

## Commodity Futures Trading Comm.

## § 190.01

(vi) Any off-exchange 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section of a Federal statute or specific regulation refers to such section or regulation as the same may be amended or superseded.

(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. In many cases, these definitions are based on definitions in parts 1, 22, and 30 of this chapter. 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 chapter 7 of the Bankruptcy Code.

(3) In the context of portfolio margining and cross margining programs, commodity contracts and associated collateral will be treated as part of the account class in which, consistent with part 1, 22, 30, or 39 of this chapter, or Commission Order, they are held.

(i) Thus, as noted in paragraph (2) of the definition of *account class* in §190.01, where open commodity contracts (and associated collateral) that would be attributable to one account class are, instead, commingled with the commodity contracts (and associated collateral) in a second account class (the “home field”), then the trustee must treat all such commodity contracts and collateral as part of, and consistent with the regulations applicable to, the second account class.

(ii) The concept in paragraph (e)(3)(i) of this section, that the rules of the “home field” will apply, also pertains to securities positions that are, pursuant to an approved cross margining program, held in a commodities account class (in which case the rules of that commodities account class will apply) and to commodities positions that are, pursuant to an approved cross-margining program, held in a securities account (in which case, the

rules of the securities account will apply, consistent with section 16(2)(b)(ii) of SIPA, 15 U.S.C. 7811(2)(b)(ii)).

### § 190.01 Definitions.

For purposes of this part:

*Account class:*

(1) Means one or more of each of the following types of accounts 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) With respect to public customers, the same definition as set forth in §1.3 of this chapter.

(B) With respect to non-public customers:

(1) With respect to a futures commission merchant, an account maintained on the books and records of the 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); and

(2) With respect to a clearing organization, an account maintained on the books and records of the 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 or a member's non-public customers (and related cash, securities, or other property).

(ii) *Foreign futures account* means:

(A) With respect to public customers:

(1) With respect to a futures commission merchant, a 30.7 account, as such term is defined in §30.1(g) of this chapter; and

(2) With respect to a clearing organization, an account maintained on the books and records of the 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 that is a futures commission merchant (and related cash, securities or other property), on behalf of that member's

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30.7 customers (as that latter term is defined in §30.1(f) of this chapter).

(B) With respect to non-public customers:

(1) With respect to a futures commission merchant, an account maintained on the books and records of the 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); and

(2) With respect to a clearing organization, an account maintained on the books and records of the 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 or a member's non-public customers (and related cash, securities, or other property).

(iii) *Cleared swaps account* means:

(A) With respect to public customers, a cleared swaps customer account, as such term is defined in §22.1 of this chapter.

(B) With respect to non-public customers:

(1) With respect to a futures commission merchant, an account maintained on the books and records of the futures commission merchant for the purpose of accounting for a person's transactions in cleared swaps (as defined in §22.1 of this chapter) (and related cash, securities, or other property); and

(2) With respect to a clearing organization, an account maintained on the books and records of the clearing organization for the purpose of accounting for transactions in cleared swaps (as defined in §22.1 of this chapter) (or in other contracts permitted to be cleared in the account) cleared or settled by the clearing organization for a member or a member's non-public customers (including any property related thereto).

(iv)(A) *Delivery account* means (for both public and non-public customers, considered separately):

(1) An account maintained on the books and records of a futures commission merchant for the purpose of ac-

counting 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), each of which shall be recognized as a separate class of account by the trustee.

(2)(i) 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.

(ii) The principle in paragraph (2)(i) of this definition will be applied to securities positions and associated collateral held in a commodity account class pursuant to a cross margining program approved by the Commission

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(and thus treated as part of that commodity account class) and to commodity positions and associated collateral held in a securities account pursuant to a cross margining program approved by the Commission (and thus treated as part of the securities account).

(3) For the purpose of this definition, 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.

*Act* means the Commodity Exchange Act.

*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.

*Business day* means weekdays, not including Federal holidays as established annually by 5 U.S.C. 6103. A business day begins at 8:00 a.m. in Washington, DC, and ends at 7:59:59 a.m. on the next day that is a business day.

*Calendar day* means the time from midnight to midnight in Washington, DC.

