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Issues Pertaining to Derivative Market Participants and Their Relationships

Alison M. Gregory

ISSUES PERTAINING TO DERIVATIVE MARKET PARTICIPANTS AND THEIR RELATIONSHIPS

ALISON M. GREGORY*

The market for derivative products has burgeoned in recent years.[1] As the derivative markets have grown, attention has increased on issues pertaining to derivative market participants and the relationships between market participants. Recently, various regulators and industry associations have released guidelines or "best practices" for market participants. Some of these guidelines and "best practices" suggest internal policies and procedures for participants in the derivatives markets. As discussed below, such guidelines and "best practices" may benefit the marketplace.

In addition, some of these guidelines or "best practices," such as *The Principles and Practices for Wholesale Financial Market Transactions* (the "*Principles*"),[2] articulate certain standard assumptions that many derivative market participants may make when entering into derivative transactions, in the absence of a written agreement to the contrary. While some praise the establishment of such standard "best practices" and assumptions, others wonder whether the "best practices" and, in particular, the assumptions present an accurate articulation of the market's existing standards and assumptions. In fact, certain "end users" (i.e., derivative market participants that are not dealers) contend that the assumptions contained in the *Principles* reflect a "dealer bias." Furthermore, some wonder whether such standards might help establish certain courses of dealing that might be used against market participants during litigation. Although market participants disagree regarding, for example, the appropriateness of

* Stanford Law School, JD 1992. The views expressed herein are solely those of the author and are not to be attributed to any former or current employer.

1. Although estimates differ regarding the true size of the derivatives market, many familiar with capital markets agree that it represents a significant portion of capital market transactions. According to the International Swaps and Derivatives Association, Inc.'s ("ISDA") most recent estimate, the over-the-counter (i.e., off-exchange) derivative market exceeds a value of seventeen trillion United States dollars. Published by ISDA (1996).

2. *See* The Principles and Practices for Wholesale Financial Market Transactions (Aug. 17, 1995) (unpublished, on file with the Federal Reserve Bank of New York) [hereinafter Principles]. As this Article went to press, a senior official of the the Federal Reserve Bank of New York announced that it may call for a redraft of the *Principles* due to certain end-user criticisms. *See New York Fed May Revisit Best Practice Documents*, DERIVATIVES WEEK, Jan. 27, 1997, at 1; *see also infra* pp. 1191-93.

certain of the assumptions articulated in the *Principles*, the supervisory regulators' guidelines and industry associations' "best practices" (including the *Principles*) provide a catalyst to initiate a discourse regarding such current guidelines, practices, and/or assumptions.

This Article will describe the increasing focus on such issues pertaining to derivative market participants and their relationships, in addition to the continuing focus on derivative product-related issues. It will then analyze the *Principles* as an illustrative example of a recent release that includes helpful suggested practices and assumptions that may either fill contract gaps or commence a discourse regarding the nature of the parties' relationship.

DISCUSSION

A. *Background: Product-Related Issues*

For some time, regulators of and participants in United States derivative markets have considered issues related to the legal classification of derivative products. I will refer to such issues as "product-related issues."

For instance, the Commodity Exchange Act, as amended, ("CEA")[3] requires that futures contracts[4] trade on a contract market designated by the Commodity Futures Trading Commission ("CFTC") absent an applicable exemption, exclusion, or no-action relief.[5] This requirement has led to a considerable amount of time and attention being dedicated to the identification of a futures contract and the scope of various exclusions and exemptions.[6]

In addition to issues arising under the CEA, some derivative market participants have analyzed certain derivative products to ascertain whether such products might constitute securities and thus be subject to federal and/or state securities laws.[7]

3. 7 U.S.C. §§ 1-24 (1994).

4. The term "futures contract" (i.e., "contracts for the purchase or sale of a commodity for future delivery") is not defined in the CEA, although caselaw and CFTC releases have helped establish a number of factors that are useful for identifying futures contracts. *See, e.g., In re* Stovall [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941 (Dec. 6, 1979); Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30,694 (CFTC 1989).

5. *See* 7 U.S.C. §§ 6(a)-(d).

