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INSIDER TRADING AND POSITION LIMITS

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Insider Trading and Position Limits

Andrew Verstein

ABSTRACT

Federal law has long prohibited insider trading in securities such as stocks and bonds. Yet many other financial assets—particularly derivatives and commodities—have historically fallen outside those rules.

This Article asks why insider trading is penalized for some assets but not others. It argues that the goals of insider trading law are often pursued through alternative mechanisms. Markets lacking insider trading prohibitions are not unregulated; rather, they are governed by substitute regimes that achieve similar ends through different means.

By examining the relationship between securities insider trading law and derivatives position limits, this Article clarifies the function of insider trading regulation and illuminates its boundaries. It shows that position-limit rules, though rarely analyzed in this way, can serve as functional substitutes for insider trading restrictions, offering a broader perspective on how law manages informed trading across markets.

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INTRODUCTION

People go to jail all the time for buying or selling stock based on corporate secrets. We call this “insider trading.”¹ But you can buy or sell things other than stock without similar risks of incarceration. For example, suppose an employee of one of Mexico’s largest gasoline import/export firms smuggled confidential plans and pricing information to you. You could make millions by buying oil futures before the firm’s purchases pushed up oil prices. Importantly, nobody has ever gone to prison for insider trading in oil futures.² Instead, insider trading cases have almost exclusively focused on stock traders.³

True, a handful of traders have sometimes agreed to pay civil penalties for insider trading in non-securities.⁴ But even these fines have been extremely rare, perhaps fewer than ten in American history. And until a dozen years ago, there was simply no law against insider trading outside of the heartland of stocks and bonds.⁵

Why has insider trading been intensely prosecuted for some financial assets and not others?

The conventional answer has been that different financial assets are in fact different: Insider trading laws serve important purposes for securities but laissez-

1. See, e.g., James Sterngold, *Boesky Sentenced to 3 Years in Jail in Insider Scandal*, N.Y. TIMES (Dec. 19, 1987), <https://www.nytimes.com/1987/12/19/business/boesky-sentenced-to-3-years-in-jail-in-insider-scandal.html> [<https://perma.cc/XD5P-SUBS>]; Carrie Johnson, *Skilling Gets 24 Years for Fraud at Enron*, WASH. POST (Oct. 24, 2006) <https://www.washingtonpost.com/archive/politics/2006/10/24/skilling-gets-24-years-for-fraud-at-enron-span-classbankheadformer-workers-tell-of-hard-times-over-lost-jobs-retirement-savings-span/f0e1c58a-ddc0-4498-8550-0f8329b31de6> [<https://perma.cc/J7WX-PL28>].
2. This precise scheme, along with other actionable conduct, led to a recent large civil penalty. See *Trafigura Trading LLC*, CFTC No. 24-08, (June 17, 2024). These facts constitute a form of “front-running” but the Commodity Exchange Act has traditionally permitted most forms of informed trading. See *infra* note 55.
3. See STEPHEN M. BAINBRIDGE, *INSIDER TRADING LAW AND POLICY* 79–81 (2014) (arguing first that the classical theory of insider trading should not apply to debt securities, second asserting that the only successful insider trading actions concerning debt securities involved equity-like convertible debt). Congress acted to ban insider trading in options. 15 U.S.C.A. § 78t(d) (making option trading illegal whenever informed securities trading would be illegal). Prior to that, the regulation of derivative trading was tenuous. See William K.S. Wang, *A Cause of Action for Option Traders Against Insider Option Traders*, 101 HARV. L. REV. 1056, 1057–58, 1058 n.11 (1988); Steve Thel, *Closing a Loophole: Insider Trading in Standardized Options*, 16 FORDHAM URB. L.J. 573, 575 (1988) (“If insider trading is illegal or wrong simply because insider traders violate duties they owe to corporate security holders, there is little reason to object to insider trading in options.”).
4. See e.g., *supra* note 2.
5. See Andrew Verstein, *Insider Trading in Commodities Markets*, 102 VA. L. REV. 447, 458–466 (2016).

faire treatment is best for everything else.⁶ Recent scholarship has pushed back on this answer, arguing that the purported differences are overstated: The policy rationales for insider trading law apply similarly to securities and non-securities, such that a stark border—Federal Bureau of Investigation (FBI) wiretaps and incarceration for one, bland indifference to the other—cannot be justified.⁷

Both sides of the debate have focused on insider trading law and enforcement to the exclusion of other law. Viewed this way, the market is sharply divided with regulation on one side and the Wild West on the other. The debate has thus been whether to harmonize the regulation of these two halves.

Yet insider trading law is not the only trading law, so it is conceivable that other legal rules operate as a substitute. Just because insider trading law might be absent from a market does not mean the market would be lawless. Rather, insider trading law's policy goals might be vindicated through alternative means.

What would it mean if the absence of insider trading regulation were paired with the presence of pervasive substitute regulations? The sharp borders of insider trading law would be recontextualized. We would cease to find it jarring that some financial assets are exempt from intense insider trading oversight. We would feel less of a need to either justify this asymmetry by differentiating these assets or harmonize the law with a trans-substantive body of insider trading law. We would slow down and ask ourselves how well the substitute law is doing as a substitute. Perhaps insider trading law's goals are already well-addressed.

Doing so would lead to new questions. If insider trading law's goals are sometimes well-addressed through substitutes, why does the law use different means to achieve the same goals? Why shouldn't insider trading law recede and make more room for its competitor? Why have scholars who study insider trading law, one of the most studied bodies of law, not noticed the law's substitutes?

This Article offers a theory of the limits of insider trading law. The theory is that all sophisticated trading markets need a body of insider trading law or a suitable substitute. In general, in domains where U.S. law appears to tolerate insider trading, it also governs it through a suitable substitute law. What counts as a suitable substitute requires a clear understanding of what insider trading law attempts to do and how different markets are constituted. Such an exploration is one of this Article's ambitions.

6. See, e.g., Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 328–29 (1979) (arguing for insider trading restrictions in securities, and clarifying that this rationale “need not extend the common law of fraud to require comparable disclosure in other markets or for other commodities or services”).

7. Verstein, *supra* note 5, at 494–499.

Central to this project is a careful look at the substitute for insider trading law that governs in its absence within half of our financial market.⁸ That substitute law is speculative position limits law.

Speculative position limits are rules that cap the quantity of a given asset that a trader can own for speculative purposes. For example, a soybean trader can bet on the value of six million bushels of soy to be delivered in the upcoming “spot month,”⁹ but not a peck more.¹⁰ A trader, however, could buy even more if she had a documented need for the soy—such as actual livestock to feed. But mere bets on price movements are cabined in their extent.

Speculative position limits are both one of the oldest existing tools of market regulation¹¹ and one of the most contemporary.¹² Yet it is safe to say that most scholars have never heard of speculative position limits. Most securities scholars stop short of any discussion of commodities regulation.¹³ And most commodities

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8. The swaps and futures markets governed by the CFTC have notional values near half a quadrillion dollars. See COMMODITY FUTURES TRADING COMM’N, 2022–2026 STRATEGIC PLAN 3. Annual trading volumes are higher; see PRESIDENT’S BUDGET, COMMODITY FUTURES TRADING COMMISSION, FISCAL YEAR 2025 (MARCH 2024), https://www.cftc.gov/sites/default/files/CFTC%20FY%202025%20President%27s%20Budget_Final_for%20Posting.pdf [https://perma.cc/ZA3F-6GK8] at 54–55. By comparison, the total value of all U.S. equities is only \$50 trillion. *Total Market Value of the U.S. Stock Market*, SIBLIS RSCH. (Apr. 4, 2025), <https://siblisresearch.com/data/us-stock-market-value> [https://perma.cc/RGC8-APC9]. This is not an apples-to-apples comparison, but the point is that both are vast markets.
 9. 17 C.F.R. pt. 150, app. E (2024) (listing a speculative position limit for soybean of 1,200 contracts in the spot month); *CBOT Rulebook*, Ch. 11 *Soybean Futures*, Rule 11101, CME GROUP, <https://www.cmegroup.com/content/dam/cmegroup/rulebook/CBOT/II/11/11.pdf> [https://perma.cc/J5RQ-C37B] (“Each [soybean] futures contract shall be for 5,000 bushels . . .”). *CBOT Position Limits*, CME GROUP, <https://www.cmegroup.com/rulebook/files/position-limits-cbot.xlsx> [https://perma.cc/2RET-X4QN] (find “Soybean Futures” in the “Contract Name” column, scroll right to the column whose title begins “Initial Spot Month Limit . . .”).
 10. That is, unless they qualify for an exemption, such as a bona fide hedging exemption. See *CBOT Rulebook*, Ch. 5 *Trading Qualifications and Practices*, Rule 559.A, CME GROUP, <https://www.cmegroup.com/content/dam/cmegroup/rulebook/CBOT/I/5.pdf> [https://perma.cc/T8CN-DYVT]. A bushel is equal to 2 kennings, 4 pecks, or 8 dry gallons. *Bushel*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Bushel> [https://perma.cc/3MYT-M7LA].
 11. The Commodity Exchange Commission was first empowered to set federal speculative position limits in 1936 by the Commodity Exchange Act. *History of the CFTC*, CFTC, https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html [https://perma.cc/JC8P-Y2EH]. The first federal speculative position limits were set in 1938, limiting traders’ position in grains generally. *Id.* But commodities exchanges imposed their own position limits in the nineteenth century. The Chicago Board of trade had position limits by 1868.
 12. Extensive new restrictions were imposed as recently as 2021. *Position Limits for Derivatives*, 86 Fed. Reg. 3236 (Jan. 14, 2021) (to be codified at 17 C.F.R. pts. 1, 15, 17, 19, 40, 140, 150 and 151).
 13. See, e.g., RESEARCH HANDBOOK ON INSIDER TRADING (Stephen M. Bainbridge ed., 2013) (no reference to insider trading in commodities); Brudney, *supra* note 6.

scholars likewise focus on other aspects of the law.¹⁴ Those few who have written about them have formed negative views. Speculative position limits are usually understood as prophylaxis against market manipulation¹⁵ or systemic risk.¹⁶ But commentators generally think of position limits as poorly suited to those two purposes.¹⁷

This Article seeks to rehabilitate speculative position limits by showing their deep and intriguing tie to insider trading law. Put simply, speculative position limits may be disappointing substitutes for market manipulation rules, but they are excellent substitutes for insider trading rules. Insider trading rules have been absent from most commodities markets for most of history, but markets functioned just fine in part because speculative position limits accomplished a similar function.

This Article's key intuition is that all markets must solve similar problems, but they need not solve them the same way. One problem every market must solve is the problem of "informed" traders. Some individuals (corporate executives, hedge fund researchers, government officials) know non-public details about an asset's value. They therefore can make good guesses about the near-term trading price of the asset. When they buy an asset likely to go up in the future, these traders push asset prices toward their "true" level today. This is beneficial, since accurate prices help society in many ways. Unfortunately, informed trading also imposes a social cost. Other investors become demoralized if they trade against insiders, and market intermediaries must increase their implied fees to cover their losses to

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14. *E.g.*, Yesha Yadav, *The Problematic Case of Clearinghouses in Complex Markets*, 101 GEO. L.J. 387 (2013) (mentioning position limits only in passing, in a discussion focused on systemic risk of clearinghouses); Jerry W. Markham, *Manipulation of Commodity Futures Prices—The Unprosecutable Crime*, 8 YALE J. ON REG. 281 (1991) (mentioning position limits only in connection with market manipulation); Gregory Scopino, *The (Questionable) Legality of High-Speed "Pinging" and "Front Running" in the Futures Market*, 47 CONN. L. REV. 607 (2015) (no reference to position limits).
 15. *See, e.g.*, Timothy E. Lynch, *Coming Up Short: The United States' Second-Best Strategies for Corraling Purely Speculative Derivatives*, 36 CARDOZO L. REV. 545, 618 ("the rules restricting speculation... appear primarily motivated to eliminate or reduce the threat of price manipulation of the underlying commodity"); 7 U.S.C. § 6a(a)(3) ("In establishing [position] limits... the Commission... shall set limits... to the maximum extent practicable, in its discretion... to deter and prevent market manipulation...").
 16. *See, e.g.*, Position Limits for Derivatives, 81 Fed. Reg. 96704–96761 (proposed Dec. 30, 2016) (to be codified at 17 C.F.R. pts. 1, 15, 17, 19, 37, 38, 140, 150 and 151) (explaining that position limits were justified in part to address systemic risk).
 17. *See, e.g.*, Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and a Proposed Alternative*, 51 WASH. & LEE L. REV. 945, 946 (1994) ("[P]osition limits may limit the ability to shift risk from the very risk averse to the very risk tolerant.... This result compromises the hedging function of futures market and may also increase price volatility.").

informed traders.¹⁸ A trading market becomes less vibrant or liquid as informed trading increases.

Insider trading law is one way to dampen the effects of informed trading by banning an important category of informed trade. Speculative position limits are another way. The basic idea is that if someone cannot own much of an asset, she cannot make much money based on her information about its future price. If informed traders can only win so much, other traders' losses are likewise limited.

Thus, the two techniques are substitutes. Insider trading law reassures traders that they aren't swimming with *many* sharks. Position limits reassure them that there are *no* sharks at the beach (though there are plenty of mosquitoes).

This Article proceeds as follows. Part I summarizes insider trading law and its limits. Those familiar with the law can pass over this Part, but they should at least dip their toes into Part II. Part II summarizes the rationales for informed trading law, including an explanation of the trading markets rationales that justify managing informed trading. Part III introduces the little-studied law of speculative position limits. Part IV demonstrates how speculative limits can serve the trading markets rationale in much the same way as insider trading law does. With two regulatory strategies available to serve similar functions, Part V compares insider trading law and speculative limits, seeking guidance on when one approach is superior to the other—and when some altogether different strategy may be best. Part VI concludes this Article.

I. INSIDER TRADING LAW

Federal securities law restricts insider trading in securities. This Part explains the nature of that restriction. Subpart A restates the headline restrictions, with which many readers will be familiar. Subpart B reminds readers that insider trading law is limited not just in the types of trades it constrains, but also the assets it governs.

A. Securities Law

American securities law prohibits four types of informed trading. First, corporate fiduciaries such as officers and directors are forbidden from trading

18. In this Article, I use the term “informed” to refer to people who use non-public information bearing on the price of an asset. The term “insider” means someone in an institutional position to gain privileged access to information, such as an officer or director. The term “insider trading” is ambiguous in common usage. It can mean informed trading, informed trading by insiders, or even non-informed trading by insiders. When I use the term, I try to be clear which of these three meanings I intend.

their corporation's stock using material non-public information.¹⁹ Second, those who obtain information through fraud are forbidden from trading securities, pursuant to the "misappropriation" theory.²⁰ For example, a therapist cannot buy stock in response to a client disclosing a pending merger (the cause of anxiety for which he seeks confidential treatment).²¹ Third, the "tipping" theory prohibits individuals from trading if they obtained information by paying someone else to breach their duty of confidentiality.²² This payment may be money, the implicit promise of returning favors, or even something less pecuniary (such as an improved reputation).²³ Fourth, a near categorical ban prohibits individuals from trading on the basis of their knowledge that someone else will soon make a tender offer.²⁴ Relatedly, forms and insiders are generally prohibited from selectively

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19. William K.S. Wang, *Stock Market Insider Trading: Victims, Violators and Remedies—Including an Analogy to Fraud in the Sale of a Used Car with a Generic Defect*, 45 VILL. L. REV. 27, 46 (2000) (describing prohibitions arising under the "classical" theory of insider trading.).
 20. See Andrew Verstein, *Insider Tainting: Strategic Tipping of Material Nonpublic Information*, 112 NW. U. L. REV. 725, 741–42 (2018); *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).
 21. See, e.g., Peer, Litigation Release No. 24012, 2017 WL 6380360 (Dec. 14, 2017); Complaint, *SEC v. Peer*, No. 2:17-CV-01865 (W.D. Wash. Dec. 14, 2017).
 22. See *Dirks v. SEC*, 463 U.S. 646, 660 (1983) ("[A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.").
 23. For example, a tipper cannot confer a gift on a "trading relative or friend." *Salman v. United States*, 580 U.S. 39, 49–50 (2016) (quoting *Dirks*, 463 U.S. at 664); see also *United States v. Martoma*, 869 F.3d 58, 64 (2d Cir. 2017) ("The benefit may, but need not be, financial or tangible in nature; it could include obtaining some future advantage, developing or maintaining a business contact or a friendship, or enhancing the tipper's reputation.").
 24. 17 C.F.R. § 240.14e-3 (2024). The bidder itself may, of course, buy shares while knowing about its own plans, subject to the other disclosure requirements of the Williams Act. The SEC considered and rejected a fuller prohibition that would have prohibited even the bidder from buying prior to its own tender offer. See generally *Tender Offers*, 44 Fed. Reg. 9956 (proposed Feb. 15, 1979) (to be codified at 17 C.F.R. pt. 240) (proposed Rule 14e-2); *Tender Offers*, 44 Fed. Reg. 70326, 70338, 70348 (proposed Dec. 6, 1979) (to be codified at 17 C.F.R. pt. 240) (proposed Rule 14e-2). The rule is only triggered if a bidder has taken a substantial step towards commencing a tender offer, though the trader need not know who the bidder is nor whether that bidder has in fact taken a substantial step. See HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 3E SEC. & FED. CORP. LAW § 19:30 (2d ed. 2024). Furthermore, the trader need not know that the information is non-public or that the source was a bidder or a bidder's associate, so long as she has reason to know. *Id.*; see also *SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004) ("Rule 14e-3, by its terms, does not require that the offender know or have reason to know that the information relates to a tender offer, so long as the information in fact does relate to a tender offer and the offender knows or has reason to know the information is nonpublic and was acquired by a person with the required status."). Likewise, Rule 14e-3 is triggered only if the informed trader knows that their information comes from the bidder; the target company; or an officer, director, partner, or employee of the bidder or target. § 240.14e-3(a); see also *id.* § 240.14e-3(b)(2) (establishing a defense for legal entities that implement a

sharing information with market analysts or shareholders who are likely to trade on it.²⁵

Taken as a set, American insider trading law prohibits quite a bit of informed trading. But plenty of trading remains legal. If a corporate executive shares information with you by mistake or in the hopes that you will publicize a fraud (in part through trading), then you can trade because you did not confer anything of value onto her to induce the disclosure.²⁶ Likewise, if you merely aggregated public information (or nonpublic but immaterial information), you can trade.²⁷ This latter “exception” is very wide. All individuals who pick stocks for a living, or who guide those who pick them, depend on their ability to know a little better than others how prices will move. If they lack any insight or information, they will not succeed. One could imagine a rule that limited or capped their ability to profit off even these insights, but the securities regime does not include such a rule.

