A BEAR MARKET FOR FREEDOM OF SPEECH: THE FIRST AMENDMENT AND REGULATION OF COMMODITY TRADING ADVISERS UNDER THE COMMODITIES EXCHANGE ACT

I. INTRODUCTION

The Commodities Exchange Act (the "CEA" or the "Act") makes it unlawful to engage in the business of providing commodity trading advice without registering as a commodities trading adviser ("CTA") with the Commodity Futures Trading Commission (the "Commission" or the "CFTC").[1] Since the Act's amendment in the early 1970s, the Commission and courts have upheld the constitutionality of the Act's registration requirements as applied to providers of indirect, impersonal commodity trading advice.[2] Specifically, they have found that the Act does not violate the First Amendment prohibition against government abridgment of the freedoms of speech and of the press.[3]

Recently, investors, CTAs and commentators began to question the constitutionality of the Act's restrictions,[4] citing a decade old Supreme Court

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1. *See* 7 U.S.C. § 6m (1994). This section provides: "It shall be unlawful for any commodity trading advisor . . . , unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor . . . ." *Id.*

2. *See, e.g.*, Savage v. Commodity Futures Trading Comm'n, 548 F.2d 192, 197 (7th Cir. 1977); *In re* Armstrong, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657 (CFTC Feb. 8, 1993), *rev'd on other grounds*, 12 F.3d 401 (3d Cir. 1993).

The most common example of indirect, impersonal trading advice is that of a CTA who publishes a newsletter in which he gives his opinion on prices of commodity futures.

3. *See* Savage, 548 F.2d at 197; *In re Armstrong*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 40,143. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . " U.S. CONST. amend. I.

4. The Northern District of Illinois dismissed a CTA's First Amendment challenge to the CEA's registration requirements in July 1997 on the grounds that the issue was not ripe for adjudication. *See* Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n, No. 97 Civ. 2362 (N.D. Ill. July 29, 1997), *discussed in Registration: Court Dismisses Free Speech Challenge to CEA's CTA Registration Requirements*, 29 SEC. REG. & L. REP. (BNA) 1114 (Aug. 8, 1997).

Additionally, a lawsuit making similar First Amendment challenges to these requirements has been filed in the U.S. District Court for the District of Columbia. *See* Taucher v. Born, Civil No. 97-1711 RMU (D.D.C., Jul. 30, 1997), *cited in Commodity Trading Advisors: CFTC's Registration Requirements Face Free Speech Challenge by Small Publishers*, 29 SEC. REG. L. REP. (BNA) 1081 (Aug. 1, 1997).

Commentators in the press also voice opposition to these requirements. *See, e.g.*, Jane Kirtley, *CFTC Shouldn't License the Press*, NAT'L. L.J., Sept. 15, 1997, at A21; Roger Runningen, *Free Speech Battle Hits Commodities*, CHI. SUN TIMES, Aug. 4, 1997, at 47; Aaron Luchetti, *Commodity Newsletter Publishers Claim Infringement of First Amendment Rights*, WALL ST. J., July 31, 1997, at

case, *Lowe v. SEC*,[5] for support. In dicta, *Lowe* stated that similar universal registration requirements imposed on investment advisers ("IAs") by the Investment Advisers Act of 1940 ("IAA") were unconstitutional.[6] Despite *Lowe*, the Commission has steadfastly refused to ease the CEA's restrictions on CTAs who provide indirect, impersonal trading advice.[7] As a result, these commentators claim that there is currently a groundless disparity in treatment between IAs who provide indirect, impersonal securities trading advice and CTAs who provide the same type of trading advice for commodities. The former are free from any registration requirements, while the latter remain subject to exactly the same requirements that the Supreme Court described as unconstitutional in *Lowe v. SEC*.[8] The restrictions on CTAs seem even more arbitrary when one considers that the exact same advice which would violate the CEA if sold to a few clients, may be published with full First Amendment protection in a magazine or newspaper such as *Barron's* or *The Wall Street Journal*.

This Note will analyze the CEA's requirements as applied to a hypothetical market newsletter—the prototypical example of indirect, impersonal trading advice. Our hypothetical newsletter is distributed by a CTA to paying subscribers to provide them with the CTA's market opinions and trading suggestions.[9] Our newsletter has limited but regular circulation to the CTA's clients, and our CTA does not provide any personalized trading advice to any of his clients.[10]

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5. 472 U.S. 181 (1985).

6. *See Lowe*, 472 U.S. 181. The *Lowe* court interpreted the IAA's statutory exclusions to exclude providers of indirect, impersonal trading advice from the IAA's registration requirements. *See id.* at 204-11. The court stated in dicta that the registration requirements of the IA were unconstitutional as applied to IAs who provided impersonal, indirect trading advice. *See id.* at 205-07.

7. *See In re Armstrong*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 40,143.; CFTC Interpretative Ltr. No. 95-101, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,565, at 43,501 (Nov. 21, 1995).

8. *See Lowe*, 472 U.S. at 205, 210-11 nn.58-59.

9. A CTA may also provide a "hotline," which is a phone number the customer calls to hear a recent recording of the CTA's current recommendations. This provides essentially the same service as a newsletter, but is more timely because the subscriber can have immediate access. Neither a newsletter nor a hotline involves direct communication between the subscriber and the CTA. *See In re Armstrong*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep.(CCH) at 40,143.

10. To further flesh out our example, we could stipulate that our CTA has experience trading commodities individually, or as a broker. Our CTA now uses this experience and contacts in the commodities markets to gather information on the markets.

To add further real world detail we can assume that our newsletter deals solely with soybean futures. A typical issue would then very likely contain information about the United States soybean crop, including acreage planted and expected yields. Our CTA would have contacts in the soybean processing industry to provide their estimates of this year's demand for soybean oil, which is a key ingredient in salad and frying oils. He would also check with his contacts in the grain trade to learn

The constitutionality of the Act's requirements hinges on whether our market newsletter is characterized as one of three types of speech activities: professional activity, commercial speech, or "fully protected" speech.[11] The Supreme Court has held that professional or commercial activity, such as law, medicine or accounting, is subject to government regulation, even though speech is a subordinate component.[12] The Supreme Court has held that commercial speech, defined as speech that promotes commercial transactions between the speaker and the audience,[13] is entitled to some degree of First Amendment protection, but less than that to which fully protected, noncommercial speech is entitled.[14] In contrast, noncommercial speech that displays "even the slightest redeeming social importance," is fully protected by the First Amendment.[15]

This Note proposes that the Act's registration requirements are unconstitutional as applied to those CTAs who provide impersonal, indirect trading advice, such as through a commodity market newsletter. Thus, Congress, or more realistically the courts, should eliminate the Act's registration requirements for CTAs who provide such advice.

Part II examines the legislative history of the Act. Part III examines the relevant First Amendment case law, including judicial interpretation of both the Act and analogous portions of the Investment Advisers Act. Part IV analyzes the constitutionality of the Act's regulation of CTAs and proposes that these regulations be eliminated for those CTAs who provide indirect, impersonal trading advice.

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about world wide demand for soybeans and the conditions of competing overseas crops, such as Canadian and European rapeseed.

Our CTA's client list could range from several dozen to several hundred individuals or companies depending on his reputation, experience and marketing effort.

This example also allows for a stark contrast between the complete First Amendment protection provided to such a newsletter published as a column in *Barron's* or *The Wall Street Journal*, and the total lack of protection currently granted to the very same newsletter provided by a CTA.

11. *See infra* Parts III and IV.A.

12. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (noting that the regulation of a course of conduct does not violate the First Amendment even though the conduct was in part "initiated, evidenced, or carried out by means of language, either spoken, written, or printed").

13. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (citations omitted).

14. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1979) (citations omitted). For discussion of the commercial speech distinction, see *infra* Part III.A.2.

15. Roth v. United States, 354 U.S. 476, 484 (1957). For purposes of this Note, "fully protected speech" refers to speech which is neither commercial, nor merely incidental to commercial conduct. Fully protected speech must also not be obscene, a concept which is irrelevant for purposes of this note. *See id.* Examples of fully protected speech would include political expression, artistic expression and communication by the traditional print media, such as newspapers, magazines or journals. *See generally* 3 RONALD D. ROTUNDA ET AL., CONSTITUTIONAL LAW, §§ 20.16-20.17, at 66-80 (1986).

II. THE COMMODITIES EXCHANGE ACT AND COMMODITY TRADING ADVISERS

In 1974, Congress enacted the Commodity Futures Trading Commission Act, which made significant amendments to the Commodities Exchange Act.[16] The Commodity Future Trading Commission Act created the Commission,[17] added the statutory definition of a CTA[18] and subjected CTA activities to regulation by the Commission.[19]

The Act defines a commodity trading adviser as anyone engaged in the business of providing advice concerning the trading of commodity futures or options, whether directly and orally, or indirectly by written or electronic media.[20] The Act further provides a list of persons who are specifically

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16. *See* Pub. L. No. 93-463, 88 Stat. 1389 (codified as amended at 7 U.S.C. §§ 1-19 (1994)). The CEA itself is the successor to the Grain Futures Act, which was enacted on September 21, 1922. Grain Futures Act, ch. 369, 42 Stat. 998 (codified as amended at 7 U.S.C. §§ 1-25 (1994)). In 1936, Congress amended the Grain Futures Act to expand the number of commodities it covered and renamed it the Commodities Exchange Act. Commodity Exchange Act, ch. 545, 49 Stat. 1491 (codified as amended at 7 U.S.C. §§ 1-25 (1994 & Supp. I 1995); *see also* 1 PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, COMMODITIES REGULATION, § 1.01, at 1-5 n.1 (3rd ed. 1998).

