

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN STOCK EXCHANGE, INC. :
and AMEX COMMODITIES CLEARING :
CORPORATION, :

Plaintiffs, :

-against- :

COMPLAINT

THE COMMODITY FUTURES TRADING :
COMMISSION, PHILIP McBRIDE JOHNSON, :
Chairman of the Commodity Futures :
Trading Commission, JAMES M. STONE, :
READ P. DUNN, JR., and DAVID G. :
GARTNER, Commissioners of the :
Commodity Futures Trading Commission, :

81 Civ. 5665

Defendants. :

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Plaintiffs, American Stock Exchange, Inc. and Amex
Commodities Clearing Corporation, by their attorneys, Lord,
Day & Lord and Paul, Weiss, Rifkind, Wharton & Garrison,
complaining of defendants allege as follows:

NATURE OF THE ACTION AND JURISDICTION

1. This is a challenge to agency action by the
Commodity Futures Trading Commission, which effectively
excludes Plaintiff American Stock Exchange, Inc. and its
subsidiary from the promising field of trading commodity
options, while permitting more favored exchanges to enter
this field. The purpose of this action is to open the field

of commodity options trading to all qualified exchanges promptly, and on equal terms.

2. This is an action for a declaratory judgment under the provisions of 28 U.S.C., Sections 2201 and 2202, to declare null and void certain new regulations concerning domestic exchange-traded commodity options, adopted by defendants on September 8, 1981 to become effective thirty days after publication in the Federal Register and for a preliminary injunction and permanent injunction restraining defendants and their agents and employees from implementing and/or enforcing said regulations. A copy of the new regulations is annexed hereto as Exhibit A.*

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1337, 2201, 2202, 7 U.S.C. § 3 and 5 U.S.C. § 701-706. Venue is established under the provisions of 28 U.S.C. § 1391(e).

4. This action arises under the provisions of the Commodity Exchange Act as amended ("the Act"), the Administrative Procedure Act and the Constitution of the United States, as hereafter more fully appears.

THE PARTIES

5. Plaintiff, American Stock Exchange, Inc. ("Amex"), is a not-for-profit corporation organized and existing under the laws of the State of New York, with its principal place

* The new regulations as adopted contain certain amendments not material to the claims herein and are not set forth in the text of Exhibit A. The new regulations as amended have not yet been published and will be submitted to the Court following their publication.

of business at 86 Trinity Place, New York, New York where it maintains a market for the trading of securities.

6. Plaintiff, Amex Commodities Clearing Corporation ("ACCC")*, is a wholly-owned subsidiary of plaintiff Amex, organized and existing under the laws of New York with its principal place of business at 86 Trinity Place, New York, New York. Subject to regulatory approval the plaintiffs plan to conduct a market for the trading of options on physical commodities on ACCC.

7. Defendant, Commodity Futures Trading Commission ("the Commission"), and defendants Johnson, Stone, Dunn and Gartner are a federal regulatory agency and the Commissioners thereof, which was created pursuant to the Commodity Futures Trading Commission Act of 1974 ("1974 Act") and reside and transact business at 2033 K Street, N.W., Washington, D.C. Pursuant to the 1974 Act the Commission is authorized to regulate the trading of commodity futures contracts and commodity options, among other things.

* There is now pending before the Secretary of State of the State of New York an application to change the name of this plaintiff from Amex Commodities Clearing Corporation to Amex Commodities Corporation.

ALLEGATIONS COMMON TO
ALL CAUSES OF ACTION

8. On September 30, 1978, Congress enacted the Futures Trading Act of 1978 ("1978 Act"), which became effective October 1, 1978.

9. The 1978 Act inter alia added Section 4c(c) (7 U.S.C. § 6c(c)) to the Act which created a ban on commodity option transactions involving those commodities which first became subject to regulation under the Act in 1974.

10. Section 4c(c) provides that the options ban is to remain in effect until "(1) the Commission transmits to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry documentation of its ability to regulate successfully such transactions, including a copy of the Commission's proposed rules and regulations, and (2) the expiration of thirty calendar days of continuous session of Congress after the date of such transmittal."

11. In promulgating any rule or regulation the Commission is required by Section 15 of the Act to "* * * take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anti-competitive means of achieving the objectives of this chapter * * * in issuing any order or adopting any Commission rule or regulation * * *." (7 U.S.C. § 19)

12. On the basis of the authority contained in § 4c(c) the Commission proposed regulations relating to domestic exchange-traded commodity options for a pilot program not to exceed three years which were published in the Federal Register on June 29, 1981 (Vol. 46, No. 124, pp. 33293 et. seq.).

13. There are two principal methods of trading commodities: (1) Traders on a futures exchange may enter into contracts in a form prescribed by the futures exchange, to buy or sell a commodity for future delivery; or (2) traders may simply buy or sell, or contract to buy or sell, physical commodities. These methods are known as the trading of "futures" and "physicals", respectively. Both methods are suitable for options trading. Indeed, as more fully appears below, options on physicals offer certain advantages over options on futures from the public's point of view.

14. The proposed regulations would establish a pilot program restricted to trading of commodity options involving contracts for future delivery. The proposed regulations would not permit exchange-traded options on physical commodities. The proposed regulations would impose the additional limitation that options trading may occur only on exchanges which already have markets in the underlying futures contracts. The Commission invited public comment on the proposed regulations.

15. On August 12, 1981 plaintiff Amex submitted detailed written comments on the proposed regulations. A copy of such comments is annexed hereto as Exhibit B.

