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§ 180.2 Prohibition on price manipulation.

It shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

PART 190—BANKRUPTCY RULES

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APPENDIX A TO PART 190—CUSTOMER PROOF OF CLAIM FORM

APPENDIX B TO PART 190—SPECIAL BANKRUPTCY DISTRIBUTIONS

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Subpart A—General Provisions

§ 190.00 Statutory authority, organization, core concepts, scope, and construction.

(a) *Statutory authority.* The Commission has adopted the regulations in this part pursuant to its authority under sections 8a(5) and 20 of the Act. Section 8a(5) provides general rulemaking authority to effectuate the provisions and accomplish the purposes of the Act. Section 20 provides that the Commission may, notwithstanding title 11 of the United States Code, adopt certain rules or regulations governing a proceeding involving a commodity broker that is a debtor under subchapter IV of chapter 7 of the Bankruptcy Code. Specifically, the Commission is authorized to adopt rules or regulations specifying:

(1) That certain cash, securities, or other property, or commodity contracts, are to be included in or excluded from customer property or member property;

(2) That certain cash, securities, or other property, or commodity contracts, are to be specifically identifiable to a particular customer in a particular capacity;

(3) The method by which the business of the commodity broker is to be conducted or liquidated after the date of the filing of the petition under chapter 7 of the Bankruptcy Code, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation;

(4) Any persons to which customer property and commodity contracts may be transferred under section 766 of the Bankruptcy Code; and

(5) How a customer's net equity is to be determined.

(b) *Organization.* This part is organized into three subparts. This subpart contains general provisions applicable in all cases. Subpart B of this part contains provisions that apply when the debtor is a futures commission merchant (as that term is defined in the Act or Commission regulations). This includes acting as a foreign futures commission merchant, as defined in section 761(12) of the Bankruptcy Code,

but excludes a person that is “notice-registered” as a futures commission merchant pursuant to section 4f(a)(2) of the Act. Subpart C contains provisions that apply when the debtor is registered as a derivatives clearing organization under the Act.

(c) *Core concepts.* The regulations in this part reflect several core concepts. The descriptions of core concepts in paragraphs (c)(1) through (6) of this section are subject to the further specific requirements set forth in this part, and the specific requirements in this part should be interpreted and applied consistently with these core concepts.

(1) *Commodity brokers.* Subchapter IV of chapter 7 of the Bankruptcy Code applies to a debtor that is a commodity broker, against which a customer holds a “net equity” claim relating to a commodity contract. This part is limited to a commodity broker that is:

- (i) A futures commission merchant; or
- (ii) A derivatives clearing organization registered under the Act and § 39.3 of this chapter.

(2) *Account classes.* The Act and Commission regulations in parts 1, 22, and 30 of this chapter provide differing treatment and protections for different types of cleared commodity contracts. This part establishes three account classes that correspond to the different types of accounts that futures commission merchants and clearing organizations are required to maintain under the regulations in the preceding sentence, specifically, the futures account class (including options on futures), the foreign futures account class (including options on foreign futures), and the cleared swaps account class (including cleared options other than options on futures or foreign futures). This part also establishes a fourth account class, the delivery account class (which may be further subdivided as provided in this part), for property held in an account designated within the books and records of the debtor as a delivery account, for effecting delivery under commodity contracts whose terms require settlement via delivery when the commodity contract is held to expiration or, in the case of a cleared option, is exercised.

(3) *Public customers and non-public customers; Commission segregation requirements; member property—(i) Public customers and non-public customers.* This part prescribes separate treatment of “public customers” and “non-public customers” (as these terms are defined in § 190.01) within each account class in the event of a proceeding under this part in which the debtor is a futures commission merchant. Public customers of a debtor futures commission merchant are entitled to a priority in the distribution of cash, securities, or other customer property over non-public customers, and both have priority over all other claimants (except for claims relating to the administration of customer property) pursuant to section 766(h) of the Bankruptcy Code.

(A) The cash, securities, or other property held on behalf of the public customers of a futures commission merchant in the futures, foreign futures, or cleared swaps account classes are subject to special segregation requirements imposed under parts 1, 22, and 30 of this chapter for each account class. Although such segregation requirements generally are not applicable to cash, securities, or other property received from or reflected in the futures, foreign futures, or cleared swaps accounts of non-public customers of a futures commission merchant, such transactions and property are customer property within the scope of this part.

(B) While parts 1, 22, and 30 of this chapter do not impose special segregation requirements with respect to treatment of cash, securities, or other property of public customers carried in a delivery account, such property does constitute customer property. Thus, the distinction between public and non-public customers is, given the priority for public customers in section 766(h) of the Bankruptcy Code, relevant for the purpose of making distributions to delivery account class customers pursuant to this part.

(C) Where a provision in this part affords the trustee discretion, that discretion should be exercised in a manner that the trustee determines will best achieve the overarching goal of protecting public customers as a class by

enhancing recoveries for, and mitigating disruptions to, public customers as a class. In seeking to achieve that overarching goal, the trustee has discretion to balance those two sub-goals when they are in tension. Where the trustee is directed to exercise “reasonable efforts” to meet a standard, those efforts should only be less than “best efforts” to the extent that the trustee determines that such an approach would support the foregoing goals.

(ii) *Clearing organization bankruptcies: Member property and customer property other than member property.* For a clearing organization, “customer property” is divided into “member property” and “customer property other than member property.” The term member property is used to identify the cash, securities, or property available to pay the net equity claims of clearing members based on their house account at the clearing organization. Thus, in the event of a proceeding under this part in which the debtor is a clearing organization, the classification of customers as public customers or non-public customers also is relevant, in that each member of the clearing organization will have separate claims against the clearing organization (by account class) with respect to:

(A) Commodity contract transactions cleared for its own account or on behalf of any of its non-public customers (which are cleared in a “house account” at the clearing organization); and

(B) Commodity contract transactions cleared on behalf of any public customers of the clearing member (which are cleared in accounts at the clearing organization that is separate and distinct from house accounts).

(iii) *Preferential assignment among customer classes and account classes for clearing organization bankruptcies.* Section 190.18 is designed to support the interests of public customers of members of a debtor that is a clearing organization.

