

October 1976

Commodities Regulation - The Proposed Suitability Standards for the Commodity Industry: Right Church, Wrong Pew

George J. Sotos

Kevin F. Bowen

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

George J. Sotos & Kevin F. Bowen, *Commodities Regulation - The Proposed Suitability Standards for the Commodity Industry: Right Church, Wrong Pew*, 53 Chi.-Kent L. Rev. 289 (1976).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol53/iss2/7>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

COMMODITIES REGULATION

THE PROPOSED SUITABILITY STANDARDS FOR THE COMMODITY INDUSTRY: "RIGHT CHURCH, WRONG PEW"

GEORGE J. SOTOS*

KEVIN F. BOWEN**

"When do I get my first dividend check?" This question is often asked by newcomers to commodities trading. New traders frequently have much to learn of the how and why of commodities markets since their frame of reference has been defined by trading in securities. Because there are many misleading similarities about the two areas, new traders may enter the world of commodities futures trading unaware of the risks involved. The standards which will be used to determine the appropriateness of commodities trading, particularly for these new customers, are among the stated concerns of the Commodity Futures Trading Commission¹ and the subject of this article.

This article is not, therefore, a survey of developments in commodities law in the past year,² but an analysis of some steps taken to implement one aspect of the new law regulating the commodities industry, the Commodity Futures Trading Commission Act of 1974.³ The enactment of the CFTCA is the most important development in the commodities law area since commodities trading began. Because Chicago is the major center of trading in commodities the courts in this circuit will play a prominent role in defining

* Associate in firm of Moses, Gibbons, Abramson & Fox; member of the Illinois Bar; J.D., IIT Chicago-Kent College of Law.

** Assistant State's Attorney for DuPage County; member of the Illinois Bar; J.D., Northwestern University School of Law.

1. The Commission was established under the authority of the Commodity Futures Trading Commission Act of 1974, 7 U.S.C. §§ 2-22 (Supp. IV). The Commission will be hereinafter referred to in the text as the CFTC or the Commission.

2. In fact, only one case was decided in the Seventh Circuit under the new law in the past year. *American Int'l Trading Co. v. Bagley*, 536 F.2d 1196 (7th Cir. 1976). That case involved an action by the International Trading Company to enjoin the CFTC from contacting certain of its customers during the course of an investigation being conducted by the CFTC. The Court of Appeals for the Seventh Circuit reversed the order of the district court entering an injunction prohibiting the use of a customer list for interview purposes. The court found that:

If there be a legitimate purpose to which the investigation is pertinent, if the agency does not have the information sought and the formal administrative steps provided in its creative Act have been followed, then courts should not intervene in the initial determinations; they are for the agency to decide at this stage of the inquiry.

Id. at 1198.

3. 7 U.S.C. §§ 2-22 (Supp. IV 1974) [hereinafter referred to in the text as the CFTCA or the Act].

commodities law in the future. The actions of the CFTC are therefore of interest not only to participants in the commodities markets, but to lawyers who advise them and courts which must adjudicate the disputes which arise.

As the Act begins to influence the way the markets operate, the approach taken by the CFTC in its enforcement of the Act will be of great interest. This article is intended to contribute to an understanding and analysis of the actions of the CFTC by critically reviewing one aspect of its work, the proposals for defining the duties and responsibilities of commodities brokers towards their new customers.

There is little if any case law which defines the duties and responsibilities of commodities brokers towards their customers. This absence of reported decisions creates significant problems for those attorneys advising their clients who trade or deal in commodities. Recently, however, an advisory committee of the CFTC has proposed certain "suitability" standards concerning new customers. This article will examine and call into question some of these standards and offer alternatives. Because analogous rules from securities regulations have been used in developing those applicable to commodities, before engaging in a close analysis of the proposed rules a survey and comparison of the commodities and securities fields will be made.

FUNCTIONS OF THE COMMODITIES MARKETS

In its broadest sense, suitability to engage in commodities transactions must be examined in light of the types of persons who use the commodities futures marketplace. By its very nature, the commodities futures market allows for only two types of participants—the hedger and the speculator. The futures marketplace works because of the interplay between these two types of participants.⁴

The Hedger

The single most important purpose for the futures market is to provide price insurance to those people who produce or utilize certain fundamental commodities.⁵ These producers and users are the hedgers in the commodities market. The financial risk of price change is inherent in the production, distribution and processing of commodities. The hedger, having an actual interest in the underlying commodity, enters into a futures transaction to

4. Commodity futures transactions can also be used to effect tax spreads for certain persons who wish to generate capital losses to offset capital gains. The Committee's suitability standards are primarily aimed at new customers who take on the speculative role in a commodities futures transaction and not the person who effects tax spreads. Suitability standards for tax spreaders should perhaps be established by the accounting profession or tax counselors, not the CFTC. This article is confined to a discussion of the new trader who views the commodities transactions as a substitute for securities trading.

5. S. ANGRIST, *SENSIBLE SPECULATING IN COMMODITIES* 21 (1972).

stabilize his profit structure and to reduce his business risk.⁶ He does so by buying or selling futures contracts to minimize the effect of inevitable price change.⁷

To understand a hedger's objectives, a classic selling hedge for an Illinois farmer will be described. In early March of the year, the farmer is prepared to plant his fields with one of several possible crops. Assume the farmer can plant either 20,000 bushels of soybeans or 50,000 bushels of corn on his land. His expectation is to harvest, store and market his product by year's end. The farmer's choice of which crop to plant is based primarily upon the selling price of that crop at the time it will be sent to market. This future selling price is available to the farmer by virtue of the price anticipation mechanism of the futures marketplace. The farmer can approximate the direct costs of growing, storing and delivering either of his possible crop choices. He may know the costs of delivering corn in December at a Chicago area grain storage elevator are \$2.55 per bushel while the costs of delivering soybeans to the same place at about the same time are \$6.70 per bushel. If the futures prices, as established on the Board of Trade of the City of Chicago, are \$2.65 per bushel for the December corn contract and \$6.75 for the January soybean contract, the farmer will choose to plant corn. By raising corn the farmer can not only make a ten cent per bushel profit (five cents more than soybeans) but he can also deliver two and one half times as many bushels of corn as soybeans. By utilizing the futures market price quotes, the farmer can make a choice of crops and can start his spring planting.

