94-6197

United States Court of Appeals

for the

Second Circuit

COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

— against —

WILLIAM C. DUNN and DELTA CONSULTANTS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE FOREIGN EXCHANGE COMMITTEE AND THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICI CURIAE*

RICHARD H. KLAPPER
SULLIVAN & CROMWELL
Attorneys for The Foreign Exchange Committee and the New York Clearing House Association, Amici Curiae
125 Broad Street
New York, New York 10004
(212) 558-4000

KENNETH M. RAISLER
TIMOTHY J. HELWICK
JOHN T. CORCORAN
Of Counsel

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v.

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BRIEF OF THE FOREIGN EXCHANGE COMMITTEE AND THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICI CURIAE*

Interests of *Amici Curiae*

The Foreign Exchange Committee (the "Forex Committee") and the New York Clearing House Association (the "Clearing House") (collectively, the "Industry Associations") are industry associations that represent many of the most significant participants in foreign exchange forwards and options trading in the United States.

Formed in 1978 under the sponsorship of the Federal Reserve Bank of New York, the Forex Committee includes representatives of major domestic and foreign commercial

and investment banks and foreign exchange brokers.[1] The Clearing House is an unincorporated association of eleven leading commercial banks in the City of New York,[2] a majority of which are active in foreign exchange trading.

The institutions represented by the Industry Associations have been trading foreign exchange on the over-the-counter ("OTC") foreign currency forwards and options markets[3] in

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[1] The members of the Forex Committee are The Chase Manhattan Bank, N.A., Republic National Bank of New York, Bankers Trust, The Bank of New York, Chemical Bank, Citibank, N.A., Morgan Guaranty Trust Co., PNC Banks, First Chicago Trading Consultants, The Bank of Boston, First Banks N.A., Manufacturers & Traders Bank, Bank of America, Paribas Corporation, Midland Bank, Barclays Bank PLC, the Bank of Tokyo, Ltd., Deutsche Bank NY, Royal Bank of Canada, Credit Commercial de France NY, The Fuji Bank, Ltd., Swiss Bank House, GiroCredit Bank, Standard & Chartered, Goldman, Sachs & Co., Morgan Stanley & Co., Inc., Lehman Brothers, Lasser Marshall (broker), Tullett & Tokyo Forex (broker), Banco Espanol de Credito.

[2] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

[3] The OTC markets are separate and distinct from commodity exchanges designated by the CFTC for exchange trading of foreign currency futures and options. In the OTC markets, foreign currency transactions are individually-negotiated, (continued...)

the United States and around the world for years with the understanding that their activity was not regulated by the United States Commodity Exchange Act (the "CEA"). A sudden and radical change in or reversal of the regulatory framework for such trading would impose tremendous regulatory and transactional costs on the OTC foreign exchange markets, create significant uncertainty over the enforceability of contracts, and possibly drive these markets out of the United States while also disadvantaging traders in this country competing in the global markets.

Because this appeal raises the basic issue of the jurisdiction of the Commodity Futures Trading Commission ("CFTC") to regulate certain foreign exchange forward and option transactions under the CEA, the Industry Associations are vitally interested in the outcome of this appeal.

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[3](...continued)
bilateral agreements, in contrast to the non-negotiable contracts that are traded on designated exchanges—in which the only variables are the price and timing of the trade.

Options are the right, but not the obligation, to buy or sell a specified amount of foreign currency at a specified price. Forwards are agreements to deliver a currency at a specified future date. By using the term "forward" we do not intend to conclude that the transactions at issue are forwards rather than futures. Because the term "forward" is used in the OTC market and in data sources concerning the market, it is used here rather than the term "futures." Cash forwards historically have been excluded from CEA coverage. *See* 7 U.S.C. § 2.

Background

1. The Foreign Exchange Markets

The OTC foreign exchange forward and option markets are highly evolved, sophisticated and very active. Trading is conducted twenty-four hours a day, with the trading day starting in the Far East and ending in the United States, and with exchange-rate quotations available worldwide on computer screens and personal telephone pagers. These OTC transactions are not conducted on organized exchanges. Most trading is conducted over the telephone directly with dealers or through brokers. These markets are sensitive to political and financial developments around the world and around the clock.

