

Rules and Regulations

Federal Register

Vol. 73, No. 192

Thursday, October 2, 2008

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150-AH76

[NRC-2007-0003]

Industry Codes and Standards; Amended Requirements; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: The Nuclear Regulatory Commission (NRC) is correcting a final rule that appeared in the **Federal Register** on September 10, 2008 (73 FR 52729). The final rule amended NRC's regulations to incorporate by reference the 2004 Edition of Section III, Division 1, and Section XI, Division 1, of the American Society of mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPV Code), and the 2004 Edition of the ASME Code for Operation and maintenance of Nuclear Power plants (OM Code) to provide updated rules for constructing and inspecting components and testing pumps, valves, and dynamic restraints (snubbers) in light-water nuclear power plants. The final rule also incorporated by reference ASME Code Cases N-722 and N-729-1.

DATES: Effective October 2, 2008.

FOR FURTHER INFORMATION CONTACT: L. Mark Padovan, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone 301-415-1423, e-mail Mark.Padovan@nrc.gov.

SUPPLEMENTARY INFORMATION: In FR doc. E8-20624 appearing on page 52729 in the **Federal Register** of Wednesday, September 10, 2008, the following corrections are made:

■ 1. On page 52734, in the center column, third complete paragraph, fifth line from the bottom, remove the words

“or impracticality must be shown under 10 CFR 50.55a(g)(6)(i).”

§ 50.55a [Corrected]

■ 2. On page 52749, in the center column, in § 50.55a(g)(6)(ii)(D)(1), line 7, remove “[insert final date of rule]” and add in its place “September 10, 2008”.

■ 3. On page 52749, in the center column, in § 50.55a(g)(6)(ii)(D)(4), “50.55a(g)(6)(ii)(D)(3)(i)” is corrected to read “§ 50.55a(g)(6)(ii)(D)(4)(i),” and “50.55a(g)(6)(ii)(D)(3)(iv)” is corrected to read “§ 50.55a(g)(6)(ii)(D)(4)(iv)”.

Dated at Rockville, Maryland, this 26th day of September 2008.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Chief, Rulemaking, Directives, and Editing Branch, Division of Administrative Services, Office of Administration.

[FR Doc. E8-23237 Filed 10-1-08; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 33

[Docket No. FAA-2007-28501; Amendment No. 33-27]

RIN 2120-AJ05

Airworthiness Standards; Aircraft Engine Standards for Pressurized Engine Static Parts; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects the amendment number to a final rule published in the **Federal Register** of Thursday, September 25, 2008, regarding requirements for pressurized engine static parts.

DATES: This amendment becomes effective November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Tim Mouzakis, Engine and Propeller Directorate Standards Staff, ANE-111, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803-5299; telephone (781) 238-7114, fax (781) 238-7199, e-mail timoleon.mouzakis@faa.gov.

Correction

■ In final rule Aircraft Engine Standards for Pressurized Engine Static Parts beginning on page 55435 in the **Federal Register** issue of Thursday, September 25, 2008, (73 FR 55435) make the following correction.

■ 1. On page 55435, in the first column, beginning on the fourth line of the heading, “Amendment No. 33-26” is corrected to read “Amendment No. 33-27.”

Issued in Washington, DC on September 26, 2008.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E8-23140 Filed 10-1-08; 8:45 am]

BILLING CODE 4910-13-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 190

Interpretative Statement Regarding Funds Related to Cleared-Only Contracts Determined To Be Included in a Customer's Net Equity

AGENCY: Commodity Futures Trading Commission.

ACTION: Interpretative statement.

SUMMARY: This interpretation by the Commodity Futures Trading Commission (“Commission”) is issued to clarify the appropriate treatment under the commodity broker provisions of the Bankruptcy Code and Part 190 of the Commission's Regulations of claims arising from contracts (“cleared-only contracts”) that, although not executed or traded on a Designated Contract Market or a Derivatives Transaction Execution Facility, are subsequently submitted for clearing through a Futures Commission Merchant (“FCM”) to a Derivatives Clearing Organization (“DCO”).