From his analysis, the farmer has calculated a potential profit of ten cents per bushel on corn. However, the price of corn delivered in Chicago in December may change between the time the farmer plants his crop in March and the time he delivers it. Besides the possible change in basis,⁸ the farmer

6. CHICAGO BOARD OF TRADE, COMMODITY TRADING MANUAL 63 (1976) [hereinafter cited as CBT MANUAL].

7. *Id.* The hedging definition adopted by the Commission in its rule 1.3(z) states:

These shall mean sales of, or short positions in, any commodity for future delivery on or subject to the rules of any contract market made or held by any persons to the extent that such sales or short positions are offset in quantity by the ownership or fixed-price purchase of the same cash commodity by the same person or, conversely, purchases of, or long positions in, any commodity for future delivery on or subject to the rules of any contract market made or held by any person to the extent that such purchases or long positions are offset by fixed-price sales of the same cash commodity by the same person.

17 C.F.R. § 1.3(z) (1976).

8. "Basis" is the difference between the the cash price of a commodity at a particular time and place and the price of that commodity in the futures market on a given exchange. The basis is expressed as the arithmetic difference between the cash price and the futures prices being quoted. The difference is due to several factors including cost of transportation between the location of the cash commodity and the futures market; supply and demand conditions at the location of the cash commodity relative to those prevailing at the terminal market(s) where deliveries are permitted on futures contracts; variations in quality factors between the cash commodity and contract grade of the commodity in the futures market. CBT MANUAL, *supra*

faces the chance that the cash market delivery price of corn in December may rise, thereby increasing the profits on his enterprise. However, if the price of cash market corn goes down in December, the farmer may not make a profit and may even realize a loss. If the farmer does not wish to take the risk of a possible adverse price change, he will hedge his crop position in the futures market.

Hedging for the farmer in this example is a relatively simple process.⁹ By contracting to deliver 50,000 bushels of corn in December at \$2.65, the farmer can protect his ten cent per bushel profit margin. If over the term of the contract the price of corn changes, that fact will be reflected in both the cash market price and the futures price for corn. Since these prices tend to move in tandem, the farmer is insuring his cash crop profit position. If corn prices rise, the profit in the cash position is offset by the loss in the futures contract. On the other hand, if corn prices go down, the loss in the cash position is offset by the farmer's gain in the futures. At lower price levels, he is able to deliver against or offset his December obligation with cheaper corn for which he has fixed a selling price of \$2.65. Regardless of which direction prices move, the farmer will have set his profit at ten cents per bushel by hedging at \$2.65. While it is true that by hedging the farmer foregoes the possibility of higher prices and profits, he insures the maintenance of a specified profit margin which keeps him in business.

The Speculator

In the foregoing example, the hedging farmer effectively shifted the risk

note 6, at 64. Basis was not included in the text example but could easily be added into the formulation of profits. The following example illustrates a hedge using basis as part of the formulation:

In March, the farmer looks at the futures prices for wheat to be delivered in Chicago in July. If his normal basis for July is 15 cents under the Chicago price, and if July wheat is trading at \$4.35 per bushel on March 20, the farmer may decide to hedge his \$4.20 price in the July future on that day. To do so, he sells two contracts (10,000 bushels) of July wheat on the Chicago Board of Trade. The farmer's position looks like this:

Cash	Futures
Mar. 20 growing 10,000 bushels of wheat on which price ob- jective is \$4.20 per bushel	sells 2 contracts of July wheat @ \$4.35 per bushel

Having placed the hedge, the farmer has protected himself against a decline in price. If prices drop, he will realize a profit on his short futures position that will balance his loss on his cash wheat. If prices rise, his gain on the selling price in the cash market will be balanced by a loss on his futures position. In either case, he will realize or exceed his price objective.

CBT MANUAL, *supra* note 6, at 69.

9. CBT MANUAL, *supra* note 6, at 69. For other examples of hedging, see Johnson, *The Changing Face of Commodity Regulation*, 20 PRAC. LAW 27, 30, 31 (1974). See also CBT MANUAL, *supra* note 6, at 63-76.

of adverse price movement away from himself. The speculator, on the other hand, enters into a futures transaction to *assume* the risk that the hedger wishes to avoid. Risking his capital for the sake of profiting on a favorable price movement, the speculator rarely if ever has an interest in the underlying commodities. Without a volume of speculative trading, the hedgers would be forced to contend with a “thin” or inactive market among themselves and their risk-shifting opportunities would be limited. Market liquidity, a vital economic concern, is insured by the speculator’s participation in commodities transactions.¹⁰

Commodities speculating is a risky venture. As a condition of trading speculators post a type of security bond called a margin, “an amount of money deposited to ensure performance of the terms of the contract (the delivery or taking of delivery of the commodity or the cancellation of the position by a subsequent offsetting trade).”¹¹ The margin amount is set as a dollar per contract figure which is usually treated as a small percentage of the value of the futures contract. It is not, however, the payment of equity or down payment on the commodity itself.¹² By posting margin, the speculator can establish positions in the market worth many times the margin deposit. This process is called leveraging. Because of this process, commodities speculators face not only the risk of losing the funds posted as margin, but also that of losing large amounts of uncommitted capital.

For example, if the margin requirement is \$1,250 and corn futures are selling for \$2.50 per bushel, a \$1,250 deposit would allow a speculator to “go long,” that is, buy one contract for future delivery of 5,000 bushels of corn worth \$12,500. The “leverage” in this type of trading is that a small deposit (\$1,250) controls a large position (\$12,500). If the price of corn rises 10% to \$2.75 per bushel, the value of the contract increases \$1,250, from \$12,500 to \$13,750. If sold, the profit on the *contract price* is 10%. From his point of view, however, the speculator has made ten times that profit. For a \$1,250 margin deposit the speculator has made an additional \$1,250—a profit of 100%.

In the above example, if the price of corn futures had dropped to \$2.25 per bushel (to a contract value of \$11,250), the speculator would have lost the full amount of his committed margin. If the price of corn had gone down 20% to \$2.00 per bushel (or \$10,000 for the contract), the speculator would have been called upon to post additional margins to cover the paper loss, because of the diminished value of the contract. If he had failed to post additional bond or margin, the speculator would have had his futures positions sold. A sale at

10. CBT MANUAL, *supra* note 6, at 101.

11. *Id.* at 280.

12. *Id.*

\$2.00 per bushel demonstrates the risks of a negative (losing) leverage trade. At the \$2.00 price level, the speculator would have lost more than he originally posted as margin. Because the trade had been leveraged, the 20% decrease in price would have brought about a 200% decrease in the speculator's capital account! The speculator would end up losing the \$1,250 margin commitment and *owing* an additional \$1,250.

