WHO PATROLS THE MONEY? THE REGULATION OF OFF-EXCHANGE FOREIGN CURRENCY OPTIONS: *DUNN V. COMMODITY FUTURES TRADING COMMISSION*

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I. INTRODUCTION

Money drives the world, and investing money provides the opportunity to increase one's financial position on the road. As hybrid forms of financial investing instruments are created, and as the methods of investing in these instruments increase, more funds are being driven into the markets. But at what cost?

Originally, the stock exchange provided a medium for investors and sellers to trade their assets and hope for profitable results.[1] As increased profits were realized, speculators derived additional investing schemes hoping for

1. *See* STOCK EXCH. HISTORICAL CO., THE NEW YORK STOCK EXCHANGE: ITS HISTORY, ITS CONTRIBUTION TO NATIONAL PROSPERITY, AND ITS RELATION TO AMERICAN FINANCE AT THE OUTSET OF THE TWENTIETH CENTURY 9 (Edmund Clarence Stedman ed., 1969).

financial success.[2] Today these schemes have evolved into highly sophisticated trading opportunities, derivative instruments, and markets of exchange.[3] In short, the unsophisticated and naive investor needs help negotiating the highway of financial investing.

The government began regulating these trades soon after their inception to promote price and supply stability, broker accountability, and risk control.[4] These regulations reflected the public policy of protecting the investor and his investments.[5] As investment opportunities expanded,[6] the government found several investment areas which could be exempted from regulations[7] and passed legislation protecting these transactions from regulatory controls.[8] Thus evolved questions of which transactions were originally intended to be unregulated, and whether marketplace changes created a need to regulate some transactions previously exempted from regulation.[9] For example, the Commodity Exchange Act (CEA)[10] generally requires that options be traded on designated exchanges.[11] However, certain types of options are excluded from CEA regulation by the Treasury Amendment.[12]

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2. *See id.* at 10 (discussing speculation on the part of both buyers and sellers regarding the future of the market).

3. *See* MEIR KOHN, MONEY, BANKING, AND FINANCIAL MARKETS 309 (2d ed. 1993) (introducing the chapter dealing with various risk schemes such as futures, options, and swaps).

4. *See* Jason A. Pinson, Casenote, *Is the Inter-Bank Market Out of Control?*: Dunn & Delta v. Commodity Futures Trading Commission, 4 TULSA J. COMP. & INT'L L. 305, 308–09 (1997). For example, the Grain Futures Act of 1922 and the Commodity Futures Act of 1936 were two early attempts at regulating the futures market. *See id.* at 308.

5. *See id.*

6. *See* KOHN, *supra* note 3, at 309.

7. *See* Kwiatkowsi v. Bear Stearns Co., No. 96 CIV. 4798(JGK), 1997 WL 538819, at *10 (S.D.N.Y. Aug. 29, 1997) (listing exempt transactions specified in the Treasury Amendment).

8. *See* Thomas A. Tormey, Note, *A Derivatives Dilemma: The Treasury Amendment Controversy and the Regulatory Status of Foreign Currency Options*, 65 FORDHAM L. REV. 2313, 2316–17 (1997). In 1974, Congress passed the Treasury Amendment, which contains a regulatory exclusion for certain foreign currency transactions. *See id.*

9. *See* Fred Vogelstein, *Two Futures Trading Bills Aim to Fix Problems*, WALL ST. J., Sept. 23, 1996, at C14 (discussing two proposed bills to "fix some of those problems" and regulate transactions previously excluded under the Treasury Amendment).

10. 7 U.S.C. §§ 1–26 (1994).

11. 7 U.S.C. § 2a(ii) (1994).

12. *See* Treasury Amendment of 1974, Pub. L. No. 93-463, 88 Stat. 1395 (1974) (codified at 7 U.S.C. § 2a(ii) (1994)). This exclusion is commonly called the Treasury Amendment because it was originally proposed by the U.S.

In two recent Courts of Appeals decisions, the Second and Fourth Circuits rendered conflicting opinions as to whether off-exchange options in foreign currency are within the Treasury Amendment exception to CEA regulation.[13] In *Dunn v. Commodity Futures Trading Commission*,[14] the U.S. Supreme Court granted certiorari to resolve the conflict among the circuits[15] and held the Treasury Amendment includes off-exchange foreign currency trading as transactions exempt from the CEA regulation.[16]

II. STATEMENT OF THE CASE

This action was brought by the Commodity Futures Trading Commission against four defendants: (1) William C. Dunn, the president and sole shareholder of Delta consultants; (2) Delta Consultants, a New Jersey corporation formed by Dunn; (3) Delta Options, Ltd., an investment company incorporated in the Bahamas in which Dunn was an advisor and managing director; and (4) Nopkine Co., Ltd., an investment company incorporated in the British Virgin Islands in which Dunn was an advisor.[17] For purposes of this Casenote, the defendants will collectively be called "Dunn."

