INFORMATION MEMORANDUM

April 29, 1982

TO: Chairman Shad
Commissioner Loomis
Commissioner Evans
Commissioner Thomas
Commissioner Longstreth

FROM: Office of the General Counsel

SUBJECT: Board of Trade of the City of Chicago v. SEC, No. 81-1660

Yesterday we received the attached undated concurring opinion by Judge Campbell in the above-captioned case, which was decided on March 24, 1982. As you may recall, the decision sets aside an order of the Commission approving a proposal by the CBOE to trade put and call options on GNMA securities. The concurring opinion expresses the view that the matter should have been resolved by the agencies rather than submitted to litigation.

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CAMPBELL, Senior District Judge, concurring.

As noted by Judge Cudahy in his opinion, I stated at oral argument that I did not appreciate seeing two federal agencies expend their time and resources fighting a jurisdictional dispute in court. I believe their efforts would be more wisely spent in utilizing their expertise to reach a solution which they would jointly recommend to Congress. Much like cases in which two labor unions fight a jurisdictional dispute, I believe the situation imposed on the Courts by the SEC's headstrong approval of GNMA options trading represents inexcusable intransigence and misguided priorities. (The SEC could at least have waited for the memorandum on jurisdiction due from the CFTC.) Apparently my comments were heeded because subsequently the agencies reached an agreement which will result in the submission of certain proposed legislation to Congress. This course could and should have been pursued at the inception of this controversy and the courts ignored.

However, the agencies initially chose to "dig in" and litigate the issue. They presented this Court with a task of statutory interpretation which presents the complexity of the "Gordian Knot" and which, once having been submitted, must be resolved by the Court. Not only are we expected to become expert in securities and commodities, master a complex mass of regulatory legislation and historical development, but we must also discern Congressional intent and apply it to a market of

financial instruments which did not exist at the time the relevant legislation was enacted. The difficulty of the task would not disturb me if I did not perceive our role in this matter as inappropriate. The proper authority to resolve this matter is, of course, Congress. The fact that Chief Judge Cummings and Judge Cudahy were able to fashion coherent and expert solutions to the problem is not due to the suitability of the task to judicial resolution, but to the individual brilliance and dedication of those men. As is apparent from my vote, I find Chief Judge Cummings' approach more persuasive. Although it is a close and difficult issue, I do not intend by this concurring opinion to qualify in any way my adherence to it. Among other things, I note that Judge Cudahy attaches some weight to "practical considerations" such as the belated compromise of the agencies and the enforcement capabilities of the CFTC. If I were a legislator these considerations might be paramount, but as a judge faced with an issue of statutory interpretation I am restricted to a more limited ambit of considerations. As noted in footnote 8 of the majority opinion, it is clear that the agencies cannot, through a bilateral agreement, alter the jurisdictional limitations set by Congress. Additionally, the issue of the viability of the CFTC as a regulatory body was never raised in this proceeding, and even if it were, this Court has neither the resources nor the authority to address it.

While the agencies did reach an agreement, that compromise

did not eliminate the necessity of this Court resolving the jurisdictional issue. This could have been done by agreeing to stay further action on the GNMA options market until Congress enacted clarifying legislation.

As I have made clear, I believe this dispute should be resolved by Congress and, in the exercise of sound judgment, should never have been brought to this Court. If Congress now chooses to resolve the matter differently it will not necessarily mean that we have erred but that considerations alien to a statutory construction analysis prevailed. However, as the situation stands now, we are relegated the task of unravelling this "Gordian Knot"; Congress can simply cut it.

I have written this concurring opinion not to chastise the parties in this suit, but to highlight an aspect of this case that I believe is important. I would hope that in the future, government agencies would exercise their judgment and discretion to work to resolve their disputes quickly, efficiently, and in the proper forum. Their paramount concern should be the public interest and not their own aggrandizement or the financial interest of private parties.