Positive leveraging is the device which allows the speculator to increase a relatively small amount of margin capital to significant wealth. Negative leverage in the usually fast and volatile commodities markets can eliminate significant wealth and vaporize uncommitted capital in a matter of days or even hours. The closest theoretical equivalent in the securities market is the stock margin account. However, the high margin requirements in securities, continuously regulated by the Federal Reserve Board, are in no sense comparable to the leverage found in commodities trading.¹³ An understanding of the roles played by the speculator and the hedger in a commodities transaction serves to establish the basic difference from its securities counterpart.

THE SECURITIES AND COMMODITIES MARKETS COMPARED

While commodities markets provide a forum wherein hedgers can shift the risk of price change to speculators, securities markets serve as resource allocators.¹⁴ Both in the initial offering and aftermarket, a company's stock is being evaluated by the investment community. Generally, prices for stock set by the market mechanism are related to a company's profitability, anticipated stream of future earnings and future dividends.¹⁵

13. Currently the Federal Reserve Board policy as administered through regulation T, 12 C.F.R. §§ 220.1-220.129 (1976), has set margin for securities purchases at 50% and "short" sales at 100%, 12 C.F.R. § 220.8 (1976). Most commodities futures purchases or sales can be margined for the equivalent of 10% less.

14. A well performing capital market will allocate the greatest part of a given volume of savings to those industries with the greatest prospective rates of return. Savings are generally channeled to the most productive use by the price mechanism. Since the price of a company's stock in the second-hand market determines the amount of capital it can obtain, 'fair price determination' in the stock market is essential to efficient allocation.

Wu, *An Economist Looks at Section 16 of the SEC Act of 1934*, 68 COLUM. L. REV. 260, 264 (1968).

An investor in the securities market has been defined as one who "invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party" *SEC v. Howey Co.*, 328 U.S. 299 (1946). One difference between the securities investor and the commodities futures trader is that the commodities futures trader does not place his money in a "common enterprise." *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972). Another difference is that the profits gained by a commodities futures trader do not result "solely from the efforts of a promoter or a third party." This article presupposes that the reader has a basic understanding of the mechanism of the securities market utilized in buying and selling stocks.

15. A variety of formulae are available to determine fair market value of stocks. Depending on the expected future growth of the company and capitalization rates employed, different values are arrived at. However, the basic formulation of present intrinsic value of a share of stock is

While the securities markets serve to evaluate profitable enterprises, raise capital and direct it to the most productive uses, commodities markets serve primarily to *preserve* hedgers' capital. The prices established on futures markets indirectly affect hedgers' capital needs. To the extent future prices signal advantageous or profitable price levels, commodity users and producers may seek to expand production or increase use of the commodities in which they deal. However, unlike the securities markets, the commodities futures market is *not* entered into as an alternative capital market.

A profound and succinct difference between securities and commodities markets is described by a professional commodities trader as follows:

Commodities trading is what economists term a "zero sum game." Every dollar lost by any trader is made by another trader and the only money that leaves the game is the broker's commission. While any trader may have a "paper profit" the profit and loss of all traders at all times adds up to zero. This is distinctly different from the stock market where the total value (and profit) goes up in a bull market and down in a bear market. The total value of all commodity futures contracts changes with price movements, but the total value of winnings will change only as the volume of business changes.¹⁶

The purposes, methods and objectives of the securities markets differ significantly from those of the commodities markets. Equating the two industries is not only inappropriate, but also misleading to the public as well

dependent upon its future dividends. To the extent dividends are available but not paid, they are retained and used to build an earnings power base. One way of valuing a share of stock is to estimate the sum of the company's future dividends and divide that stream of dividends by the difference between an appropriate capitalization rate and the company's growth factor. This can be described in algebraic terms as:

$$P_o = \frac{D_o}{K-g}$$

where: P_o is the price of the stock today;
 D_o is the estimate of future dividends;
 K is the investor's required rate of return on an investment with this degree of risk;
 g is company's expected growth rate.

J. WESTON & E. BRIGHAM, *MANAGERIAL FINANCE* 297-306 (2d ed. 1966). These formulations of stock prices have no application in commodities speculation or commodity price forecasting. The main reason for the difference lies in the fact that commodities and commodity futures contracts do not generate earnings, much less dividends. The price of commodities futures contracts relate to the supply and demand factors of the particular commodity being traded. Factors which affect supply and demand for that commodity will affect its price. For a fuller explanation of "fundamental" and "technical" trading approaches and economic factors underlying commodities price forecasting, see CBT MANUAL, *supra* note 3, at 79-99. See also T. Hieronymous, *ECONOMICS OF FUTURES TRADING FOR COMMERCIAL AND PERSONAL PROFIT* 136-69 (1971).

Of interest is the fact that companies have certain theoretical bases below which their stock should not trade. Book value per share or the liquidation value of the company per share gives a guidepost to the investor seeking to own shares of a traded company. Such guideposts are not found in the cash market price relationship to the futures prices.

16. B. GOULD, *DOW-JONES-IRWIN GUIDE TO COMMODITIES TRADING* 55 (1973) [hereinafter cited as GOULD].

as to brokers and regulators who attempt the difficult task of applying securities concepts to the realities of commodities trading. Moreover, such an attempt will inevitably mislead the customer, frustrate communication between the customer and the broker, perhaps lead to otherwise unnecessary litigation and, most significantly, could ultimately lead to the withdrawal of essential speculative funds from the commodity marketplace.

THE PROPOSED RULES

Concern for Customers New to Commodities Trading

The Commodities Futures Trading Commission was created by an Act of Congress known as the Commodity Futures Trading Commission Act of 1974.¹⁷ The legislative history of the Act reveals that some of the needs Congress sought to meet by creating the CFTC were to regulate the commodities industry, to prevent market abuses, and to ensure orderly markets.¹⁸

On August 5, 1975, the CFTC established an advisory committee

17. 7 U.S.C. §§ 2-22 (Supp. IV 1974).

18. The Senate Committee in its report on H.R. 13113 analyzed the need for better and extended regulation in this manner:

The shift to market-oriented economy has brought the general public into the futures markets in growing numbers. Speculators are attracted to the futures markets by the wide price swings and the possibility of large profits. Such an increase in trading by the speculative public, while useful to hedgers, brings with it potential market problems. If individual speculators or groups operating in concert obtain control of the futures markets, price manipulation, corners and squeezes can occur, with adverse effects on producers and consumers alike.

