name and address of each participant on the covered entity authorized to enter into transactions; and

''(C) in the case of a transaction or covered entity performing a significant price discovery function for transactions in the cash market for the underlying commodity, subject to paragraph (6), the requirements (to the extent the Commission determines appropriate by regulation) that—

''(i) information on trading volume, settlement price, open interest, and opening and closing ranges be made available to the public on a daily basis;

''(ii) notice be provided to the Commission in such form as the Commission may require;

''(iii) reports be filed with the Commission (such as large trader position reports); and

''(iv) consistent with section 4i, books and records be maintained relating to each transaction in such form as the Commission may require for a period of at least 5 years after the date of the transaction.

''(6) PROPRIETARY INFORMATION.—In carrying out paragraph (5)(C), the Commission shall not—

''(A) require the real-time publication of proprietary information;

''(B) prohibit the commercial sale or licensing of real-time proprietary information; and

''(C) publicly disclose information regarding market positions, business transactions, trade secrets, or names of customers, except as provided in section 8.

''(7) NOTIFICATION, DISCLOSURES, AND OTHER REQUIREMENTS FOR COVERED ENTITIES.—A covered entity subject to the exemption under paragraph (3) shall (to the extent the Commission determines appropriate)—

''(A) notify the Commission of the intention of the covered entity to operate as a covered entity subject to the exemption under paragraph (3), which notice shall include—

''(i) the name and address of the covered entity and a person designated to receive communications from the Commission;

''(ii) the commodity categories that the covered entity intends to list or otherwise make available for trading on the covered entity in reliance on the exemption under paragraph (3);

''(iii) certifications that—

''(I) no executive officer or member of the governing board of, or any holder of a 10 percent or greater equity interest in, the covered entity is a person described in any of subparagraphs (A) through (H) of section 8a(2);

''(II) the covered entity will comply with the conditions for exemption under this subsection; and

''(III) the covered entity will notify the Commission of any material change in the information previously provided by the covered entity to the Commission under this paragraph; and

''(iv) the identity of any derivatives clearing organization to which the covered entity transmits or intends to transmit transaction data for the purpose of facilitating the clearance and settlement of transactions conducted on the covered entity subject to the exemption under paragraph (3);

''(B)(i) provide the Commission with access to the trading protocols of the covered entity and electronic access to the covered entity with respect to transactions conducted in reliance on the exemption under paragraph (3); and

''(ii) on special call by the Commission, provide to the Commission, in a form and manner and within the period specified in the special call, such information relating to the business of the covered entity as a covered entity exempt under paragraph (3), including information relating to data entry and transaction details with respect to transactions entered into in reliance on the exemption under paragraph (3), as the Commission may determine appropriate—

''(I) to enforce the provisions specified in paragraph (4);

''(II) to evaluate a systemic market event; or

''(III) to obtain information requested by a Federal financial regulatory authority to enable the authority to fulfill the regulatory or supervisory responsibilities of the authority;

''(C)(i) on receipt of any subpoena issued by or on behalf of the Commission to any foreign person that the Commission believes is conducting or has conducted transactions in reliance on the exemption under paragraph (3) on or through the covered entity relating to the transactions, promptly notify the foreign person of, and transmit to the foreign person, the subpoena in a manner that is reasonable under the circumstances, or as specified by the Commission; and

''(ii) if the Commission has reason to believe that a person has not timely complied with a subpoena issued by or on behalf of the Commission under clause (i), and the Commission in writing directs that a covered entity relying on the exemption under paragraph (3) deny or limit further transactions by the person, deny that person further trading access to the covered entity or, as applicable, limit that access of the person to the covered entity for liquidation trading only;

''(D) comply with the requirements of this subsection applicable to the covered entity and require that each participant, as a condition of trading on the covered entity in reliance on the exemption under paragraph (3), agree to comply with all applicable law;

''(E) certify to the Commission that the covered entity has a reasonable basis for believing that participants authorized to conduct transactions on the covered entity in reliance on the exemption under paragraph (3) are eligible contract participants;

''(F) maintain sufficient capital, commensurate with the risk associated with transactions; and

''(G) not represent to any person that the covered entity is registered with, or designated, recognized, licensed, or approved by the Commission.

''(8) HEARING.—A person named in a subpoena referred to in paragraph (7)(C) that believes the person is or may be adversely affected or aggrieved by action taken by the Commission under this subsection, shall have the opportunity for a prompt hearing after the Commission acts under procedures that the Commission shall establish by rule, regulation, or order.

