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ABA BUSINESS LAW SECTION

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September 29, 2017

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Project KISS Suggestion -- Clearing (RIN 3038-AE55)

Dear Mr. Kirkpatrick,

The Part 190 Subcommittee ("**Committee**") of the Business Law Section of the American Bar Association ("**ABA**") appreciates the opportunity to submit its work product to the Commodity Futures Trading Commission ("**CFTC**" or "**Commission**") for consideration in connection with the Commission's Project KISS initiative.¹ We ask the Commission to consider adopting a new set of Part 190 Rules to govern a commodity broker bankruptcy under subchapter IV of chapter 7 of the Bankruptcy Code, in the form of the attached model rules ("**Model Part 190 Rules**"). The Model Part 190 Rules are the product of a two-year plus initiative undertaken by the Committee to holistically reevaluate the current rules, in light of significant market and regulatory developments since they were first adopted over 30 years ago, and with the benefit of industry experience living through the bankruptcies of several futures commission merchants ("**FCMs**").

The views expressed in this letter, and the proposed Model Part 190 Rules, are presented on behalf of the Committee. They have not been approved by the House of Delegates or Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA. In addition, they do not represent the position of the ABA Business Law Section, nor do they necessarily reflect the views of all members of the Committee.

The Committee believes that the Model Part 190 Rules are consistent with the goals of Project KISS to simplify and improve how CFTC rules apply in practice, and that our submission is in the spirit of Project KISS.² If the Commission is interested in moving forward with a rulemaking proceeding to amend Part 190, as we recommend, but would prefer that we file a rulemaking petition to initiate the process, we are happy to resubmit the Model Part 190 Rules in that manner.

¹ *Project KISS (Request for Information)*, 82 FR 23765 (May 24, 2017).

² We understand that Project KISS is "about taking CFTC's existing rules as they are and applying them in ways that are simpler, less burdensome and less of a drag on the American economy," and is "not about identifying existing rules for repeal or even rewrite." *Id.* at 23766. The press release announcing Project KISS, though, appears to contemplate rule change recommendations. See CFTC Press Release No. 7555-17, *CFTC Requests Input on Simplifying Rules* (May 3, 2017).

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I. Background on the Committee and the Part 190 Project

The Committee was established in February 2015 as a joint subcommittee of the Derivatives and Futures Law Committee and Business Bankruptcy Committee of the ABA Business Law Section, and its members are drawn primarily from those two committees.³ The Committee was formed to conduct a careful review of the Part 190 Rules to identify potential areas where they could be improved, with the plan to draft comprehensive revisions in the form of model rules that the CFTC could consider for potential agency rulemaking.

The Part 190 Rules apply to the liquidation of a U.S.-based FCM or a U.S.-based clearing house that is registered with the CFTC as a derivatives clearing organization (“*DCO*”), in a proceeding (a “*subchapter IV proceeding*”⁴) governed by subchapter IV of chapter 7 of the U.S. Bankruptcy Code (“*Code*”). The CFTC first adopted the rules in 1983, pursuant to its authority under Section 20 of the Commodity Exchange Act (“*Act*” or “*CEA*”), and has amended them several times over the years. The rules are of critical importance for managing the liquidation of an FCM or DCO in a subchapter IV proceeding.

The rules have generally served the industry, bankruptcy professionals and customers well. That said, the Committee believes there is a need to update Part 190 in a comprehensive manner, as the markets – and how they are regulated – have changed dramatically in the intervening decades. At the same time, it is important to stay true to the sound conceptual elements of the existing rules with respect to account class distinctions, porting of customer positions, and pro rata distribution of customer property by account class, with priority given to public customers. The Committee was also spurred to act by the MF Global and Peregrine Financial Group bankruptcies, and the lessons they revealed on the challenges of liquidating a large FCM that is severely under-segregated.

A. *Committee Membership*

The Committee initially had around 35 members, but over time expanded to more than 45 members. The Committee comprises attorneys who work extensively in the areas of derivatives law, bankruptcy law or both, including lawyers at:

- Law firms
- FCMs
- Clearing houses and exchanges
- Government agencies
- Industry associations

Committee members participated in the project with the shared goals of developing model rules that work together as an integrated whole, are clear and unambiguous in setting out objectives, and avoid unnecessary complexity that could hinder or delay timely, prudent action by the trustee for the failed commodity broker. The members brought differing views to the many issues that the Committee considered, drawing on their unique and varied experiences, to the benefit of the final work product.

³ The Committee is co-chaired by Kathryn Trkla, representing the Derivatives and Futures Law Committee, and Vincent Lazar, representing the Business Bankruptcy Committee.

⁴ The term also covers a proceeding initiated under SIPA (defined below) against an FCM that is registered under the federal securities laws as a broker-dealer.

Notably, attorneys for the MF Global trustee, and the trustee for the Peregrine Financial Group bankruptcy, actively participated in the Committee's work, offering their valuable perspective on practical issues they encountered in administering those bankruptcies under the current rules. The DCO representatives provided helpful input based on their experience managing the defaults of clearing member FCMs such as MF Global, and also on appropriate rules for handling the liquidation of a DCO in a subchapter IV proceeding. The Committee also benefitted from the participation of attorneys who were formerly at the CFTC, including one of the drafters of the original rules.

B. Methodology for Developing the Model Part 190 Rules

At the outset, several law firms contributed to a detailed section-by-section analysis of the existing Part 190 Rules, which was shared with all Committee members. The analysis addressed the text of the rules and experience operating under the rules, and identified potential issues for the Committee's attention. Based on that analysis, and with additional input from Committee members, the Committee prepared a master issues list. The Committee then organized into working groups to tackle issues in the following areas:

- Delivery Account Class
- Retail Forex/Custody Arrangements
- Customer Property – FCM Bankruptcy
- Initial Administration – FCM Bankruptcy
- Porting – FCM Bankruptcy
- Account Liquidation – FCM Bankruptcy
- Claims Process
- Dually Registered FCM-BDs
- DCO Bankruptcies
- Cross-Border

The working groups provided recommendations and proposed drafting changes to the existing rules, from which the Committee prepared a first draft of the model rules that was circulated to the full Committee for review and comment on October 4, 2016. Revised drafts were circulated to the Committee on June 1, 2017, August 22, 2017 and September 6, 2017.⁵ A number of committee members contributed to the drafting and provided input and comments, resulting in the Model Part 190 Rules.