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Associate Director, rwasserman@cftc.gov, (202) 418-5092, or Amanda Olear, Attorney-Advisor, Division of Clearing and Intermediary Oversight, aolear@cftc.gov, (202) 418-5283, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

Section 20 of the Commodity Exchange Act¹ (Act) empowers the Commission to provide how the net equity of a customer is to be determined:

the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11 of the United States Code, by rule or regulation—(1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property; * * * and (5) how the net equity of a customer is to be determined.

Subchapter IV of Chapter 7 of the Bankruptcy Code, governing commodity brokers, has the same effect, explicitly basing the definition of “net equity” on “such rules and regulations as the Commission promulgates under the Act.”²

The Commission has exercised this power in promulgating Part 190 of its regulations.³ In particular, the term “net equity” is defined by Commission Regulation 190.07⁴ as:

the total claim of a customer against the estate of the debtor based on the commodity contracts held by the debtor for or on behalf of such customer less any indebtedness of the customer to the debtor.

Therefore, the determination of whether claims relating to cleared-only contracts in Section 4d accounts are properly includable within the meaning of “net equity” is dependent upon whether an entity holding such claims is properly considered a “customer.” This, in turn, as discussed below, requires an analysis of whether such claims are derived from “commodity contracts.”

Cleared-Only Transactions as Commodity Contracts

Commission Regulation 190.01(k) defines “customer” through incorporation by reference of the definition of the term appearing in Section 761(9) of the Bankruptcy Code, which provides, in relevant part:

(9) “Customer” means—

(A) With respect to a futures commission merchant—

(i) Entity for or with whom such futures commission merchant deals and holds a claim against such futures commission merchant on account of a *commodity contract* made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such future commission merchant’s business as a futures commission merchant from or for the commodity futures account of such entity; or

(ii) Entity that holds a claim against such futures commission merchant arising out of—

(I) The making, liquidation, or change in the value of a *commodity contract* of a kind specified in clause (i) of this subparagraph;

(II) A deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a *commodity contract*; or

(III) The making or taking of delivery on such a *commodity contract*].⁵

Therefore, for an entity to be considered a “customer” of an FCM, such entity’s claim must arise out of a “commodity contract.”⁶

A “commodity contract,” as the term appears within the context of Section 761(9), is defined in Section 761(4) of the Bankruptcy Code, which states, in pertinent part:

(4) “Commodity contract” means—

(A) With respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade[.]⁷

This definition contains two elements: (1) The nature of the contract; and (2) the nature of the venue whose rules govern the contract.

With regard to the first element, over-the-counter contracts that are cleared-only contracts are contracts for the purchase or sale of a commodity for future delivery within the meaning of this section of the Bankruptcy Code. When cleared, they are subject to performance bond requirements, daily variation settlement, the potential for offset, and final settlement procedures that are substantially similar, and often identical, to those applicable to exchange-traded products at the same clearinghouse. *Cf.* 11 U.S.C. 761(4)(F). Although the creation and trading of these products is outside the Commission’s jurisdiction, the clearing of these products by FCMs and DCOs is within the Commission’s jurisdiction.

With regard to the second element, Section 761(7) of the Bankruptcy Code states that a “‘contract market’ means a registered entity,” and Section 761(8), in turn, provides that a “‘registered entity’ * * * ha[s] the meaning[] assigned to [that] term[] in the [Commodity Exchange] Act.”⁸ Section 1a(29)(C) of the Act defines the term “registered entity” as including “a derivatives clearing organization registered under section 5b” of the Act.⁹

Thus, when a contract is cleared through a DCO, such a contract would be considered a “commodity contract”

under Section 761(4) of the Bankruptcy Code.¹⁰ Therefore, an entity with a claim based on a cleared-only contract would be a “customer” within the meaning of Section 761 of the Bankruptcy Code. Further, because Part 190 of the Commission’s Regulations defines “customer” as having the meaning set forth in Section 761, such entity with a claim based on a cleared-only contract would also be a “customer” for the purposes of Part 190 of the Commission’s Regulations. Based on the foregoing, such claims arising out of cleared-only contracts are properly included within the meaning of “net equity” for the purposes of Subchapter IV of the Bankruptcy Code and Part 190 of the Commission’s Regulations.