One more exception to the prohibition on insider trading is so large as to potentially dwarf the rule: The forgoing restrictions only apply to securities. Other financial assets can be traded without regard to federal restrictions on securities trading. It is to that “exception” we now turn.

B. The Limit of Securities Law

Broadly speaking, securities are claims to the cashflows of businesses. Stocks and bonds are the quintessential securities.²⁸ Small baskets of securities, and financial contracts whose payouts are tied to securities, are themselves securities.²⁹ The primary regulator of securities is the Securities and Exchange Commission

compliance program intended to prevent agents from acquiring and trading on tender offer information). For further discussion of Rule 14e-3, see generally WILLIAM K.S. WANG & MARC. I. STEINBERG, *INSIDER TRADING* §§ 9.1–9.4 (3d ed. 2010).

25. See 17 C.F.R. § 243.100(a), (b)(1) (2024).

26. SEC v. Switzer, 590 F. Supp. 756 (W.D. Okla. 1984); Dirks v. SEC, 463 U.S. 646 (1983).

27. See Chiarella v. United States, 445 U.S. 222, 233 (1980) (rejecting “a general duty between all participants in market transactions to forgo actions based on material, nonpublic information”); Andrew Ross Sorkin, *Just Tidbits, or Material Facts for Insider Trading?*, N.Y. TIMES (Nov. 29, 2010 8:56 PM), <https://archive.nytimes.com/dealbook.nytimes.com/2010/11/29/just-tidbits-or-material-facts-for-insider-trading> [<https://perma.cc/2JDZ-AKUX>]; 2 ALAN R. BROMBERG & LEWIS D. LOWENFELS, *BROMBERG & LOWENFELS ON SECURITIES FRAUD* § 7:225 (2d ed. 2025). But see Edward Greene & Olivia Schmid, *Duty-Free Insider Trading?*, 2013 COLUM. BUS. L.R. 369, 412–15 (discussing the “mosaic” theory, which allows trading on immaterial information, and noting its limited success).

28. Securities Act of 1933, 15 U.S.C. § 77b(a)(1).

29. *Id.* But derivatives on baskets of ten or more securities are commodities. See 7 U.S.C. § 1a (including “index” in the definition of “commodity” but differentiating between indices and “narrow-based” indices, including bundles of nine or fewer securities).

(SEC). Securities are subject to insider trading law. Other assets, such as commodities, are not.

The quintessential commodities are natural resources and agricultural products. Consistent with this, the Commodity Exchange Act (CEA) specifically enumerates numerous assets (“wheat, cotton . . . frozen concentrated orange juice”³⁰) as commodities. Commodities are regulated by the Commodities Futures Trading Commission (CFTC), even when they are directly sold from producers to consumers. A farmer selling grain to a miller is subject to parts of the CEA.³¹

However, the full brunt of commodities regulation only materializes once the transaction is financialized by financial derivatives. A derivative is a contract that derives its value from some underlying asset. The most typical commodity derivative is a “future.” A future is a contract that calls for—but does not actually anticipate—delivery of a designated grade and quantity of the commodity, at a designated location and time. For example, the Chicago Mercantile Exchange (CME) July 24 Soybean Futures contract calls for the delivery of 5,000 bushels (136 metric tons) of soybeans (preferably #2 yellow, but #1 or #3 available at a slightly higher or lower price) by Friday August 2, 2024³² to the Chicago Switching District or Burns Harbor, Indiana (alternative locations available at slightly different prices).³³ A trader who “buys” one of these contracts commits herself to paying the going rate for such soybeans and taking possession of them at that time. However, both the buyer and the seller under the contract probably plan no such exchange. They both understand that the real end of the contract will be a payment from one to the other of an amount that fairly reflects the value of soybeans at that time. The contract amounts to a bet on soybean prices.³⁴

30. 7 U.S.C. § 1a(9). *But see id.* (excluding onions and motion picture box office receipts); *see also id.* § 1a(19) (excluding foreign currency, except insofar as market abuse or retail transactions are concerned).

31. 17 C.F.R. § 180.1(a) (prohibiting fraud and manipulation in a “contract of sale of any commodity in interstate commerce”).

32. *Soybean Futures–Contract Specs*, CME GROUP, <https://www.cmegroup.com/markets/agriculture/oilseeds/soybean.contractSpecs.html> [https://perma.cc/B6DG-ATMT] (delivery day as late as second business day following last trading day of delivery month). In this case, that is August 2.

33. *CBOT Rulebook*, Ch. 11 *Soybean Futures*, Rule 11105, CME GROUP, <https://www.cmegroup.com/content/dam/cmegroup/rulebook/CBOT/II/11/11.pdf> [https://perma.cc/V4X8-JPBV].

34. Some readers may be unfamiliar with commodities futures and wonder why these transactions may be privately beneficial or socially valuable. The simplest use case for futures involves “hedging.” In a hedging transaction, a party offloads risk to someone happier to bear it. For example, a soybean farmer may be reluctant to plant if she knows prices could fall around

The “financial” character of commodity derivatives becomes more apparent when we look beyond physical products, for which physical delivery is not possible. The legal definition of “commodity” is quite expansive.³⁵ The category includes “all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”³⁶ If people trade (or someday will trade) futures on XYZ, then XYZ is a commodity subject to the CFTC’s power.³⁷

The CEA expressly includes as a commodity any “interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure.”³⁸ Thus, commodities regulation covers bets on interest rates and foreign currency exchange rates. Futures and options on baskets of securities, such as the S&P 500, are regulated as commodities, even though they are composed of SEC-regulated assets. That is because groupings of ten or more stocks are, collectively, deemed a commodity.³⁹ Bets on interest rates and on stock indices,

harvest time. By selling soy futures now, she commits herself to deliver at the now-current price. If prices fall, the farmer can still cover her costs of planting. In return, she gives up the chance to profit if soy prices rise. On the other side of the trade, soybean millers (who supply feed to animal farmers) worry that soybean prices might rise. This fear could discourage the miller from making otherwise rational long-term investments in facilities and marketing. By buying futures, the miller locks in the current price and protects itself against adverse price movements. Futures make this possible. Importantly, most futures contracts are not settled by actual delivery of the commodity. Instead, prices at certain common delivery locations are used to set cash payments from one party to the other. These cash payments suffice to offset price changes as though delivery had occurred. Channeling many people to use standardized contracts creates trading volume and improves price accuracy.

35. PHILIP MCBRIDE JOHNSON, THOMAS LEE HAZEN, SUSAN CRVIN, CHARLES R. MILLS & KATHRYN M. TRKLA, *DERIVATIVES REGULATION* § 1.02, at 4 (1st ed., 2021 Cum. Supp. 2004), available at <https://business.cch.com/srd/Johnson-DerivativesRegulation-102.pdf> [<https://perma.cc/7KB P-6X4T>] (“Although this . . . may seem curious, it illustrates an important principle of commodities regulation: its interest is in a *form of economic activity* rather than in the attributes or character of the underlying subject. The economic activity in question is futures trading; the nature of the commodity does not affect the regulatory result.”) (emphasis added).

36. 7 U.S.C. § 1a(9).

37. The definition of a “future” is vague and requires extensive clarification in order to distinguish it from a “forward” contract (which is only regulated by the CFTC when market abuse is implicated). The heart of the distinction concerns contemplated delivery. A forward contract contemplates delivery of the item under contract. A future contract may formally call for delivery, and may sometimes result in delivery, but does not realistically contemplate delivery. Instead, futures are speculative instruments that both sides expect will be settled by cancelling the contract prior to delivery.

38. 7 U.S.C. § 1a(19).

39. 7 U.S.C. § 1a(25)(A); *Security Futures Products Overview*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/IndustryOversight/ContractsProducts/SecurityFuturesProduct/sfpoverview.html> [<https://perma.cc/SH7W-TUHZ>].

introduced in the early 1970s and 1980s, respectively,⁴⁰ have ballooned to dominate financial markets. Indeed, bets on the S&P 500 futures occupy more trading than all the world's exchange-traded funds (ETFs) combined.⁴¹ The category also covers “an occurrence, extent of an occurrence, or contingency.”⁴² That means sports wagers (bets on an occurrence, surely) are commodities contracts.⁴³ So are bets on election outcomes,⁴⁴ terrorist attacks,⁴⁵ and payments tied to the weather.⁴⁶

Commodities are subject to vastly reduced insider trading restrictions, and the differences were even more pronounced until quite recently. For most of the last one hundred years, essentially all forms of insider trading were legal in commodities markets.⁴⁷ To illustrate this, suppose that an agricultural corporation learned information material to the future price of a commodity. For example, suppose the corporation had discretely agreed to export a large quantity of grain to a foreign country—so large a quantity that domestic grain prices would likely rise in response. Commodity regulations would not prohibit the corporation from trading grain futures and derivatives, buying instruments sure

40. William L. Silber, *The Economic Role of Financial Futures*, in FUTURES MARKETS: THEIR ECONOMIC ROLE 83, 85 (Anne E. Peck ed., 1985) (“[T]he first financial futures contracts on foreign currencies were introduced in 1972. They were soon followed by interest-rate futures in 1975, while stock index futures did not arrive on the scene until 1982.”).

41. For example, during the month of December 2023, the daily dollar trading volume (calculated by multiplying a contract's value at the close of trading by the daily number of contracts sold) for the E-Mini S&P 500 future deliverable in March 2024 was, on average, 11 times the daily dollar trading volume of SPDR S&P 500 ETF Trust, the leading S&P 500 ETF. See *S&P 500 E-Mini Mar '24 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/etfs-funds/quotes/SPY/interactive-chart> (last visited Nov. 17, 2025).

42. 7 U.S.C. § 1a(19)(iv).

43. A few of the CFTC's attorneys certainly seem to think so. See Dave Aron & Matt Jones, *States' Big Gamble on Sports Betting*, 12 UNLV GAMING L.J. 53, 54 (arguing that “the [CFTC] may have jurisdiction over some traditional sports bets because such bets can be viewed as binary, other options, or other types of swaps”).

44. See Zeke Faux, *PredictIt Owns the Market for 2020 Presidential Election Betting*, BLOOMBERG (Aug. 1, 2019, 1:10 PM), <https://www.bloomberg.com/news/articles/2019-08-01/predictit-owns-the-market-for-2020-presidential-election-betting> [<https://perma.cc/2DRN-CPTA>]; Jeff Sommer, *The Betting on the Presidential Election Has Begun*, N.Y. TIMES (Nov. 10, 2023), <https://www.nytimes.com/2023/11/10/business/presidential-election-betting.html> [<https://perma.cc/KF8H-YHRK>].

45. Note that these are currently illegal, though. 17 C.F.R. § 40.11(a)(1) (2011).

46. See, e.g., *Weather Products*, CME GROUP, <https://www.cmegroup.com/trading/weather> [<https://perma.cc/VH8B-ZY4E>]; *Beat the Heat: How to Bet on Weather*, ODDSSHARK (Jan. 10, 2023, 1:20 PM), <https://www.oddsshark.com/other/weather-betting-odds> [<https://perma.cc/TRA6-AJFU>].

47. See Verstein, *supra* note 5, at 456–66 (comparing the history of insider trading regulation in commodities markets with the significantly stricter insider trading regulation of securities markets).

to appreciate in value. Nor would any rule prohibit the firm from sharing this information with third party firms, who could repay the favor out of their trading profits. Nor would any rule prevent an employee of the trading firm from discretely trading grain futures on her own account. Nor would any rule prevent the employee's therapist from profitable speculation after learning about the details in a confidential session.

Most famously of all, no rule would have prevented the kind of insider trading depicted by the 1983 film *Trading Places*. That film follows a scheme to misappropriate information from the Department of Agriculture. The film's villains and pseudo-heroes conspire to peek at government information pertaining to orange crop yields so that they can speculate in the frozen orange juice concentrate futures market. The government's information is highly material to the price of commodity futures, so the characters try to outfox each other for illicit access—but at no time did they violate commodities regulation. As the CFTC Chairman told Congress in 2010, there was no rule against trading commodities on the basis of ill-gotten government information.⁴⁸

While it is fair to contrast securities and commodities as prohibiting and permitting insider trading respectively, there are three ways in which this initial characterization overstates things. First, laws outside of commodities regulations can manage informed commodities trading.⁴⁹ Second, commodities regulations have long restricted trading by specific individuals (the CFTC,⁵⁰ commodity exchange employees,⁵¹ and brokers).⁵² Third, commodities regulation has lately expanded its insider trading coverage. The Dodd-Frank Act

48. See *Hearing to Review Implementation of Changes to the Commodity Exchange Act Contained in the 2008 Farm Bill: Hearing Before the Subcomm. on Gen. Farm Commodities and Risk Mgmt. of the H. Comm. on Agric.*, 111th Cong. 7 (2010) (statement of Gary Gensler, Chairman, Commodity Futures Trading Commission), available at <https://www.govinfo.gov/content/pkg/CHRG-111hhrg55459/pdf/CHRG-111hhrg55459.pdf> [<https://perma.cc/W9QF-SYSM>].

49. A therapist who trades on her client's information might thereby violate state professional responsibility standards, incurring civil or criminal liability. An employee who misappropriates corporate intelligence might violate state agency law or trade secrecy law. A director who does the same might violate federal wire fraud or the corporate opportunity law.

50. 7 U.S.C. § 13(c) (2012).

51. 17 C.F.R. § 1.59 (2013).

52. *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985). CFTC Rules §§ 155.3(a)(1), 155.4(a)(1).

permitted the CFTC to promulgate a general anti-fraud rule modeled on Rule 10b-5.⁵³ It did so.⁵⁴

Yet there have been very few public or private actions related to insider trading in commodities, and almost all have involved front-running by brokers—a betrayal of fiduciary duty that can be condemned and prosecuted without even conceiving of it as insider trading.⁵⁵ Insider trading by those other than brokers is hard to detect and prosecute, and there doesn’t yet seem to be much focus on pushing the boundaries of the law.

* * *

So here is the state of things: Securities law permits many forms of informed trading, but aggressively prohibits other forms of informed trading by insiders and fraudsters. Commodities regulation has some insider trading restrictions on paper, but only recently, and none of them are actively enforced.

What should we make of the extent of insider trading law? Should it cover more securities trading or less, and should such coverage be mirrored for commodities traders? To answer these questions requires a grasp of the law’s policy objectives. It is to those normative matters we now turn.

II. INSIDER TRADING POLICY

Insider trading law’s purposes are varied and contested. This Part briefly reviews the policy objectives often cited by the law’s proponents and reformers. This review is somewhat partisan, taking one of these policy rationales to be superior to the rest. I accordingly divide the rationales into two bundles: (A) the “traditional” rationales that are broadly familiar and (B) the new “trading market” rationale, which I find most persuasive.

Although this Part sets forth the reasons why I find the traditional rationales insufficient and the trading markets theory to be superior, I do not expect or require that readers leave it sharing my precise views. What is essential is to understand the trading markets theory and find it plausible and attractive.

53. It also directly prohibited misappropriation of government information for trading. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 746, 124 Stat. 1376, 1737–39 (2010).

54. 17 C.F.R. § 160.1.

55. Front-running is a practice by which a broker places orders on its own account prior to those of a customer. By trading first, the broker gets a better price than the customer and may drive up the price the customer has to pay, and can then sell the asset at price moved by the customer order. See Andrew Verstein, *The First Insider Trader in Commodities*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 4, 2015) <https://corpgov.law.harvard.edu/2015/12/04/the-first-insider-trader-in-commodities> [<https://perma.cc/TJ5S-2BW9>].

A. Traditional Rationales

Most arguments for insider trading restrictions have come in one of two forms: a concern for the unfair treatment of other investors who must trade without inside information, or a concern for corporations whose employees may misbehave as they pilfer and trade on corporate secrets. This Subpart considers fairness and agency costs as rationales for insider trading law.

1. Fairness

When executives and those close to a company trade, they may take advantage of the ignorance of third parties with less access to information about the firm's true value.⁵⁶ The apparent unfairness of this informational asymmetry animated several early federal insider trading decisions.⁵⁷

Yet scholars struggle to articulate a defensible fairness-based argument for insider trading restrictions that does not end up condemning or prohibiting far too much conduct.⁵⁸ Differences in information levels are inevitable and are tolerated by background principles of contract law.⁵⁹ Indeed, fairness often inclines us to reward individuals who work to develop an informational advantage.⁶⁰

56. See Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 346 (1979). But see Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 330 (1981) (noting that investors' skill, wealth, and human capital differences result in different abilities to use the information they discover); Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 478 (2001) (pointing out that individuals might opt to become executives in order to acquire information).

57. See, e.g., *In re Cady, Roberts & Co.*, Exchange Act Release No. 34-6668, 1961 WL 60638, at *4 (Nov. 8, 1961) (discussing the "inherent unfairness" when the parties to a trade do not have the same information); *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (en banc) (stating that the rule "is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information").