17. *See* 7 U.S.C. § 4a (1994).

18. *See id.* § 1a(5)(A).

19. *See id.* § 6m. The 1974 creation of the Commission and amendments to the Act were a legislative reaction to the historically high inflation of food prices in the early 1970s which had been caused by turmoil in agricultural commodities markets. This situation occurred when the Soviet Union, which prior to 1972 had been one of the largest grain exporters in the world, was forced to import massive quantities of grain in that year due to crop disasters and rising domestic demand. Grain trading companies, which became aware of this before the general public, were able to make huge profits in several ways. They were able to sell millions of tons to the Russians and at the same time exploit their valuable inside information by trading futures on the organized exchanges before the market reacted to the new supply and demand situation. Retail prices for meats and breads rose as the higher cost of grain raised the costs of producing these goods. Public outcry was intense, as consumers felt that multinational grain trading companies were holding them hostage in the supermarket. The concern over America's food supply became so intense that the government interfered with U.S. agricultural trade for the first time since World War II by ordering an embargo on the export of soybeans. *See generally* DAN MORGAN, MERCHANTS OF GRAIN, 192-219 (1979).

In the CFTC Act of 1974, Congress attempted to bring commodities exchanges under the same regulatory scrutiny as the Securities Acts had done to securities markets. *See* Letter from Herman E. Talmudge, Acting Secretary of Agriculture, to Senate Agriculture Committee (May 15, 1974), *in* 1974 U.S.C.C.A.N. 5843, 5885 (stating that "the futures market have attracted more attention than at any other time in history").

The effect of the 1972 Russian buying spree in spurring increased regulation of commodities markets can be compared to the effect of the stock market crash of 1929 in leading to the development of securities regulation statutes. For a collected legislative history of the CFTC Act of 1974, see generally 1974 U.S.C.C.A.N. 5843.

20. *See* 7 U.S.C. § 1a(5)(A). This section defines a CTA as:

> any person who--
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> (i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in--
>
> (I) any contract of sale of a commodity for future delivery made or to be made on or subject

excluded from the definition of a CTA, including publishers of print or electronic media with a general and regular dissemination.[21] However, the applicability of this exclusion is subject to an important restriction found in another subsection.[22] This restriction limits the exclusions to persons whose furnishing of advice is "solely incidental to the conduct of the [provider's] business or profession."[23] The exclusion is thus available only to people whose main business is not providing trading advice. Parties whose primary business is providing advice cannot avail themselves of the exclusion, even if they limit their services to impersonal, indirect advice.[24]

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to the rules of a contract market;

(II) any commodity option authorized under section 6c of this title; or

(III) any leverage transaction authorized under section 23 of this title; or

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).

7 U.S.C. § 1a(5)(A).

Most CTAs fall into the Act's definition under subsection (i)(I), through their advice regarding futures markets. A detailed understanding of futures trading is not necessary for purposes of this Note, but a few basics are helpful. A "future" is a contract to deliver a certain commodity, at a certain place and future time at a set price. *See* 1 JOHNSON & HAZEN, *supra* note 16, § 1.02[3], at 1-19. The CEA governs all futures that are traded in an organized exchange, whether or not the underlying product is traditionally considered a commodity. *See* 7 U.S.C. § 2(a)(1)(A)(i); 1 JOHNSON & HAZEN, *supra* note 16, § 1.02[1], at 1-7, 1-10 & n.24. Today, there are futures for products ranging from agricultural products to stock indexes and foreign currency; all are considered commodities under the CEA. *See id.* § 1.02[1], at 1-7.

The fundamental purpose of futures trading is to allow parties to assume or diminish the risk of market price fluctuations for the underlying commodity. Persons trading commodities in cash markets use futures to manage their exposure to price fluctuations. Few futures contracts ever result in actual deliveries of the underlying commodity. The most active futures market in the world is the Chicago Board of Trade. For a general overview of futures trading see generally 1 JOHNSON & HAZEN, *supra* note 16, §§ 1.01-1.16, at 1-1 to 1-215. For a detailed explanation of the mechanics of futures trading, see JAKE BERNSTEIN, HOW THE FUTURES MARKETS WORK (1989); CHICAGO BOARD OF TRADE, COMMODITY TRADING MANUAL (1989).

21. Section 1a(5)(B) states: "Subject to subparagraph (C), the term "commodity trading adviser" does not include . . . (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees . . . ." Were it not for the restriction discussed immediately below, this language would exclude most CTAs who provide trading advice solely through newsletters and hotlines. *See infra* notes 22-24 and accompanying text.

22. *See* 7 U.S.C. § 1a(5)(B)(i) (1994).

23. *Id.* § 1a(5)(C).

24. *See* 1974 U.S.C.C.A.N. 5843, 5864. The legislative history of the Act states:

> [T]he [Senate Agriculture Committee] wished to make clear that many individuals who are engaged in the buying and selling of commodities may, in the course of their arms-length transactions with customers, offer opinions on the value of commodities or commodity futures which are entirely gratuitous. Any such incidental expression of views does not bring either an employee or his employer within the definition of a "commodity trading advisor."

Id. Congress primarily intended the exclusion to protect only two types of entities: traditional news publishers, such as newspapers and magazines, and traders of physical, "cash" commodities, who in the course of dealing with their trading partners and customers typically give free advice on the futures markets. Large, sophisticated traders typically provide their opinions or advice on futures markets as a free service in order to develop customer loyalty. All players in the commodity markets are acutely

It is unlawful for a person falling within the definition of a CTA to provide any trading advice unless registered as a CTA.[25] Registration is a complex and cumbersome process, requiring, among other things, disclosure of the CTA's financial assets, prior criminal convictions and fingerprinting.[26] The Commission can deny registration on several grounds, including prior regulatory violations, felony convictions, willful misstatements or omissions on the registration statement and anything else deemed to be "good cause."[27] Providing trading advice without registration exposes the CTA to criminal liability,[28] fines,[29] injunctions[30] and private remedies.[31]

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interested in the futures prices, because changes in the price of grain futures are usually translated quickly into the cash price of the physical commodity market. *See* 1 JOHNSON & HAZEN, *supra* note 16, § 1.03[2], at 1-83.

Congress did not intend to create an exclusion for publishers of impersonal trading advice who make advising their primary business. CTAs whose main business is providing indirect, impersonal trading advice through newsletters or other means cannot make use of these exclusions and remain subject to the Act's requirements. *See In re* Armstrong, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657, at 40,149 (CFTC Feb. 8, 1993), *rev'd on other grounds*, 12 F.3d 401 (3d Cir. 1993). *See also infra* Part III.B.

25. *See* 7 U.S.C. § 6m(1) (1994).

26. *See* 17 C.F.R. § 3.10 (1997). This regulation lays out the forms required to be used by registering CTAs. Registrants must fill out one Form 7-R, which is a questionnaire regarding registering firms. *See id.* Form 7-R includes questions regarding general information on the firm, such as addresses and financial information. It also includes a "Disciplinary History" section, which includes questions regarding the firm's history of felonies, violations of commodity laws, disbarments and disqualifications to participate in government contracts. *See* Comm. Fut. L. Rep. (CCH) ¶ 3515, at 3596-97, Form 7-R, Items 11-12.

In addition to Form 7-R, which must be filled out for the firm, section 3.10 requires that each person who is a principal of the firm must fill out a Form 8-R. *See* 17 C.F.R. § 3.10(2)(i). Form 8-R includes its own "Disciplinary History" section, which is more detailed and more personal than Form 7-R. Among other things, it asks the registrant to disclose whether the registrant, or any entity the registrant has ever controlled, has: been subject to disciplinary proceedings brought by the CFTC, SEC, any foreign or domestic commodities or securities exchanges, or any professional associations; convicted or found guilty of any felony; been found guilty of violating the CEA, the Securities Act of 1933 the Securities Exchange Act of 1934 or the Investment Advisors Act of 1940; been fired due to a "complaint" by a customer; or filed for bankruptcy protection under Chapters 7 or 11. *See* Comm. Fut. L. Rep. (CCH) ¶ 3521, at 3620-21, Form 8-R, Items 14-22.

Additionally, section 3.10 requires each person filing a Form 8-R to submit a set of fingerprints on a fingerprint card with the form. *See* 17 C.F.R. § 3.10(2)(i); *see also* 1 JOHNSON & HAZEN, *supra* note 16, § 1.10[3], at 1-177.

27. 7 U.S.C. § 12a(3) (1994). The CFTC has the power to deny registration on several grounds, including, among others: the registrant has (A) violated provisions of the CEA; (B) violated provisions of securities laws; (C) allowed a person under their supervision to violate provisions of securities laws; (D) been convicted of a felony; (E) been convicted of misdemeanors related to commodities transactions; (F) been debarred from contracting with the United States; (G) willfully made false statements on their registration application; and, (M) "other good cause." 7 U.S.C. § 12a(3)(A)-(N). The CFTC elaborates on the good cause provision in the Appendix to Part 3. *See* 17 C.F.R. pt. 3, app. A (1997); *see also CFTC Interpretive Statement Setting Forth Factors for Denial of Registration for Other Good Cause Shown*, [1978-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,005 (March 5, 1980); 1 JOHNSON & HAZEN, *supra* note 16, § 1.10[5] at 1-181.