In addition to commercial and investment banks, the most significant participants in the OTC currency markets are foreign exchange brokerage companies, corporations, money managers (including pension and mutual fund managers), cash managers, insurance companies, governments, and central banks. Indeed, governments and businesses have historically relied upon the OTC currency markets to serve a number of their fiscal and commercial needs.

For example, the Federal Reserve Bank of New York (on behalf of the United States and foreign central banks), foreign central banks and foreign governments intervene in the OTC markets in an effort to implement their policies with respect to their national currencies.

The importance of foreign exchange to the United States economy is considerable. United States businesses as well as financial institutions depend on active trading in, and the orderly function of, the foreign exchange markets. These

OTC markets provide businesses with access to international markets for goods and services by providing the foreign currency necessary for transactions worldwide.

These liquid markets also assist international businesses faced with the vagaries of global interest rate and currency volatility by providing a means of hedging against the risk of an adverse exchange-rate movement. OTC foreign currency forward and option contracts are commonly used to hedge inventories or accounts receivable or payable denominated in a particular currency. Such contracts allow participants to shift the risk of an adverse exchange-rate movement to a counterparty willing to accept that risk and concurrent potential investment return.

The global significance of these markets and the full scope of activity in this country is evident from a study conducted by the Bank for International Settlements ("BIS") in Basle, Switzerland. According to the BIS, the average daily turnover in foreign currency forwards in twenty-six countries was $58 billion in April 1992.[4] The same study showed that the average daily turnover of currency options was $37.7 billion, nearly half of which was in the United States. *Id.* at 22, Tables 1-A, 4-E. The United Kingdom, Japan, France, Switzerland and Singapore also accounted for significant portions of this turnover. The BIS noted that "the great bulk" of currency options transactions ($31 billion) were over-the-counter, while exchange-traded options were only a "small part" of the total. *Id.* at 22. The BIS also noted that trading in options has grown substantially—a 124%

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[4] Bank for International Settlements, Basle, Switzerland, "Central Bank Survey of Foreign Exchange Market Activity in April 1992" at 19, Table 1-A (March 1993).

increase—over the three year period from 1989 to 1992. Moreover, it is widely acknowledged that the growth of options trading has far outpaced the general growth in foreign exchange trading over the past several years.

2. The Regulatory Structure

Historically, OTC foreign exchange transactions have not been governed by the CEA. When the CEA was amended in 1974 to expand the definition of commodities subject to the CFTC's jurisdiction, transactions in foreign currency (and certain other specified products) were generally excluded from coverage under the CEA at the request of the Department of the Treasury. This exclusion, popularly called the Treasury Amendment, provides in relevant part:

> Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. § 2(a)(1)(A)(ii).

The Treasury Amendment recognizes that transactions in foreign exchange, which are generally between large and sophisticated investors, should be outside the CFTC's jurisdiction, unless they occur on a board of trade. *See* S. Rep. No. 1131, 93d Cong. 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5863-64 (herein "*Legislative History*") ("A great deal of trading in foreign currency in the United States is carried out through an informal network of banks and [dealers]. The [Senate] Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary.") *See also Salomon Forex, Inc.* v. *Tauber*, 8 F.3d 966, 977 (4th Cir. 1993), *cert. denied*,

114 S. Ct. 1540, *reh'g denied*, 114 S. Ct. 2156 (1994) ("What the statute commands . . . is the exemption of all trading off organized exchanges, including the entire informal professional trading network of which banks are a key part.").

Concerned primarily about the welfare of small investors, the CFTC has sought to limit the scope of the Treasury Amendment so as to retain for the CFTC the authority to enjoin the marketing of OTC foreign currency forward and option contracts to retail investors. For example, the CFTC stated in an amicus brief in *Tauber*, *supra*, that an overly broad interpretation of the Treasury Amendment could allow the "market[ing] to the general public [of] off-exchange futures contracts in foreign currency completely free of federal regulation. Bucket shops and boiler rooms, the very type of fraudulent businesses Congress sought to outlaw in enacting the CEA, would inevitably follow."

The Industry Associations support the CFTC's jurisdiction to regulate retail marketing by unregulated entities to the general public of standardized foreign exchange forward and option transactions. The CFTC has taken a number of enforcement actions to enjoin foreign exchange marketers whose activities can only be described as boiler rooms or bucket shops for foreign exchange forward and option transactions (*see infra* at pp. 14-15). The Industry Associations recognize that such consumer protection should be part of the CFTC's jurisdiction and should not be excluded by the terms of the Treasury Amendment.