6. *See, e.g.*, CFTC v. Noble Metals Int'l, Inc., 67 F.3d 766 (9th Cir. 1995), *petition for cert. filed,* (Mar. 21, 1996); *In re* Bybee, 945 F.2d 309 (9th Cir. 1991); Transnor (Berm.) Ltd. v. BP N. Am. Petroleum, 738 F. Supp. 1472, 1489-93 (S.D.N.Y. 1990) (involving the CEA's forward contract exclusion).

7. *See, e.g.*, Robert B. Hiden, Jr., et al., *Equity Swaps Revisited*, FUTURES INT'L L. LETTER, May-June 1995, at 8-15. *See also infra* notes 10-11 and accompanying text.

Over the years, certain issues regarding the classification of an instrument as a security or a futures contract have been clarified. In 1982, the CFTC and the Securities and Exchange Commission ("SEC") agreed to a jurisdictional accord, helping to clarify the jurisdiction of each agency with respect to certain financial instruments, such as options on securities and futures or options on indices of securities.[8] Also, the CFTC issued an interpretation and then an exemption that provided frameworks for analysis of securities with commodity-dependent components.[9]

The legal status of other financial instruments, including certain swaps, remains less clear. For example, the SEC brought an administrative proceeding against BT Securities Corporation, a subsidiary of Bankers Trust New York Corporation, involving several swap agreements that Gibson Greetings, Inc. purchased from BT Securities Corporation.[10] In the 1994 order announcing and settling the administrative action, the SEC, *inter alia*, determined that two of the swap agreements that were individually-negotiated, cash-settled, over-the-counter options on the prices, yields, or spreads of debt securities issued by the United States Treasury Department were securities.[11]

More recently, the United States District Court of the Southern District of Ohio held, in connection with a grant of summary judgment motions for Bankers Trust, which was involved in litigation with the Procter & Gamble Corporation, that, *inter alia*, the interest rate swaps at issue were not securities under either Ohio or federal securities laws.[12] In reaching its decision, the court explained that the swaps failed the *SEC v. Howey*[13] and *Reves v. Ernst & Young*[14] tests in various ways, and that the swaps were not options on securities.[15]

8. *See, e.g.*, 7 U.S.C. § 2a.

9. Part 34 of the CEA Regulations, 58 Fed. Reg. 5580 (CFTC 1993).

10. *See In re* BT Sec. Corp. [1994-95 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,477 (Dec. 22, 1994).

11. *See id.* Upon the issuance of the order, the SEC simultaneously released an exemptive order that temporarily exempted certain swap dealers engaging in similar instruments from broker-dealer registration requirements. *See* Order Exempting Certain Brokers and Dealers from Broker-Dealer Registration [1994-95 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85, 476 (Dec. 22, 1994) [hereinafter SEC Order]. The SEC extended the temporary relief. *See id.* ¶ 86,108. *See also* Kenneth M. Raisler and Alison M. Gregory, *Regulatory and Legal Issues*, *in* MANAGING ENERGY PRICE RISK 1, 280 n.12 (Risk Publ'g, 1995) [hereinafter *Regulatory and Legal Issues*].

12. *See* Procter & Gamble Co v. Bankers Trust Co., 925 F. Supp. 1270, 1277-83 (S.D. Ohio 1996).

13. 328 U.S. 293 (1946).

14. 494 U.S. 56 (1990).

15. *See* Procter & Gamble Co. v. Bankers Trust Co., 925 F. Supp. at 1277-83. The Court's determination that the swaps were not securities appears arguably to create some tension with the SEC Order. *See, supra* notes 10-11 and accompanying text.

Furthermore, issues can arise regarding products that contain both futures and securities elements.[16] While interesting, such product-related topics are beyond the scope of this Article and are discussed elsewhere, including in some of the other articles included in this Symposium.

B. Beyond Product-Related Issues: Issues Pertaining to Market Participants and Their Relationships

In recent years, derivatives market participants and regulators have devoted considerable attention to non-product-related issues. Increasingly, they are focusing on issues pertaining to types of market participants as well as the nature of the relationship between market participants.