''(9) PRIVATE REGULATORY ORGANIZATIONS.—

''(A) DELEGATION OF FUNCTIONS UNDER CORE PRINCIPLES.—A covered entity may comply with any core principle under subparagraph (B) that is applicable to the covered entity through delegation of any relevant function to—

''(i) a registered futures association under section 17; or

''(ii) another registered entity.

''(B) CORE PRINCIPLES.—The Commission may establish core principles requiring a covered entity to monitor trading to—

''(i) prevent fraud and manipulation;

''(ii) prevent price distortion and disruptions of the delivery or cash settlement process;

''(iii) ensure that the covered entity has adequate financial, operational, and managerial resources to discharge the responsibilities of the covered entity; and

''(iv) ensure that all reporting, recordkeeping, notice, and registration requirements under this subsection are discharged in a timely manner.

''(C) RESPONSIBILITY.—A covered entity that delegates a function under subparagraph (A) shall remain responsible for carrying out the function.

''(D) NONCOMPLIANCE.—If a covered entity that delegates a function under subparagraph (A) becomes aware that a delegated function is not being performed as required under this Act, the covered entity shall promptly take action to address the noncompliance.

''(E) VIOLATION OF CORE PRINCIPLES.—

''(i) IN GENERAL.—If the Commission determines, on the basis of substantial evidence, that a covered entity is violating any applicable core principle specified in subparagraph (B), the Commission shall—

''(I) notify the covered entity in writing of the determination; and

''(II) afford the covered entity an opportunity to make appropriate changes to bring the covered entity into compliance with the core principles.

''(ii) FAILURE TO MAKE CHANGES.—If, not later than 30 days after receiving a notification under clause (i)(I), a covered entity fails to make changes that, as determined by the Commission, are necessary to comply with the core principles, the Commission may take further action in accordance with this Act.

''(F) RESERVATION OF EMERGENCY AUTHORITY.—Nothing in this paragraph limits or affects the emergency powers of the Commission provided under section 8a(9).

''(10) METALS.—Notwithstanding any other provision of this subsection, an agreement, contract, or transaction in metals—

''(A) shall not be subject to this subsection (as amended by section ___05 of the Energy Policy Act of 2003); and

''(B) shall be subject to this subsection and subsection (h) (as those subsections existed on the day before the date of enactment of the Energy Policy Act of 2003).

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

SEC. ___06. PROHIBITION OF FRAUDULENT TRANSACTIONS.

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 person, directly or indirectly, in or in connection with any account, or any offer to enter into, the entry into, or the confirmation of the execution of, any agreement, contract, or transaction subject to this Act—

''(1) to cheat or defraud or attempt to cheat or defraud any person (but this paragraph does not impose on parties to transactions executed on or subject to the rules of designated contract markets or registered derivative transaction execution facilities a legal duty to provide counterparties or any other market participants with any material market information);

''(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 for any person any false record (but this paragraph does not impose on parties to transactions executed on or subject to the rules of designated contract markets or registered derivative transaction execution facilities a legal duty to provide counterparties or any other market participants with any material market information);

''(3) willfully to deceive or attempt to deceive any person by any means whatsoever (but this paragraph does not impose on parties to transactions executed on or subject to the rules of designated contract markets or registered derivative transaction execution facilities a legal duty to provide counterparties or any other market participants with any material market information); or

''(4) except as permitted in written rules of a board of trade designated as a contract market or derivatives transaction execution facility on which the agreement, contract, or transaction is traded and executed—

''(A) to bucket an order;

''(B) to fill an order by offset against 1 or more orders of another person; or

''(C) willfully and knowingly, for or on behalf of any other person and without the prior consent of the person, to become—

''(i) the buyer with respect to any selling order of the person; or

''(ii) the seller with respect to any buying order of the person.''.

SEC. ___07. FERC LIAISON.

Section 2(a)(9) of the Commodity Exchange Act (7 U.S.C. 2(a)(9)) is amended by adding at the end the following:

''(C) LIAISON WITH FEDERAL ENERGY REGULATORY COMMISSION.—The Commission shall, in cooperation with the Federal Energy Regulatory Commission, maintain a liaison between the Commission and the Federal Energy Regulatory Commission.''.

SEC. ___08. CRIMINAL AND CIVIL PENALTIES.

(a) ENFORCEMENT POWERS OF COMMISSION.—Section 6(c) of the Commodity Exchange Act (7 U.S.C. 9, 15) is amended in paragraph (3) of the tenth sentence—

(1) by inserting ''(A)'' after ''assess such person''; and

(2) by inserting after ''each such violation'' the following: '', or (B) in any case of manipulation of, or attempt to manipulate, the price of any commodity, a civil penalty of not more than the greater of $1,000,000 or triple the monetary gain to such person for each such violation,''.