However, the Industry Associations are strongly opposed to an extension of CFTC jurisdiction which could seriously disrupt the smooth functioning of the foreign exchange markets. Such an extension would impose extraordinary costs

on domestic businesses competing in international markets and would damage the United States' ability to compete as a world financial center. Moreover, if the legitimate needs of commerce cannot be served by the OTC markets in the United States, those needs will no doubt be met by other financial centers to the significant detriment of the United States. Such results would be completely contrary to Congress's intent in enacting the Treasury Amendment.

SUMMARY OF ARGUMENT

The Treasury Amendment exempts from CFTC jurisdiction all "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(a)(1)(A)(ii). A panel of this Court previously held that the clause "transactions in foreign currency" does not exclude options to buy or sell foreign currency "engaged in with private individuals." *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242, 1249 (2d Cir. 1986). The Industry Associations respectfully submit that the *American Board of Trade* decision should be limited to its facts and that the Treasury Amendment exclusion should apply to all forward and option transactions that do not involve retail marketing to small investors. As the Fourth Circuit has recently held, CFTC jurisdiction should depend in such cases on whether such transactions were "conducted on a board of trade." *Tauber*, 8 F.3d at 977.

Although this Court has not directly addressed the issue of what constitutes a "board of trade," other courts have held that the definition of a board of trade, and hence the existence of subject matter jurisdiction, depends on whether the underlying foreign exchange transactions were standardized forward and option contracts marketed by

unregulated entities to the public. The Industry Associations believe that the district court should be instructed to follow guidelines such as those set forth below and to consider factors such as the nature and identity of the participants, as well as the size and purpose of the transaction, in determining whether a transaction was conducted on a board of trade.

Because the district court has not had the opportunity to make any such jurisdictional fact findings, the action should be remanded to the district court for a determination of subject matter jurisdiction in accordance with the guidelines suggested below.

ARGUMENT

I.

The "Transactions In Foreign Currency" Clause of the Treasury Amendment Should be Construed to Exclude from CFTC Regulation All Transactions in Foreign Currency, Including Option Transactions.

The Industry Associations respectfully submit that the Treasury Amendment was intended to exclude from CEA coverage all OTC foreign currency transactions, including forwards and options transactions, between sophisticated counterparties. A contrary interpretation would be inconsistent with the language and legislative history of the Treasury Amendment, as well as with sound commercial practice.

As the Fourth Circuit recently held, the plain language and legislative history of the Treasury Amendment excludes

from CEA coverage "individually-negotiated foreign currency option and futures transactions between sophisticated, large-scale foreign currency traders." *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 978. Analyzing the language of the Treasury Amendment, the Fourth Circuit stated:

> The class of transactions covered by the general clause "transactions in foreign currency" must include a larger class than those removed from it by the "unless" clause in order to give the latter clause meaning. Thus, because the clause "unless such transactions involve the sale thereof for future delivery conducted on a board of trade" refers to futures, the general clause "transactions in foreign currency" must also include futures. Under this analysis, we would have to construe the Treasury Amendment exempting transactions in foreign currency to reach beyond transactions in the commodity itself and to include *all* transactions in which foreign currency is the subject matter, including futures and options.

Id. at 975.

The Fourth Circuit further held that "it is a short step to conclude that the Treasury Amendment applies to *all* transactions in which foreign currencies are the subject matter, including options." *Id.* at 976. The Court reasoned that "[s]ince trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context." *Id.*

By comparison, in *CFTC* v. *American Board of Trade, Inc.*, a panel of this Court held that the sale of options in several commodities, including foreign currency, to private individuals on an unregistered exchange violated the CEA.

