

PART 190—BANKRUPTCY RULES

Authority: 7 U.S.C. 1a, 2, 6c, 6d, 6g, 7a-1, 12, 12a, 19, and 24 and 11 U.S.C. 362, 546, 548, 556, and 761-767, unless otherwise noted.

Subpart A—General Provisions

§ 190.00 Statutory authority, organization, core principles, scope, and construction.

(a) *Statutory authority.* The Commission has adopted the regulations in this part pursuant to its authority under section 20 of the Act, which provides that the Commission may, notwithstanding title 11 of the United States Code, adopt certain rules or regulations governing a proceeding involving a commodity broker that is a debtor under subchapter IV of chapter 7 of the Bankruptcy Code. Specifically, the Commission is authorized to adopt rules or regulations specifying (1) that certain cash, securities or other property, or commodity contracts, are to be included in or excluded from customer property or member property; (2) that certain cash, securities or other property, or commodity contracts, are to be specifically identifiable to a particular customer in a particular capacity; (3) the method by which the business of the commodity broker is to be conducted or liquidated after the date of the filing of the petition under chapter 7 of the Bankruptcy Code, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation; (4) any persons to which customer property and commodity contracts may be transferred under section 766 of the Bankruptcy Code; and (5) how a customer's net equity is to be determined.

(b) *Organization.* This part is organized into three subparts. Subpart A contains general provisions applicable in all cases. Subpart B contains provisions that apply when the debtor is a futures commission merchant (i.e., it is registered or required to be registered as a futures commission merchant, excluding a person that is "notice-registered" as a futures commission merchant pursuant to section 4f(a)(2) of the Act). Subpart C contains provisions that apply when the debtor is registered as a derivatives clearing organization under the Act.

(c) *Core principles.* The regulations in this part reflect several core principles. The following descriptions of core principles in this § 190.00(c) are subject to the further specific requirements set forth in this part, and the specific requirements in this part should be interpreted and applied consistently with these core principles.

(1) *Commodity brokers and commodity contracts.* Subchapter IV of chapter 7 of the Bankruptcy Code applies to a debtor that is a commodity broker, against which a customer holds a "net equity" claim relating to a commodity contract. This part is limited to a commodity broker that is a futures commission merchant or that is registered as a derivatives clearing organization under the Act, with respect to commodity contracts that are cleared by a clearing organization or a foreign clearing organization.

(2) *Account classes.* The Act and Commission regulations provide differing treatment and protections for different types of cleared commodity contracts. This part establishes three account classes that correspond to the different types of accounts that futures commission

merchants and clearing organizations are required to maintain under Commission regulations, specifically, the futures account class (including options on futures), the foreign futures account class (including options on foreign futures) and the cleared swaps account class (including options other than options on futures or foreign futures). This part also establishes a fourth account class, the delivery account class (which may be further subdivided as provided in this part), for property held in an account designated within the books and records of the debtor as a delivery account, for effecting delivery under commodity contracts whose terms require settlement via delivery when the commodity contract is held to expiration or, in the case of an option on a commodity, is exercised.

(3) *Public customers and non-public customers; Commission segregation requirements; member property.*

(i) This part prescribes separate treatment of public customers and non-public customers (as defined in § 190.01(ll) and § 190.01(ff), respectively) within each account class in the event of a proceeding under this part in which the debtor is a futures commission merchant. Public customers of a debtor futures commission merchant are entitled to a priority in the distribution of cash, securities or other customer property over non-public customers. The cash, securities or other property held on behalf of the public customers of a futures commission merchant in the futures, foreign futures or cleared swaps account classes are subject to special segregation requirements imposed under Commission regulations for each account class. Although such segregation requirements generally are not applicable to cash, securities or other property received from or reflected in the futures, foreign futures or cleared swaps accounts of non-public customers of a futures commission merchant, such transactions and property are customer property within the scope of this part. Commission regulations also do not impose special segregation requirements with respect to treatment of cash, securities or other property of public customers carried in a delivery account, but the distinction between public and non-public customers is nonetheless relevant for the purpose of making distributions to delivery account class customers pursuant to this part.

(ii) In the event of a proceeding under this part in which the debtor is a clearing organization, the classification of customers as public customers or non-public customers also is relevant, in that each member of the clearing organization will have separate claims against the clearing organization (by account class) with respect to (A) commodity contract transactions cleared for its own account or on behalf of any of its non-public customers (which are cleared in a house account at the clearing organization), and (B) commodity contract transaction cleared on behalf of any public customers of the clearing member (which are cleared in an account at the clearing organization that is separate and distinct from the house account). The term member property (as defined in § 190.18) is used to identify the cash, securities or property available to pay the net equity claims of clearing members based on their house account at the clearing organization.

(4) *Porting of public customer commodity contract positions.* In a proceeding in which the debtor is a futures commission merchant, this part sets out a policy preference for transferring, or porting, open commodity contract positions of the debtor's public customers along with such customers' account equity, to another futures commission merchant. To

facilitate porting, this part addresses the manner in which the debtor's business is to be conducted on and after the filing date, with specific provisions addressing the collection and payment of margin for open commodity contract positions prior to porting.

(5) *Pro rata distribution.* As a general matter, if there is a shortfall in the cash, securities or other property in a particular account class needed to satisfy the net equity claims of public customers in that account class, the customer property in that account class will be distributed pro rata to those public customers. Any customer property not attributable to a specific account class, or that exceeds the amount needed to pay allowed customer net equity claims in a particular account class, will be distributed to public customers in other account classes so long as there is a shortfall in those other classes. Non-public customers will not receive any distribution of customer property so long as there is any shortfall, in any account class, of customer property needed to satisfy public customer net equity claims.

(6) *Deliveries.*

(i) Commodity contracts may have terms that require a customer owning the contract (A) to make or take delivery of the underlying commodity if the customer holds the contract to a delivery position or, (B) in the case of an option on a commodity, (1) to make delivery upon exercise (as the buyer of a put option or seller of a call option) or (2) to take delivery upon exercise (as seller of a put option or buyer of a call option). Depending upon the circumstances and relevant market, delivery may be effected via a delivery account, a futures account, a foreign futures account or a cleared swaps account, or, when the commodity subject to delivery is a security, in a securities account (in which case property associated with the delivery held in a securities account is not part of any customer account class for purposes of this part).

(ii) Although commodity contracts with delivery obligations are typically offset prior to triggering bilateral delivery obligations, when delivery obligations arise, a delivery default could have a disruptive effect on the cash market for the commodity and adversely impact the parties to the transaction. This part therefore sets out special provisions to address open commodity contracts that are settled by delivery, when those positions are nearing or have entered into a delivery position at the time of or after the filing date. The delivery provisions in this part are intended to allow deliveries to be completed in accordance with the rules and established practices for the relevant commodity contract market or clearing organization, as applicable and to the extent permitted under this part.

(iii) In a proceeding in which the debtor is a futures commission merchant, the delivery provisions in this part reflect policy preferences to liquidate commodity contracts that settle via delivery before they move into a delivery position, or when such contracts are in a delivery position, where practicable, to allow delivery to occur outside administration of the debtor's estate.

(iv) The delivery provisions in this part apply to any commodity that is subject to delivery under a commodity contract, as the term commodity is defined in section of 1a(9) of the Act, including agricultural commodities as defined in § 1.3(zz) of this

chapter, other non-financial commodities (such as metals or energy commodities) covered by the definition of exempt commodity in section 1a(20) of the Act, and commodities that are financial in nature (such as foreign currencies) covered by the definition of excluded commodity in section 1a(19) of the Act.

(d) *Scope.*

(1) *Proceedings.*

(i) *Certain commodity broker proceedings under subchapter IV of chapter 7 of the Bankruptcy Code.*

(A) This part applies to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code with respect to a commodity broker that is (1) registered or required to be registered as a futures commission merchant under the Act or (2) registered as a derivatives clearing organization under the Act.

(B) Section 101(6) of the Bankruptcy Code recognizes “futures commission merchants” and “foreign futures commission merchants,” as those terms are defined in section 761(12) of the Bankruptcy Code, as separate categories of commodity broker. The definition of commodity broker in § 190.01 of this part, as it applies to a commodity broker that is registered or required to register as a futures commission merchant under the Act, covers both because a foreign futures commission merchant is required to register as a futures commission merchant under the Act.

(C) Section 101(6) of the Bankruptcy Code recognizes “leverage transaction merchants” and “commodity options dealers,” as defined in section 761(12) of the Bankruptcy Code, as separate categories of commodity brokers. This part does not prescribe special rules applicable to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code with respect to a commodity broker that is a leverage transaction merchant or a commodity option dealer.

(ii) *Futures commission merchants subject to a SIPA proceeding.* Pursuant to section 7(b) of SIPA, the trustee in a SIPA proceeding has the same duties as a trustee in a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code when the debtor also is a commodity broker, to the extent consistent with the provisions of SIPA or as otherwise ordered by the court. This part therefore also applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under the Exchange Act when the debtor also is registered or required to be registered as a futures commission merchant.

(iii) *Commodity brokers subject to an FDIC proceeding.* Section 5390(m)(1)(B) of title 12 of the United States Code provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code in respect of the distribution of customer property and member property in connection with the liquidation of a covered financial company or a bridge financial company (as those terms are defined in section

5381(a) of title 12) that is a commodity broker as if such person were a debtor for purposes of subchapter IV, except as specifically provided in section 5390 of title 12. This part therefore may serve as guidance as to such distribution of property in a proceeding in which the FDIC is acting as a receiver pursuant to Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act with respect to a covered financial company or bridge financial company that is a commodity broker whose liquidation otherwise would be administered by a trustee under subchapter IV of chapter 7 of the Bankruptcy Code.

(2) Account class and trust account limitations.

(i) The trustee may not recognize any account class that is not one of the account classes enumerated in § 190.01 of this part.

(ii) Absent extraordinary circumstances and upon application by the trustee (such as to address transfers of funds initiated prior to, but completed after, the entry of the order for relief), so long as there is any shortfall of customer property needed to satisfy customer net equity claims in the classes enumerated in § 190.01 of this part, no person is entitled to a distribution of any property in which the debtor holds any interest on the basis that the debtor holds such property in a “constructive trust” for such person. The foregoing does not restrict any rights a person may have to distribution of property held by the debtor that is not covered by an account class on a “custodial” or express trust basis pursuant to statute, governmental rule, regulation or order, or legally binding written agreement between the debtor and such person.

(3) Commodity contract exclusions.

(i) For purposes of this part, the term commodity contract in § 190.01 does not include (A) options on commodities (including swaps subject to regulation under part 32 of this chapter) that are not centrally cleared by a clearing organization or foreign clearing organization; (B) transactions, contracts or agreements that are classified as “forward contracts” under the Act pursuant to the exclusion from the term “future delivery” set out in section 1a(27) of the Act or the exclusion from the definition of a “swap” under section 1a(47)(B)(ii) of the Act, in each case that are not centrally cleared by a clearing organization or foreign clearing organization; or (C) security futures products as defined in section 1a(45) of the Act when such products are held in a securities account; or (D) contracts, agreements or transactions that are subject to regulation under part 31 as leverage transactions. This part applies to options, forward contracts under the Act and security futures products only if they are carried in an account for which there is a corresponding account class under this part.

(ii) For avoidance of doubt, the term commodity contract does not include (A) any retail foreign exchange transaction, contract or agreement described in sections 2(c)(2)(B) or (C) of the Act; or (B) any security-based swap or other security (as defined in Section 3 of the Exchange Act) other than a security futures product that is carried in an account for which there is a corresponding account class under this part.

(iii) The term commodity contract does not include any retail commodity transaction, contract or agreement described in section 2(c)(2)(D) of the Act, unless such transaction, contract or agreement is traded on or subject to the rules of a designated contract market or foreign board of trade as, or as if, such transaction, contract or agreement is a futures contract.

(e) *Construction.*

(1) A reference in this part to a specific section of a federal statute or specific regulation refers to such section or regulation as the same may be amended, superseded or renumbered.

(2) Where they differ, the definitions set forth in § 190.01 shall be used instead of defined terms set forth in section 761 of the Bankruptcy Code. Notwithstanding the use of different defined terms, the regulations in this part are intended to be consistent with the provisions and objectives of subchapter IV of title 7 of the Bankruptcy Code.

§ 190.01. Definitions.

For purposes of this part:

(a)(1) *Account class* means one or more of each of the following types of account maintained by a futures commission merchant or clearing organization (as applicable), each type of which must be recognized as a separate account class by the trustee:

(i) *Futures account* means:

(A) An account maintained on the books and records of a futures commission merchant for the purpose of accounting for a person's transactions in futures or options on futures contracts executed on or subject to the rules of a designated contract market registered under the Act (and related cash, securities or other property), including an account maintained for a public customer and thus subject to the segregation requirements of section 4d(a) of the Act and Commission regulations thereunder, including §§ 1.20—1.30 of this chapter; and

(B) An account maintained on the books and records of a clearing organization for the purpose of accounting for transactions in futures or options on futures contracts cleared or settled by the clearing organization for a member (and related cash, securities or other property), including an account maintained by a clearing organization for a member on behalf of its public customers.

