

paid liability of such partner for a State or local tax on or measured by income, to the extent that such liability arose from the inclusion in such partner's taxable income of earnings of such partnership that were not withdrawn by such partner, is a claim only against such partnership.

(d) Notwithstanding section 541 of this title, if there are pending a case under this chapter concerning a partnership and a case under this chapter concerning a partner in such partnership, then any State or local tax refund or reduction of tax of such partner that would have otherwise been property of the estate of such partner under section 541 of this title—

(1) is property of the estate of such partnership to the extent that such tax refund or reduction of tax is fairly apportionable to losses sustained by such partnership and not reimbursed by such partner; and

(2) is otherwise property of the estate of such partner.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2611; Pub. L. 98-353, title III, § 481, July 10, 1984, 98 Stat. 382; Pub. L. 99-554, title II, § 257(t), Oct. 27, 1986, 100 Stat. 3116.)

#### HISTORICAL AND REVISION NOTES

##### LEGISLATIVE STATEMENTS

Section 728 of the House amendment adopts a provision contained in the House bill that was deleted by the Senate amendment.

Liquidations: The House bill contained special tax provisions concerning the treatment of liquidations cases for State and local tax laws. These provisions deal with the taxable years of an individual debtor, return-filing requirements, and rules allocating State and local tax liabilities and refunds between a bankrupt partner and the partnership of which he is a member. The Senate amendment deleted these rules pending consideration of the Federal tax treatment of bankruptcy in the next Congress. The House amendment returns these provisions to the bill in order that they may be studied by the bankruptcy and tax bars who may wish to submit comments to Congress in connection with its consideration of these provisions in the next Congress.

##### SENATE REPORT NO. 95-989

Section 728 of title 11 applies only to state and local taxation. This provision contains four subsections which embody special tax provisions that apply in a case under chapter 7. Subsection (a) terminates the taxable year of an individual debtor on the date of the order for relief under chapter 7 of title 11. The date of termination of the individual's taxable year is the date on which the estate first becomes a separate taxable entity. If the case was originally filed under chapter 11 of title 11, then the estate would have been made a separate taxable entity on the date of the order for relief under that chapter. In the rare case of a multiple conversion, then the date of the order for relief under the first chapter under which the estate was a separate taxable entity is controlling.

Subsection (b) permits the trustee of the estate of an individual debtor or a corporation in a case under chapter 7 of title 11 to make a tax return only if the estate or corporation has net taxable income for the entire case. If the estate or corporation has net taxable income at the close of the case, then the trustee files an income tax return for each tax year during which the case was pending. The trustee of a partnership debtor must always file returns for each such taxable period.

Subsection (c) sets forth a marshalling rule pertaining to tax claims against a partner and a partnership

in a case under chapter 7 of title 11. To the extent that the income tax liability arose from the inclusion of undistributed earnings in the partner's taxable income, the court is required to disallow the tax claim against the partner's estate and to allow such claim against the partnership estate. No burden is placed on the taxing authority; the taxing authority should file a complete proof of claim in each case and the court will execute the marshalling. If the partnership's assets are insufficient to satisfy partnership creditors in full, then section 723(c) of title 11 will apply, notwithstanding this subsection, to allow any unsatisfied tax claims to be asserted by the partnership trustee against the estate of the partner. The marshalling rule under this subsection applies only for purposes of allowance and distribution. Thus the tax claim may be nondischargeable with respect to an individual partner.

Subsection (d) requires the court to apportion any tax refund or reduction of tax between the estate of a partner and the estate of his partnership. The standard of apportionment entitles the partnership estate to receive that part of the tax refund or reduction that is attributable to losses sustained by the partnership that were deducted by the partner but for which the partner never reimbursed the partnership. The partner's estate receives any part not allocated to the partnership estate. The section applies notwithstanding section 541 of title 11, which includes the partner's right to a tax refund or to reduction of tax as property of the partner's estate.

#### AMENDMENTS

1986—Subsec. (a). Pub. L. 99-554 inserted reference to section 1208 of this title.

1984—Subsec. (c). Pub. L. 98-353, § 481(a), substituted "taxable income" for "taxable income,".

Subsec. (d)(2). Pub. L. 98-353, § 481(b), substituted "is otherwise property of the estate of such partner" for "is property of the estate of such partner otherwise".

#### EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99-554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 346, 348, 723 of this title.

### SUBCHAPTER III—STOCKBROKER LIQUIDATION

#### SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title.

### § 741. Definitions for this subchapter

In this subchapter—

(1) "Commission" means Securities and Exchange Commission;

(2) "customer" includes—

(A) entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity—

- (i) for safekeeping;
- (ii) with a view to sale;
- (iii) to cover a consummated sale;
- (iv) pursuant to a purchase;
- (v) as collateral under a security agreement; or
- (vi) for the purpose of effecting registration of transfer; and

(B) entity that has a claim against a person arising out of—

- (i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or
- (ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security;

(3) “customer name security” means security—

(A) held for the account of a customer on the date of the filing of the petition by or on behalf of the debtor;

(B) registered in such customer’s name on such date or in the process of being so registered under instructions from the debtor; and

(C) not in a form transferable by delivery on such date;

(4) “customer property” means cash, security, or other property, and proceeds of such cash, security, or property, received, acquired, or held by or for the account of the debtor, from or for the securities account of a customer—

(A) including—

(i) property that was unlawfully converted from and that is the lawful property of the estate;

(ii) a security held as property of the debtor to the extent such security is necessary to meet a net equity claim of a customer based on a security of the same class and series of an issuer;

(iii) resources provided through the use or realization of a customer’s debit cash balance or a debit item includible in the Formula for Determination of Reserve Requirement for Brokers and Dealers as promulgated by the Commission under the Securities Exchange Act of 1934; and

(iv) 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, unless including such property as customer property would not significantly increase customer property; but

(B) not including—

(i) a customer name security delivered to or reclaimed by a customer under section 751 of this title; or

(ii) property to the extent that a customer does not have a claim against the debtor based on such property;

(5) “margin payment” means payment or deposit of cash, a security, or other property, that is commonly known to the securities trade as original margin, initial margin, maintenance margin, or variation margin, or as a mark-to-market payment, or that secures an

obligation of a participant in a securities clearing agency;

(6) “net equity” means, with respect to all accounts of a customer that such customer has in the same capacity—

(A)(i) aggregate dollar balance that would remain in such accounts after the liquidation, by sale or purchase, at the time of the filing of the petition, of all securities positions in all such accounts, except any customer name securities of such customer; minus

(ii) any claim of the debtor against such customer in such capacity that would have been owing immediately after such liquidation; plus

(B) any payment by such customer to the trustee, within 60 days after notice under section 342 of this title, of any business related claim of the debtor against such customer in such capacity;

(7) “securities contract” means contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency;

(8) “settlement payment” means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade; and

(9) “SIPC” means Securities Investor Protection Corporation.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2611; Pub. L. 97-222, §8, July 27, 1982, 96 Stat. 237; Pub. L. 98-353, title III, §482, July 10, 1984, 98 Stat. 382; Pub. L. 103-394, title V, §501(d)(25), Oct. 22, 1994, 108 Stat. 4146.)

#### HISTORICAL AND REVISION NOTES

##### LEGISLATIVE STATEMENTS

Section 741(6) of the House bill and Senate amendment is deleted by the House amendment since the defined term is used only in section 741(4)(A)(iii). A corresponding change is made in that section.

##### SENATE REPORT NO. 95-989

Section 741 sets forth definitions for subchapter III of chapter 7.

Paragraph (1) defines “Commission” to mean the Securities and Exchange Commission.

Paragraph (2) defines “customer” to include anybody that interacts with the debtor in a capacity that concerns securities transactions. The term embraces cash or margin customers of a broker or dealer in the broadest sense.

Paragraph (3) defines “customer name security” in a restrictive fashion to include only non-transferable securities that are registered, or in the process of being registered in a customer’s own name. The securities must not be endorsed by the customer and the stockbroker must not be able to legally transfer the securities by delivery, by a power of attorney, or otherwise.