Portfolio Performance Bond as Net Equity

There is an alternative path to reach the same conclusion. In cases where cleared-only contracts are held in a commodity futures account with an FCM and margined as a portfolio with exchange-traded futures (*i.e.*, where the Commission has issued an order pursuant to Section 4d(a)(2) of the Commodity Exchange Act), assets margining that portfolio are likely to be includable within “net equity” even if cleared-only contracts were found not to be “commodity contracts” within the meaning of the Bankruptcy Code and Part 190 of the Commission’s Regulations.

Where the assets in an entity’s account margin (*i.e.*, collateralize) both cleared-only contracts and exchange-traded futures, the entirety of those assets serves as performance bond for each of the exchange-traded futures and the cleared-only contracts. Therefore, (a) a claim for those assets constitutes a claim “on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such future commission merchant’s business as a futures commission merchant from or for the commodity futures account of such entity;”¹¹ (b) the entity qualifies as a “customer” within the meaning of the Bankruptcy Code as a result of that claim; and (c) those margin assets are properly included within that entity’s net equity.

The dynamics of futures trading render it unwise to distinguish between

⁵ 11 U.S.C. 761(9) (emphasis added).

⁶ A similar analysis would apply to a customer of a clearing organization (*i.e.*, a clearing member).

⁷ 11 U.S.C. 761(4).

⁸ 11 U.S.C. 761(7) and (8).

⁹ 11 U.S.C. 1a(29)(C).

¹⁰ *Cf.* H.R. REP. NO. 109–31(I) (2005)

(emphasizing distinction between definitions for purposes of Bankruptcy Code and for purposes of other statutes).

¹¹ Section 761(9)(A) of the Bankruptcy Code provides that an entity holding such a claim is a “customer.” 11 U.S.C. 761(9)(A).

¹ 7 U.S.C. 24.

² 11 U.S.C. 761(17).

³ 17 CFR Part 190.

⁴ 17 CFR 190.07.

an account that *currently* is portfolio margined and one that was at one time or is intended to be so in the future. Indeed, Subchapter IV of the Bankruptcy Code includes as customers entities with certain claims arising out of property that is not currently margining a commodity contract. Specifically, Section 761(9)(A)(ii) provides that an entity can qualify as a “customer” based on claims arising out of any of the following: (I) The “liquidation, or change in the value of a commodity contract;” (II) a deposit of property “for the purpose of making or margining * * * a commodity contract;” or (III) “the making or taking of delivery of a commodity contract.” Accordingly, there is no requirement that the customer’s assets be margining commodity contracts on the day that the bankruptcy petition is filed. Therefore, all assets contained in such an account are properly included within the customer’s net equity.

Account Classes

Part 190 of the Commission’s Regulations divides accounts into several classes, specifically: Futures accounts, foreign futures accounts, leverage accounts, commodity option accounts, and delivery accounts.¹²

In October 2004, the Commission issued an interpretation regarding the appropriate account class for funds attributable to contracts traded on non-domestic boards of trade, and the assets margining such contracts, that are included in accounts segregated in accordance with Section 4d of the Act pursuant to Commission Order.¹³ In that context, the Commission concluded that the claim is properly against the Section 4d account class because customers whose assets are deposited in such an account pursuant to Commission Order should benefit from that pool of assets. The same rationale supports the Commission’s conclusion that a claim arising out of a cleared-only contract, or the property margining such a contract, would be includable in the futures account class where, pursuant to Commission Order, the contract or property is included in an account segregated in accordance with Section 4d of the Act.