(A) Certain customer property is preferentially assigned to “customer property other than member property” instead of “member property” to the extent that there is a shortfall in funded balances for members’ public customer claims. Moreover, to the extent

that there are excess funded balances for members’ claims in any customer class/account class combination, that excess is also preferentially assigned to “customer property other than member property” to the extent of any shortfall in funded balances for members’ public customer claims.

(B) Where property is assigned to a particular customer class with more than one account class, it is assigned to the account class for which the funded balance percentage is the lowest until there are two account classes with equal funded balance percentages, then to both such account classes, keeping the funded balance percentage the same, and so forth following the analogous approach if the debtor has more than two account classes within the relevant customer class.

(4) *Porting of public customer commodity contract positions.* In a proceeding in which the debtor is a futures commission merchant, this part sets out a policy preference for transferring to another futures commission merchant, or “porting,” open commodity contract positions of the debtor’s public customers along with all or a portion of such customers’ account equity. Porting mitigates risks to both the customers of the debtor futures commission merchant and to the markets. To facilitate porting, this part addresses the manner in which the debtor’s business is to be conducted on and after the filing date, with specific provisions addressing the collection and payment of margin for open commodity contract positions prior to porting.

(5) *Pro rata distribution.* (i) The commodity broker provisions of the Bankruptcy Code, subchapter IV of chapter 7, in particular section 766(h), have long revolved around the principle of pro rata distribution. If there is a shortfall in the cash, securities or other property in a particular account class needed to satisfy the net equity claims of public customers in that account class, the customer property in that account class will be distributed pro rata to those public customers (subject to appendix B of this part). Any customer property not attributable to a specific account class, or that exceeds the amount needed to pay

allowed customer net equity claims in a particular account class, will be distributed to public customers in other account classes so long as there is a shortfall in those other classes. Non-public customers will not receive any distribution of customer property so long as there is any shortfall, in any account class, of customer property needed to satisfy public customer net equity claims.

(ii) The pro rata distribution principle means that, if there is a shortfall of customer property in an account class, all customers within that account class will suffer the same proportional loss relative to their allowed net equity claims. The principle in this paragraph (c)(5)(ii) applies to all customers, including those who post as collateral specifically identifiable property or letters of credit. The pro rata distribution principle is subject to the special distribution provisions set forth in framework 1 in appendix B of this part for cross-margin accounts and framework 2 in appendix B of this part for funds held outside of the U.S. or held in non-U.S. currency.

(6) *Deliveries.* (i) Commodity contracts may have terms that require a customer owning the contract:

(A) To make or take delivery of the underlying commodity if the customer holds the contract to a delivery position; or

(B) In the case of an option on a commodity:

(1) To make delivery upon exercise (as the buyer of a put option or seller of a call option); or

(2) To take delivery upon exercise (as seller of a put option or buyer of a call option).

(ii) Depending upon the circumstances and relevant market, delivery may be effected via a delivery account, a futures account, a foreign futures account or a cleared swaps account, or, when the commodity subject to delivery is a security, in a securities account (in which case property associated with the delivery held in a securities account is not part of any customer account class for purposes of this part).

(iii) Although commodity contracts with delivery obligations are typically offset before reaching the delivery

stage (*i.e.*, prior to triggering bilateral delivery obligations), when delivery obligations do arise, a delivery default could have a disruptive effect on the cash market for the commodity and adversely impact the parties to the transaction. This part therefore sets out special provisions to address open commodity contracts that are settled by delivery, when those positions are nearing or have entered into a delivery position at the time of or after the filing date. The delivery provisions in this part are intended to allow deliveries to be completed in accordance with the rules and established practices for the relevant commodity contract market or clearing organization, as applicable and to the extent permitted under this part.

(iv) In a proceeding in which the debtor is a futures commission merchant, the delivery provisions in this part reflect policy preferences to:

(A) Liquidate commodity contracts that settle via delivery before they move into a delivery position; and

(B) When such contracts are in a delivery position, to allow delivery to occur, where practicable, outside administration of the debtor's estate.

(v) The delivery provisions in this part apply to any commodity that is subject to delivery under a commodity contract, as the term commodity is defined in section of 1a(9) of the Act, whether the commodity itself is tangible or intangible, including agricultural commodities as defined in §1.3 of this chapter, other non-financial commodities (such as metals or energy commodities) covered by the definition of exempt commodity in section 1a(20) of the Act, and commodities that are financial in nature (such as foreign currencies) covered by the definition of excluded commodity in section 1a(19) of the Act. The delivery provisions also apply to virtual currencies that are subject to delivery under a commodity contract.

(d) *Scope—(1) Proceedings—(i) Certain commodity broker proceedings under subchapter IV of chapter 7 of the Bankruptcy Code.* (A) Section 101(6) of the Bankruptcy Code recognizes “futures commission merchants” and “foreign futures commission merchants,” as those terms are defined in section 761(12) of

the Bankruptcy Code, as separate categories of commodity broker. The definition of commodity broker in § 190.01, as it applies to a commodity broker that is a futures commission merchant under the Act, also covers foreign futures commission merchants because a foreign futures commission merchant is required to register as a futures commission merchant under the Act.

(B) Section 101(6) of the Bankruptcy Code recognizes “commodity options dealers,” and “leverage transaction merchants” as defined in sections 761(6) and (13) of the Bankruptcy Code, as separate categories of commodity brokers. There are no commodity options dealers or leverage transaction merchants as of December 8, 2020.

NOTE 1 TO PARAGRAPH (b)(1)(i)(B). The Commission intends to adopt rules with respect to commodity options dealers or leverage transaction merchants, respectively, at such time as an entity registers as such.

(ii) *Futures commission merchants subject to a SIPA proceeding.* Pursuant to section 7(b) of SIPA, 15 U.S.C. 78ff–1(b), the trustee in a SIPA proceeding, where the debtor also is a commodity broker, has the same duties as a trustee in a proceeding under subchapter IV of chapter 7 of the Bankruptcy Code, to the extent consistent with the provisions of SIPA or as otherwise ordered by the court. This part therefore also applies to a proceeding commenced under SIPA with respect to a debtor that is registered as a broker or dealer under section 15 of the Securities Exchange Act of 1934 when the debtor also is a futures commission merchant.