58. For one attempt, see Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 376–77, 381 (1999).

59. See Anthony T. Kronman, *Mistake, Disclosure, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 28 (1978).

60. See e.g., *Laidlaw v. Organ*, 15 U.S. (2. Wheat.) 178, 193 (1817) (no fraud had been perpetrated by insider trading, "unless rising earlier in the morning, and obtaining by superior diligence and alertness that intelligence by which the price of commodities was regulated, be such").

It is also unclear whether this inequality actually leaves outsider investors worse than they started.⁶¹ In a competitive market, investors will demand and receive a discount on stock that will be subject to predation.⁶² The founders receive less in the initial public offering, but subsequent investors are on net compensated for their expected losses to insider traders. Is insider trading unfair if investors are fairly compensated ex ante for their losses?

2. Agency Costs

If those close to a firm get to trade on its secrets, they may act in ways that are harmful to the firm.⁶³ For example, managers may push the firm to take more risks or to reduce the quality of periodic disclosures,⁶⁴ to multiply the opportunities for the insider to trade ahead of a wild price swing.⁶⁵ Trading may distract

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61. See Merritt B. 52 & Kevin S. Haeberle, *Evaluating Stock-Trading Practices and Their Regulation*, 42 J. CORP. L. 887, 909–12 (2017); see also John P. Anderson, *Green, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 7–9 (2014) (reviewing Henry Manne’s version of the “no victim” argument); but see William K.S. Wang, *Stock Market Insider Trading: Victims, Violators and Remedies—Including an Analogy to Fraud in the Sale of a Used Car With a Generic Defect*, 45 VILL. L. REV. 27, 46–48 (2000).
 62. Easterbrook, *supra* note 56, at 325; Kenneth E. Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy*, 9 J. LEGAL STUD. 801, 807–09 (1980).
 63. It may constitute a form of theft of informational property for the employee to trade on information, given an employer’s prohibition on such trading. Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1252–57 (1995). But to posit that the corporation wishes to prohibit the trade is to presume some harm the corporation expects. This Subpart focuses on those underlying harms.
 64. See Robert J. Haft, *The Effect of Insider Trading Rules on the Internal Efficiency of the Large Corporation*, 80 MICH. L. REV. 1051, 1054–55 (1982) (“Subordinates would stall the upward flow of critical information to maximize their opportunities for financial gain.”); Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 VA. L. REV. 1425, 1437 (1967). Cf. Jesse M. Fried, *Insider Signaling and Insider Trading With Repurchase Tender Offers*, 67 U. CHI. L. REV. 421, 425 n.18 (2000) (“The prospect of insider trading profits can . . . encourage insiders to invest in projects that are difficult for outsiders to assess, whether these projects are otherwise desirable or not, in order to increase the information asymmetry between themselves and public shareholders . . .”). But see Stephen M. Bainbridge, *Insider Trading*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 772, 787–88 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), at <http://encyclo.findlaw.com/5650book.pdf> [<https://perma.cc/N9EL-H57F>] (arguing that delay is unlikely).
 65. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 330 (1981) (arguing that insider trading may lead to excess volatility); Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 149 (1982) (“[T]he temptation of profit might actually encourage an insider to act against the corporation’s interest.”); but see Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 874–76 (1983) (arguing risk-averse managers need such incentives, and their team dynamics limit how far things can go without a leak).

employees.⁶⁶ The very act of trading might spill the beans on an employer's proprietary secrets.⁶⁷ For example, when mining executives buy their company's shares en masse, it may hint to other prospectors where they should dig to find valuable minerals.⁶⁸

On the other hand, scholars have sometimes pondered whether insider trading might *improve* incentives. Professor Henry Manne famously argued that insider trading opportunities could constitute an appropriate means of paying employees, by compensating hard-to-observe innovation.⁶⁹ An employee may be more likely to improve the business if she can buy large amounts of stock upon realizing that her improvement worked. Indeed, executives seem to be willing to take a meaningful pay cut—perhaps twenty percent—to preserve the flexibility to trade.⁷⁰

Even if insider trading tends to undermine incentives, the question would remain why federal criminal enforcement is an appropriate response. Employers generally internalize the costs of their employees' incentives. Why can't firms just fire or sue the employees who violate contractual insider trading restrictions? Why should federal wiretaps and penitentiaries be deployed to help these firms manage their workforce or to punish employees the employer has decided to forgive?

B. Trading Markets Rationale

The traditional rationales focus on identifiable victims in privity with the insider trader: the person who buys stock that the insider knows will decline, or the corporation who employs the insider. But insider trading may have broader systemic effects. Insider trading may harm the market at large. Increasingly,

66. James D. Cox, *Insider Trading and Contracting: A Critical Response to the "Chicago School"*, 1986 DUKE L.J. 628, 646 (1986).

67. James D. Cox, *Seeking an Objective for Regulating Insider Trading Through Texas Gulf Sulphur*, DUKE L. SCH. PUB. L. & LEGAL THEORY SERIES NO. 2018-47, 18-22, June 18, 2018, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194542 [<https://perma.cc/S2W7-WMX3>].

68. Verstein, *supra* note 5, at 490–91.

69. HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 138 (1966). See also Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561, 571–72 (1971) ("The cotton gin had obvious speculative implications for the price of cotton . . ."). Many scholars have noted the profits available to employees trading the stock of other companies. Bruce H. Kobayashi & Larry E. Ribstein, *Outsider Trading as an Incentive Device*, 40 U.C. DAVIS L. REV. 21, 25–26 (2006) (arguing that such trading is important to compensate producers of intellectual property).

70. M. Todd Henderson, *Insider Trading and CEO Pay*, 64 VAND. L. REV. 505, 507 (2011). But see *Dirks v. S.E.C.*, 463 U.S. 646, 653 n.10 (1983) (quoting *Cady, Roberts & Co.*, 40 S.E.C. 907, 912 n.15 (Nov. 8, 1961)) (rejecting the notion that insider trading is "a normal emolument of corporate office").

scholars have taken seriously the fact that these regulations do not target individual unfair trades or disloyal agents in the abstract but instead evince a special goal of producing a vibrant trading environment.

A version of this argument has long existed in the literature. Perceived unfairness may affect the legitimacy and vibrancy of trading markets.⁷¹ A key goal of the Securities Acts was to encourage retail investors to place their trust in public markets after the stock market crash of 1929.⁷² But this simplistic version of the theory works on debatable theories about investor psychology.⁷³

One of the greatest achievements in recent years has been greater appreciation for how trading markets work and how insider trading can sometimes undermine them. This Subpart discusses this sophisticated, modern approach to analyzing insider trading law. Subpart II.B.1 first clarifies the goals of market regulation, Subpart II.B.2 explains how informed trading impacts those goals, and Subpart three explains how insider trading law can help.

1. Accuracy and Liquidity

Efficient trading markets are accurate and liquid. Price accuracy means that a given instrument's price is a good predictor of the cashflows it will ultimately generate.⁷⁴ Price accuracy is valuable for many reasons. First, the market price of shares is a major determinant in the price corporations receive when they raise money from the public.⁷⁵ When prices are accurate, better corporations can raise more money.⁷⁶ Second, in a price-accurate market, investors will more readily buy and sell without fear that an investment opportunity might be over or undervalued.⁷⁷ Third, accurate prices help ensure managers do their best work. Accurate prices are needed for incentive-based pay, which can encourage better

71. Merritt B. Fox & Kevin S. Haeberle, *Evaluating Stock-Trading Practices and Their Regulation*, 42 J. CORP. L. 887, 912 (2017).

72. S. Rep. No. 73-22, at 2983 (1933).

73. John P. Anderson, *Insider Trading and the Myth of Market Confidence*, 56 WASH. UNIV. J. OF L. AND POL'Y 1 (2018).

74. Merritt B. Fox, *Measuring Share Price Accuracy*, 1 BERKELEY BUS. L.J. 113, 115 (2004).

75. Merritt B. Fox, Lawrence R. Glosten & Gabriel V. Rauterberg, *Informed Trading and Its Regulation*, 43 J. CORP. L. 817, 833–34 (2018).

76. See Fox, *supra* note 74, at 113 n.2; Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 1006 (1992) (explaining the correlation between price accuracy and efficient capital allocation, as well as price inaccuracy and inefficient capital allocation).

77. Andrew Verstein, *Insider Trading: Are Insolvent Firms Different?*, 13 BROOK. J. CORP. FIN. & COM. L. 53, 65 (2018).

management decisions.⁷⁸ Accuracy also helps reveal when managers poorly manage assets as well as their ability to choose efficient investment projects.⁷⁹

“Liquidity” means the ability to trade rapidly, cheaply, and in large amounts. Liquidity is largely measured in terms of “bid-ask spread,” which is the distance between the cheapest price to buy a stock and the most expensive opportunity to sell it. For example, if the cheapest you could buy a share of Macerich Company stock is currently \$9.59 per share, and you could sell your existing shares for at most \$9.50, then the bid-ask spread is \$0.09 per share (a little less than 1 percent). A trader who bought one share and then promptly sold it would lose \$0.09 per share. The shares of Macerich would be more liquid if the round-trip trading cost dropped to \$0.08 per share, or if the transaction could be done at the same \$0.09 price but at a greater volume or with greater speed.

Liquidity is valuable because it encourages efficient resource allocation, efficient risk allocation, and greater share price accuracy.⁸⁰ When the market is liquid, resources easily transfer from, say, the stock of a company generating relatively less social value to the stock of another generating more.⁸¹ Investors are more likely to invest in a company’s shares if they know that, in the future, those shares will be liquid, such that it will be possible to sell those shares.⁸² Such liquidity thereby increases the value of the shares, which has the effect of lowering the issuer’s cost of capital.⁸³

2. The Effect of Informed Trading on Trading Markets

Henry Manne famously argued that insider trading improves both stock price accuracy and liquidity.⁸⁴ For years, even Manne’s critics tacitly accepted this claim.⁸⁵ Only recently have insights from microstructure economics shown the

78. Merritt B. Fox, Lawrence R. Glosten & Gabriel V. Rauterberg, *Stock Market Manipulation and Its Regulation*, 35 YALE J. ON REG. 67, 83 (2018); *see also* THIERRY FOUCAULT, MARCO PAGANO & AILSA RÖELL, MARKET LIQUIDITY: THEORY, EVIDENCE, AND POLICY 361–68 (2013) (collecting and describing empirical studies suggesting that price accuracy encourages efficient managerial decision making).

79. FOUCAULT, PAGANO & RÖELL, *supra* note 78, at 361–68.

80. Fox, Glosten & Rauterberg, *supra* note 75, at 834–35.

81. Sue S. Guan, *Benchmark Competition*, 80 MD. L. REV. 1, 10 n.25 (2020).

82. Verstein, *supra* note 77, at 64.

83. Merritt B. Fox, Lawrence R. Glosten, & Gabriel V. Rauterberg, *The New Stock Market: Sense and Nonsense*, 65 DUKE L.J. 191, 224 (2015).

84. HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966).

85. *See, e.g.*, Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 376–77 (1999) (focusing on orthogonal fairness arguments).

error in Manne's reasoning.⁸⁶ As Merritt Fox, Lawrence Glosten, and Gabriel Rauterberg put it, "every type of informed trading has a positive impact on price accuracy and a negative impact on liquidity."⁸⁷ This Subpart explains the tension between accuracy and liquidity.

Informed traders make prices more accurate. This happens through three related mechanisms. First, traders who expect to make trading profits from information will tend to research the market in costly but productive ways—generating new information on which to trade. Second, the activity of buying is itself a revelation mechanism.⁸⁸ A trader who sees a \$9.55 stock and estimates its true value at \$11 will buy all the shares available at any price less than \$11. Soon, the public price will *be* \$11, because that will be the most recent transaction price and that will be the cheapest one could buy the stock at (all cheaper units were bought by the informed trader).⁸⁹ Third, informed traders who have acquired a position that will become profitable once information is revealed will tend to publicize the information, in order to accelerate their profits. Thus, informed trading increases accuracy by encouraging research, revelatory trade, and voluntary disclosure.

But informed traders' profits come from someone else. As a matter of theory and empirical reality, those profits come immediately from "market makers." Market makers are professional traders who stand ready to buy or sell in order to capture the spread. In the Macerich example above, the market maker is the one who sells to someone for \$9.59 and buys from someone else at \$9.50 per share, pocketing a \$0.09 profit on the pair of trades. In the context of informed trading, market makers are the ones who sell stock to insiders just before it appreciates and buy from them just before the stock sinks. The insider's gains are market makers' losses.

Market makers exist in a somewhat competitive market, so they cannot just absorb those losses. Instead, they widen their spreads, charging more to investors. They also expend resources avoiding traders who might be informed. For example, they may be unwilling to execute a large trade, for fear that large trades are more likely to reflect information. The impact of informed trading is a reduction in liquidity.

86. For the canonical account of microstructure's implications, see LARRY HARRIS, *TRADING AND EXCHANGES: MARKET MICROSTRUCTURE FOR PRACTITIONERS* (2002).

87. Fox, Glosten & Rauterberg, *supra* note 75, at 832.

88. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

89. The price may update even quicker if others observe the informed trader's purchase and infer that the current price is not accurate. These observers may become reluctant to sell or even begin a pattern of copy-cat buying, pushing up the price.

Consider a hypothetical and stylized example to make more tangible the effect of informed trading on liquidity. We can imagine an asset that is worth about \$1.00. A market maker stands ready to buy for \$0.99 and sell for \$1.01. The market maker will net \$0.02 in profits every time she is able to successfully buy and sell. We can say that on average, each transaction is worth \$0.01 to the market maker. Of course, the market maker may not always perfectly pair the transactions. Some days, more buyers may contact the market maker than sellers. But other days the reverse should be true. If the market maker trades 100 million shares per week, its trading profits should be about \$1 million.

Why is \$0.01 the per-trade profit expected by the market maker? The answer should have to do with the market maker's costs. The market maker must spend money to operate—hiring staff to operate the trading system, renting computer equipment, and paying lawyers to ensure legal compliance. Those costs might come to, say, \$1 million per week. If they did, then the market maker's apparent profits are really just the amortized cost of doing business. We can say that such a market maker is breaking even. If those costs came to less than \$1 million, the market maker would indeed make profits, but other market makers might come to compete. Anyone can post orders on a stock or commodity exchange. Only when profits are low are they at little risk of being competed away.

Competition caps the market maker's trading profits. Costs set the floor. If the market maker charged less than a penny per trade, it would make less than its \$1 million in operating expenses per week—and promptly perish.

The result, in this imaginary case, is a "spread" of \$0.02, such that there is a two-cent difference between the buying price and the selling price of an asset. This spread functions as a transaction cost to any trader. An investor who wishes to liquidate stock to pay a tuition payment, or a hedge fund that wishes to buy stock expected to appreciate, must push through a non-trivial cost. On these facts, a trader loses 1 percent of the value of what they want to buy or sell. That is their roundabout contribution to the cost the market maker bears setting in place a system in which rapid trading is possible.

Now consider what happens if a new cost emerges: an informed trader. The informed trader knows she can sell to the market maker for \$1.01. If she expects the asset to depreciate, she may sell a large quantity to the market maker. The market maker will suffer losses on those purchases. If the stock falls to, say, \$0.90, the market maker's apparent \$0.01 profit was really a \$0.10 loss. If the informed trader sold 20 million shares this way, the market maker would have lost \$2 million. The informed trader's gain was the market maker's loss.

The market maker cannot absorb this loss and stay in business, so the market maker must increase its profits on other trades to cover it. Its \$1 million cost,

spread among one hundred million shares traded, yielded a per-trade implied fee of \$0.01. But its costs have risen to \$3 million, necessitating a \$0.03 per trade fee. The market maker will no longer offer to buy for \$0.99 and sell for \$1.01. Instead, the market maker must buy at \$0.97 and sell for no less than \$1.03.⁹⁰

The informed trader has increased the trading cost on all other traders.⁹¹ Those traders are directly worse off,⁹² and further problems may follow. Some traders will trade less, now that it is costly. The volume of trades will drop from one hundred million to something lower. That means the \$3 million cost must be spread over a smaller base. If trading dropped by half, the per-share trading cost would double from \$0.03 to \$0.06. Forced to pay 6 percent of the value of the shares each time they trade, people would then trade even less. The market could shrink or disappear if too much informed trading taxes it.⁹³

Informed trading is socially beneficial, insofar as it generates new information or causes known information to be disseminated. It can improve price accuracy. But the price of that accuracy is reduced liquidity. The central function of market regulation is to produce as much price accuracy as possible without unduly sacrificing liquidity. The next Subpart show how insider trading law tackles this function.

3. Insider Trading Law & Trading Markets

The principal function of securities law is to prohibit forms of informed trading that harm liquidity more than they help price accuracy. The case for prohibition is strongest if a trading practice harms liquidity without even improving price accuracy. Zohar Goshen and Gideon Parchomovsky explained how this might occur. If insiders trade, there will be no hope for non-insiders to cultivate informed trading strategies. Who would invest in building a hedge fund

90. Of course, the price has fallen to \$0.90 on this hypothetical, so the new six-cent spread would be applied to those prices: \$0.87 and \$0.93 respectively. But exposition is easier if we keep things centered at the same baseline throughout. Hence \$1.

91. This discussion is simplified, consistent with the microstructure literature. Of course, it is possible that two positional traders may match simultaneous, offsetting trading needs. They could thereby bypass the bid-ask spread. But most trading is with market makers and it is clarifying to focus on them exclusively.

92. Traders might have seen this coming and discounted their initial willingness to purchase accordingly. Then the harm would fall ultimately on the entrepreneurs who must pay more for outside equity capital. The forgoing discussion continues to focus on only market makers, but the same dynamic occurs in models without a market-maker dynamic. George Akerlof describes how the used car market can fail to clear due to the fear that sellers have informational advantage over buyers. George A. Akerlof, *The Market for "Lemons" Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

93. *Id.*

team of PhDs, buying and assembling vast public datasets, to predict the price of Macerich Company if the CEO of Macerich can just trade based on his boardroom information? Insiders learn for free what is sufficient to outfox most non-insider traders.