803 F.2d 1242, 1243 (2d Cir. 1986). Although the Treasury Amendment excludes "transactions in foreign currency," the panel opined that "[a]n option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a 'transaction[] in' that currency unless and until the option is exercised." *Id.* at 1248 (citations omitted).[5]

Nonetheless, the Second Circuit panel was careful to limit its interpretation of the scope of the Treasury Amendment's exclusion to the specific facts of the case before it. In this regard, the panel noted that the legislative history revealed that the Treasury Amendment "exception was included in the [CEA] at the behest of the Treasury Department on the ground that the protections of the Act were not needed for the sophisticated financial institutions, already subject to regulation, that participated in such transactions . . . ." *Id.* at 1248-49. After quoting from the legislative history, the panel then stated that "[t]hese descriptions of the intended reach of the Treasury Amendment belie the notion that the exception was designed to exclude from regulation foreign currency options transactions *such as those defendants engaged in with private individuals*." *Id.* at 1249 (emphasis added).[6]

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[5] Although the defendants, the so-called "American Board of Trade," were a self-proclaimed board of trade that "provided, *inter alia*, an exchange and marketplace for certain commodity options transactions," the Court did not directly address whether they constituted a board of trade under the Treasury Amendment. *Id.* at 1244, 1248.

[6] *See also CFTC* v. *Sterling Capital Co.*, 1980-1982 Decisions] (continued...)

The Industry Associations submit that the holding in *American Board of Trade* should be limited to its facts. For example, the Fourth Circuit reconciled its holding with *American Board of Trade* by distinguishing the nature of the parties involved in the two cases:

> Although the [Second Circuit], in dictum, seemed to indicate that no trading in foreign currency options or futures is excluded from CEA coverage because such trading is not trading 'in' foreign currencies, at the same time it noted that such trading *is* excluded when carried out by sophisticated financial institutions. This inconsistency reveals that the key for the Second Circuit in deciding the case was not the subject matter of the deals—but the identity of the parties—unsophisticated private individuals buying on an organized exchange.

8 F.3d at 977-78.

Moreover, the notion in *American Board of Trade* that a foreign currency option is never a transaction "in" foreign currency until the option is exercised elevates form over substance and is inconsistent with commercial practice. An option gives a person a right to obtain foreign currency. The

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[6](...continued)
Comm. Fut. L. Rep. (CCH) ¶ 21,169, *modified on other grounds*, [1980 - 1982 Decisions] Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. 1981) (accord); *but see Chicago Board of Trade* v. *SEC*, 677 F.2d 1137, 1155, n. 34 (7th Cir. 1982), *vacated as moot*, 459 U.S. 1026 (1982) (drawing "no conclusion" as to whether the Treasury Amendment affected CFTC jurisdiction over options on foreign currency).

holder of an option anticipates and intends the exercise of the option (and delivery of the currency) if it is "in the money," in other words, only if there is value to the holder of the option would it be exercised.[7] Whether there will be such value will depend on movements in the price of the currency from the purchase date of the option, an entirely unpredictable event. It thus makes no sense -- by differentiating between exercised and unexercised options -- to let delivery determine whether a transaction is subject to CFTC jurisdiction. To do so in effect would allow unpredictable market forces to determine the legality of a transaction. From a commercial perspective, foreign currency options are transactions "in" foreign currency because foreign currency is the subject of the transactions. *See Tauber*, 8 F.3d at 976-77; *see also supra*, pp. 9-10.

II.

This Action Should be Remanded to the District Court for a Determination of Whether the Underlying Transactions Were Conducted on a Board of Trade and, Hence, Whether There is Subject Matter Jurisdiction.

Although the district court below appointed a temporary receiver, it has not yet determined whether there is subject

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[7] To the same extent, the fact that the purchaser of an option may offset or net a transaction, rather than receive actual delivery of foreign currency, does not change the essential nature of the transaction.

matter jurisdiction over the action.[8] Instead, the district court assumed that it had jurisdiction "for purposes of today" on the basis of this Court's ruling in *American Board of Trade*.

In contrast to *American Board of Trade* and *Tauber*, *supra at pp. 9-11*, it is not clear from the pleadings and record here whether the underlying foreign exchange transactions were marketed to the general public on a "board of trade" or took place off-exchange between sophisticated counterparties. Accordingly, the district court must make a number of factual findings in order to assess its subject matter jurisdiction.