In recent years, the consumer has become increasingly aware that futures markets have a direct effect on such matters as his grocery bill and the cost of his home. Properly operating futures markets help to hold down consumer prices by reducing middleman costs. However, improperly operating futures markets can have the opposite result. In order to assure that futures markets operate properly and that the prices consumers pay are not artificially high, careful and efficient supervision of the markets is essential.

It is apparent that a regulatory agency cannot be expected to oversee the rapidly expanding and complex futures markets without additional tools with which to do the job and proper organization and funding. In addition to providing the tools that the regulatory body would need in preventing violations and disciplining violators directly, its role in supervising exchanges must be substantially expanded. Unquestionably, exchanges are going to have to perform their regulatory role better in order to provide a viable market in which the public can have confidence. The Federal regulatory agency must be given the authority to require that exchanges do so.

S. REP. NO. 93-1131, 93d Cong., 2d Sess. 18-19 (1974). The Act is designed to insure fair practices and honest dealings on the commodity exchanges and to provide a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers and the exchanges themselves. S. REP. NO. 93-1131, 93d Cong., 2d Sess. 2-27 (1974).

Early government regulation sought to protect farm interests from unscrupulous speculators who profited at the expense of grain growers. The Grain Futures Act of 1922, Ch. 369, § 1, 42 Stat. 998 (current version at 7 U.S.C. §§ 1-12 (Supp. IV 1974)), required licensing of grain markets as one manner of preventing abuse. In 1936 Congress amended the Grain Futures Act by the Commodity Exchange Act, which established several new licensing requirements for futures commission merchants (FCMs) and floor brokers. Commodity Exchange Act, Ch. 545, § 5, 49 Stat. 1494-95 (1936) (current version at 7 U.S.C. §§ 6d & 6e (Supp. IV 1974)). For a more detailed discussion of the history of the regulation of commodities markets, see Note, *The Commodities Game Has a New Referee*, 52 CHI.-KENT L. REV. 443-44 (1975) [hereinafter cited as *The Commodities Game*].

program comprised of four separate Advisory Committees, each of limited duration. One such committee was the advisory committee on Commodity Futures Trading Professionals.¹⁹ The Commission stated that the Committee would be asked to consider and submit reports and recommendations on the standards for regulation of domestic and foreign commodity futures trading professionals, including futures commission merchants.²⁰

In recent years, the ranks of commodity speculators have swelled with novice traders who came to the commodities market seeking an alternative to stock trading. Lured by tales of spectacular profits, low margins and overnight millionaires, uninformed investors began speculating in bellies and bushels, unaware of the sobering risks inherent in the mechanics of commodity trading.²¹ The Committee formed its overall recommendations to meet

19. 40 Fed. Reg. 32,866 (1975).

20. *Id.* Included in the category of commodity futures trading professionals are commodity trading advisors, commodity pool operators, futures commission merchants, persons associated therewith and floor brokers. Each of these persons has been specially defined in section 2(a)(1) of the Act. 7 U.S.C. § 2 (Supp. IV 1974). The Committee's report was published only in a special edition of the *Commodities Futures Law Reporter*, 29 COMM. FUT. L. REP. (CCH) ADVISORY COMMITTEE REPORT TO THE COMMODITY FUTURES TRADING COMMISSION, COMMODITY FUTURES TRADING PROFESSIONALS (August 20, 1976, Part II) [hereinafter cited as ADVISORY COMMITTEE REPORT].

21. The comparisons between commodities and securities trading have been ably set forth in a recent publication:

Similarities between stocks and commodities can be misleading. The public trader does business through brokerage houses, such as E. F. Hutton or Merrill Lynch in both cases, and often the same broker will handle both stocks and commodities. Both brokers will give out tips, brochures, and a dry shoulder when needed. Both brokers will service an established account by phone. Both brokers will take your money. Margin accounts appear to be about the same in function but much lower for commodities; in fact they are entirely different. Both feature nearly instantaneous ticker reporting and any good newspaper will give quotations of daily price movements for both in the same manner. Many of the terms used in one market mean the same thing in the other.

Here are some terms which are used in both stock and commodity trading:

(Commodities)	(Securities)
Job lot	odd lot
Leverage	same
Limited order	same
Long	same
Margin (good faith)	in true sense
Market order	same
Net position	same
Offer	ask
On opening	same
Open interest	float
Open order	same
Opening, the	same
Opening price	same
Pit	floor
Point	same
Position	same
Price averaging	same
Privileges	same
Pyramiding	same
Quotations	similar
Range	same
Seasonals	stock cycles
Short	same

what it felt was the public's lack of information about, and often misunderstanding, of commodity futures markets.²² However, the specific group of greatest apparent concern to the Committee was that class of customer new to commodities markets.

The Committee sought to protect new customers by compelling futures professionals including futures commission merchants to prepare a risk disclosure statement.²³ As further protection the Committee recommended the establishment of a "know-your-customer" rule and suitability standards for adoption in the commodity industry.²⁴ Apparently it was thought that these regulations, among others, would help safeguard the new commodities trader against the substantial risk of loss inherent in futures trading.²⁵

Spread	arbitrage
Stop-loss order	same
Straddle	arbitrage
Scalper	specialist
Tape	same
Technical rally	same
Technicals	same
Volume	same
Ask	same
At the market	same
Bear	same
Bid	same
Break	same
Bull	same
Buy on close	same
Buy on opening	same
Cash commodity	no comparison
[CFTC]	SEC
Close, the	same
Closing price	same
Cover (liquidation)	same
Day order	same
Evening up	same
Fundamentals	same
Hedge	same principle

These many similarities in the handling of commodity and stock accounts can lead to the false impression that the two games are played the same way. While the mechanics of trading are much alike, the strategy of play is much different. GOULD, *supra* note 13, at 51. The similarity in the legislator's mind is evidenced by the statements of the Chairman of the Conference Committee which considered the bill. Chairman Herman Talmadge stated: "I believe the legislation we are now considering will be considered landmark legislation in the future. It creates an agency comparable in stature and responsibility to the Securities and Exchange Commission." Statement by Chairman Talmadge on Consideration of the Conference Report on H.R. 13113 (October 19, 1974).

22. ADVISORY COMMITTEE REPORT, *supra* note 20, at 1, 2. The Committee also noted that the public's lack of understanding and misunderstanding and low confidence in futures markets is:

exacerbated by inevitable comparisons to the securities industry—which has benefited from the 40-year presence of a vigorous independent regulatory agency, an active self-regulatory association, a dominant exchange and federal insurance of brokerage accounts. None of these benefits—which are important to the public's perception of an industry—has been available to the commodities industry.

See also note 21 *supra* for misleading similarities between commodities and securities trading.