(b) MANIPULATIONS AND OTHER VIOLATIONS.—Section 6(d) of the Commodity Exchange Act (7 U.S.C. 13b) is amended in the first sentence—

(1) by striking ''paragraph (a) or (b) of section 9 of this Act'' and inserting ''subsection (a), (b), or (f) of section 9''; and

(2) by striking ''said paragraph 9(a) or 9(b)'' and inserting ''subsection (a), (b), or (f) of section 9''.

(c) NONENFORCEMENT OF RULES OF GOVERNMENT OR OTHER VIOLATIONS.—Section 6b of the Commodity Exchange Act (7 U.S.C. 13a) is amended—

(1) in the first sentence—

(A) by inserting ''section 2(g)(9),'' after ''sections 5 through 5c,''; and

(B) by inserting before the period at the end the following: '', or, in any case of manipulation of, or an attempt to manipulate, the price of any commodity, a civil penalty of not more than $1,000,000 for each such violation''; and

(2) in the second sentence, by inserting before the period at the end the following: '', except that if the failure or refusal to obey or comply with the order involved any offense under section 9(f), the registered entity, director, officer, agent, or employee shall be guilty of a felony and, on conviction, shall be subject to penalties under section 9(f)''.

(d) ACTION TO ENJOIN OR RESTRAIN VIOLATIONS.—Section 6c(d) of the Commodity Exchange Act (7 U.S.C. 13a–1(d)) is amended by striking ''(d)'' and all that follows through the end of paragraph (1) and inserting the following:

''(d) CIVIL PENALTIES.—In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation—

''(1) a civil penalty in the amount of not more than the greater of $100,000 or triple the monetary gain to the person for each violation; or

''(2) in any case of manipulation of, or an attempt to manipulate, the price of any commodity, a civil penalty in the amount of not more than the greater of $1,000,000 or triple the monetary gain to the person for each violation.''.

(e) VIOLATIONS GENERALLY.—Section 9 of the Commodity Exchange Act (7 U.S.C. 13) is amended—

(1) by redesignating subsection (f) as subsection (e); and

(2) by adding at the end the following:

''(f) PRICE MANIPULATION.—It shall be a felony punishable by a fine of not more than $1,000,000 for each violation or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for any person—

''(1) to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity;

''(2) to corner or attempt to corner any such commodity;

''(3) knowingly to deliver or cause to be delivered (for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication) false or misleading or knowingly inaccurate reports concerning market information or conditions that affect or tend to affect the price of any commodity in interstate commerce; or

''(4) knowingly to violate section 4 or 4b, any of subsections (a) through (e) of subsection 4c, or section 4h, 4o(1), or 19.''.

SEC. ___09. CONFORMING AMENDMENTS.

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

(1) in subsection (d)(1), by striking ''section 5b'' and inserting ''section 5a(g), 5b,'';

(2) in subsection (e)—

(A) in paragraph (1), by striking '', 2(g), or 2(h)(3)''; and

(B) in paragraph (3), by striking ''2(h)(5)'' and inserting ''2(g)(7)'';

(3) by redesignating subsection (i) as subsection (h); and

(4) in subsection (h) (as redesignated by subparagraph (C))—

(A) in paragraph (1)—

(i) by striking ''No provision'' and inserting ''IN GENERAL.—Subject to subsection (g), no provision''; and

(ii) in subparagraph (A)—

(I) by striking ''section 2(c), 2(d), 2(e), 2(f), or 2(g) of this Act'' and inserting ''subsection (c), (d), (e), or (f)''; and

(II) by striking ''section 2(h)'' and inserting ''subsection (g)''; and

(B) in paragraph (2), by striking ''No provision'' and inserting ''IN GENERAL.—Subject to subsection (g), no provision''.

(b) Section 4i of the Commodity Exchange Act (7 U.S.C. 6i) is amended in the first sentence by inserting '', or pursuant to an exemption under section 4(c)'' after ''transaction execution facility''.

(c) Section 8a(9) of the Commodity Exchange Act (7 U.S.C. 12a(9)) is amended—

(1) by inserting ''or covered entity under section 2(g)'' after ''direct the contract market'';

(2) by striking ''on any futures contract''; and

(3) by inserting ''or covered entity under section 2(g)'' after ''given by a contract market''.

Mrs. FEINSTEIN. Madam President, once again, what we are seeking to do is close a loophole that was created in 2000 when this Congress passed the Commodity Futures Modernization Act. That act exempted just energy and metals. It was not the intention actually to do that. The Senate part of that bill did not exempt them. What happened was Enron went to the House and Enron secured an exemption of energy and metals in the House. That exemption was handled in the conference, and the Senate language was not in the bill.