Paragraph (4) defines “customer property” to include all property of the debtor that has been segregated for customers or property that should have been seg-

regated but was unlawfully converted. Clause (i) refers to customer property not properly segregated by the debtor or customer property converted and then recovered so as to become property of the estate. Unlawfully converted property that has been transferred to a third party is excluded until it is recovered as property of the estate by virtue of the avoiding powers. The concept excludes customer name securities that have been delivered to or reclaimed by a customer and any property properly belonging to the stockholder, such as money deposited by a customer to pay for securities that the stockholder has distributed to such customer.

Paragraph (5) [enacted as (6)] defines “net equity” to establish the extent to which a customer will be entitled to share in the single and separate fund. Accounts of a customer are aggregated and offset only to the extent the accounts are held by the customer in the same capacity. Thus, a personal account is separate from an account held as trustee. In a community property state an account held for the community is distinct from an account held as separate property.

The net equity is computed by liquidating all securities positions in the accounts and crediting the account with any amount due to the customer. Regardless of the actual dates, if any, of liquidation, the customer is only entitled to the liquidation value at the time of the filing of the petition. To avoid double counting, the liquidation value of customer name securities belonging to a customer is excluded from net equity. Thus, clause (ii) includes claims against a customer resulting from the liquidation of a security under clause (i). The value of a security on which trading has been suspended at the time of the filing of the petition will be estimated. Once the net liquidation value is computed, any amount that the customer owes to the stockbroker is subtracted including any amount that would be owing after the hypothetical liquidation, such as brokerage fees. Debts owed by the customer to the debtor, other than in a securities related transaction, will not reduce the net equity of the customer. Finally, net equity is increased by any payment by the customer to the debtor actually paid within 60 days after notice. The principal reason a customer would make such a payment is to reclaim customer name securities under §751.

Paragraph (6) defines “1934 Act” to mean the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.].

Paragraph (7) [enacted as (9)] defines “SIPC” to mean the Securities Investor Protection Corporation.

#### REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in par. (4)(A)(iii), is act June 6, 1934, ch. 404, 48 Stat. 881, as amended, which is classified principally to chapter 2B (§ 78a et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78a of Title 15 and Tables.

#### AMENDMENTS

1994—Par. (4)(A)(iii). Pub. L. 103-394 struck out “(15 U.S.C. 78a et seq.)” after “Act of 1934”.

1984—Par. (2)(A). Pub. L. 98-353, § 482(1), substituted “with whom a person deals” for “with whom the debtor deals”, “that has a claim” for “that holds a claim”, “against such person” for “against the debtor”, “held by such person” for “held by the debtor”, and “such person’s business as a stockbroker,” for “business as a stockbroker”.

Par. (2)(B). Pub. L. 98-353, § 482(2)(A), (B), substituted “has a claim” for “holds a claim” and “against a person” for “against the debtor” in provisions preceding cl. (i).

Par. (2)(B)(ii). Pub. L. 98-353, § 482(2)(C), substituted “such person” for “the debtor”.

Par. (4)(A)(i). Pub. L. 98-353, § 482(3), substituted “from and that is the lawful” for “and that is”.

Par. (6)(A)(i). Pub. L. 98-353, § 482(4), inserted a comma after “petition” and “any” after “except”.

Par. (7). Pub. L. 98-353, § 482(5), amended par. (7) generally, inserting provisions relating to options for the

purchase or sale of certificates of deposit, or a group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies.

Par. (8). Pub. L. 98-353, § 482(6), inserted “a final settlement payment.”.

1982—Par. (4). Pub. L. 97-222, § 8(1), struck out “at any time” after “security, or property,” in provisions preceding subpar. (A), and inserted “of a customer” after “claim” in subpar. (A)(ii).

Par. (5). Pub. L. 97-222, § 8(3), added par. (5). Former par. (5) redesignated (6).

Par. (6). Pub. L. 97-222, § 8(2), (4), redesignated former par. (5) as (6), in provisions preceding subpar. (A), substituted “all accounts of a customer that such customer has” for “the aggregate of all of a customer’s accounts that such customer holds”, in subpar. (A)(2) inserted “in such capacity”, and in subpar. (B) inserted “in such capacity”. Former par. (6) redesignated (9).

Pars. (7), (8). Pub. L. 97-222, § 8(5), added pars. (7) and (8).

Par. (9). Pub. L. 97-222, § 8(2), (6), redesignated former par. (6) as (9) and substituted “Securities” for “Security”.

#### EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 362, 546, 548, 555, 752 of this title; title 12 sections 1787, 1821.

### § 742. Effect of section 362 of this title in this subchapter

Notwithstanding section 362 of this title, SIPC may file an application for a protective decree under the Securities Investor Protection Act of 1970. The filing of such application stays all proceedings in the case under this title unless and until such application is dismissed. If SIPC completes the liquidation of the debtor, then the court shall dismiss the case.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 9, July 27, 1982, 96 Stat. 237; Pub. L. 103-394, title V, § 501(d)(26), Oct. 22, 1994, 108 Stat. 4146.)

#### HISTORICAL AND REVISION NOTES

##### LEGISLATIVE STATEMENTS

Section 742 of the House amendment deletes a sentence contained in the Senate amendment requiring the trustee in an interstate stock-brokerage liquidation to comply with the provisions of subchapter IV of chapter 7 if the debtor is also a commodity broker. The House amendment expands the requirement to require the SIPC trustee to perform such duties, if the debtor is a commodity broker, under section 7(b) of the Securities Investor Protection Act [15 U.S.C. 78ggg(b)]. The requirement is deleted from section 742 since the trustee of an intrastate stockbroker will be bound by the provisions of subchapter IV of chapter 7 if the debtor is also a commodity broker by reason of section 103 of title 11.

##### SENATE REPORT NO. 95-989

Section 742 indicates that the automatic stay does not prevent SIPC from filing an application for a pro-

protective decree under SIPA. If SIPA does file such an application, then all bankruptcy proceedings are suspended until the SIPA action is completed. If SIPA completes liquidation of the stockbroker then the bankruptcy case is dismissed.

## REFERENCES IN TEXT

The Securities Investor Protection Act of 1970, referred to in text, is Pub. L. 91-598, Dec. 30, 1970, 84 Stat. 1636, as amended, which is classified generally to chapter 2B-1 (§ 78aaa et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78aaa of Title 15 and Tables.

## AMENDMENTS

1994—Pub. L. 103-394 struck out “(15 U.S.C. 78aaa et seq.)” after “Act of 1970”.

1982—Pub. L. 97-222 substituted “title” for “chapter” after “all proceedings in the case under this”.

## EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 349 of this title.

## § 743. Notice

The clerk shall give the notice required by section 342 of this title to SIPA and to the Commission.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 99-554, title II, § 283(t), Oct. 27, 1986, 100 Stat. 3118; Pub. L. 103-394, title V, § 501(d)(27), Oct. 22, 1994, 108 Stat. 4146.)

## HISTORICAL AND REVISION NOTES

## SENATE REPORT NO. 95-989

Section 743 requires that notice of the order for relief be given to SIPA and to the SEC in every stockbroker case.

## AMENDMENTS

1994—Pub. L. 103-394 substituted “342” for “342(a)”.

1986—Pub. L. 99-554, which directed the amendment of this section by striking “(d)”, rather than “(a)”, could not be executed because “(d)” did not appear in text. See 1994 Amendment note above.

## EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

## EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99-554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

## § 744. Executory contracts

Notwithstanding section 365(d)(1) of this title, the trustee shall assume or reject, under section 365 of this title, any executory contract of the debtor for the purchase or sale of a security in the ordinary course of the debtor's business, within a reasonable time after the date of the order for relief, but not to exceed 30 days. If the trustee does not assume such a contract within such time, such contract is rejected.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 10, July 27, 1982, 96 Stat. 238.)

## HISTORICAL AND REVISION NOTES

## SENATE REPORT NO. 95-989

Section 744 instructs the court to give the trustee a reasonable time, not to exceed 30 days, to assume or reject any executory contract of the stockbroker to buy or sell securities. Any contract not assumed within the time fixed by the court is considered to be rejected.

## AMENDMENTS

1982—Pub. L. 97-222 inserted “but” after “relief,”.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

## § 745. Treatment of accounts

(a) Accounts held by the debtor for a particular customer in separate capacities shall be treated as accounts of separate customers.

(b) If a stockbroker or a bank holds a customer net equity claim against the debtor that arose out of a transaction for a customer of such stockbroker or bank, each such customer of such stockbroker or bank shall be treated as a separate customer of the debtor.