23. ADVISORY COMMITTEE REPORT, *supra* note 20, at 2.

24. *Id.* at 10-11.

25. *Id.* at 1.

Proposed Customer Protection

The Committee suggested the following rules:

1. *Disclosure.* FCM's must be required to furnish each new commodities customer with a clear and concise written statement (preferably one page) explaining the risks inherent in commodity futures trading, particularly the risk to uncommitted capital. The FCM should be required promptly to obtain from the customer a written acknowledgement that he has received the risk disclosure document²⁶

2. *Know your customer.* An FCM must have a continuing general knowledge of each customer, including his overall financial situation, trading objectives and suitability to engage in futures trading²⁷

3. *Suitability.* An FCM must have a reasonable ground for believing that each recommendation made by it to a customer is suitable in light of the customer's financial condition, objectives, etc.²⁸

4. *Required minimums.* The CFTC should not establish a minimum net worth requirement that a customer must meet in order to maintain an account with an FCM²⁹

It is apparent from the proposed rules and the Committee's discussion underlying each recommendation³⁰ that the commodities broker is being made to assume the added responsibilities of a customer's financial analyst and advisor. FCM's will be required to ascertain the prospective customer's financial and personal situations, make recommendations suited to each individual's trading propensity and continuously investigate the propriety of a customer's continued trading on the commodities futures markets.

26. *Id.* at 9.

27. *Id.* at 10.

28. *Id.* at 11.

29. *Id.*

30. The following is a part of the full discussion underlying some of the Committee's recommendations:

Know your customer. Commission Rule 1.37 which requires FCM's to ascertain the name, address and occupation of each account-holder, must be broadened to require FCM's to obtain from each customer complete information as to his income, net worth, number of dependents, etc. . . . The FCM's duty to know his customer must be a continuing one. A customer's financial situation and capacity for risk-taking may change from what it was when he opened the account. FCM's should know their customers not only for the purpose of making suitable recommendations but also to avoid situations in which a defaulting customer might jeopardize the entire firm and its other customers. . . .

Suitability. Suitability is of particular importance in commodities trading because of the wide varieties of trading programs that are available to customers. For example, a series of spread trades may be appropriate for a conservative trader whereas an aggressive program of speculation in a volatile contract may be entirely unsuitable. . . .

Required minimums. A customer's suitability to trade futures does not depend on his net worth. First, there are many different kinds of trading programs in which a customer may engage—ranging from the highly conservative to the very aggressive. Second, net worth is only one element of a customer's capacity for risk-taking; an individual with a relatively small net worth but high income and few dependents is probably more suited to futures trading than an individual with a higher net worth but relatively low income and several dependents. . . .

What has occurred, obviously, is that the Committee proposes to incorporate into commodities law the doctrines of "know-your-customer" and "suitability" originally developed in securities law. However, because of the difference between securities and commodities trading, the application of the securities law doctrines is inappropriate to commodities law.

THE SECURITIES LAW SUITABILITY DOCTRINE AND ITS
POSSIBLE APPLICATION TO COMMODITIES LAW

Genesis of the Suitability Doctrine

Securities law concepts, including the suitability doctrine, served as a foundation for the regulatory proposals of the CFTC Advisory Committee. The suitability doctrine has valid purposes when applied to the securities industry, but its unaltered or inflexible application to the commodities industry is unwarranted. A review of the suitability doctrine's foundation is necessary in order to determine the proper scope of its application to the commodities field.

The securities law suitability doctrine arises from the application to the securities industry of certain rules of the National Association of Securities Dealers,³¹ the Securities and Exchange Commission³² and the New York Stock Exchange.³³ The needs fulfilled by these rules are the need to verify the customer's capital and the need to ascertain the customer's investment goals.

Section 2, article III of the NASD Rules of Fair Practice states:

In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.³⁴

SEC rule 15b10-3³⁵ applies to broker/dealers who are not members of the NASD. This rule contains basically the same provisions as the NASD rule but also requires broker/dealers to make inquiry of a customer's financial situation, needs and investment objectives if the customer himself fails to provide adequate information.

These NASD and SEC rules have been interpreted as requiring two separate and distinct determinations to be made by a broker/dealer prior to recommending any securities to his customer. The broker/dealer must first determine whether a security is worth recommending at all³⁶ and must *then*

31. Hereinafter referred to in the text as N.A.S.D.

32. Hereinafter referred to in the text as the SEC.

33. Hereinafter referred to in the text as the N.Y.S.E.

34. CCH NASD Manual, ¶ 2152 (1976).

35. 17 C.F.R. § 240.15b10-3 (1976).

36. This test is usually called the reasonable basis for recommendations doctrine. It would

determine whether that security is suitable for a particular customer. The first determination has come to be known as the "reasonable basis test" and relates to the nature of the security rather than its appropriateness for a particular customer. The latter determination is the province of the suitability doctrine.³⁷ As in the case of many single-sentence doctrines, the suitability "one-liner" opens a flood of unanswerable questions and difficult judgment calls to be made by brokers.

Some of the problems the suitability test causes for broker/dealers include obtaining private information from reluctant customers, deciding how much information is to be obtained, and separating the relevant information from the irrelevant. The broker/dealer's difficulties are magnified because the regulatory agencies and courts have rarely faced, much less resolved, the question of which specific standards should be imposed on the securities industry in order to implement the broadly drawn suitability doctrine.³⁸

NYSE rule 405(1), the "know-your-customer" rule, is commonly applied as part of the suitability doctrine. It is similar to the NASD rule described above and requires a broker/dealer to: "[u]se due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person

be of little use in commodities law because a commodity underlying a commodity future need not be investigated in the same manner as a relatively unknown company in the securities market need be. The only need for investigation in the commodities field concerns the manner in which various factors affect a commodity's supply and demand.

37. Cases which have illuminated the procedures to be used in satisfying the suitability doctrine are *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); *Blackburn v. Witter*, 201 Cal. App. 2d 518, 19 Cal. Rptr. 842 (1962).

In *Hecht* the court held that excessive trading was unsuitable for the plaintiff's account. 283 F. Supp. at 437. It set forth the elements necessary to fulfill the suitability doctrine by referring to publications of the NASD and the American Association of Stock Exchange Firms:

These publications indicate that good standard practice in the brokerage business requires that a "partner" is obliged to know the "essential facts" relative to each customer and to "supervise diligently" all accounts handled by registered representatives to obtain the appropriate facts concerning each customer prior to opening the account; that each time a new account is opened new information should be obtained directly from the customer; that the investigation performed by the registered representative should be a continuing one; that note of any changes in the customer's financial status should be kept; that the registered representative should ascertain whether the customer understands the basic mechanics of purchasing securities; that representatives must know and keep themselves informed of circumstances relating to their clients' interests which may have a bearing on the client's interests as investors' and that a firm should not rely exclusively on a registered representative to obtain the essential facts but should have a series of checks to determine that the full facts are being obtained sufficiently to satisfy the firm's responsibilities.