28. *See* 7 U.S.C. § 13(a)(5). This section makes it a felony for "[a]ny person willfully to violate

Commission regulations also impose continuous record keeping requirements on CTAs.[32] CTAs must keep detailed records of clients' names and addresses as well as transactions and communications with these clients.[33]

The Act also contains important antifraud provisions specifically aimed at CTAs.[34] The Act makes it unlawful for any CTA to use instrumentalities of interstate commerce to defraud a client or potential client or to engage in a transaction that may serve to defraud a client or potential client.[35] Violations

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any other provision of this chapter, or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter...." *Id.*

29. *See id.* § 13a-1(d). This section gives the CFTC the power to seek civil penalties of up to the greater of $100,000 or triple the person's monetary gain for each violation of the Act. *See id.*

30. *See id.* § 13a-1(a). This section gives the CFTC the power to seek an injunction to prohibit any person from violating the act when it appears that the person is currently violating, or about to violate the Act. This section provides that such an injunction cannot be granted *ex parte* unless it is to enjoin the person from disposing of documents. *See id.*

31. Since 1983, the Act has specifically recognized private remedies for those injured by the wrongful conduct of any person covered by the Act. *See* 7 U.S.C. § 25. The effect of section 25(a) is to allow private damage suits, limited to actual damages, against any CTA who has violated, or willfully aided a violation of the Act. *See id.* § 25(a). Section 25 also specifically provides that it is the exclusive private judicial remedy for violations of the Act. *See id.* § 25(a)(2). For discussion of express private rights of actions under the CEA, see generally Michael S. Sackheim, *Parameters of Express Private Rights of Action for Violations of the Commodity Exchange Act,* 28 ST. LOUIS U. L.J. 51 (1984).

Prior to 1983, the courts recognized an implied private right of action. *See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982). Injured parties may still rely on the implied right of private action for transactions occurring before 1983. *See, e.g.,* Jarrett v. Kassel, 972 F.2d 1415 (6th Cir. 1993). For the judicial development of implied private rights of actions under the CEA, see 2 JOHNSON & HAZEN, *supra* note 16, § 5.09, at 5-197 to 5-219.

32. *See* 17 C.F.R. § 4.33 (1997); *see also* 1 JOHNSON & HAZEN, *supra* note 16, § 1.10[4], at 1-180.

33. *See* 17 C.F.R. § 4.33(a)-(b). The CTA must keep a list of clients' names and addresses, copies of required disclosures signed by clients, all agreements giving the CTA control over a client's account, all other agreements between the CTA and any client, all commodity transactions made by the CTA, all advertisements made by the CTA, and any business transactions involving commodity markets. *See id.* Violations of this regulation expose the CTA to criminal and civil liability. *See* 7 U.S.C. §§ 13(a)(4), 13a-1(a), 13a-1(d); *see also supra* notes 28-31 and accompanying text.

34. The Act also contains a general antifraud provision which covers fraud by persons acting "for or on behalf of any other person" in connection with commodity futures contracts. 7 U.S.C. § 6b. This provision is generally aimed at traders or brokers who execute orders for customers, thus CTAs would not normally be covered by this section. However, a CTA could be subject to liability for fraudulent conduct under this section if the CTA had assumed some control over a client's actual trades, was trading for a client or giving the client specific buy and sell orders. *See generally* 1 JOHNSON & HAZEN, *supra* note 16, § 1.10[6], at 1-183 n.842.

35. *See* 7 U.S.C. § 6o (1994). "It shall be unlawful for a [CTA] ... (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant." *Id.* This prohibition applies whether or not the CTA is registered, subject to registration or exempted from registration. *See id.* However, this provision specifically governs only those falling into the definition of a CTA.

of the antifraud provisions also subject the CTA to criminal and civil liabilities.[36]

III. JUDICIAL AND ADMINISTRATIVE INTERPRETATION OF THE COMMODITIES EXCHANGE ACT

A. Relevant First Amendment Law

The issue presented by the Act's registration requirements involves three important classifications of speech activity: professional conduct that only incidentally involves speech, commercial speech, and fully protected speech. Each class of speech activity enjoys a different level of First Amendment protection. The first step in assessing the constitutionality of the registration requirements is, thus, understanding the framework of these classifications and how they apply to the regulations in question.

1. Professional or Commercial Activity That Only Incidentally Involves Speech

It is well established that government may regulate commercial and professional activity, even to the point of a total ban.[37] Courts have held that this power is no less valid when speech is an incidental component of that activity.[38] The power has its limits, however. In 1931, the Supreme Court held in *Near v. Minnesota ex rel. Olson*[39] that a state could not restrict constitutionally protected activity merely by labeling it a business.[40] Simply "[c]haracterizing [a] publication as a business, and the business as a nuisance," did not allow a state to thereby regulate a publication in a manner

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Courts have held that scienter is not required to incur liability under this provision. *See, e.g.*, Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 283-85 (9th Cir. 1979). However, the Supreme Court has imposed a scienter requirement for similar actions under Rule 10b-5 in securities fraud cases. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). The similarity of the language of the two statutes, and the similar contexts in which they operate has led the Eleventh Circuit and at least one commentator to suggest that *Ernst & Ernst* calls for a similar imposition of a scienter requirement in section 6b and section 6o actions in commodities fraud cases. *See* Messer v. E.F. Hutton & Co., 833 F.2d 909, 917-19 (11th Cir. 1987) (holding that violation of section 6o requires *scienter*); Philip F. Johnson, *Applying* Hochfelder *in Commodity Fraud Cases*, 20 B.C. L. REV. 633 (1979).

36. *See supra* notes 28-31 and accompanying text.

37. *See* Dent v. West Virginia, 129 U.S. 114, 122 (1889) (holding that "there is no [unconstitutional] deprivation of [a] right where [a person's exercise of his profession] is not permitted because of a failure to comply with conditions imposed ... for the protection of society"). This principal justifies state regulation of professions such as law, medicine and even hair stylists.

38. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

39. 283 U.S. 697 (1931).

40. *See id.* at 720.

that would otherwise be unconstitutional.[41] Despite this ruling, the Court advanced no standard by which to make the distinction between regulation of a commercial activity and regulation of speech.

Justice Jackson discussed this distinction in the 1945 case of *Thomas v. Collins*.[42] In *Thomas*, the Court struck down a Texas law that prohibited labor organizing without a license.[43] The majority found that the statute did more than regulate the vocation of labor organizing; rather, it licensed speech itself.[44] As such, it operated as an unconstitutional prior restraint.[45]

In his concurring opinion, Justice Jackson elaborated on the distinction between regulation of commercial activity that only incidentally involved speech and the regulation of speech itself.[46] Justice Jackson illustrated this distinction by contrasting a state's valid power to bar an unlicensed person from providing medical care and a state's invalid attempts to bar the same unlicensed person from speaking about medical care in general.[47]

In the half century since *Thomas*, the Court has done very little to refine the distinction between regulation of a vocation and regulation of speech. However, in a concurring opinion in *Lowe v. SEC*,[48] Justice White proposed a test to distinguish between professional activity and speech activity. According to this test, a speaker practices a profession when that person

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41. *Id.*

42. 323 U.S. 516 (1945).

43. *See id.* at 535-43. The plaintiff, Thomas, was a professional labor organizer from out of the state who was arrested for violating this law by giving a speech in Texas to a group of workers without the required license. *See id.* at 523.

44. *See id.* at 540.

> If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order.

Id.

45. *See id.* at 541. Generally, a prior restraint is "any governmental order which restricts or prohibits speech prior to its publication." 3 ROTUNDA ET AL., *supra* note 15, § 20.16, at 72. For a discussion of prior restraints, see *infra* Part III.A.3.

46. *See Thomas*, 323 U.S. at 544-45 (Jackson, J., concurring).

47. *See id.*

> [T]he state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

Id.

48. 472 U.S. 181, 223 (1985) (White, J., concurring). Justice White was joined in his concurrence by Chief Justice Burger and Justice Rehnquist. *Id.* The majority opinion in this case is discussed more fully below. *See infra* Part III.C.2.

"takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client," a situation that Justice White characterized as a "personal nexus" between the speaker and the client.[49] When speaker and client lack this personal nexus the activity is speech.[50] As providing impersonal investment advice lacks a personal nexus, regulation of the advise must be analyzed under the standards for regulation of speech.[51]

2. *Regulation of Commercial Speech*

The Supreme Court laid down the current definition of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[52] There, the Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[53]

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49. *Lowe*, 472 U.S. at 232.

> Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's [prohibition].

Id.

50. *See id.* at 233. Justice White stated that regulation of entry into "the profession of providing investment advice tailored to the individual needs of each client ... is not subject to scrutiny as a regulation of speech"; rather, it is a "legitimate exercise of the power to license" the practice of a profession. *Id.* However, he concluded that providing indirect, impersonal investment advice was not a professional activity because it lacked the personal nexus factor. *See id.* Therefore, the state may not regulate this activity. *See id.*

51. *See id.*

52. 447 U.S. 557 (1980). *Central Hudson* involved a state regulation, prompted by New York's desire to promote energy conservation that completely banned electric utilities from advertising to promote the use of electricity. *See id.* at 558-60.