Beginning in 1992, Dunn solicited investments from individuals, partnerships, and companies.[18] These investors were told their funds would be invested using complex strategies involving call and put options[19] to purchase or sell

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Treasury Department. *See* S. Rep. No. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5843, 5887.

13. *Compare* Commodity Futures Trading Comm'n v. American Bd. of Trade, 803 F.2d 1242, 1248 (2d Cir. 1986) (holding that the Treasury Amendment exclusion did not extend to foreign currency options), *with* Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 976 (4th Cir. 1993) (holding that because the Treasury Amendment exclusion applies to futures, "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.").

14. 117 S. Ct. 913 (1997).

15. 517 U.S. 1219 (1996).

16. *Dunn*, 117 S. Ct. at 919–20 (holding both futures and options are covered by the Treasury Amendment exemption).

17. *See* Commodity Futures Trading Comm'n v. Dunn, 58 F.3d 50, 51 (2d Cir. 1995), *rev'd*, 117 S. Ct. 913 (1997).

18. *See id.*

19. A call option allows the purchase (call) of a security at a set price by a certain date. *See* JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS 69–70 (4th ed. 1995). A put option allows the sell (put) of a security at a set price by a certain date. *See id.* at 451–52.

various foreign currencies in over-the-counter (OTC) markets.[20]

Dunn apparently did engage in many such transactions by trading in exotic positions such as strangles,[21] by "contract[ing] directly with international banks and others without making use of any regulated exchange or board of trade."[22] In other words, Dunn engaged in foreign currency options in the off-exchange or OTC markets.[23] Dunn made these trades using the names "of [the] defendants, and no participations or options were sold directly to investors."[24]

The investors' positions were tracked through internal accounts and weekly reports showing the status of the investors' various holdings.[25] By submitting misleading weekly reports to show impressive returns,[26] Dunn convinced the customers to roll-over their accounts, thus allowing the defendants to continue holding the funds.[27] For a time, the continued stream of roll-over and new investment money provided the necessary funds to compensate for the heavy losses, but by November 1993, the losses became too great and much of the money had disappeared.[28]

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20. *See Commodity Futures Trading Comm'n,* 58 F.3d at 51. OTC trading is not conducted on any kind of organized exchange. *See id.*

21. *See id.* A strangle is the "sale or purchase of a put option and a call option on the same underlying instrument, with the same expiration, but at strike prices equally out of the money." DOWNES & ELLIOT, *supra* note 19, at 567 (emphasis is omitted).

22. Dunn v. Commodity Futures Exchange Comm'n, 117 S. Ct. 913, 915 (1997).

23. *See id.* OTC markets are said to serve practical and important functions such as providing access to foreign currency for international transactions and allowing business to hedge against the risk of exchange rate movements. *See* Brief of the Foreign Exchange Committee et al. at 6, *Dunn* (No. 95-1181). "Off-exchange" trading is another term describing transactions occurring without using a regulated exchange or formal board of trade. *Dunn*, 117 S. Ct. at 915.

24. *Commodity Futures Trading Comm'n,* 58 F.3d at 51.

25. *See Dunn*, 117 S. Ct. at 915.

26. *See Commodity Futures Trading Comm'n,* 58 F.3d at 52. The Commodity Futures Trading Commission (CFTC) submitted affidavits stating that Dunn and his agents disseminated false information about the risks of currency trading in general and of investing with the defendants specifically. *See id.* at 51–52.

27. *See id.* at 52. When options expire, the positions "mature" and investors can either "cash out" or "roll over" their positions. Some investors claimed the falsified printouts misled them to "roll over" instead of withdraw their money. *See id.*

28. *See id.* (explaining that roll-over and new investment money could be used to "cash out" investors when necessary until the losses exceeded the income from these sources). Dunn announced trading losses of $95 million and communicated to investors that they would not be compensated for their losses. *See id.* Although not at issue before the Supreme Court in *Dunn*,

Subsequently, the Commodity Futures Trading Commission (CFTC) commenced these proceedings alleging that the defendants were deceiving investors and causing them to receive false reports of their account status.[29] The district court granted CFTC's request for a temporary equity receiver[30] over defendants' argument that under the Treasury Amendment, the CFTC had no power to regulate OTC options in foreign currency.[31] When the district court ruled that Dunn's foreign currency option trades were subject to CFTC regulation, Dunn brought an interlocutory appeal to the Second Circuit.[32]