Yet it does not follow that active trading by those individuals would suffice to create accurate prices. That is because individual insiders lack the cross-company information needed to make broader inferences. If non-insider traders must compete with insiders, they will disappear from the market and their distinctive contribution will go unaddressed.

And that's not all. Another part of the non-insider information environment, the analyst community, will also fail. These individuals develop information as a marketing strategy to draw clients to their firms. Their information processing becomes public. But who will be drawn to an investment bank because of its analysts if those analysts are consistently behind the C-Suite traders? The cross-subsidy of this public-facing research would dry up, leaving markets less researched and discussed—and prices less efficient.

Goshen and Parchomovsky's achievement is impressive, and subsequent work expanded it even further by accounting for liquidity. There is no need to argue that insider trading harms price accuracy—there is an efficiency rationale for insider trading restrictions even if insider trading ultimately helps price accuracy, so long as it reduces liquidity.

Fox, Glosten, and Rauterberg analyze the tradeoffs between price accuracy and liquidity.⁹⁴ Their work concedes that informed traders tend to increase price accuracy. But such traders decrease liquidity and, crucially, the ratio differs from one type of trading to another. A trader who misappropriates earnings information from her employer improves stock price accuracy through her trades, but only trivially. Her employer's earnings information would be disclosed in periodic filings soon enough anyway. If pilfered earnings information is the basis of trade, the market pays a fee in terms of reduced liquidity and all it gets is a minor increase in information dissemination speed. By contrast, a hedge fund that aggregates disparate information improves stock price accuracy in ways that would not otherwise occur. Nobody knew what the hedge fund knew until the hedge fund developed the information. The sacrifice in liquidity really does give us information we would not have otherwise had. It is therefore plausible that it is socially valuable.

94. Fox, Glosten & Rauterberg, *supra* note 75, at 882–83; *see also* Nicholas L. Georgakopoulos, *Insider Trading as a Transactional Cost: A Market Microstructure Justification and Optimization of Insider Trading Regulation*, 26 CONN. L. REV. 1, 1–2 (1993).

To put it another way, some information is researched (and perhaps disclosed) without an eye toward trading. It may be acquired for free or as a byproduct of other projects. For example, an executive may learn about her company's sales because her job is to evaluate salespeople for promotion. The information was free for the executive to learn, and it cost the corporation money to produce this data—but the cost was worth bearing just to run a good business, without regard to its trading value. Anthony Kronman called this information “casually acquired.”⁹⁵ The securities regime bans trading on the most important classes of casually acquired information and mandates its disclosure, because it is useful to price accuracy and because no special reward is needed to encourage people to generate it.

By contrast, some information requires special effort to produce and disseminate. For example, a financial analyst may compare the earnings of thousands of companies in order to compare them or to predict the prospects for upstream suppliers. Nobody would do this synthetic work unless there were trading profits available. Kronman called this “deliberately acquired information.”⁹⁶ The securities regime encourages people to deliberately acquire information by permitting them to trade on it. Thus, securities insider trading law strikes a plausible balance between liquidity and price accuracy by sacrificing liquidity only where it is necessary to improve price accuracy, but never where price accuracy can be improved essentially for free.

Fox, Glosten, and Rauterberg account for the various zigs-and-zags in our law by examining the tradeoffs inherent in different types of information trading. We allow analysts to aggregate many bits of disparate information because this deliberately acquired information would not otherwise be generated or shared. We prohibit employees from misappropriating information from their employers because it depletes the trading rewards available to the employer (who researched the information originally) or because the employer may have been willing to generate and disclose the information for business purposes anyway.

The law seems to limit informed trading because such trading decreases liquidity, but the law permits informed trading in cases where the social cost is especially small or the gains to price accuracy are especially large. By letting some (but not all) informed traders trade, insider trading law limits the quantity of informed trading profits to a manageable level, and channels it to the highest value uses.

* * *

95. See Kronman, *supra* note 59.

96. *Id.* at 13.

We have now examined the complex law of insider trading and found a policy capable of rationalizing it. Trading markets require a body of law that calibrates informed trading, closing the sluice when vibrant markets are endangered by the flood of informed trading. For securities, insider trading law is that body of law.

Commodities markets have historically operated without insider trading law. Does that mean that commodities markets fail under vital policy criteria? One might wonder whether fairness or agency costs are worse in the commodities world, but nobody can seriously argue that futures markets are illiquid. If vibrant trading markets are the main goal of insider trading regulation, and commodities markets are vibrant, something must play that role. To find the cause, we must better understand the laws of that land.

III. SPECULATIVE LIMITS LAW

Commodities markets have long been typified by limits on the size of a trader's speculative position: You can buy as much as you need for actual consumption or to hedge risks, but you face limits if your goal is to profit from price changes.

One kind of ownership limit is called a position limit. A position limit is a hard cap on the amount of a given commodity instrument that a trader may own at a given time. A trader may not buy more than that number. And a trader who finds herself owning more than the lawful amount must promptly sell enough of the instrument to come back into compliance.

For example, a position limit of 1,200 contracts for May 2024 soy futures constrained how much a trader could bet on May 2024 soybean prices.⁹⁷ Specifically, the trader could own at most 1,200 contracts, each entitling the bearer to claim 5,000 bushels of soybeans in May 2024.⁹⁸ A trader who correctly predicted the movement of soy prices could make a lot of money. In May of 2023, a bushel of May 2024 soybeans traded for about \$12.86. A trader who bought 1,200 contracts obliged herself to pay something like \$77 million for 7.5 million cubic feet of soybeans. A confident trader would happily have bet more, but position limits prevented her from betting \$80 million (or \$80 billion for that matter).

97. *Position Limits for Derivatives*, CFTC, <https://www.cftc.gov/IndustryOversight/MarketSurveillance/SpeculativeLimits/index.htm> [<https://perma.cc/6RJ3-DD4H>]. The 1200 limit constraints spot months, so this number will be applicable at the time of probable publication of this article. The paragraph above describes the bet being made in advance (May 2023). The position limit for that distant contract is actually higher than 1200.

98. Likewise, a trader skeptical of soy prices could oblige herself to deliver 6 million bushels of soybeans in May 2024—but not a bean more.

Nearly all commodity futures are subject to position limits and have been for at least ninety years; recently, most other commodity derivatives have come into the fold.⁹⁹ The regulation of position limits is a complicated matter. Hundreds of pages of regulations set and reset this system. Experts in these rules are sought after. Fortunately, a high-level treatment will suffice for our purposes.

The Commodity Exchange Act requires all trading markets to establish position limits for nearly all their products. The trading venue has some latitude in setting these limits, but federal law structures the venue's options. Some limitations are general. The market's position limits must "reduce the potential threat of market manipulation or congestion."¹⁰⁰ The CFTC's general opinion is that position limits must cap a trader's position at 25 percent of deliverable supply in the "spot" month, but exchanges are free to set even more restrictive rules. Under this standard, a trader of May 2024 soy contracts could lay claim to at most a quarter of the soy that is likely to be available for delivery.

Nineteen commodities are subject to CFTC-set position limits in their final month that may be far more restrictive than the deliverable supply.¹⁰¹ Soybeans, as noted above, are subject to such a restriction in their final month: 1,200 contracts. One thousand, two hundred is considerably lower than the 25 percent threshold that governs most contracts in their final months. In May 2023, the contract prior to the spot month was July 2023. That contract had 777,582 outstanding contracts. Twenty-five percent of that outstanding interest would be almost 200,000 contracts—and, thus, much more than 1,200. The position is limited to less than 2 percent of the available supply.

The rules from the CFTC are more specific still for a few important commodities (including soy) for which it sets out required limits (instead of the general 25 percent rule) even for preceding months. Thus, for soy contracts that are not currently expiring, the CFTC limit forces the trading venue (Chicago Board of Trade) to cap ownership at no more than ten percent of the open interest for the first 25,000 contracts in the market, and 2.5 percent thereafter. Thus, when

99. Position limits do not apply to currency derivatives. A trader is free to buy as many Yen futures contracts as she likes. See *CME Position Limits*, CME GROUP, <https://www.cme.com/rulebook/files/position-limits-cme.xlsx> [<https://perma.cc/R2SG-PLMF>]. There is, however, an accountability limit, which requires any trader in excess of the accountability limit to "[h]alt increasing further its position or reduce its position in an orderly manner, in each case as requested by the designated contract market or swap execution facility." 17 C.F.R. § 150.1 (2024).

100. 7 U.S.C. § 7(d)(5).

101. Position Limits for Derivatives, 86 Fed. Reg. 3236, 3410 n.1433 (Jan. 14, 2021).

777,582 contracts were open for soy, a single trader could own no more than 21,314 contracts (about 2.7 percent of the total owned).¹⁰²

So far, we have described hard caps on ownership, but soft caps may be even more important. The name for a soft cap on ownership is a position accountability level. Traders who reach this level must stop buying contracts. However, they may contact the trading venue to request permission to trade above it.¹⁰³ Given the time needed to request permission, and the need to account for one's reasons, many traders refrain from trades that might have been approved if authorization had been sought.

Position accountability levels apply at much lower levels of ownership than position limits. First, recall that most commodities derivatives are not subject to explicit CFTC-imposed position limits outside of their list month of trading; it is the exchange's rules alone that construct positions limits for further-out contracts. Nevertheless, the CFTC does impose across-the-board position accountability levels for most commodity derivatives. The level is set at ten percent of the instruments for the first 25,000 contracts, followed by 2.5 percent of the subsequent contracts.¹⁰⁴

A trader's request to exceed the position accountability level will explain why they should be permitted to acquire a larger position than otherwise permitted. The most typical explanation will be that the trader has a bona fide reason to hedge that cannot be satisfied without an extraordinarily large futures position.¹⁰⁵ For example, a firm that contracted to sell an enormous quantity of soy meal in one year would be afraid that soybeans (the main input in soy meal) might become more expensive in the intervening time. A large, long position in soybean futures would be necessary, perhaps far larger than the position accountability levels would have allowed. A trader that documents a worthwhile exception may exceed the position accountability level.

Indeed, the trader may even be permitted to exceed the position limit if her explanation satisfies a relevant exemption. The position accountability levels and position limits are meant to constrain "speculative" ownership.¹⁰⁶ Speculative position limits are set high enough to allow most forms of speculation to go

102. The average open interest for soybean futures in 2019 was 717,978. Position Limits for Derivatives, 86 Fed. Reg. at 3394.

103. Market Regulation Advisory Notice RA1711-5 at *2, CME GROUP (Aug. 11, 2017), <https://www.cmegroup.com/notices/market-regulation/2017/08/RA1711-5.pdf> [<http://perma.cc/96X4-LZ82>].

104. 17 C.F.R. § 150.5 (2024).

105. 7 U.S.C. § 6(c)(2)(A); see Andrew Verstein, *Privatizing Personalized Law*, 86 U. CHI. L. REV. 551, 554–55 (discussing position limits exceptions).

106. 17 C.F.R. § 150.3 (2024).

unconstrained, but low enough that traders do wish to exceed them and are sometimes prosecuted for allegedly doing so. When the CFTC proposed a version of the current regime imposing specific rules for almost thirty commodities, it estimated that 400 traders would be affected.¹⁰⁷ Thus, the rules mostly matter for a medium-sized group of large traders. However, the limits do not apply to “hedging,” “spread,” or “arbitrage” transactions.¹⁰⁸

The following example of the hedging exception may make these claims slightly more tangible. Tyson Foods buys soybean meal to feed to its animals. It has a legitimate need to hedge the prices of this input, buying futures such that it would receive payments if soybean meal prices rose. Such payments could offset the losses suffered from more expensive feed.¹⁰⁹ Tyson can legally enter into any hedging transactions designed to protect itself from this commodity price fluctuation.

Tyson can also go further and legally speculate on soymeal prices based on its sense of likely future prices. For example, if it observed higher soymeal prices from vendors, it could legally buy soymeal futures on the theory that its experience suggests a market-wide trend. But it can be (and was, in 2021) penalized for speculating further than a certain amount. The position limit for soymeal in the relevant period was around 6500 contracts. Those contracts were for 100 tons of soybean meal. At current soymeal prices (\$425 per ton), the position limit would cap bets at a quarter billion dollars. Tyson could lawfully speculate at that scale, but not higher. In fact, Tyson exceeded the limit by 2,473 contracts on average, increasing the scale of its speculation by 38 percent.¹¹⁰ Tyson paid a \$1.5 million civil penalty for overstepping.¹¹¹

107. *Questions and Answers: Position Limits for Derivatives*, CFTC, https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/pl_150_qa.pdf [<https://perma.cc/6HTY-F9PP>]. More specifically, it estimated that “no more than 53 traders in any legacy agricultural referenced contract, 28 traders in any non-legacy agricultural referenced contract, 148 traders in any energy referenced contract, and 5 traders in any metal referenced contract would hold or control positions that would exceed a spot-month limit.” And “no more than 12 traders in any legacy agricultural futures contract, 18 traders in any non-legacy agricultural referenced contract, 11 traders in any energy referenced contract, and 16 traders in any metal referenced contract would hold or control positions that would exceed either a single month or all months combined limit.”

108. *Id.*

109. Press Release, CFTC Orders Tyson Foods to Pay \$1.5 Million for Position Limit, Reporting, and Recordkeeping Violations, CFTC (Aug. 13, 2021), <https://www.cftc.gov/PressRoom/PressReleases/8413-21> [<https://perma.cc/KFQ4-GAY2>].

110. *Id.*

111. *Id.*

IV. SPECULATIVE LIMITS POLICY

Despite being one of the most enduring features of commodities market regulation, speculative position limits are rarely the subject of scholarly interest. To the degree they are discussed, it is in terms of three policy objectives: preventing market manipulation, reduce market volatility, and controlling systemic risk. Scholars tend to think position limits function poorly in both of those tasks. Subpart A describes the conventional wisdom on speculative limits. Subpart B then offers a novel rationale. Subpart C provides illustrative examples to elaborate the rationale and motivate its appeal.

A. Traditional Rationales

The most familiar rationale for position limits law is to constrain market manipulation.¹¹² If a trader faced no speculative limits, the trader could amass positions so large as to exert market power. For example, a trader who bought 60,000 soy futures contracts would be entitled to thirty million bushels of soy on a given date. It will sometimes be impossible to deliver thirty million bushels of soy; the largest container ships in the world can contain at most half that number.¹¹³ Traders obliged to deliver soy but unable to obtain it must pay whatever price the manipulator demands to be released from their obligation. Speculative position limits prevent this outcome by capping the size of the position a trader can acquire.

Thinking of position limits as a check on market manipulation naturally leads to the question of their necessity; we already have market manipulation laws.¹¹⁴ Why use position limits as well? Most commentators have deemed position limits strictly worse than market manipulation laws because position

112. See, e.g., Timothy E. Lynch, *Coming Up Short: The United States' Second-Best Strategies for Corraling Purely*, 36 CARDOZO L. REV. 545, 618 (2014) (“the rules restricting speculation...appear primarily motivated to eliminate or reduce the threat of price manipulation of the underlying commodity”); 7 U.S.C. § 6a(a)(3) (“In establishing [position] limits...the Commission...shall set limits...to the maximum extent practicable, in its discretion...to deter and prevent market manipulation...”).

113. A standard twenty-foot equivalent unit (TEU) single-cargo container can contain about 800 bushels of soy. *What is a “TEU”? An “FEU”? How Many Bushels Can They Hold?*, SOY TRANSP. COAL., https://soytransportation.org/Stats/Containers_WhatsATEU.pdf [http s://perma.cc/9UZ7-BETW]. The largest cargo ships in the world can contain about 24,000 TEUs. *Largest Container Ships Worldwide*, STATISTA (Apr. 2023), <https://www.statista.com/statistics/1309481/largest-container-ships-worldwide> [https://perma.cc/LQ6P-8NCL].

114. See, e.g., 17 C.F.R. § 180.2 (2012).

limits are overinclusive: They restrict large positions even when there is no manipulative purpose or effect.¹¹⁵

A second rationale for position limits is to reduce “excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity.”¹¹⁶ The thought here is that even innocent large trades may lead to temporary price distortions. One problem with this rationale is that position limits may be counterproductive in addressing volatility. When prices are volatile, speculators are precisely the ones who can calm the waters. If prices are unduly low, speculators are the ones who buy the undervalued asset and push it up again. They do the opposite when prices are too high. Tying speculators’ hands prevents them from doing this work. A speculator whose position is limited cannot exert enough pressure to counteract whatever forces led to volatility or inaccurate prices.

A third rationale for speculative position limits concerns systemic risk.¹¹⁷ If traders place large bets on financial assets, an unfavorable price swing can bankrupt them. Their sudden bankruptcy could lead to a cascade of worry and insolvency: Will the trading venue lose money in its dealing with the trader? Will the trader have to rapidly sell her position at a loss to cover outstanding obligations, pushing prices even further out of whack?

Critics argue position limits may actually worsen these risks.¹¹⁸ For example, the CEO of CME Group told the CFTC that limits “will merely drive trading away from transparent markets and regulated clearing” and that “CFTC-imposed restrictions on fully regulated designated contract markets would predictably shift price discovery activity” to unregulated markets, exacerbating market instability and financial disruptions.¹¹⁹ Also, there are many ways to endanger personal solvency and generate systemic risk without placing a concentrated bet

115. *E.g.*, Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and a Proposed Alternative*, 51 WASH. & LEE L. REV. 945, 946 (1994) (“[P]osition limits may limit the ability to shift risk from the very risk averse to the very risk tolerant.... This result compromises the hedging function of futures markets and may also increase price volatility.”).

116. 86 Fed. Reg. 3237 (Jan. 14, 2021) (to be codified at 17 C.F.R. pts. 1, 15, 17, 19, 40, 140, 150 & 151).

117. Position Limits for Derivatives, *supra* note 16.

118. *Hearing on Energy Position Limits and Hedge Exemptions Before the CFTC* (2009) (statement of Craig S. Donohue, Chief Executive Officer of CME Group Inc.).

