



Commodity Markets Council
600 Pennsylvania Ave. SE
Suite 300
Washington, D.C. 20003
Tel 202-842-0400
Fax 202-547-3036
www.commoditymkts.org

July 20, 2020

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: Bankruptcy Regulations (RIN 3038-AE67)

Dear Mr. Kirkpatrick:

The Commodity Markets Council (“CMC”) appreciates the opportunity to submit comments on the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) proposed amendments to its regulations governing bankruptcy proceedings of commodity brokers (the “Proposal”).

CMC is a trade association that brings together exchanges and their industry counterparts. Its members include commercial end-users that utilize the futures and swaps markets for agriculture, energy, metal, and soft commodities. Its industry member firms also include regular users and members of swap execution facilities (each, a “SEF”) as well as designated contract markets (each, a “DCM”), such as the Chicago Board of Trade, Chicago Mercantile Exchange, ICE Futures US, Minneapolis Grain Exchange, NASDAQ Futures, and the New York Mercantile Exchange. Along with these market participants, CMC members also include regulated derivatives exchanges and price reporting agencies.

CMC broadly supports the proposed rule and appreciates the Commission’s efforts to improve its bankruptcy regulations and specifically the Commission’s efforts to protect customers in the event of an FCM, DCO, or DCM bankruptcy. We write in support of the proposal and to highlight two issues in particular that are relevant to CMC’s commercial end-user firms that address various aspects of delivery, including delivery account class, delivery property, and delivery letters of credit (“LOCs”). CMC also writes in support of the comments submitted by the CME Group on these points to the extent they are consistent with those discussed herein.

Delivery Account Class

During a bankruptcy proceeding, the Proposal directs the trustee to use reasonable efforts to allow a customer to fulfill its delivery obligations directly, outside the bankruptcy estate’s administration, when permitted under the rules of the relevant derivatives clearing organization (“DCO”), foreign clearing organization, or market. Proposed rule 190.06(a) further contains provisions for the trustee to facilitate deliveries that cannot occur outside the estate’s administration. Proposed rule 190.06(a) also contains special language related to splitting the delivery account class into the cash delivery and physical delivery account class.

Proposed rule 190.16 would require the trustee to use reasonable efforts to facilitate deliveries on behalf of a clearing member or its customer in a manner consistent with proposed rule 190.06(a) and the *pro rata* distribution concepts set out in proposed rule 190.00(c)(5). This obligation is limited to commodity contracts that have moved into the delivery position prior to the date and time of the order for relief.

The Proposal expands the definition of the scope of the delivery account class. The expanded definition would cover both tangible and intangible commodities, including those that are financial in nature under the Commodity Exchange Act's ("CEA") definition of commodity, that are recorded by the debtor as held in a delivery account. The proposed definition also divides the delivery account class into a physical delivery account class and a cash delivery account class.

Recommendation

CMC recommends that the Commission consider, in a separate rulemaking, the merits of imposing custody requirements or other customer protection requirements with respect to delivery accounts, along with the possibility of further subdividing delivery accounts and delivery account classes by underlying asset class or delivery mechanism, *e.g.*, electronic transfer versus physical load-out.

Delivery Property

The Proposal provides definitions for cash delivery property and physical delivery property. Cash or cash equivalents are considered cash delivery property if they are recorded in the delivery account as of the filing date, but only if they are identified in the debtor's books and records as having been received from or for the account of the customer during the three calendar day window before the relevant first notice date for futures or the exercise date for options.

CMC agrees that the cash delivery property should include cash or cash equivalents recorded in a customer's delivery accounts as of the filing date, along with any delivery property subsequently received in accepting a delivery. We also agree that physical delivery property should include any cash delivery property received subsequent to the filing date in exchange for making a delivery.

The three-day window, however, seems unnecessary and potentially detrimental to CMC's end-user members by excluding cash that a customer may have posted sooner in its delivery account in anticipation of paying for a delivery from the protection of being included within the delivery account class. Moreover, the three-day window also leaves a potential hole in a customer's claim arising from the manner in which cash posted in the delivery account more than three days before the delivery notice or exercise date will be treated in an FCM bankruptcy.

Recommendation

We recommend that the CFTC revise the cash delivery property definition to remove the limitation that cash delivery property must be recorded in the delivery account no sooner than three calendar days before the first notice date or exercise date.

CMC also asks that a final rule expand the definition to allow for the possibility that a customer may be unable to post funds needed to pay for a delivery in advance of the filing date so that the definition would also cover cash delivery property received after the filing date in anticipation of taking delivery of a commodity.

Delivery Letters of Credit

Proposed rule 190.04(d) addresses LOCs received, acquired, or held to guarantee, purchase, secure, or sell a commodity contract for a customer and their treatment during a bankruptcy proceeding. Under the Proposal, a trustee may require that the customer deliver substitute customer property to the trustee even if the LOC has expired after the FCM entered bankruptcy. The trustee may also draw on any unexpired LOC if the customer fails to post substitute customer property within a reasonable time specified by the trustee.

Proposed rule 190.10 contains requirements for FCMs accepting LOCs “during business as usual,” *i.e.*, before any bankruptcy. Pursuant to proposed rule 190.10, an FCM “shall not accept a [LOC] as collateral unless such [LOC] may be exercised through its date of expiry” under two conditions, “regardless of whether the customer posting that [LOC] is in default in any obligation.”

The first condition is that the LOC must provide that a trustee in an FCM bankruptcy must be able to draw on the LOC in accordance with rule 190.04. The second condition for LOCs passed through to a DCO must provide that a trustee in a DCO bankruptcy must also be able to draw on the LOC in accordance with rule 190.04. To summarize, a trustee must be able to draw on an LOC without the requirement of a prior customer default.

While it is critically important that the LOC be available to draw upon if the customer defaults or is expected to default on its obligation to pay the seller, unlike other situations, a delivery LOC simply serves as collateral for delivery of a futures contract after expiry but before delivery is taken and while the seller still has possession of the commodity for delivery. A trustee’s decision to request substitute collateral for a delivery LOC would create a sudden and unexpected liquidity need for that delivery participant and introduce unnecessary strain into derivatives markets. The policy reasons for the trustee’s general right to demand substitute collateral do not exist with respect to a delivery LOC.

Recommendation

We ask that the Commission limit or eliminate the trustee’s powers to request that a market participant substitute other forms of collateral for a delivery LOC upon which the DCO is beneficiary.

Conclusion

CMC appreciates the opportunity to comment on the proposed rule to improve the Commission’s bankruptcy rules. If you have any questions about these comments, or we can provide further information, please do not hesitate to contact me at Kevin.Batteh@Commoditymkts.org.

Sincerely,

/s/ Kevin K. Batteh

Kevin Batteh
General Counsel
Commodity Markets Council