*Cash delivery account class* has the meaning set forth under *account class* in this section.

*Cash delivery property* means any cash or cash equivalents recorded in a delivery account that is, as of the filing date:

(1) Credited to such account to pay for receipt of delivery of a commodity under a commodity contract;

(2) Credited to such account to collateralize or guarantee an obligation to make or take delivery of a com-

modity under a commodity contract; or

(3) Has been credited to such account as payment received in exchange for making delivery of a commodity under a commodity contract. It also includes property in the form of commodities that have been delivered after the filing date in exchange for cash or cash equivalents held in a delivery account as of the filing date. The cash or cash equivalents must be identified on the books and the records of the debtor as having been received, from or for the account of a particular customer, on or after seven calendar days before the relevant:

(i) First notice date in the case of a futures contract; or

(ii) Exercise date in the case of a (cleared) option.

(4) Cash delivery property also includes any cash transferred by a customer to the trustee on or after the filing date for the purpose of paying for delivery, consistent with § 190.06(a)(3)(ii)(B)(I).

(5) In the case of a contract where one fiat currency is exchanged for another fiat currency, each such currency, to the extent that it is recorded in a delivery account, will be considered cash delivery property.

*Cash equivalents* means assets, other than United States dollar cash, that are highly liquid such that they may be converted into United States dollar cash within one business day without material discount in value.

*Cleared swaps account* has the meaning set forth under *account class* in this section.

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

*Commodity broker* means any person that is:

(1) 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.

*Commodity contract* means:

(1) A futures or options on futures contract executed on or subject to the rules of a designated contract market;

(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 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 this section and is submitted to and cleared by a clearing organization.

(5) Notwithstanding paragraphs (1) through (4) of this definition, 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. Moreover, a contract, agreement, or transaction described in §190.00(d)(3) as excluded from the term “commodity contract” is excluded from this definition.

*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 futures intermediary 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.

*Court* means the court having jurisdiction over the debtor’s estate.

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

*Customer* means:

(1)(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.

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

*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.

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

*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, or for which the Federal Deposit Insurance Corporation is appointed as a receiver pursuant to 12 U.S.C. 5382, *provided, however*, that this part applies only to such a proceeding if the debtor is a commodity broker as defined in this section.

*Delivery account* has the meaning set forth under *account class* in this section.

*Distribution* of property to a customer includes transfer of property on the customer’s behalf, return of property to a customer, as well as distributions to a customer of valuable property that is different than the property posted by that customer.

*Equity* means the amount calculated as equity in accordance with §190.08(b)(1).

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

*FDIC* means the Federal Deposit Insurance Corporation.

*Filing date* means the date a petition under the Bankruptcy Code or application under SIPA commencing a proceeding is filed or on which the FDIC is appointed as a receiver pursuant to 12 U.S.C. 5382(a).

*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 as determined by rule 3002(c) of the Federal Rules of Bankruptcy Procedure, the expiration of the six-month period imposed pursuant to section 8(a)(3) of SIPA, or such other date (whether earlier or later) set by the court (or, in the case of the FDIC acting as a receiver pursuant to 12 U.S.C. 5382(a), the deadline set by the FDIC pursuant to 12 U.S.C. 5390(a)(2)(B)); or

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

*Foreign board of trade* has the same meaning as set forth in §1.3 of this chapter.

*Foreign clearing organization* means a clearing house, clearing association, clearing corporation or similar entity, facility, or organization clears and settles transactions in futures or options on futures executed on or subject to the rules of a foreign board of trade.

*Foreign future* shall have the same meaning as that set forth in section 761(11) of the Bankruptcy Code.

*Foreign futures account* has the meaning set forth under *account class* in this section.

*Foreign futures commission merchant* shall have the same meaning as that

set forth in section 761(12) of the Bankruptcy Code.

*Foreign futures intermediary* refers to a foreign futures and options broker, as such term is defined in §30.1(e) of this chapter, acting as an intermediary for foreign futures contracts between a foreign futures commission merchant and a foreign clearing organization.

*Funded balance* means the amount calculated as funded balance in accordance with §190.08(c) and, as applicable, §190.17(d).