(iii) *Commodity brokers subject to an FDIC proceeding.* Section 5390(m)(1)(B) of title 12 of the United States Code provides that the FDIC must apply the provisions of subchapter IV of chapter 7 of the Bankruptcy Code in respect of the distribution of customer property and member property in connection with the liquidation of a covered financial company or a bridge financial company (as those terms are defined in section 5381(a) of title 12) that is a commodity broker as if such person were a debtor for purposes of subchapter IV, except as specifically provided in section 5390 of title 12. This part therefore shall serve as guidance as to such distribution of property in a proceeding in

which the FDIC is acting as a receiver pursuant to title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act with respect to a covered financial company or bridge financial company that is a commodity broker whose liquidation otherwise would be administered by a trustee under subchapter IV of chapter 7 of the Bankruptcy Code.

(2) *Account class and implied trust limitations.* (i) The trustee may not recognize any account class that is not one of the account classes enumerated in § 190.01.

(ii) No property that would otherwise be included in customer property, as defined in § 190.01, shall be excluded from customer property because such property is considered to be held in a constructive, resulting, or other trust that is implied in equity.

(3) *Commodity contract exclusions.* For purposes of this part, the following are excluded from the term “commodity contract”:

(i) Options on commodities (including swaps subject to regulation under part 32 of this chapter) that are not centrally cleared by a clearing organization or foreign clearing organization.

(ii) Transactions, contracts or agreements that are classified as “forward contracts” under the Act pursuant to the exclusion from the term “future delivery” set out in section 1a(27) of the Act or the exclusion from the definition of a “swap” under section 1a(47)(B)(ii) of the Act, in each case that are not centrally cleared by a clearing organization or foreign clearing organization.

(iii) Security futures products as defined in section 1a(45) of the Act when such products are held in a securities account.

(iv) Any off-exchange retail foreign currency transaction, contract or agreement described in sections 2(c)(2)(B) or (C) of the Act.

(v) Any security-based swap or other security (as defined in section 3 of the Exchange Act), but a security futures product or a mixed swap (as defined in 1a(47)(D) of the Act) that is, in either case, carried in an account for which there is a corresponding account class under this part is not so excluded.

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(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. 7811l(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

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

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

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;

(ii) 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

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commodity broker) may, for good cause shown, request from the Commission an exemption from the requirements of any procedural provision in this part, including an extension of any time limit prescribed by this part or an exemption subject to conditions, provided that the Commission shall not grant an extension for any time period established by the Bankruptcy Code.

(2) A request pursuant to paragraph (a)(1) of this section—

(i) May be made *ex parte* and by any means of communication, written or oral, provided that the trustee must confirm an oral request in writing within one business day and such confirmation must contain all the information required by paragraph (b)(3) of this section. The request or confirmation of an oral request must be given to the Commission as provided in paragraph (a) of this section.

(ii) Must state the particular provision of this part with respect to which the exemption or extension is sought, the reason for the requested exemption or extension, the amount of time sought if the request is for an extension, and the reason why such exemption or extension would not be contrary to the purposes of the Bankruptcy Code and this part.

(3) The Director of the Division of Clearing and Risk, or members of the Commission staff designated by the Director, shall grant, deny, or otherwise respond to a request, on the basis of the information provided in any such request and after consultation with the Director of the Market Participants Division or members of the Commission staff designated by the Director, unless exigent circumstances require immediate action precluding such prior consultation, and shall communicate that determination by the most appropriate means to the person making the request.

(b) *Delegation of authority to the Director of the Division of Clearing and Risk.*

(1) Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Risk, and to such members of the Commission's staff acting under the Director's direction as they may designate, after consultation with the Director of the Mar-

ket Participants Division, or such members of the Commission's staff under the Director's direction as they may designate, unless exigent circumstances require immediate action, all the functions of the Commission set forth in this part, except the authority to disapprove a pre-relief transfer of a public customer commodity contract account or customer property pursuant to § 190.07(e)(1).

(2) The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated to the Director pursuant to paragraph (b)(1) of this section.

(3) Nothing in this section shall prohibit the Commission, at its election, from exercising its authority delegated to the Director of the Division of Clearing and Risk under paragraph (b)(1) of this section.

(c) *Forward contracts.* For purposes of this part, an entity for or with whom the debtor deals who holds a claim against the debtor solely on account of a forward contract, that is not cleared by a clearing organization, will not be deemed to be a customer.

(d) *Other.* The Bankruptcy Code will not be construed by the Commission to prohibit a commodity broker from doing business as any combination of the following: Futures commission merchant, commodity options dealer, foreign futures commission merchant, or leverage transaction merchant, nor will the Commission construe the Bankruptcy Code to permit any operation, trade, or business, or any combination of the foregoing, otherwise prohibited by the Act or by any of the Commission's regulations in this chapter, or by any order of the Commission.

(e) *Rule of construction.* Contracts in security futures products held in a securities account shall not be considered to be "from or for the commodity futures account" or "from or for the commodity options account" of such customers, as such terms are used in section 761(9) of the Bankruptcy Code.

(f) *Receivers.* In the event that a receiver for a futures commission merchant is appointed due to the violation or imminent violation of the customer property protection requirements of

section 4d of the Act, or of the regulations in part 1, 22, or 30 of this chapter that implement section 4d or 4(b)(2) of the Act, or of the futures commission merchant's minimum capital requirements in §1.17 of this chapter, such receiver may, in an appropriate case, file a petition for bankruptcy of such futures commission merchant pursuant to section 301 of the Bankruptcy Code.

(g) *Definition of "allowed."* The term "allowed" in this part shall have the meaning ascribed to it in the Bankruptcy Code.

Subpart B—Futures Commission Merchant as Debtor

§ 190.03 Notices and proofs of claims.

(a) *Notices—means of providing—*(1) *To the Commission.* Unless instructed otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this subpart shall be directed by electronic mail to bankruptcyfilings@cftc.gov. For purposes of this subpart, notice to the Commission shall be deemed to be given only upon actual receipt.

(2) *To Customers.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow procedures reasonably designed for giving adequate notice to customers under this subpart and for receiving claims or other notices from customers. Such procedures should include, absent good cause otherwise, the use of a prominent website as well as communication to customers' electronic addresses that are available in the debtor's books and records.