A "board of trade" is defined under the CEA as "any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment." 7 U.S.C. § 1a. If this definition were applied literally, however, every participant in foreign exchange transactions could be deemed a board of trade. *See CFTC* v. *Standard Forex, Inc.*, [1994 Current] Comm. Fut. L. Rep. (CCH) ¶ 26,063 (E.D.N.Y. Aug. 9, 1993). Certainly federally and state regulated banks, broker dealers, and similarly regulated entities have never been—and should not be—considered boards of trade. *See "Legislative History," supra* at p. 6. Instead, courts that have addressed the definition of "board of trade," primarily in the boiler room and bucket shop contexts, have concluded that the retail marketing of standardized, non-negotiable commodity contracts to the general public defines a "board of trade." *See Standard Forex, Inc.*, ¶ 26,063 at 41,455 (holding that the

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[8] Defendants filed a motion to dismiss for lack of subject matter jurisdiction, which is pending before the district court.

marketing of non-negotiable contracts for foreign exchange to private, unsophisticated investors is not excluded from CFTC jurisdiction by the Treasury Amendment); *CTFC* v. *American Metal Exchange Corp.*, 693 F. Supp. 168, 176-79, 193 (D.N.J. 1988), *aff'd in part and vacated in part on other grounds*, 991 F.2d 71 (3d Cir. 1993) (company selling standardized precious metal futures contracts to the public was board of trade); *CFTC* v. *Co Petro Marketing Group, Inc.*, 680 F.2d 573 (9th Cir. 1982) (gasoline broker operated as an undesignated board of trade where it deceptively marketed futures contracts to the general public through newspaper advertisements, private seminars, commissioned telephone solicitors, and various other commissioned sales agents); *CFTC* v. *National Coal Exchange, Inc.*, [1980 - 1982 Decisions] Comm. Fut. L. Rep. (CCH) ¶ 21,424 at 26,049-50 (W.D. Tenn. 1982) (a broker of coal was a "board of trade" where its sales program was a "carefully contrived, but yet concerted, effort at fraudulent inducement of inexperienced members of the general public" and had all the characteristics of a "typical boiler-room operation"). *See also Abrams* v. *Oppenheimer Gov't. Sec., Inc.*, 589 F. Supp. 4 (N.D. Ill. 1983), *aff'd*, 737 F.2d 582 (7th Cir. 1984) (defining "over the counter" as including face to face negotiations and sellers having direct responsibility for the delivery of the GNMAs).

In an interpretative letter issued in 1977, the CFTC provided a list of factors that it considered relevant in determining whether a transaction fell outside the CEA:

> In our view, whether any transactions involve contracts of sale of a commodity for future delivery, traded or executed on a board of trade requires an examination of the terms and conditions of the contracts involved, the nature of the persons

> participating in the transactions, the functions served or to be served by the contract, and the marketplace and the manner in which the transactions are effected. Of course, these factors must be viewed in the context of the provisions of the Act, as they have been enacted or amended from time to time, and the legislative history of those provisions.

CFTC Interpretative Letter No. 77-12 [1977-1980 Decisions] Comm. Fut. L. Rep. (CCH) ¶ 20,467 at 21,910 (Aug. 17, 1977). Typically, the focus of the CFTC's analysis has been whether the challenged transactions are being marketed to the general public. See *id.* (in concluding that the sale of GNMA forwards were not subject to CFTC regulation, the CFTC found the lack of public participation in the transactions most compelling); *see also, CFTC Statutory Interpretation, Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42983 (Oct. 23, 1985) (*"CFTC Statutory Interpretation"*) ("[A]ny marketing to the general public of futures transactions in foreign currencies conducted outside the facilities of [an exchange market designated by the CFTC] is strictly outside the scope of the Treasury Amendment.").

The Industry Associations respectfully submit that this action should be remanded in order for the district court to analyze the transactions at issue to determine subject matter jurisdiction. Based on commercial practice and the experience of the Industry Associations, and consistent with the case law and agency releases interpreting the Treasury Amendment, as well as its legislative history, the Industry Associations recommend that this Court direct the district court to analyze

the transactions at issue taking into account the following guidelines:

1. All OTC transactions conducted between "financial institutions," as that term is defined in the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. § 4402(9),[9] should continue to be excluded from CEA coverage. All other transactions should be analyzed taking into account the criteria set forth in paragraphs 2-4 below.

2. Any transaction, including an option transaction, covering $1 million or more of a currency entered into by a single customer should be excluded from the CFTC's jurisdiction. Such a safe-harbor would recognize that transactions of this magnitude generally reflect wholesale, rather than retail, transactions.

3. With respect to transactions, including options transactions, covering less than $100,000 of a currency, there should be a rebuttable presumption that these represent retail transactions, subject to the jurisdiction of the CFTC. This presumption could be rebutted on the basis of the factors identified in paragraph 4 below.