(ii) *Foreign futures account* means:

(A) An account maintained on the books and records of a futures commission merchant for the purpose of accounting for a person's transactions in futures or options on futures contracts executed on or subject to the rules of a foreign board of trade (and related cash, securities or other property), including an account maintained for a public customer and thus subject to the segregation requirements of § 30.7 of this chapter; and

(B) An account maintained on the books and records of a clearing organization for the purpose of accounting for transactions in futures or options on futures contracts executed on or subject to the rules of a foreign board of trade, cleared or settled by the clearing organization for a member (and related cash, securities or other property), including an account maintained by a clearing organization for a member on behalf of its public customers.

(iii) *Cleared swaps account* means:

(A) An account maintained on the books and records of a futures commission merchant for the purpose of accounting for a person's transactions in swaps (as defined in § 190.01(ss) of this part) (and related cash, securities or other property), including an account maintained for a public customer and thus subject to the segregation requirements of section 4d(f) of the Act and the regulations in part 22 of this chapter; and

(B) An account maintained on the books and records of a clearing organization for the purpose of accounting for transactions in swaps (as defined in § 190.01(ss) of this part) (or in other contracts permitted to be cleared in the account) cleared or settled by the clearing organization for a member (including any property related thereto), including an account maintained by the clearing organization for a member on behalf of its public customers.

(iv)(A) *Delivery account* means:

(1) An account maintained on the books and records of a futures commission merchant for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity, and which is designated as a delivery account on the books and records of the futures commission merchant; and

(2) An account maintained on the books and records of a clearing organization for a clearing member (or a customer of a clearing member) for the purpose of accounting for the making or taking of delivery under commodity contracts whose terms require settlement by delivery of a commodity, as well as any account in which the clearing organization holds physical delivery property represented by electronic title documents or otherwise existing in an electronic (dematerialized) form in its capacity as a central depository, in each case where the account is designated as a delivery account on the books and the records of the clearing organization.

(B) The delivery account class is further divided into a "physical delivery account class" and a "cash delivery account class," as provided in § 190.06(b) of this part, each of which must be recognized as a separate class of account by the trustee.

(2) If open commodity contracts that would otherwise be attributable to one account class (and any property margining, guaranteeing, securing or accruing in respect of such commodity contracts) are, pursuant to a Commission rule, regulation, or order, or a clearing organization rule approved in accordance with § 39.15(b)(2) of this chapter, held separately from other commodity contracts and property in that account class and are commingled with the commodity contracts and property of another account class, then the trustee must treat the former commodity contracts (and any property margining, guaranteeing, securing or accruing in respect of such commodity contracts), for purposes of this part, as being held in an account of the latter account class.

(3) A commodity broker is considered to maintain an account for another person by establishing internal books and records in which it records the person's commodity contracts and cash, securities or other property received from or on behalf of such person or accruing to the credit of such person's account, and related activity (such as liquidation of commodity contract positions or adjustments to reflect mark-to-market gains or losses on commodity contract positions), regardless whether the commodity broker has kept such books and records current or accurate.

(b) *Act* means the Commodity Exchange Act.

(c) *Allowed net equity* means, for purposes of subpart B, the amount calculated as allowed net equity in accordance with § 190.08(a), and for purposes of subpart C, the amount calculated as allowed net equity in accordance with § 190.17(c).

(d) *Bankruptcy Code* means, except as the context of the regulations in this part otherwise requires, those provisions of title 11 of the United States Code relating to ordinary bankruptcies (chapters 1 through 5) and liquidations (chapter 7 with the exception of subchapters III and V), together with the federal rules of bankruptcy procedure relating thereto.

(e) *Business day* means weekdays, not including Federal holidays.

(f) *Calendar day* means the time from midnight to midnight.

(g) *Cash delivery property* means any cash or cash equivalents recorded in a delivery account that is credited to such account to pay for receipt of delivery of a commodity under a commodity contract, that is credited to such account as payment received in exchange for making delivery of a commodity under a commodity contract, or that is credited to such account as margin to secure or guarantee an obligation to make or take delivery of a commodity under a commodity contract.

(h) *Cash equivalents* means investments that are highly liquid such that they may be converted into cash within one business day without material discount in value.

(i) *Clearing organization* means a derivatives clearing organization that is registered with the Commission as such under the Act.

(j) *Commodity broker* means any person that is (1) registered or required to register as a futures commission merchant under the Act, but excludes a person that is "notice-registered" as a futures commission merchant under section 4f(a)(2) of the Act, or (2) a clearing organization, in each case with respect to which there is a "customer" as that term is defined in this section.

(k) *Commodity contract* means (1) a futures or options on futures contract executed on or subject to the rules of a designated contract market registered as such under the Act, (2) a futures or option on futures contract executed on or subject to the rules of a foreign board of trade, (3) a swap as defined in section 1a(47) of the Act and § 1.3(xxx) of this chapter, that is directly or indirectly submitted to and cleared by a clearing organization and which is thus a cleared swap as that term is defined in section 1a(7) of the Act and § 22.1 of this chapter, or (4) any other contract that is a swap for purposes of this part under the definition in § 190.01(ss). Notwithstanding the foregoing, a security futures product as defined in section 1a(45) of the Act is not a commodity contract for purposes of this part when such contract is held in a securities account.

(l) *Commodity contract account* means (1) a futures account, foreign futures account, cleared swaps account, or delivery account, or (2) if the debtor is a futures commission merchant, for purposes of identifying customer property for the foreign futures account class (subject to § 190.09(a)(1)), an account maintained for the debtor by a foreign clearing organization or a foreign broker reflecting futures or options on futures executed on or subject to the rules of a foreign board of trade, including any account maintained on behalf of the debtor's public customers.

(m) *Court* means the court having jurisdiction over the debtor's estate.

(n) *Cover* has the meaning set forth in § 1.17(j) of this chapter.

(o)(1) *Customer means:*

(i) With respect to a futures commission merchant as debtor (including a foreign futures commission merchant as that term is defined in section 761(12) of the Bankruptcy Code), the meaning set forth in sections 761(9)(A) and (B) of the Bankruptcy Code.

(ii) With respect to a clearing organization as debtor, the meaning set forth in section 761(9)(D) of the Bankruptcy Code.

(2) The term customer includes the owner of a portfolio cross-margining account covering commodity contracts and related positions in securities (as defined in section 3 of the Exchange Act) that is carried as a futures account or cleared swaps customer account pursuant to an appropriate rule, regulation, or order of the Commission and the Securities and Exchange Commission.

(p) *Customer claim of record* means a customer claim that is determinable solely by reference to the records of the debtor.

(q) *Customer class* means each of the following two classes of customers, which must be recognized as separate classes by the trustee: public customers and non-public customers; provided, however, that when the debtor is a clearing organization the references to public customers and non-public customers are based on the classification of customers of, and in relation to, the members of the clearing organization.

(r) *Customer property, customer estate* are used interchangeably to mean the property subject to distribution in a commodity broker bankruptcy in the priority set forth in section 766(h) of the Bankruptcy Code, and includes cash, securities, and other property as set forth in § 190.09(a).

(s) *Debtor* means a person with respect to which a proceeding is commenced under subchapter IV of chapter 7 of the Bankruptcy Code or under SIPA, provided, however, that this part applies only to such a proceeding if the debtor is a commodity broker as defined in this section.

(t) *Exchange Act* means the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78a et seq.

(u) *FDIC* means the Federal Deposit Insurance Corporation.

(v) *Filing date* means the date a petition under the Bankruptcy Code or application under SIPA commencing a proceeding is filed.

(w) *Final net equity determination date* means the latest of:

(1) The day immediately following the day on which all commodity contracts held by or for the account of customers of the debtor have been transferred, liquidated or satisfied by exercise or delivery,

(2) The day immediately following the day on which all property other than commodity contracts held for the account of customers has been transferred, returned or liquidated,

(3) The bar date for filing customer proofs of claim, or

(4) The day following the allowance or disallowance of all disputed customer net equity claims.

(x) *Foreign board of trade* means a board of trade that is located outside the United States and its territories or possessions, but excludes any such board of trade that is registered under the Act as a designated contract market.

(y) *Foreign clearing organization* means a clearing house, clearing association, clearing corporation or similar entity, facility or organization that (1) is located outside the United States, its territories or possessions, (2) is not registered as a derivatives clearing organization under the Act, and (3) clears and settles transactions in (i) futures or options on futures executed on or subject to the rules of a foreign board of trade or (ii) swaps.

(z) *Funded balance* means, for purposes of subpart B, the amount calculated as funded balance in accordance with § 190.08(c).

(aa) *Futures, futures contract* are used interchangeably to mean any contract for the purchase or sale of a commodity (as defined in section 1a(9) of the Act) for future delivery that is executed on or subject to the rules of a designated contract market registered as such under the Act or on or subject to the rules of a foreign board of trade. The term also covers, for purposes of this part, (1) any transaction, contract or agreement described in section 2(c)(2)(D) of the Act and traded

on or subject to the rules of a designated contract market or foreign board of trade, to the extent not covered by the foregoing definition, and (2) any transaction, contract or agreement that is classified as a “forward contract” under the Act pursuant to the exclusion from the term “futures delivery” set out in section 1a(27) of the Act or the exclusion from the definition of a “swap” under section 1a(47)(B)(ii) of the Act, provided that such transaction, contract or agreement is traded on or subject to the rules of a designated contract market or foreign board of trade and is cleared by a clearing organization or foreign clearing organization the same as if it were a futures contract.

(bb) *House account* means, (1) in the case of a futures commission merchant as debtor, any commodity contract account owned by the debtor, and (2) in the case of a clearing organization as debtor, any commodity contract account of a member at such clearing organization maintained to reflect trades for the member’s own account or for any non-public customer of such member.

(cc) *In-the-money* means:

(1) With respect to a call option, when the value of the underlying interest (such as a commodity or futures contract) which is the subject of the option exceeds the strike price of the option; and

(2) With respect to a put option, when the value of the underlying interest (such as a commodity or futures contract) which is the subject of the option is exceeded by the strike price of the option.

(dd) *Joint account* means any commodity contract account held by more than one person and includes any account of a commodity pool which is not a legal entity.

(ee) *Net equity* means, for purposes of subpart B, the amount calculated as net equity in accordance with § 190.08(b), and for purposes of subpart C, the amount calculated as net equity in accordance with § 190.17(b).

(ff) *Non-public customer* means:

(1) With respect to a futures commission merchant, any customer that is not a public customer, and

(2) With respect to a clearing organization, any person whose account carried on the books and records of (i) a member of the clearing organization that is a futures commission merchant, is classified as a proprietary account under § 1.3(y) of this chapter (in the case of the futures or foreign futures account class) or as a Cleared Swaps Proprietary Account under § 22.1 of this chapter (in the case of the cleared swaps account class), or (ii) a member of the clearing organization that is a foreign broker, is classified or treated as proprietary under and for purposes of the rules of the clearing organization.

(gg) *Open commodity contract* means a commodity contract which has been established in fact and which has not expired, been redeemed, been fulfilled by delivery or exercise, or been offset (i.e., liquidated) by another commodity contract.

(hh) *Order for relief* has the same meaning set forth in section 301 of the Bankruptcy Code, in the case of the filing of a voluntary bankruptcy petition, and means the entry of an order granting relief under section 303 of the Bankruptcy Code in an involuntary case.

(ii) *Person* means any individual, association, partnership, corporation, trust or other form of legal entity.

(jj) *Physical delivery property* means a commodity held in a form that can be delivered to meet and fulfill delivery obligations under a commodity contract that settles via delivery if held to a delivery position (as described in § 190.06(a)(1) of this part), including warehouse receipts, shipping certificates or other documents of title (including electronic title documents) for the commodity, or the commodity itself:

(1) That the debtor holds for the account of a customer for the purpose of making delivery of such commodity on the customer's behalf, which as of the filing date or thereafter, can be identified on the books and records of the debtor as held in a delivery account for the benefit of such customer;

(2) That the debtor holds for the account of a customer and that the customer received or acquired by taking delivery under an expired or exercised commodity contract and which, as of the filing date or thereafter, can be identified on the books and records of the debtor as held in a delivery account for the benefit of such customer, regardless how long such property has been held in such account;

(3) That the debtor holds in a futures account, foreign futures account or cleared swaps account, or, if the commodity is a security, in a securities account, provided, however, that physical delivery property held in any such account is not part of the delivery account class and any such security held in a securities account is not part of any account class recognized under this part; or

(4) That is not held by the debtor and is delivered or received by a customer in accordance with § 190.06(a)(2) (or in accordance with § 190.06(a)(2) in conjunction with § 190.16(a) if the debtor is a clearing organization) to fulfill a customer's delivery obligation under a commodity contract.

(kk) *Primary liquidation date* means the first business day immediately following the day on which all commodity contracts (including any commodity contracts that are specifically identifiable property) have been liquidated or transferred.

(ll) *Public customer* means:

(1) With respect to a futures commission merchant and in relation to:

(i) The futures account class, a futures customer as defined in § 1.3(iiii) of this chapter whose futures account is subject to the segregation requirements of section 4d(a) of the Act and Commission regulations thereunder, including as applicable §§ 1.20—1.30 of this chapter;

(ii) The foreign futures account class, a § 30.7 customer as defined in § 30.1 of this chapter whose foreign futures accounts is subject to the segregation requirements of § 30.7 of this chapter;

(iii) The cleared swaps account class, a Cleared Swaps Customer as defined in § 22.1 of this chapter whose cleared swaps account is subject to the segregation requirements of part 22 of this chapter;

(iv) The delivery account class, a customer that is or would be classified as a public customer if the property reflected in the customer's delivery account had been held in an account described in paragraph (l) (1)(i), (ii) or (iii).