The exemption was effectively created. The loophole was created. We are just trying to eliminate that loophole. We are not attacking derivatives. All we are saying is: If you do this kind of trading, you must keep a record just as anybody else does. You must be transparent. You must have an audit trail, and you are subject to any fraud or manipulation oversight by the Commodity Futures Trading Commission.

This is where it gets a little complicated. If I sell energy to you and you deliver, then that is covered by the Federal Energy Regulatory Commission. If I sell energy to you and you sell it to a third person or entity that sells it to a fourth entity that sells it to a fifth entity and then it goes into the field, those interim trades are not covered.

That is what we seek to cover because that is where the games exist. It is a rather subtle point, but it is also an important point.

I heard people say that this will stifle the market. I will tell you what has been happening out there. Without transparency and without record keeping stifles the market.

When Mr. Fortney was arrested last week for creating schemes such as Ricochet, Death Star, and Get Shorty, you don't think that stifles the market when you have other traders pleading guilty to fraud and wire fraud?

Does that not stifle the market? And does that not give the average consumer the belief that they cannot trust this marketplace as being fair and transparent? I believe it does. More fundamentally, I believe the rules that govern the marketplace should be rules to protect the average consumer, not the big boys; they can take care of themselves. But the average consumer has to have confidence in the marketplace that it is fair and that it is transparent.

I would like to correct the idea that this amendment has not gone through regular order. I moved this amendment last year to the Energy bill. Senator Gramm of Texas, who, incidentally, subsequently went to work for EnronOnline in its new life with UBS Warburg—which is fine—argued against my amendment. We tried to settle our differences. It took quite some time. We could not settle our differences on this amendment, and we did have a vote.

Another reason for the vote is there were people who believed this had not had enough committee hearing. So we had a vote, and I think we got 48 votes. The amendment went to the Agriculture Committee. The Agriculture Committee held hearings. The staff of both sides reviewed the legislation. Senator HARKIN, who was chairman, and Senator LUGAR, who was ranking member, are both cosponsors of this amendment.

The problem is, the end of the session came without a markup, so this is really the opportunity we have to place this amendment into some form of law, and so we take this opportunity.

I also wish to say that the President's working group in 1999, in their report—this was before the Commodity Futures Modernization Act of 2000—very specifically said, on page 2 of their report, that:

> An exclusion from the CEA [Commodities Exchange Act] for electronic trading systems for derivatives, provided that the systems limit participation to sophisticated counterparties trading for their own accounts and are not used to trade contracts that involve non-financial commodities with finite supplies. . . .

In other words, they are saying that commodities with finite supplies should be included in the bill, but they are recommending that those that do not have finite supplies, such as financials derivatives, not be included in the bill. Now, apparently, they are changing their position. But I want to make very clear that was the position of the ''Over-the-Counter Derivatives Markets and the Commodity Exchange Act, Report of The President's Working Group on Financial Markets'' dated November 1999. And the Senate version of the Commodity Futures Modernization Act actually did just what this working group stated.

Again, to refute the allegation that I am in some way blaming derivatives for the western energy crisis—I am not—I am blaming this loophole which allows all this secret trading, which we have seen result in fraudulent schemes, to try to close that loophole. And the way to close it is to bring the light of day to it. That is what we are trying to do.

I pointed out yesterday, because some people said, well, we need to study this more, that it has been studied more and that the ''Final Report On Price Manipulation In Western Markets, Fact-Finding Investigation Of Potential Manipulation Of Electric And Natural Gas Prices,'' which was prepared by the staff of the Federal Energy Regulatory Commission, and dated March 2003, says the following as one of their recommendations:

> Recommend that Congress consider giving direct authority to a Federal agency to ensure that electronic trading platforms for wholesale sales of electric energy and natural gas in interstate commerce are monitored—

That is what we do—

> and provide market information that is necessary for price discovery in competitive energy markets.

That is exactly what this does, as recommended by this report of the Federal Energy Regulatory Commission.

With the modification I made, metals will have the same level of oversight as exists under current law today.

Now, let me go back again to 2000. I mentioned the change that was made to accommodate Enron lobbying to the Commodity Futures Modernization Act. It also did not take long for EnronOnline and others in the energy sector to take advantage of this new freedom by trading energy derivatives absent any transparency or regulatory oversight. Thus, after the 2000 legislation—and really right away—EnronOnline began to trade energy derivatives bilaterally without being subject to proper regulatory oversight.

It should not surprise anyone that without this transparency, prices soared. In 2000, if Enron's derivatives business had been a stand-alone company, it would have been the 256th largest company in America. That year, Enron claimed it made more money from its derivatives business—$7.23 billion—than Tyson Foods made from selling chicken. That is according to author Robert Bryce, who wrote a book on Enron called ''Pipe Dreams.''