53. *Id.* at 561. The Court's definition of commercial speech is a concept in transition. Earlier cases tried to define commercial speech by looking at the primary purpose of the speech. If the primary purpose of the speech was to secure a profit, the speech was deemed commercial. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that political protest message placed on back of advertising flier was not protected because publisher's primary purpose had been to use it to evade an ordinance banning purely commercial advertising); *cf.* Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (holding that advertising to sell religious tracts was not commercial activity where the main purpose was to preach and publicize a religion, not to make profit).

The Court eventually recognized the potential of the primary purpose test to engulf even those forms of speech traditionally thought of as fully protected. Indeed, the test could have eventually engulfed newspapers, which, after all, do operate to make a profit. The Court, therefore, rejected this standard. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that fact that newspaper was motivated by profit to carry an ad did not render the ad commercial speech, thus subject to lower level of First Amendment protection); *see also* Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (noting that profit motivation for advertisement at issue is not sufficient for classification of such speech as commercial).

The Supreme Court currently uses a content based definition. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In *Virginia Pharmacy Board*, the Court defined commercial speech as that which does "no more than propose a commercial transaction." *Id.* at

Prior cases had established that a speaker's profit motive does not satisfy the "economic interest" portion of this test and is irrelevant in characterizing speech as commercial or noncommercial.[54]

Central Hudson also laid out the current standard for legitimate government regulation of commercial speech. If the speech concerns lawful activity and is not misleading,[55] government regulation of such speech is constitutional only if the government has a substantial interest in the regulation, and the regulation advances the government interest without being more extensive than necessary.[56]

The Court explored the relevant contours of this two part test in cases involving state regulation of lawyer advertising. In *Ohralik v. Ohio State Bar Association,*[57] the Court upheld a state court regulation banning all lawyers from personally soliciting recent accident victims. Although the Court recognized that this was commercial speech, entitled to some degree of constitutional protection,[58] it found that the regulation was justified under the two-part test.[59] First, personal solicitation by lawyers presents a great

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762 (citing *Pittsburgh Press Co.*, 413 U.S. at 385).

The degree of protection to which commercial speech is entitled has also been in transition throughout this century. In its earliest treatments, the Court held commercial speech was entitled to no constitutional protection. *See Valentine*, 316 U.S. at 54 ("[T]he Constitution imposes no such restraint on government as respects purely commercial advertising."). For several decades, the Court interpreted this holding to cover any speech proposing a commercial transaction. *See* 3 ROTUNDA ET AL., *supra* note 15, § 20.27, at 131. However, the Court rejected this doctrine in *Virginia Pharmacy Board* and held that commercial speech was entitled to limited constitutional protection. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 761. For a complete treatment of the evolution of the commercial speech doctrine, see generally 3 ROTUNDA ET AL., *supra* note 15, §§ 20.26-20.31, at 129-62.

54. *See, e.g., New York Times*, 376 U.S. at 266; *Pittsburg Press Co.*, 413 U.S. 376.

55. *See Central Hudson*, 447 U.S. at 566.

56. *See id.* at 566; *see also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.").

57. 436 U.S. 447, 467 (1978). The Ohio Bar brought a disciplinary proceeding against a lawyer, Ohralik, to enforce a ban on personal solicitation of accident victims. Ohralik had solicited representation of two teenage girls who had been involved in an automobile accident by visiting the girls in the hospital immediately after the accident and urging them to retain him as their council on a contingency fee basis. The two girls did not have any prior experience with retaining a lawyer. Even after rejections by the girls, Ohralik tried to insert himself between them and their respective insurance companies. *See id.* at 449-54.

The Court rejected at the outset Ohralik's claim that his conduct was beyond regulation because it involved speech as a "subordinate component," *Id.* at 456. "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (quoting *Giboney*, 336 U.S. at 502).

58. *See Ohralik*, 436 U.S. at 455.

59. *See id. Ohralik* predates *Central Hudson* by two years; however, the Court's analysis in *Ohralik* closely parallels *Central Hudson's* two part test: 1) a substantial state interest, and 2) a

opportunity for overreaching and fraud, thereby creating a substantial state interest in regulating this speech.[60] Second, the evidentiary problems presented in regulating personal solicitation reduce the effectiveness of any regulation short of a total ban. Therefore, in this case, the Court found a prophylactic measure to be appropriate.[61]

In *Shapero v. Kentucky Bar Association,*[62] the Court distinguished direct and indirect lawyer solicitation. *Shapero* struck down a state law banning direct mail advertising by lawyers by distinguishing mail solicitation from the face-to-face solicitation of *Ohralik.*[63] First, unlike a personal solicitation, mail can be "put in a drawer to be considered later, ignored or discarded."[64] Thus, it does not present as great a hazard of overreaching, invasion of privacy and fraud.[65] Second, there are effective means of regulating direct mail solicitation other than an outright ban.[66] For example, the state can scrutinize direct mail solicitation through legitimate screening mechanisms, similar to those used to screen lawyer advertising.[67] Therefore, there is neither a substantial state interest at stake, nor is the regulation sufficiently

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regulation that directly advances that interest without being more extensive than necessary.

60. *See id.* at 465-66. Several characteristics of personal solicitation of accident victims created a high danger of overreaching or fraud. First, the lawyer's supposed persuasive skills and the potential client's inability to verify the lawyer's statements. *See id.* at 465. Second, the potential client's injured or distressed condition. *See id.* Third, the average layman's lack of sophistication regarding the attorney-client relationship. *See id.* at 465 n.24.

The Court distinguished the dangers of such direct solicitation from the lesser dangers posed by broadly aimed public advertising, which it felt presented a less substantial state interest in regulation. *See id.* at 457.

61. *See id.* at 466. The Court focused on the difficulty of proving the actual facts of personal solicitation. Personal solicitation is not open to public scrutiny and there are often no witnesses to the solicitation so it is often difficult to prove the actual facts in court. *See id.* Thus, the only effective method of regulation is a strong prophylactic rule. *See id.*

62. 486 U.S. 466 (1988).

63. *See id.* at 475. Shapero was an attorney who applied to the Kentucky Attorneys Advertising Commission seeking approval of a mass mailing that he wished to send to potential clients who had been the subject of foreclosure suits. The letter informed the recipient that Zauderer knew they had been foreclosed on, and that he could potentially help them keep their homes and assets through bankruptcy law. He then urged the recipient to call him for free advice. *See id.* at 469. The Commission refused to permit Shapero to send the letters, basing its refusal on a Kentucky Supreme Court Rule which banned lawyer solicitation through mail or delivery which was motivated by the recipient's special situation which created a need in the recipient for legal services. *See id.* at 469-70. On appeal, the Kentucky Supreme court found that this rule was unconstitutional. *See id.* However, the Kentucky Supreme Court then replaced the rule with a very similar rule modeled after ABA Model Rule of Professional Conduct 7.3, which barred essentially the same type of activity. *See id.* at 470-71. The *Shapero* Court aimed its opinion at both rules given their close similarities. *See id.* at 471.

64. *Id.* at 476.

65. *See id.*

66. *See id.*

67. *See id.* at 477-78.

narrow in advancing any alleged state interest.[68]

3. *Licensing Requirements as Prior Restraints on Noncommercial Speech*

Generally, the First Amendment protects fully protected speech from any state attempt at prior restraint.[69] The modern definition of a prior restraint, established in *Near v. Minnesota ex rel. Olson*,[70] is any state act which restricts speech or publication prior to its being made.[71] *Near* struck down a statute that allowed state courts to enjoin the publication of any "malicious, scandalous and defamatory newspaper, magazine or other periodical."[72] The statute thus allowed the state to prevent the publication of material based solely on content.[73] Overturning the statute, the Court held that preventing prior restraints of speech was one of the main purposes of the First Amendment.[74]

Licensing schemes specifically aimed at preventing fraud are also subject to scrutiny as prior restraints. In *Village of Schaumburg v. Citizens for a*

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68. *See id.* at 478-79.

69. *See* Roth v. United States, 354 U.S. 476, 484 (1957). For explanation of fully protected speech, see *supra* note 15. Over the years, the Court has carved out exceptions where the First Amendment allows prior restraints. Prior restraints may be allowed to prevent actual obstruction of military recruiting activities, to prevent obscene speech, or to prevent incitements to violence and overthrow of the government. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931). For a full discussion of the prior restraint doctrine and its exceptions, see 3 ROTUNDA ET AL., *supra* note 15, § 20.16, at 74-80. This Note does not consider CTAs who may spice up their trading newsletters with obscenity, calls for violent revolution or threats to national security.

70. 283 U.S. 697 (1931). For additional analysis of *Near*, see 3 ROTUNDA ET AL., *supra* note 15, § 20.16, at 74-80. *See generally* Symposium, *Near v. Minnesota, 50th Anniversary*, 66 MINN. L. REV. 1 (1981); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

71. *See* 3 ROTUNDA, ET AL., *supra* note 15, § 20.16, at 72.

72. *Near*, 283 U.S. at 701-02.

73. The Court faulted the statute for several reasons. The statute was not aimed at the "redress of individual or private wrongs." *Id.* at 709. The statute did not act as punishment for publishing such material, but as a means of suppressing the publisher of such material. *See id.* at 711. Finally, the statute operated as continuing censorship of the publisher, enjoining the publisher from resuming the distribution of the offending publication. *See id.* at 712. In summary, the Court stated:

> [T]he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter ... and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. *This is the essence of censorship.*

Id. at 713 (emphasis added).

