



## Consumer Federation of America

1620 I Street, N.W., Suite 200 \* Washington, DC 20006

March 13, 2008

The Honorable Tom Harkin  
Chairman  
United States Senate Committee on  
Agriculture, Nutrition, and Forestry  
328A Senate Russell Office Building  
Washington, DC 20510

Dear Chairman Harkin:

As you are aware, a 2004 7th Circuit decision, *CFTC v. Zelener*, raised concerns regarding the Commodity Futures Trading Commission's (CFTC) jurisdiction over certain cleverly drafted retail futures contracts known as "rolling spots." We are writing to support including language in the Farm Bill that would close the broad loophole created by this court decision and provide needed protection for consumers.

In *Zelener*, the court found that while retail customers – consumers – had been defrauded, the CFTC, the agency most capable of discovering and stopping these types of fraudulent activities, had no jurisdiction to intervene in these transactions because they were for spot contracts, not futures. The Court in *Zelener* held that the CFTC lacked jurisdiction even though the contracts involved were marketed to retail customers for purposes of speculation, were sold on margin, were routinely rolled over and over and held for long periods of time, and were regularly offset so that delivery seldom, if ever, occurred.

The *Zelener* case left a road map for how to avoid CFTC jurisdiction through clever draftsmanship of contracts, and many have followed in *Zelener's* footsteps. Just this past January, the Commission lost another case, *CFTC v. Erskine*, where the 8<sup>th</sup> Circuit Court of Appeals adopted and expanded upon the *Zelener* court's logic to once again hold that the CFTC had no jurisdiction over these "rolling spot" contracts, leaving consumers adrift.

While in both *Zelener* and *Erskine* the commodity involved was foreign exchange, the "rolling spot" contract can and is being applied to other commodities such as precious metals and oil. Commodity Exchange Act legislation passed by the House Committee on Agriculture would close the *Zelener* loophole for foreign exchange only. The Senate-passed farm bill, offered as a substitute to H.R. 2419, seeks to close the loophole for foreign exchange and other commodities.

We understand that conferees to the Farm Bill are currently considering whether to include a broad fix to the *Zelener* loophole in the final package. We strongly support the inclusion of such a broad fix. Our experience with consumer fraud shows that criminals are very flexible and will quickly take advantage of any available loopholes. It is crucial not to wait until consumers lose millions to fraud but to act now to clarify the CFTC's authority over these sales to retail customers.

Thank you for your consideration.

Sincerely yours,

A handwritten signature in black ink that reads "Susan Grant". The signature is written in a cursive, flowing style.

Susan Grant  
Director of Consumer Protection  
Consumer Federation of America