(b) *Notices to the Commission and designated self-regulatory organizations—*(1) *Of commencement of a proceeding.* Each commodity broker that is a futures commission merchant and files a petition in bankruptcy shall as soon as practicable before, and in any event no later than, the time of such filing, notify the Commission and such commodity broker's designated self-regulatory organization of the anticipated or actual filing date, the court in which the proceeding will be or has been filed and, as soon as known, the docket number assigned to that proceeding. Each commodity broker that

is a futures commission merchant and against which a bankruptcy petition is filed or with respect to which an application for a protective decree under SIPA is filed shall immediately upon the filing of such petition or application notify the Commission and such commodity broker's designated self-regulatory organization of the filing date, the court in which the proceeding has been filed, and, as soon as known, the docket number assigned to that proceeding.

(2) *Of transfers under section 764(b) of the Bankruptcy Code.* As soon as possible, the trustee of a commodity broker that is a futures commissions merchant, the relevant designated self-regulatory organization, or the applicable clearing organization must notify the Commission, and in the case of a futures commission merchant, the trustee shall also notify its designated self-regulatory organization and clearing organization(s), if such person intends to transfer or to apply to transfer open commodity contracts or customer property on behalf of the public customers of the debtor in accordance with section 764(b) of the Bankruptcy Code and §190.07(c) or (d).

(c) *Notices to customers—*(1) *Specifically identifiable property other than open commodity contracts.* In any case in which an order for relief has been entered, the trustee must use all reasonable efforts to promptly notify, in accordance with paragraph (a)(2) of this section, any customer whose futures account, foreign futures account, or cleared swaps account includes specifically identifiable property, other than open commodity contracts, which has not been liquidated, that such specifically identifiable property may be liquidated commencing on and after the seventh day after the order for relief (or such other date as is specified by the trustee in the notice with the approval of the Commission or court) if the customer has not instructed the trustee in writing before the deadline specified in the notice to return such property pursuant to the terms for distribution of specifically identifiable property contained in §190.09(d)(1). Such notice must describe the specifically identifiable property and specify the terms

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upon which that property may be returned, including if applicable and to the extent practicable any substitute customer property that must be provided by the customer.

(2) *Open commodity contracts carried in hedging accounts.* To the extent reasonably practicable under the circumstances of the case, and following consultation with the Commission, the trustee may treat open commodity contracts of public customers identified on the books and records of the debtor as held in a futures account, foreign futures account, or cleared swaps account designated as a hedging account in the debtor's records, as specifically identifiable property of such customer.

(i) If the trustee does not exercise such authority, such open commodity contracts do not constitute specifically identifiable property.

(ii) If the trustee exercises such authority:

(A) The trustee shall use reasonable efforts to promptly notify, in accordance with paragraph (a)(2) of this section, each relevant public customer of such determination.

(B)(1) Where, in the judgment of the trustee, the books and records of the debtor reveal a clear preference by a relevant public customer with respect to transfer or liquidation of open commodity contracts, the trustee shall endeavor, to the extent reasonably practicable, to comply with that preference.

(2) Where, in the judgment of the trustee, the books and records of the debtor do not reveal a clear preference by a relevant public customer with respect to transfer or liquidation of open commodity contracts, the trustee will request the customer to provide written instructions whether to transfer or liquidate such open commodity contracts. Such notice must specify the manner for providing such instructions and the deadline by which the customer must provide instructions.

(C) Such notice must also inform the customer that:

(1) (Where instructions have been requested pursuant to paragraph (c)(2)(ii)(B)(2) of this section), if the customer does not provide instructions in the prescribed manner and by the

prescribed deadline, the customer's open commodity contracts will not be treated as specifically identifiable property under this part;

(2) Any transfer of the open commodity contracts is subject to the terms for distribution contained in § 190.09(d)(2);

(3) Absent compliance with any terms imposed by the trustee or the court, the trustee may liquidate the open commodity contracts; and

(4) Providing (or having provided) instructions may not prevent the open commodity contracts from being liquidated.

(3) *Involuntary cases.* Prior to entry of an order for relief, and upon leave of the court, a trustee appointed in an involuntary proceeding pursuant to section 303 of the Bankruptcy Code may notify customers, in accordance with paragraph (a)(2) of this section, of the commencement of such proceeding and may request customer instructions with respect to the return, liquidation, or transfer of specifically identifiable property.

(4) *Notice of bankruptcy and request for proof of customer claim.* The trustee shall promptly notify, in accordance with paragraph (a)(2) of this section, each customer that an order for relief has been entered and instruct each customer to file a proof of customer claim containing the information specified in paragraph (e) of this section. Such notice may be given separately from any notice provided in accordance with paragraph (c) of this section. The trustee shall cause the proof of customer claim form referred to in paragraph (e) of this section to set forth the bar date for its filing.

(d) *Notice of court filings.* The trustee shall promptly provide the Commission with copies of any complaint, motion, or petition filed in a commodity broker bankruptcy which concerns the disposition of customer property. Court filings shall be directed to the Commission addressed as provided in paragraph (a)(1) of this section.

(e) *Proof of customer claim.* The trustee shall request that customers provide, to the extent reasonably practicable, information sufficient to determine a customer's claim in accordance with the regulations contained in this

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part, including in the discretion of the trustee:

(1) The class of commodity contract account upon which each claim is based (*i.e.*, futures account, foreign futures account, cleared swaps account, or delivery account (and, in the case of a delivery account, how much is based on cash delivery property and how much is based on the value of physical delivery property);

(2) Whether the claimant is a public customer or a non-public customer;

(3) The number of commodity contract accounts held by each claimant, and, for each such account:

(i) The account number;

(ii) The name in which the account is held;

(iii) The balance as of the last account statement for the account, and information regarding any activity in the account from the date of the last account statement up to and including the filing date that affected the balance of the account;

(iv) The capacity in which the account is held;

(v) Whether the account is a joint account and, if so, the amount of the claimant's percentage interest in that account and whether participants in the joint account are claiming jointly or separately;

(vi) Whether the account is a discretionary account;

(vii) Whether the account is an individual retirement account for which there is a custodian; and

(viii) Whether the account is a cross-margining account for futures and securities;

(4) A description of any accounts held by the claimant with the debtor that are not commodity contract accounts;

(5) A description of all claims against the debtor not based upon a commodity contract account of the claimant or an account listed in response to paragraph (e)(4) of this section;

(6) A description of all claims of the debtor against the claimant not included in the balance of a commodity contract account of the claimant;

(7) A description of and the value of any open positions, unliquidated securities, or other unliquidated property held by the debtor on behalf of the claimant, indicating the portion of

such property, if any, which was included in the information provided in paragraph (e)(3) of this section, and identifying any such property which would be specifically identifiable property as defined in § 190.01;

(8) Whether the claimant holds positions in security futures products, and, if so, whether those positions are held in a futures account, a foreign futures account, or a securities account;

(9) Whether the claimant wishes to receive payment in kind, to the extent practicable, for any claim for unliquidated securities or other unliquidated property; and

(10) Copies of any documents which support the information contained in the proof of customer claim, including without limitation, customer confirmations, account statements, and statements of purchase or sale.