The Committee held three in-person meetings – in April 2015, June 2015 and November 2016 – at which members discussed issues in depth. The Committee also held a number of planning and progress update calls. The Committee greatly appreciates the participation by CFTC Division of Clearing and Risk (“DCR”) staff in two of the in-person meetings. Their willingness to share their knowledge in our “brainstorming” exercises helped inform our understanding of the current rules and how they are intended to operate. DCR staff expressly conveyed that they did not want to direct the Committee's deliberations, and they were careful not to offer comments that could be construed as trying to persuade the Committee to any particular viewpoint on any particular issue. They were also clear that their comments did not represent the views of the Commission, or of anyone other than the person expressing them.

⁵ In addition, many interim drafts were circulated with particular working groups or among individuals actively involved in the drafting.

II. Overview of the Model Part 190 Rules

The Model Part 190 Rules represent a comprehensive overhaul of the existing rules. The Committee took care to adhere to the core concepts first laid out when the rules were adopted in 1983. The changes do, though, represent some changes to existing policies, as noted below.

A. *General*

1. *Reorganization*

The Model Part 190 Rules are organized into three subparts: Subpart A, which contains general provisions applicable to all proceedings under the rules; Subpart B, which contains provisions specific to a proceeding in which the debtor is an FCM; and Subpart C, which contains provisions specific to a proceeding in which the debtor is a DCO. We believe that reorganizing the rules into three subparts will improve the application of the Part 190 Rules, which currently are not organized into subparts, because that will simplify how and when the rules apply in practice, by identifying the circumstances in which different rules are relevant.

The Model Part 190 Rules are organized as follows.

Subpart A—General Provisions

Rule 190.00 - Statutory authority, organization, core principles, scope, and construction (NEW)

Rule 190.01 - Definitions

Rule 190.02 - General

Subpart B—Debtor is a Futures Commission Merchant

Rule 190.03 - Notices and proofs of claim

Rule 190.04 - Operation of the debtor's estate—customer property

Rule 190.05 - Operation of the debtor's estate—general

Rule 190.06 - Making and taking delivery under commodity contracts

Rule 190.07 - Transfers

Rule 190.08 - Calculation of allowed net equity

Rule 190.09 - Allocation of property and allowance of claims

Rule 190.10 - Provisions generally applicable to futures commission merchants

Subpart C—Clearing Organization as Debtor (NEW)

Rule 190.11 - Scope and purpose

Rule 190.12 - Required reports and records

Rule 190.13 – Prohibitions on the avoidance of transfers

Rule 190.14 - Operation of the estate of the debtor subsequent to the filing date and prior to the primary liquidation date

Rule 190.15 - Wind-down and recovery plan

Rule 190.16 – Delivery

Rule 190.17 - Calculation of net equity

Rule 190.18 - Treatment of property

In addition, the Model Part 190 Rules contain two appendices:

Appendix A – Template Claim Form for Commodity Broker Customers of a Debtor FCM

Appendix B – 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

Framework 2—Special Distribution of Customer Funds When the Cross-Margining Account is a Cleared Swaps Customer Account [RESERVED]

2. Limiting Part 190 to FCMs and DCOs

The definition of commodity broker in Section 101(6) of the Code covers categories of commodity brokers beyond FCMs and DCOs, specifically, commodity option dealers and leverage transaction merchants. To our knowledge, no person is currently registered or operating as a commodity option dealer or leverage transaction merchant. Indeed, it does not appear that a person may legally act as a commodity option dealer in light of the Commission's decision to rescind its commodity option dealer rules in 2012.⁶ The Commission, in fact, already removed commodity option dealers from the scope of Part 190 when it eliminated the commodity option account class formerly recognized under the rules.⁷

Although the CFTC has not revoked its Part 31 Rules governing leverage transaction merchants, we question whether trading of leverage contracts is permissible in light of the restrictions on retail commodity transactions added to the CEA in 2010. With limited exception, Section 2(c)(2)(D) effectively prohibits persons from trading leveraged, margined or financed transactions in commodities with retail customers in bilateral, off-exchange transactions.

Thus, we recommend uncluttering the rules by limiting their scope to subchapter IV proceedings of commodity brokers that are FCMs or DCOs, with respect to commodity contracts that are cleared. We further note that this approach aligns the account class distinctions in the Model Part 190 Rules to the

⁶ *Commodity Options*, 77 FR 25320 (April 27, 2012).

⁷ *Protection of Cleared Swaps Customer Contracts and Collateral: Conforming Amendments to the Commodity Broker Bankruptcy Provisions*, 77 FR 6336 (Feb. 7, 2012).

distinctions made by the CFTC in prescribing customer funds segregation protections for different categories of commodity contracts.⁸

If the regulatory framework changes such that it becomes viable for a person to operate as a commodity option dealer or leverage transaction merchant, the Commission could expand the Model Part 190 Rules at that time to add a subpart containing rules specific to a subchapter IV proceeding of such a commodity broker.

3. Context to Aid Administration

The Committee recommends adding a rule to Subpart A that provides context and sets forth the general framework for the Part 190 Rules to assist a trustee or bankruptcy court in understanding the reasons for the specific requirements set forth in the other rules. If the individual appointed as the trustee, or the bankruptcy court, does not have extensive experience with the CEA or CFTC rules, in particular with requirements relating to clearing and customer funds segregation, the Part 190 Rules may well prove difficult to comprehend, particularly in the critical early days when the trustee is expected to act in circumstances that are likely chaotic and stressful. This context and description of the general framework will also be important to customers and other stakeholders that may not have experience with a subchapter IV proceeding.

Thus, the Committee has proposed Rule 190.00, which explains:

- The Commission's statutory authority to adopt the Part 190 Rules.⁹
- The organization of the rules into the three subparts described above.
- The core principles reflected in the rules.
- The scope of the rules in terms of proceedings, account classes, customer property and commodity contracts.

Although Rule 190.00 adds to the length of the rules, on balance, we believe it provides useful explanation that will benefit trustees, bankruptcy judges, customers and other stakeholders applying the rules in practice.

4. Scope

a. Proceedings

As explained above, the Committee recommends limiting Part 190 to commodity brokers that are FCMs or DCOs. Thus, proposed Rule 190.00(d)(1)(i) states that the rules apply to proceedings commenced by or against an FCM or DCO under subchapter IV of chapter 7 of the Code.