Id. at 438.

38. Even if the broker is not required to make the absolutely correct determination of suitability in all instances, he must still possess and apply the knowledge and use the skill and care ordinarily used by well-qualified brokers under the same or similar circumstances. *See, e.g.*, ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, I.P.I.2d. CIVIL, Instruction 105.01 at 319 (1971).

holding power of attorney over any account accepted or carried by such organization."³⁹ Rule 405(1) was originally intended to prevent stolen securities from being sold through brokerage firms.⁴⁰ Theoretically, if a broker/dealer knew his customer, he would also know that the customer's securities certificates came from legitimate sources.⁴¹

The Inapplicability of the Securities Doctrines to Commodities

Neither aspect of the suitability doctrine from securities law is applicable to commodities futures trading. The "know-your-customer" prong of the doctrine is not applicable because certificates of ownership are used in the commodities industry only at the time of delivery of a commodity, not during the trading process with respect to futures. Futures contracts are evidenced by entries on the books of brokers and clearing houses with the customer receiving confirmations of those purchases or sales. Since no document representing the futures contract is ever issued, a customer has no fear of having his futures contracts stolen.⁴² Thus, in commodities law, the absence of the original purpose of the "know-your-customer" rule diminishes that rule's relevance in this area.

The purpose of the broader "suitability rule" when applied to traders in commodities is also of questionable relevance. One of the primary purposes of the suitability doctrine is to protect the innocent customer who comes to a broker/dealer for a low-risk investment program from being placed instead, without his knowledge or full understanding, in a high-risk trading program.⁴³ The suitability rule is intended to prevent this abuse by requiring the broker/dealer to obtain and to take into consideration in his recommendations the customer's investment objectives and the reasonableness of these objectives in light of his assets, liabilities and financial needs.

The wide range of trading objectives in securities includes trading in conservative or secure issues. Many securities are rated and judged in accordance with certain industry standards with ratings published by Standard and Poor's and other services.⁴⁴ Some "safe" issues, such as government bonds, are more suited to the objective of protecting or preserving capital.

39. [1976] 2 NYSE Guide (CCH) ¶ 2405.

40. See REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES & EXCHANGE COMMISSION 316, H.R. DOC. NO. 95, 88th Cong., 1st Sess. (1963); Comment, *The "Know Your Customer" Rule of the NYSE: Liability of Broker-Dealers Under the UCC and Federal Securities Laws*, 1973 DUKE L.J. 489.

41. Rule 405(1) has now expanded in scope to include the suitability doctrine.

42. See *The Mechanics of Futures Trading*, S. REP. NO. 1131, 93d Cong., 2d Sess. 16-17 (1974).

43. See Fishman, *Broker-Dealer Obligations to Customers—The NASD Suitability Rule*, 51 MINN. L. REV. 233, 239-41 (1966).

44. Some of the most conservatively rated issues include government bonds and AA rated issues such as A. T. & T. and General Motors bonds.

Trading programs are available which can place either a large or small proportion of low risk investments in the portfolios of a particular individual. The predictability and assuredness of stock dividends and bond interest payments are important to an investor who plans his financial program on such income sources. Thus, the conservative investor who may buy securities with the intent of holding them for long periods of time to receive dividends or capital gains from an issue's growth has a multitude of possibilities for his conservative investment plan.

In contrast, commodities trading cannot be considered an investment vehicle and no options for conservative trading exist. The concept of holding an issue for long-term profit on its growth is foreign to commodities trading because of the short life of the commodities futures contract. And, although it may be true that some commodities futures prices historically are more volatile than others,⁴⁵ it is misleading from a trading point of view to conclude that any particular futures contract can constitute a conservative purchase as opposed to a risky one. Commodities trading inherently involves substantial risk regardless of which contracts are traded.

The types of securities trading programs described above are totally foreign to the nature of commodities speculation. Aside from hedgers, commodities traders are speculators and all non-hedging commodities futures trading should be assumed to be speculative. Speculators are not investors⁴⁶ and cannot be presumed to be seeking the same objectives as an investor in the securities market. While most investors desire price stability, speculators desire price change. Conservative investors are interested in the long term prospects of an issue and are therefore unconcerned with daily or weekly price changes in the stock. Commodities speculators, on the other hand, must be concerned with daily and even hourly price changes of futures contracts since the mechanics of leverage trading translates slight price changes into significant profits or losses.⁴⁷ The speculator in commodities can never enjoy a promise to pay a fixed sum on the part of the government or a major

45. For commodities which have highly volatile prices, see, for example, orange juice (frozen), Sept. 1976-N.Y. traded between August, 1975 and February, 1976, COMMODITY RESEARCH BUREAU, INC., 21 COMM. CHART S. 15 (Feb. 13, 1976); lumber, March, 1976-Chicago, traded between August, 1975 and February, 1976, *id.* at 14; cattle (feeder), May, 1976-Chicago, traded between September, 1975 and February, 1976, *id.* at 4; potatoes (Maine), May, 1976-N.Y., traded between May, 1975 and February, 1976, *id.* at 19; plywood, March 1976-Chicago, traded between April, 1975 and February, 1976, *id.* at 17.

46. THE JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. REP. NO. 1194, 93d Cong., 2d Sess. 33-44 (1974), sets forth important background information and data which was considered by the Conference Committee in editing H.R. 13113. One interesting point is the non-use of the hedger/speculator analysis and the questionable use of the word "investors" to describe customers of commodities brokers.

47. An adverse price change of several pennies realized on tens of thousands of bushels, for example, may mean the loss of thousands of dollars to a speculator.

corporation. Insofar as he stands unsecured in bearing the risk of commodities trading, his trading cannot be considered conservative.

The Committee's suggestion that "spread trades" may be an appropriate vehicle for conservative traders is unsupported.⁴⁸ "Spreading" involves simultaneously taking a long (purchase) position in one futures contract against a short (sale) position in another futures contract. Spreading can be conducted between commodities, between markets and between different delivery months of the same commodity.⁴⁹ Because of what may be perceived as a normal price relationship between commodities, delivery months or markets, an excessive or diminished price difference signals a "spread trade" opportunity to the spreader. The spreader is a speculator who, by entering a simultaneous purchase of the relatively low priced commodity and a sale of the relatively high priced commodity, seeks to make money as those commodity prices return to their normal or usual relationship.