74. *See id.* ("In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.").

Better Environment,[75] the Court struck down an ordinance that prohibited solicitation by charitable organizations that used more than twenty-five percent of their funds for overhead. The city claimed that such organizations constituted for-profit groups and presented a greater chance of fraud.[76] The Court was unpersuaded and held that the ordinance was too broad.[77] The Court identified less restrictive means available to achieve the legitimate goal of preventing fraud, including existing fraud laws that punish fraudulent speech without prior restraint.[78]

*B. Pre-*Lowe *Case Law Regarding the Commodities Exchange Act*

Only two years after its enactment, the CTA provisions of the Commodities Exchange Act faced a First Amendment challenge in *Savage v. CFTC*,[79] in which the Seventh Circuit found the registration requirements of the Act to be constitutional.[80] The court, assuming that CTA activity was commercial speech, acknowledged that commercial speech was entitled to "a measure" of First Amendment protection.[81] However, without articulating a clear rule, the court stated that the First Amendment "does not remove a business engaged in the communication of information from general laws

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75. 444 U.S. 620 (1980). In *Lovell v. Griffin*, 303 U.S. 444, 451 (1938), the Court had earlier held that licensing of the press is as much of a prior restraint as an outright ban. *Lovell* also defined the term "press" very broadly to include "every sort of publication which affords a vehicle of information and opinion." *Id.* at 452.

76. *See Shaumburg*, 444 U.S. at 636-37.

77. *See id.* at 637. Specifically, the registration requirement for all charities whose overhead exceeded 25% was too broad to be considered intimately related to the alleged state interest of preventing fraud. *See id.* at 636-37.

78. *See id.* at 636-38.

79. 548 F.2d 192 (7th Cir. 1977). The Commission denied Savage's registration as a CTA on the grounds that he had been previously convicted of securities and mail fraud in connection with activities as a CTA. *See id.* at 193-95. Savage had been engaged in IA activities prior to the enactment of the CEA. During this time Savage sold stocks that customers had hypothecated with Savage's firm without informing the customers and gave customers confirmations of sale and purchase orders that he had never executed on an exchange. These violations of securities laws were grounds for the Commission to deny registration to Savage. *See supra* note 27. Savage's appeal claimed that the registration requirements of the CEA were an "unwarranted impairment of [his] First Amendment rights of freedom of speech and press." *Savage*, 548 F.2d at 196.

After the Seventh Circuit's decision against him, Savage continued to engage in CTA activity despite his lack of registration. Two years later the Commission, alleging fraudulent conduct by Savage in violation of 7 U.S.C. §§ 6b, 6c, 6o, obtained a permanent injunction against Savage to keep him from engaging in CTA activities. On appeal, the Ninth Circuit affirmed the injunction with respect to section 6o but reversed with respect to sections 6b and 6c. *See* Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270 (9th Cir. 1979).

80. *See Savage*, 548 F.2d at 197.

81. *Id.* at 197 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)).

regulating business practices."[82]

C. Lowe v. SEC *and the Investment Advisers Act of 1940*

The 1985 Supreme Court case, *Lowe v. SEC*,[83] considered registration requirements imposed on investment advisers ("IAs") by the Investment Advisers Act of 1940 ("IAA"). The provisions at issue in *Lowe* are sufficiently similar to the provisions in the Commodities Exchange Act that *Lowe* should serve as persuasive authority for any court interpreting the registration requirements of the CEA.[84] Unfortunately, courts and the Commission have not been persuaded on this point.[85] Understanding how, if at all, *Lowe* should affect constitutional analysis of the CEA first requires a brief look at the relevant language of the IAA.

1. *The Investment Advisers Act of 1940*

In language very similar to the CEA, the IAA defines an investment adviser as any person who advises others, either directly or through publications or writings, as to investing in securities, or issues reports concerning securities for profit.[86] The IAA definition of an IA specifically excludes publishers of "bona fide" newspapers, news magazines or business or financial publications of general and regular circulation.[87] Unlike the CEA, however, the IAA exclusion is not limited to those persons for whom providing investment advice is solely incidental to their business.[88]

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82. *Savage*, 548 F.2d at 197 (citing Curtis Publishing Co. v. Butts, 288 U.S. 130, 150 (1967)).

83. 472 U.S. 181 (1985).

84. *See* 1 JOHNSON & HAZEN, *supra* note 16, § 3.04, at 3-60.

> The language of section 1a of the Commodities Exchange Act closely parallels the Investment Advisers Act. ... [A] narrower reading of the [CTA] exclusion would raise the constitutional issues that the *[Lowe]* Court noted but did not reach. The question would then become whether prohibiting investment advice unless the publisher has registered results in an unconstitutional prior restraint in violation of the First Amendment.

Id. (footnote omitted).

85. *See infra* Part III.D.

86. *See* 15 U.S.C. § 80b-2(a)(11) (1994), which defines an investment adviser:

> [A]ny person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities."

Id. This is analogous to the definition of a CTA found in 7 U.S.C. § 1a(5) (1994). *See supra* note 20.

87. *See* 15 U.S.C. § 80b-2(a)(11)(D) (excluding from the definition of an IA, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation").

88. *See supra* notes 20-24 and accompanying text. *Compare* 15 U.S.C. § 80b-2(a)(11)(D) (1994), *with* 7 U.S.C. § 1a(5)(B)(i) (1994).

The IAA also prohibits an unregistered investment adviser from engaging in any business as an investment adviser.[89] The IAA also includes antifraud provisions which are specifically aimed at persons meeting the statutory definition of investment adviser.[90]

2. Lowe v. SEC

In *Lowe*, the Supreme Court interpreted the IAA's definition of an investment adviser.[91] Broadly interpreting the exclusion of the IAA so as to exclude all publishers of any "bona fide" publication of "regular and general" circulation,[92] the Court explicitly held that all IAs who sold advice strictly through newsletters or hotlines qualified for this exclusion.[93] In dicta, the Court stated that the IAA's restrictions on publishing indirect, impersonal advice were unconstitutional restrictions on commercial speech because this activity did not present sufficent danger to the recipient to justify the regulation.[94] However, the Court explicitly reserved the constitutional issue, relying instead on their interpretation of the IA's exclusions to accomplish

89. *See* 15 U.S.C. § 80b-3(a). The language of section 80b-3(a) is similar to the language of CEA at 7 U.S.C. § 6(m)(1). *See supra* note 1.

90. *See* 15 U.S.C. § 80b-6. "It shall be unlawful for any *investment adviser* ... (1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client...." *Id.* (emphasis added).

91. 472 U.S. 181 (1985). In this case, the SEC sought to enjoin an unregistered investment adviser, Lowe, from providing trading advice through newsletters. Lowe had been a registered investment adviser from 1974 to 1981. During that time he was convicted of "misappropriating funds of an investment client, of engaging in business as an investment adviser without filing a registration application with New York's Department of Law, of tampering with evidence to cover up fraud of an investment client and of stealing from a bank." *Id.* at 183. As a result of these violations, the SEC revoked his registration as an IA. Lowe ceased his personalized investment advice business, but continued to publish impersonal investment advice in the form of newsletters. A year later, the SEC brought suit again, seeking to enjoin Lowe from publishing these newsletters. *See id.*

92. *Id.* at 206.

93. *See id.* at 208. The Court created a two part requirement for a publication to claim the subsection (D) exclusion: the publication must be "bona fide" as evidenced by "disinterested commentary and analysis as opposed to promotional material disseminated by a 'tout,'" and it must be "of regular and general circulation." *Id.* at 206. Lowe's newsletters were disinterested, and were offered with sufficient regularity, thus both requirements were satisfied. *See id.*

94. *See id.* at 204-11. A key part of the majority's analysis examined the legislative history of the IAA. The majority focused on hearings in which legislators discussed the difference between investment advisers that dealt with their clients in a one-on-one fashion, exercising control over their clients' accounts, and advisers that merely provided advice through newsletters and other impersonal, indirect means. One-on-one advising presented sufficient danger to clients to merit regulation, indirect advising did not. *See id.* at 220-11.

While the *Lowe* majority chose not to adopt Justice White's personal nexus standard, White's standard is only thinly disguised in the majority's analysis. *See id.* at 210. For discussion of the personal nexus test, see *supra* note 50.

their desired result.[95]

Finally, the Court recognized that its interpretation of the IAA's exclusions may remove providers of impersonal, indirect investment advice from coverage by the IAA's constitutionally valid and highly effective antifraud provisions.[96]

*D. Post-*Lowe *Interpretation of the Commodities Exchange Act*

In a 1993 administrative decision, *In the Matter of Armstrong*,[97] the Commission rejected the argument that *Lowe* was applicable to the Act's regulation of commodity trading advisers. Appellant Armstrong argued that *Lowe's* broad reading of the bona fide publication exclusion in section 202(a)(11)(D) of the IAA should control interpretation of the exclusions in section 1(a)(5)(11) of the CEA.[98] The Commission rejected this argument, emphasizing the different language and structure of the CEA's exclusion.[99] Specifically, the Commission noted that the CEA's exclusion for publishers of a newsletter of regular dissemination, though analogous to the exclusion in

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95. The Court stated their constitutional concerns in rather oblique terms. They started with the assumption that Congress must have been aware of the constitutional problem of regulating such speech, and concluded that Congress had intended to exclude providers of such advice from the IAA's definition of an IA, and thus the IAA's IA registration requirements. *See id.* at 194-95, 198-99.