Relying on circuit precedent,[33] and acknowledging conflict with the Fourth Circuit,[34] the Court of Appeals affirmed.[35] The U.S. Supreme Court granted certiorari to resolve the conflict between the circuits[36] and held the OTC transactions in foreign currency options were exempt from CFTC regulation under the Treasury Amendment.[37]

This Casenote discusses the significance of the Supreme Court's decision in *Dunn* and its contribution to the

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evidence in the record shows the transfer of nearly $20 million dollars to bank accounts in Switzerland. *See id.*

29. *See id.* at 53. This behavior, occurring in conduct regulated by the CFTC, is unlawful under 7 U.S.C. § 6c(b) (1994) (prohibiting any transaction contrary to any "order, rule, or regulation" of the CFTC); *see also Commodity Futures Trading Comm'n,* 58 F.3d at 52–53 (noting that a restraining order freezing the defendant's assets was granted on April 5, 1994, the same day that the CFTC filed suit in the Southern District of New York).

30. *See id.* at 53. A temporary equity receiver is appointed by the court to locate, preserve, and control property for the benefit of others involved in a suit. *See* Brief of the Foreign Exchange Committee et al. at 7, Dunn v. Commodity Futures Exchange Comm'n, 117 S. Ct. 913 (1997) (No. 95-1181).

31. *See* Brief for the Commodity Futures Trading Commission at 20, *Dunn* (No. 95-1181) (arguing "the Treasury Amendment precludes CEA regulation of all off-exchange foreign currency transactions, including . . . options.").

32. *See Commodity Futures Trading Comm'n,* 58 F.3d at 53. Dunn also filed a motion to stay the equity receiver order by the district court. The Second Circuit denied the stay but expedited the appeal. *See id.*

33. *See id. at* 54 (following Commodity Futures Trading Comm'n v. American Bd. of Trade, 803 F.2d 1242 (2d Cir. 1986)).

34. *See id.* (citing Salomon Forex, Inc. v. Tauber, 8 F.3d 966 (4th Cir. 1993)).

35. *See id.* The Court of Appeals is bound by state decisions and prior decisions of the circuit. However, the Second Circuit opinion makes clear that the district court holding, affirmed in this case, is not necessarily the personal judgment of the members of this court. *See id.* at 54.

36. *See* Dunn v. Commodity Futures Trading Comm'n, 517 U.S.1219 (1996).

37. *See* Dunn v. Commodity Futures Trading Comm'n, 117 S. Ct. 913, 915–16. (1997). The Court reversed and remanded the case for further proceedings consistent with its decision. *See id.* at 921.

interpretation of CEA and CFTC authority. As a necessary supplement, this Note will also focus on the state of the regulations, both before and after the *Dunn* decision. While *Dunn* is important for its specific holding, the complete opinion and amici briefs involved in the decision provide insight into the resolution of maintaining balance between international trading opportunities, American involvement in the international market, and consumer investment protection.[38] Although statutory construction formed the basis of the Court's decision in *Dunn*, evaluating the public policy behind the regulations, determining how to achieve the proper balance, and at what costs, remain controversial domestic and international issues.[39]

III. ANALYSIS

A. The Scene of Forward and Futures Trading

Before stock markets and futures trading existed, agricultural products were sold in a central market, and dramatic price fluctuations affected both the farmer and the processor.[40] Some risk was alleviated by forward contracting, which allowed agreements to fix terms of the sale in advance of delivery.[41] For example, a farmer could take a short position to protect against price decline, or a wheat processor could take a long position to protect against price increases in wheat.[42] This practice, also known as hedging,[43] provided an opportunity to profit[44] as a result of the fluctuating

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38. *See generally* Brief for Petitioners, *Dunn* (No. 95-1181) and Brief of the Commodity Futures Trading Commission et al., *Dunn* (No. 95-1181).

39. *See Dunn*, 117 S. Ct. at 920 (acknowledging public policy points made in amicus curiae brief). Several parties submitted amicus curiae briefs in this case including: (1) Brief of Crédit Lyonnais et al., (2) Brief for the Board of Trade of the City of Chicago, (3) Brief for Foreign Exchange Committee et al., and (4) Brief for Chicago Mercantile Exchange. *See id.* at 915 nn.3 & 6, 916 n.8, 920 n.15.

40. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 357 (1982).

41. *See id.* at 357. Other methods of alleviating risks included adopting quality standards and improving storage and transporting facilities. *See id.*

42. *See id.* at 358 (comparing the advantages and disadvantages of short and long positions).

43. *See id.* at 358 (explaining that hedging is facilitated by speculators willing to assume market risks the hedging party is seeking to avoid). In a derivative, the value is derived from the future price of the underlying asset. *See* Pinson, *supra* note 4, at 306.

