Following is a transcript of the House energy conference committee on September 19, 2002 in which Rep. Ed Markey (D-MA) offered an amendment to remove the special exemption for Westar Energy. Markey's amendment was defeated when Reps. Tom DeLay, W.J. "Billy" Tauzin, Joe Barton and five other Republicans voted against it. The text was transcribed from the video available at this link:
http://energycommerce.house.gov/107/markups/09192002Markup727.htm
The video is five hours long. The relevant debate begins at 2:28:40 and ends at 2:48:10.

[Markey's opening statement largely reflects the text of his Motion to Strike, located here www.citizen.org/documents/markeymotiontostrike.pdf *]*

MARKEY: Thank you, Mr. Chairman, very much. Mr. Chairman, section 136 provides that any company that was as of December 31, 2001 an affiliate of a holding company as defined in PUHCA [Public Utility Holding Company Act] and held investment securities as defined under the Investment Company Act of 1940 of one or more companies engaged directly or indirectly in the electric or gas utility business or other permitted business activities shall be exempt from regulation as an investment company. Now, under this provision any such company could operate as a mutual fund. *(Can you believe we're talking about that in the energy market, these companies going to transform themselves into a mutual fund, can you believe that Peter?)* Or other type of investment company. *(What? Yeah, that company.)* Wall Street can be totally exempted from SEC oversight and regulation. Back in January, Mr. Dingell and I wrote the Securities and Exchange Commission to ask about the impact of a similar proposal and reported that there may be hundreds of unregulated investment companies that will result from enactment of this language and that it would be impossible to determine the exact number of unregulated investment companies it could potentially create. The SEC provided me with five boxes of documents containing information about the potentially hundreds of companies that could exploit this loophole. We are told that this is only a special interest provision that is aimed at benefitting a single company, a Kansas state company known as Westar Energy, a utility holding company formerly known as Western Resources that decided several years ago to diversify into the burglar alarm business. This company reportedly claims that they need an exemption from the investment company act because of their holdings. But I see no reason why we should give it to them. If this company has a legitimate case to make as to why they are only incidentally or temporarily an investment company, or why they should be exempted from the act, why aren't they successfully making their case today at the Securities and Exchange Commission. The SEC actually has the authority to address any legitimate issues this company may have either by finding that Westar Energy does not meet the definition of an investment company under section 3 of the 1940 [Investment Company] Act or by using its exemptive authority under section 6 of the 1940 Act to exempt them

from the Act's application. If the company has a legitimate case to make they should make it to Harvey Pitt and the Securities and Exchange Commission staff. They should not be wasting our time with a legislative fix. The fact that they are doing so raises some alarm bells to me as to what their real motivation might be. It's not exactly this incredible watchdog over at the Securities and Exchange Commission that we're talking about. I think they're willing to be very open-minded. That's what Harvey Pitt said when he took over. If they can't get past the Harvey Pitt standard, as for a waiver, what are we doing on this Committee which has been flying off just to put some lead in the pencil of that agency over the last year to make sure that it in fact does stand up to those who want to engage in acts of nefarious misbehavior as malefactors of financial fraud upon ordinary unsuspecting investors across our country. I would like to remind my colleagues that we went down this path before considering legislative exemptions from the 1940 Act and pressuring the Securities and Exchange Commission to grant administrative exemptions. In 1996, Enron came to Congress when we were working on the National Securities Markets Improvement Act and they sought an exemption from the Investment Company Act. Mr. Dingell and I resisted this provision and it was not added to the final bill—though the Majority insisted on report language encouraging the Securities and Exchange Commission to favorably consider Enron's request. The following year in 1997 Enron sought and obtained an exemption from the Securities and Exchange Commission from the Investment Company Act of 1940 which it exploited to engage in activities that would have been prohibited if it had been regulated as an investment company. **The proposed 1940 Act exemption in section 136 of this bill is significantly broader than that exemption granted Enron back in 1997 and literally hundreds of unregulated investment companies could be created across our country if that provision which is in this bill becomes law.** Why should we permit it to happen? Have my colleagues and I learned nothing from our hearings this year? I don't believe we're going to allow that to happen again. Let us not let the mistakes of the past be repeated again in this Committee. Please support the Markey amendment to block this attempt at circumventing the legitimate oversight responsibilities of the Securities and Exchange Commission.

BARTON: Chair recognizes himself in mild opposition to the Markey amendment. We have been around and around on this. The gentleman from Massachusetts certainly has good reasons to offer his amendment. This really is a policy decision here that the committee, the conference needs to make. This particular provision benefits one company. That company is Western Resources based in Topeka, Kansas. The provision has been in the draft circulated at the subcommittee I chaired. It's been in discussion drafts. It is in the pending proposal at my request. The reason I put it in is because this company is in unique situation that it has got a subsidiary that has a natural gas affiliate that's primary business is in electronic security and because of the problems that have occurred in the stock market, the affiliate it is trying to sell puts it in this unique position that it finds itself. I'm sure when we go to the Senate if this stays in the bill, we will discuss it. I would love for the SEC to act. They have no substantive reason not to. They will say that off the record. But for some reason they refuse to exercise regulatory authority on the record. Perhaps this debate might encourage them to. At the appropriate time I think that this would be a subject that we could work together with our colleagues in the Senate. I'm going to oppose the amendment, but only in a very mild way.