16. The comments evidenced plaintiffs' desire and ability to establish a market for trading of options based on physical delivery of the underlying commodity. The comments established that the Amex's desire to create such a market was a long-standing one. As early as 1976 the Amex has developed a detailed proposal for establishing an associated commodities exchange to trade options on gold and silver bullion which proposal was communicated to the Commission and its staff in a series of meetings and documents. Moreover, Amex and its associated commodities exchange had jointly submitted comments in May of 1977 on the Commission's then proposed regulations on commodity options transactions. Because of the failure of the Commission to establish a regulatory framework with respect to options on physical commodities, the proposal could not be implemented.

17. Following publication of the proposed regulations in the Federal Register the Board of Governors of plaintiff Amex on July 9, 1981 approved in principle the preparation of an application to be filed with the Commission

proposing a program for trading options on gold and silver bullion.

18. As demonstrated in plaintiffs' detailed comments, options on physicals would be preferable to options on futures contracts for both economic and regulatory reasons. The comments demonstrated that the public would prefer trading options on physicals because of their relative simplicity and similarity to the trading of stock options. The comments demonstrated that the Amex would be in an especially strong position to oversee the trading of options on physicals because of its experience in connection with operating a market for stock options and providing regulatory and other services with respect to commodities trading.

19. The comments also demonstrated that restricting participants in the pilot program to only those exchanges which already have markets in the underlying futures contracts would give those participating exchanges an overwhelming competitive advantage virtually equivalent to an exclusive franchise for a particular commodity option and may even have the effect of impairing the ability of other exchanges later to implement trading in different but economically related options.

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20. On September 8, 1981 the Commission adopted their new regulations relating to domestic exchange-traded commodity options and directed that they be published in the Federal Register and transmitted to Congress. These regulations are similar to those published in the Federal Register on June 29, 1981 in that the pilot program is restricted to trading of commodity options involving contracts for future delivery and limits participants to those exchanges which already have markets in the underlying futures contracts. At the meeting of September 8, 1981, Commissioner Stone proposed to adopt regulations which would permit trading of options on physical commodities consistent with plaintiffs' proposals to the Commission. There was no second to this proposal so it was not further considered. Commissioner Dunn proposed and the Commission approved a resolution directing the staff to draft regulations concerning trading of options on physical commodities as proposed by plaintiffs which, if approved by the Commission, would subsequently be published in the Federal Register for public comment, followed by possible adoption months in the future. The Commission directed, however, that the pilot program which excluded trading of options on physical commodities should

go forward without delay.

21. The adoption of these new regulations was an arbitrary and capricious action of and an abuse of discretion by the Commission.

22. These new regulations will permit certain markets to sell options on commodity futures contracts while denying plaintiffs an opportunity to sell options on physical commodities, a competing product. No valid regulatory purpose is served by limiting the pilot program to the trading of commodity options involving contracts for future delivery as opposed to options on physical commodities.

23. The inclusion of options on physical commodities in the pilot program would not result in any significant delay in the implementation of the program.

24. Implementation of these prohibitive and restrictive regulations as adopted by the Commission will directly, substantially and irreparably injure plaintiffs by depriving them of the valuable business opportunity to (1) trade options on physical commodities and (2) participate in the pilot program.

25. The adoption of the Commission's regulations constitutes final agency action. The plaintiffs have exhausted their administrative remedies by responding to the

Commission's request for comments on the proposed regulations as originally published in the Federal Register on June 29, 1981. Plaintiffs have no other remedy in a court of law.

26. As such, this action involves an actual and substantial controversy within the terms of the Federal Declaratory Judgment Act. 28 U.S.C. § 2201.

AS AND FOR A FIRST
CAUSE OF ACTION

27. Plaintiffs repeat and reallege with the same force and effect as if fully set forth herein paragraphs 1 through 26 of the Complaint.

28. The adoption of these new regulations by the Commission was arbitrary, capricious, and an abuse of discretion, contrary to the best interests of the public, and not in accordance with the intent of Congress thereby constituting an act in excess of the Commission's statutory authority, all as more fully set forth in Exhibit B annexed hereto and made a part hereof.

29. Plaintiffs have no adequate remedy at law.

AS AND FOR A SECOND
CAUSE OF ACTION

30. Plaintiffs repeat and reallege as if fully

set forth herein paragraphs 1 through 26 of the Complaint.

31. The new regulations are clearly anticompetitive and in direct contravention of Section 15 of the Act (7 U.S.C. § 19) which requires this agency in adopting any rule or regulation to endeavor to take the least anti-competitive means all as more fully set forth in Exhibit B, thereby constituting an act in excess of the Commission's statutory authority.

32. Plaintiffs have no adequate remedy at law.

AS AND FOR A THIRD
CAUSE OF ACTION

33. Plaintiffs repeat and reallege as if fully set forth herein paragraphs 1 through 26 of the Complaint.

34. The due process clause of the Fifth Amendment of the United States Constitution prohibits the deprivation of life, liberty, or property without due process of law.

35. The adoption of these new regulations by the Commission which will permit certain markets to sell options on commodity futures contracts while denying plaintiffs the opportunity to sell options on physical commodities, a competing product, was arbitrary, capricious, an abuse of discretion and not in accordance with the intent of Congress

thereby constituting a wrongful deprivation of property without due process of law and denies to plaintiffs the equal protection of the laws in violation of the Fifth Amendment to the United States Constitution.

36. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs American Stock Exchange, Inc. and Amex Commodities Clearing Corporation demand the following relief:

1. Judgment declaring that the adoption of these new regulations relating to domestic exchange-traded commodity options was arbitrary, capricious, an abuse of discretion, beyond the scope of authority of the Commodity Futures Trading Commission and thereby null and void.

2. A preliminary and permanent injunction preventing and restraining defendants and their agents and employees from implementing or enforcing these new regulations relating to domestic exchange-traded commodity options.

3. Such other and further relief as to this Court

may seem just and proper together with the costs of this action.

Dated: New York, New York
September 11, 1981

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