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

*Futures* and *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 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 “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, 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, respectively, a clearing organization or foreign clearing organization the same as if it were a futures contract.

*Futures account* has the meaning set forth under *account class* in this section.

*House account* means, in the case of a clearing organization, any commodity contract account of a member at such

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clearing organization maintained to reflect trades for the member's own account or for any non-public customer of such member.

*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.

*Joint account* means any commodity contract account held by more than one person.

*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.

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

*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 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:

(A) The rules of the clearing organization; or

(B) The jurisdiction of incorporation of such member.

*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.

*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. It also means, where applicable, the issuance of a protective decree under section 5(b)(1) of SIPA or the appointment of the FDIC as receiver pursuant to 12 U.S.C. 5382(a)(1)(A).

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

*Physical delivery account class* has the meaning set forth under *account class* in this section.

*Physical delivery property* means:

(1) *In general.* A commodity, whether tangible or intangible, 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)), including warehouse receipts, other documents of title, or shipping certificates (including electronic versions of any of the foregoing) for the commodity, or the commodity itself:

(i) 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. Cash or cash equivalents received after the filing date in exchange for delivery of such physical delivery property shall also constitute physical delivery property;

(ii) 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

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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; or

(iii) Where property 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, would meet the criteria listed in paragraph (1) or (2) of this definition, but for the fact of being held in such account rather than a delivery account, such property will be considered physical delivery property solely for purposes of the obligations to make or take delivery of physical delivery property pursuant to § 190.06.

(iv) Commodities or documents of title that are not held by the debtor and are 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 will be considered physical delivery property solely for purposes of the obligations to make or take delivery of physical delivery property pursuant to § 190.06. As this property is held outside of the debtor's estate, it is not subject to pro rata distribution.

(2) *Special cases.* (i) In the case of a contract where one fiat currency is exchanged for another fiat currency, neither such currency, to the extent that it is recorded in a delivery account, will be considered physical delivery property.

(ii) In a case where the final settlement price is negative, *i.e.*, where the party obliged to deliver physical delivery property under an expiring futures contract or an expired options contract is also obliged to make a cash payment to the buyer, such cash or cash equivalents constitute physical delivery property.

*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.

*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 of this chapter whose futures account is subject to the segregation requirements of section 4d(a) of the Act and the regulations in this chapter that implement section 4d(a), including as applicable §§ 1.20 through 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; and

(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 (1)(i), (ii), or (iii) of this definition.

(2) With respect to a clearing organization, any customer of that clearing organization that is not a non-public customer.

*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.

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

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

*Specifically identifiable property* means:

(1)(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)(i) Held for the account of a customer;

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(ii) Registered in such customer's name;

(iii) Not transferable by delivery; and

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

(2)(i) Fully paid;

(ii) Non-exempt; and

(iii) Identified on the books and records of the debtor as held by the debtor for or on behalf of the commodity contract account of a particular customer for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

(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;

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

(iii) Any physical delivery property described in paragraphs (1) through (3) of the definition of physical delivery property in this section.

(2) Notwithstanding paragraphs (1) and (3) of this definition, 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.

(3) No property that is not explicitly included in this definition may be treated as specifically identifiable property.

*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.

*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.

*Swap* has the meaning set forth in section 1a(47) of the Act and § 1.3 of this chapter, and, in addition, also means any other contract, agreement, or transaction that is carried in a cleared swaps account pursuant to a rule, regulation, or order of the Commission, provided, in each case, that it is cleared by a clearing organization as, or the same as if it were, a swap.

*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, or the FDIC, where it has been appointed as a receiver pursuant to 12 U.S.C. 5382.

*Undermargined* means, with respect to a futures account, foreign futures account, or cleared swaps account carried by the debtor, the funded balance for such account 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.

*Variation settlement* means variation margin as defined in § 1.3 of this chapter plus all other daily settlement amounts (such as price alignment payments) that may be owed or owing on the commodity contract.

**§ 190.02 General.**

(a) *Request for exemption.* (1) The trustee (or, in the case of an involuntary petition pursuant to section 303 of the Bankruptcy Code, any other person charged with the management of a