⁸ The one exception is the delivery account class; the CFTC does not have rules imposing segregation obligations with respect to property held in a delivery account.

⁹ Specifically, we explain the authority granted under Section 20 of the Act. We have also updated the statutory authority citations that precede the Part 190 Rules.

In addition, proposed Rule 190.00(d)(1)(ii) explains that the rules apply to an FCM that is subject to a proceeding under the Securities Investor Protection Act of 1970 (“*SIPA*”). Many FCMs are also registered as broker-dealers (“*BDs*”) with the Securities and Exchange Commission under the Securities Exchange Act of 1934. A proceeding against a dually-registered FCM-BD will likely be initiated under *SIPA*, as was the case with the Lehman and MF Global proceedings. Part 190 is relevant in this scenario because the trustee in a *SIPA* proceeding has the same duties as a trustee in a subchapter IV proceeding when the debtor is also a commodity broker, to the extent consistent with the provisions of *SIPA* or as otherwise ordered by the court.¹⁰

Proposed Rule 190.09(d)(1) also explains that the rules may serve as guidance with respect to distribution of property in a proceeding in which the Federal Deposit Insurance Corporation (“*FDIC*”) acts as receiver for an FCM or DCO pursuant to Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“*Dodd-Frank Act*”). Section 5390(m)(1)(B) of Title 12 of the U.S.C. provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Code in respect of the distribution of customer property and member property in connection with the liquidation of a commodity broker that is a “covered financial company” or “bridge financial company” (as those terms are defined in 12 U.S.C. § 5381(a)).

b. Account Class and Trust Property Limitations

Proposed Rule 190.00(d)(2) provides that the trustee may not recognize any account class that is not enumerated in the definition of account class in Rule 190.01. The account classes are limited to (i) futures accounts; (ii) foreign futures accounts; (iii) cleared swaps accounts; and (iv) delivery accounts, which we further recommend splitting into physical delivery and cash delivery account classes. The Committee believes that adding the account class limitation underscores the Commission’s position that an FCM’s retail forex customers are not covered as a protected account class under Part 190.¹¹

Proposed Rule 190.00(d)(2) includes limitations on the recognition of certain types of trusts. Specifically, it provides that, so long as there is any shortfall in customer property to satisfy customer net equity claims in the enumerated account classes, a creditor is not entitled to distribution of property on the basis that the debtor holds the property in a constructive trust. The provision is intended, *inter alia*, to conserve resources of the bankruptcy estate by mitigating the risk of costly litigation over whether property is covered by a constructive trust. The proposed rule, though, does not restrict a creditor’s rights to property not covered by an account class that the debtor holds on an express trust basis pursuant to statute, government rule, regulation or order, or legally binding agreement between the debtor and such person.

c. Commodity Contracts: Explicitly Defining What’s In and What’s Out

Proposed Rule 190.00(d)(3) limits commodity contracts within the scope of Part 190 to commodity contracts that are cleared by a DCO or by a foreign clearing organization.

¹⁰ See 15 U.S.C. 78fff-1(b) (“To the extent consistent with the provisions of [*SIPA*] or as otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee in a case under chapter 7 of title 11, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7 . . .”).

¹¹ See generally *In re Peregrine Financial Group, Inc.*, No. 16-3424 (7th Cir. Aug. 7, 2017). See also the Risk Disclosure Statement that an FCM engaged in retail forex is required to provide to its retail forex customers, which is set out in CFTC Rule 5.5.

Proposed Rule 190.00(d)(3) explains that uncleared options on commodities and leverage transactions are excluded from the definition of commodity contract for purposes of Part 190. It also states that commodity contracts do not include security futures products when they are carried in a securities account. For avoidance of doubt, it also states that retail foreign exchange transactions described in CEA Sections 2(c)(2)(B) or (C), and security-based swaps or other securities (other than security futures products carried in an enumerated account class), are not commodity contracts.

In addition, Proposed Rule 190.00(d)(3)(iii) makes clear that the term commodity contract does not include retail commodity transactions described in CEA Section 2(c)(2)(D), unless the transactions are executed on or subject to the rules of a designated contract market (“*DCM*”) or foreign board of trade (“*FBOT*”) as, or as if, they are futures. Because they are exchange-traded, it follows that the transactions will be cleared.

Cleared contracts within the scope of the Model Part 190 Rules include certain commodity contracts that may not fit within the CEA classifications for futures, options on futures or swaps. Commodity contracts for purposes of the Model Part 190 Rules include:

- As part of the cleared swaps account class, swaps as defined in CEA Section 1a(47) and Commission Rule 1.3(xxx) that are cleared, along with non-swap/non-futures contracts that are traded on an over-the-counter (“*OTC*”) basis¹² and cleared by a DCO or a foreign clearing organization the same as if they are swaps. *See* the definition of commodity contract in proposed Rule 190.01(k) in conjunction with the definition of swap in proposed Rule 190.01(ss).
- As part of the futures or foreign futures account class, futures or options on futures executed on or subject to the rules of a DCM or FBOT, including retail commodity contracts traded on such markets as or “as if” they are futures, as well as exchange-listed contracts that may be classified as forward contracts under the Act and which are cleared by a DCO or a foreign clearing organization the same as if they are futures. *See* the definition of commodity contract in proposed Rule 190.01(k) in conjunction with the definition of futures contract in proposed Rule 190.01(aa).

The Committee believes it is important for the rules to cover cleared OTC transactions in contracts that may be outside the swap definition and futures contract classification, such as foreign exchange forwards or foreign exchange swaps excluded by the Treasury Department¹³ or spot forex transactions, because such transactions are already being cleared by DCOs as if they are swaps. It is the Committee’s understanding that the DCOs are clearing such OTC transactions under the account structure, and subject to the customer funds segregation rules, for cleared swaps prescribed in the CFTC Part 22 Rules. Thus, we have included such commodity contracts in the cleared swaps account class.

Code Section 761(4)(F)(ii) provides that the term commodity contract covers, with respect to a commodity broker that is an FCM or a DCO, “any other contract, option, agreement, or transaction, in each case, that is cleared by” a DCO. Thus, such contracts already fall within the scope of subchapter IV, and the Commission therefore has authority to cover non-swap/non-futures OTC transactions cleared by a DCO within the scope of Part 190 Rules applicable to a subchapter IV proceeding. To the extent a foreign

¹² We use the term OTC also to refer to any trading of such cleared non-swap/non-futures instruments that may occur on a swap execution facility.