The status of market participants has always been relevant to the basic contract. For example, it is fairly standard in the over-the-counter ("OTC") derivatives market for dealers to assess their counterparty's capacity and authority to enter into derivative transactions, in addition to analyzing other enforceability-related matters of contract law. The type of market participant can also be important to the authority analysis necessary for an OTC derivatives dealer to transact with a regulated entity, such as an insurance company, municipality, or pension plan. In addition to the usual authority inquiry, a counterparty seeking to transact with such a regulated entity should consider any relevant statutory or regulatory framework that could restrict such an entity's activities.[17]

In addition to such issues, a number of releases in recent years have addressed other issues regarding the types of market participants and the relationships between them. Some supervisory regulators have released guidelines regarding the derivative activities of the entities they supervise. Along these lines, banking regulators, for example, concerned about the safety and soundness of the banks under their supervision, have issued a plethora of such guidelines, beginning with the Office of the Comptroller of the Currency's ("OCC") October 1993 Banking Circular 277,[18] to guide national banks in conducting their risk management activities with regard to derivatives.

16. *See, e.g.*, Chicago Mercantile Exch. v. SEC, 883 F.2d 537 (7th Cir. 1989).

17. For example, certain regulatory requirements must be satisfied for netting provisions of a derivatives contract involving an entity subject to the FDI Act in the event of a bankruptcy of the entity.

18. *See Risk Management of Financial Derivatives*, Banking Circular No. 277 [1995] 5 Fed. Banking L. Rep. (CCH) ¶ 62-152, at 71-703-12 (Oct. 27, 1993).

The Board of Governors of the Federal Reserve System then issued its guidelines for examiners.[19] Numerous bank regulatory releases have since been issued concerning a variety of derivatives-related topics.[20]

Other supervisory or self-regulatory bodies also are attempting to provide instruction regarding their respective regulated entities. For example, the National Association of Insurance Commissioners has been preparing a Model Act to guide the derivative activities of insurance companies.[21]

Furthermore, during the past few years, various industry association groups have worked together to create "best practices" or standards. During 1993, the "Group of Thirty" issued its recommendations regarding OTC derivatives.[22] The "Group of Thirty" is comprised of central bankers, bankers, lawyers, and other industry representatives. The "Group of Thirty" report provided a valuable overview of derivatives and derivatives markets and issued a number of recommendations.[23] Other significant industry association efforts include the Derivatives Policy Group's *Framework for Voluntary Oversight*[24] and the Treasury Management Association's *Voluntary Principles and Practices Guidelines for End-Users of Derivatives*.[25]

The industry association effort that will be analyzed in detail in the following section is the *Principles*. The *Principles* are voluntary, although it is expected that market participants generally will adhere to them due to their benefits (described below). They establish assumptions which can affect the rights and obligations of counterparties, including dealers and end-users, to wholesale transactions, in the absence of written agreements to the contrary.

Further, the *Principles* are in addition to, and do not change or modify, other published guidance, including OCC Banking Circular

19. *See Regulatory and Legal Issues, supra* note 11, at text accompanying note 79.

20. For example, see the OCC report entitled *Futures Commission Merchant Activities*, 935 PLI/Corp. 9 at 317-42 (Prac. L. Inst., April 1996), and see the OCC and the Federal Reserve Bank's memorandum, B4-7122, regarding credit derivatives, *reprinted in* SWAPS AND OTHER DERIVATIVES IN 1996 935-70 (Prac. L. Inst. 1996).

21. *See Regulatory and Legal Issues, supra* note 11, at 202 n.57.

22. *See id.* at 275 and n.52.

23. *See id.*

24. *See* Derivatives Policy Group, *Framework for Voluntary Oversight: A Framework for Voluntary Oversight of the OTC Derivatives Activities of Securities Firm Affiliates to Promote Confidence and Stability in Financial Markets, in* DERIVATIVES REGULATION 97 (PLI Corp. Law & Practice Course Handbook Series No. B4-7086, 1995).

25. *See* Treasury Management Association, Voluntary Principles and Practices Guidelines for End-Users of Derivatives (Oct. 1995) (unpublished).