Whether or not Congress actually had this distinction in mind is a matter of some debate. Justice White criticized the majority analysis in his concurring opinion. *See Lowe*, 472 U.S. at 211 (White, J., concurring). *See supra* notes 48-51 and accompanying text for a discussion of White's proposed constitutional analysis.

Commentators have also been critical of *Lowe*. They point out that the Court ignored the plain language of the exclusion which indicated that it was available only to publishers in the mainstream press, such as newspapers, magazines and others whose main purpose was other than providing investment advice. *See, e.g.*, Lani M. Lee, *The Effects of* Lowe *on the Application of the Investment Advisers Act of 1940 to Impersonal Investment Advisory Publications*, 42 BUS. LAW. 507 (1987); Carol E. Garver, Note, Lowe v. SEC: *The First Amendment Status of Investment Advice Newsletters*, 35 AM. U. L. REV. 1253 (1986); Stacy P. Thompson, Comment, Lowe v. SEC: *Investment Advisers Act of 1940 Clashes with First Amendment Guarantees of Free Speech and Press*, 21 U. RICH. L. REV. 205 (1986).

96. The Court conceded this point in their opinion. *See Lowe*, 472 U.S. at 209-10 n.56. However, the Court stated that antifraud remedies would be available under mail fraud statutes and also under section 10b of the Securities Exchange Act of 1934 and the SEC rule enacted pursuant to section 10b, Rule 10b-5. *See id.*; *see also* Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1994); 17 C.F.R 240.10b-5 (1997).

97. *In re* Armstrong, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657, at 40,144-45 (CFTC Feb. 8, 1993), *rev'd on other grounds*, 12 F.3d 401 (3d Cir. 1993). Armstrong had engaged in the giving of both direct, personalized advice, and indirect impersonal advice. *In re Armstrong*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 40,148-49. Armstrong disseminated his indirect, impersonal advice in the form of a newsletter and a hotline which gave telephone access to a prerecorded message. *See id.* at 40,249.

98. *See id.* at 40,149.

99. *See id.*

the IAA, differs in that it is only available to persons for whom publication of the newsletter is "solely incidental" to their business.[100] Therefore, the Commission concluded that it could not interpret the CEA's exclusions to exclude all CTAs who relied solely on regularly published newsletters to disseminate their advice, because clearly this was not solely incidental to their business.[101] Given this difference, the Commission found *Lowe's* interpretation of the IAA's exclusion to be inapplicable.[102] While this result clearly ignores *Lowe's* dicta about the constitutionality of such a provision, it is entirely in keeping with *Lowe's* refusal to extend that dicta to a broader constitutional holding.[103]

The Commission also summarily refused to evaluate Armstrong's constitutional challenge to the CEA.[104] The Commission has continued to espouse this view in interpretive letters issued after the *Armstrong* decision.[105]

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100. *Id.*

> [W]hile the definition of a CTA in Section 1a(5) of the Act bears some similarity to the definition of an "investment adviser" in Section 202(a)(11) of the IA, the exclusionary language included in Section 1a(5) of the Act is significantly different from the language underlying the Court's holding in *Lowe.*

Id. All of the exclusions listed in section 1(a)(5)(B) of the CEA, including that for "publisher[s] or producer[s] of any print or electronic data of general and regular dissemination . . . ," are conditioned on the provision in section 1(a)(5)(C), which makes the exclusions available only if "the furnishing of such services by the foregoing persons is *solely incidental* to the conduct of their business or profession." 7 U.S.C § 1(a)(5)(B)(iv)-(C) (1994).

The key difference between the language of the CEA and the language of the IAA is the "solely incidental" language found in the CEA exclusion, but absent in the IAA exclusion. *See In re Armstrong,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 40,149.

101. *See id.*

102. *See id.* at 40,149.

103. *Lowe* has been criticized for this split personality approach. *See supra* note 95. While the constitutional dicta is strong and broadly stated, the actual holding of the case is based on the Court's tortured statutory construction of the IAA, which an unwilling lower court need not extend to an analysis of the CEA.

104. *See id.* The Commission stated: "As a general rule, an administrative agency lacks authority to consider the constitutional validity of the statute which it administers." *Id.* (citing *In re* American Int'l Trading Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,127, at 24,568 (CFTC Nov. 26, 1980)). *In re Armstrong*'s constitutional arguments were undoubtedly hampered by *Lowe*'s refusal to make a constitutional holding in that case. As a result, *Lowe* is, at best, persuasive authority in a constitutional evaluation of the CEA.

105. *See* CFTC Interpretive Letter 95-101 [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,565 (CFTC Nov. 21, 1995) (stating Commission staff position that *Lowe* does not control interpretation of the CEA's exclusions, and that the Commission intends to interpret those exclusions as narrowly as possible). Though not binding on courts, interpretive letters have significant impact on how parties will conduct themselves.

IV. ANALYSIS AND PROPOSAL

While the Supreme Court in *Lowe* did not explicitly decide the constitutionality of the IAA's registration requirements, the Court intimated that these requirements were unconstitutional.[106] The similarity between the registration requirements of the IAA and the CEA,[107] the *Lowe* dicta, and the First Amendment precedent on which *Lowe* rests, call for a reevaluation of *Savage & Armstrong.*[108]

The Commission's distinction between registration requirements for IAs and those for CTAs as expressed in *Armstrong,* is faithful to the text of the statute and to the technical holding in *Lowe. Lowe,* despite its bold dicta, rests entirely on the less restrictive wording of the exclusions in the Investment Adviser's Act.[109] While the publications of the Investment Advisers and CTAs may be clearly similar, the wording of the two statutes is not.[110] This gave the Commission room to conclude that *Lowe* should not be extended to the CEA. While *Lowe* may be merely persuasive authority, the Commission should have recognized the Supreme Court's message in its clearly applicable dicta regarding the constitutionality of registration requirements, which exists independent of a statutory basis for the distinction.[111]

The appropriate solution is for the legislature to eliminate the Act's unconstitutional registration requirements for CTAs who provide indirect, impersonal trading advice, while leaving these CTAs subject to the Act's antifraud provisions.

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106. *See supra* Part III.C.

107. The CEA, written 34 years after the IAA, is analogous to the IAA in its prohibited acts, and its aim of protecting investors. *See* Savage v. Commodity Futures Trading Comm'n, 548 F.2d 192, 197 (7th Cir. 1977).

Publications by CTAs are similar to publications by IAs in that both are providing analysis of a publicly traded financial instrument, usually traded on an open exchange. The analysis involved in both is essentially the same—analysis of economic, political and other factors which affect the price of the traded financial instrument. A CTA's analysis would focus on factors such as economic conditions affecting demand for the commodities, political factors such as subsidies or price supports for the commodity and factors affecting production of the commodity such as changes in technology, crop conditions, or weather. An IA's analysis would focus on the financial condition of the issuer of the security, general market patterns affecting that company's business and the quality of the issuer's management. Both the IA and the CTA would present this analysis in a format that laymen could use in making a decision to invest in certain commodities or securities.

108. *In re Armstrong* should also be questioned, although it was decided after *Lowe. See supra* Parts II.B, II.C, II.D for discussion of *Lowe, Savage* and *In re Armstrong.*

109. *See supra* notes 95-96 and accompanying text.

110. *See supra* notes 101-04 and accompanying text.

111. *Id.*

A. Analysis

An established framework exists to test the constitutionality of the CTA registration requirements.[112] Applying the framework to our hypothetical market newsletter,[113] a court would need to ask two questions. First, the court must determine whether the Act's regulations, as applied to our hypothetical publisher of a commodity newsletter, are a legitimate regulation of professional or commercial activity that only incidentally involve speech or are a regulation of speech itself.[114] The government has broad power to regulate professional or commercial acts even if the acts incidentally involve speech.[115] Second, if publishing our newsletter is not a professional activity, but a form of speech, the court must decide whether it is commercial speech or fully protected speech.[116] If the newsletter is commercial speech, the regulation must not be more restrictive than necessary to achieve a legitimate government objective.[117] If the newsletter is not commercial speech, the next step is to evaluate the regulation as a potential prior restraint on fully protected speech.[118]

1. Regulation of Professional or Commercial Activity That Only Incidentally Involves Speech

The threshold question that must be answered is whether regulation of our hypothetical commodity newsletter under the Act is regulation of speech or regulation of commercial activity.

Applying Justice White's personal nexus test[119] to the Act's regulation of our newsletter leads to the conclusion that the Act is not regulating professional activity but instead regulating speech. Indirect, impersonal commodity trading advice, such as that provided by Savage and Armstrong

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112. The *Lowe* majority did not analyze the constitutional issue presented by regulation of providers of impersonal, indirect trading advice. However, Justice White's concurring opinion in *Lowe* did set forth a framework to evaluate the IA's requirements. *See* Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring). This analysis is applicable to the issue of the constitutionality of the CEA's restrictions with respect to impersonal trading advice, such as commodity newsletters, because of the analogous nature, if not the wording, of the statutes and the similarities between IAs and CTAs. *See* Johnson, *supra* note 35, at 645-46.

113. *See supra* notes 9-10 and accompanying text for description of the hypothetical. This same analysis would hold true for any provider of indirect, impersonal trading advice.

114. *See Lowe*, 472 U.S. at 232.

115. *See id.* (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

116. *See Lowe*, 472 U.S. at 233.

