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A CITIZEN'S CONCERNS IN THE JURISDICTIONAL DEBATE

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Washington, DC 20549**

The views expressed herein are those of Commissioner Fleischman and do not represent those of the Commission, other Commissioners, or the staff.

My thanks for the opportunity to participate in this program are owed to Mahlon Frankhauser, chairman of the sponsoring Committee on Futures Regulation, and to John Notz, moderator of the program. My credentials to justify your attention here are my longtime membership (beginning in 1980) and sometime participation (most recently in 1988) in the Committee on Futures Regulation.

I requested the opportunity to speak this morning because I am very concerned that fundamental issues have been omitted from the ongoing debate over stock index futures jurisdiction and stock index futures margin authority. The issues that I think demand attention are not securities market or SEC-oriented issues and are not futures market or CFTC-directed issues; rather, they are issues of federal regulatory market structure.

Because they are issues of structure, basic to decisions on allocation of regulatory authority without reference to the current debate, and because they involve the standards by which performance of regulatory responsibility is ultimately assessed, these issues should be doubly meaningful to this audience. First of all, you are citizens of these United States personally affected by allocation of federal regulatory authority, and, second, you are lawyers responding to the impact on your clients (who are citizens, too) of the federal regulatory agencies' performance of their respective responsibilities.

In all this, of course, I speak for myself. My views, as you know, are not the views of the Securities and Exchange Commission, of any of my colleagues on the Commission, or of the Commission's staff. I speak solely as one citizen, and lawyer, to others.

It has been a strange year, 1989-90. It has been a year of hearings, of shrill voices, of lobbying, of legislative maneuvering, and of squabbling over jurisdiction. One may assume, as I do, that the Secretary of the Treasury's policy motivations are of the highest

and most praiseworthy, or one may arrogate to me and to others at the SEC far less noble motives; that really makes no difference since now, as is so often the case in human affairs, the advocates on all sides have become convinced by their own insight and eloquence and have become wedded to the success of their own cause. So I invite you to step back for a moment and to assess the matters at issue from the point of view of public expectation: what we all, as citizens, expect from our federal government.

- We expect -- we have a right to expect -- federal regulatory agencies (departments, bureaus, commissions, whatever) to be fully competent in the performance of their allocated regulatory functions.
- We expect -- we have a right to expect -- federal regulatory agencies to have a solid basis for the regulatory programs they initiate and the regulatory policies they pursue.
- We expect -- we have a right to expect -- federal regulatory agencies whose jurisdiction intersects or overlaps to coordinate their activities and to cooperate in securing the general welfare, which is their common goal.
- We expect -- we have a right to expect -- that federal regulatory agencies will always remember that they serve us, that we the public do not exist to be regulated, and that ours is a federal government of limited powers with the huge reservoir of authority that keeps this nation free reserved through the states to the people themselves.

Those expectations -- they are mine; I believe they are yours as well -- prompt me to raise three issues (and to state my conclusions on all three issues) that are fundamental, but peculiarly unspoken, in the present debate.

First: the crucial standard for any federal market-regulatory agency, second only to its integrity, is thorough knowledge and the familiarity born of experience with the markets

committed to its supervision. Until pressed by anticipation of jurisdictional transfer, the SEC held back from asserting expertise in the functioning of the index futures markets; its understanding of those markets, despite recent strides, remains by no means comparable to the understanding that the CFTC has developed over a decade of regulation of the financial futures markets. Markets as important to the interests of our national economy as are the index futures markets deserve federal regulatory oversight possessed of the most sophisticated knowledge and experience that the federal government can provide. The federal reservoir of that knowledge and experience with respect to the index futures markets lies in the CFTC, and the duplication or replacement of that reservoir, in response to a jurisdictional excision, could only be effected at the expense of the markets themselves.

Second: marketplace activity is economics in action. Because most financial regulators are trained as bankers or lawyers, the impulse toward change in market-regulatory policy is all too often a regulator's self-convinced deduction as to what would be beneficial for the regulated market. But deduction, even with the best of motives, is no substitute in market regulation for economic analysis based on empirical evidence; and the empirical evidence thus far presented in academic and regulatory studies of securities and related futures markets, while suggesting specific market weaknesses, clearly contradicts assertions that futures trading undermines a related securities market. In the absence of substantial economic foundations anchored in the functioning of the regulated markets, the change in market-regulatory policy and structure proposed through transfer of index futures regulation and related margin authority to the SEC would only damage the utility of the relevant markets and the economic interests of the respective market participants.

Third: the aggregation of jurisdiction in an independent regulatory agency is a fearsome matter. Continuous formal (and informal) policy coordination among market-regulatory agencies assures that the best of complementary regulatory expertise is reflected

in regulatory policy decisions. If we've reached the point where thoroughgoing SEC/CFTC coordination is no longer possible, then we the public are entitled to have both agencies yoked together within the Department of the Treasury; in that manner not only would policy coordination be enforced but, perhaps even more important, the scope for overreaching inherent in the combined "independent" regulatory function would be limited by the authority of the President, the breadth of view of the Secretary and the ultimate discipline of the ballot box. By contrast, the addition of new jurisdictional areas and authority to the SEC would concentrate yet more discretion in a "fourth branch" agency whose independence is easily susceptible of use to avoid accountability to the President and the executive branch, to the Congress, to the lower federal courts, and to the regulated and the protected communities.

I, for one, don't believe that shuffling the deck chairs or reassigning the stewards is the solution to market regulatory problems. I don't believe that the next market break can be prevented or even retarded by allocating margin-setting authority or direct jurisdiction over index futures away from the agency that best understands the risk-transfer markets generally and the index futures markets in particular. And I don't believe that members of the public participating in the securities and futures markets, concerned as they are about instantaneous information transfer, institutionalization of the markets, internationalization, inflation, the possibility of credit tightening, and now the crisis in the Middle East, will take any particular comfort from the transfer of jurisdictional "turf" between impersonal and far-away federal regulatory agencies.

But I do believe, strongly, that the public interest particularly embraces the principles of federal regulatory structure that underlie the assignment of jurisdictional "turf". And I do believe that the pursuit of regulatory experience and understanding, the demand for hard evidence to justify change of regulatory policy, and the fear of excess authority in regulatory

agencies insulated from the process of public accountability -- which I hold key among such principles -- lead compellingly to denying to the Securities and Exchange Commission, on which I am privileged to serve, the additional authority over index futures markets and over index futures margins that the Commission has been so avidly seeking.