(c) Each trustee's account specified as such on the debtor's books, and supported by a trust deed filed with, and qualified as such by, the Internal Revenue Service, and under the Internal Revenue Code of 1986, shall be treated as a separate customer account for each beneficiary under such trustee account.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 11, July 27, 1982, 96 Stat. 238; Pub. L. 98-353, title III, § 483, July 10, 1984, 98 Stat. 383; Pub. L. 103-394, title V, § 501(d)(28), Oct. 22, 1994, 108 Stat. 4146.)

## HISTORICAL AND REVISION NOTES

## SENATE REPORT NO. 95-989

Section 745(a) indicates that each account held by a customer in a separate capacity is to be considered a separate account. This prevents the offset of accounts held in different capacities.

Subsection (b) indicates that a bank or another stockbroker that is a customer of a debtor is considered to hold its customers accounts in separate capacities. Thus a bank or other stockbroker is not treated as a mutual fund for purposes of bulk investment. This protects unrelated customers of a bank or other stockholder from having their accounts offset.

Subsection (c) effects the same result with respect to a trust so that each beneficiary is treated as the customer of the debtor rather than the trust itself. This eliminates any doubt whether a trustee holds a personal account in a separate capacity from his trustee's account.

## REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsection (c), is classified generally to Title 26, Internal Revenue Code.

## AMENDMENTS

1994—Subsec. (c). Pub. L. 103-394 substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.)”.

1984—Subsec. (a). Pub. L. 98-353 inserted “the debtor for” after “by”.

1982—Subsec. (c). Pub. L. 97-222 substituted “Each” for “A”.

## EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

## EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

**§ 746. Extent of customer claims**

(a) If, after the date of the filing of the petition, an entity enters into a transaction with the debtor, in a manner that would have made such entity a customer had such transaction occurred before the date of the filing of the petition, and such transaction was entered into by such entity in good faith and before the qualification under section 322 of this title of a trustee, such entity shall be deemed a customer, and the date of such transaction shall be deemed to be the date of the filing of the petition for the purpose of determining such entity's net equity.

(b) An entity does not have a claim as a customer to the extent that such entity transferred to the debtor cash or a security that, by contract, agreement, understanding, or operation of law, is—

- (1) part of the capital of the debtor; or
- (2) subordinated to the claims of any or all creditors.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 12, July 27, 1982, 96 Stat. 238.)

## HISTORICAL AND REVISION NOTES

## SENATE REPORT NO. 95-989

Section 746(a) protects entities who deal in good faith with the debtor after the filing of the petition and before a trustee is appointed by deeming such entities to be customers. The principal application of this section will be in an involuntary case before the order for relief, because § 701(b) requires prompt appointment of an interim trustee after the order for relief.

Subsection (b) indicates that an entity who holds securities that are either part of the capital of the debtor or that are subordinated to the claims of any creditor of the debtor is not a customer with respect to those securities. This subsection will apply when the stockbroker has sold securities in itself to the customer or when the customer has otherwise placed such securities in an account with the stockbroker.

## AMENDMENTS

1982—Pub. L. 97-222, § 12(c), substituted “claims” for “claim” in section catchline.

Subsec. (a). Pub. L. 97-222, § 12(a), substituted “enters into” for “effects, with respect to cash or a security,”; struck out “with respect to such cash or security” wherever appearing, and substituted “the date of the filing of the petition” for “such date”, and “entered into” for “effected”.

Subsec. (b). Pub. L. 97-222, § 12(b), substituted “transferred to the debtor” for “has a claim for” in provisions preceding par. (1), and struck out “is” in par. (2).

**§ 747. Subordination of certain customer claims**

Except as provided in section 510 of this title, unless all other customer net equity claims have been paid in full, the trustee may not pay in full or pay in part, directly or indirectly, any net equity claim of a customer that was, on the date the transaction giving rise to such claim occurred—

- (1) an insider;
- (2) a beneficial owner of at least five percent of any class of equity securities of the debtor, other than—

(A) nonconvertible stock having fixed preferential dividend and liquidation rights; or

(B) interests of limited partners in a limited partnership;

- (3) a limited partner with a participation of at least five percent in the net assets or net profits of the debtor; or

(4) an entity that, directly or indirectly, through agreement or otherwise, exercised or had the power to exercise control over the management or policies of the debtor.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97-222, § 13, July 27, 1982, 96 Stat. 238.)