44. *See Curran,* 456 U.S. at 357–58. Futures markets can also alleviate fluctuations in interest rates, currency values, stock prices and other variables

market and led to the advent of speculation in the futures markets.[45] Due to price volatility,[46] the forward contract market evolved into a futures market with standardized contracts.[47]

Similarly, volatility of currency trading during the 1970s and 1980s[48] caused evolutionary developments in the currency markets such as the trading of foreign currency futures on regulated and OTC markets.[49] In 1982, options on these currency futures contracts were introduced into the United States.[50]

B. Enter the OTC Markets

Derivatives investments, such as futures and options, are either traded on an exchange or in the OTC market.[51] Unlike organized exchanges, OTC markets enable investors to make customized agreements subject to individual negotiation.[52]

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that can cause major problems for financial executives. *See* Pinson, *supra* note 4, at 308.

45. *See Curran,* 456 U.S. at 357. Since these contracts were assignable, a speculator could participate in the futures market and attempt to take advantage of profit margins while having no intention of ever taking delivery of the commodity. *See id.* at 357–58.

46. *See* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 VAND. L. REV. 473, 476 (1988) (discussing events that led to unstable commodity prices).

47. *See* Jerry W. Markham, "*Confederate Bonds," "General Custer," and the Regulation of Derivative Financial Instruments*, 25 SETON HALL L. REV. 1, 6 n.15 (1994) (explaining that contract terms were standardized as to grade of commodity and delivery date so price was the only negotiated provision, and contract uniformity made commodity price speculation easier for traders).

48. *See* Armando T. Belly, *The Derivative Market in Foreign Currencies and the Commodity Exchange Act—The Status of Over-the-Counter Futures Contracts*, 71 TUL. L. REV. 1455, 1464–65 (1997). The first devaluation of the U.S. dollar led many countries to use a floating exchange rate. *See id.* at 1464. After a brief return to a fixed rate, the international monetary system again used a floating rate system allowing major currencies to float against each other, which led to increased volatility as time went on, despite predictions otherwise. *See id.* at 1464–65.

49. *See id.* at 1465. Foreign currency futures contracts were initiated in Chicago in 1972. *See id.*

50. *See* Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983) (codified as amended at 7 U.S.C. §§ 1–26 (1994)).

51. *See* Bernard J. Karol and Mary B. Lehman, *Unprecedented Technological and Mathematical Sophistication Has Created a Vast Market for Derivatives,* 27 REV. OF SEC. AND COMMODITIES REGULATION, 121, 122–23 (1994); *see also* Pinson, *supra* note 4, at 306. An OTC market has no physical existence and it operates as a mere network of computers connecting the traders. *See id.* at 307.

52. *See* Brief of Foreign Exchange Committee et al. at 4 n.4, Dunn v. Commodities Futures Trading Comm'n, 117 S. Ct. 913 (1997) (No. 95-1181). Whereas the transactions on OTC markets are bilateral and personally

OTC markets are extremely active[53] and sensitive[54] markets providing businesses with access to international markets through the sale of foreign currencies.[55] Currency options are often traded in privately negotiated OTC exchanges because of term flexibility, ease of participation, and superior market liquidity.[56] Today, the frequency and magnitude of the trading in the OTC markets, specifically foreign currency options, is significant both in the United States and throughout the world.[57]

C. Regulation: The Watch Begins

Historically, as investment opportunities developed, Congress recognized the potential hazards and benefits of OTC trading,[58] and in 1921 Congress enacted the Future Trading Act,[59] which taxed futures transactions not consummated on a designated market.[60] This statute was held unconstitutional,[61] but in 1922 the provisions were

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individualized agreements, transactions on designated exchanges are largely fungible, with the price and timing of the trade as the only options. *See id.*

53. *See id.* at 5. Trading occurs twenty-four hours a day usually by direct telephone connections between dealers and brokers. *See id.* at 5–6.

54. *See id.* at 6. Political and financial developments throughout the world affect the OTC markets. *See id.* at 6–7.

55. *See id.* at 6. OTC participants include commercial and investment banks, foreign exchange dealers, brokerage companies, corporations, money managers, commodity training advisors, insurance companies, governments, and central banks. *See id.* For example, the Federal Reserve Bank of New York, foreign central banks and their governments frequently intervene in the OTC markets in an effort to implement their respective policies with regard to their national currencies. *See id.*

56. *See* Brief of Crédit Lyonnais et al. at 2, *Dunn* (No. 95-1181); *see also* Belly, *supra* note 48, at 1470 (listing the different contexts in which foreign currency is traded in the OTC market: spot transactions, forward transactions, and option transactions).