(2) With respect to a foreign broker (as defined in § 1.3(xx) of this chapter) that is a member of a clearing organization, any customer of the foreign broker other than a non-public customer, for which the foreign broker clears transactions in the foreign account class through such clearing organization.

(3) With respect to any foreign broker (as defined in § 1.3(xx) of this chapter) that is a member of a clearing organization, and that is not registered and not required to register as a futures commission merchant, any customer of such member other than a non-public customer, for which the clearing member clears transactions in the futures account class or cleared swaps account class through such clearing organization.

(mm) *Securities account* means, in relation to a futures commission merchant that is registered as a broker or dealer under the Exchange Act, an account maintained by such futures commission merchant in accordance with the requirements of section 15(c)(3) of the Exchange Act and § 240.15c3-3 of this title.

(nn) *Security* has the meaning set forth in section 101(49) of the Bankruptcy Code.

(oo) *SIPA* means the Securities Investor Protection Act of 1970, 15 U.S.C. sections 78aaa et seq.

(pp)(1) *Specifically identifiable property* means:

(i) The following property received, acquired, or held by or for the account of the debtor from or for the futures account, foreign futures account or cleared swaps account of a customer:

(A) Any security which as of the filing date is:

(1) Held for the account of a customer;

(2) Registered in such customer's name;

(3) Not transferable by delivery; and

(4) Has a duration or maturity date of more than 180 days; or

(B) Any warehouse receipt, bill of lading or other document of title which as of the filing date:

(1) Can be identified on the books and records of the debtor as held for the account of a particular customer; and

(2) Is not in bearer form and is not otherwise transferable by delivery;

(ii) Any open commodity contracts treated as specifically identifiable property in accordance with § 190.03(b)(2); and

(iii) Any physical delivery property described in § 190.01(jj)(1) through (3).

(2) Except as is otherwise specified in this § 190.01(pp), no customer property may be treated as specifically identifiable property.

(3) Notwithstanding any other provision of this § 190.01(pp), security futures products, and any money, securities or property held to margin, guarantee or secure such products, or accruing as a result of such products, shall not be considered specifically identifiable property for the purposes of subchapter IV of the Bankruptcy Code or this part, if held in a securities account.

(qq) *Strike price* means the price per unit multiplied by the total number of units at which a person may purchase or sell a futures contract or a commodity or other interest underlying an option that is a commodity contract.

(rr) *Substitute Customer Property* means cash or cash equivalents delivered to the trustee by or on behalf of a customer in connection with (1) the return of specifically identifiable property by the trustee, or (2) the return of, or an agreement not to draw upon, a letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract.

(ss) *Swap* has the meaning set forth in section 1a(47) of the Act and § 1.3(xxx) of this chapter, and, in addition, for purposes of this part, means any foreign exchange forwards or forward exchange swaps as defined in sections 1a(24) and (25) of the Act, commodity options that qualify for the trade option exemption under § 32.3 of this chapter, or any other contract, agreement or transaction, provided, in each case, that it is cleared by a clearing organization or foreign clearing organization the same as if it were a swap.

(tt) *Trustee* means, as appropriate, the trustee in bankruptcy or in a SIPA proceeding appointed to administer the debtor's estate and any interim or successor trustee.

(uu) *Variation settlement* means any amount paid or collected (or to be paid or collected) on an open commodity contract relating to changes in the market value of the commodity contract since the trade was executed or the previous time the commodity contract was marked to market along with all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract.

§ 190.02 General.

(a) Notices.

(1) *To the Commission.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this part shall be directed by electronic mail to *bankruptcyfilings@cftc.gov*, with a copy sent by overnight delivery to Director, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. For purposes of this part, notice to the Commission shall be deemed to be given only upon actual receipt.

(2) *To Customers.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow reasonably designed procedures for giving notices to customers under this part and for receiving claims or other notices from customers.

(b) Request for exemption.

(1) The trustee may, for good cause shown, request from the Commission an exemption from the requirements of any procedural provision in this part, including an extension of any time limit prescribed by this part, provided that the Commission shall not grant an extension for any time period established by the Bankruptcy Code.

(2) Such a request may be made *ex parte* and by any means of communication, written or oral, provided that the trustee must confirm an oral request in writing within one business day and such confirmation must contain all the information required by paragraph (b)(3) of this section. The request or confirmation of an oral request must be given to the Commission as provided in paragraph (a) of this section.

(3) The request must state the particular provision of this part with respect to which the exemption or extension is sought, the reason for the requested exemption or extension, the amount of time sought if the request is for an extension, and the reason why such exemption or extension would not be contrary to the purposes of the Bankruptcy Code and this part.

(4) The Director of the Division of Clearing and Risk, or members of the Commission staff designated by, and acting under the direction of, the Director, shall grant, deny or otherwise respond to a request, on the basis of the information provided in any such request and after consultation with the Director of the Division of Swap Dealer and Intermediary Oversight or members of the Commission staff designated by, and acting under the direction of the Director, unless exigent circumstances require immediate action precluding such prior consultation, and shall communicate that determination by the most appropriate means to the person making the request.

(c) Delegation of authority to the Director of the Division of Clearing and Risk.

(1) Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Risk, and to such members of the Commission's staff acting under the Director's direction as they may designate, after

consultation with the Director of the Division of Swap Dealer and Intermediary Oversight, or such member of the Commission's staff under the Director's direction as they may designate, unless exigent circumstances require immediate action, all the functions of the Commission set forth in this part, except the authority to disapprove a pre-relief transfer of a public customer commodity contract account or customer property pursuant to § 190.07(e)(1).

(2) The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated to the Director pursuant to paragraph (c)(1) of this section.

(3) Nothing in this section shall prohibit the Commission, at its election, from exercising its authority delegated to the Director of the Division of Clearing and Risk under paragraph (c)(1) of this section.

(d) *Notice of court filings.* The trustee shall promptly provide the Commission with copies of any complaint, motion, or petition filed in a commodity broker bankruptcy which concerns the disposition of customer property. Court filings shall be directed to the Commission addressed as provided in paragraph (a) of this section.

Subpart B—Debtor is a Futures Commission Merchant

§ 190.03 Notices and proofs of claims.

(a) *Notices to the Commission and Designated Self-Regulatory Organizations.*

(1) *Of commencement of a proceeding.* Each commodity broker that is registered or required to register as a futures commission merchant and which files a petition in bankruptcy shall at or before the time of such filing, and each commodity broker against which such a petition is filed or with respect to which an application for a protective degree under SIPA is filed, shall immediately notify the Commission and such commodity broker's designated self-regulatory organization of the filing date, the court in which the proceeding has been filed, and the docket number assigned to that proceeding.

(2) *Of transfers under section 764(b) of the Bankruptcy Code.* As soon as possible, the trustee, or an applicable clearing organization, must notify the Commission, and in the case of a futures commission merchant shall also notify its designated self-regulatory organization, if such person intends to transfer or to apply to transfer open commodity contracts on behalf of the public customers of the debtor in accordance with section 764(b) of the Bankruptcy Code and § 190.07(c) or (d).

(b) *Notices to customers—Specifically identifiable property.*

(1) *Specifically identifiable property other than open commodity contracts.* In any case in which an order for relief has been entered, the trustee must use all reasonable efforts to promptly notify, in accordance with § 190.02(a)(2), any customer whose futures account, foreign futures account or cleared swaps account includes specifically identifiable property, other than open commodity contracts, which has not been liquidated, that such specifically identifiable property may be liquidated commencing on and after the seventh day after the order for relief (or such other date as is specified by the trustee in the notice with the approval of the Commission or court) if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of specifically identifiable property contained in § 190.09(d)(1). Such notice must describe the specifically identifiable property and specify the terms upon which that property may be returned, including if applicable any substitute customer property that must be provided by the customer.

(2) *Open commodity contracts carried in hedge accounts.* To the extent reasonably practicable under the circumstances of the case, and following consultation with the Commission, the trustee may treat open commodity contracts of public customers identified on the books and records of the debtor as held in a futures account, foreign futures account or cleared swaps account designated as a hedging account in the debtor's records, as specifically identifiable property of such customer. If the trustee does not exercise such authority, such open commodity contracts do not constitute specifically identifiable property. If the trustee exercises such authority, the trustee shall use reasonable efforts to promptly notify, in accordance with § 190.02(a)(2), each relevant public customer of such determination and request the customer to provide written instructions whether to transfer or liquidate the positions. Such notice must specify the manner for providing such instructions and the deadline by which the customer must

provide instructions. Such notice must also inform the customer that (A) if the customer does not provide instructions in the prescribed manner and by the prescribed deadline, the customer's open commodity contracts will not be treated as specifically identifiable property under this part, (B) any transfer of the open commodity contracts is subject to the terms for distribution contained in § 190.09(d)(2), (C) absent compliance with any terms imposed by the trustee or the court, the trustee may liquidate the open commodity contracts, and (D) providing instructions may not prevent the open commodity contracts from being liquidated.

(3) *Involuntary cases.* Prior to entry of an order for relief, and upon leave of the court, the trustee appointed in an involuntary proceeding may notify customers, in accordance with § 190.02(a)(2), of the commencement of such proceeding and may request customer instructions with respect to the return, liquidation or transfer of specifically identifiable property.

(c) *Notice of bankruptcy and request for proof of customer claim.* The trustee shall promptly notify, in accordance with § 190.02(a)(2), each customer that an order for relief has been entered and instruct each customer to file a proof of customer claim containing the information specified in paragraph (d) of this section. Such notice may be given separately from any notice provided in accordance with paragraph (b) of this section. The trustee shall cause the proof of customer claim form referred to in paragraph (d) of this section to set forth the bar date for its filing.

(d) *Proof of customer claim.* The trustee shall request that customers provide, to the extent reasonably possible, information sufficient to determine a customer's claim in accordance with the regulations contained in this part, including in the discretion of the trustee:

- (1) The class of commodity contract account upon which each claim is based;
- (2) The number of accounts held by each claimant, and the capacity in which they are held;
- (3) The equity as of the filing date of each account based on commodity contract transactions in that account;
- (4) Whether each account is an account of a public customer or a non-public customer;
- (5) Whether any account is a discretionary account;
- (6) A description of all claims against the debtor not based upon a commodity contract account of the claimant;
- (7) A description of all claims of the debtor against the claimant not included in the equity of a commodity contract account of the claimant;
- (8) A description of any deposits of money, securities or property with the debtor made by the claimant indicating the portion of such, if any, which was included in the information provided in paragraph (d)(3) of this section and identifying any such property which would be specifically identifiable property as defined in § 190.01;
- (9) The amount of the claimant's percentage interest in any joint account;

(10) Whether the claimant's positions in security futures products are held in a futures account, a foreign futures account or a securities account; and

(11) Copies of any documents which support the information contained in the proof of customer claim, including without limitation, customer confirmations, account statements, and statements of purchase or sale.

(e) *Proof of claim form.* A template customer proof of claim form which may (but is not required) to be used by the trustee is set forth in Appendix A to this part. In the event the trustee determines that the debtor's books and records reflecting customer transactions are not reasonably reliable, or account statements are not available from which account equity as of the date of transfer or liquidation of customer property may be determined, the proof of claim form used by the trustee should be modified to take into account the particular facts and circumstances of the case.

§ 190.04 Operation of the debtor's estate—customer property.

(a) *Transfers.*

(1) *All cases.* The trustee for a commodity broker shall use its best efforts to effect a transfer in accordance with §§ 190.07(c) and (d) no later than the seventh calendar day after the order for relief of the open commodity contracts and property held by the commodity broker for or on behalf of its public customers.

(2) *Involuntary cases.* A commodity broker against which an involuntary petition in bankruptcy is filed must use its best efforts to effect a transfer in accordance with §§ 190.07(c) and (d) of all open commodity contracts and equity held by the commodity broker for or on behalf of its customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing date, and immediately cease doing business; provided, however, that if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer or liquidation is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and this chapter.

(b) *Treatment of open commodity contracts.*

(1) *Payments by the trustee.* Prior to the primary liquidation date, the trustee may make payments of initial or performance bond margin and variation settlement, to a clearing organization, commodity broker, foreign clearing organization or foreign broker, carrying the account of the debtor, pending the transfer or liquidation of any open commodity contracts, whether or not such contracts are specifically identifiable property of a particular customer, provided, that:

(i) Unless authorized by the Commission, to the extent within the trustee's control, the trustee shall not make any payments on behalf of any commodity contract account on the books and records of the debtor that is in deficit; provided, however, that

this provision shall not be construed to prevent a clearing organization, foreign clearing organization, futures commission merchant or foreign broker carrying an account of the debtor from exercising its rights to the extent permitted under applicable law.

(ii) Any margin payments made by the trustee with respect to a specific customer account shall not exceed the funded balance for that account;

(iii) The trustee shall not make any payments on behalf of non-public customers of the debtor from funds that are segregated for the benefit of public customers;

(iv) If the trustee receives payments from customers in response to margin calls, to the extent within the trustee's control, the trustee must use such payments only to make margin payments for the open commodity contract positions of such customers and may not use payments received from one public customer to meet the margin (or any other) obligations of any other customer; and

(v) If funds segregated for the benefit of public customers in a particular account class exceed the aggregate funded balances for all public customers in such account class, the trustee may use such excess funds to meet the margin obligations for any public customer in such account class whose account is under-margined (as described in § 190.04(b)(4)) but not in deficit, provided that the trustee issues a margin call to such customer and provided further that the trustee shall liquidate such customer's open commodity contracts if the customer fails to make the margin payment within a reasonable time as provided in § 190.04(b)(4).