Spreads are attractive to many persons because they involve reducing the amount of a trader's money at risk on a given number of contracts. This reduction results from the lower margin requirements established for spread trades.⁵⁰ To the trader this means that by taking a spread position he has lowered the capital committed to those contracts.⁵¹ However, placing less money at risk on a given contract is not the same as lowering the risk factors inherent in trading commodities. Lowering one's risk relates to lowering the possibility of loss while lowering the amount of money at risk relates to how much capital is tied up. Because spread margins are lower than those required for a speculator taking an outright position, a spread trader uses less of his

48. There are trading devices which can be used and if executed may assist in limiting loss exposure. One such device is the stop loss order. This order is one placed by a person who holds a position in the market. In order to protect against loss caused by an adverse price move, the trader places an order to offset his positions should prices move against him. Assume, for example, that a speculator has purchased 10,000 bushels of July corn futures at \$2.10 per bushel. In order to protect his position against downward price movement, the trader might place a stop loss order to sell 10,000 bushels of July corn at \$2.00. If corn prices move down to \$2.00 per bushel his order will be executed and theoretically his loss will be limited to \$.10 per bushel. The same device is easily employed to protect short positions by placing the stop loss order at an execution price above the short price. The problem attendant to stop loss orders in a fast and volatile commodity market is that the order may not get executed at the specified price. If a particular commodity is experiencing "limit" price moves and no trading occurs, a trader may find his stops unexecuted until trading resumes at price levels which have increased his loss. This is known as "blowing through the stops," an event which surprises many new traders who have mistakenly determined and fixed their potential loss exposure based on the stop loss price.

49. CBT MANUAL, *supra* note 6, at 113. The CFTC has included straddles and spreads under the definition of "arbitrage." 7 U.S.C. § 6a (Supp. IV 1974).

50. Margins functions have been adequately described in *The Commodities Game*, *supra* note 18, at 442: "Commodity exchanges set the minimum initial margin requirements and maintenance margin levels for commercial and speculative accounts, but individual commission houses may require margin deposits above the exchange's minimum level." *See also* CBT MANUAL, *supra* note 6, at 128.

51. CBT MANUAL, *supra* note 6, at 125.

resources to satisfy margin requirements. With more of his equity available for margining uses, a spreader can increase the number of contracts for which he is committed. If an outright speculator and a spread trader commit equal amounts of capital to the margining of positions, neither has lowered the amount of money at risk relative to the other and there may be increased rather than lowered probability of loss for the spreader.⁵² Successful spreading depends primarily upon the accurate assessment of what price relationships should be, as opposed to what they are when the trade is entered into. While spreads may appeal to some speculators, the process of spread trading is considered a sophisticated trading technique and is not recommended for the beginning commodity trader.⁵³

The Committee's suggestion that spread trading may be appropriate for a conservative trader contains the misleading suggestion that the objectives of some traders may be conservative. The concept is inapplicable. To the extent spreading does entail lower per contract margin requirements, it does lower the speculator's capital at risk. This should not be confused with lowering the risk of loss.

Suitability standards for commodities speculators should be based on the true premise of that marketplace: *speculators are risk takers*. Suitability to trade can then be measured by one's risk-taking ability, which is a function of one's liquid assets available for trading and possible loss in volatile markets.⁵⁴ The real suitability question to ask of a prospective commodities trader is whether he should trade commodities futures at all. Unlike the securities suitability standards, focusing on the recommendation of an appropriate security to the investor,⁵⁵ commodities suitability should be concerned with determining whether the speculator can maintain open positions in the market before an adverse price change annihilates those positions.⁵⁶ Because the

52. Another way to reduce one's money at risk is to trade smaller contract units as are available on at least one Chicago exchange.

53. CBT MANUAL, *supra* note 6, at 125. "Skillful spreading requires a careful analysis of all factors affecting the specific spread . . . [t]he spread must be seen in its historical and seasonal context before the profitability of a change in a typical relationship between two futures prices can be accurately evaluated."

54. Because speculators trade on margin, one can lose more than he puts up in the margin pledge.

55. See notes 36, 37, *supra*.

56. The commodity trader does not have this question about trading mix. He knows all of his purchases and sales are going to be speculative before he makes any move. His game is not trading mix for he will deal in only two or three commodities at a time, changing his positions often. He may trade wheat futures for several months, then switch to cattle, copper, or coconut oil as prices fluctuate. He makes his money on the small percentage moves on the very large positions he can control with his margin account. He expects to lose money on more than half his trades but if he is a successful trader he keeps these losses extremely small and he is going to be there for the major price moves either up or down. The commodity speculator is playing a game of money management rather than trading mix. Which commodity he chooses is less important than how he handles his account. GOULD, *supra* note 16, at 53.

range of risk inherent in commodities futures trading is narrow, it is clear that the traditional reasons for the application of the suitability doctrine in securities law are inapplicable to commodities law and should not be the basis of a suitability standard for commodities traders.

OTHER COMMITTEE RECOMMENDATIONS

Risk Disclosure Statement

One of the better recommendations the Committee has made is that of the risk disclosure statement.⁵⁷ As envisioned, this would be a written statement given to the new commodities futures customer explaining the risks in trading commodity futures. The statement would be directed primarily to the person who is trading in commodity futures for the first time. Such a person, especially if he has previously traded in securities, may tend to equate commodities futures trading with securities trading without recognizing the fundamental differences.

As the Committee appreciates, the risk disclosure statement should inform the customer "that futures prices are subject to large and rapid fluctuations; that the potential for profit (*and loss*) is directly related to the degree of leverage; and that the same high leverage which creates the potential for large profits can also lead to large losses."⁵⁸ The customer must be made to understand how margin works, especially the fact that the amount of margin is inversely proportionate to the amount of leverage and the probability that the customer may be called upon to meet margin calls.

The mechanics of the commodity futures market must be explained to the customer, emphasizing "daily price limits; the possibility of successive days of limit trading; and the fact that successive limit days can vitiate stop-loss orders."⁵⁹ Since these possibilities do not exist in the better-publicized securities markets, a special effort should be made to ensure the customer's understanding of these concepts. Otherwise, the broker may be blamed if a new customer does not understand how he was caught on the wrong side of a "limits down" market and could not liquidate his position because he was "locked into" the market.