Issued in Washington, DC, on September 26, 2008, by the Commodity Futures Trading Commission.

David Stawick,

Secretary of the Commission.

Concurrence of Commission Michael V. Dunn CBOT Request for an Order Under Section 4d of the Commodity Exchange Act Related to the Clearing of OTC Ethanol Products

I concur with granting 4d relief to the Chicago Board of Trade (CBOT) related to the clearing of OTC ethanol products while reserving judgment as to whether the Commission in the future should revisit the determination as to whether ethanol should be considered an agricultural commodity.

Ethanol markets clearly impact agricultural markets as we all realize. Even though I recognize that arguments can be made that ethanol is an energy commodity because it is primarily used as a source of energy, I don’t think that should necessarily be the deciding factor.

Ethanol is clearly an important part of our agricultural economy. At some point, I think we may need to reconsider carefully whether ethanol should be considered an agricultural commodity so that it would be subject to the highest level of Commission jurisdiction rather than the lesser jurisdiction that attends energy commodities.

Despite this, I believe the order should be approved because the conditions attending the 4d order will bring greater transparency and accountability to the CBOT’s ethanol swaps market than currently exist.

[FR Doc. E8–23277 Filed 10–1–08; 8:45 am]

BILLING CODE 6351–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 229

[Release Nos. 33–8961; 34–58656]

Technical Amendment to Item 407 of Regulation S–K

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendment.

SUMMARY: The Securities and Exchange Commission (“Commission”) is making a technical amendment to Item 407 of Regulation S–K. The technical amendment updates a reference to Independence Standards Board Standard No. 1 (“ISB No. 1”), which was previously adopted by the Public Company Accounting Oversight Board (“PCAOB”) as an interim standard but has been superseded by the PCAOB’s newly adopted Ethics and Independence Rule 3526, *Communication with Audit Committees Concerning Independence*. The

reference is being updated to refer to the “applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant’s communications with the audit committee concerning independence.”

DATES: *Effective Date:* September 30, 2008.

FOR FURTHER INFORMATION CONTACT:

Melanie Jacobsen, Special Counsel, at 202–551–5300, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION:

I. Background

We are amending Item 407 of Regulation S–K¹ to update a reference as a result of the adoption of a new Public Company Accounting Oversight Board (“PCAOB”) rule. Item 407 is being amended to update the following reference:

Old Reference:

“Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, *Independence Discussions with Audit Committees*), as adopted by the Public Company Accounting Oversight Board in Rule 3600T”

New Reference:

“applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant’s communications with the audit committee concerning independence”

Independence Standards Board Standard No. 1 (“ISB No. 1”) was part of the interim standards previously adopted by the PCAOB on April 16, 2003.² It required an auditor annually to discuss with the audit committee its independence and to provide written disclosures of all relationships between the auditor and the company that may reasonably be thought to bear on independence and a letter confirming the auditor’s independence.³

Effective on September 30, 2008, PCAOB Rule 3526 supersedes ISB No. 1 regarding the annual discussion and disclosure the auditor must make to the audit committee.⁴ Rule 3526 was adopted by the PCAOB on April 22,

¹ 17 CFR 229.407.

² PCAOB Rule 3600T.

³ ISB No. 1.

⁴ Rule 3526 also superseded ISB Interpretation 00–1, *The Applicability of ISB Standard No. 1 When “Secondary Auditors” are Involved in the Audit of a Registrant*, and ISB Interpretation 00–2, *The Applicability of ISB Standard No. 1 When “Secondary Auditors” are Involved in the Audit of a Registrant, An Amendment of Interpretation 00–1*.

¹² See 17 CFR 190.01.

¹³ See Interpretative Statement Regarding Funds Determined To Be Held in the Futures Account Type of Customer Account Class, 69 FR 69510 (Nov. 30, 2004).