EnronOnline rapidly became the biggest platform for electronic energy trading. But unlike regulated exchanges, such as the New York Mercantile Exchange, the Chicago Mercantile Exchange, the Chicago Board of Trade, EnronOnline was not registered

with the CFTC, the Commodity Futures Trading Commission, so it set its own standards. And that is the problem. Traders and others in the energy sector came to rely on EnronOnline for pricing information. Yet the company's control over this information, and its ability to manipulate it, was large.

As this same author, Robert Bryce, describes—and let me quote—

Enron didn't just own the casino. On any given deal, Enron could be the house, the dealer, the oddsmaker, and the guy across the table you're trying to beat in diesel fuel futures, gas futures, or the California electricity market.

The Electric Power Supply Association, EPSA, has sent a letter to all Senators asking them to oppose our oversight amendment. This should not be strange to anybody because its members are exactly the same companies that are being investigated and have been investigated by FERC for wrongdoing in the western energy crisis. It is AES Corporation; it is BP Energy; it is Duke Energy; it is Mirant Energy; it is Reliant Energy; it is UBS Warburg, which purchased Enron's trading unit; and it is Williams Energy. Now, with others, they are all members of EPSA, not companies that Westerners trust very much these days in light of what we have been through.

Now, I want to just document some of this.

Let me quickly run through these again because, again, a lot of these round-trip trades were done on the Internet.

Other schemes were carried out on the Internet. Let's just go through this. Duke Energy disclosed that $1.1 billion worth of trades were round trip since 1999. Roughly two-thirds of these were done on the Intercontinental Exchange, which is an online trading platform owned by the banks, again, where there is no transparency, no net capital requirements, and no recordkeeping whatsoever. Now, this also meant that thousands of subscribers would have seen false price signals.

Why would they see false price signals? That is because of the nature of a wash or round-trip trade. Again, a wash or round-trip trade would be that I am going to sell you energy at a certain price and you are going to sell me energy at a certain price, but no energy ever changes hands; yet we both post sales. That is what a wash trade or a round-trip trade is.

A class action suit accused the El Paso Corporation of engaging in dozens of round-trip energy trades that artificially bolstered its revenues and trading volumes over the last 2 years.

CMS Energy admitted conducting wash energy trades that artificially inflated its revenue by more than $4.4 billion. These round-trip trades accounted for 80 percent of their trade in 2001. So 80 percent of this company's trades in 2001—in the heart of the energy crisis—were not trades at all. No energy ever traded hands. They just boosted their sales—artificially.

This is another facet of artificially filing false reports: reporting fictitious natural gas transactions to an industry publication. You can read it for yourself. The overwhelming figure in this is, if you look at what was done with energy and you look at California, where one year the total cost of energy was $7 billion and the next year it was $28 billion, which is a 400 percent increase, there is no way that could be legitimate. There is no way the energy need of a State could increase 400 percent in 1 year. Demand didn't increase 400 percent.

So without this type of legislation, there really is insufficient authority to investigate and prevent fraud and price manipulations since parties making the trade are not required to keep a record. What we would require them to do is keep a record. Therefore, the Commodity Futures Trading Commission, in the event of many of these interim trades, and the FERC, where energy is directly delivered as a product of a trade, has the ability to do the investigation based on records. If you don't keep records, it is very hard to prove that.

I would like to repeat that this amendment does not ban trades. This amendment does not affect financial derivatives. This amendment would only require oversight and transparency for those energy trades that are now taking place within this loophole, and it would provide oversight, as recommended in the FERC report.

We are very proud to have the support of the National Rural Electric Cooperative Association, the Derivative Study Center, the American Public Gas Association, American Public Power Association, California Municipal Utilities Association, Southern California Public Power Authority, Transmission Excess Policy Study Group, U.S. Public Interest Research Group, Consumers Union, Consumers Federation of America, Calpine, Southern California Edison, Pacific Gas and Electric, and FERC Chairman Patrick Wood.

Again, this amendment is not going to do anything to change what happened in California and the West. But it does provide the necessary authority for the CFTC and the FERC to help protect against another energy crisis.

I might say I am very suspicious of people who want to do trading in the dark. I am very suspicious when they say, oh, we are so sophisticated you cannot possibly know how this is done and you are going to stifle trade, because they don't want to keep a record of that trade, they don't want transparency, they don't want to keep an audit on trade, and they don't want any Government agency assuring there isn't fraud or manipulation. I am doubly suspicious of them, particularly because of the fraud and manipulation we now know took place.