4. Transactions covering between $100,000 and $1 million should be analyzed to determine whether the customer meets certain sophisticated customer criteria. Such determination might be based on a number of factors, including the identity or status of the customer as a corporation, institution, fund or individual; the

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[9] "The term 'financial institution' means a broker or dealer, a depository institution, a futures commission merchant, or any other institution as determined by the Board of Governors of the Federal Reserve System."

customer's net worth or capitalization; the customer's prior experience and familiarity with trading products identified in the Treasury Amendment, or other indications of the extent to which the customer is informed; and the purpose of the transactions, including whether they represent speculation, hedging or general investments.

These guidelines would provide a greater degree of certainty regarding the legality of foreign exchange transactions and the scope of the CFTC's jurisdiction over the otherwise unregulated entities. The CFTC has never asserted jurisdiction over, or even expressed an interest in, transactions at the wholesale level (covering $1 million or more), but clarification would "reduce uncertainty and the burden on those monitoring compliance."[10] Participants, including individuals, who enter into transactions covering less than $1 million but more than $100,000 presumably have the financial wherewithal to tolerate losses and generally are presumed to be entitled to fewer resources of the federal government to protect against investments that prove to be unwise. Thus, the Industry Associations suggest that transactions covering between $100,000 and $1 million be judged on a case-by-case basis.

In short, only if, after analyzing the challenged transactions, the district court determines that the defendants

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[10] *See generally* Comment Letter from Michael Bradfield, General Counsel to the Board of Governors of the Federal Reserve System, to Kenneth M. Raisler, General Counsel to the CFTC, dated March 6, 1986, filed in response to the CFTC Statutory Interpretation's, supra at 16, request for comments (recommending exclusion from CEA coverage under the Treasury Amendment for "a wholesale transaction, such as $1 million").

in this case are engaged in retailing foreign exchange to the general public, should it conclude that it has subject matter jurisdiction over this action. Otherwise, if the court concludes that the transactions at issue involve private transactions between sophisticated individuals, it should conclude that these transactions are excluded from regulation under the Treasury Amendment and that the court is without subject matter jurisdiction.[11]

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[11] Typically, this Court vacates the order of the district court if it determines that there is an insufficient record on appeal establishing subject matter jurisdiction. *See, e.g., United Food & Commercial Workers Union* v. *Centermark Properties Meriden Square, Inc.*, 1994 U.S. App. LEXIS 17131, at *2-3 (2d Cir. 1994) ("Because we conclude that a resolution of the jurisdictional issue requires further findings and because we believe that the district court should be given an opportunity to resolve the jurisdictional issue, we vacate the judgement and remand the matter to the district court for further proceedings."). This Court also may, under the power vested in it by 28 U.S.C. § 2106, retain jurisdiction while remanding the action for supplementary findings and conclusions. *See United States* v. *Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994) ("Precedent . . . allows us to seek supplementation of the record while retaining jurisdiction, without a mandate issuing or the need for a new notice of appeal. However, we believe that the better practice in such cases is to direct that a mandate issue forthwith and that the mandate state the conditions that will restore jurisdiction to this court."); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1018-19 (2d Cir. 1975) (Friendly, J.). In this manner, the Court may preserve its jurisdiction and maintain the *status quo* of this litigation, while providing the district court with the opportunity to make the necessary findings to determine whether there is subject matter jurisdiction over this action.

CONCLUSION

The OTC foreign currency markets are a critical element in the continued development and viability of global markets. Given the tremendous size and importance of these markets and the disruption that would be caused if certain participants in this market were subject to the CEA, the Foreign Exchange Committee and the New York Clearing House Association respectfully urge that this Court remand this action to the district court to determine whether the underlying transactions were conducted on a "board of trade" and, hence, whether there is subject matter jurisdiction.

Respectfully submitted,

RICHARD H. KLAPPER
SULLIVAN & CROMWELL
125 Broad Street,
New York, New York 10004.
(212) 558-4000
Attorneys for The Foreign Exchange Committee and the New York Clearing House Association,
Amici Curiae.

KENNETH M. RAISLER
TIMOTHY J. HELWICK
JOHN T. CORCORAN

Of Counsel

September 12, 1994.