¹³ *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act*, 77 FR 69694 (Nov. 20, 2012).

clearing organization may clear such transactions for an FCM under the CEA framework, we believe the transactions would be covered by the Code's commodity contract definition in Section 761(4)(F)(i), which covers "any other contract, option, agreement, or transaction that is similar to a contract, option, agreement, or transaction referred to in this paragraph."

It is appropriate to cover exchange-traded and cleared retail commodity transactions within the scope of Part 190, and as part of the futures or foreign futures account class, because they may only be traded on or subject to the rules of an exchange as futures or as if they are futures. If the transactions are futures, they are commodity contracts under Code Section 761(4)(A) or (B). If they are treated "as if" they are futures, it follows that they would be covered by the Commission's segregation rules for futures or foreign futures. They would also be commodity contracts either under Code Sections 761(4)(A) or (B), or under Code Section 761(4)(F)(i) as contracts that are similar to contracts referred to in other parts of the section.

It is also appropriate to treat any exchange-listed contracts that may be covered by the forward contract exclusion as part of the futures or foreign futures account class when they are cleared by a clearing organization or foreign clearing organization the same as futures. Such contract would be commodity contracts under Code Section 761(4)(F)(i) as contracts that are similar to contracts referred to in other parts of the section.

5. Clearing Relationships

The Committee designed the Model Part 190 Rules to recognize different clearing relationships that exist today or could potentially exist in the future, and to explicitly address the different considerations they raise. Thus, we make distinctions in the rules between clearing and non-clearing FCMs (*e.g.*, proposed Rule 190.04(e)(1)), and the rules expressly acknowledge that a debtor FCM could clear commodity interest transactions through a foreign broker or foreign clearing organization (*e.g.*, proposed Rule 190.01(l)).

In addition, the Model Part 190 Rules contemplate that a DCO potentially could have foreign broker clearing members that clear trades for their non-U.S. customers, and that foreign clearing organizations potentially could clear swaps for customers of FCM clearing members pursuant to a CFTC exemption from DCO registration. We understand that the Commission would need to amend its existing rules (or issue appropriate orders) to accommodate such relationships, but we believe it is useful to anticipate those potential changes in the Model Part 190 Rules. In addition, if the Commission were to permit FCMs to clear swaps for customers through a foreign clearing organization that is not registered as a DCO, we understand that it may adopt separate segregation requirements for such "foreign swaps" clearing and, thus, may wish to establish a corresponding account class for such cleared commodity contracts. We believe the flexible design of the Model Part 190 Rules will readily accommodate amendments to add another enumerated account class.

6. Definitions

We have made a number of changes to the definitions used in Part 190. Many of the changes are intended to update and simplify the definitions, or to correct cross-references. Others are more substantive, as explained below:

- **Account Class**. We have expanded the definition of the term account class (set out in proposed Rule 190.01(a)) to include specific definitions for the terms "futures account," "foreign futures

account,” “cleared swaps account,” and “delivery account.” The definitions distinguish between accounts carried on the books of an FCM and on the books of a DCO. The delivery account definition provides that the account class is further divided into separate physical delivery and cash delivery account classes.

- **Commodity Broker.** We propose replacing the definition in current Rule 190.01(g) with a streamlined definition that is consistent with our recommendation to limit Part 190 to FCMs and DCOs. *See* proposed Rule 190.01(j).
- **Commodity Contract; Futures Contract and Swap Contract.** We propose replacing the definition of the term commodity contract in current Rule 190.01(h), which cross-references the Code definition, with a definition that is consistent with the scope we recommend, described above. *See* proposed Rule 190.01(k). We have added definitions for the terms “futures contract” and “swap” that are also consistent with our recommended scope. *See* proposed Rules 190.01(aa) and (ss), respectively. (The swap definition is in lieu of the cleared swap definition in current Rule 190.01(pp).)
- **Foreign Board of Trade.** We recommend adding a definition for the term in proposed Rule 190.01(x) that is consistent with the standard in Section 4(a) of the Act and the definitions in CFTC Rules 1.3(ss) and 48.2(a).
- **Foreign Clearing Organization.** We recommend adding a definition for the term in proposed Rule 190.01(y) that covers a clearing house or similar entity that is located outside the U.S., its possessions or territories, is not registered as a derivatives clearing organization, and clears and settles transactions in futures or options on futures executed on or subject to the rules of a foreign board of trade or transactions in swaps.
- **House Account.** We recommend replacing the current definition with one that separately defines the term in relation to an FCM and in relation to a DCO. *See* proposed Rule 190.01(bb).
- **Physical Delivery Property and Cash Delivery Property.** These are new definitions, which are contained in proposed Rules 190.01(jj) and (g), respectively. They are relevant for dividing the delivery account class into physical delivery and cash delivery account classes. The terms are also relevant for proposed Rule 190.06, which addresses the process for making or taking physical delivery under commodity contracts, including deliveries that may occur outside a delivery account. We have moved elements of the current definition for specifically identifiable property that are relevant for the delivery account class, in updated form, to the physical delivery property definition. The proposed definition specifically recognizes that title documents for commodities are now commonly held in dematerialized, electronic form, in lieu of paper.
- **Public Customer and Non-Public Customer.** We recommend shifting the focus to explain who is considered a public customer of an FCM, with relevant cross-references to other Commission rules, and then defining an FCM’s non-public customers as a customer that is not a public customer. The proposed definitions also seek to clarify who is considered a public customer or non-public customer in relation to a clearing member of a DCO, including in the context of a clearing member that is a foreign broker. *See* proposed Rules 190.01(ll) and (ff), respectively.

- **Specifically Identifiable Property.** We propose a new definition that updates and streamlines the definition in current Rule 190.01(ll). *See* proposed Rule 190.01(pp).
- **Other.** We recommend adding new definitions for the terms “cash equivalent” (used in the definition of cash delivery property), “Exchange Act,” “FDIC,” “SIPA” and “variation settlement.” *See* proposed Rules 190.01(h), (t), (u), (oo) and (uu), respectively. We recommend deleting definitions for the terms “equity” (not used elsewhere in the Model Part 190 Rules) and “premium” (the term is commonly understood).