277, the Federal Reserve's Examination Guidelines,[26] the Voluntary Framework agreed to by the Derivatives Policy Group and submitted to the SEC, the National Association of Securities Dealers' ("NASD") suitability release, and such statutes, rules, regulations, and common law as may be applicable.[27]

C. *The Principles and Practices for Wholesale Financial Market Transactions*

1. Summary of the *Principles*

The *Principles* were released on August 17, 1995, by a number of industry association groups coordinated by the Federal Reserve Bank of New York.[28] The groups involved in the preparation of the *Principles* were the Emerging Markets Traders Association, the Foreign Exchange Committee (independent of but sponsored by the Federal Reserve Bank of New York), the International Swaps and Derivatives Association, the New York Clearing House Association, the Public Securities Association, and The Securities Industry Association.[29]

The *Principles* "are intended to provide guidance for the conduct of wholesale transactions in the over-the-counter financial markets between Participants ('Transactions')."[30] The *Principles* also "confirm the arm's-length nature of Transactions and describe the assumptions that Participants make about each other" and include a set of "best practices" that Participants "should aspire to achieve in connection with their Transactions."[31]

The definitions of the terms "Transaction" and "Participant" in the *Principles* indicate the scope of the *Principles*. The term "Transaction" encompasses not only swaps and other derivative[32] transactions, but also a wide variety of other wholesale transactions. Nevertheless, this article will generally focus on the application of the *Principles* with respect to privately-negotiated, bilateral swap agreements.

26. *See, Regulatory and Legal Issues, supra* note 11, at text accompanying note 79.
27. *See* Principles, *supra* note 2, § 1.3.
28. *See generally,* Principles, *supra* note 2.
29. *See id.*
30. Principles, *supra* note 2, § 1.1.
31. *Id.* § 1.2.
32. Derivative instruments include futures, forwards, options, swaps, caps, floors, collars, swaptions and other similar instruments. Derivatives have values that are related to the values of underlying assets, such as interest rates, currency exchange rates, commodity prices or securities prices. For the purposes of this article's analysis of the *Principles*, the term "derivative" and the term "swap" shall be used only with respect to privately-negotiated, off-exchange derivative agreements.

The *Principles* define the term "Participant" to mean "any corporation, partnership, trust, government or other entity that engages regularly in one or more types of Transactions."[33] While broad, this definition includes the words "engages regularly" because the *Principles* are not intended to apply to transactions involving infrequent participants in wholesale transactions markets. However, some commentators, such as the End Users Derivative Association, have expressed concerns regarding the potential scope of the *Principles'* application and criticized the drafters of the *Principles* for failing to specify the level of transactional activity that would constitute "engaging regularly."[34]

It is also noteworthy that the definition of the term Participant does not include natural persons.[35] An earlier draft circulated for industry comment included, in the definition of the term "Participant," eligible swap participants, as such term is defined in the CFTC's swap exemption.[36] The CFTC swap exemption's definition of the term "eligible swap participant" includes natural persons with total assets exceeding ten million dollars.[37]

Next, Sections Two and Three of the *Principles* set forth a number of "best practices" to which Participants should adhere. Section Two provides that a Participant's financial resources should be adequate in light of the Participant's Transactions' material risks and commitments.[38]

Section Three addresses the policies and procedures appropriate for Participants:

> With respect to policies and procedures of the types identified in the Principles, a Participant should have policies approved by its board of directors, a committee thereof or an appropriate level of senior management. An appropriate level of senior management should approve controls and procedures to implement these policies. All policies, controls and procedures should be appropriate to the size, nature and complexity of the Participant and its Transactions, and should be reviewed as business and market circumstances change.[39]

The Section then details a number of appropriate policies and procedures. These policies and procedures address, among other things, the supervision and training of employees, risk management procedures,

33. Principles, *supra* note 2, § 1.1.
34. *See, Futures Commission Merchant Activities, supra* note 20, at 774.
35. *See* Principles, *supra* note 2, § 1.1.
36. *See* Exemption of Swap Agreements, 17 C.F.R. § 35 (1996).
37. *See* 17 C.F.R. § 35(b)(2)(xi) (1996).
38. *See* Principles, *supra* note 2, § 2.1.
39. *Id.* § 3.1.