(2) *Margin calls.* The trustee (or, prior to appointment of the trustee, the debtor against which an involuntary petition was filed) may issue a margin call to any public customer whose commodity contract account contains open commodity contracts if such account is under-margined. A futures account, foreign futures account or cleared swaps account carried by the debtor is considered under-margined if the funded balance for such account, less the value of any property previously transferred or returned to the customer on or after the filing date, is below the minimum amount that the debtor is required to collect and maintain for the open commodity contracts in such account under the rules of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility or foreign board of trade. If any such rules establish both an initial margin requirement and a lower maintenance margin requirement applicable to any commodity contracts (or to the entire portfolio of commodity contracts or any subset thereof) in a particular commodity contract account of the customer, the trustee will use the lower maintenance margin level to determine the customer's minimum margin requirement for such account.

(3) *Margin payments by the customer.* The full amount of any margin payment by a customer in response to a margin call under paragraph (b)(2) of this section must be credited to the funded balance of the particular account for which it was made.

(4) *Trustee obligation to liquidate certain open commodity contracts.* The trustee shall, as soon as practicable under the circumstances, liquidate all open commodity contracts in any commodity contract account that is in deficit, or for which the customer fails to meet a margin

call made by the trustee within a reasonable time. Except as otherwise provided in this part, absent exigent circumstances, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day, as the trustee may determine in its sole discretion.

(5) *Partial liquidation of open commodity contracts by others.* In the event that a clearing organization, foreign clearing organization, futures commission merchant, foreign broker or other person carrying a commodity customer account for the debtor in the nature of an omnibus account has liquidated open commodity contracts in such account, but only a portion of such open commodity contracts, the trustee will assign the liquidating transactions to the underlying commodity customer accounts carried by the debtor, first to liquidate open commodity contracts in any accounts that are in deficit; second, to liquidate open commodity contracts in any accounts that are under-margined; and finally to liquidate open commodity contracts in any other accounts. If more than one commodity contract account reflects open commodity contracts in a particular commodity contract for which liquidating transactions have been executed, the trustee shall to the extent possible allocate the liquidating transactions to such accounts pro rata based on the number of open commodity contracts of such type in the applicable accounts.

(c) *Contracts Moving to Into Delivery Position.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, the trustee shall use its best efforts to liquidate any open commodity contract that settles upon expiration or exercise via the making or taking of delivery of a commodity: (i) if such contract is a futures contract or a cleared swaps contract, before the earlier of the last trading day or the first day on which notice of intent to deliver may be tendered with respect thereto, or otherwise before the debtor or its customer incurs a bilateral obligation to make or take delivery of the commodity under such contract; (ii) if such contract is a long option on a commodity and has value, before the first date on which the contract could be automatically exercised or the last date on which the contract could be exercised if not subject to automatic exercise; or (iii) if such contract is a short option on a commodity that is in-the-money in favor of the long position holder, before the first date on which the long option position could be exercised.

(d) *Liquidation or offset.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, and except as otherwise set forth in this paragraph (d), the following commodity contracts and other property held by or for the account of a debtor must be liquidated in accordance with § 190.04(e)(1) or liquidated via offset in accordance with § 190.04(e)(2) by the trustee promptly and in an orderly manner:

(1) *Open commodity contracts.* All open commodity contracts, except for (i) commodity contracts that are specifically identifiable property (if applicable) and are subject to customer instructions to transfer (in lieu of liquidating) as provided in § 190.03(b)(2), provided that the customer is in compliance with the terms of § 190.09(d)(2), and (ii) open commodity contract positions that are in a delivery position, which shall be treated in accordance with the provisions of § 190.06.

(2) *Specifically identifiable property other than open commodity contracts.* Specifically identifiable property other than open commodity contracts or physical delivery property, to the extent that:

(i) The fair market value of such property is less than 75% of its fair market value on the date of entry of the order for relief;

(ii) Failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account; or

(iii) The trustee has not received instructions to return pursuant to § 190.03(b)(1), or has not returned such property upon the terms contained in § 190.09(d)(1).

(3) *Letters of credit.* The trustee may request that a customer deliver substitute customer property with respect to any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract, whether held by the trustee on behalf of the debtor's estate or a derivatives clearing organization or a foreign clearing organization on a pass-through or other basis, equaling the full face amount of the letter of the credit or any portion thereof, to the extent required or may be required in the trustee's discretion to ensure pro rata treatment consistent with §§ 190.08 and 190.09. If a customer fails to provide substitute customer property within three (3) business days following a request by the trustee, or within such shorter time as is ordered by the court, the trustee may draw upon the full amount of the letter of credit or any portion thereof.

(4) *All other property.* All other property, other than physical delivery property held for delivery in accordance with the provisions of § 190.06, which is not required to be transferred or returned pursuant to customer instructions and which has not been liquidated in accordance with paragraphs (c)(1) – (3) of this section.

(e) *Liquidation of open commodity contracts.*

(1) *By the trustee or a clearing organization in the market.*

(i) *Debtor as a clearing member.* For open commodity contracts cleared by the debtor as a member of a clearing organization, the trustee or clearing organization, as applicable, shall liquidate such open commodity contracts pursuant to the rules of a clearing organization, a designated contract market, or a swap execution facility, if and as applicable. Any such rules providing for liquidation other than on the open market shall ensure that the process for liquidating open commodity contracts results in competitive pricing, to the extent feasible under market conditions at the time of liquidation. For open commodity contracts that are futures or options on futures that were established on or subject to the rules of a foreign board of trade and cleared by the debtor as a member of a foreign clearing organization, the trustee shall liquidate such open commodity contracts pursuant to the rules of the foreign clearing organization or foreign board of trade or, in the absence of such rules, in the manner the trustee determines appropriate.

(ii) *Debtor not a clearing member.* For open commodity contracts submitted by the debtor for clearing through one or more accounts established with a futures

commission merchant or foreign broker (as defined in § 1.3(xx) of this chapter), the trustee shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility or foreign board of trade governing the liquidation of open commodity contracts.

(2) *By the trustee or a clearing organization via book entry offset.* Upon application by the trustee or clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization in accordance with its rules. Such rules must ensure that such settlement price is established in a competitive manner, to the extent feasible under market conditions at the time of liquidation.

(3) *By a futures commission merchant or foreign broker.* For open commodity contracts cleared by the debtor through one or more accounts established with a futures commission merchant or foreign broker (as defined in § 1.3(xx) of this chapter), such futures commission merchant or foreign broker may exercise any enforceable contractual rights it has to liquidate such commodity contracts, provided, that it shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility or foreign board of trade governing its liquidation of such open commodity contracts. If a futures commission merchant or foreign broker fails to use commercially reasonable efforts to liquidate open commodity contracts to achieve competitive pricing in accordance with this § 190.04(e)(3), the trustee may seek damages reflecting the difference between the price (or prices) at which the relevant commodity contracts would have been liquidated using commercially reasonable efforts to achieve competitive pricing and the price (or prices) at which the commodity contracts were liquidated, which shall be the sole remedy available to the trustee. In no event shall any such liquidation be voided.

(4) *Liquidation only.* Nothing in this part shall be interpreted to permit the trustee to purchase or sell new commodity contracts for customers of the debtor except to offset open commodity contracts; provided, however, that the trustee may, in its discretion and with approval of the Commission, cover uncovered inventory or commodity contracts of the debtor which cannot be liquidated immediately because of price limits or other market conditions, or may take an offsetting position in a new month or at a strike price for which limits have not been reached.

(f) *Long option contracts.* Subject to paragraphs (d) and (e) of § 190.04 of this part, the trustee shall use its best efforts to assure that a commodity contract that is a long option contract with value does not expire worthless.

§ 190.05 Operation of the debtor's estate—general.

(a) *Compliance with the Act and regulations.* Except as specifically provided otherwise in this part, the trustee shall use reasonable efforts to comply with all of the provisions of the Act and of the regulations thereunder as if it were the debtor.

(b) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or specifically identifiable property as of the close of business each business day subsequent to the order for relief until the date all open commodity contracts and specifically identifiable property in such account has been transferred or liquidated, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

(c) *Records.*

(1) *Maintenance.* Except as otherwise ordered by the court, records required under this chapter to be maintained by the debtor shall be maintained by the trustee until such time as the debtor's case is closed.

(2) *Accessibility.* The records required to be maintained by paragraph (c)(1) of this section shall be available during business hours to the Commission and the U.S. Department of Justice. The trustee shall give the Commission and the U.S. Department of Justice access to all records of the debtor, including records required to be retained in accordance with § 1.31 of this chapter and all other records of the commodity broker, whether or not the Act or this chapter would require such records to be maintained by the commodity broker.

(d) *Customer statements.* The trustee shall use all reasonable efforts to continue to issue account statements with respect to any customer for whose account commodity contracts or other property is held that has not been liquidated or transferred.

(e) *Other matters.*

(1) *Disbursements.* With the exception of transfers of customer property made in accordance with § 190.07, the trustee shall make no disbursements to customers except with approval of the court.

(2) *Investment.* The trustee shall promptly invest the proceeds from the liquidation of commodity contracts or specifically identifiable property, and may invest any other customer property, in obligations of the United States and obligations fully guaranteed as to principal and interest by the United States, provided that such obligations are maintained in a depository located in the United States, its territories or possessions.

(f) *Residual interest.* The trustee is not required to transfer cash, securities or other property of the debtor into a segregated account to maintain the debtor's ongoing compliance with its targeted residual amount obligations pursuant to § 1.11 of this chapter and the debtor's residual interest policies adopted thereunder or its related obligations to cover debit balances or undermargined amounts as provided in §§ 1.22, 22.2 or 30.7 of this chapter; provided, however, that

any property not segregated under this exception shall nonetheless constitute customer property as provided in § 190.09(a)(1).

§ 190.06 Making and taking delivery under commodity contracts.

(a) Deliveries.

(1) *General.* The provisions of this § 190.06(a) apply to commodity contracts that settle upon expiration or exercise by making or taking delivery of physical delivery property, if such commodity contracts are in a delivery position on the filing date, or the trustee is unable to liquidate such commodity contracts in accordance with § 190.04(c) to prevent them from moving into a delivery position, i.e., before the debtor or its customer incurs bilateral contractual obligations to make or take delivery under such commodity contracts.

(2) *Delivery made or taken on behalf of a customer outside of the administration of the debtor's estate.* The trustee shall use reasonable efforts to allow a customer to deliver physical delivery property that is held directly by the customer and not by the debtor (and thus not recorded in any commodity contract account of the customer) in settlement of a commodity contract, and to allow payment in exchange for such delivery, to occur outside the administration of the debtor's estate, when the rules of the exchange or other market listing the commodity contract, or the clearing organization or the foreign clearing organization clearing the commodity contract, as applicable, prescribe a process for delivery that allows the delivery to be fulfilled (i) in the normal course directly by the customer, (ii) by substitution of the customer for the commodity broker, or (iii) through agreement of the buyer and seller to alternative delivery procedures.

(3) *Delivery as part of administration of the debtor's estate.* When it is not possible to effect delivery as provided in § 190.06(a)(2):

(i) To facilitate the making or taking of delivery directly by a customer, the trustee may, as it determines reasonable under the circumstances of the case and consistent with the pro rata distribution of customer property by account class:

(A) When a customer is obligated to make delivery, return any physical delivery property to the customer that is held by the debtor for or on behalf of the customer under the terms set forth in § 190.09(d)(1)(ii), to allow the customer to deliver such property to fulfill its delivery obligation under the commodity contract, or

(B) When a customer is obligated to take delivery:

(1) Return any cash delivery property to the customer that is reflected in the customer's delivery account, provided that cash delivery property returned under this subsection shall not exceed the lesser of (i) the amount the customer is required to pay for delivery of the commodity, or (ii) the customer's net funded balance for all of the customer's commodity contract accounts;

(2) Return cash, securities or other property held in the customer's non-delivery commodity contract accounts, provided that property returned under this section shall not exceed the lesser of (i) the amount the customer is required to pay for delivery of the commodity, or (ii) the net funded balance for all of the customer's commodity contract accounts reduced by any amount returned to the customer pursuant to § 190.06(a)(3)(i)(B)(1), and provided further, however, that the trustee may distribute such property only to the extent that the customer's funded balance for each such account exceeds the minimum margin obligations for such account (as described in § 190.04(b)(2)); and

(C) Impose such conditions on the customer as it considers appropriate to assure that property returned to the customer is used to fulfill the customer's delivery obligations.

(ii) If the trustee does not return physical delivery property, cash delivery property or other property in the form of cash or cash equivalents to the customer as provided in § 190.06(a)(3)(i), subject to § 190.06(a)(4):

(A) To the extent practical, the trustee shall make or take delivery of physical delivery property in the same manner as if no bankruptcy had occurred, and when making delivery, the party to which delivery is made must pay the full price required for taking such delivery; or

(B) When taking delivery of physical delivery property:

(1) The trustee shall pay for the delivery first using the customer's cash delivery property or other property, limited to the amounts set forth in § 190.06(a)(3)(i)(B), along with any cash transferred by the customer to the trustee on or after the filing date for the purpose of paying for delivery.