117. *See id.* at 234; *see also supra* notes 55-56 and accompanying text.

118. *See Lowe*, 472 U.S. at 234.

119. *See supra* notes 48-51 and accompanying text.

in their newsletters, involves no nexus between the CTA and the customer. This type of advice is not personalized to fit the needs of any individual client, nor does it involve any personal relationship between the CTA and the client.[120] In Justice White's words, our CTA, in publishing his newsletter, has not taken the client's affairs into his own hands.[121] In fact, impersonal trading advice provided by CTAs is in no way different from that provided by Lowe as an investment adviser.[122] Because there is no personal nexus between the CTA and the client in this context, providing this advice is not a professional activity, but a protected speech activity. The same result is reached when our market newsletter is compared to the fact patterns in both *Near v. Minnesota* and *Thomas v. Collins.* As in both of these earlier cases, the government singled out an activity, publishing news on a specific topic, that is clearly constitutionally protected and deemed it to be a vocation subject to licensing.[123]

2. Commercial Speech Analysis

The next question is whether our newsletter is commercial speech. Using the language of *Central Hudson,*[124] our CTA could clearly argue that the newsletter is not commercial speech because it is not related to the CTA's economic interest. The speech is instead related to market conditions, price trends and strategies the customer should take to increase market returns.[125] Thus, to use the language of *Central Hudson,* the speech is related to the interest of the audience, but not the speaker.[126] As noted previously, the fact that our CTA publishes his newsletter for a profit is immaterial to the issue of whether it is commercial speech.[127]

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120. *See* Savage v. Commodity Futures Trading Comm'n, 548 F.2d 192 (7th Cir. 1977); *In re Armstrong,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep.(CCH) ¶ 25,657, at 40,148 (CFTC Feb. 8, 1993), *rev'd on other grounds,* 12 F.3d 401 (3d Cir. 1993).

121. *See* Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).

122. In all three cases, *Lowe, Savage* and *In re Armstrong,* the courts characterized the speech involved in terms such as indirect or impersonal. *See Lowe,* 472 U.S. 181; *Savage,* 548 F.2d 192; *In re Armstrong,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 40,148.

123. *See* Thomas v. Collins, 323 U.S. 516, 541 (1944); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931); *see also supra* Part III.A.1.

124. *See supra* Part III.A.2.

125. A CTA's typical newsletter will discuss important factors such as supply and demand information for various commodities, the recent trading activity in the exchanges where the commodity is traded and recent price fluctuations. CTAs also may provide political news in the form of commentary on current and potential government regulations, and the effects of certain political leaders and their policies on commodity markets.

126. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 561 (1980).

127. The Court has held that the fact that the speech is motivated by profit is not sufficient to render it commercial. The speech must promote a specific transaction. *See* New York Times v.

The only commercial speech to be found in our hypothetical newsletter would have occurred if or when our CTA advertised his newlsetter for sale to the public.[128] However, the newsletter itself is no different from a commodities news column in a magazine or newspaper.[129] The economic interest our CTA has in his newsletter is the same as that of the columnist writing the hypothetical column. Both the CTA and the columnist are interested in being as accurate as possible to ensure that people will keep reading their publication. In the case of our CTA, this ensures that clients will continue to pay for his newsletter; for a columnist, this ensures that the column will remain popular and that the publication will continue to print it.

Even if our market newsletter could somehow be characterized as commercial speech, the registration requirements of the Act would be invalid. The publishing of trading advice in a newsletter does not present a substantial state interest for regulation. And, even if there were such an interest, the Act's regulations are more extensive than necessary.

As already discussed, the *Lowe* Court found that indirect, impersonal trading advice presented insufficient danger of fraud to create a substantial government interest.[130] *Lowe's* finding in this regard is applicable to our hypothetical CTA because of the similarites between CTAs and IAs.[131] The same result is reached using the direct/indirect distinction created in *Ohralik* and *Shapero*. A commodity newsletter is more like the mailings involved in *Shapero* than the face-to-face solicitation involved in *Ohralik*.[132] As such, the danger of fraud or overreaching is not sufficiently high to justify a broad restriction on the first amendment rights of CTAs.[133] In fact, the case for

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Sullivan, 376 U.S. 254 (1964); *see also supra* note 53.

128. *See supra* Part III.A.2.

129. This fact alone should be very persuasive in characterizing our market newsletter as noncommercial, fully protected speech. Regardless, both the majority opinion and White's concurrence neglected to classify a market newsletter as either commercial or noncommercial speech. Justice White explicitly refused to decide this. *See* Lowe v. SEC, 472 U.S. 181, 234 (1985) (White, J., concurring). The majority, however, implied that they viewed such newsletters as commercial speech. *See id.* at 210 n.58.

130. *See id.* at 210.

131. *See* Johnson, *supra* note 35, at 645-46 (comparing commodities markets and securities markets).

132. For discussion of *Shapero*, see *supra* notes 62-68 and accompanying text.

133. This is not to say that CTAs have no opportunity to harm their clients. One particular problem is "scalping," the practice of publishing advice that moves a financial instrument in a direction that results in monetary gains to the adviser, usually because the adviser has already taken a position in that instrument. For instance, if an adviser held a "long" position (a position of net ownership) in a commodity, the adviser may be tempted to publish advice which drives up the value of that commodity (such as, in the case of a grain, overemphasizing crop problems, which would, if believed, drive up prices due to concern about smaller supply). Cases involving scalping by CTAs are rare. For an example of scalping in a securities context, see *Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th

regulation here is even weaker than in *Shapero* because the CTA engages in no solicitation of any kind.[134] Instead, our CTA merely provides his opinion on the market.

Even assuming that indirect trading advice presented enough of a danger of fraud to create a substantial state interest in its regulation, the CEA is much broader than necessary to prevent that fraud. The Act gives the Commission power to deny registration to anyone who has a prior history of misconduct, even in cases where the conduct does not relate to CTA activity.[135] Additionally, the registration requirements extend to all providers of advice, whether they be competent and disinterested or fraudulent and manipulative.[136] As Justice White indicated in *Lowe*, this type of broad restraint based on a mere likelihood that the registrant's speech *may* be fraudulent violates *Central Hudson's* requirement that the regulation not be more extensive than necessary to advance the state's interests.[137]

Cir. 1979). In *Zweig*, a newspaper financial columnist published misleading information regarding merger to benefit his own holdings of stock in parties to the merger. *See id.*

Justice White considered these dangers in his concurring opinion in *Lowe*, and concluded that any threat to investor welfare was not strong enough to create a substantial state interest in regulating IAs who provide impersonal, indirect trading advice. *See* Lowe v. SEC, 472 U.S. 181, 229 (1985) (White, J., concurring). However, Justice White also believed that the antifraud provisions of the IAA would be constitutional in their application to prosecute advisers who had been caught engaging in scalping. *See id.* at 225.

The case for regulation of impersonal trading advice in commodities markets is even less compelling than for securities markets because fundamental differences between the two markets greatly reduce the possibilities for manipulating commodities markets. Securities markets involve trade in thousands of different instruments, which differ substantially from each other. Commodities trading, on the other hand, involves trade in a uniform instrument, whose properties are widely understood by traders. Additionally, a tremendous amount of information on commodities is available from government agencies, such as the United States Department of Agriculture, that publish periodic information on factors such as crop conditions, international and domestic usage and inventories. *See* Johnson, *supra* note 35, at 645-46.

Justice White also flatly rejected the SEC's argument that the danger presented by incompetent or ill-motivated investment advisors who provided indirect, impersonal trading advice was so great that it merited regulation of the ability to provide such advice. *See Lowe*, 472 U.S. at 233 (White, J., concurring).

134. Indirect, impersonal trading advice presents even less of a state interest in regulation than did *Shapero's* mail solicitation. Unlike Mr. Shapero, the CTA, in providing advice, is not advocating a transaction to which he is a party; he is not selling anything to his client. True, he is advocating a transaction, the buying or selling of commodities. However, the CTA doesn't stand to profit from the transaction, because he will not be trading with the client. Therefore, the CTA's primary incentive is to provide accurate advice to ensure client satisfaction. This presents less danger of fraud or overreaching than indirect lawyer solicitation.

135. *See* 7 U.S.C. § 12a(3)(A)-(N) (1994); *see also supra* note 27.

136. *See* 7 U.S.C. § 6m.

137. *See Lowe*, 472 U.S. at 234-35. The Court has specifically held that blanket bans on certain types of speech cannot be justified by the fact that the speech in question has a mere potential to be misleading. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (finding that universal state ban on direct mail advertising by lawyers too broad a means of regulating lawyer conduct);

3. *Prior Restraint of Fully Protected Speech*

Because our hypothetical commodity newsletter is not commercial speech, the registration requirements of the Act are unconstitutional prior restraints on CTAs' First Amendment right to speak or publish freely.[138] The Act's registration scheme clearly violates the principles laid out in *Schaumburg*.[139] The registration requirement at issue in *Schaumburg* was triggered by only a single criteria: the percentage of solicited funds used for a charity's overhead.[140] Arguably, the Act's registration requirements are even more universal, in that they apply to any person wishing to provide investment advice for profit. As in *Schaumburg*, the speech restricted by the Act has only the *potential,* as opposed to a certainty, of being fraudulent.[141] Also, as in *Schaumburg*, the Act's regulations are far broader than necessary to prevent the fraud they aim to prevent.[142] The Commission may deny a license on any number of specific grounds or on any grounds that can be characterized as good cause.[143] Seen in this light, the Act's licensing scheme is nothing more than a prior restraint. It is also unnecessary given the availability of the Act's antifraud provisions.[144]

In cases where the Commission enjoins publication of advice by a CTA, the resulting injunction bears remarkable similarities to the unconstitutional injunctions struck down in *Near*. As in *Near,* the government injunction does not merely prevent discrete occurrences of speech, but acts as a continuing suppression of the CTA's speech activities.[145] The *Near* Court stated that this

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Zauderer v. Office of Interdisciplinary Counsel, 471 U.S. 626, 641 (1985) (finding that universal state ban on lawyer advertising was too broad of a means in achieving state goal of regulating lawyer conduct); *In Re* R.M.J. 455 U.S. 191, 203 (1982) ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.").