(f) *Proof of claim form.* A template customer proof of claim form which may (but is not required to) be used by the trustee is set forth in appendix A to this part.

(1) If there are no open commodity contracts that are being treated as specifically identifiable property (*e.g.*, if the customer proof of claim form was distributed after the primary liquidation date), the trustee should modify the customer proof of claim form to delete references to open commodity contracts as specifically identifiable property.

(2) In the event the trustee determines that the debtor's books and records reflecting customer transactions are not reasonably reliable, or account statements are not available from which account balances as of the date of transfer or liquidation of customer property may be determined, the proof of claim form used by the trustee should be modified to take into account the particular facts and circumstances of the case.

§ 190.04 Operation of the debtor's estate—customer property.

(a) *Transfers*—(1) *All cases.* The trustee for a commodity broker shall promptly use its best efforts to effect a transfer in accordance with § 190.07(c) and (d) no later than the seventh calendar day after the order for relief of the open commodity contracts and

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property held by the commodity broker for or on behalf of its public customers.

(2) *Involuntary cases.* A commodity broker against which an involuntary petition in bankruptcy is filed, or the trustee if a trustee has been appointed in such case, shall use its best efforts to effect a transfer in accordance with § 190.07(c) and (d) of all open commodity contracts and property held by the commodity broker for or on behalf of its public customers and such other property as the Commission in its discretion may authorize, on or before the seventh calendar day after the filing date, and immediately cease doing business; *provided, however*, that if the commodity broker demonstrates to the Commission within such period that it was in compliance with the segregation and financial requirements of this chapter on the filing date, and the Commission determines, in its sole discretion, that such transfer is neither appropriate nor in the public interest, the commodity broker may continue in business subject to applicable provisions of the Bankruptcy Code and of this chapter.

(b) *Treatment of open commodity contracts—(1) Payments by the trustee.* Prior to the primary liquidation date, the trustee may make payments of initial margin and variation settlement to a clearing organization, commodity broker, foreign clearing organization, or foreign futures intermediary, carrying the account of the debtor, pending the transfer, or liquidation of any open commodity contracts, whether or not such contracts are specifically identifiable property of a particular customer, provided, that:

(i) To the extent within the trustee's control, the trustee shall not make any payments on behalf of any commodity contract account on the books and records of the debtor that is in deficit; *provided, however*, that the provision in this paragraph (b)(1) shall not be construed to prevent a clearing organization, foreign clearing organization, futures commission merchant, or foreign futures intermediary carrying an account of the debtor from exercising its rights to the extent permitted under applicable law;

(ii) Any margin payments made by the trustee with respect to a specific

customer account shall not exceed the funded balance for that account;

(iii) The trustee shall not make any payments on behalf of non-public customers of the debtor from funds that are segregated for the benefit of public customers;

(iv) If the trustee receives payments from a customer in response to a margin call, then to the extent within the trustee's control, the trustee must use such payments to make margin payments for the open commodity contract positions of such customer;

(v) The trustee may not use payments received from one public customer to meet the margin (or any other) obligations of any other customer; and

(vi) If funds segregated for the benefit of public customers in a particular account class exceed the aggregate net equity claims for all public customers in such account class, the trustee may use such excess funds to meet the margin obligations for any public customer in such account class whose account is under-margined (as described in paragraph (b)(4) of this section) but not in deficit, provided that the trustee issues a margin call to such customer and provided further that the trustee shall liquidate such customer's open commodity contracts if the customer fails to make the margin payment within a reasonable time as provided in paragraph (b)(4) of this section.

(2) *Margin calls.* The trustee (or, prior to appointment of the trustee, the debtor against which an involuntary petition was filed) may issue a margin call to any public customer whose commodity contract account contains open commodity contracts if such account is under-margined.

(3) *Margin payments by the customer.* The full amount of any margin payment by a customer in response to a margin call under paragraph (b)(2) of this section must be credited to the funded balance of the particular account for which it was made.

(4) *Trustee obligation to liquidate certain open commodity contracts.* The trustee shall, as soon as practicable under the circumstances, liquidate all open commodity contracts in any commodity contract account that is in deficit, or for which any mark-to-market

calculation would result in a deficit, or for which the customer fails to meet a margin call made by the trustee within a reasonable time. Except as otherwise provided in this part, absent exigent circumstances, a reasonable time for meeting margin calls made by the trustee shall be deemed to be one hour, or such greater period not to exceed one business day, as the trustee may determine in its sole discretion.

(5) *Partial liquidation of open commodity contracts by others.* In the event that a clearing organization, foreign clearing organization, futures commission merchant, foreign futures intermediary, or other person carrying a commodity customer account for the debtor in the nature of an omnibus account has liquidated only a portion of open commodity contracts in such account, the trustee will exercise reasonable business judgment in assigning the liquidating transactions to the underlying commodity customer accounts carried by the debtor. Specifically, the trustee should endeavor to assign the contracts as follows: First, to liquidate open commodity contracts in a risk-reducing manner in any accounts that are in deficit; second, to liquidate open commodity contracts in a risk-reducing manner in any accounts that are undermargined; third, to liquidate open commodity contracts in a risk-reducing manner in any other accounts, and finally to liquidate any remaining open commodity contracts in any accounts. If more than one commodity contract account reflects open commodity contracts in a particular account class for which liquidating transactions have been executed, the trustee shall to the extent practicable allocate the liquidating transactions to such commodity contract accounts pro rata based on the number of open commodity contracts of such commodity contract accounts. For purposes of this section, the term “a risk-reducing manner” is measured by margin requirements set using the margin methodology and parameters followed by the derivatives clearing organization at which such contracts are cleared.