(2) If the value of the cash or cash equivalents that may be used to pay for deliveries as described in § 190.06(a)(3)(i)(B) is less than the amount required to be paid for taking delivery, the trustee shall issue a payment call to the customer. The full amount of any payment made by the customer in response to a payment call must be credited to the funded balance of the particular account for which such payment is made.

(3) If the customer fails to meet a call for payment under 190.06(a)(3)(ii)(B)(2) before payment is made for delivery, the trustee must convert any physical delivery property received on behalf of the customer to cash as promptly as possible.

(4) *Deliveries in a securities account.* If an open commodity contract held in a futures account, foreign futures account or cleared swaps account requires delivery of a security upon expiration or exercise of such commodity contract, and delivery is not completed pursuant to § 190.06(a)(2) or 190.06(a)(3)(i), the trustee may make or take delivery in a securities account in a manner consistent with § 190.06(a)(3)(ii), provided, however, that the trustee may transfer

property from the customer's commodity contract accounts to the securities account to fulfill the delivery obligation only to the extent that the customer's funded balance for such commodity contract account exceeds the customer's minimum margin obligations for such accounts (as described in § 190.04(b)(2)) and provided further that the customer is not under-margined or does not have a deficit balance in any other commodity contract accounts.

(5) *Delivery made or taken on behalf of house account.* If delivery of physical delivery property is to be made or taken on behalf of a house account of the debtor, the trustee shall make or take delivery, as the case may be, on behalf of the debtor's estate, provided that if the trustee takes delivery of physical delivery property it must convert such property to cash as promptly as possible.

(b) *Special account class provisions for delivery accounts.*

(1) Within the delivery account class, the trustee shall treat (i) physical delivery property held in delivery accounts as of the filing date, and the proceeds of any such physical delivery property subsequently received, as part of the physical delivery account class, and (ii) cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a customer in accordance with § 190.06(a)(3), as part of a separate cash delivery account class.

(2) If the debtor holds any cash or cash equivalents in an account maintained at a bank, clearing organization, foreign clearing organization or other person under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking delivery, or receiving payment for making delivery, of a commodity under commodity contracts, such property shall (subject to § 190.09) be considered customer property in the delivery account class. In addition, any other property (excluding property segregated for the benefit of customer in the futures, foreign futures or cleared swaps account class) that is traceable as having been held or received for the purpose of making payment for delivery, or as having been held or received in payment for delivery, shall (subject to § 190.09) be considered customer property in the delivery account class for the relevant commodity contract.

§ 190.07 Transfers.

(a) *Transfer rules.* No clearing organization, designated contract market or swap execution facility shall adopt, maintain in effect, or enforce rules that:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from futures commission merchants that are required to transfer accounts pursuant to § 1.17(a)(4) of this chapter; and

(3) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from futures commission merchants with respect to which an order for relief has been entered, if such transfers have been approved by the Commission, *provided, however,* that this paragraph shall not limit the exercise of any

contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts.

(b) *Requirements for transferees.*

(1) It is the duty of each transferee to assure that it will not accept a transfer that would cause the transferee to be in violation of the minimum financial requirements set forth in this chapter.

(2) Any transferee that accepts a transfer of open commodity contracts from the estate of the debtor accepts the transfer subject to any loss that may arise in the event the transferee cannot recover from the customer any deficit balance that may arise related to the transferred open commodity contracts.

(3) A transferee may accept open commodity contracts and property, and open accounts on its records, for customers whose commodity contracts and property are transferred pursuant to this part prior to completing customer diligence, provided that account opening diligence as required by law is performed, and records and information required by law are obtained, as soon as practicable.

(4) Any account agreements governing a transferred account (including an account that has been partially transferred) shall be deemed assigned to the transferee by operation of law and shall govern the transferee and customer's relationship until such time as the transferee and customer enter into a new agreement; provided, however, that any breach of such agreement by the debtor existing at or before the time of the transfer (including but not limited to any failure to segregate sufficient customer property) shall not constitute a default or breach of the agreement on the part of the transferee, or constitute a defense to the enforcement of the agreement by the transferee.

(5) If specifically identifiable property has been, or is to be, transferred in accordance with section 764(b) of the Bankruptcy Code and this section, customer instructions previously received by the trustee with respect to specifically identifiable property shall be transmitted to the transferee of property, which shall comply therewith to the extent practicable.

(c) *Eligibility for transfer under section 764(b) of the Bankruptcy Code—Accounts eligible for transfer.* All commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer after the filing date pursuant to section 764(b) of the Bankruptcy Code, except:

(1) House accounts or the accounts of general partners of the debtor if the debtor is a partnership; and

(2) Accounts that are in deficit.

(d) *Special rules for transfers under section 764(b) of the Bankruptcy Code.*

(1) The trustee for a commodity broker shall use its best efforts to effect a transfer to one or more other commodity brokers of all eligible commodity contract accounts, open commodity

contracts and property held by the debtor for or on behalf of its customers, based on customer claims or record, no later than the seventh calendar day after the order for relief.

(2) *Partial transfers; multiple transferees*

(i) *Of the customer estate.* If all eligible commodity contract accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer. Commodity contract accounts may be transferred to one or more transferees, and, subject to § 190.07(b)(4), may be transferred to different transferees by account class.

(ii) *Of a customer's commodity contract account.* If all of a customer's open commodity contracts and property cannot be transferred under this section, a partial transfer of contracts and property may be made so long as such transfer would not result in an increase in the amount of any customer's net equity claim. One, but not the only, means to effectuate a partial transfer is by liquidating that portion of the open commodity contracts held by a customer representing sufficient equity to permit the transfer of some or all of the remaining open commodity contracts and property. If any open commodity contract to be transferred in a partial transfer is part of a spread or straddle, to the extent practicable under the circumstances, each side of such spread or straddle must be transferred or none of the open commodity contracts comprising the spread or straddle may be transferred.

(3) *Letters of Credit.* A letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract may be transferred with an eligible commodity contract account if it is held by a derivatives clearing organization on a pass-through or other basis or is transferable by its terms, so long as the transfer will not result in a recovery which exceeds the amount to which the customer would be entitled under §§ 190.08 and 190.09. If the letter of credit cannot be transferred as provided for in the foregoing sentence, and the customer does not deliver substitute customer property to the trustee in accordance with § 190.04(c)(3), the trustee may draw upon a portion or all of the letter of credit, the proceeds of which shall be treated as customer property in the applicable account class.

(4) *Physical delivery property.* The trustee shall use reasonable efforts to prevent physical delivery property held for the purpose of making delivery on a commodity contract from being transferred separate and apart from the related commodity contract, or to a different transferee.

(5) *No prejudice to other customers.* No transfer shall be made under this part by the trustee if, after taking into account all customer property available for distribution to customers in the applicable account class at the time of the transfer, such transfer would result in insufficient remaining customer property to make an equivalent percentage distribution to all holders of net equity claims in the applicable account class based on customer claims of record.

(e) *Prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code.*

(1) *Pre-relief transfers.* Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549 or 724(a) of the Bankruptcy Code:

(i) The transfer of commodity contract accounts or customer property prior to the entry of the order for relief in compliance with § 1.17(a)(4) of this chapter unless such transfer is disapproved by the Commission;

(ii) The transfer prior to the order for relief at the request of a public customer, including a transfer at the request of a public customer that is a commodity broker, of commodity contract accounts or customer property held from or for the account of such customer by or on behalf of the debtor unless:

(A) The customer acted in collusion with the debtor or its principals to obtain a greater share of customer property or the bankruptcy estate than that to which it would be entitled under this Part; or

(B) The transfer is disapproved by the Commission; or

(iii) The transfer prior to the order for relief by a clearing organization of one or more accounts held for or on behalf of customers of the debtor, or of commodity contracts and other customer property held for or on behalf of customers of the debtor, provided that the transfer is not disapproved by the Commission.

(2) *Post-relief transfers.* Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549 or 724(a) of the Bankruptcy Code:

(i) The transfer of a customer account or customer property eligible to be transferred under paragraphs (c) and (d) of this section made by the trustee or by any clearing organization on or before the seventh calendar day after the entry of the order for relief, as to which the Commission has not disapproved the transfer; or

(ii) The transfer of a customer account or customer property at the direction of the Commission on or before the seventh calendar day after the order for relief, upon such terms and conditions as the Commission may deem appropriate and in the public interest.

(f) *Commission action.* Notwithstanding any other provision of this section (other than §§ 190.07(d)(2)(ii) and 190.07(d)(5)), in appropriate cases and to protect the public interest, the Commission may:

(1) Prohibit the transfer of customer accounts; or

(2) Permit transfers of accounts that do not comply with the requirements of this section.

§ 190.08 Calculation of allowed net equity.

For purposes of this subpart, allowed net equity shall be computed as follows:

(a) *Allowed claim.* The allowed net equity claim of a customer shall be equal to the aggregate of the funded balances of such customer's net equity claim for each account class.

(b) *Net equity.* Net equity means a customer's total customer claim of record against the estate of the debtor based on the customer property, including any commodity contracts, held by the debtor for or on behalf of such customer less any indebtedness of the customer to the debtor. Net equity shall be calculated as follows:

(1) Step 1—Equity determination.

(i) Determine the equity balance of each commodity contract account of a customer by computing, with respect to such account, the sum of:

(A) The ledger balance;

(B) The open trade balance; and

(C) The realizable market value, determined as of the close of the market on the last preceding market day, of any securities or other property held by or for the debtor from or for such account, plus accrued interest, if any.

(ii) For the purposes of this paragraph (b)(1), the ledger balance of a customer account shall be calculated by

(A) adding:

(1) Cash deposited to purchase, margin, guarantee, secure, or settle a commodity contract;

(2) Cash proceeds of property referred to in paragraph (b)(1)(C) of this section;

(3) Gains realized on trades; and

(4) the face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract; and

(B) Subtracting from the result:

(1) Losses realized on trades;

(2) Disbursements to or on behalf of the customer (including transfers made pursuant to §§ 190.04(a) and 190.07); and

(3) The normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees, insurance and other costs and charges lawfully incurred in connection with the purchase, sale, exercise, or liquidation of any commodity contract in such account.

(iii) For purposes of this paragraph (b)(1), the open trade balance of a customer's account shall be computed by subtracting the unrealized loss in value of the open commodity contracts held by or for such account from the unrealized gain in value of the open commodity contracts held by or for such account.

(2) Step 2—Customer determination (aggregation). Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity. Paragraphs (b)(2)(i) through (b)(2)(xii) of this section prescribe which accounts must be treated as being held in the same capacity and which accounts must be treated as being held in a separate capacity.

(i) Except as otherwise provided in this paragraph (b)(2), all accounts that are maintained with a debtor in a person's name and that, under this paragraph (b)(2), are deemed to be held by that person in its individual capacity shall be deemed to be held in the same capacity.

(ii) An account maintained with a debtor by a guardian, custodian, or conservator for the benefit of a ward, or for the benefit of a minor under the Uniform Gift to Minors Act, shall be deemed to be held in a separate capacity from accounts held by such guardian, custodian or conservator in its individual capacity.

(iii) An account maintained with a debtor in the name of an executor or administrator of an estate shall be deemed to be held in a separate capacity from accounts held by such executor or administrator in its individual capacity. An account maintained with a debtor in the name of a decedent, in the name of the decedent's estate, or in the name of the executor or administrator of such estate shall be deemed to be accounts held in the same capacity.

(iv) An account maintained with a debtor by a trustee shall be deemed to be held in the individual capacity of the grantor of the trust unless the trust is created by a valid written instrument for a purpose other than avoidance of an offset under the regulations contained in this part. A trust account which is not deemed to be held in the individual capacity of its grantor under this paragraph (b)(2)(iv) shall be deemed to be held in a separate capacity from accounts held in an individual capacity by the trustee, by the grantor or any successor in interest of the grantor, or by any trust beneficiary, and from accounts held by any other trust.

(v) An account maintained with a debtor by a corporation, partnership, or unincorporated association shall be deemed to be held in a separate capacity from accounts held by the shareholders, partners or members of such corporation, partnership or unincorporated association, if such entity was created for purposes other than avoidance of an offset under the regulations contained in this part.

(vi) A hedging account of a person shall be deemed to be held in the same capacity as a speculative account of such person.

(vii) An omnibus customer account of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from the house account and any other omnibus customer account of such futures commission merchant.

(viii) A joint account maintained with the debtor shall be deemed to be held in a separate capacity from any account held in an individual capacity by the participants in such account, from any account held in an individual capacity by a commodity pool operator or commodity trading advisor for such account, and from any other joint account; provided, however, that if such account is not transferred in accordance with §§ 190.04(a) and 190.07, it shall be deemed to be held in the same capacity as any other joint account held by identical participants and a participant's percentage interest therein shall be deemed to be held in the same capacity as any account held in an individual capacity by such participant.

(ix) An account maintained with a debtor in the name of a plan that is subject to the terms of the Employee Retirement Income Security Act of 1974 and the regulations thereunder, or similar state, federal or foreign laws or regulations shall be deemed to be held in a separate capacity from an account held in an individual capacity by the plan administrator, any employer, employee, participant, or beneficiary with respect to such plan.

(x) Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.

(xi) With respect to the cleared swaps account class, each individual customer account within each omnibus customer account referred to in paragraph (b)(2)(vii) of this section shall be deemed to be held in a separate capacity from each other such individual customer account, subject to the provisions of paragraphs (b)(2)(i) through (x) of this paragraph (b)(2).