independent risk monitoring, valuation procedures, credit risk procedures, procedures regarding the provision of valuations to others, procedures with respect to the Participant's reasonably satisfying itself of its counterparty's legal capacity and authority to enter into the Transaction, and internal control and compliance procedures to ensure that its Transactions will be conducted "in accordance with applicable legal and regulatory requirements, internal policies and any specific requirements contained in any agreements applicable to its transactions."[40]

The most controversial aspects of the *Principles* involve the *Principles'* provisions regarding various assumptions relating to the nature of the relationship between Participants that will govern, subject to applicable law, unless the Participants to the relevant transactions agree otherwise in writing. Some assumptions set forth in the *Principles* pertain to the arm's-length nature of the relationship between the Participants.

Section Four of the *Principles* contains assumptions and engenders the most controversy. Section 4.2 provides that a Participant "should satisfy itself that it has the capability (internally or through independent professional advice) to understand and make independent decisions about its Transactions."[41] It also states "[a]bsent a written agreement to the contrary, a Participant should expect that its counterparty will assume that the Participant has the capability to understand and make independent decisions about its Transactions and will act accordingly."[42] Similarly, Section 4.2.2 provides that:

> [a]bsent a written agreement or an applicable law, rule or regulation that expressly imposes affirmative obligations to the contrary, a counterparty receiving [communications regarding transaction or market suggestions, ideas or information] should assume that the Participant is acting at arm's length for its own account and that such communications are not recommendations or investment advice on which the counterparty may rely.[43]

If a Participant does not desire to make an independent investment decision and wants to rely on its counterparty's communications, the Participant should so inform its counterparty in writing before entering into a Transaction that will involve the Participant's reliance on such counterparty.[44]

40. *Id.* § 3.3.
41. *Id.* § 4.2.1.
42. *Id.* § 4.2.1.
43. *Id.* § 4.2.2.
44. *See id.* § 4.2.2.

Section Four also contains a fair dealing and professional standards provision. This provision provides that:

> A Participant should act honestly and in good faith when marketing, entering into, executing and administering Transactions. A Participant should act in a manner designed to promote public confidence in the wholesale financial markets. In addition, a Participant should show its counterparties professional courtesy and consideration.[45]

Section Five of the *Principles* also addresses considerations relating to relationships between Participants. Section 5.1 suggests, *inter alia*, that Participants, especially dealers, "should maintain policies and procedures that identify and address circumstances that can lead to uncertainties, misunderstandings or disputes with the potential for relationship, reputational or litigation risk."[46] Section Five discusses a number of practices in which a Participant "may wish" to engage. For example, it states that a Participant "may wish to maintain policies and procedures for identifying (based on information in the possession of the representative of the Participant executing the Transaction . . .) and addressing exceptional situations . . . " that could affect the counterparty's ability to understand or make independent decisions about the Transaction or to undertake the risk involved in the Transaction.[47] Section Five also notes that a Participant may wish to provide additional information to assist the counterparty in its decision-making with respect to the Transaction[48] and may wish to inform its counterparty of the nature of the relationship between Participants.[49]

The final sections of the *Principles*, Sections Six and Seven, involve aspects of the mechanics of Transactions, including confirmations, documentation, payment and settlement instructions, and standards for Transactions (such as market terminology and conventions).

2. Possible Benefits

Participants to wholesale financial transactions are afforded various benefits by the adoption and utilization of the *Principles*. These benefits include the commencement of a dialogue on potentially ambiguous issues, clarifications regarding the nature of the relationship by filling contractual "gaps," the articulation of "best practices" to

45. *Id.* § 4.1.
46. *Id.* § 5.1.
47. *Id.* § 5.2.
48. *See id.* § 5.4.
49. *See id.* § 5.3.

guide such Participants, and a possible reduction of the likelihood of unwanted or unnecessary legislation.

The *Principles* describe in detail the nature of the relationship between the Participants involved in the relevant Transactions.[50] For example, Section Four provides that each Participant understands the Transaction and that neither party acts as a fiduciary to the other.[51] If the Participants disagree with these assumptions, the delivery of the *Principles* increases the likelihood that the Participant with a different understanding will commence a dialogue with regard to such assumptions. If such a dialogue occurs, it may benefit both Participants by identifying the parties' differences in their understandings and, hopefully, by clarifying the terms of their relationship.