## HISTORICAL AND REVISION NOTES

## SENATE REPORT NO. 95-989

Section 747 subordinates to other customer claims, all claims of a customer who is an insider, a five percent owner of the debtor, or otherwise in control of the debtor.

## AMENDMENTS

1982—Pub. L. 97-222 substituted “the transaction giving rise to such claim occurred” for “such claim arose” in provisions preceding par. (1).

**§ 748. Reduction of securities to money**

As soon as practicable after the date of the order for relief, the trustee shall reduce to money, consistent with good market practice, all securities held as property of the estate, except for customer name securities delivered or reclaimed under section 751 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614.)

## HISTORICAL AND REVISION NOTES

## SENATE REPORT NO. 95-989

Section 748 requires the trustee to liquidate all securities, except for customer name securities, of the estate in a manner consistent with good market practice. The trustee should refrain from flooding a thin market with a large percentage of shares in any one issue. If the trustee holds restricted securities or securities in which trading has been suspended, then the trustee must arrange to liquidate such securities in accordance with the securities laws. A private placement may be the only exemption available with the customer of the debtor the best prospect for such a placement. The subsection does not permit such a customer to bid in his net equity as part of the purchase price; a contrary result would permit a customer to receive a greater percentage on his net equity claim than other customers.

**§ 749. Voidable transfers**

(a) Except as otherwise provided in this section, any transfer of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, or 549 of this title. For the purpose of such sections, the property so transferred shall be deemed to have

been property of the debtor and, if such transfer was made to a customer or for a customer's benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before five days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or

(2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614; Pub. L. 97-222, § 14, July 27, 1982, 96 Stat. 238.)

#### HISTORICAL AND REVISION NOTES

##### SENATE REPORT NO. 95-989

Section 749 indicates that if the trustee avoids a transfer, property recovered is customer property to any extent it would have been customer property but for the transfer. The section clarifies that a customer who receives a transfer of property of the debtor is a creditor and that property in a customer's account is property of a creditor for purposes of the avoiding powers.

#### AMENDMENTS

1982—Pub. L. 97-222 substituted “(a) Except as otherwise provided in this section, any” for “Any”, and “but” for “except”, inserted “such property”, substituted “or 549” for “549, or 724(a)”, and added subsec. (b).

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

### § 750. Distribution of securities

The trustee may not distribute a security except under section 751 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614.)

#### HISTORICAL AND REVISION NOTES

##### SENATE REPORT NO. 95-989

Section 750 forbids the trustee from distributing a security other than a customer name security. The term “distribution” refers to a distribution to customers in satisfaction of net equity claims and is not intended to preclude the trustee from liquidating securities under proposed 11 U.S.C. 748.

### § 751. Customer name securities

The trustee shall deliver any customer name security to or on behalf of the customer entitled to such security, unless such customer has a negative net equity. With the approval of the trustee, a customer may reclaim a customer name security after payment to the trustee, within such period as the trustee allows, of any claim of the debtor against such customer to the extent that such customer will not have a negative net equity after such payment.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614.)

#### HISTORICAL AND REVISION NOTES

##### SENATE REPORT NO. 95-989

Section 751 requires the trustee to deliver a customer name security to the customer entitled to such secu-

rity unless the customer has a negative net equity. The customer's net equity will be negative when the amount owed by the customer to the stockbroker exceeds the liquidation value of the non-customer name securities in the customer's account. If the customer is a net debtor of the stockbroker, then the trustee may permit the customer to repay debts to the stockbroker so that the customer will no longer be in debt to the stockbroker. If the customer refuses to pay such amount, then the court may order the customer to endorse the security in order that the trustee may liquidate such property.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 741, 748, 750 of this title.

### § 752. Customer property

(a) The trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims and in priority to all other claims, except claims of the kind specified in section 507(a)(1) of this title that are attributable to the administration of such customer property.

(b)(1) The trustee shall distribute customer property in excess of that distributed under subsection (a) of this section in accordance with section 726 of this title.

(2) Except as provided in section 510 of this title, if a customer is not paid the full amount of such customer's allowed net equity claim from customer property, the unpaid portion of such claim is a claim entitled to distribution under section 726 of this title.