With such information clearly explained, the customer should begin to understand that commodities futures trading is a highly speculative venture. He must be told that the commodities futures market should only be for those

57. ADVISORY COMMITTEE REPORT, *supra* note 20, at 2.

58. *Id.* at 9.

59. *Id.* "Daily price limits" are those price limits set by the various exchanges, within which trading can occur. If supply and demand dictate a real price beyond the limits for that day, all trading stops. Trading resumes the next day with limits set around the close of the preceeding day's preceding day's closing price.

who are able to withstand substantial financial losses and that the majority of new speculators lose money in the market. Finally, and most important, the customer must be informed of the risk to his *uncommitted* capital.⁶⁰ Because of the low margin requirement, margin calls can be made with only a slight variation in the price of the future, creating the possibility that the customer may lose more capital than he originally put into the market. This fact alone should warn the potential customer that speculators, not investors, belong in the commodities futures markets. As has been recently stated in *Geldermann v. Lane*,⁶¹ “[t]his [commodities trading] obviously is no business, game or sport for the fainthearted or for those of limited financial resources.”

The Committee proposes that the risk disclosure statement be a uniform, one-page document.⁶² While undue complexity which might discourage the potential customer should be avoided, the document should clearly illustrate all of the dangers involved in trading commodities futures. Assuming the document is not couched in legalistic terms, two or three pages may not be too much to expect a customer to read and digest.

A final but very important procedure is that “[t]he FCM should be required promptly to obtain from the customer a written acknowledgement that he has received the risk disclosure document.”⁶³ This acknowledgement should be received before any trades are made. One of its purposes is to ensure that the risk disclosure statement is brought to the attention of the customer. Bringing it to his attention, however, is insufficient; the customer must also understand the contents of the risk disclosure statement. A few questions directed to the customer by the broker may help determine this. Without the prospective trader’s full understanding, the risk disclosure statement is worthless. When the customer understands the risk involved in commodities futures trading, he can determine for himself whether he is suitable for trading.

Minimum Customer Liquid Capital

One area of suitability which should remain the FCM’s concern is that of

60. *Id.*

61. 527 F.2d 571, 578 (7th Cir. 1975).

62. ADVISORY COMMITTEE REPORT, *supra* note 20, at 9-10. A precedent for such a document can be found in prospectuses selling commodity futures funds. These prospectuses must meet not only the adequate disclosure requirements of the SEC, but also the adequate and accurate disclosure requirements of the Blue Sky laws. Even though a buyer cannot lose more than he invested in these funds, the prospectuses still disclose the price fluctuations of the commodity markets and the effect that small margins have on the leverage of the price.

63. *Id.* at 9. A rule similar to the one proposed is Chicago Board Options Exchange Rule 9.7, CBOE GUIDE (CCH) 2132 (1976), which requires a member organization to provide a customer with a prospectus at or prior to the time the account is approved and to receive within fifteen days of such time an agreement from the customer that his account will be handled in accordance with the rules of the Exchange and the Clearing Corporation. In this instance the risk disclosure statement was compiled by the various exchanges, not the SEC.

the customer's financial situation. The small size of the margin required to trade in commodities futures contemplates the possibility of a number of margin calls in the future. In order to satisfy these a trader must have a ready reserve of liquid capital. The FCM, both for its own protection and its customer's, should be required to use procedures which confirm the existence of a customer's liquid capital.

One possible rule for the CFTC to consider in this area is to require a customer to have a minimum net worth before he is allowed to trade in commodities futures.⁶⁴ The Committee believes this to be undesirable, curiously stating that "[a] customer's suitability to trade futures does not depend on his net worth."⁶⁵ As support the Committee remarks that commodities futures trading programs range "from the highly conservative to the very aggressive."⁶⁶ This viewpoint ignores the fact that all commodities futures trading is speculative and risky; investment programs can be found only in the securities industry. Once the commodities futures trader is recognized as the speculator he is, there is no need to be concerned with traditional facets of the suitability doctrine. The only relevant aspect of the financial suitability is the prospective trader's ability to withstand monetary loss. The Committee's failure to recognize this results in its erroneous conclusion that net worth is not a major factor to consider in determining suitability to trade commodities.

The FCM should discover three things about his customer: (1) Whether he is informed of the risks; (2) whether he desires to trade in commodity futures; and (3) whether he is financially able to trade. The customer's desire will become manifest only after full disclosure has been made to him concerning the risks involved. The customer's ability can be ascertained by requiring him to maintain a minimum liquid capital in reserve for margin calls. What the FCM should not have to decide subjectively for his customer is whether trading commodities futures is appropriate. This is the customer's decision. To do otherwise would place the entire unnecessary burden of the suitability doctrine on the FCM. Simply stated, if the customer understands

64. Many state securities commissioners have seen fit to establish minimum standards for prospective commodity fund purchasers. These funds are usually limited partnership arrangements wherein purchasers buy one share in the venture and thereby limit their loss exposure to the amount of their purchase. These funds offer no chance of the limited partner losing more than he paid for his shares and in that way offer less exposure for the owners. The State of Illinois Securities Department in its statement of policy, for example, has determined as a guideline for prospective buyers of commodity fund shares that:

Illinois residents warrant and represent that they have a net worth (exclusive of home, furnishings and automobiles) of at least \$75,000 or a net worth (similarly calculated) of at least \$20,000 and non-taxable income of at least \$20,000. The minimum purchase (of shares) for Illinois residents is \$5,000.

65. ADVISORY COMMITTEE REPORT, *supra* note 20, at 11.

66. *Id.*

the risks involved, his trades should be limited only by his ability to meet the next margin call.

Procedures to help the FCM determine this ability should be developed by the commodities industry. The method chosen must not involve an inordinate amount of paperwork. One possibility is to require a new customer to obtain a bank letter of credit for a stated amount from a bank to use as margin. Other procedures may develop through experiment. Although somewhat arbitrary, the minimum customer liquid capital rule provides a certainty for the commodities industry which is lacking in the application of suitability doctrine.

CONCLUSION

Commodities trading is not an investment vehicle and is riskier than securities speculation. The fact is that one can lose more than is put up in "margin" pledge. Losses can eliminate all of the trader's uncommitted capital in volatile commodity markets. Leverage and volatility combine to make commodities trading a form of financial risk taking not meant for the uninformed.

There is only one honest and objective standard to use in judging the suitability of a prospective trader—does he have the capital to stay in the game. If he does and if he understands the mechanics of the enterprise and the risks involved, he can trade. *Investor* standards of suitability like the *investor* himself, have no business in the commodity markets.