B. Proceeding Involving an FCM

1. Claims Process

The Model Part 190 Rules replace the detailed requirements (which are also outdated, *e.g.*, publication of notices in newspapers) for how the trustee must communicate with the customers of a failed FCM. As proposed, the trustee, after consultation with the Commission, may follow their own reasonably designed procedures for providing notice to, and receiving claims from, the FCM’s customers. *See* proposed Rule 190.03, in conjunction with proposed Rule 190.02(a).

We also recommend a streamlined template proof of customer form that the trustee may use, to be attached to the rules as Appendix A. The trustee is given flexibility to modify the proof of claim form to take into account the particular facts and circumstances of the case.

2. Changing the Special Treatment for Hedge Positions

We have modified the treatment of hedge accounts and positions. Current Part 190 treats hedge positions as a type of specifically identifiable property, where the customer is given special rights to avoid having its hedge positions liquidated by the trustee. We propose instead to give the trustee the authority, when practical under the circumstances, to treat public customer positions carried in a hedge account as specifically identifiable property, following consultation with the Commission. *See* proposed Rules 190.03(b)(2) and 190.04(d)(1).

We have made other changes that are intended to make the process simpler for the trustee to identify hedge positions and to move away from requiring FCMs to provide the hedge instructions form when a customer first opens a hedge account, and allowing an FCM to designate an account as a hedge account in reliance on a representation from the customer that the account will contain hedge positions.¹⁴ *See* proposed Rule 190.10(b).

Given the policy preference set out in the Model Part 190 Rules that the trustee should attempt to port positions of public customers, which in practice is what typically occurs in actual subpart IV proceedings, we question the need to provide special protection to assure that hedge positions are transferred. We are also concerned that if a trustee is required to identify hedge accounts and provide the hedge account holders the opportunity to keep their positions open, that could interfere with the trustee’s ability to take prudent and timely action to manage the debtor FCM’s estate to protect all customers. We have attempted

¹⁴ The proposed rule includes a grandfather provision that allows the FCM to continue to rely on hedge instructions for existing accounts.

to strike a balance by allowing the trustee to provide special hedge account treatment when it is practical to do so.

3. Collection of Margin and Variation Settlement

We propose changes that are intended to streamline, clarify and update the provisions allowing a trustee to collect margin from a debtor FCM's customers. *See* proposed Rule 190.04(b). We have retained the important concept that margin payments made by a customer in response to a trustee's margin call are fully credited to the customer's funded balance. Thus, such payments are not subject to pro rata distribution, in that they count dollar-for-dollar towards the customer's allowed net equity claim. *See* proposed Rule 190.04(b)(3).

4. Liquidation and Valuation of Positions

We propose changes to streamline, clarify and update the provisions on liquidation of open positions. We provide more detail relating to liquidation of positions by a person other than the trustee, *i.e.*, by a DCO, a foreign clearing organization, another FCM or a foreign broker. The changes include provisions for the trustee to assign liquidating positions to the debtor FCM's customers when only a portion of the open contracts are liquidated, and for addressing circumstances where an FCM or foreign broker fails to use commercially reasonable efforts to liquidate positions to achieve competitive pricing. *See* proposed Rule 190.04(d) and (e).

We also clarify the manner in which customer positions and other customer property are valued for purposes of determining the amount of a customer's claim. *See* proposed Rule 190.08(d).

5. Deliveries Under Physical Delivery Commodity Contracts

a. The Delivery Process

We recommend certain changes relating to deliveries under commodity contracts. Delivery issues may not arise in every subchapter IV proceeding, as that will largely depend on the timing of the entry of the order for relief relative to when physical delivery contracts move into a delivery position. Also, many commodity contracts are cash-settled, and for contracts that settle by physical delivery, market participants typically offset the contracts before incurring delivery obligations. Nonetheless, a debtor FCM could be carrying commodity contracts requiring delivery performance. It is important to address deliveries to avoid disruption to the cash market for the commodity or adverse consequences to parties that may be relying on delivery taking place in connection with their business operations.

The delivery provisions in Part 190 have remained largely unchanged since they were adopted in 1983. The existing rules reflect the prevailing delivery practices of the time, when delivery was effected largely by tendering paper warehouse receipts or certificates. Today, though, most deliverable title documents are held in electronic form, typically (but not always) with the clearing organization serving as the central depository for such instruments, and delivery occurs by electronic transfer. Thus, as noted above, we have updated the definition of physical delivery property to recognize electronic as well as other forms of title.

In addition, under the terms of some contracts (such as certain energy futures), the party with the contractual obligation to make delivery will physically transfer the tangible commodity to meet its obligations. The proposed rule is designed to cover that type of delivery as well.

We have retained the policy that the trustee should use their best efforts to liquidate open commodity contracts that settle by physical delivery (and which are not transferred) before they move into a delivery position. *See* proposed Rule 190.04(c). Open positions may nonetheless get caught in a delivery position where parties incur bilateral contractual delivery obligations. We believe it is useful to provide more specificity than is found in current Rule 190.05 on how to accomplish delivery in those circumstances. We provide this specificity in proposed Rule 190.06.

The ways in which delivery of a commodity is effected under a physical delivery contract vary based on the circumstances and relevant market. This variability includes the role that an FCM may have in facilitating deliveries for its customers. When the FCM has a role in facilitating delivery, deliveries may occur via title transfer in a futures account, foreign futures account, cleared swaps account, delivery account, or, if the commodity is a security (*i.e.*, Treasuries), in a securities account. We recognize that deliveries may be effected in different types of accounts in proposed Rule 190.06. *See* also proposed Rule 190.10(c).¹⁵

Current Rule 190.05 applies to delivery of a “physical commodity.” Proposed Rule 190.06 applies to any type of commodity that is subject to physical delivery, such as Treasury securities or foreign currencies. This is captured in the definition of physical delivery property. Given the different ways in which delivery may take place, physical delivery property is not limited to property that an FCM holds for or on behalf of a customer in a delivery account.