So, please, don't tell me I am not sophisticated enough to understand. I understand plenty. I understand, when the price goes from $7 billion to $28 billion in a very short period of time, that you have to begin to look. I understand now that these arrests are occurring and the manipulations of Ricochet and Death Star and Get Shorty and wash trades are all becoming well known. I understand. The point is it is wrong. The point is, you cannot prove it is wrong if there are no records of those trades.

So what we are saying is these trades can go on, but you keep records. We give the CFTC the responsibility to set net capital requirements commensurate with risk. That is good oversight for the public and that is good oversight for anybody who is going to invest, because when net capital is not available and the house begins to collapse, as it did with Enron, the company goes bankrupt.

I think I have made my case. We have gone over this. I sent this legislation to the head of Goldman Sachs. They run an electronic exchange. I said, please, if you have problems with it, let me know. I did not hear. We have vetted it and talked over the past year and a half, 2 years, with virtually anyone who wanted to come in and talk with us about it.

Mr. President, I am absolutely determined and I am going to come back and back and back until this loophole is closed. Nobody can tell me I am not sophisticated enough to know that sunshine and records and transparency are critical to the effective functioning of a free marketplace, because I believe that just as much as I believe in the Pledge of Allegiance—and I do believe in the Pledge of Allegiance. When you allow hiding and you allow these trades to take place surreptitiously, that is when there are problems.

I am afraid I have said this over and over again, but we went through it and we saw it. We read the 3,000 pages California has sent to the FERC. This is another intrigue. Can you imagine that no State has the right today to present evidence to the FERC of fraud or manipulation?

California had to go to the Supreme Court to get that right, and then when we got that right, we were told it had to be in in 100 days. California submitted 3,000 pages within the 100 days, and it is loaded with examples of fraud and manipulation.

We know there is fraud, we know there is manipulation, and we know that was present in the western energy crisis, and all we are trying to do is bring light of day to one loophole that was in the Commodity Futures Modernization Act because a major offender lobbied for it in the laws. It was not in the Senate bill. The Senate bill originally covered this, but they lobbied in the House. It was taken out in conference, and the loophole was created.

If the past 3 years have not been evidence enough, if the arrests are not evidence enough, if we do not want a transparent marketplace, if we want people to be able to do this trading—

and we can tell you the language of some of these trades; if they knew they were being recorded, I do not think they would do it in the way they did it—if we want to allow those procedures to continue to happen, that is what a motion to table and a tabling vote will do.

I am very hopeful and I am asking my colleagues to vote nay on the motion to table and vote yea on the modified amendment which is now at the desk.

I thank the Chair, and I yield the floor. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. HAGEL). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 877, WITHDRAWN

Mr. REID. Mr. President, I ask that the Reid amendment be withdrawn.

The PRESIDING OFFICER. The Senator has that right. The amendment is withdrawn.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. COCHRAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. COCHRAN. Mr. President, the Senate is considering the amendment offered by the distinguished Senator from California, Mrs. FEINSTEIN, to the Energy bill now before the Senate. This amendment seeks to transfer, in effect, regulatory authority from the body that now has that authority, the Commodity Futures Trading Commission, to the Federal Energy Regulatory Commission.

There are several good reasons why the Senate should not adopt this amendment and force that transfer of regulatory authority. First, the Federal Energy Regulatory Commission has special responsibilities but this will give them new and different responsibilities where there is no experience, there is no body of law or regulatory decisionmaking on which to base the assumption that this kind of regulation or this regulation carried out by this Commission would be of any better character or type than that which would be exercised by the Commodity Futures Trading Commission.

The Commodity Futures Trading Commission has been operating for some time now and has actually shown that it is capable of taking action to prevent abuses and illegal activities that can occur in these trading markets and in the energy trading area as well.

The Feinstein amendment would give the Federal Energy Regulatory Commission authority over areas that are currently regulated by the Commodity Futures Trading Commission and would require, in addition, regulation of energy derivatives. These are complex instruments. They are used to transfer risks among traders and they are important tools in the energy markets today.

Congress considered in the past, when it took up the Commodity Futures Modernization Act of 2000 several years ago, regulating these instruments. But it decided not to do so. The Federal Energy Regulatory Commission has no current responsibility in regulating derivatives.

It seems to me that when you look to see who has been carrying out duties now complained about by some Senator, you can find that the Commodity Futures Trading Commission has a record of taking legal action against companies such as Enron, El Paso, and others regarding energy market problems. The Commodity Futures Trading Commission has recovered millions of dollars in fines from these companies, and it has several ongoing investigations in this area, and more charges are possible.