(c) Any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor, excluding property excluded under section 741(4)(B) of this title, shall be apportioned between the general estate and customer property in the same proportion as the general estate of the debtor and customer property were subject to such security interest.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2614; Pub. L. 97-222, § 15, July 27, 1982, 96 Stat. 238; Pub. L. 98-353, title III, § 484, July 10, 1984, 98 Stat. 383.)

#### HISTORICAL AND REVISION NOTES

##### SENATE REPORT NO. 95-989

Section 752(a) requires the trustee to distribute customer property to customers based on the amount of their net equity claims. Customer property is to be distributed in priority to all claims except expenses of administration entitled to priority under § 507(1). It is anticipated that the court will apportion such administrative claims on an equitable basis between the general estate and the customer property of the debtor.

Subsection (b)(1) indicates that in the event customer property exceeds customers net equity claims and administrative expenses, the excess pours over into the general estate. This event would occur if the value of securities increased dramatically after the order for relief but before liquidation by the trustee. Subsection (b)(2) indicates that the unpaid portion of a customer's net equity claim is entitled to share in the general estate as an unsecured claim unless subordinated by the court under proposed 11 U.S.C. 501. A net equity claim of a customer that is subordinated under section 747 is entitled to share in distribution under section 726(a)(2) unless subordinated under section 510 independently of the subordination under section 747.

Subsection (c) provides for apportionment between customer property and the general estate of any equity

of the debtor in property remaining after a secured creditor liquidates a security interest. This might occur if a stockbroker hypothecates securities of his own and of his customers if the value of the hypothecated securities exceeds the debt owed to the secured party. The apportionment is to be made according to the ratio of customer property and general property of the debtor that comprised the collateral. The subsection refers to cash and securities of customers to include any customer property unlawfully converted by the stockbroker in the course of such a transaction. The apportionment is made subject to section 741(4)(B) to insure that property in a customer's account that is owed to the stockbroker will not be considered customer property. This recognizes the right of the stockbroker to withdraw money that has been erroneously placed in a customer's account or that is otherwise owing to the stockbroker.

#### AMENDMENTS

1984—Subsec. (a). Pub. L. 98-353, §484(a), substituted “customers’ allowed” for “customers allowed”, “except claims of the kind” for “except claims”, and “such customer property” for “customer property”.

Subsec. (b)(2). Pub. L. 98-353, §484(b), substituted “section 726” for “section 726(a)”.

1982—Subsec. (c). Pub. L. 97-222 substituted “Any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor, excluding property excluded under section 741(4)(B) of this title, shall be apportioned between the general estate and customer property in the same proportion as the general estate of the debtor and customer property were subject to such security interest” for “Subject to section 741(4)(B) of this title, any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor shall be apportioned between the general estate and customer property in the proportion that the general property of the debtor and the cash or securities of customers were subject to such security interest”.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 702 of this title.

### SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION

#### SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title; title 7 section 24; title 15 section 78fff-1.

### § 761. Definitions for this subchapter

In this subchapter—

- (1) “Act” means Commodity Exchange Act;
- (2) “clearing organization” means organization that clears commodity contracts made on, or subject to the rules of, a contract market or board of trade;
- (3) “Commission” means Commodity Futures Trading Commission;
- (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;

(B) with respect to a foreign futures commission merchant, foreign future;

(C) with respect to a leverage transaction merchant, leverage transaction;

(D) with respect to a clearing organization, 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 that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(E) with respect to a commodity options dealer, commodity option;

(5) “commodity option” means agreement or transaction subject to regulation under section 4c(b) of the Act;

(6) “commodity options dealer” means person that extends credit to, or that accepts cash, a security, or other property from, a customer of such person for the purchase or sale of an interest in a commodity option;

(7) “contract market” means board of trade designated as a contract market by the Commission under the Act;

(8) “contract of sale”, “commodity”, “future delivery”, “board of trade”, and “futures commission merchant” have the meanings assigned to those terms in the Act;

(9) “customer” means—

(A) with respect to a futures commission merchant—

(i) entity for or with whom such futures commission merchant deals and that 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 futures 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;

(B) with respect to a foreign futures commission merchant—

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