Another possible benefit relies upon contractual theory. Adoption of the *Principles* by Participants may also serve a valuable contractual function by creating "default" rules that can "fill gaps" to the extent that the contract would otherwise remain incomplete.[52] The *Principles*' assumptions are not immutable rules; rather, they are default rules or agreements that expressly provide that they may be changed by the parties' written agreement.[53]

As Professors Charles J. Goetz and Robert E. Scott explained:

> Most contract rules are permissive, applying only if the parties do not otherwise agree. By providing standardized and widely suitable risk allocations in advance, the law enables most parties to select a preformulated legal norm 'off the rack,' thus eliminating the cost of negotiating every detail of the proposed arrangement. Atypical parties remain free to bargain for customized provisions, much as a person with an unusual physique may purchase custom-tailored garments for a premium rather than accept a standard size and cut available at a lower price.
>
> Ideally, the preformulated rules . . . should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction.[54]

Another potential benefit of the *Principles* is its articulation of "best practices" for all Participants. Provisions, such as those, regarding financial capabilities and a variety of risk-management policies and procedures, provide a helpful list of appropriate considerations

50. *See, e.g.,* Principles, *supra* note 2, § 4.
51. *See id.* § 4.2.1.
52. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87-88 (1989) (detailing a variety of types of efficient contractual "defaults").
53. *See id.* at 87.
54. *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 270 (1985).

and safeguards to guide Participants engaging in wholesale transactions.

Finally, to the extent that some industry associations or market participants seek to avoid what they consider to be unwanted or unnecessary legislation or regulation, the existence of the *Principles* (or other general standards) might provide a benefit to such industry associations or markets participants to the extent that the existence and use of the *Principles* help to avoid additional legislation or regulation.

3. Possible Concerns and Responses

Concerns about the *Principles* include those expressed by a group of "end users." Some of the end users contend that the *Principles*' assumptions favor dealers and should not apply with respect to them. Some of these commentators also expressed concerns about the possibility that, if the *Principles* bind the parties, they might shift burdens to the detriment of end users. Not only are such commentators opposed to any burden shifting away from dealers, but they also argue that the *Principles* are too burdensome to small end users because they place the onus on such end users to be on notice regarding the existence of the assumptions and of their need to provide written statements when these assumptions are inapposite.

In particular, the assumptions regarding the "arm's-length" nature of the relationship and the assumption providing that neither Participant is acting as an advisor or fiduciary to the other, while supported by many market participants, appear contrary to certain other appropriateness or suitability trends. For example, the NASD has issued a suitability proposal and OCC Banking Circular 277 included an appropriateness-type inquiry.[55]

In response, members of the drafting committee explained that their intention was to identify the arm's-length terms and assumptions that were already the standards in wholesale financial markets for these bilateral agreements. The drafters contend that the assumptions and "best practices" merely reflect the general state of affairs among the majority of counterparties and/or transactions, and serve to clarify and initiate a discussion. As discussed above, such "gap fillings" and clarifications may be quite helpful in reducing the likelihood of misunderstandings and the possibility of ambiguities.[56]

55. *See, Regulatory and Legal Issues, supra* note 11, at 275-76.
56. *See, supra* notes 52-54 and accompanying text.

In this regard, the drafters appear to be contending that these default rules are "untailored" default rules reflecting what the majority of contracting parties would want, thereby reducing contract negotiation and related transactional costs.[57] According to the Coase Theorem:

> if bargaining costs are sufficiently low, resources that can be bargained over will end up in the hands of which ever party values them most. . . . [I]f transaction costs are low, it won't matter (as far as the decision to perform or breach is concerned) whether the law gives the performing party a right to breach and pay damages, or whether it gives the nonperforming party the right to block the other party's breach through a remedy of specific performance. If breach is efficient . . . and the law does not give the performing party the right to breach, that party will simply purchase that right from the nonperforming party.[58]

Thus, the Coase Theorem and the drafters' negotiating-cost argument support placing the default rules in accordance with the majority wishes.