Current Rule 190.05(b) requires a DCO, DCM or swap execution facility (“*SEF*”) to enact rules that permit parties to make or take delivery under a commodity contract outside the debtor’s estate, through substitution of the customer for the commodity broker. The Committee believes that deliveries should occur in that manner, where feasible. Current Rule 190.05(b) may be of limited value in that regard, though, given that customers, to a large extent, rely on their FCMs to hold physical delivery property on their behalf in electronic form. We also do not think it is necessary to require a clearing house or market to adopt such a rule, because they have their own self-interest in protecting against delivery interruptions.

Thus, we have not included the provisions of Rule 190.05(b) in proposed Rule 190.06. Instead, proposed Rule 190.06(a) directs the trustee to use reasonable efforts to allow a customer to fulfil its delivery obligation directly, outside administration of the estate, when the rules of the relevant clearing house or market allow 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.

For deliveries that occur as part of the administration of the debtor’s estate, proposed Rule 190.06 contains provisions for the trustee to deliver physical or cash delivery property on a customer’s behalf, or return such property to the customer so that the customer may fulfill its delivery obligation. The rule includes restrictions designed to assure that a customer does not receive a distribution of customer property that exceeds the customer’s pro rata share of the relevant customer property pool.

b. Delivery Account Class

The delivery account class is relevant when an FCM establishes delivery accounts through which it effects physical delivery under commodity contracts, or in which it holds physical delivery property, on

¹⁵ We believe this is implicit in current Rule 190.05.

behalf of a customer. Customer property held in a delivery account is not subject to CFTC segregation requirements. Thus, it may be more difficult to identify customer property for the delivery account class. Based on lessons learned from the MF Global bankruptcy, those challenges are likely greater for tracing cash. Physical delivery property, in particular when held in the form of electronic title documents as is prevalent today, is more readily identifiable and less vulnerable to loss, compared to cash delivery property that an FCM may hold in an operating bank account. For these reasons, the Committee recommends that the delivery account class be divided into separate physical delivery and cash delivery account classes, for purposes of pro rata distributions to customers in the delivery account class on their net equity claims.

6. Transfers

We recommend explicitly identifying in proposed Rule 190.04(a) a clear policy that the trustee should use best efforts to transfer open commodity contracts and property held by the failed FCM for or on behalf of its public customers to one or more solvent FCMs.

We also recommend certain changes to the separate rule governing transfers. Specifically, proposed Rule 190.07 includes:

- Clarification that the rule does not limit a DCO's (or other registered entity's¹⁶) contractual right to liquidate *or transfer* open commodity contracts. *See* proposed Rule 190.07(a)(3).
- Provisions relating to assignment of customer agreements to a receiving FCM, and the FCM's reliance on such records prior to conducting its own customer due diligence. *See* Proposed Rule 190.07(b)(3) and (4).
- A provision relating to the treatment and transfer of customer letters of credit. *See* Proposed Rule 190.07(d)(3).
- A provision that requires the trustee to use reasonable efforts to prevent physical delivery property from being separated from commodity contract positions under which the property is deliverable. *See* proposed Rule 190.07(d)(4).
- A "no prejudice to other customers" provision that prohibits the trustee from making a transfer that would result in insufficient customer property being available to make equivalent percentage distributions to all net equity claim holders in the applicable account class. *See* proposed Rule 190.07(d)(5).

7. Customer Property: The Griffin Trading Issue and Residual Interest

Current Rule 190.08(a) defines the scope of "customer property" that is available (by account class) to pay the claims of the debtor FCM's futures customers, foreign futures customers or cleared swaps customers. Customers are entitled to receive distributions of customer property over other creditors of the debtor (other than certain claims in administering the bankruptcy estate), with claims of public customers satisfied ahead of those of non-public customers. The current definition includes a provision that deems any cash, securities or other property in the debtor's estate to be customer property to the extent that

¹⁶ Another registered entity would include a DCM or a SEF.

customer property under the other definitional elements is insufficient to satisfy in full all claims of the FCM's public customers. *See* current CFTC Rule 190.08(a)(1)(ii)(J).

As the Commission knows, in 2000 the Bankruptcy Court in *In re Griffin Trading Co.*¹⁷ ruled that the CFTC exceeded its statutory authority by adopting this provision of the rule, and thus it held that the provision was invalid. Although the decision was vacated on appeal, and thus is of no precedential value, that action was taken pursuant to a stipulation reached by the parties, not based on a ruling on the merits. Thus, the issue is widely understood to be unsettled.

The Committee recommends retaining the provision. Given the risk of potential legal challenge, though, we also recommend adding a provision to the customer property definition that deems property in the debtor's estate to be customer property to the extent of the FCM's obligation to maintain a targeted residual amount in segregation pursuant to CFTC Rule 1.11, or its obligation to cover debit balances or under-margined amounts in customer accounts under CFTC Rules 1.22, 22.2 or 30.7. *See* proposed Rule 190.09(a)(1)(ii)(G).

Those obligations were not expressly set out in the Commission's rules when Part 190 was promulgated; thus, the provision updates the customer property definition to reflect the Commission's current segregation rules. The provision is defensible because it is linked specifically to property that an FCM is required to set aside pursuant to Commission rule for the benefit of its customers. Thus, it should be covered by the definition of customer property in Section 761(10)(A)(ix) of the Code, which covers "other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer." We understand the Commission's position that such property should be covered by current Rule 190.08(a)(1)(ii)(G), but we believe adding a provision that expressly covers an FCM's "top up" obligations prescribed under specific CFTC rules provides greater legal certainty.

As a related change, we recommend including a provision in proposed Rule 190.05 clarifying the trustee's obligations with respect to residual interest. Under the current rules and the Model Part 190 Rules, the trustee is required to comply with provisions of the CEA and CFTC rules "as if it were the debtor," "except as specifically provided otherwise" in the rules. It seems impractical to require the trustee to continue to assure that funds of the debtor FCM are transferred into segregation to meet the FCM's top up obligations after the order for relief. Thus, we include a provision that states that the trustee is not required to transfer cash or other property into a segregated account to maintain a debtor FCM's compliance with its targeted residual amount obligations under CFTC Rule 1.11 or its other top-up obligations under CFTC Rules 1.22, 22.2 or 30.7. Importantly, the provision also confirms that such amounts still constitute customer property as provided in proposed Rule 190.09(a)(1).