119. *Hearing on Energy Position Limits and Hedge Exemptions: Before the CFTC* (2009) (statement of Craig Donohue, Chief Executive Officer, CME Group Inc.) at 3, 9.

on a single commodity.¹²⁰ There are much more targeted ways to prudentially reduce individual and system-wide risks.¹²¹

Viewed as a substitute for manipulation, volatility, or prudential regulation, speculative position limits are unimpressive, blunt instruments. But what if that wasn't all they were? The next Subpart sketches another possible role for position limits.

B. Trading Markets Rationale

Speculative limits necessarily constrain speculative profits. Individuals with information want to bet on the price changes, but speculative limits mean that they can only bet so much. When speculators are right, they profit, but only up to a point. Speculative limits throttle trading, so they also throttle informed trading and informed trading profits.

In this way, speculative position limits serve a similar function to insider trading law. Insider trading law allows some informed trading to encourage research, trading, and dissemination of information relevant to securities prices. So does speculative position limits law. For securities, the permitted zone is category based. For instance, information diligently researched and not acquired in breach of a duty of trust. For commodities, the permitted zone has been broadly based. Any trader can take modest positions and profit from them. In both domains, the availability of some informed trading encourages costly research, trading, and dissemination of information relevant to accurate prices.

But the informed traders' profits undermine trading market liquidity, so both regimes seek to limit those profits. Under the insider trading law regime, entire categories of conduct are prohibited, particularly those that are deemed to be of low value—such as pilfering information from one's employer. Speculative position limits likewise tamp down on trading profits, but they do so consistently across trading categories. Nobody can make a killing off their insights, whether legitimately or illegitimately acquired, because nobody can take a gigantic trading position. As a result, others need not fear losing much to informed traders.

120. See, e.g., MARK JICKLING ET AL., CONG. RSCH. SERV., RL31045, FINANCIAL RISK: AN OVERVIEW OF MARKET AND POLICY CONSIDERATIONS (2001).

121. *Hearing on Energy Position Limits and Hedge Exemptions: Before the CFTC* 5 (2009) (testimony of Blythe Matthews, Managing Director & Head of the Global Commodities Group, J.P. Morgan).

This is a novel interpretation of position limits. Indeed, some are skeptical of the mere notion that commodities markets contain informed traders.¹²² The Chairman of the CFTC once told Congress, “[t]here is almost no way to trade insider information in the commodities industry.”¹²³ This skepticism is strange, given that the first insider trading case most law students read is about informed trading on commodities information.¹²⁴

We begin with some illustrations to help motivate the notion. These examples both demonstrate that someone might use information to profit in commodities markets and that position limits constitute a boundary on those profits.

In one of the examples, a trader and his family made about \$9 million. In another case, a hypothetical trader might make as much as \$200 million. Those are meaningful sums, great enough to justify the effort of trading. But these rewards are not a certainty for a speculator. And they are also not billion-dollar windfalls, resulting from everyday trading events. These are multi-million-dollar rewards for predicting very large, sporadic events. Position limits impose a cap somewhere higher than the Tower of Babel but below the Vault of Heaven.

C. Illustrations

1. A Storm Corn

In 1993, there was widespread flooding in the Midwest, substantially affecting the corn and soybean crops.¹²⁵ Since the extent of the damage was unclear, the agricultural community generally relied on the U.S. Department of Agriculture’s (USDA) crop yield estimates.¹²⁶ But not Gary Bielfeldt; he believed

122. *SEC/CFTC Jurisdictional Issues and Oversight—Part 2: Hearings on H.R. 5447, H.R. 5515, and H.R. 6156 Before the Subcomm. on Telecomms., Consumer Prot., and Fin., and the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Com.*, 97th Cong. 405 (1982); see also *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the H. Comm. on Agric.*, 93d Cong. 183 (1974) (statement of Glenn Willett Clark, Professor of Law and Superintendent of Securities for the State of Iowa) (testifying that “[c]ommodities trading, unlike securities trading, takes place in an operational climate in which inside information has been assumed to be nonexistent”).

123. *Joint Meeting on Harmonization of Regulation Before the United States SEC* (2009), <https://www.sec.gov/spotlight/harmonization/sec-cftc-harmonization-090309-transcript.pdf> [<https://perma.cc/8KAD-6PVB>].

124. That case is, of course, *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), in which executives traded based on the company’s discovery of vast mineral deposits. Verstein, *supra* note 5 at 447–50, 468–69, 489, 491 (discussing *Texas Gulf Sulphur*).

125. *In re Bielfeldt*, CFTC No. 96–1, 2004 WL 2785293, at *1 (Dec. 2, 2004) [hereinafter *Bielfeldt 2004*].

126. *Id.*

the USDA was underestimating the extent of crop damage, such that their crop yield estimates were too high.¹²⁷ If he was correct, the corn futures prices were far too low, as they did not adequately reflect the actual scarcity of corn that was to come.¹²⁸

Figure 1. Missouri River Flooding on July 30, 1993



In August, after “exhaustive fundamental research and analysis,” Gary started buying corn futures for commodity futures trading accounts that he managed as a broker.¹²⁹ By October, he was one contract shy of the speculative position limit.¹³⁰ At that point, he started loaning money to friends and family and urging them to join his campaign.¹³¹ Sure enough, new USDA estimates came in, suggesting even lower crop yields, leading to higher corn futures prices on October 13.¹³²

127. *In re Bielfeldt*, CFTC No. 96–1, 1995 WL 640296, at *2 (Oct. 31, 1995) [hereinafter *Bielfeldt* 1995].

128. *Id.*

129. *Bielfeldt* 2004, *supra* note 125, at *2.

130. *Id.*

131. *Id.* at *3.

132. *Id.*

Gary believed these estimates were still too high.¹³³ Before the USDA's next report on November 9, Gary's friends and family increased their positions.¹³⁴ Gary's spouse Carlotta quickly reached the single month and all months combined speculative position limits through only her accounts.¹³⁵ The new USDA estimate came and, yet again, severely reduced expected crop yield, leading to big market moves the next day.¹³⁶ Many of Gary's friends and family exited the corn futures market soon thereafter.¹³⁷

Gary was right, and when all was said and done, he and his friends and family made millions (together, approximately \$9 million) off of those market adjustments in just a few weeks.¹³⁸ Those trades were challenged as exceeding speculative position limits, but Gary and associates ultimately avoided liability.¹³⁹ Gary did not have non-public information—there were no spies inside the USDA, nor did Gary know that his own stash of corn was blighted. He was an information trader in the same way that a fundamental value analyst devotes weeks of energy to glean insights from synthetic combinations of several different public sources. He was allowed to profit from his insight, but only up to a point.

2. Ukraine Grain

The early 2020s have seen substantial conflict between Russia and Ukraine.¹⁴⁰ Because Ukraine accounts for a substantial amount of global wheat exports, the global wheat market has become more volatile, as markets react to war news¹⁴¹ In July 2022, Russia, Ukraine, and a host of other countries signed a deal that allowed for the safe export of Ukrainian grains through the Black Sea.¹⁴² On October 31, 2022, Russia pulled out of the deal.¹⁴³ Wheat futures prices for the nearest

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at *5.

139. *Id.* at *15–16.

140. *War in Ukraine*, COUNCIL ON FOREIGN RELS. (May 20, 2024), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine> [<https://perma.cc/9PTC-Y8LW>].

141. Victoria Masterson, *This Chart Shows How Much Ukraine and Russia Export to the World*, WORLD ECON. F. (Apr. 13, 2022), <https://www.weforum.org/agenda/2022/04/world-bank-ukraine-food-energy-crisis> [<https://perma.cc/H3JV-VT6G>].

142. Hanna Duggal, *As Russia Exits Grain Deal, Which Countries Will be Affected?*, AL JAZEERA (Jul. 17, 2023), <https://www.aljazeera.com/news/2023/7/17/as-russia-exits-grain-deal-which-countries-will-be-affected> [<https://perma.cc/4VFR-HC5Q>].

143. *Id.*; Hanna Ziady, *Wheat and Corn Prices Jump After Russia Quits Black Sea Grain Deal*, CNN BUS. (Oct. 31, 2022), <https://www.cnn.com/2022/10/31/business/wheat-prices-russia-ukraine-graine-deal/index.html> [<https://perma.cc/PHU7-XQJW>].

delivery month, which was December 2022 (ZWZ22), reacted immediately; at the close of trading on October 28, the price of ZWZ22 wheat was quoted at 829–2,¹⁴⁴ which translates to a contract price of \$41,462.50,¹⁴⁵ and by the open of trading on October 31, the price was 884–4 (or \$44,225 per contract).¹⁴⁶ The price was largely driven by traders' concerns about a global wheat shortage.¹⁴⁷ On November 2, 2022, Russia rejoined the agreement.¹⁴⁸ The same day, ZWZ22 prices plummeted nearly six percent from an open of 898–4 (\$44,925 per contract) to a close of 846–0 (\$42,300 per contract).¹⁴⁹

How profitable might this series of events have been if a trader had ahead-of-the-market knowledge as to Russia's temporary exit from the Black Sea grain deal? To answer this question, we will assume that the trader made two sets of trades: the first capitalizing on the spike in price caused by Russia's exit from the deal, and the second capitalizing on the fall in price occurring after Russia rejoined the deal. During the relevant period, there were fourteen wheat futures contracts available for trading: the earliest being that with a delivery month in December 2022 and the latest being that with a delivery month of July 2025.¹⁵⁰ The prices of each of these contracts followed a similar pattern: They each reached a local (as opposed to all-time) low on October 28 (First Low), then reached a high on either November 1 or 2 (First High), and then reached a second low on either November 2 or 3 (Second Low). In order to determine the profit potential of this series of events, we will calculate the profit that results from a trader (1) taking a long position on October 28 at the First Low, (2) liquidating that position at the

144. *Wheat Dec '22 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWZ22/interactive-chart> (last visited Nov. 17, 2025) [hereinafter ZWZ22 Chart].

145. A wheat quote of “829–2” translates to a price of \$8.2925 per bushel. See *Chicago SRW Wheat Futures Contract Specs*, CME GROUP, <https://www.cmegroup.com/markets/agriculture/grains/wheat.contractSpecs.html> [<https://perma.cc/YG48-B2UC>]. There are 5,000 bushels on a contract, so the total price of the contract is \$8.2925 times 5,000, which is \$41,462.50. *Id.*

146. ZWZ22 Chart, *supra* note 144.

147. Kashish Rastogi & Carmen Ang, *These Are the Top 10 Countries That Produce the Most Wheat*, WORLD ECON. F. (Aug. 4, 2022), <https://www.weforum.org/agenda/2022/08/top-10-countries-produce-most-wheat> [<https://perma.cc/AYT8-EV3X>]; Masterson, *supra* note 141.

148. Duggal, *supra* note 142.

149. ZWZ22 Chart, *supra* note 144.

150. See *Chicago SRW Wheat Contract Specs*, CME GROUP, <https://www.cmegroup.com/markets/agriculture/grains/wheat.contractSpecs.html> [<https://perma.cc/ZHS7-T7FZ>] (stating that there will be listed “15 monthly contracts of Mar, May, Jul, Sep, Dec listed annually following the termination of trading in the July contract of the current year”). Following the termination of the July 2022 contract, there were fifteen contracts listed from September 2022 to July 2025. In the relevant time here, the September 2022 contract had already terminated, leaving fourteen contracts from December 2022 to July 2025.

First High, (3) taking a short position at the First High, and finally (4) liquidating that position at the Second Low.

Contract	Margin ¹⁵¹	First Low (10/28)	First High (11/1, or 11/2*)	Second Low (11/3, or 11/2*)
ZWZ22 ¹⁵²	\$3,300	822–4 \$41,125.00	904–0 \$45,200.00	827–6 \$41,387.50
ZWH23 ¹⁵³	\$3,250	842–0 \$42,100.00	920–6 \$46,037.50	847–2 \$42,362.50
ZWK23 ¹⁵⁴	\$3,200	853–2 \$42,662.50	926–4 \$46,325.00	856–4 \$42,825.00
ZWN23 ¹⁵⁵	\$3,150	854–0 \$42,700.00	921–2* \$46,062.50	858–0 \$42,900.00
ZWU23 ¹⁵⁶	\$3,100	860–0 \$43,000.00	923–4* \$46,175.00	864–0 \$43,200.00
ZWZ23 ¹⁵⁷	\$3,050	867–6 \$43,387.50	928–4* \$46,425.00	871–2 \$43,562.50
ZWH24 ¹⁵⁸	\$3,000	869–0 \$43,450.00	925–6* \$46,287.50	873–2 \$43,662.50
ZWK24 ¹⁵⁹	\$2,700	868–2 \$43,412.50	913–4 \$45,675.00	875–0 \$43,750.00
ZWN24 ¹⁶⁰	\$2,500	827–0 \$41,350.00	867–0 \$43,350.00	831–4 \$41,575.00
ZWU24 ¹⁶¹	\$2,500	807–2 \$40,362.50	848–2 \$42,412.50	819–0* \$40,950.00
ZWZ24 ¹⁶²	\$2,500	816–6 \$40,837.50	855–0 \$42,750.00	825–6* \$41,287.50

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151. *List of Historical Margins by Name*, CME GROUP, <https://www.cmegroup.com/clearing/risk-management/historical-margins.html> [https://perma.cc/8XNW-CEH8] (navigate to the “Wheat” row under “Agriculture” and click on the PDF in the column “2020–Present”).
 152. ZWZ22 Chart, *supra* note 144.
 153. *Wheat Mar ‘23 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWH23/interactive-chart> (last visited Nov. 17, 2025).
 154. *Wheat May ‘23 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWK23/interactive-chart> (last visited Nov. 17, 2025).
 155. *Wheat Jul ‘23 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWN23/interactive-chart> (last visited Nov. 17, 2025).
 156. *Wheat Sep ‘23 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWU23/interactive-chart> (last visited Nov. 17, 2025).
 157. *Wheat Dec ‘23 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWZ23/interactive-chart> (last visited Nov. 17, 2025).
 158. *Wheat Mar ‘24 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWH24/interactive-chart> (last visited Nov. 17, 2025).
 159. *Wheat May ‘24 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWK24/interactive-chart> (last visited Nov. 17, 2025).
 160. *Wheat Jul ‘24 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWN24/interactive-chart> (last visited Nov. 17, 2025).
 161. *Wheat Sep ‘24 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWU24/interactive-chart> (last visited Nov. 17, 2025).
 162. *Wheat Dec ‘24 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWZ24/interactive-chart> (last visited Nov. 17, 2025).

Contract	Margin ¹⁶³	First Low (10/28)	First High (11/1, or 11/2*)	Second Low (11/3, or 11/2*)
ZWH25 ¹⁶⁴	\$2,500	808–0 \$40,400.00	846–2 \$42,312.50	817–0* \$40,850.00
ZWK25 ¹⁶⁵	\$2,500	793–6 \$39,687.50	832–0 \$41,600.00	802–6* \$40,137.50
ZWN25 ¹⁶⁶	\$2,500	749–0 \$37,450.00	785–2 \$39,262.50	756–0* \$37,800.00

The trader's profits will be the speculative position limit (which is 19,300 for each contract)¹⁶⁷ multiplied by the absolute change in price from the First Low to the First High plus the absolute change in price from the First High to the Second Low. For example, the greatest of these values occurs when the trader invests in ZWZ22. In this case, the trader takes on a long position of 19,300 ZWZ22 contracts at \$41,125.00 per contract on October 28. Those contracts appreciate to \$45,200.00 on November 1, at which point the trader liquidates her position. At this point, her profits are \$4,075.00 per contract, totaling \$78,647,500.00. She then takes on a short position of 19,300 ZWZ22 contracts (she sells 19,300 contracts). The contracts then depreciate to \$41,387.50 on November 3, at which point she liquidates her position by buying 19,300 contracts. Her profits from her short sale are \$3,812.50 per contract, totaling \$73,581,250.00.

After all is said and done, she has made \$152,228,750.00 in profits between October 28 and November 3. If the trader had followed this strategy, her initial investment would have been \$63,690,330.00,¹⁶⁸ and her return on investment would have been 239 percent.¹⁶⁹

163. *List of Historical Margins by Name*, CME GROUP, <https://www.cmegroup.com/clearing/risk-management/historical-margins.html> [https://perma.cc/8XNW-CEH8] (navigate to the "Wheat" row under "Agriculture" and click on the PDF in the column "2020–Present").

164. *Wheat Mar '25 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWH25/interactive-chart> (last visited Nov. 17, 2025).

165. *Wheat May '25 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWK25/interactive-chart> (last visited Nov. 17, 2025).

166. *Wheat Jul '25 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZWN25/interactive-chart> (last visited Nov. 17, 2025).

167. No contract was in its spot month during the relevant period, so the single-month/all-months speculative position limit of 19,300 is the most restrictive applicable limit. See 17 C.F.R. § 150.2 (2024).

168. This number is calculated by multiplying 19,299 (the speculative position limit minus one) by the maintenance margin (in this case, \$3,300) and adding the initial margin of one contract (we have supposed that, as is usually the case, the trader's initial margin would have been 110 percent of the maintenance margin, in which case it would be \$3,630.00).

169. This is her profits (\$152,228,750.00) divided by her investment (\$63,690,330.00).

3. EPA Biofuel

On December 1, 2022, the Environmental Protection Agency (EPA) announced a proposed rule that would mandate the use of a certain amount of biomass-based diesel fuel as a proportion of total fuels, as well as mandate a certain volume of production of biomass-based diesel fuel.¹⁷⁰ The rule's proposal was expected, but "mandated . . . [less use] of biomass-based diesel than many . . . [had] expected."¹⁷¹ The day of the report, the price of the nearest soybean oil contract, which was December 2022 (ZLZ22), dropped almost 8.2 percent from a quote of 74.50 to 68.40 (cents per pound).¹⁷² Because a soybean oil contract's quote is in cents per pound, and a contract represents 60,000 pounds, the drop in the quote translates to the drop in the price of a contract from \$44,700 to \$41,040 in the span of just one day.¹⁷³ Just over a week later, on December 9, ZLZ22 closed at 62.20, or \$37,320 per contract.¹⁷⁴ In the span of just eight days, the December 2022 soybean oil contract fell a total of 16.5 percent.