In light of the foregoing, and assuming that the drafters' contention (i.e., that the assumptions are in accordance with the majority of transactions and relationships) is correct, it may be possible to attribute certain end user critics' denunciation of the *Principles* to a strategic position. In part, they might strategically prefer the ambiguity resulting from an incomplete contract with respect to such terms.[59] For example, the strategy may relate to a counterparty's belief (mistaken or not) that the *Principles* could weaken their ability to argue successfully certain claims (such as its reliance on the other party and that the other party acted as a fiduciary or advisor). Consider Judge Feikens' *Procter & Gamble v. Bankers Trust* decision regarding Procter & Gamble claims against Bankers Trust. The judge rejected a fiduciary duty claim holding, *inter alia*, that an arm's-length, counterparty relationship existed and that Banker's Trust's "superior knowledge" with respect to swap transactions did "not convert their business relationship into one in which fiduciary duties are imposed."[60]

57. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *see also* Ayres and Gertner, *supra* note 52.

58. RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW 54 (1994).

59. Analogously, Ayres and Gertner explain that "a second source of contractual incompleteness . . . [is] strategic." Ayres & Gertner, *supra* note 52, at 94. The strategy discussed in their article is a strategy to withhold information. *See id.*

60. *See* Procter & Gamble Co. v. Bankers Trust Co., 925 F. Supp. 1270, 1289 (S.D. Ohio 1996). However, Judge Feikens did state that duties to disclose may arise due to superior knowledge, even in the absence of fiduciary duty.

In any event, it is important to note that the *Principles'* terms may not defeat such claims because disclosures or statements in an agreement may not always control depending on the relevant facts. As Douglas Harris, former Senior Deputy Comptroller of the OCC, noted in a letter to Stephen Greene, Credit Suisse Financial Products's then Managing Director and London General Counsel, a disclosure that a Participant is acting "solely in the capacity of an arm's-length contractual counterparty" may not achieve its goal of limiting liability if the transaction results in a legal dispute.[61]

On the other hand, such end users' criticisms may be the product of their sincere disagreement with the drafters' contention that these terms and assumptions represent the typical assumptions applicable to the majority of transactions and relationships in derivatives markets. If this is the case, then this fact underscores the need for the discussion that the *Principles* have helped, and may continue, to evoke. When two parties to a bilateral agreement have a sincere difference in their understanding of the terms of their agreement, a discussion to clarify the terms is necessary and appropriate.[62]

Other concerns stem from the articulation of industry association standards. One such concern involves possible litigation scenarios in which both end users and dealers fear that the *Principles* might be used to their disadvantage. As discussed above, it is conceivable that some end users may be concerned that they will be held to the terms and assumptions contained in Section Four to their detriment. Meanwhile, others may be concerned that the "best practices" expressed therein might be deemed to establish industry standards or a course of conduct to which they may be held to their detriment.

One final concern of note is whether the *Principles* would be binding on Participants regardless of whether or not the Participants received the *Principles*. In this regard, note that Section Five states that a Participant may want to notify its counterparty of the *Principles'* application.[63]

61. *See* James C. Allen, *Generic Derivative Reports Fall Short, OCC Official Warns*, Am. Banker, Nov. 6, 1995.

62. In fact, these assumptions may appear particularly appropriate in light of the fact that derivatives transactions are unlike a public securities offering where a significant disparity in access to information exists because one party (namely the issuer) has greater access to pertinent, material information.

63. *See,* Principles, *supra* note 2, § 5.3.

D. *The Shift Toward Increasing Supervisory Regulation and the Articulation of Industry Association Standards—Effects on Market Participants*

While some critics of releases or "best practices" have denounced aspects of these documents and, in particular, some disagree with the assumptions contained in the *Principles*, the increasing attention to the internal policies and procedures of derivative market participants and their relationships with each other makes the articulation of what are now, in some cases, "unwritten assumptions" more vital than ever. At the very least, a discussion of guidelines or principles, such as the *Principles*, can provoke an examination of many issues that may now seem ambiguous, at least to some. Moreover, the attention on internal policies and procedures, and discussions and clarifications with respect to the relationships among market participants, will likely prevent some internal problems and transactional disputes.