To transfer now the regulatory authority to a different commission and purport to take away the authority from the Commodity Futures Trading Commission is going to create disruption in ongoing investigations and actions that are taken to discipline this market and make it more predictable and trustworthy.

The Senator from California has suggested that the amendment she has offered is needed to prevent wash trades. These are trades that are fictitious. A company will buy a commodity and then sell it creating the impression that this is a legitimate trade. It establishes a price. It establishes volume. But it is fictitious trading. It shouldn't have that effect but it does.

The Commodity Futures Trading Commission has taken action to discourage that activity and to punish that activity. It has specific authority to do that under the Commodity Exchange Act. The Commodity Futures Trading Commission has brought several actions under that authority in the last several years. Its authority to take this kind of action has been upheld by two decisions from U.S. appeals courts.

Just this year, the Commodity Futures Trading Commission has recovered tens of millions of dollars from merchant energy traders for so-called wash trades and false trades.

Another claim that is made in support of the amendment of the Senator from California is that because the exempt commercial markets are not regulated under the Commodity Exchange Act that they have no regulatory oversight. That is just not true. Those markets are required by statute today to have electronic audit trails. They are required by statute to keep records for 5 years. They are required to be subject to the Commodity Futures Trading Commission's antifraud and antimanipulation authorities. They are subject to special call examinations by the Commodity Futures Trading Commission. To suggest there are no regulatory requirements on those exempt commercial markets is just not true.

It is also claimed that the Feinstein amendment would impose capital requirements on exempt commercial markets. It would require capital requirements. That doesn't necessarily solve anything. Capital requirements aren't imposed now on the Chicago Mercantile Exchange, or the New York Mercantile Exchange, or the Chicago Board of Trade. They are not viewed as necessary. Those markets have been functioning without capital requirements. To now impose them on exempt commercial markets is inappropriate and unnecessary.

Capital requirements or other exempt commercial markets would be difficult to establish. They would change on a regular basis—weekly probably—because of new contracts being offered, and change financial positions of participants. Capital requirements would impose significant costs and there are no identifiable benefits.

The amendment would also impose large trader reporting on exempt commercial markets. Large trader reporting works on retail futures exchanges with standardized contracts but would not work on exempt commercial markets. They don't have the same type of standardization. Large trader reporting on exempt commercial markets could actually lead to misleading information being provided to the public. Large trader reporting is used for market surveillance in retail futures markets.

The Commodity Futures Trading Commission's statutory authority for exempt commercial markets is after the fact, antifraud and antimanipulation enforcement, and is inconsistent with a large trader reporting scheme.

In closing, the Senate has to take into account the fact that the leading figures in our Government who are responsible for enforcement and managing the departments that understand financial markets and the impact they have on our economy and on our place in the world economy are urging that the Senate not adopt the Feinstein amendment.

This is a letter which was put on every Senator's desk in the last several minutes signed by John W. Snow, Secretary of the Department of the Treasury, Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System, William H. Donaldson, Chairman, U.S. Securities and Exchange Commission, and James E. Newsome, Chairman of the Commodity Futures Trading Commission.

With the permission of the Chair, I will read the letter.

It is addressed to Senator CRAPO of Idaho and Senator MILLER of Georgia.

Thank you for your letter of June 10, 2003, requesting the views of the President's Working Group on Financial Markets [PWG] on proposed Amendment No. 876—

That is the Feinstein amendment—

to S. 14, the pending energy bill.

As this amendment is similar to a proposed amendment on which you sought the views of the PWG last year, we reassert the positions expressed in the PWG's response dated September 18, 2002, a copy of which is enclosed. The proposed amendment could have significant unintended consequences for an extremely important risk management market—serving businesses, financial institutions, and investors throughout the U.S. economy. For that reason, we believe that adoption of this amendment is ill-advised.

We would also point out that, since we wrote that letter last year, various federal agencies have initiated actions against wrongdoing in the energy markets. As you note, the CFTC has brought formal actions against Enron, Dynegy, and El Paso for market manipulation, wash (or roundtrip) trades, false reporting of prices, and operation of illegal markets. The Securities and Exchange Commission, the Federal Energy Regulatory Commission, and the Department of Justice have also initiated formal actions in the energy sector. Some of these actions have already resulted in substantial monetary penalties and other sanctions. These initial actions alone make clear that wrongdoing in the energy markets are fully subject to the existing enforcement authority of federal regulators.

The Commodity Futures Modernization Act of 2000 brought important legal certainty to the risk management marketplace. Businesses, financial institutions, and investors throughout the economy rely upon derivatives to protect themselves from market volatility triggered by unexpected economic events. This ability to manage risks makes the economy more resilient and its importance cannot be underestimated. In our judgment, the ability of private counterpart surveillance to effectively regulate these markets can be undermined by inappropriate extensions of government regulation.