(xii) Accounts held by a customer in separate capacities shall be deemed to be accounts of different customers. The burden of proving the capacity in which an account is held shall be upon the customer.

(3) Step 3—Setoffs.

(i) The net equity of one customer account may not be offset against the net equity of any other customer.

(ii) Any obligation to the debtor which is not required to be included in computing the equity of a customer under paragraph (b)(1) of this section, must be deducted from any obligation to the customer which is not required to be included in computing the equity of a customer. If the former amount exceeds the latter, the excess must be deducted from the equity balance of the customer obtained after performing the preceding

calculations required by paragraph (b) of this section, provided, that if the customer owns more than two classes of accounts the excess must be offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances of accounts of different classes held by such customer.

(iii) A negative equity balance obtained with respect to one customer account class must be set off against a positive equity balance in any other account class of such customer held in the same capacity, provided, that if a customer owns more than two classes of accounts such balance must be offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances in accounts of different classes held by such customer.

(iv) To the extent any indebtedness to the customer which is not required to be included in computing the equity of such customer under paragraph (b)(1) of this section exceeds such indebtedness of the customer to the debtor, the customer claim therefor will constitute a general creditor claim rather than a customer property claim, and the net equity therefor shall be separately calculated.

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section must be applied subsequent to the entry of an order for relief; prior to the filing date, the provisions of § 1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act (and, in each case, the regulations promulgated thereunder) shall govern what setoffs are permitted.

(4) Step 4—Correction for distributions. The value on the date of transfer or distribution of any property transferred or distributed subsequent to the filing date and prior to the primary liquidation date with respect to each class of account held by a customer must be added to the equity obtained for that customer for accounts of that class after performing the steps contained in paragraphs (b)(1)–(3) of this section.

(5) Step 5—Correction for subsequent events. Compute any adjustments to Steps 1 through 4 of this paragraph (b) required to correct misestimates or errors including, without limitation, corrections for subsequent events such as the liquidation of unliquidated claims or specifically identifiable property at a value different from the estimated value previously used in computing net equity.

(c) *Calculation of funded balance.* “Funded balance” means a customer’s pro rata share of the customer estate with respect to each account class available for distribution to customers of the same customer class as of the primary liquidation date or, in the case of a delivery account class, the later of the primary liquidation date or the date by which delivery has been completed under all commodity contracts in such account class that are subject to such delivery as provided in § 190.06.

(1) The funded balance of any customer claim shall be computed (separately by account class and customer class) by:

(i) Multiplying the ratio of the amount of the net equity claim less the amounts referred to in paragraph (c)(1)(ii) of this section of such customer for any account class

bears to the sum of the net equity claims less the amounts referred to in paragraph (c)(1)(ii) of this section of all customers for accounts of that class by the sum of:

(A) The value of letters of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract relating to customer accounts of the same class;

(B) The value of the money, securities, or other property segregated on behalf of customer accounts of the same class less the amounts referred to in paragraph (c)(1)(ii) of this section;

(C) The value of any money, securities or property which must be allocated under § 190.09 to customer accounts of the same class; and

(D) The amount of any add-back required under paragraph (b)(4) of this section; and

(ii) Then adding 100% of any margin payment made between the entry of the order for relief or the date on which the petition for bankruptcy is filed in an involuntary case and the primary liquidation date; provided, however, that if margin is posted to substitute for a letter of credit, such margin does not increase the funded balance.

(2) *Corrections to funded balance.* The funded balance must be adjusted, as of the primary liquidation date, to correct for subsequent events including, without limitation:

(i) Added claimants;

(ii) Disallowed claims;

(iii) Liquidation of unliquidated claims at a value other than their estimated value; and

(iv) Recovery of property.

(d) *Valuation.* In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (d).

(1) *Commodity Contracts.*

(i) *Open Contracts.* Unless otherwise specified in this paragraph (d), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules; provided, however, that if an open commodity contract is transferred to another commodity broker, its value on the debtor's books and records shall be determined as of the end of the last settlement cycle on the day preceding such transfer.

(ii) *Liquidated Contracts.* Except as specified below, the value of a commodity contract liquidated on the open market shall equal the actual value realized on liquidation of the commodity contract.

(A) *Weighted Average.* If identical commodity contracts are liquidated within a 24 hour period (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of commodity contracts, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such commodity contracts.

(B) *Bulk Liquidation.* The value of a commodity contract liquidated as part of a bulk auction, taken into inventory or under management by a clearing organization, or similarly liquidated outside of the open market shall be equal to the settlement price calculated by the clearing organization as of the end of the settlement cycle during which the commodity contract was liquidated.

(2) *Securities.* The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated, the value of such security shall be equal to the net proceeds of its liquidation; provided, however, that if identical securities are liquidated within a 24 hour period (or such other period as court may determine is appropriate) as part of a general liquidation of securities, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer holding such securities. Securities which are not publicly traded shall be valued by the trustee, using such professional assistance as the trustee deems necessary under the circumstances.

(3) *Property.* Commodities held in inventory, as collateral or otherwise, shall be valued at their fair market value. Subject to the other provisions of this paragraph (d), all other property shall be valued by the trustee using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances; provided, however, that if such property is sold, its value for purposes of the calculations required by this part shall be the net proceeds of such sale; and, provided further, that the sale shall be made in compliance with all applicable statutes, rules and orders of any court or governmental entity with jurisdiction there over.

(4) *Letters of Credit.* Unless the trustee makes a determination in good faith that a draw on a letter of credit is unlikely to be honored on either temporary or permanent basis, the value of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract shall be its face amount.

§ 190.09 Allocation of property and allowance of claims.

The property of the debtor's estate must be allocated among account classes and between customer classes as provided in this section, subject to the provisions of Appendix B to this part with respect to any cross-margining account for commodity contracts and related position in

securities (as defined in section 3 of the Exchange Act) that is carried as a futures account pursuant to rule, regulation, or order of the Commission and the Securities and Exchange Commission. The property so allocated will constitute a separate estate of the customer class and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(a) *Scope of customer property.*

(1) Customer property includes the following:

(i) All cash, securities, or other property or the proceeds of such cash, securities or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer, including a non-public customer, which is:

(A) Property received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property described in § 190.01(jj)(1) through (3);

(D) Cash, securities or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer;

(E) Profits or contractual rights accruing to a customer as the result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn by the trustee pursuant to § 190.04(c)(3) of this part;

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account;

(H) Property hypothecated under § 1.30 of this chapter to the extent that the value of such property exceeds the proceeds of any loan of margin made with respect thereto, and

(ii) All cash, securities, or other property which:

(A) Is segregated for customers on the filing date;

(B) Is a security owned by the debtor to the extent there are customer claims for securities of the same class and series of an issuer;

(C) Is specifically identifiable to a customer;

(D) Was property of a type described in paragraph (a)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(E) Represents recovery of any debit balance, margin deficit, or other claim of the debtor against a customer;

(F) Was unlawfully converted but is part of the debtor's estate;

(G) Is cash, securities or other property of the debtor's estate that, as of the date of the order for relief, constitutes current assets of the debtor within the meaning of § 1.17(c)(2) of this chapter, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, in the greater of the amount that the debtor is obligated to set aside as its targeted residual amount pursuant to § 1.11 of this chapter and the debtor's residual interest policies adopted thereunder or the debtor's obligations to cover debit balances or undermargined amounts as provided in §§ 1.22, 22.2 or 30.7 of this chapter, but only to the extent necessary to prevent under-segregation for the futures, foreign futures or cleared swaps account class, as applicable;

(H) Other property of the debtor that any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers;

(I) Is property of the debtor's estate recovered by the Commission in any proceeding brought against the principals, agents, or employees of the debtor;

(J) Is proceeds from the investment of customer property by the trustee pending final distribution;

(K) Is a payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property;

(L) Is segregated for the benefit of the debtor's securities customers and remains after the satisfaction of the requirements of 15 U.S.C. § 78fff-2(c)(1)(A)—(D) in excess of the requirements of 15 U.S.C. § 78;

(M) Is cash, securities or other property of the debtor's estate, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, but only to the extent that the property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (L) of this section is insufficient to satisfy in full all claims of public customers.

(2) Customer property will not include:

(i) Claims against the debtor for damages for any wrongdoing of the debtor, including claims for misrepresentation or fraud, or for any violation of the Act or of the regulations thereunder;

(ii) Other claims for property which are not based upon property received, acquired or held by or for the account of the debtor, from or for the account of the customer;

(iii) Forward contracts;

(iv) Physical delivery property described in § 190.01(jj)(4);

(v) Property deposited by a customer with a commodity broker after the entry of an order for relief which is not necessary to meet the margin requirements applicable to the accounts of such customer;

(vi) Property hypothecated pursuant to § 1.30 of this chapter to the extent of the loan of margin with respect thereto;

(vii) Money, securities or property held to margin, guarantee or secure security futures products, or accruing as a result of such products, if held in a securities account; and

(viii) Money, securities or property held in a securities account to fulfill delivery under a commodity contract from or for the account of a customer, as described in § 190.06(b)(2).

(3) Nothing contained in this section, including, but not limited to, the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (a)(1)(i)(E) and (a)(1)(ii)(A) through (L) of this section.

(b) Allocation of property between customer classes. No portion of the customer estate may be allocated to pay non-public customer claims until all public customer claims have been satisfied in full. Any property segregated on behalf of or attributable to non-public customers must be treated initially as part of the public customer estate and allocated under paragraph (c)(2) of this section.

(c) Allocation of property among account classes.

(1) *Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class, or readily traceable on the filing date to customers of such account class, or recovered by the trustee on behalf of or for the benefit of an account class, must be allocated to the customer estate of the account class for which it is segregated or to which it is readily traceable.

(2) *All other property.* Money, securities and property received from or for the account of customers on behalf of any account class which is recovered on behalf of the customer estate and which cannot be allocated in accordance with paragraph (c)(1) of this section, must be allocated as of the primary liquidation date in the following order:

(i) To the estate of the account class for which, after the allocation required in paragraph (c)(1) of this section, the percentage of each public customer net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such class equals the percentage of each public customer's net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(ii) To the estate of the two account classes referred to in paragraph (c)(2)(i) of this section so that the percentage of the net equity claims which are funded for each class remains equal until the percentage of each public customer net equity claim which is funded equals the percentage of each public customer net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until the percentage of each public customer net equity claim which is funded is equal for all classes of accounts; and then,

(iii) Among account classes in the same proportion as the public customer net equity claims for each such account class bears to the total of public customer net equity claims of all account classes until the public customer claims of each account class are paid in full; and, thereafter,

(iv) To the non-public customer estate for each account class in the same order as is prescribed in paragraphs (c)(2)(i) to (iii) of this section for the allocation of the customer estate among account classes.

(d) *Distribution of customer property.*

(1) *Return or transfer of specifically identifiable property.* Specifically identifiable property not required to be liquidated under § 190.04(c)(2) may be returned or transferred on behalf of the customer to which it is identified:

(i) If it is margining an open commodity contract, only if substitute customer property is first deposited with the trustee in an amount equal to the greater of the full fair market value of such property on the return date or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security; or

(ii) If it is not margining an open contract, at the option of the customer, either pursuant to the terms of paragraph (d)(1)(i) of this section, or pursuant to the following terms: such customer first deposits substitute customer property with the trustee with a value equal to the amount by which the greater of the value of the specifically identifiable property to be transferred or returned on the date of such transfer or return or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security, together with any other disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; provided, however, that adequate security for the non-recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(2) *Transfers of specifically identifiable commodity contracts under section 766 of the Bankruptcy Code.* Any open commodity contract that is specifically identifiable property and which is not required to be liquidated under § 190.04(c), and which is not otherwise liquidated, may be transferred on behalf of a public customer, provided, however, that such customer must first deposit cash with the trustee in an amount equal to the amount by which the equity to be transferred to margin such contract together with any other transfers or returns of specifically identifiable property or disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with the respect to the customer's net equity claim for such account; and, provided further, that adequate security for the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(3) *Distribution in kind of specifically identifiable securities.* If any securities of a customer are specifically identifiable property under § 190.01(pp)((1)(i)(A) of this chapter but the customer has no open commodity contracts, the customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities, with a fair market value (inclusive of transaction costs) which does not exceed that portion of such customer's allowed net equity claim that constitutes a claim for securities, if like-kind securities can be purchased in a fair and orderly manner.

(4) *Proof of customer claim.* No distribution shall be made pursuant to paragraphs (d)(1) and (d)(2) of this section prior to receipt of a completed proof of customer claim as described in § 190.03(d) or (e).

(5) *No differential distributions.* Partial distributions with respect to a particular account class made prior to the final net equity determination date must be made pursuant to a preliminary plan of distribution approved by the court, upon notice to the parties and to all customers, which plan requires adequate security to the debtor's estate for the non-recovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers in such account class.

§ 190.10 Provisions generally applicable to futures commission merchants.

(a) *Current records.* A person that is registered or required to register as a futures commission merchant must maintain current records relating to its customers' accounts, including copies of all account agreements and related account documentation, and "know your customer" materials, which may be provided to another futures commission merchant to facilitate the transfer of open commodity contracts or other customer property held by such person for or on behalf of its customers to the other futures commission merchant, in the event an order for relief is entered with respect to such person.