170. Press Release, EPA, EPA Takes Next Steps in Renewable Fuel Standard Program for 2023–25 (Dec. 1, 2022), 2022 WL 17352448 [hereinafter EPA Proposed Rule Press Release].

171. Bob Henderson, *Soybean Oil Rallies Ahead of EPA Decision on Biofuels*, WALL ST. J. (Jun. 20, 2023, 6:11 PM), <https://www.wsj.com/livecoverage/stock-market-today-dow-jones-06-20-2023/card/soybean-oil-rallies-ahead-of-epa-decision-on-biofuels-91MtSY2SqiqltnfxiukD> [<https://perma.cc/PPD7-7ECQ>]; see also Bob Henderson, *Escalating Demand for Soybean Oil Hits Possible Slowdown*, WALL ST. J. (Mar. 19, 2023, 9:00 AM), <https://www.wsj.com/articles/escalating-demand-for-soybean-oil-hits-possible-slowdown-d5c6a4f9> [<https://perma.cc/2V6R-T5FV>] ("The [EPA proposal] numbers came as a bit of a shock," said Dave Walton, who farms about 750 acres of corn and soy. . .").

172. *Soybean Oil Dec '22 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZLZ22/interactive-chart> (last visited Nov. 17, 2025) [hereinafter ZLZ22 Chart].

173. *Soybean Oil Futures Contract Specs*, CME GROUP, <https://www.cmegroup.com/markets/agriculture/oilseeds/soybean-oil.contractSpecs.html> [<https://perma.cc/H9XL-G35C>].

174. ZLZ22 Chart, *supra* note 172.

Figure 2. December 22 Soybean Oil Futures Contract Prices



This incident accordingly involved two opportunities for informed trade. First, a trader could exploit political knowledge, if they could predict how the EPA was going to act. But the price continued to fall for a week after the announcement, suggesting that the market did not yet appreciate how bad this information was. A large trader who realized that their own inventory or productive capacity was much larger than the market knew about would be able to continue shorting the asset, taking advantage of their superior understanding of the facts. Or the trader might have undertaken costly synthetic research. How profitable might this event have been for either sort of informed trader?

The profits are constrained by the position limits. Of the soybean oil contracts available to trade between November 29 and December 12 of 2022,¹⁷⁵ the December 2022 contract (ZLZ22) underwent the greatest change per contract.¹⁷⁶ ZLZ22, however, was in its spot month,¹⁷⁷ and so the trader would only be able to control 1100 ZLZ22 contracts during this period.¹⁷⁸ The all-months combined limit for soybean oil was 17,400, so the trader would have bought 16,300 of the

175. Those with delivery dates between December 2022 and December 2024. See ZLZ22 Chart, *supra* note 172.

176. *Id.*

177. CBOT Rulebook, Ch. 11 Soybean Futures, Rule 11102, CME GROUP, <https://www.cmegroup.com/content/dam/cmegroup/rulebook/CBOT/II/11/11.pdf> [<https://perma.cc/F4HV-PAJ4>] (showing that soybean oil contracts go into their spot month two trading days before the first trading day of the delivery month).

178. 17 C.F.R. § 150.2 (2024); CBOT Rulebook, Ch. 11 Soybean Futures, Rule 11102.E, CME GROUP, <https://www.cmegroup.com/content/dam/cmegroup/rulebook/CBOT/II/11/11.pdf> [<https://perma.cc/F4HV-PAJ4>].

second most profitable contract available, which was—not coincidentally¹⁷⁹—ZLF23, the contract with the second-nearest delivery date.¹⁸⁰ On December 1, the day the EPA released their proposed rule,¹⁸¹ ZLZ22 immediately plummeted to \$40,806 from its November 30 high of \$46,332;¹⁸² ZLF23 similarly dropped to \$40,428 from its November 29 high of \$44,676.¹⁸³ If a trader were to have sold (i.e., taken a short position of) 1100 ZLZ22 contracts and 16,300 ZLF23 contracts at their respective highs and liquidated them at their lows, she would have made a cool \$73,915,200 off of an initial investment of \$46,980,540 in the span of just a few days.

Suppose, though, she knew that the contracts' prices were going to drop even more—the kind of knowledge that implies more than political connections, but some appreciation for stockpiles—staying in until December 12, when ZLZ22 contracts reached a low of \$36,960 and ZLF23 contracts reached a low of \$35,364, at which point she liquidated her position. With the same initial investment of \$46,980,540, she would have made \$162,094,800, more than tripling her money.

* * *

Commodities law imposes position limits on traders. These limits are built to allow most trading. Small traders will never be constrained, and large traders can always trade to address genuine commercial needs. Only the largest speculative traders are constrained. The result is substantial horizontal freedom—nearly anyone can trade when they like. Yet there are vertical limits on a trader's position and therefore profits. The profits of informed trade remain substantial—enough to justify some research, trading, and disclosure. But profits are ultimately capped lower than the market would otherwise bear. Commodities position limits therefore limit the extent of informed trading profits and losses, thus preserving liquidity. Properly calibrated, they can limit informed trading to a similar level as securities insider trading restrictions—but the limit is fundamentally different because it hinges on the level of trading rather than the type of trading.

This interpretation of position limits fits the facts of hypothetical cases and offers a rationalizing theory of what position limits do: They are a poor substitute for anti-manipulation rules and prudential systemic risk regulation, but they are

179. It is rather intuitive that contracts with nearer delivery months would be more impacted by current events than those with more distant deliveries. This might not be the case if, say, the commodity in question was something much more perishable, like livestock, and the EPA's rule would not go into effect until, say, 2026.

180. *Soybean Oil Jan '23 Futures Interactive Chart*, BARCHART, <https://www.barchart.com/futures/quotes/ZLF23/interactive-chart> (last visited Nov. 17, 2025) [hereinafter ZLF23 Chart].

181. EPA Proposed Rule Press Release, *supra* note 170.

182. ZLZ22 Chart, *supra* note 172.

183. ZLF23 Chart, *supra* note 180.

an intriguing substitute for insider trading law. When should the law exploit this substitute, and when should it stick with insider trading law? That is the question we theorize next.

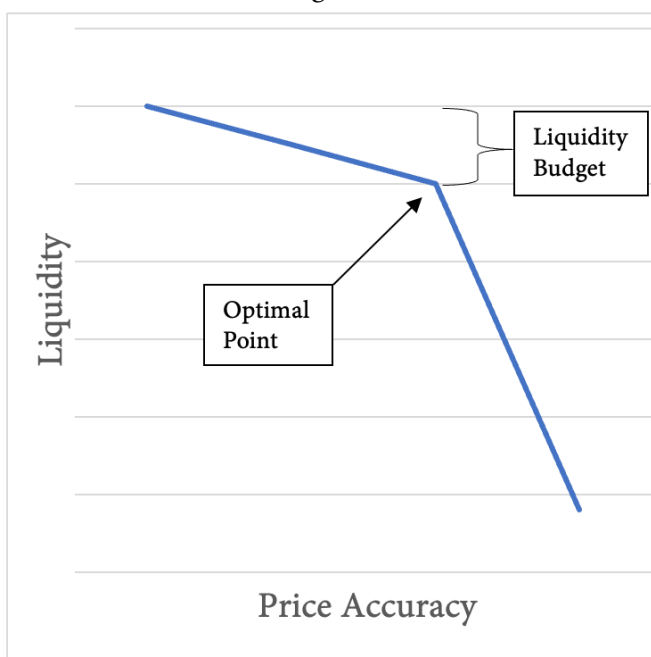
V. THEORIZING LIMITS TO INSIDER TRADING AND SPECULATION

This Article has recapitulated how to best think about the economics of securities' insider trading and applies similar reasoning to commodities' position limits. The result is the following insight: Informed trading profits can be regulated with insider trading rules or with position limit rules. How should we think about these two options? When is one more appropriate than the other? That is the subject of this discussion. The key idea is that both approaches limit the amount of informed trading profits, and thus the amount of informed trading, but in different ways. Insider trading regulation works horizontally. It disqualifies categories of trades or traders. Position limits instead operate vertically. They tend to cap the profits a given trader can make, preserving the number of potential informed traders but lowering their individual incentives to act. This Part theorizes vertical and horizontal limits on trading profits.

A. A Liquidity Budget (and How to Spend It)

The first step of our analysis is to conceptualize a “liquidity budget.” This is the sum that society is willing to pay, in a given context, to informed traders as profits for their informed trade. This sum is identical to the cost the market maker will lose to the informed trader and will closely track the increase in trading costs that non-informed traders must ultimately pay. If we set aside \$200,000 per week for informed trader profits, we are imposing around \$200,000 in trading costs on non-informed traders. The benefit is some improved price accuracy, as the \$200,000 induces individuals to generate, trade on, and disclose important information about asset prices. We would forgo those benefits if we set aside zero dollars. And if we set aside \$200 million instead, we would increase price accuracy but only at an inordinate cost. The “optimal” budget gives us a high level of accuracy for an acceptable liquidity cost.

Figure 3



In reality, regulators will be unable to identify precisely how much informed traders are collecting as profits, let alone pinpoint the optimal point after which additional price accuracy is unnecessary. But regulators will have some implied sense of when informed trading is causing more harm than good. Up until that point, trading profits are implicitly conceded as an acceptable sacrifice for price accuracy. And then the question is how best to make the sacrifice.

Let us suppose that we have identified our regulatory budget as \$200,000 in informed trading profits per period. Let us suppose also that there are currently two potentially informed traders (call them A and B) operating in the market each of whom would naturally trade for and claim \$200,000 in trading profits per period (for a total of \$400,000). That is to say that if regulation were relaxed, both of these individuals would research, trade on, and reveal information sufficient to generate those profits.¹⁸⁴ Collectively, they would claim \$400,000. Price accuracy would

184. Why two individuals? To keep the hypothetical tractable. Nothing here turns on them really being two individuals, rather than two *types* of individuals, such that the profits are split among many people. Nor is \$200,000 in profits a crucial number either. The idea is only that unregulated traders would not make unlimited money with their informed trades. They would face non-legal frictions that would level off their profits at some level. Moreover, the discussion

tend to increase from their work and other traders would bear \$400,000 in trading losses. Those losses constitute reduced liquidity.

Suppose that the regulator observes high trading costs and concludes that this natural rate of informed trading is too high and wishes to reduce the rate by half. How can it do so? There are two basic strategies. The regulator could ban A from trading, while letting B continue. Figure 4 illustrates this trading regulation approach, which concentrates trading profits.

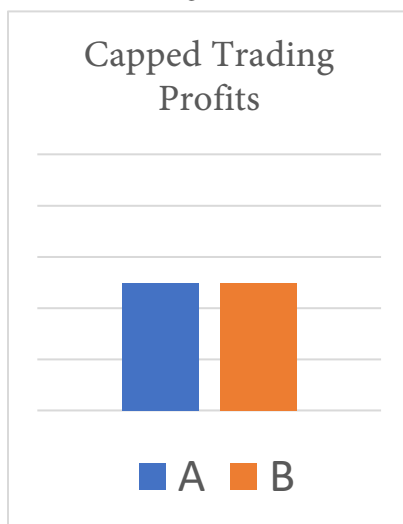
Figure 4



The regulator imposes a rule that prevents A from capturing much or any informed trading profits, while letting B trade unhindered. These rules could resemble American insider trading law (prohibiting A because A is a CEO trading on her company's information, while permitting diligent researcher B).

Alternatively, the regulator could constrain both traders to make only \$100,000 in profit. It will have effectively capped profits. Figure 5 displays this option.

is framed as "per period," in order to abstract away from the questions of whether this is a repeat game or a one-off, and whether the total cost here is very high (as if periods are seconds) or low (as if periods are lifetimes).

Figure 5

This regulatory approach could look like CFTC position limits. If A and B are permitted to buy only half of their desired level of a soon-to-rise investment, each makes modest trading profits.

Viewing insider trading law and position limits as merely two ways to channel trading profit liberates us to consider novel variants of each. There are infinite options for purely horizontal concentrations of trading profits and vertical caps on trading profits. As a substitute for insider trading regulation, the regulator stipulates A can trade on even-numbered days and B can trade on odd. The regulator could set daily trading limits for each security, such that when B's order arrives, there is no more inventory permitted for A to trade. The abstract point is that we have differentiated the pool of traders and concentrated the trading profits on a subset.

Other capped profit regimes are likewise conceivable instead of position limits. We could demand brokerage statements from each trader and seize profits above a designated level. We could institute a highly progressive tax of short-term trading profits. We could mandate large fees for large traders as a rough proxy for the greater profits those traders would otherwise claim. As with the concentration strategy, the capping strategy can be viewed abstractly rather than as focused on any one instantiation.

Mixed regimes are also possible. A regulator could both cap and concentrate profits to varying degrees. A regulator could impose position limits (capping profits) and insider trading rules (concentrating them). Indeed, the commodities

regime does this, insofar as some insider trading rules now apply to commodities trading. Or a regulator could likewise begin with insider trading rules and then institute some hint of profit capping. The securities regime does this, insofar as large traders are more likely to face regulatory scrutiny.¹⁸⁵ That scrutiny is a sort of tax that lowers the profits available to a given firm. We could imagine many other mixed regimes.¹⁸⁶

Still, both securities and commodities regulation are mostly focused on a single approach, so it will prove fruitful to explore the natural result of each regime's essential core. Both concentrating and capping regimes will be imperfect. And subject to those constraints, both strategies can be effective in reducing overall trading losses to informed traders, without altogether sacrificing the informational benefits these traders contribute. What factors counsel one selection rather than another? The next Subpart details them.

B. Factors Relevant to Selecting a Regulatory Approach

There are two ways to spend our regulatory budget, so regulators need guidance on the smartest way to do so. When is it wise to concentrate informed trading profits and when is it better to cap (and thus spread) them? This Subpart identifies three considerations, plus one characterization that partially summarizes all of them.

185. Regulators would be especially wise to focus on larger trades because studies find that larger trades may show greater per-trade profits. See, e.g., Sureyya Burcu Avci, H. Nejat Seyhun & Andrew Verstein, *Insider Trading Against the Corporation*, 16 HARV. BUS. L. REV. (forthcoming 2026).

186. A trading regime could set different caps for Trader A and Trader B, *nearly* banning trade by A and *nearly* permitting unlimited trade by B. Or the regulator could ban Trader A *and* cap profits for Trader B. Or the regulator could use one approach in one domain and the other in other situations. For example, the regulator could concentrate profits to one trader on Tuesdays, while capping profits on other days. This discussion does not focus on these combined or complex strategies because our present goal is to set out the basic parameters that makes either approach attractive in a given moment. That is all we can do at this level of abstraction. In a later Subpart, we see how these considerations fit the real world, and we will have recourse to more complexity.

Second, a regime can engage in concentration and capping without expressly doing so. For example, a regulator could purport to ban all informed trading but enforce the rule only imperfectly. The regulator could assess only small fines. A trader who pursues large trading profits and expects to pay a small penalty has effectively traded pursuant to a profit cap. Alternatively, a regulator could enforce its speculative limits imperfectly. An across-the-board ban on informed trading, which was only enforced by patrolling A's neighborhood, would effectively concentrate all trading profits in B. The analysis that follows presents the rules without discussing enforcement realities, but such complications matter for the actual implications of a rule.

1. Research

Information is often costly to produce. A trader may need to conduct new observational research or devote themselves to analyzing existing observations. This research costs money. But the costs are not always the same. Some information is necessarily expensive to produce: Launching satellites to photograph parking lots (to observe customer shopping behavior) is ridiculously expensive. Other information is cheap to produce. An executive will be handed marketing data from a subordinate, so that she can decide whether to renew the corporation's marketing strategy. From the executive's point of view, this marketing data is cheap to produce; she need only devote the energy to remember the data and deduce its likely impact on the stock price. The information was costly for the corporation to produce, but that cost is fairly attributable to another activity (preparing for marketing decisions). At the point that the information is redeployed for trading, it is cheap.

Insofar as information is costly to produce, it is better to concentrate all trading profits. If a trader stands to gain \$200,000 in trading profits, she will spend up to \$200,000 in generating information. If her trading profits are limited to \$100,000, she will spend no more than \$100,000 on research. If insights in this domain routinely cost more than that—if the field is one where satellites make a difference—it makes sense to devote all the trading profits to a diligent researcher. That way, no cost-justified research strategies go unaddressed.

If profits are capped, the most expensive research will not be undertaken. Instead, many different traders will compete against each other to claim the small profits available for cheap research. The misallocation leads to wasteful duplication of only the easiest research.

When research costs are low, it makes sense to let more traders profit by spreading out the profits more broadly. If most insights cost only \$90,000 to produce, we grossly overcompensate traders by letting them take \$200,000 as their reward. Capping profits at \$100,000 is sufficient to encourage the useful informed trade. And spreading things out has the added benefit of generating additional insights since we can afford two \$90,000 insights rather than one. Or perhaps we may sometimes come in under our \$200,000 budget, awarding \$100,000 for a single \$90,000, rather than the full \$200,000. Thus, low research costs favor profit caps.

This case is clearest where research costs are zero. If a trader learns useful information in the course of other projects, the trader needs only a tiny incentive to trade and disclose the information. Suppose there were an asset for which merely riding on the bus to work exposes one to useful insights about the asset's

future price and that each bus's different route lets its passengers observe different things.¹⁸⁷ A regime that allowed just \$100 profits per trader would encourage prompt trading by every observant bus passenger. We would quickly aggregate all the tiny observations from all over town. We would be worse off if only one observer claimed all \$200,000 and we had no incentive for all the other observers (of other information).

