

# Chicago-Kent Law Review

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Volume 71

Issue 4 *Symposium on Derivative Financial Products*

Article 1

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June 1996

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Chicago-Kent Law Review

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### Recommended Citation

Chicago-Kent Law Review, *Table of Contents - Issue 4*, 71 Chi.-Kent L. Rev. i (1996).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol71/iss4/1>

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VOLUME 71

1996

NUMBER 4

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### SYMPOSIUM ON DERIVATIVE FINANCIAL PRODUCTS

SYMPOSIUM EDITOR  
PHILIP N. HABLUTZEL

FOREWORD: ON THE BORDERLANDS  
OF DERIVATIVES: ROCKET SCIENCE  
FOR THE NEXT MILLENNIUM *Philip N. Hablutzel* 1043

RESPONSIBILITY FOR CUSTOMER LOSSES  
DUE TO FAILURE OF CORRESPONDENT  
BROKERS AND OTHER  
DEPOSITORY INSTITUTIONS *Arthur W. Hahn* 1053  
*& Edward J. Zabrocki*

The default of Barings plc in February 1995 underscored the reliance placed by existing regulatory systems on depository institutions to hold funds and other customer property used to collateralize positions. The default of such a depository not only may impair the short-term liquidity of both brokers and exchanges, but also reveals divergent views as to the parties responsible for returning such liquidity. This Article examines the alternative legal theories and arguments likely to be advanced in any dispute involving issues of a futures commission merchant's responsibility for customer margin property following the default of a depository institution holding such property.

THE CFTC NET CAPITAL RULE—  
SHOULD A MORE RISK-BASED  
APPROACH BE ADOPTED? *Jerry W. Markham* 1091

Professor Markham's Article on CFTC net capital requirements focuses on the need for a more risk-based approach to this important regulatory tool. The Article reviews the purpose of the net capital rule, the rule's background, and some deficiencies in the rule as it now exists. Professor Markham proposes a more risk-based approach in applying net capital requirements in order to prevent unnecessary restriction of business and to more accurately reflect the risks of carrying commodity futures positions.

COMMENTS ON

MARKHAM'S *NET CAPITAL RULE*

*Paul B. Uhlenhop* 1111

A brief commentary on the important issues raised by Professor Jerry W. Markham's proposal, including the necessity of conforming the SEC capital rules with changes in the CFTC's rule.

THE CFTC AND DERIVATIVE PRODUCTS:  
PURPOSEFUL AMBIGUITY AND  
JURISDICTIONAL REACH

*Alton B. Harris* 1117

This Article discusses the uncertainty surrounding the scope of the Commodity Futures Trading Commission's jurisdiction given the ambiguity in the distinction between futures contracts, over which the CFTC has jurisdiction, and forward contracts, over which it does not. This jurisdictional uncertainty is particularly troublesome in the case of complex derivative products that may embody characteristics similar to both futures contracts and commodity options. The Article uses an in-depth analysis of the CFTC's recent enforcement actions against BT Securities Corporation and MG Refining and Marketing to illustrate how the CFTC purposefully uses and contributes to ambiguity in the futures-forward distinction as a way of expanding its jurisdiction. After discussing the sources and consequences of this ambiguity, Mr. Harris proposes a practical approach to ending the ambiguity and providing reasonable certainty as to the CFTC's jurisdictional reach.

ISSUES PERTAINING TO DERIVATIVE  
MARKET PARTICIPANTS AND  
THEIR RELATIONSHIPS

*Alison M. Gregory* 1181

This Article describes the increasing focus on issues pertaining to derivative market participants and their relationships. It next analyzes *The Principles and Practices for Wholesale Financial Transactions*, which provides helpful "best practices" for participants in the derivative markets and articulates certain standard assumptions that many derivative market participants make in the absence of a contrary written agreement.

DERIVATIVES-RELATED BANK ACTIVITIES  
AS AUTHORIZED BY THE OFFICE OF  
COMPTROLLER OF THE CURRENCY AND  
THE FEDERAL RESERVE BOARD

*Steven C. McGinity* 1195

With derivative financial products being increasingly accepted as appropriate instruments for financial risk management purposes, more banking institutions will become involved in derivatives-related activities both as end-users for their own risk-management needs and as intermediaries by offering brokerage and advisory services to their customers. This Article discusses some of the typical uses of derivatives related activities by the banking industry. Further, it reviews the enabling statutes pursuant to which the banking regulators have authorized their use and identifies the considerations, conditions, and commitments that national banks, bank holding companies, and their subsidiaries are presently required to observe.

## STUDENT NOTES AND COMMENTS

INCORPORATION MAY NOT MEAN  
SOPHISTICATION: SHOULD THERE BE A  
SUITABILITY REQUIREMENT FOR  
BANKS SELLING DERIVATIVES  
TO CORPORATIONS?

*Jason M. Rosenthal* 1249

In this Note, Mr. Rosenthal explores the need for regulating banks selling derivative securities to corporations. In the aftermath of several large corporate losses resulting from derivative investments, industry experts are proposing increased liability for banks who sell derivatives which are not suitable for their customers. This Note concludes that such regulation is unnecessary, arguing that the appropriate controls are already in place, and that a free market approach based on basic contract principles is in all the parties best interests.