57. *See* Brief of Foreign Exchange Committee et al. at 7, *Dunn* (No. 95-1181) (citing a survey coordinated by the Bank for International Settlements in Basle, Switzerland). In April 1995, the average daily turnover of foreign currency forward transactions was approximately $100 billion, representing a 70% increase in three years. *See id.* Approximately one-half of the daily OTC currency options trading is attributable to the United States. *See id.*

58. *See* Brief for Commodity Futures Trading Commission at 4–5, *Dunn* (No. 95-1181) (tracing the history of OTC trading and Congressional action in response to OTC effects).

59. Pub. L. No. 67-66, 42 Stat. 187 (1921).

60. *Id.* § 4. Congress attempted to regulate futures trading on grain by taxing futures contracts on grain sales at a prohibitive rate or exempting trades from the tax if trades complied with congressional regulations. *See* Chicago Bd. of Trade v. Olsen, 262 U.S. 1, 31 (1923).

61. *See* Hill v. Wallace, 259 U.S. 44, 45 (1922) (holding the Futures Trading Act unconstitutional as an improper exercise of the congressional taxing power

reenacted in the Grain Futures Act[62] and upheld.[63] In 1936, the statute was renamed the Commodity Exchange Act (CEA).[64] As part of the 1974 amendments to the CEA which expanded the coverage of the statute,[65] Congress established the Commodities Futures Trading Commission (CFTC).[66]

Additionally, Congress enacted the Treasury Amendment,[67] one of several exemptions to the CFTC,[68] which expressly prohibited regulation of transactions in foreign currency.[69] The purpose of the Treasury Amendment was to avoid the uncertainty of CFTC enforcement for OTC government securities and foreign exchange markets[70] by

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because sales for future delivery on the Board of Trade were not interstate commerce).

62. Pub. L. No. 67-331, 42 Stat. 998 (1922).

63. *See* Chicago Bd. of Trade, 262 U.S. at 43. Here the Court upheld the Grain Futures Act under the commerce power and distinguishing it as only regulating "interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce." *Id.* at 32.

64. Pub. L. No. 74-675, 49 Stat. 1491 (1936). The CEA also regulates commodity futures and options trading by requiring they take place on exchanges approved and regulated by the CFTC. *See* Brief of the Foreign Exchange Committee et al. at 16, Dunn v. Commodities Futures Trading Comm'n, 117 S. Ct. 913 (1997) (No. 95-1181). However, the CEA recognizes statutory exclusions and regulatory exemptions such as the Treasury Amendment. *See id.*

65. *See Dunn*, 117 S. Ct. at 915 (stating that the statute expansion covered nonagricultural commodities "in which contracts for future delivery are presently or in the future dealt in.").

66. The Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1395 (1974) (codified in scattered sections of 7 U.S.C.). The CFTC assumed the powers previously exercised by the Secretary of Agriculture to regulate commodity trading. *See id.*

67. 7 U.S.C. § 2(ii) (1995). Due to concerns that an expanded CEA might adversely affect foreign exchange markets, the Treasury Department urged the CEA legislation to "make clear that its provisions would not be applicable to futures trading in foreign currencies or other [specified] financial transactions." S. Rep. No. 93-1131 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5889.

68. In addition to the Treasury Amendment, two regulatory exemptions to the CFTC include the CFTC's trade option exemption and swap exemption. *See* Brief of Foreign Exchange Committee et al. at 17–18, *Dunn* (No. 95-1181). These exemptions are more limited in scope than the Treasury Amendment. *See id.* at 16.

69. 7 U.S.C. § 2(ii) (stating that the provisions of the chapter do not govern "transactions in foreign currency" unless the transactions involve the sale of foreign currency "for future delivery conducted on a board of trade.").

70. *See* Roger L. Anderson, *The Treasury Department's Role in Regulating the Derivatives Marketplace*, 66 FORDHAM L. REV. 775, 777 (1997). The basic rule is that off-exchange futures contracts are unenforceable under the CEA. *See id.* Uncertainty arises because there is no clear futures contract standard, so an OTC contract may be deemed a futures contract and therefore unenforceable. *See id.*

excluding CEA coverage of those transactions while effectively expanding the coverage of CFTC regulation to include futures contracts traded on an exchange.[71] For example, in 1978 the CFTC adopted a regulation banning transactions in commodity options.[72]

D. Hiding Spots

However, in trying to avoid uncertainty and determine the scope of the Treasury Amendment, several issues have been raised.[73] One such uncertainty was addressed and resolved in *Dunn*.[74]

The narrow issue presented in *Dunn* is whether the CFTC has authority under the Treasury Amendment to regulate transactions involving foreign currency options made on off-exchange markets.[75]

The Treasury Amendment exempts several transactions from CFTC control.[76] Specifically, "[n]othing in this chapter 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