It is clear from the letter that the Senate has received no response to inquiries from Senator CRAPO and Senator MILLER clearly explaining the dangers in adopting the Feinstein amendment.

At the appropriate time it will be our intention to move to table the Feinstein amendment and ask for the yeas and nays at that time. I hope Senators will carefully review the information we now have available on each Senator's desk and vote to table the Feinstein amendment.

Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mrs. DOLE). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. FRIST. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. FRIST. Madam President, I ask unanimous consent that the vote in relation to the Feinstein amendment No. 876 occur at 3:15 today, with no amendments in order to the amendment prior to the vote.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Madam President, it is my understanding that would be a motion to table.

Mr. FRIST. That is correct.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

EXECUTIVE SESSION

NOMINATION OF J. RONNIE GREER, OF TENNESSEE, TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The senior assistant bill clerk read the nomination of J. Ronnie Greer, of Tennessee, to be United States District Judge for the Eastern District of Tennessee.

Mr. FRIST. Madam President, in a few moments, I believe at 2:15, the vote for J. Ronnie Greer's nomination as a United States District Court Judge for the Eastern District of Tennessee will take place.

As we come to the final few moments before that vote, I want to express my strong support for a very good friend over the years, Ronnie Greer.

People who come from the mountains of northeast Tennessee are known in our State for certain qualities. They are the qualities of loyalty, of steadfastness, of a can-do spirit. This individual, who we will be voting on in a few minutes, really personifies that tradition. He is a highly accomplished public servant who has served as an attorney in Tennessee's judicial system with great distinction for more than 20 years. His academic career speaks for itself—he graduated at the top of his class at the University of Tennessee Law School and was invited to be on Law Review. Since starting his own law office in Greeneville, he has represented numerous clients on a wide range of issues, and he has considerable experience before the Federal courts. Recognizing the need to help his fellow man, he has not hesitated to accept the appointments of indigent clients, representing them in both the District Court and the Sixth Circuit Court of Appeals.

Ronnie has also had a distinguished career in politics and public service outside of his law practice. He was a State Senator in Tennessee's General Assembly for nine years, ably serving the people of District One. He served on both the Judiciary Committee and as Chairman of the Environment, Conservation and Tourism Committee. Ronnie also served as a Special Assistant in then-Governor LAMAR ALEXANDER's first term, forming a friendship and a bond that continues to this day.

You can't demand respect from the people of northeast Tennessee, you have to earn it, and Ronnie has without question. He is known for his sense of fair play and his compassion for others. With his easy-going, thoughtful manner, yet quick mind and keen legal ability, he has the temperament and judgement required for the Federal bench. For the last nineteen years, Judge Thomas Hull has served as District Judge in Tennessee's Eastern District, and his distinguished career will long be remembered. While Judge Hull leaves big shoes to fill, I am confident Ronnie is up to the task.

Mr. President, Ronnie Greer's dedication to the citizens of our State, his love of the law, and his desire to serve his country make him an ideal choice to serve as a U.S. District Judge. He has my highest recommendation and unqualified support, and I am delighted to urge my colleagues to vote for his confirmation today.

Mr. ALEXANDER. Madam President, within a few minutes, we will be voting on the President's nomination of J. Ronnie Greer, of Greeneville, TN, to be a Federal District Judge for the Eastern District of Tennessee. I want to just say a word about that.

The President has made a superb nomination. Ronnie Greer is a distinguished lawyer. He knows the people of east Tennessee. He has earned our respect. I am delighted the Senate has moved so expeditiously to consider this exceptional nominee.

I had the privilege, as Governor, of appointing nearly 50 men and women as judges, and I know how important it can be. What I always looked for was intelligence and good character; someone who knew and understood the people; and someone who would be courteous to the men and women to come before the judge once the judge assumes the bench. In this case, it is a lifetime position, and it is even more important that the judge have those qualities.

Ronnie Greer has all those qualities. I have known him since he was student body president at East Tennessee State University. He was a champion debater. That was some 30 years ago. I knew then he would amount to something special, and he already has.

He has served his community in many ways. He has served his political party, the Republican party, in many important ways. He has been a State senator from his part of upper east Tennessee. He has been active on issues that have to do with solid waste and the environment. He has been chairman of his local committee.

I think one of the things that most strongly recommends Ronnie Greer is he takes this most important position in what we call in upper east Tennessee having been a trial judge. He will have lots of people before him, litigants before him trying cases, making decisions on many different kinds of things. He has actually practiced law in the grand manner. He has been the kind of lawyer we used to see all over the country, where a single lawyer