(b) *Designation of hedging accounts.*

(1) A futures commission merchant must provide an opportunity to each customer, when it first opens a futures account, foreign futures account or cleared swaps account with such

futures commission merchant, to designate such account as a hedging account.

(2) A futures commission merchant may permit the customer to open the account as a hedging account only if it obtains the customer's written representation that the customer's trading of futures or options on futures, foreign futures or options on foreign futures, or cleared swaps (as applicable) in the account constitutes hedging as such term may be defined under any relevant Commission regulation or rule of any clearing organization, foreign clearing organization, designated contract market, swap execution facility or foreign board of trade.

(3) The requirements set forth in paragraphs (b)(1) and (2) do not apply to a futures commission merchant with respect to any commodity contract account that the futures commission merchant opened prior to [insert effective date of the Part 190 revisions]. The futures commission merchant may continue to designate as a hedge account any account with respect to which the futures commission merchant received written hedge instructions from the customer in accordance with former § 190.06(d).

(4) A futures commission merchant may re-designate an existing futures account, foreign futures account or cleared swaps account of a particular customer as a hedging account, provided that it has obtained the representation set out in paragraph (b)(2) of this section from such customer.

(c) *Delivery accounts.* In connection with the making or taking of delivery of a commodity under a commodity contract whose terms require settlement via physical delivery, if a futures commission merchant facilitates or effects the transfer of the physical delivery property and payment therefor on behalf of the customer, and does so outside the futures account, foreign futures account or cleared swaps account in which the commodity contract was held, the futures commission merchant must do so in a delivery account, provided, however, that when the commodity subject to delivery is a security, a futures commission merchant may, consistent with any applicable regulatory requirements, do so in a securities account.

Subpart C—Clearing Organization as Debtor

§ 190.11 Scope and purpose.

This subpart C applies to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization.

§ 190.12 Required reports and records.

(a) *Reports provided to the trustee and the Commission.* As soon as practicable following the commencement of a proceeding that is subject to this subpart and in no event later than the business day following the commencement of such proceeding, the debtor shall provide to the trustee and the Commission, copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c) of this chapter, including copies of any reports required under § 39.19(c)(2), (c)(3) and (c)(4) of this chapter that the debtor filed with the Commission during the preceding 12 months.

(b) *Records provided to the trustee and the Commission.* As soon as practicable following commencement of a proceeding that is subject to this subpart and in no event later than the next business day, the debtor shall make available to the trustee and the Commission, upon request, copies of the following records:

- (1) All records maintained by the debtor described in § 39.20(a) of this chapter;
- (2) Any recovery and wind-down plan of the debtor maintained under § 39.39(b) of this chapter;
- (3) The default management plan and default rules and procedures maintained by the debtor under § 39.16 and, as applicable, § 39.35 of this chapter; and
- (4) Any opinions of counsel provided to the debtor in the 12 months preceding the commencement of such proceeding relating to the enforceability of the rules and procedures of the debtor in the event of the commencement of an insolvency proceeding against the debtor.

(c) To the extent that the debtor makes available to the trustee the reports and records required under paragraphs (a) and (b) of this section but does not deliver such reports and records to the Commission, the trustee shall deliver such reports and records to the Commission as soon as practicable upon request from the Commission.

§ 190.13 Prohibitions on avoidance of transfers.

The following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549 or 724(a) of the Bankruptcy Code:

(a) *Pre petition transfers.* Any transfer of open commodity contracts and the equity margining or securing such contracts made to another clearing organization that was as approved by the Commission, and was made prior to entry of the order for relief; and

(b) *Post-relief transfers.* Any transfers of open commodity contracts and the equity margining or securing such contracts made to another clearing organization following entry of the order for relief, that was made with the prior approval of the Commission, on or before the seventh calendar day after the entry of the order for relief.

§ 190.14 Operation of the estate of the debtor subsequent to the filing date and prior to the primary liquidation date.

(a) *Notices to the Commission.* A debtor that files a petition in bankruptcy shall, at or before the time of such filing, and a debtor against which such a petition is filed shall, as soon as possible, but no later than one calendar day after the receipt of notice of such filing, notify the Commission of the filing date, the court in which the proceeding has been filed, and the docket number assigned to that proceeding by the court.

(b) *Proofs of Claim.* The trustee may, in its discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee, and seek a court order establishing a bar date for the filing of such proofs of claim. In such an event, notwithstanding the provisions of § 190.15, any procedures relating to the allowance of claims and distribution of customer and member property approved or ordered by the court shall control and supersede the debtor's recovery and wind-down plan and default rules and procedures.

(c) *Margin calls.* Subsequent to the filing date and prior to the primary liquidation date, the trustee, in its reasonable discretion and with the prior approval of the Commission, is permitted, to the extent practicable and in accordance with the rules and procedures of the debtor, with respect to open commodity contracts of the debtor, to:

(1) Make calls for initial margin and effect returns of initial margin to clearing members of the debtor; and

(2) Make variation settlement payments to clearing members of the debtor.

(d) *Liquidation.* The trustee shall liquidate all open commodity contracts that have not been terminated or liquidated as of seven calendar days after entry of the order for relief, unless the Commission determines that liquidation would not be in the best interests of the debtor's estate. Such liquidation of open commodity contracts shall be conducted in accordance with the rules and procedures of the debtor, to the extent applicable. In lieu of liquidating securities held by the debtor and making distributions in the form of cash, the trustee may, in its reasonable discretion, make distributions in the form of securities that are equivalent to the securities originally delivered to the debtor by the clearing member or customer.

§ 190.15 Wind-down and recovery plan.

(a) *Prohibition on avoidance of actions taken pursuant to a recovery and wind-down plan.* Subject to the provisions of section 766 of the Bankruptcy Code and §§ 190.13 and 190.18, the trustee shall not avoid or prohibit any action taken by a debtor subject to this subpart that is reasonably within the scope and is provided for in any recovery and wind-down plan maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter.

(b) *Implementation of debtor's default rules and procedures.* In administering a proceeding under this subpart, the trustee shall implement, in consultation with the Commission, the default rules and procedures maintained by the debtor under § 39.16 and, as applicable, § 39.35 of this chapter and any termination, close-out and liquidation provisions included in the rules of the debtor, subject to the reasonable discretion of the trustee and to the extent that implementation of such default rules and procedures is practicable.

(c) *Implementation of wind-down and recovery plan.* In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plan maintained by the debtor filed with the Commission pursuant to § 39.39 of this chapter, to the extent reasonable and practicable; provided, however, that the trustee shall not be required to take any action that is detrimental to customers.

§ 190.16 Delivery.

(a) *General.* In the event that the trustee is unable to liquidate any open commodity contracts that settle upon expiration or exercise by making or taking delivery of physical delivery property before such commodity contracts move into a delivery position, i.e., before a member or its customer has incurred contractual obligations to make or take delivery under such contracts, or such commodity contracts were in a delivery position on the date of the order for relief, the trustee must use its reasonable best efforts to complete the delivery on behalf of the member or the member's customer in a manner consistent with § 190.06(a).

(b) *Special provisions for delivery accounts.*

(1) Each type of commodity contract subject to delivery under this § 190.16 and for which delivery occurs in or through a delivery account carried by the debtor shall constitute a separate delivery account class.

(2) Within the delivery account class for a particular commodity contract, the trustee shall treat (i) physical delivery property held in delivery accounts, along with the proceeds from any subsequent sale of such physical delivery property in accordance with § 190.06(a)(3) to fulfill a member's or its customer's delivery obligation or any other subsequent sale of such property, as part of the physical delivery account class, and (ii) cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a member or its customer in accordance with § 190.06(a)(3), as part of the separate cash delivery account class.

(3) If the debtor holds any cash or property in the form of cash equivalents in an account with a bank or other person under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking physical delivery, or receiving payment for making physical delivery, of a commodity under any commodity contracts, such property shall (subject to § 190.19) be considered customer property in the delivery account class for the relevant commodity contract.

§ 190.17 Calculation of net equity.

(a) *General.* If a member of the clearing organization clears trades in commodity contracts through a commodity contract account carried by the debtor as a customer account for the benefit of the member's public customers and through a house account, the member shall be treated as having customer claims against the debtor in separate capacities with respect to the customer account and house account at the clearing organization, and by account class.

(b) *Equity.* The equity shall be calculated separately for each separate customer capacity in which the member has a claim against the debtor, i.e., separately by customer account and house account and by account class. The equity shall be calculated in the manner provided in § 190.08(a)(1), to the extent applicable.

(c) *Allowed net equity claim.*

(1) *On behalf of a member's public customers.* The allowed net equity claim of a member based on accounts carried by the debtor as customer accounts for the benefit of the member's public customers shall be equal to the member's pro rata share of the customer property with respect to each account class available as of the primary liquidation date for distribution to members of the same customer class.

(2) *Based on a member's house account.* The allowed net equity claim of a member based on a house account shall be equal to the member's pro rata share of the member property with respect to each account class available as of the primary liquidation date for distribution to members of the same customer class.

§ 190.18 Treatment of property.

(a) *General.* The property of the debtor's estate must be allocated among account classes and between customer property and member property as provided in this section to satisfy claims of members, as customers of the debtor. The property so allocated will constitute a separate estate of the customer class and the account class to which it is allocated, and will be designated by reference to such customer class and account class. A member shall be treated as part of the public customer class with respect to claims based on any commodity customer accounts carried as "customer accounts" by the clearing organization for the benefit of the member's public customers, and as part of the non-public customer class with respect to claims based on its house account.

(b) *Scope of customer property.* Customer property is the property available for distribution within the relevant account class in respect of claims by members, as customers of the clearing organization, based on customer accounts carried by the debtor for the benefit of such member's public customers.

(1) Customer property includes the following:

(i) All cash, securities, or other property, or the proceeds of such cash, securities or other property, received, acquired or held by or for the account of the debtor, from or

for any commodity customer account of a member carried by the debtor on behalf of such member's public customer, which is:

(A) Property received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property described in § 190.01(jj)(1) through (3);

(D) Profits or contractual rights accruing to the member's public customers as a result of a commodity contract;

(E) Letters of credit, including any proceeds of a letter of credit drawn upon by the trustee;

(F) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account;

(ii) All cash, securities, or other property which is segregated by the debtor on the filing date for the benefit of members' public customers;

(iii) All cash, securities, or other property:

(A) Which was of a type described in § 190.14(a)(1)(i)(A) that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(B) Represents a recovery of any debit balance, margin deficit or other claim of the debtor against any commodity customer account carried for the benefit of a member's public customers;

(C) Was unlawfully converted but is part of the debtor's estate;

(D) Of a type described in paragraph (a)(1)(ii)(F) and (H) through (K) of § 190.09 (as if the term debtor used therein refers to a clearing organization as debtor); and

(iv) Any guaranty deposit or similar payment or deposit made by a member, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of the member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member, to the extent the property enumerated in this § 190.04(a) is insufficient to satisfy in full all claims on behalf of members' public customers.

(2) Customer property will not include property of the type described in § 190.09(a)(2), as if the term debtor used therein refers to a clearing organization and to the extent relevant to a clearing organization.

(b) *Member property.*

(1) *In general.* “Member property” means, in connection with a clearing organization bankruptcy, the property which may be used to pay that portion of the net equity claim of a member which is based on the member’s house account at the clearing organization, including any claims on behalf of non-public customers of the member.

(2) *Scope of member property.* Member property shall include all money, securities and property received, acquired, or held by a clearing organization to margin, guarantee or secure, on behalf of a clearing member, the commodity contract positions in the relevant account class for or on behalf of the member or the member’s non-public customers, provided, however, that any guaranty deposit or similar payment or deposit made by such member and any capital stock, or membership of such member in the clearing organization shall also be included in member property after payment in full, in each case in accordance with the by-laws or rules of the clearing organization, of that portion of:

(i) The net equity claim of the member based on its customer account; and

(ii) Any obligations due to the clearing organization which may be paid therefrom, including any obligations due from the clearing organization to the customers of other members.

(c) *Property of the debtor.* Assets of the estate that are not customer property or member property shall be used to satisfy the claims of the following entities before satisfying general unsecured claims of the debtor’s estate, in order of priority:

(1) Claims by a member based on customer accounts carried by the debtor for the benefit of the member’s public customers;

(2) Claims by a member based on the member’s house account.

(d) Nothing in this section, including but not limited to the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (a)(1)(i)(A) and (C) through (F), or (a)(1)(ii) or (iv) of this § 190.14.

Appendix A to Part 190—Customer Proof of Claim Form

[CASE CAPTION]

CLAIM FORM FOR COMMODITY BROKER CUSTOMERS OF [DEBTOR]

Debtor: [INSERT]	
Customer Name:	COURT USE ONLY
Account Number(s): Daytime Telephone number: Email:	<input type="checkbox"/> Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____
Name and address where payment should be sent (if different from above): Telephone number: Email:	<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

THIS CLAIM FORM SHOULD BE USED ONLY IF YOU ARE A CUSTOMER AND HAVE A CLAIM BASED ON FUTURES, FOREIGN FUTURES, DELIVERY OR SWAPS ACCOUNT(S) AT THE DEBTOR. A DIFFERENT CLAIM FORM MUST BE USED TO ASSERT OTHER TYPES OF CLAIMS AGAINST THE DEBTOR.