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[71]. *See* Brief for the Commodity Futures Trading Commission at 25, *Dunn* (No. 95-1181). The Treasury Amendment exemption was due to the Department of Treasury's concern that as a result of the proposed expansion of the CEA's scope, foreign currency and other financial instruments would become subject to unnecessary regulation. *See* Brief of Foreign Exchange Committee et al. at 8, *Dunn* (No. 95-1181) (citing the legislative history of the Treasury Amendment). Another concern was the effect of increased regulation on the usefulness and efficiency of the foreign exchange markets. *See id.* The Treasury Department believed that the CFTC "would clearly not have the expertise to regulate a complex banking function and would confuse an already highly regulated business sector." Brief for the Commodity Futures Trading Commission at 25, app. B at 11a, *Dunn* (No. 95-1181) (citing the letter of Donald Ritger, Acting General Counsel of the Treasury Department).

[72]. *See* Suspension of Commodity Option Transactions, 17 C.F.R. § 32.11 (1998); *see also* Suspension of the Offer and Sale of Commodity Options, 43 Fed. Reg. 16,153, 16,161 (1978) (codified at 17 C.F.R. § 32.11 (1998)). The CFTC determined that less restrictive regulation was not effective because "the offer and sale of commodity options has for some time been and remains permeated with fraud and other illegal or unsound practices." *Id.* at 16,155.

[73]. *See* Anderson, *supra* note 70, at 777. For example, disagreements between the Treasury Department and the CFTC include whether unexercised options, as opposed to exercised options, were included in the Treasury Amendment, whether there is a participant limitation, and what constitutes a "board of trade." *See id.*

[74]. 117 S. Ct. at 916 (holding that foreign currency options fall within the Treasury Amendment exception).

[75]. *Id.* at 915 (stating the issue was deciding whether the Treasury Amendment phrase "transactions in foreign currency" includes foreign currency options transactions).

[76]. 7 U.S.C. § 2(ii) (1994).

conducted on a board of trade."[77] Thus, the seemingly single issue in *Dunn* becomes two: first, is an option an exempted transaction if it is done in foreign currency and second, is this conducted on a board of trade?

E. Dunn*: Who is Watching?*

Two Appellate Courts considered the first issue of whether options are exempted transactions in foreign currency, and the holdings are opposite.[78] The Supreme Court granted certiorari in *Dunn* to resolve the conflict.[79]

The Court recognized the issue as one of statutory construction[80] and applied the statute to the applicable acts.[81] First, the Court looked to the statute, which describes the exemption applying to foreign currency transactions.[82] The Court then described an option as a right, but not an obligation to perform a transaction.[83] The CFTC argued that

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77. *Id.*

78. *Compare* Commodity Futures Trading Comm'n v. American Bd. of Trade, 803 F.2d 1242, 1248 (2d Cir. 1986) (holding the Treasury Amendment exclusion does not extend to foreign currency options), *with* Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 978 (4th Cir. 1993) (holding the Treasury Amendment exclusion applies to foreign currency options).

79. Dunn v. Commodity Futures Trading Comm'n, 517 U.S. 1219 (1996).

80. *See Dunn*, 117 S. Ct. at 916. "Interpretation begins with the text of the statute. If the text is unambiguous, our task is at an end unless the text produces a manifestly absurd result, an exceptionally rare occurrence." Dubroff v. First Nat'l Bank of Glens Falls, 119 F.3d 75, 76 (2d Cir. 1997); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1258 (1997) (noting that although Chevron U.S.A., Inc. v. Natural Resources Defenses Council, Inc., 467 U.S. 837 (1984), is a leading case on the principle of deference on questions of statutory interpretation, *Dunn* declined to rely on *Chevron* principles because the statute seemed clear).

81. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980). "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*

82. *See Dunn*, 117 S. Ct. at 915.

83. *See id.* (defining an option as "a transaction in which the buyer purchases from the seller for consideration the right, but not the obligation, to buy or sell an agreed amount of a commodity at a set rate at any time prior to the option's expiration.").

an option is not a transaction in foreign currency,[84] but the Court held otherwise.[85]

Having decided that an option is a transaction involving foreign currency, the court moved to the second part of the test and easily concluded that the transactions in *Dunn* occurred off-exchange.[86] Thus, an option in foreign currency traded OTC is within the scope of the Treasury Amendment and beyond the scope of the CFTC's authority to regulate under the CEA.[87]

After applying statutory construction, the Court then reinforced their decision with a discussion of legislative intent.[88] The Supreme Court concluded that "Congress' broad purpose in enacting the Treasury Amendment was to provide a general exemption from CFTC regulation for sophisticated off-exchange foreign currency trading, which had previously developed entirely free from supervision under the commodities laws."[89]

Dunn is important for its specific holding, but the decision also acknowledges the competing and substantial public policies at issue in international trade regulation.[90] While the Court expressly declined to decide the issue on

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84. *See id.* at 916 (stating the CFTC argued an option is "a contract right to engage in such a transaction at a future date."); *see also* Brief for Commodity Futures Trading Commission at 30–31, *Dunn* (No. 95-1181) (distinguishing the purchase of foreign commodities as clearly a "transaction" from an option, which is the right to purchase); Commodity Futures Trading Comm'n v. Dunn, 58 F.3d 50, 53 (2d Cir. 1995) (holding that options are not included as transactions in foreign currency under the Treasury Amendment exemption).