8. Provisions Generally Applicable to FCMs

We recommend setting out certain obligations that apply generally to an FCM in a single, standalone rule. To that end, the Committee recommends proposed Rule 190.10, which addresses the following:

- **Current Customer Records.** Paragraph (a) requires an FCM to maintain current records relating to its customer accounts, and provides that those records may be provided to another FCM to facilitate transfer of open customer positions. The provision is not intended to expand an FCM's recordkeeping obligations under other Commission rules. It is intended to emphasize the

¹⁷ 245 B.R. 291 (N.D. Ill. 2000), *vacated*, 270 B.R. 882 (2001).

importance of current and accurate records for an FCM that is accepting the transfer of customer positions and property from the debtor FCM.

- **Designation of Hedge Accounts.** Paragraph (b) requires an FCM to provide a customer an opportunity to designate an account as a hedge account when the customer first opens the account. It provides that the FCM may rely upon the customer's written representation that positions in the account are hedge positions, in lieu of obtaining written hedge instructions as required under current Rule 190.06(d). The proposed rule also allows an FCM to re-designate an existing account as a hedge account if it obtains an appropriate representation from the customer that the account contains hedge positions. The proposed rule expressly recognizes that an FCM may continue to designate existing accounts as hedge accounts based on the hedge instructions.

The proposed rule expressly clarifies that an account may be designated as a hedge account if positions in the account constitute hedging as defined under any relevant Commission rule or rule of a DCO, foreign clearing organization, DCM, SEF or FBOT.

- **Deliveries.** Paragraph (c) recognizes that delivery under a customer's physical delivery contract, when facilitated by the FCM, could be effected in a futures account, foreign futures account or cleared swaps account (or a securities account if the commodity being delivered is a security). It also provides that if the delivery does not occur in one of those accounts, the FCM must (when facilitating the delivery) effect the delivery through a delivery account. It is the Committee's understanding that the provision is consistent with the manner in which deliveries occur in practice.

The Committee recommends deleting the requirement in current Rule 190.10 that an FCM must (except as provided in other CFTC rules) provide its customers with a special disclosure statement regarding treatment of non-cash collateral they may post, in the event of the FCM's bankruptcy. It is our understanding that the Commission originally imposed this requirement out of concern that a customer could challenge pro rata distribution of non-cash collateral if the customer has not specifically consented to such treatment. The Committee does not believe that such a risk exists today under prevailing bankruptcy law.

9. Appendix A Forms

The Committee recommends deleting Forms 1 through 3 contained in Appendix A and replacing Form 4 with a streamlined proof of claim form. The forms that would be deleted include: (i) a schedule of the trustee's duties in operating the debtor FCM's estate, (ii) a form for requesting customer instructions regarding non-cash property; and (iii) a form for requesting instructions from a customer concerning transfer of hedge positions. The forms contain outdated provisions and are highly prescriptive. The Committee believes it is preferable for the trustee to have flexibility to act based on the specific circumstances of the case, in a manner consistent with the rules.

10. Appendix B Special Distribution Rules

Appendix B to the current Part 190 Rules contains special bankruptcy distribution rules, as follows: (i) Framework 1, which provides special rules for distributing customer funds when the debtor FCM participated in a futures-securities cross-margining program; and (ii) Framework 2, which provides

special rules for allocating a shortfall in customer funds to customers when the shortfall is incurred with respect to funds held in a depository outside the U.S. or in a foreign currency.

We recommend retaining Framework 1, with some clarifying changes. We do not recommend, and have not made, changes to the examples illustrating how the distribution rules apply to different segregation/under-segregation scenarios. We propose deleting the specific limitation that customers must be market professionals, to provide flexibility should the Commission decide to expand the scope of customers that may participate in futures-securities cross-margining programs. The Commission will still control who may participate under the terms of the cross-margining orders it issues.

We recommend including a place holder for distribution rules relating to customer cross-margining programs for swaps and securities (e.g., security-based swaps). The CFTC and SEC have not, to date, approved such programs, and thus we have not attempted to define appropriate distribution rules for securities held in cross-margining accounts that are considered cleared swaps customer accounts.

We recommend deleting the separate distributional framework addressing shortfalls relating to customer funds held outside the U.S. or in the form of a foreign currency. The existing provisions are complicated, raising concerns that they could interfere with quick porting of positions in the event there are losses due to extraordinary foreign events. Also, the CFTC has significantly enhanced customer protections since the existing Framework 2 was adopted,¹⁸ which we believe mitigates the concerns underlying the current provisions.

C. Separate Rules to Govern a DCO Subchapter IV Proceeding

The current Part 190 Rules apply generally to a commodity broker liquidation proceeding administered under subchapter IV of chapter 7 of the Code, including to a proceeding that may involve a DCO. The rules, although general in application, are largely tailored to a subchapter IV proceeding involving an FCM, and contain only one provision, Rule 190.09 Member Property, that is specific to a DCO proceeding. Because a DCO insolvency raises unique considerations, the FCM focus of the existing rules could create significant confusion if tested in a DCO subchapter IV proceeding.

Accordingly, the Committee has included Subpart C in the Model Part 190 Rules, which contains rules that are specific to a DCO proceeding. We were careful to avoid overly prescriptive rules, to preserve flexibility for the trustee to act as appropriate for the *sui generis* circumstances at hand. Proposed Subpart C provides some deference to a DCO's wind-down and recovery plan, recognizing that the DCO's plan and related rules will likely take into account any unique considerations and issues that the DCO faces. We believe this approach allows the DCOs and Commission the flexibility to continually evaluate the issues around a DCO insolvency and the appropriate manner for responding.

We also provide a new definition for the term "member property" in proposed Rule 190.18, which we believe is consistent with the current definition.

Although the Committee recognizes that the likelihood of liquidating a DCO in a subchapter IV proceeding may be remote, so long as that is a possibility, we believe it is important for Part 190 to set out the basic rules that would apply. In the event that a DCO is instead subject to an orderly liquidation

¹⁸ *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, 78 FR 68506 (Nov. 14, 2013).

proceeding by the FDIC pursuant to Title II of the Dodd-Frank Act, the proposed Subpart C rules could provide useful guidance on distribution of customer and member property in accordance with subchapter IV of chapter 7 of the Code, and consistent with no-creditor worse off standards.

III. Recommended Changes to Other Commission Rules

As the Committee progressed with our comprehensive review of the current Part 190 Rules, we identified a small number of other related or cross-referencing CFTC Rules that we believe the Commission should consider amending. We emphasize, though, that the changes proposed below are not prerequisites for the Model Part 190 Rules to work as drafted. The proposed Model Part 190 Rules stand on their own.