THE DEADLINE FOR FILING ALL CUSTOMER CLAIMS IS [BAR DATE]. NO CUSTOMER CLAIM WILL BE ALLOWED IF IT IS RECEIVED AFTER THIS DATE. CLAIMS MUST BE RECEIVED BY 11:59 P.M. ([TIME ZONE]) ON _____ TO BE CONSIDERED TIMELY.

[Include case-specific instructions for how to file a claim]

If you require additional space to answer any question, please attach separate pieces of paper and label the answers to the corresponding questions.

I. CLAIM AMOUNT

For each type of account that is applicable, state the amount of your claim against the Debtor.

- a. Commodity futures account claim: \$ _____
 - b. Foreign futures account claim: \$ _____
 - c. Cleared swaps account claim: \$ _____
 - d. Delivery account claim: \$ _____
- Total Claim: \$ _____

Date on which your claim is valued (*see instructions*): _____

II. OPEN POSITIONS AND UNLIQUIDATED PROPERTY

On the date on which your claim is valued, did you have any open positions, unliquidated securities or other unliquidated property in any of our accounts?

Check one: YES NO

If you selected "YES," please (i) state below the value of your open positions, unliquidated securities and/or other unliquidated property, (ii) explain in an attachment the basis for that value, and (iii) attach any documentary evidence supporting the value.

Value of all open positions and property: \$ _____

III. ACCOUNT BALANCE ON CUSTOMER STATEMENT

Please state the account balance reflected on the most recent customer statement you received from the Debtor. If you have multiple accounts, please state the aggregate net account balance. Please attach your account statement or statements reflecting the balance.

Account balance per most recent account statement(s): \$ _____

Do you agree with the account balance on your most recent account statement(s), as set forth above?

Check one: YES NO

If you selected "NO," please explain in an attachment the reasons why you disagree with the account balance on your most recent statement or statements.

IV. CAPACITY IN WHICH ACCOUNT IS HELD

Please specify the capacity in which you hold the account or accounts on which this claim is based (check all that are applicable):

- a. Individual capacity
- b. Guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act
- c. Executor or administrator of an estate
- d. Trustee for a trust beneficiary
- e. Corporation, partnership, or unincorporated association
- f. Omnibus customer account of a futures commission merchant
- g. Part owner of a joint account
- h. Individual retirement account
- i. Agent or nominee for a principal or beneficial owner (and not described in Items (a)-(h))
- j. In any other capacity not described above in Items (a)-(i) (please specify the capacity): _____

V. CONNECTIONS WITH THE DEBTOR

(1) Is the customer making this claim one of the following persons (check all that are applicable):

- a. The Debtor.
- b. Officer, director, general partner or owner of ten percent or more of the capital stock of the Debtor.
- c. An employee, limited partner or special partner of the Debtor whose duties include (1) the management of the business of the Debtor or any part thereof; (2) the handling of the trades or customer funds; (3) the keeping of records pertaining to the trades or funds of customers; or (4) the signing or cosigning of checks or drafts on behalf of Debtor.
- d. A spouse or minor dependent living in the same household as any person listed in this section.
- e. A business affiliate that directly or indirectly controls the Debtor, or is directly or indirectly controlled by or is under common control with the Debtor.

(2) Is the customer making the claim on behalf of any account that is owned 10% or more by any of the persons, alone or jointly, identified in V.(1)?

Check one: YES NO

If you selected "YES," please identify such person(s) and the category identified in V.(1) under which they fit.

VI. ADDITIONAL INFORMATION

A. Is this a joint account?

Check one: YES NO

If you selected "YES," specify the amount of your percentage interest in the account, and whether all participants in a joint account are claiming jointly.

If you selected "YES," are the securities positions held in a futures account with the debtor or in an account you have with an affiliate of the debtor?

Check one: FUTURES ACCOUNT
ACCOUNT WITH AFFILIATE
WITH DEBTOR Please identify: _____

F. If you are claiming securities held in your account, do you wish to receive payment in kind, if possible?

Check one: YES NO

VII. AMOUNTS OWED TO DEBTOR

Do you owe any amounts to the Debtor not already taken into account in the claim and account balances provided in Nos. II-III above?

Check one: YES NO

If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.

VIII. VERIFICATION

CHECK THE APPROPRIATE BOX.

I am the customer

I am the customer's authorized agent.

I am a guarantor, surety, indorser
or other (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above):

Telephone number: _____

Email: _____

Signature

(Date)

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR CUSTOMER PROOF OF CLAIM FORM

<p>Customer’s Name and Address: Fill in the name of the person or entity asserting the claim, and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The customer has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).</p>	<p>Date on Which Claim is Valued: Your claim should be valued as of [the last date on which any contracts or property not liquidated to cash balances remained in your account. Do not include the value of any contracts, funds or other property transferred to another commodity broker] [^, the date established by the Court as the date on which customer accounts should be valued].</p>
<p>Claim in foreign currencies: If some or all of your claim is based on a currency other than U.S. dollars, please file you claim in U.S. dollars based on the exchange rate in effect as of the petition date ([INSERT]), and identify the exchange rate used in calculating your claim in a separate attachment.</p>	<p>Estimated Claim Amount: If you cannot compute the amount of your claim, you must file an estimated claim. In that case, please be sure to indicate that your claim is an estimated claim.</p>
<p>Types of Customer Accounts:</p> <p>A “futures account” is an account opened for the purpose of trading futures or options on futures on a U.S. futures exchange. Your account statement for a “futures account” would typically include the term “SEG” in the title or description of the account.</p> <p>A “foreign futures account” is an account opened for the purpose of trading futures or options on futures on an exchange located outside the U.S. Your account statement for a “foreign futures account” would typically include the term “30.7” in the title or description of the account.</p> <p>A “delivery account” is an account denominated as such and through which deliveries of commodities occurs under expiring futures contracts. A delivery account also may hold cash balances and/or title documents for commodities such as metals warehouse receipts that are deliverable under an exchange’s futures contract.</p> <p>A “cleared swaps account” is an account opened for the purpose of holding swaps traded bilaterally or in off-exchange markets that are required to be submitted to a U.S. clearinghouse for settlement and clearing. Your account statement for a “cleared swaps account” would typically include the term “swap” in the title or description of the account.</p> <p>Your account statement may include multiple types of customer accounts in a single account statement.</p>	<p>Verification:</p> <p>The individual completing this proof of claim must sign and date it. If the claim is filed electronically, the Bankruptcy Code authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration.</p> <p>Print the name and title, if any, of the customer or other person authorized to file this claim. State the filer’s address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. Criminal penalties apply for making a false statement on a proof of claim.</p>

<p>Other types of derivatives trading accounts, such as “FX” or “forex” accounts, are not customer accounts entitled to special protection under the Bankruptcy Code.</p>	
<p>1. Documentation.</p> <p>2. Please attach a copy (not the original) of the most recent account statement for each account on which this claim is based.</p> <p>3. Please enclose copies (not originals) of any documentation or correspondence you believe will be of assistance in processing your claim, including, but not limited to, customer confirmations, account statements, and statements of purchase or sale.</p> <p>4. If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the claim that you are asserting in this claim form, please provide copies of the complaint and all related correspondence, as well as any replies that you received.</p>	<p>Credits:</p> <p>An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the customer gave the Debtor credit for any obligations of the customer to the Debtor.</p>
<p>ADDITIONAL INFORMATION</p>	
<p>Acknowledgment of Receipt of Claim</p> <p>[Instructions for acknowledgment of filing]</p>	<p>Offers to Purchase a Claim</p> <p>Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact you and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the Debtor. These entities do not represent the Bankruptcy Court or the Debtor. A customer has no obligation to sell its claim. However, if a customer decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 <i>et seq.</i>), and any applicable orders of the Bankruptcy Court.</p>

Appendix B to Part 190—Special Bankruptcy Distributions When a Debtor FCM Participates in Cross-Margining Programs for Commodity Contracts and Securities

FRAMEWORK 1—SPECIAL DISTRIBUTION OF CUSTOMER FUNDS WHEN THE CROSS-MARGINING ACCOUNT IS A FUTURES ACCOUNT

This distributional rule applies when a debtor futures commission merchant has participated in a cross-margining (“XM”) program for futures and securities under which the cross-margined positions of its futures customers (as defined in § 1.3 of this chapter) and the property received to margin, secure or guarantee such positions are held in one or more accounts pursuant to a Commission order that requires such positions and property to be segregated, pursuant to section 4d(a) of the Act, from the positions and property of (a) the futures commission merchant, (b) if applicable, any affiliate carrying the securities positions as a participant in the XM program (“Affiliate”), and (c) other futures customers of the futures commission merchant (such segregated accounts, the “XM accounts”). The futures commission merchant may, and any Affiliate that holds the securities positions in an XM account that it directly carries will, be registered as a broker-dealer under the Exchange Act. The Commission order approving the XM program will require a participating customer to sign an agreement, in a form approved by the Commission, that refers to this distributional rule.

A futures commission merchant is deemed to receive securities held in an XM account, including securities and other property held by an Affiliate in an XM account, as “futures customer funds” (as defined in § 1.3 of this chapter) that margin, guarantee or secure commodity contracts in the XM account (or paired XM accounts at the futures commission merchant and an Affiliate). Under the agreement signed by the customer, in the event that the futures commission merchant (or Affiliate) is the subject of a SIPA proceeding, the customer agrees that securities in an XM account are excluded from the securities estate for purposes of SIPA, and that its claim for return of the securities will not be treated as a customer claim under SIPA. These restrictions apply to the customer only, and should not be read to limit any action that the trustee may take to seek recovery of property in an XM account carried by an Affiliate as part of the customer estate of the futures commission merchant.

XM accounts, and other futures accounts that are subject to segregation under section 4d(a) of the Act (pursuant to the Commission’s regulations thereunder) (“non-XM accounts”), are treated as two subclasses of futures account with two separate pools of segregated futures customer property, an XM pool and a non-XM pool, each of which constitutes a segregated pool under section 4d(a) of the Act. If the futures commission merchant has participated in multiple XM programs, the XM accounts in the different programs are combined and treated as part of the same XM subclass of futures accounts. A futures customer could hold both non-XM and XM accounts.

Customer claims under Part 190 arising out of the XM subclass of accounts are subordinated to customer claims arising out of the non-XM subclass of accounts in certain circumstances in which the futures commission merchant does not meet its

segregation requirements. The segregation requirement is the amount of futures customer funds that the futures commission merchant is required by the Act and Commission regulations or orders to hold on deposit in segregated accounts on behalf of its futures customers (exclusive of its targeted residual amount obligations pursuant to § 1.3 of this chapter).

If there is a shortfall in the non-XM pool and no shortfall in the XM pool, all customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and paid pro rata out of the combined XM and non-XM pools of futures customer property. If there is a shortfall in the XM pool and no shortfall in the non-XM pool, customer net equity claims arising from the XM subclass of accounts must be satisfied first from the XM pool, and customer net equity claims arising from the non-XM subclass of accounts must be satisfied first from the non-XM pool. If there is a shortfall in both the non-XM and XM pools: (1) if the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement for the XM pool, all customer net equity claims will be paid pro rata out of the combined XM and non-XM pools of futures customer property; and (2) if the XM shortfall as a percentage of the segregation requirement for the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool, non-XM customer net equity claims will be paid pro rata out of the available non-XM pool, and XM customer net equity claims will be paid pro rata out of the available XM pool. In this way, non-XM customers will never be adversely affected by an XM shortfall.

The following examples illustrate the operation of this rule. The examples assume that the FCM has two futures customers, one with exclusively XM accounts and one with exclusively non-XM accounts.

1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	150	300
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	0	
Shortfall (percent)	0	0	
Distribution	150	150	300

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

2. Shortfall in Non-XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	150	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	0	
Shortfall (percent)	$50/150=33.30$	0	
Pro rata (percent)	$150/300=50$	$150/300=50$	
Pro rata (dollars)	125	125	
Distribution	125	125	250

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his pro rata share of the funds available, or 50% of the \$250 available, or \$125.

3. Shortfall in XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	100	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	50	
Shortfall (percent)	0	$50/150=33.3$	
Pro rata (percent)	$150/300=50$	$150/300=50$	
Pro rata (dollars)	125	125	
Distribution	150	100	250

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving \$150 while the XM customer will receive the remaining \$100.

4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	125	100	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	25	50	
Shortfall (percent)	$25/150=16.7$	$50/150=33.3$	
Pro rata (percent)	$150/300=50$	$150/300=50$	
Pro rata (dollars)	112.50	112.50	
Distribution	125	100	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM customer will receive the \$125 available with respect to non-XM claims while the XM customer will receive the \$100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	125	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	25	
Shortfall (percent)	$50/150=33.3$	$25/150=16.7$	
Pro rata (percent)	$150/300=50$	$150/300=50$	
Pro rata (dollars)	112.50	112.50	
Distribution	112.50	112.50	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the \$225 available, or \$112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	125	200
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	50	
Shortfall (percent)	$50/150=33.3$	$50/150=33.3$	
Pro rata (percent)	$150/300=50$	$150/300=50$	
Pro rata (dollars)	100	100	
Distribution	100	100	200

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the \$200 available, or \$100.

These examples illustrate the principle that pro rata distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, pro rata distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

FRAMEWORK 2— SPECIAL DISTRIBUTION OF CUSTOMER FUNDS WHEN THE CROSS-MARGINING ACCOUNT IS A CLEARED SWAPS ACCOUNT

Reserved.