85. *See Dunn,* 117 S. Ct. at 918 (holding, "We think the history of the Treasury Amendment suggests . . . that it was intended to take all transactions relating to foreign currency not conducted on a board of trade outside of the CEA's ambit.").

86. *Id.* at 920. The CFTC advanced legislative history citing statements made by drafters of a 1982 CEA amendment that the CFTC could regulate foreign currency options traded on an exchange other than a national securities exchange. *See id.* The Second Circuit considered these statements "legislative dicta" because the amendment made no change in the off-exchange trading law, and this position was inconsistent with the position of the Treasury Amendment authors. *Id.*

87. *See id.*

88. *See id.* at 920–21 (noting that despite the unanimous decision, Justice Scalia, in a concurring opinion, agreed with the Court's stated approach of giving effect to the plain meaning of the statutory language, but said that approach was "contradicted" by the extensive discussion of legislative history as if it were "necessary to confirm the 'plain meaning of the language,' or (worse) might have power to overcome it.").

89. *Id.* at 917.

90. *Id.* at 920–21.

such grounds,[91] the Court recognized and discussed the substantial public policy arguments on both sides and directed these to Congress.[92]

F. Changing Need for Patrol

The basis for the Treasury Amendment exemption is to protect sophisticated investors from excessive regulation.[93] In 1974, most of the investors in OTC foreign currency options were banking-related investors already subject to extensive banking regulations.[94] Today, in 1997, individual and corporate investors make up a far greater percentage than in 1974, and the sheer volume of this type of trading has grown exponentially.[95] Therefore, the demographics and characteristics of the investors protected by the Treasury Amendment have evolved, and the need for the Treasury Amendment exemption has changed.

G. To Patrol or Not to Patrol

One problem with OTC trading in foreign currency transactions is the particular susceptibility of such transactions to fraud and abuse[96] and the plausibility of these harms reaching the general market and specific investors.[97] Other concerns include manipulation of the regulated markets by the availability of markets free from regulation.[98] It seems ironic that OTC transactions, which

91. *See id.* at 921 (claiming a lack of "expertise or authority to assess these important competing claims.").
92. *See id.* (stating "these are arguments best addressed to the Congress, not the courts.").
93. *See id.* at 917.
94. *See id.* at 917–18 (citing legislative history stating that trading predominately is done by an informal market of banks and tellers subject to extensive regulation by banking agencies).
95. *See* Brief for the Board of Trade of the City of Chicago at 1–2, *Dunn* (No. 95-1181).
96. *See Dunn,* 117 S. Ct. at 920–21; *see also* Brief for Commodity Futures Trading Commission at 25–26, *Dunn* (No. 95-1181) (providing the CFTC argument that unscrupulous promoters frequently use commodity options to take advantage of unsuspecting investors).
97. *See* Brief for Commodity Futures Trading Commission at 3–4, 14–15, *Dunn* (No. 95-1181). Further, the Treasury Department agrees that the CFTC needs "clear authority to shut down foreign currency bucket shops." Anderson, *supra* note 70, at 777.
98. *See* Brief of Board of Trade of the City of Chicago at 24, *Dunn* (No. 95-1181). In 1995, approximately 75% of the daily trading on the Chicago Board of Trade involved options and futures, and there was concern these transactions would evaporate if the OTC markets, operating without regulation, began serving the same customer base that established exchanges served. *See id.*

occur in a sophisticated and highly volatile market, are exempt from regulation, especially in foreign currency transactions, another volatile and sophisticated market area.[99] But there are also strong arguments for denying the attempts to regulate in this area. The U.S. firms in businesses requiring transactions abroad need highly liquid OTC markets so they may obtain the best possible price for their currency purchases and sales. If the OTC markets were to become less liquid, these firms would likely have to shift their currency sales and purchases to other more liquid financial centers offshore.