2. Disclosure

Informed trading is just one way for information to be disclosed and impact prices. Another way is to compel individuals to research and disclose relevant information. It only makes sense to give a strong bounty to researcher-traders if doing so is cheaper than merely obliging someone to publicly report. The cost in question is both the public cost of identifying the individual best positioned to do this research and disclosure, and the private cost of that individual performing research and losing privacy.

Sometimes, it is easy to identify an individual who knows (or could know at trivial cost) some important information, and for whom it is no serious harm to disclose it. For example, a corporation may know its total indebtedness, or it may be able to do so with little difficulty. The task merely requires looking at existing bonds, contracts, and the like and summing the figures. There is some cost to that work, though most businesses would bear that cost anyway (because this information is useful in ordinary business operations), so the marginal cost of compelled compilation is nearly zero. And it is not likely that some grave harm will result if it reveals how much it owes. The regulator can compel production of this information at a low cost, so it is less important to devote the regulatory liquidity budget to traders who find and trade on this information.

Alternatively, some information is costly to obtain without information traders. The regulator may not know who possesses (or could easily possess) this information, so they may have to expend resources in searching for the right researcher and they may wastefully impose disclosure duties on individuals who can only obtain and share information at great cost.

The regulator may also be unable to cheaply verify the veracity of the disclosures. Then the regulator must either devote substantial resources to audit disclosures or settle for information that may be inaccurate. For example, consider information about the quality of a soon-to-open restaurant. A famous chef may know material information after an informal visit to her friend, the

187. Kronman uses the bus analogy; see *supra* note 59.

restaurant's owner; the chef may learn a lot from sampling pre-opening meals. But it may be hard for a regulator to force disclosure of her subjective assessment of the business's food quality. It is too subjective: Too few people are in a good position to contradict the "expert" taste of the chef, and the regulator won't even know that an informal visit has taken place. It is conceivable that the best way to elicit this information would be to let the chef profit from her opinion.¹⁸⁸

Finally, there may be some affirmative harm associated with the disclosure. For example, suppose the contents of my diary contain embarrassing stories involving me and an identifiable world leader. Suppose these secrets indicate that an identifiable company will soon improve its earnings. We could compel disclosure of the diary, but it would harm me (and maybe destabilize world politics). The high cost here suggests that we might want the information to impact the price some other way: Perhaps I will buy the company's stock, putting upward pressure on the stock before making a partial, oblique disclosure later.

As alternative disclosure strategies become cheaper, the need to incentivize research or disclosure with trading profits falls. That tends to lower the level of the optimal budget. If we halve the number of secrets we need informed traders to find, we can approximately halve the amount we set aside as their reward.

But if we keep the liquidity budget fixed, the implications are somewhat surprising. Cheap alternative disclosure does not counsel ceilings on the profits an individual information trader can obtain. To the contrary, the possibility of cheap alternative disclosure means that we can devote trading profits to the few items of information that were not amenable to other forms of disclosure. If we can force someone to disclose most forms of information, we might wisely devote large sums to traders who generate forms of information that could not be forcibly disclosed.

Whereas if alternative forms of disclosure are costly, informed trade is the only game in town. There will be lots of important research and disclosure the law cannot cheaply compel without trading profits. This raises the optimal trading budget, but it also counsels spreading the budget more widely. We cannot spend all \$200,000 on publicizing one morsel of information when there is no plan for publicizing lots of other information.

Thus, high disclosure costs may counsel in favor of profit capping. Low disclosure costs may counsel in favor of profit spreading.

188. Of course, this example is a little bit silly. Small restaurants don't have liquid shares for the chef to buy or sell short, in part because informed traders impose too high a cost. More realistically a chef might profit from her private knowledge is to write a restaurant review, offer to join the restaurant as an investor, or charge for advice to potential investors about whether to back the restaurant.

3. Tainting

Positional traders trade in order to express a view about price trends. They will tend to profit if they are informed. Limiting information traders largely limits positional traders, for better and for worse. But positional trade is not the only type. Utility trades also matter.¹⁸⁹ They sell because they need money to live. They buy because they need to save for the future, or because they genuinely need this particular asset as some business input. Limits on utility trading impose meaningful harms without a salutary effect on liquidity.

Importantly, positional trades and utility trades are not always fully distinct. A trader may buy both because she has information predicting the asset will appreciate and because she needs the asset as a business input. A trader may sell both because she has information that the asset will depreciate and because she needs to sell all her stock for a down payment on a house. We can refer to traders with both information and non-information reasons to trade as mixed motive traders.¹⁹⁰ The law can respond to such traders in many ways, but one is to bar them from trading. When the law forbids otherwise lawful trading because of the information a trader knows, we can say that the trader has been “tainted” by the information.¹⁹¹

Insofar as traders possess mixed motives, there is an additional social cost to restricting trade. If we prevent a mixed-motive trader from trading, we both undermine price accuracy and harm that trader’s utility-trading goals. That additional “tainting” harm should make us more cautious about restricting trade.¹⁹² It should lower our liquidity budget, leading to a more liberal trading regime. With a fixed budget, however, we can also make pronouncements about the best restrictions in light of tainting. And the answer here depends on the strength of the traders’ various reasons for trading.

189. Utility traders are those who trade for reasons relating to personal utility, rather than expectations about price.

190. Andrew Verstein, *Mixed Motives Insider Trading*, 106 IOWA L. REV. 1253 (2021).

191. Andrew Verstein, *Insider Tainting: Strategic Tipping of Material, Non-Public Information*, 112 NW. U. L. REV. 725 (2018).

192. The social cost of banning trade need not be the trader’s private losses. It may be third parties who have something to lose. Imagine that Traders A and B were literally the only plausible buyers of a given asset in a given period. Perhaps the asset is stock subject to a share transfer restriction, such that it must be sold only to existing shareholders (of whom only A and B remain), or it is a commodity that would spoil if shipped further than the factory of nearby A and B. A rule that banned either trader (or both) from trading would harm their potential counterparts. Someone who wanted to sell might find no willing buyer if the buyer is legally prohibited from buying. The law would harm that frustrated seller. This social cost applies even if the constrained buyer had no non-informational reason to buy.

Most simply, if it is common that information traders have strong non-informational reasons to trade, then we should favor a rule that lets more traders trade. Then, everyone can undertake the trades they would undertake even in the absence of information, and their utility trading needs are protected. For example, suppose it were true that those best able to predict staple food prices were shoppers who often cook with such food. It would be socially costly to prevent any of those people from buying food altogether. They need it to eat! We would prefer to limit informed trading by capping the number of eggs any shopper can buy (and thus, resell for profit), while consigning no one to starvation. On the other hand, if it is rare for traders to have compelling, ulterior utility trading motives, then we can comfortably exclude some traders from trading altogether.¹⁹³ If most experts in an asset's price have no important utility reasons to trade, we can safely reach our liquidity budget by banning trade by some of those individuals.¹⁹⁴

193. We have here tacitly assumed that utility traders would tend to trade in smaller volume than information traders. That assumption is necessary to draw the inference that capping per-trader profits better supports mixed-motive traders: We imagine allowing moderate levels of informed trade, which is presumably still great enough to meet the trader's utility goals. This is a reasonable assumption if we think the utility trader is selling in order to meet ordinary liquid needs. A person who sells for that reason is satisfied with a small sale. It is only the positional trader who hopes to trade vast quantities.

There may be times, however, where we are confident that the utility trader has greater trading volume needs—perhaps so great that large utility trades are qualitatively more important than small utility trades. Imagine someone who is buying an asset necessary for a project. Small purchases may do the trader no good at all, since she doesn't have enough of the asset to complete the project. Small purchases would then be the domain of informed traders alone. The optimal informed trading budget would then permit large purchases. It would not cap trading. To balance the liquidity budget, the law would have to somehow prevent some informed traders from trading at all so that others could trade the large amounts they need. Better that some traders should fail in their utility trades than all of them.

It is for this second reason that we are looking at the cost of constraining *small* mixed motives trades. When those costs are high, we prefer a profit-capping approach. But if the cost of constraining mixed motives trades falls mostly on the large trades, we would prefer the profit concentrating approach.

194. The analysis changes only somewhat if the law is assumed to be able to regulate profits directly rather than a proxy for profits. It may seem that the law could effortlessly cap trading profits at zero for Trader B (rather than banning her from trade) while letting her continue to make her non-information based trade. Thus, the law could permit her to buy and sell shares for non-informational reasons (such as a need to obtain assets for commercial reasons and then to sell off the excess), while requiring disgorgement of any trading profits. Such a strategy is worse than it looks. A trader who must disgorge when they make profits is not going to be able to look to the government for reimbursement of their trading losses. The disgorgement rule whipsaw's the utility trader, leading her to abstain from some amount of trading.

4. Insiders and Outsiders

We now have three factors relevant to the optimal choice of informed trading regulation. It is best to cap profits when research is cheap but disclosure or tainting is costly. It is best to concentrate profits when information gathering is costly and it is cheap to force disclosure or restrain mixed-motives traders.

Figure 6. Information Trading Regulation as a Function of Costs

Concentrate Profits	Cap Profits
High Research Costs	High Disclosure & Tainting Costs

In a moment, we will apply these factors. But first, it is worth noticing that a single rule of thumb tends to predict the breakdown of factors. As a first cut to applying these factors, one can simply ask whether this is a “market for outsiders” or a “market for insiders.” That is to say, some markets cater to traders who have no significant relationship to the traded asset apart from the fact that they trade it. These are markets for outsiders. Other markets have many traders who have some relationship to the asset apart from trading it. These are markets for insiders.

For example, in a market for insiders, many of the traders will have independent sources of information; that is because they have some non-trading relationship to the asset, and that relationship will generate some information. That means research costs will often be low. By contrast, in a market for outsiders, none of the traders have any “natural” sources of information. All information acquired is acquired by the deliberate effort of traders. Thus, research costs tend to run higher in an outsider market, which makes profit concentration more important in an outsider market.

In a market for insiders, disclosure costs run high. That is because we posit information is generated and distributed among many traders. It will be costly to impose disclosure burdens on many sources of information. If millions of traders must each spend a few hours compiling their disclosures, the toll is many millions of hours.

Nor will these disclosures be especially informative. In many cases, the traders will differ in their non-trading relationship to the asset, and so the nature of their information will differ. It will be costly to standardize and render legible this diverse body of information. It will also be necessary for the regulator or information-users to expend resources verifying the truth of these disclosures.

That is because the disclosures come from individuals who are also traders. By both disclosing and trading, the trader gains an incentive to falsely disclose in order to spread whatever misinformation best supports their trading strategy. Insiders' disclosures are useless without costly auditing. It makes sense in this environment to cap (and spread) trading profits, so that individual traders have a financial incentive to voluntarily and honestly express their private knowledge—by trading on the basis of that knowledge to capture profits when prices differ from their private expectations.

By contrast, when the traders are all outsiders to the traded asset, disclosure burdens fall on those without an intrinsic conflict of interest. Those who know things about assets, and thus whom the law may force to disclose their knowledge, are not themselves traders—and so the discloser does not have an inherent conflict of interest. That lowers the risk of false reporting and the cost of monitoring and enforcement. It is also possible that the traders will all get their information from just a few sources of information. For example, if all the traders learn about a corporation from the corporation's disclosures, then the cost of disclosure runs lower: Only one source (the corporation) must go through the work of serving up information, rather than thousands or millions of traders doing it. Thus, when a market is for outsiders, disclosure costs run low. And when disclosure costs run low, it makes sense to concentrate trading profits—to incentivize production of the little information that is not amenable to mandatory disclosure.

Insider markets will be characterized by higher costs from tainting mixed-motive traders. If traders have a non-trading relationship to an asset, that means that they are not a purely positional trader. They may work for the issuer of the shares being offered, or they may consume the traded commodity as an input in their industrial process, for example. When someone has another identity besides an informed trader, restrictions on their ability to trade may harm their ability to take legitimate actions relevant to that non-trader identity. For example, a prohibition on trading while in position of material non-public information would sometimes prevent an executive from selling stock she really needed to sell for liquidity reasons, or prevent a factory from buying necessary industrial inputs. Where traders are often insiders, it often makes sense to cap and spread profits, to allow all traders some chance to achieve their non-trading objectives.

By contrast, in a market for outsiders, it usually makes sense to concentrate trading profits, even if it means some traders cannot trade at all. That is because few traders will have more than one reason to trade, so traders barred from trade lose little other than informed trading profits.

True, outsiders may have utility reasons to trade and those utility reasons may be hampered by occasional prohibitions on trading. A mutual fund that buys

shares may be prohibited from selling shares to meet shareholder redemption requirements if it discovers negative, non-public information about the stock mid-day. These costs are real, but they are not enormous. Utility traders can delay their trade a few hours or days, or they can simply disclose the information they now possess.

C. Applying These Factors

Consistent with the foregoing, securities and commodities markets have adopted different regulatory strategies because they differ in respect to these three factors. Securities concentrate profits with insider trading rules because it is cheap to force disclosure and constrain mixed-motive traders. Disclosure and constraint, however, are costly for commodities markets (though information gathering is itself much cheaper)—as a result, the position limits rule rationally limits profits in commodities informed trading. Largely consistent with these factors, securities markets are predominated by outsiders whose only tie to the asset is their investment in it. Commodities markets are insider markets, where many of the traders are also commercially tied to the asset. The following Subparts demonstrate this.

1. Research

Lots of research is cheap to produce in both securities and commodities markets. Crucial corporate information, such as planned mergers and upcoming earnings reports, are naturally generated by the corporation in the course of ordinary commercial operations. The corporation needs this information to function. The cost to deploy it for trading is trivial. If the law permits it, the corporation can easily trade on this information or authorize someone else to trade.

Most commodities information is similarly cheap to produce. Farmers observe their crops (taking notice of blight or prosperity) and automatically learn some information predictive of future prices. Food retailers plan their purchasing decisions for the year and thereby learn something about a segment of the market's demand curve. This information is partial, but it is not trivial. But to the degree it has trading value, it can be cheaply deployed to trading.

Still, the research costs will often run higher in securities. Unlike commodities, much of the valuable information in securities is costly, in that it would not be rational for non-traders to produce this information in the course of commercial operation. One type is comparative and synthetic research. A securities researcher may study dozens of companies in order to extract

comparative insights or trends. The researcher may discover that two competitors (X and Y) are both showing higher supplier costs, and thus predict bright prospects for their common supplier Z. The researcher might compare the balance sheet of three companies in order to develop a comparative judgment: Whatever firm X's prospects, they are poorer than firm Y's. This synthetic information is socially valuable: It allows us to channel resources toward Z and Y, rather than X. But the firms in question (X, Y, and Z) do not have strong incentives to generate this information. Something must subsidize this research and trading profits are a candidate.

Costly synthetic research is possible in commodities, but it is rarer. One reason is that commodity firms are more likely to have a commercial reason to generate synthetic information. If X and Y are both spending more on Z's output, Z has a strong reason to research the market for its own inputs. Z will want to plan ahead, hedge against shortfalls in access, and lock in prices. All that work lets Z trade on the input price. Z's commercial needs will make it cheaper for it to perform the comparative research.

To be sure, there are deep synthetic insights to be had in commodities markets. Spotting trends in many corporate balance sheets may help predict the future of the stock market in general, and bets on the broader market are often fashioned as commodities (S&P 500 futures). Likewise, currency and oil traders often seek abstract and comparative insights: Whatever the future of the Euro and the dollar is, a trader may think that they will tend to move together rather than separately. Whatever the future of oil prices is, a trader may think one delivery date is likely to be cheaper than another. These traders seek to aggregate information that no one commercial firm may have a reason to discover. The case for profit capping is accordingly smaller here, at least with respect to research costs. Still, other factors such as disclosure costs may tip the balance in favor of the current regime of profit capping. Little surprise that the highest profile public enforcement on insider trading in commodities has focused on oil benchmarks¹⁹⁵ and S&P 500 futures.¹⁹⁶

One more point about the social cost of research follows. Providing funds for research can even be socially harmful in commodities. What information is not possessed by a single farmer? Aggregate farming information is one good

195. *In re* Trafigura Trading LLC, CFTC No. 24-08 (June 17, 2024).

196. Hibah Yousuf, *NY Attorney General Blasts 'Insider Trading 2.0'*, CNN Bus. (Sept. 24, 2013, 3:31 PM), <https://money.cnn.com/2013/09/24/investing/schneiderman-high-frequency-trading/index.html> [<https://perma.cc/36ZX-VX3V>]; Michael Rothfeld & Brody Mullins, *Action Urged on High-Speed Traders' Early Access to Data*, WALL ST. J. (Sept. 24, 2013), <https://www.wsj.com/articles/SB10001424052702304213904579095214026152666> [<https://perma.cc/HC3L-9EY5>].

example. This information can be socially valuable. As discussed in Subpart C.2. below, much of the information that is credibly aggregated in commodities is aggregated by the government. The Department of Agriculture and the CFTC both produce reports on stockpiles and needs. Yet it is often cheaper to gather the information from the government through bribery or subterfuge. That is the plot of *Trading Places*. Providing high-powered, concentrated information sufficient to gather aggregate information is almost a prescription for corruption.

The same is less true for securities. A social cost of informed trading is the corruption would-be traders bring to the information sources.¹⁹⁷ Put bluntly, traders may bribe corporate employees for information about the employer. But corruption is nevertheless a smaller problem for securities. First, the great aggregating bodies are the traders, not some non-trading body. Second, those who aggregate in securities, such as hedge funds, are well equipped to address bribery and theft of information. They themselves are providing high powered incentives. They pay their analysts enough not to smuggle much information away. So there is some hope of holding the information without bribery. This stands in contrast to commodities, where the aggregating bodies are government agencies that cannot pay their employees well enough to predictably resist bribery.