(c) *Contracts moving into delivery position.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to at-

tempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, the trustee shall use its best efforts to liquidate any open commodity contract that settles upon expiration or exercise via the making or taking of delivery of a commodity:

(1) If such contract is a futures contract or a cleared swaps contract, before the earlier of the last trading day or the first day on which notice of intent to deliver may be tendered with respect thereto, or otherwise before the debtor or its customer incurs an obligation to make or take delivery of the commodity under such contract;

(2) If such contract is a long option on a commodity and has value, before the first date on which the contract could be automatically exercised or the last date on which the contract could be exercised if not subject to automatic exercise; or

(3) If such contract is a short option on a commodity that is in-the-money in favor of the long position holder, before the first date on which the long option position could be exercised.

(d) *Liquidation or offset.* After entry of the order for relief and subject to paragraph (a) of this section, which requires the trustee to attempt to make transfers to other commodity brokers permitted by § 190.07 and section 764(b) of the Bankruptcy Code, and except as otherwise set forth in this paragraph (d), the following commodity contracts and other property held by or for the account of a debtor must be liquidated in the market in accordance with paragraph (e)(1) of this section or liquidated via book entry in accordance with paragraph (e)(2) of this section by the trustee promptly and in an orderly manner:

(1) *Open commodity contracts.* All open commodity contracts, except for:

(i) Commodity contracts that are specifically identifiable property (if applicable) and are subject to customer instructions to transfer (in lieu of liquidating) as provided in § 190.03(c)(2), provided that the customer is in compliance with the terms of § 190.09(d)(2); and

(ii) Open commodity contract positions that are in a delivery position,

which shall be treated in accordance with the provisions of § 190.06.

(2) *Specifically identifiable property, other than open commodity contracts or physical delivery property.* Specifically identifiable property, other than open commodity contracts or physical delivery property, to the extent that:

(i) The fair market value of such property is less than 75% of its fair market value on the date of entry of the order for relief;

(ii) Failure to liquidate the specifically identifiable property may result in a deficit balance in the applicable customer account; or

(iii) The trustee has not received instructions to return pursuant to § 190.03(c)(1), or has not returned such property upon the terms contained in § 190.09(d)(1).

(3) *Letters of credit.* The trustee may request that a customer deliver substitute customer property with respect to any letter of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract, whether the letter of credit is held by the trustee on behalf of the debtor's estate or a derivatives clearing organization or a foreign intermediary or foreign clearing organization on a pass-through or other basis, including in cases where the letter of credit has expired since the date of the order for relief. The amount of the request may equal the full face amount of the letter of the credit or any portion thereof, to the extent required or may be required in the trustee's discretion to ensure pro rata treatment among customer claims within each account class, consistent with §§ 190.08 and 190.09.

(i) If a customer fails to provide substitute customer property within a reasonable time specified by the trustee, the trustee may, if the letter of credit has not expired, draw upon the full amount of the letter of credit or any portion thereof.

(ii) For any letter of credit referred to in this paragraph (d)(3), the trustee shall treat any portion that is not drawn upon (less the value of any substitute customer property delivered by the customer) as having been distributed to the customer for purposes of calculating entitlements to distribu-

tion or transfer. The expiration of the letter of credit on or at any time after the date of the order for relief shall not affect such calculation.

(iii) Any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by a customer, shall be considered customer property in the account class applicable to the original letter of credit.

(iv) The trustee shall, in exercising their discretion with regard to addressing letters of credit, including as to the timing and amount of a request for substitute customer property, endeavor to mitigate, to the extent practicable, the adverse effects upon customers that have posted letters of credit, in a manner that achieves *pro rata* treatment among customer claims.

(4) *All other property.* All other property, other than physical delivery property held for delivery in accordance with the provisions of § 190.06, which is not required to be transferred or returned pursuant to customer instructions and which has not been liquidated in accordance with paragraphs (d)(1) through (3) of this section.

(e) *Liquidation of open commodity contracts*—(1) *By the trustee or a clearing organization in the market*—(i) *Debtor as a clearing member.* For open commodity contracts cleared by the debtor as a member of a clearing organization, the trustee or clearing organization, as applicable, shall liquidate such open commodity contracts pursuant to the rules of the clearing organization, a designated contract market, or a swap execution facility, if and as applicable. Any such rules providing for liquidation other than on the open market shall be designed to achieve, to the extent feasible under market conditions at the time of liquidation, a process for liquidating open commodity contracts that results in competitive pricing. For open commodity contracts that are futures or options on futures that were established on or subject to the rules of a foreign board of trade and cleared by the debtor as a member of a foreign clearing organization, the trustee shall liquidate such open commodity contracts pursuant to the rules of the foreign clearing organization or foreign board of trade or, in the absence of

such rules, in the manner the trustee determines appropriate.

(ii) *Debtor not a clearing member.* For open commodity contracts submitted by the debtor for clearing through one or more accounts established with a futures commission merchant (as defined in §1.3 of this chapter) or foreign futures intermediary, the trustee shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, designated contract market, swap execution facility, or foreign board of trade governing the liquidation of open commodity contracts.

(2) *By the trustee or a clearing organization via book entry offset.* Upon application by the trustee or clearing organization, the Commission may permit open commodity contracts to be liquidated, or settlement on such contracts to be made, by book entry. Such book entry shall offset open commodity contracts, whether matched or not matched on the books of the commodity broker, using the settlement price for such commodity contracts as determined by the clearing organization in accordance with its rules. Such rules shall be designed to establish, to the extent feasible under market conditions at the time of liquidation, such settlement prices in a competitive manner.