A. Definition of Foreign Option In Rule 30.1(d)

We recommend that the Commission revise the definition of “foreign option” in Rule 30.1(d) to state explicitly that the definition covers options on futures. This is implicit in the history and context of Part 30, but the clarification would avoid any confusion or misunderstanding that the Part 30 framework applies to options that are covered by the swap definition in CEA § 1a(47) or that are regulated as trade options under Commission Regulation 32.3.

B. Definition of Proprietary Account in Rule 1.3(y)

We recommend that the Commission consider adopting a new definition of proprietary account in Rule 1.3(y) to narrow the scope of persons denied public customer protections when clearing their futures or swaps trades through an FCM with which they are affiliated.¹⁹ The current definition is out of sync with the global consensus to treat affiliates of professional clearing intermediaries as public customers.

At a minimum, we recommend that the Commission consider excluding commodity pools from the current definition. It appears that a commodity pool could be classified as a proprietary account of an FCM if any person identified in paragraphs (2)(i) – (viii) of Rule 1.3(y) owns 10% or more of the pool. We do not see any policy reason to deny passive investors in such a pool the benefits of public customer protections or of having the pool’s claim receive the priority of a public customer claim.

C. Definition of Variation Margin in Rule 1.3(fff)

We ask the Commission to consider amending the definition of variation margin in Rule 1.3(fff) to conform to the definition we propose in proposed Rule 190.01(uu). That definition covers:

“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.”

¹⁹ The Commission, though, should retain the current definition for the limited purpose of the Rule 3.10(c)(1) exemption from FCM registration.

D. Part 22 Rules

We recommend that the Commission revise its Part 22 Rules to explicitly provide that the segregation framework for cleared swaps applies to non-swap (and non-futures) OTC transactions, such as foreign exchange forwards or foreign exchange swaps, if they are cleared by a DCO.²⁰ The definition of “commodity contract” in Section 761 of the Bankruptcy Code explicitly covers “any other contract, option, agreement, or transaction, in each case that is cleared by a clearing organization [*i.e.*, by a registered DCO].” As explained above, the Model Part 190 Rules treat such contracts as part of the cleared swaps account class, which we believe is consistent with the approach taken by the DCOs that clear such “other” contracts.

E. Part 31 Rules for Leverage Transaction Merchants

As explained above, we question if a person may act as a leverage transaction merchant under the current CEA framework, as amended in 2010 by the Dodd-Frank Act. In any event, we believe that CEA Section 19 gives the Commission the authority to decide whether to adopt or maintain rules that permit leverage contract trading. Moreover, to our knowledge, there are no registered leverage transaction merchants. Thus, we recommend that the Commission consider repealing the Part 31 Rules as outdated and of no current relevance.

F. Technical Housekeeping Changes

We recommend the following housekeeping changes, if the Commission decides to initiate a rulemaking proceeding to revise the Part 190 Rules:

- Rules 1.55(d), (d)(1) and (d)(2): Delete the cross-references to Rule 190.06 (customer acknowledgement).
- Rules 1.55(f), 1.65(a)(3) and 1.65(a)(3)(iii): Delete the cross-references to 190.10(c) (customer acknowledgement).
- Rule 1.25(a)(2)(ii)(C): Change the cross-reference from 190.01(kk) (definition of specifically identifiable property) to 190.01(pp).
- Rule 4.5(c)(2)(iii)(A): Change the cross-reference and defined term for “in the money amount”: ... the in-the-money amount as defined in Rule 190.01(cc)(x) (17 CFR 190.01(cc)(x)).
- Rules 4.12(b)(1)(i)(C) and 4.13(a)(3)(ii)(A): Change the cross-reference and defined term for “in the money amount”: ... the in-the-money amount as defined in Rule 190.01(cc)(x).
- Rule 41.41(d): Delete the cross-reference to Rule 190.06 recordkeeping obligations.

IV. Conclusion

The Committee appreciates the opportunity to provide this letter and the Model Part 190 Rules for the Commission’s consideration in connection with Project KISS. We look forward to a dialogue with the

²⁰ Retail commodity transactions that are exchange-listed and centrally cleared would be covered by the Commission’s segregation rules for futures and options on futures.

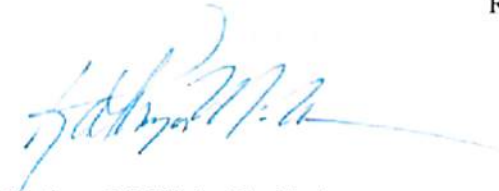
September 29, 2017

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Commissioners and Commission staff to discuss the Model Part 190 Rules and our related suggestions for revising other CFTC Rules.

Please contact Kathryn Trkla (312-832-5179) or Vincent Lazar (312-923-2989) if you have any questions about this letter, the Model Part 190 Rules or the Committee's process for developing the proposed rules.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Kathryn M. Trkla', with a long horizontal flourish extending to the right.

Kathryn M. Trkla, Co-Chair

A handwritten signature in blue ink, appearing to read 'Vincent E. Lazar', with a long horizontal flourish extending to the right.

Vincent E. Lazar, Co-Chair

cc: Chairman J. Christopher Giancarlo
Commissioner Sharon Y. Bowen
Commissioner Brian D. Quintenz
Commissioner Rostin Benham

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 (ll) (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: _____ <i>(If known)</i> 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.

(1) My percentage interest in the account is: _____%

(2) Participants in a joint account are claiming:

Check one: SEPARATELY JOINTLY

B. Do you have any other accounts with the Debtor?

Check one: YES NO

If you selected "YES," specify the other account number(s) and the type of each such account.

Account Number	Type of Account
1. _____	_____
2. _____	_____

(Attach additional page(s) if necessary)

C. Is this account an individual retirement account for which there is a custodian?

Check one: YES NO

If you selected "YES," please provide in an attachment the name, address and contact information for both the custodian and the account owner.

D. Is any portion of your claim based on securities futures products?

Check one: YES NO

If you selected "YES," are these securities futures products held in a futures account or a securities account?

Check one: SECURITIES FUTURES
 ACCOUNT ACCOUNT

E. Is any portion of your claim based on a cross-margining account for futures and securities positions?

Check one: YES NO

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 <u>must</u> 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.