2. Disclosure

The securities regime is characterized by fixation on disclosure. Insiders must promptly disclose all the details of their trading,¹⁹⁸ along with explanations for many of their trades.¹⁹⁹ Corporate issuers must provide periodic and interim filings, replete with hundreds of pages of information—earnings, material contracts, predictions, and risks.²⁰⁰ This is a far cry from the disclosure system of the CEA. There is some amount of mandatory disclosure in commodities markets. For example, large traders must disclose their trading positions to the CFTC.²⁰¹ This information, however, is not publicly available except in an aggregate and anonymous form.²⁰²

197. Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. REV. 928 (2014).

198. 7 U.S.C. § 16a.

199. *Id.* (providing guidance on explanatory codes). See also 7 U.S.C. § 14 (requiring large purchasers to explain their intentions).

200. See generally STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION, CASES AND ANALYSIS* 193–235 (6th ed. 2024).

201. *Large Trader Reporting Program*, CFTC <https://www.cftc.gov/IndustryOversight/MarketSurveillance/LargeTraderReportingProgram/index.htm> [<https://perma.cc/L9PN-ZYKN>]; 17 C.F.R. § 15.01 (2024).

202. Section 8 of the CEA. 7 U.S.C. § 12 (2015).

The different levels of mandatory disclosure reflect the different costs of mandatory disclosure. It is easier to mandate disclosure in securities markets, so more information disclosure can be achieved through that mechanism. By contrast, almost none of the useful commodities information can be cheaply produced by mandate. If the law is to coax this information out of private hands, it must pay for it. And informed trading will often be the cheapest way.

Corporate information is not excessively burdensome to disclose. The corporation already produces and packages this information for widespread consumption. Its executives must comprehend earnings trends to strategize. Its line employees must learn about a merger so that they can cooperate with their new, future coworkers. Forcing the corporation to disclose this information is only a marginal increase in effort. And that effort is only born by a few reporting companies. Microsoft is the best source of information about Microsoft, so nearly all the Microsoft corporate information can be disclosed by a mandate upon a single, well-capitalized corporation. There is no need to demand disclosures from, say, every Microsoft customer, so the overall compliance cost is reasonable.

And the quality of the output is likely to be high. All corporations fret over earnings and the like, and earnings accounting is sufficiently standardized that all firms can report theirs in similar ways.²⁰³ That means that when Microsoft reports their earnings, it is easy for third parties to understand and compare those results. Likewise, it is somewhat easy for regulators to tell whether Microsoft has complied with this mandate. Microsoft will have earnings every quarter, so it cannot leave the entry blank and imply that it has none. Its answer will be numerical and falsifiable. It can be cost-effective to task auditors with checking.

All of this means that the category of “corporate” information is amenable to public disclosure and need not be the subject of informed trading.²⁰⁴ The informed trading budget can be devoted to other forms of information, such as comparative information generated by market analysts at hedge funds and investment banks.

203. To be sure, accounting and information diversity is possible. The US and Europe have settled on distinct accounting systems. And some companies, such as Airbnb, have explored radically different reporting practices. But such diversity is optional, not inevitable. Corporations naturally generate similar forms of information and can render that information commensurable and public if required to do so.

204. Insights arising from comparing companies is not amenable to public disclosure. First, the administrative burden from mandating disclosure of such information would be great, if only because of the number of individuals subject to it. Many millions of people (and many thousands of institutions) speculate on the value of companies. Second, there is no standardized, useful, and credible disclosure obligation that can be imposed. Individuals would find it easy to withhold their comparative information about firms, or to disclose it in a way that nobody else could use it. It is not feasible to replace informed trading in comparative information (for example) with mandatory disclosure.

While much of corporate information is amenable to public disclosure, the same cannot be said for commodities. The heart of the matter is that there is no important subcategory akin to “corporate information” for commodities. Many types of information bear on commodities prices. The information is produced not by one firm, but by millions of individuals and firms. Every driller, shipper, and refiner has information material to the future price of oil (as do upstream suppliers of equipment and downstream customers).

Part of the problem arises from that numerosity. One could require every farmer to disclose their expected crop yields, but such a mandate would be burdensome, falling on many small firms.²⁰⁵ Even small disclosure burdens become costly when borne by millions of filers.²⁰⁶

In any case, this widespread cost would achieve little value. Many commodities traders possess information that is hard to detect, falsify, and use. A trader could withhold their best information, confident that no one will be able to prove that they were strategically silent. Who can prove that a farmer really thought that her crop looked limp (subtly predicting scarcity and higher commodity prices)? Even if the trader truthfully disclosed what she knows, there is no way to standardize this information in a way that is systemic and legible for third parties. No standardized form can be designed that calls for all the various and sundry facts that lead commodity producers and consumers to predict future market conditions. Or, if there is a standardized form, it is the commodities futures contract. That instrument equates all information, eliciting knowledgeable individuals to translate their private knowledge into the legible form of a bet.

The basic intuition that it is costly to force commercial actors to disclose their private knowledge about supply and demand, but that prices do the same work cheaply, is associated with economist Friedrich Hayek.

[A] little reflection will show that there is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of the particular circumstances of time and place. It is with respect to this that practically every individual has some advantage over all others in that he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions

205. Indeed, since everyone is a commodities producer or consumer, it is literally impossible for society to bear the compliance cost and some line would have to be drawn.

206. Cf. Demian Brady, *6.5 Billion Hours, \$260 Billion: What Tax Complexity Costs Americans*, NAT'L TAXPAYERS UNION FOUND. (Apr. 17, 2023), <https://www.ntu.org/foundation/detail/65-billion-hours-260-billion-what-tax-complexity-costs-for-americans> [https://perma.cc/ZT65-N23E] (estimating cost of annual income tax compliance as \$364 billion).

depending on it are left to him or are made with his active cooperation.²⁰⁷

Hayek, of course, won the Nobel Prize for explaining the importance of trading to price discovery and efficient economic conduct. His arguments are often cited as reasons to allow informed trading in securities, but his memorable example was about commodities.

Assume that somewhere in the world, a new opportunity for the use of some raw material, say tin, has arisen, or that one of the sources of supply of tin has been eliminated. It does not matter for our purpose – and it is very significant that it does not matter – which of these two causes has made tin more scarce. All that the users of tin need to know is that some of the tin they used to consume is now more profitably employed somewhere, and that in consequence they must economize tin. There is no need for the great majority of them to even know where the more urgent need has arisen, or in favor of what other needs they ought to husband the supply. If only some of them know directly of the new demand, and switch resources over to it, and if the people who are aware of the new gap thus created in turn fill it from still other sources, the effect will rapidly spread throughout the whole economic system and influence not only all the uses of tin, but also those of its substitutes and the substitutes of these substitutes, the supply of all things made of tin, and their substitutes, and so on; and all this without the great majority of those instrumental in bringing about these substitutions knowing anything at all about the original cause of these changes.²⁰⁸

For Hayek, commodities are the quintessential item for which mandatory disclosure is infeasible and yet private use, by trade and conduct, rationally adjusts prices, distribution, production, and consumption. The crucial idea for our purposes is that it is costly to stop someone from trading altogether since one cannot otherwise force disclosure of their private knowledge. But there may be little harm to capping how much they can profit from their trades, since any profits at all are in some sense a windfall. They will trade if they merely profit enough to cover the cost of trading.

3. Tainting

Some informed traders are also utility traders with non-speculative reasons to trade. If their exposure to information constrains their ability to trade, more is

207. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521–22 (1945).

208. *Id.* at 526.

lost than price accuracy. The frustrated objectives of the trader qua utility trader constitute a loss in themselves and may have downstream harms for others. This effect is plainly more compelling for commodities than securities. This means that, in general, it is safe to economize on the liquidity budget by barring some securities traders from trading. But similar prohibitions on some commodities traders could disproportionately inhibit utility trading. It is better to cap trading profits (as regulators do) than ban some commodities traders altogether.

There are some costs to tainting securities utility trading: If executives cannot trade when they know their company's prospects, the life of executives becomes more difficult. Talented individuals may avoid those jobs or take them only without incentive-aligning stock-based compensation.²⁰⁹ And the public may suffer in that they will have fewer counterparties to trade with. Executive traders may deliberately avoid learning information that might "taint" their ability to consummate planned trades.²¹⁰ Yet these costs are plainly acceptable.

After all, executives can plan ahead to prevent inconvenience by trading (or establishing trading plans) when they do not have information.²¹¹ And executives are a tiny portion of traders; there are plenty of counterparties if they are gone from the market. Moreover, allowing informed trading by executives could undermine their incentives—they might, for example, delay information disclosure to trade on it. It is plainly feasible for securities markets to efficiently operate even if some insiders are barred from trading while in possession of material, non-public information; it is often healthier for it.

Although securities markets can tolerate limits on who can trade, they cannot tolerate limits on how much someone can trade. Position caps are inconceivable for securities. Extremely high levels of ownership are not just part of a trading strategy to exploit information—they are also part of the market for corporate control. Activist investors must sometimes buy large quantities of stock to exert control over corporate executives.²¹² A rule that capped trading at 40 or 5 percent of the stock, in order to limit insider trading profits, would render all corporations functionally entrenched.²¹³

209. Jesse M. Fried, *Insider Abstention*, 113 YALE L.J. 455 (2003).

210. Verstein, *supra* note 20, at 784.

211. They are permitted to implement 10b5-1(c) trading plans. These plans permit them to trade even when in position of material non-public information, so long as the plan predates possession.

212. Activism and corporate takeovers are controversial topics. But few will doubt the notion that it is sometimes valuable that directors be accountable to shareholder pressure.

213. See Jason S. Oh & Andrew Verstein, *A Theory of the REIT*, 133 YALE L.J. 755 (2024) (explaining how ownership caps entrench REIT management).

Commodities are different from securities. It is infeasible to altogether ban some category of informed traders because the social cost of barring any informed trader is often quite high. That is because informed traders often become informed by virtue of their business, but those with business related commodity needs are a vital part of the commodity market. Imagine banning farmers from trading when they learn (from their farm) something material to future commodity movements. The market would be much less liquid, since potentially informed traders are the backbone of the market. And those traders would be worse off than if they knew nothing—they would be unable to engage in hedges when they need to do so.

It is far better to let commodities traders trade no matter what, but with limits on how much they can make in informed trading profits. Here, it is worth remembering that speculative position limits law is a law limiting *speculative* positions. Bona fide hedgers and those with genuine commercial need for commodities are not barred from trading under the CFTC's rules. Rather, caps only limit trades that are ultimately motivated by expected price movements. This plainly protects utility trading and permits "tainted" traders to complete their otherwise innocent trades.

VI. CONCLUSION

Insider trading law and policy have been extensively studied and debated. The best rationale for regulating insider trading is the trading markets rationale, which emphasizes the tradeoff between price accuracy and liquidity. Insider trading law is fine-tuned to calibrate this tradeoff.

The trading markets rationale has proven terrifically persuasive in the analysis of securities law. Its chief weakness has been its strength. If addressing the liquidity/accuracy tradeoff is the guiding principle of market regulation, what limiting principle bounds its insights to securities markets? In other words, why don't insider trading laws extend to commodities markets?

Notice that these questions did not arise with great urgency under the traditional rationales. For example, many scholars think there is a great betrayal when an executive uses her position of trust to trade against the very investors who, in some sense, placed her in that office. Few see similar problems in commodities markets. When someone sells corn futures, that person probably has no special relationship to the farmer, miller, or financial speculator on the other side of the trade.

By contrast, the trading markets rationale for insider trading law abstracts away from any such relationship. It asks principally whether an asset's liquidity

and accuracy are both of social significance and how they interact. It applies when we care about both values and recognize the tension between them. This outlook seems to apply to stocks and bonds just as much as to corn and crypto. So, should we have insider trading laws for corn and crypto?

Some have thought so.²¹⁴ Some scholars have advocated for the expansion of insider trading law to cover much or all of the commodities derivatives;²¹⁵ insider trading law's domain has expanded accordingly.

Still, most securities scholars are skeptical that insider trading law should expand.²¹⁶ Even microstructure scholars have shied away from this implication. Implicit in their argument is that something about commodities makes them a poor fit for insider trading regulation, though I am not aware of any microstructure account explaining that poor fit.²¹⁷

This Article vindicated the sense that insider trading law should not fully extend to commodities, without rejecting the microstructure approach or leading into overdrawn generalities about how commodities differ from securities. The basic story is that commodities are subject to other laws that do similar work to insider trading law. Given that an alternative regulatory regime already exists, robust insider trading law would prove superfluous. Furthermore, this alternative regime is an overall better fit for its market. Insider trading law is mostly bounded in the right spot.

Although the most direct policy implications of this study are modest—keep doing what we have done—the investigation was not unimportant. For one thing, until quite recently, the trend was toward greater enforcement of insider

214. Andrew Verstein, *Crypto Assets and Insider Trading Law's Domain*, 105 IOWA L. REV. 1, 6 (2019); Verstein, *supra* note 5.

215. Verstein, *supra* note 5.

216. See, e.g., Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 328–29 (1979) (arguing that securities' insider trading restrictions “need not extend” to “other markets . . . commodities or services”); James J. Park, *Insider Trading and the Integrity of Mandatory Disclosure*, 2018 WIS. L. REV., 1133, 1178; Mihailis E. Diamantis, *The Light Touch of Caveat Emptor in Crypto's Wild West*, 104 IOWA L. REV. ONLINE 113, 114 (2020); John P. Anderson, *Insider Trading and Cryptoassets: The Waters Just Got Muddier*, 104 IOWA L. REV. ONLINE 120, 123, 128 (2020).

217. To be sure, many arguments have been offered for keeping insider trading law away from commodities markets. These arguments, however, rely on generalizations that are plainly false for at least some commodities. For example, it may be true that insider trading restrictions could sometimes prevent farmers from selling their crops (a result at odds with folksy common sense), but such a worry cannot explain the absence of insider trading restrictions on S&P 500 futures. And even for farmers, this objection is, at best, a side constraint on the main contribution of the microstructure theory: that the presumptive case should be in favor of informed trading restrictions of some kind.

trading rules in commodities markets, including in the nascent realms of cryptocurrencies and other digital assets.²¹⁸

More importantly, this Article should revive new interest in regulatory cartography. The United States is peculiar in its multiplicity of regulators and regulatory regimes. Other nations do not cleave their trading market regulation into two halves, as we have done for the SEC and the CFTC—to say nothing of our dozens of banking regulators.²¹⁹

American regulatory fragmentation is sometimes defended as permitting regulators to build expertise in a particular domain, but it is more often criticized as a source of needless complexity and unintended loopholes.²²⁰ Even those without a strong opinion about the merits of regulatory fragmentation may still worry about the regulation of particular assets. Should crypto assets be regulated by the SEC and subject to securities-type rules, or should the CFTC and its rules govern, or both, or neither?²²¹

This Article's method gives us better purchase on such debates. The central lessons are that the core functions of market regulation are universal, but that they are amenable to multiple implementation strategies. Good regulatory theorists spot functional substitutes. Good regulatory architects pick the tools best suited to the asset and market.

This Article practiced this method for insider trading and position limits, but apparent regulatory differences abound. For example, commodities markets

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218. Press Release, U.S. Attorney's Office, Southern District of New York, Former Employee of NFT Marketplace Sentenced to Prison in First-Ever Digital Asset Insider Trading Scheme (Aug. 22, 2023), <https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-sentenced-prison-first-ever-digital-asset-insider> [<https://perma.cc/QB39-E8BY>]. That tide has now turned toward a period of regulatory quiescence and accommodation. Angel Au-Yeung, Eliza Collins & Meredith McGraw, *Trump's Washington Embraces Crypto with Meme Coins and Black-Tie Galas*, WALL ST. J. (Feb. 2, 2025 9:00 AM), <https://www.wsj.com/politics/policy/trump-embrace-crypto-industry-48445999?> [<https://perma.cc/65F8-9BBJ>].
 219. Julie L. Stackhouse, *Why Are There So Many Bank Regulators?*, FED. RSRV. BANK OF ST. LOUIS (Apr. 24, 2017), <https://www.stlouisfed.org/on-the-economy/2017/april/why-many-bank-regulators> [<https://perma.cc/J2K5-822P>]; MARC LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2023).
 220. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010); *Where Were the Watchdogs? The Financial Crisis and the Breakdown of Financial Governance Before the Senate Comm. on Homeland Sec. & Governmental Affs.*, 111th Cong. (2009) (testimony of Howell E. Jackson, Professor of Law, Harv. U.); *Where Were the Watchdogs? The Financial Crisis and the Breakdown of Financial Governance Before the Senate Comm. on Homeland Sec. and Governmental Affs.*, 111th Cong. (2009) (testimony of Steven M. Davidoff, Professor of Law, Univ. of Conn.)
 221. See generally Verstein, *supra* note 214, at 17–59.

have long prohibited brazen market manipulation;²²² securities markets have not.²²³ Commodities regulators have traditionally practiced a form of merit-based review, reserving the right to prohibit assets from trade because the regulator deems them to be bad; securities regulators permit bad securities so long as disclosure is proper.²²⁴

These appear to be stark differences. Yet are they more similar at the level of functional output? How do regulatory structures work as systems to overcome their seeming gaps and deficiencies? Despite long study, much remains undertheorized. Even after decades of scholarly effort, we have surely not reached the limits of speculation.

222. See Rosa M. Abrantes-Metz, Gabriel Rauterberg & Andrew Verstein, *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 369–70, 391–94 (2013) (describing the CFTC’s traditional four-part test, and recent changes to the law).

223. Securities laws prohibit market manipulation when it is a form of fraud, but non-fraudulent market manipulation has had only a tenuous status in securities law. See Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215, 252, 263 (passages on open market manipulation).

224. See Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 WASH. U. L. REV. 63, 66 n.8, 101 (2012); accord Eric A. Posner & E. Glen Weyl, *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets*, 107 NW. U. L. REV. 1307, 1357 (2013).