(3) *By a futures commission merchant or foreign futures intermediary.* For open commodity contracts cleared by the debtor through one or more accounts established with a futures commission merchant or a foreign futures intermediary, such futures commission merchant or foreign futures intermediary may exercise any enforceable contractual rights it has to liquidate such commodity contracts, provided, that it shall use commercially reasonable efforts to liquidate the open commodity contracts to achieve competitive pricing, to the extent feasible under market conditions at the time of liquidation and subject to any rules or orders of the relevant clearing organization, foreign clearing organization, des-

ignated contract market, swap execution facility, or foreign board of trade governing its liquidation of such open commodity contracts. If a futures commission merchant or foreign futures intermediary fails to use commercially reasonable efforts to liquidate open commodity contracts to achieve competitive pricing in accordance with this paragraph (e)(3), the trustee may seek damages reflecting the difference between the price (or prices) at which the relevant commodity contracts would have been liquidated using commercially reasonable efforts to achieve competitive pricing and the price (or prices) at which the commodity contracts were liquidated, which shall be the sole remedy available to the trustee. In no event shall any such liquidation be voided.

(4) *Liquidation only.* (i) Nothing in this part shall be interpreted to permit the trustee to purchase or sell new commodity contracts for the debtor or its customers except to offset open commodity contracts or to transfer any transferable notice received by the debtor or the trustee under any commodity contract; *provided, however,* that the trustee may, in its discretion and with approval of the Commission, cover uncovered inventory or commodity contracts of the debtor which cannot be liquidated immediately because of price limits or other market conditions, or may take an offsetting position in a new month or at a strike price for which limits have not been reached.

(ii) Notwithstanding paragraph (e)(4)(i) of this section, the trustee may, with the written permission of the Commission, operate the business of the debtor in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of the debtor under appropriate circumstances, as determined by the Commission.

(f) *Long option contracts.* Subject to paragraphs (d) and (e) of this section, the trustee shall use its best efforts to assure that a commodity contract that is a long option contract with value does not expire worthless.

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§ 190.05 Operation of the debtor's estate—general.

(a) *Compliance with the Act and regulations in this chapter.* Except as specifically provided otherwise in this part, the trustee shall use reasonable efforts to comply with all of the provisions of the Act and of the regulations in this chapter as if it were the debtor.

(b) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account that contains open commodity contracts or other property as of the close of business each business day subsequent to the order for relief until the date all open commodity contracts and other property in such account have been transferred or liquidated, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

(c) *Records—(1) Maintenance.* Except as otherwise ordered by the court or as permitted by the Commission, records required under this chapter to be maintained by the debtor, including records of the computations required by this part, shall be maintained by the trustee until such time as the debtor's case is closed.

(2) *Accessibility.* The records required to be maintained by paragraph (c)(1) of this section shall be available during business hours to the Commission and the U.S. Department of Justice. The trustee shall give the Commission and the U.S. Department of Justice access to all records of the debtor, including records required to be retained in accordance with § 1.31 of this chapter and all other records of the commodity broker, whether or not the Act or this chapter would require such records to be maintained by the commodity broker.

(d) *Customer statements.* The trustee shall use all reasonable efforts to continue to issue account statements with respect to any customer for whose account open commodity contracts or other property is held that has not been liquidated or transferred. With respect to such accounts, the trustee must also issue an account statement reflecting any liquidation or transfer of open commodity contracts or other

property promptly after such liquidation or transfer.

(e) *Other matters—(1) Disbursements.* With the exception of transfers of customer property made in accordance with § 190.07, the trustee shall make no disbursements to customers except with approval of the court.

(2) *Investment.* The trustee shall promptly invest the proceeds from the liquidation of commodity contracts or specifically identifiable property, and may invest any other customer property, in obligations of the United States and obligations fully guaranteed as to principal and interest by the United States, provided that such obligations are maintained in a depository located in the United States, its territories or possessions.

(f) *Residual interest.* The trustee shall apply the residual interest provisions of § 1.11 of this chapter in a manner appropriate to the context of their responsibilities as a bankruptcy trustee pursuant subchapter IV of chapter 7 of the Bankruptcy Code and this part, and in light of the existence of a surplus or deficit in customer property available to pay customer claims.

§ 190.06 Making and taking delivery under commodity contracts.

(a) *Deliveries—(1) General.* The provisions of this paragraph (a) apply to commodity contracts that settle upon expiration or exercise by making or taking delivery of physical delivery property, if such commodity contracts are in a delivery position on the filing date, or the trustee is unable to liquidate such commodity contracts in accordance with § 190.04(c) to prevent them from moving into a delivery position, i.e., before the debtor or its customer incurs bilateral contractual obligations to make or take delivery under such commodity contracts.

(2) *Delivery made or taken on behalf of a customer outside of the administration of the debtor's estate.* (i) The trustee shall use reasonable efforts to allow a customer to deliver physical delivery property that is held directly by the customer and not by the debtor (and thus not recorded in any commodity contract account of the customer) in settlement of a commodity contract, and to allow payment in exchange for

such delivery, to occur outside the administration of the debtor's estate, when the rules of the exchange or other market listing the commodity contract, or the clearing organization or the foreign clearing organization clearing the commodity contract, as applicable, prescribe a process for delivery that allows the delivery to be fulfilled:

(A) In the normal course directly by the customer;

(B) By substitution of the customer for the commodity broker; or

(C) Through agreement of the buyer and seller to alternative delivery procedures.

(ii) Where a customer delivers physical delivery property in settlement of a commodity contract outside of the administration of the debtors' estate in accordance with paragraph (a)(2)(i) of this section, any property of such customer held at the debtor in connection with such contract must nonetheless be included in the net equity claim of that customer, and, as such, can only be distributed pro rata at the time of, and as part of, any distributions to customers made by the trustee.

(3) *Delivery as part of administration of the debtor's estate.* When the trustee determines that it is not practicable to effect delivery as provided in paragraph (a)(2) of this section:

(i) To facilitate the making or taking of delivery directly by a customer, the trustee may, as it determines reasonable under the circumstances of the case and consistent with the pro rata distribution of customer property by account class:

(A) When a customer is obligated to make delivery, return any physical delivery property to the customer that is held by the debtor for or on behalf of the customer under the terms set forth in §190.09(d)(1)(ii), to allow the customer to deliver such property to fulfill its delivery obligation under the commodity contract; or

(B) When a customer is obligated to take delivery:

(1) Return any cash delivery property to the customer that is reflected in the customer's delivery account, provided that cash delivery property returned under this paragraph (a)(3)(i)(B)(1) shall not exceed the lesser of:

(i) The amount the customer is required to pay for delivery of the commodity; or

(ii) The customer's net funded balance for all of the customer's commodity contract accounts;

(2) Return cash, securities, or other property held in the customer's non-delivery commodity contract accounts, provided that property returned under this section shall not exceed the lesser of:

(i) The amount the customer is required to pay for delivery of the commodity; or

(ii) The net funded balance for all of the customer's commodity contract accounts reduced by any amount returned to the customer pursuant to paragraph (a)(3)(i)(B)(1) of this section, and provided further, however, that the trustee may distribute such property only to the extent that the customer's funded balance for each such account exceeds the minimum margin obligations for such account (as described in §190.04(b)(2)); and

(C) Impose such conditions on the customer as it considers appropriate to assure that property returned to the customer is used to fulfill the customer's delivery obligations.