138. White's concurring opinion in *Lowe* said of similar regulation in the context of the IAA: "Such a flat prohibition, or prior restraint on speech is, as applied to fully protected speech, presumptively invalid and may be sustained only under the most extraordinary circumstances." *Lowe*, 472 U.S. at 234 (1985) (White. J., concurring) (citing New York Times Co. v. United States, 403 U.S. 713 (1971)).

139. *See* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980); *see also supra* notes 75-78 and accompanying text.

140. *See Schaumburg*, 444 U.S. at 637.

141. *See id.* at 636-37.

142. *See id.* at 637; *see also supra* note 78 and accompanying text.

143. *See supra* note 27 and accompanying text.

144. *See Schaumburg*, 444 U.S. at 637. In *Zauderer v. Office of Interdisciplinary Council*, 471 U.S. 626, 644 (1985), the Court used a similar "least restrictive means" test strike down state regulation of lawyer advertising. The CEA provides for both private and government remedies for any violation of the Act, including fraudulent conduct. *See* 7 U.S.C. § 25 (1994); *see also supra* notes 28-31.

145. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 712 (1931).

was the very essence of censorship and in direct violation of the First Amendment.[146]

B. Proposal

The publication of commodity newsletters by CTAs is fully protected, noncommercial speech. The best solution would be to eliminate the Act's CTA registration requirements with respect to market newsletters such as the one in our hypothetical, while still including the provider in the definition of a CTA.[147] This could be done by either the legislature or the courts.

Legislative change would be the ideal solution. Congress could easily amend the Act by deleting the registration requirements for CTAs who provide only indirect, impersonal trading advice.[148] Congress could write a new exemption from registration that exempted providers of impersonal, indirect trading advice. For example, section 6m, which imposes the registration requirement, could be amended as follows:

> *Provided,* That the provisions of this section shall not apply to any commodity trading advisor whose activities shall solely consist of providing impersonal trading advice through indirect media such as newsletters, chart services or recorded messages transmitted by mail, fax, recorded audio messages, electronic mail or other method of transmission not involving any direct contact between the commodity trading advisor and recipient.[149]

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146. *See id.* at 712; *see also supra* notes 70-74 and accompanying text.

147. A finding that the investment advice should be classified as commercial speech would allow for greater regulation by the State, because commercial speech is afforded less constitutional protection. In this case, the First Amendment would merely require a narrower focus than that of the current requirements. *See supra* Parts III.A.2 & IV.A.2.

148. Bills have recently been discussed in both houses that would deregulate portions of the commodities markets, however neither of these bills contain any provisions for the CEA's regulation of CTAs. The bills have been introduced by Republican Senator Richard Lugar, *see* S. 257, 105th Cong. (1997), and Republican Representative Thomas Ewing, *see* H.R. 467, 105th Cong. (1997). Congress should include the above proposed exclusion for providers of indirect, impersonal trading advice in this reform package.

149. By mimicking the *Lowe* Court's use of the term "impersonal" to describe the exempted advice, this language would cover the same type of trading advice that the *Lowe* Court found to be protected. Congress could add this exemption to the currently existing exemption of CTAs who provide advice to less than 15 people. *See* 7 U.S.C. § 6m (1994).

The legislature may not need to deregulate completely providers of impersonal, indirect trading advice. It may be constitutionally permissible to require minimum disclosure requirements. For example, CTAs with a history of criminal or regulatory violations could be required to disclose this fact. Therefore, potential clients would have notice of the CTA's past performance. Courts have held that disclosure requirements are sometimes permissible. *See* Zauderer v. Office of Interdisciplinary Counsel, 471 U.S. 626, 641 (1985) (holding that state may require disclosure of certain information, so

By doing so, the problem of unconstitutional regulation of the press would be avoided, while at the same time CTAs still would be covered specifically by the antifraud provisions of the Act.[150]

The antifraud provisions give the government the power to prosecute or to seek civil penalties against CTAs who engage in fraudulent activities.[151] They thus provide powerful deterrents to those who may try to use CTA status to defraud their clients, while at the same time assuring First Amendment protection to nonfraudulent CTAs.[152]

CTAs would also remain subject to the record keeping requirements imposed by Commission regulations.[153] The record keeping requirements serve a valuable evidentiary function in that, should a CTA come under suspicion of fraudulent practices, the record keeping provisions ensure that there will be evidence of any fraud.[154]

Despite the merits of a legislative solution, the more probable solution will be judicial.[155] The appropriate judicial decision would be to hold that the CTA's registration requirements are unconstitutional, as applied to CTAs

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long as it does not seek to "prescribe what shall be orthodox" in matters such as politics, religion or nationalism) (quoting West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)). However, courts are less likely to uphold disclosure requirements in fully protected speech cases than in commercial cases. *See id.* It is not certain that such a disclosure requirement would be permissible for CTAs providing impersonal, indirect trading advice.

150. The antifraud provisions specifically covering CTAs apply to all CTAs whether or not required to register. *See* 7 U.S.C. § 6o (1994). The Act's special antifraud provision for CTAs applies to any person satisfying the definition of a CTA. By leaving the definition of CTA unchanged, but eliminating the registration requirements, unregistered CTAs would still be subject to the antifraud provisions. *See id.*

151. *See* 7 U.S.C. § 13(a) (1994); *see also supra* notes 34-36 and accompanying text.

152. The antifraud provisions, which penalize the misrepresentation of or failure to disclose material facts, do not present the same constitutional problems as the broader registration requirements. Courts have consistently upheld the constitutionality of antifraud measures as valid means of preventing fraudulent speech. *See, e.g.*, Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620, 637 (1980) ("[F]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

153. *See* 17 C.F.R. § 4.33 (1997); *see also supra* note 33 and accompanying text.

154. If the CTA has failed to keep records, or destroyed records, then the CTA would be subject to civil and criminal penalties. *See* 7 U.S.C. §§ 13(a)(4), 13a-1(d), 13a-1(a) (1994); *see also supra* notes 32-33 and accompanying text.

155. There has already been substantial opposition to the two most recent reform bills aimed at the commodities markets. Predictably, the Commission has portrayed any attempt to deregulate commodities markets as a case of big business trying to ride over the small, defenseless investor. *See Commodity Exchange Act: Congress Should Consider Negative Effects of CEA Reform Bills, GFOA Says*, 29 Sec. Reg. L. Rep. (BNA) 832 (June 13, 1997); Paul G. Barr, *Change Sweeping Futures Industry: Deregulation, EMU Alter Landscape*, PENSIONS & INVES., Mar. 17, 1997, at 3; Roger Runningen, *Exchanges Face Hurdles in Fight for Deregulation*, CHI. SUN TIMES, May 19, 1997, at 47.

who provide indirect, impersonal trading advice.[156] A court should characterize the Act's registration requirements as unconstitutional regulation of fully protected speech. In doing so, the court should take care to limit its holding to the registration requirements. The Court should clearly indicate that neither the Act's antifraud provisions nor its recording provisions would be affected by such a holding.[157]

VII. CONCLUSION

Congress should repeal the registration requirements of the Commodities Exchange Act as applied to providers of indirect, impersonal commodity trading advice. The Act's requirements are infringements on the First Amendment guarantee of a free press. In the absence of legislative action, courts should strike down these requirements. In either case, any resolution of this issue should leave intact the Act's antifraud provisions which provide needed protection to market players who rely on this type of advice.

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156. An approach consistent with *Lowe* would be innappropriate given the statutory language of the CEA's definition of a CTA, which has much narrow exclusions than the IAA. Any person claiming an exclusion from the CEA's classification as a CTA must meet the condition that the provision of trading advice be "solely incidental" to that person's business. *See In re* Armstrong, [1992-1994 Transfer Binder] Comm. Fut. L. Rep.(CCH) ¶ 25,657, at 40,149 (CFTC Feb. 8, 1993), *rev'd on other grounds*, 12 F.3d 401 (3d Cir. 1993); *see also supra* notes 97-105 and accompanying text.

Additionally, the legislative history of the CEA demonstrates that CTAs who provide indirect, impersonal trading advice were within the contemplation of lawmakers when constructing the Act's registration requirements. *See supra* note 24.

157. *See supra* notes 152-54 for discussion of the importance of the Act's antifraud and recording provisions. The *Lowe* opinion produced an undesirable result with respect to regulation of IAAs. By straining the interpretation of the IAA's definition of investment adviser, the Court left in doubt the ability of the government and private parties to use the IAA's antifraud provisions, the applicability of which are keyed to the statutory definition of an investment adviser. *See supra* note 97 and accompanying text.