This is problematic because it is inconvenient and troublesome for businesses and the United States. First, the foreseeable problems include shifting current operations and personnel, establishing new offices and relations in other OTC places, less convenient operating hours, and taking business out of the United States.[100] In addition, adherence to CEA regulation also increases the costs associated with trading,[101] and these increased costs could drive the foreign currency trading business out of the United States.[102] Further, foreign currency market participants will suffer the uncertainty of never knowing whether their specific activity is governed by the CEA.[103] Finally, this regulation will result in increased costs to market participants, enormous uncertainty of the enforceability of billions of dollars of outstanding currency options contracts, and competitive advantages to market participants in other parts of the world trading beyond the jurisdictional reach of the CEA.[104] For these reasons, the issue of regulation, and specifically the regulation of transactions discussed in *Dunn*, are important

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99. *See id.*

100. *Cf. Dunn,* 117 S. Ct. at 920 (stating that more regulation could drive business out of the United States).

101. These costs include the registration expenses and compliance costs associated with CFTC regulation, maintaining the capital requirements imposed by the CEA, being forced to trade on a CFTC designated exchange, and exposure to private rights of action under the CEA. *See* Brief of Crédit Lyonnais et al. at 3 n.1, *Dunn* (No. 95-1181); *see also* Anderson, *supra* note 70, at 778 (stating that if the benefits of compliance do not compensate for the costs, these costs can get passed on to the Treasury and taxpayers).

102. *See Dunn,* 117 S. Ct. at 920.

103. *See* Brief of Crédit Lyonnais at 9–10, *Dunn* (No. 95-1181).

104. *See id.* at 3; *see also* Brief of the Foreign Exchange Committee et al. at 5, *Dunn* (No. 95-1181) (stating that allowing CFTC regulations to apply to OTC foreign exchange options will put many U.S. businesses at a disadvantage in global competition).

to the United States economy and its role in international trade.

As pointed out in *Dunn*, it is not the court's role to make legislation that will protect the investors in this area, but the role of the legislature.[105] The decision in *Dunn* does not change the Treasury Amendment in any way. Further, dicta in the opinion supports its existence and continued validity.[106]

IV. CONCLUSION

In *Dunn*, the Supreme Court stays within the scope of it's power because it merely exercises "the province and duty of the judicial department to say what the law is,"[107] and when there is a conflict between circuits, as there was here, the U.S. Supreme Court is the "ultimate interpreter."[108]

As in many of the U.S. Supreme Court decisions, *Dunn* is again a reminder of the separation of powers and the authority granted to each governmental branch.[109] Here, the Supreme Court is restricted to interpreting the CFTC and the Treasury Amendment. Despite the well argued amici and party briefs, the role of the Supreme Court is extremely and necessarily limited.[110] Further, the decision today does not "yield results so manifestly unreasonable that they could not be fairly attributed to congressional design."[111] The emotional issue at stake is the protection of investors, and that issue is never even reached by the highest court. Here the Court correctly defers to the legislature to shape and define public

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105. *Dunn,* 117 S. Ct. at 921*; see also* Levar v. Freeman Decorating Co., 967 F. Supp. 1055, 1061 (1997). Further, the U.S. Supreme Court has held that policy arguments should not be considered when the language of the statute is clear. *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 188 (1994).

106. *See Dunn,* 117 S. Ct. at 918. "Although the OTC market for foreign currency options had not yet developed in 1974, the reasons underlying the Treasury Department's express desire at that time to exempt off-exchange commodity futures trading from CFTC regulation apply with equal force to options today." *Id.*

107. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

108. Baker v. Carr*,* 369 U.S. 186, 211 (1962).

109. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2166 (1997) (applying a separation of powers argument in the Fourteenth Amendment context).

110. *See Dunn,* 117 S. Ct. at 921. Although the Supreme Court's decision was based on statutory construction, it recognized an "important public policy dispute —with substantial arguments favoring each side." *Id.* at 920. The Court did not decide the outcome of the public policy dispute but left that to the Congress. *See id.* at 921.

111. *Id.* (quoting United States v. Rutherford*,* 442 U.S. 544, 555, (1979)).

policy,[112] and the briefs contributed to this case will provide a quick study in the arguments on both sides. The wisdom behind the 1974 Treasury Amendment has not changed,[113] only the demographics and characteristics of the investor profile. Whether the protection is worthwhile to potentially inhibit the economy and international affluence of U.S. businesses and OTC market is the very essence of a public policy question. The U.S. Supreme Court, in their wisdom, skipped the subject and left the question with the legislature where it belongs.

As the debate continues, money is continually changing hands. Some investors are winning and others are losing. Fortunes are sought and lost with increasing regularity. The chance to prosper is an American dream, and the financial markets provide an opportunity. And right now, in this one tiny area, there is no one patrolling the money.

Julie Baumgarten†

112. *See id.*; *see also* Rutherford, 442 U.S. at 555 ("Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied.").

113. *See Dunn,* 117 S. Ct. at 918.

† This Casenote received the Weil Gotshal & Manges writing award.