DINGELL: I was intrigued by the exemption from the Investment Company Act of 1940. This is a statute which has been protecting investors including the savings and investments of a lot of us here today for well over half a century. Without government subsidies or taxpayer credit investment

companies including the ever popular mutual funds have operated with remarkable safety and soundness and have provided capital to meet the needs of a growing economy. Why? Because the Investment Company Act provides investors with specific protections against self- dealing, against conflicts of interest, against misappropriation of funds, against over-reaching with respect to fees, expenses and undisclosed risks of many types. The SEC has the important job of policing these and other requirements and it has done so both responsibly and successfully. I found that there was an exemption in the offer which is now before us. I started to hunt around to see who it was who was going to benefit from this. Only one company, Western Resources. But it is interesting to note that any company which could structure itself to be roughly the same as Western Resources could come in under that loophole and then could function not just as manager of natural resources but in fact as a mutual fund and could do everything that any mutual fund can do, open or closed end and would be able then to do so totally without any scrutiny, totally without any protection for the investors or anything being done by the sec to prevent the kinds of abuses that the Investment Company Act was put in place to prevent. The director of SEC's Division of Investment Management informed us in a February 13 memo that there may be hundreds of unregulated investment companies that would result from this exemption. It isn't just Western Resources that is going to be able to do any kind of rascality they want. Totally exempt from the holding company act, but a lot of people are going to be able to come in and do the same kind of mischief, disregarding the needs and concerns of investors. I would remind everyone here present that the situation in the economy is not good. One of the reasons is no one has any confidence in the marketplace because of Enron, because of Global Crossing, because of Worldcom, and a lot of other people including the good folks at Tyco who so diligently took advantage of the opportunities to enrich themselves and disregard the well-being of investors and now shaken the trust of investment public. I've warned the industry time after time. Everybody thinks it runs on money. It doesn't. It runs on public confidence. And if there's public confidence there will be lots of money made by everybody. The Investment Company Institute very wisely sent us a communication on this in which the head of that institution, Mr. Matt Fink, observed this: the provision would permit this company and perhaps others to operate as a mutual fund, but to be completely free from SEC regulation under the Investment Company Act. Thus we are not setting up an exemption only for Western Resources who may be virtuous as the papacy. Or a nunnery. But even if that is so we have no assurances that this splendid loophole is not going to be available to any number of smart rascals, MBAs and others on Wall Street so that they can skin the American investors in the most scandalous and outrageous ways. The amendment gives us firm assurance that we are preventing a rich plethora of scandal which will come back to haunt us if we don't adopt the amendment.

BARTON: The letter from the SEC was based on an earlier version of language. The SEC today would tell you in a similar letter that this language does in fact deal with just one company. That may be onerous but it does just deal with just one company. It does not deal with potentially hundreds of companies as that letter indicates.

MARKEY: Letter from investment company opposing this exemption. Obviously every other mutual fund company in the United States would oppose it because this one company and everyone else that would slip in under this exception would be exempt from all of the other requirements that legitimate mutual fund companies have to be abide by. What are they getting an exemption from? I am about to…some of the legal niceties they seek to escape by having this exemption. They escape oversight by independent directors, bans on affiliated transactions, making daily markings to market of assets, no limits on leveraging and no special full-disclosure requirements which the other mutual funds will be

required to do. Basically turn the transparency dial down to zero as to what the world can know about what's going on inside of this company.
Moreover, the special grandfathered investment companies that could be established pursuant to this would not be subject to the restrictions applicable to other investment vehicles such as hedge funds that currently rely on specific exemptions from registration under the 1940 Act. They could therefore engage in some of the risky and speculative investment strategies pursued by hedge funds with no assurance they would be limited in size pursuant to statutory limits on the number of hedge fund investors or restrictions limiting such funds to sophisticated investors. All in all, a really, really nice exemption from the laws which you would think somebody would be requesting in 1928, right before the 1929 crash, not in year 2002 after we've just had the worst crash since that period of time in terms of impact on investors, especially in the area that this company specifically and I'm sure other companies that would follow its lead seem to have a special interest in. I think it's a terrible, terrible thing for us to be doing. We should rely on the Securities and Exchange Commission if they want to give an exemption because it doesn't fit under the historical test as a mutual fund, they can do it. But if it does, and in my view that's why they are coming to us, they want to engage in those very same activities but without any regulation which is essentially what this provision will allow them to do, then it's wrong for us to be acting in that special interest way. I urge support for Markey amendment.

Tauzin, no by proxy.
Bilarakis, no by proxy.
Barton, no.
Upton, no by proxy.
Stearns, no by proxy.
Gillmor, no by proxy.
Burr, no by proxy.
DeLay, no by proxy
8

Dingell, y by p
Waxman, y by p
Markey, y
Boucher y
Gordon y by p
Rush y by p
6
six ayes and eight nays, Markey amendment defeated.