(ii) If the trustee does not return physical delivery property, cash delivery property, or other property in the form of cash or cash equivalents to the customer as provided in paragraph (a)(3)(i) of this section, subject to paragraph (a)(4) of this section:

(A) To the extent practical, the trustee shall make or take delivery of physical delivery property in the same manner as if no bankruptcy had occurred, and when making delivery, the party to which delivery is made must pay the full price required for taking such delivery; or

(B) When taking delivery of physical delivery property:

(1) The trustee shall pay for the delivery first using the customer's cash delivery property or other property, limited to the amounts set forth in paragraph (a)(3)(i)(B) of this section, along with any cash transferred by the customer to the trustee on or after the filing date for the purpose of paying for delivery.

(2) If the value of the cash or cash equivalents that may be used to pay for deliveries as described in paragraph (a)(3)(i)(B) of this section is less than the amount required to be paid for taking delivery, the trustee shall issue a payment call to the customer. The full amount of any payment made by the customer in response to a payment call must be credited to the funded balance of the particular account for which such payment is made.

(3) If the customer fails to meet a call for payment under paragraph (a)(3)(ii)(B)(2) of this section before payment is made for delivery, the trustee must convert any physical delivery property received on behalf of the customer to cash as promptly as possible.

(4) *Deliveries in a securities account.* If an open commodity contract held in a futures account, foreign futures account, or cleared swaps account requires delivery of a security upon expiration or exercise of such commodity contract, and delivery is not completed pursuant to paragraph (a)(2) or (a)(3)(i) of this section, the trustee may make or take delivery in a securities account in a manner consistent with paragraph (a)(3)(ii) of this section, *provided, however*, that the trustee may transfer property from the customer's commodity contract accounts to the securities account to fulfill the delivery obligation only to the extent that the customer's funded balance for such commodity contract account exceeds the customer's minimum margin obligations for such accounts (as described in §190.04(b)(2)) and provided further that the customer is not under-margined or does not have a deficit balance in any other commodity contract accounts.

(5) *Delivery made or taken on behalf of proprietary account.* If delivery of physical delivery property is to be made or taken on behalf of the debtor's own account or the account of any non-public customer of the debtor, the trustee shall make or take delivery, as the case may be, on behalf of the debtor's estate, provided that if the trustee takes delivery of physical delivery property it must convert such property to cash as promptly as possible.

(b) *Special account class provisions for delivery accounts.* (1) Within the delivery account class, the trustee shall treat—

(i) Physical delivery property held in delivery accounts as of the filing date, and the proceeds of any such physical delivery property subsequently received, as part of the physical delivery account class; and

(ii) Cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a customer in accordance with paragraph (a)(3) of this section, as part of a separate cash delivery account class.

(2)(i) If the debtor holds any cash or cash equivalents in an account maintained at a bank, clearing organization, foreign clearing organization, or other person, under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking delivery, or receiving payment for making delivery, of a commodity under commodity contracts, such property shall (subject to §190.09) be considered customer property—

(A) In the cash delivery account class if held for making payment for taking delivery; and

(B) In the physical delivery account class, if held as a result of receiving such payment for a making delivery after the filing date.

(ii) Any other property (excluding property segregated for the benefit of customer in the futures, foreign futures or cleared swaps account class) that is traceable as having been held or received for the purpose of making delivery, or as having been held or received as a result of taking delivery, of a commodity under commodity contracts, shall (subject to §190.09) be considered customer property—

(A) In the cash delivery account class if received after the filing date in exchange for taking delivery; and

(B) Otherwise shall be considered customer property in the physical delivery account class.

§ 190.07 Transfers.

(a) *Transfer rules.* No clearing organization or self-regulatory organization

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may adopt, maintain in effect, or enforce rules that:

(1) Are inconsistent with the provisions of this part;

(2) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from futures commission merchants that are required to transfer accounts pursuant to § 1.17(a)(4) of this chapter; or

(3) Interfere with the acceptance by its members of transfers of commodity contracts, and the property margining or securing such contracts, from a futures commission merchant that is a debtor as defined in § 190.01, if such transfers have been approved by the Commission, *provided, however*, that this paragraph (a)(3) shall not—

(i) Limit the exercise of any contractual right of a clearing organization or other registered entity to liquidate or transfer open commodity contracts; or

(ii) Be interpreted to limit a clearing organization's ability adequately to manage risk.

(b) *Requirements for transferees.* (1) It is the duty of each transferee to assure that it will not accept a transfer that would cause the transferee to be in violation of the minimum financial requirements set forth in this chapter.

(2) Any transferee that accepts a transfer of open commodity contracts from the estate of the debtor—

(i) Accepts the transfer subject to any loss that may arise in the event the transferee cannot recover from the customer any deficit balance that may arise related to the transferred open commodity contracts.

(ii) If the commodity contracts were held for the account of a customer:

(A) Must keep such commodity contracts open at least one business day after their receipt, unless the customer for whom the transfer is made fails to respond within a reasonable time to a margin call for the difference between the margin transferred with such commodity contracts and the margin which such transferee would require with respect to a similar set of commodity contracts held for the account of a customer in the ordinary course of business; and

(B) May not collect commissions with respect to the transfer of such commodity contracts.

(3) A transferee may accept open commodity contracts and property, and open accounts on its records, for customers whose commodity contracts and property are transferred pursuant to this part prior to completing customer diligence, provided that account opening diligence as required by law (including the risk disclosures referred to in § 1.65(a)(3) of this chapter) is performed, and records and information required by law are obtained, as soon as practicable, but in any event within six months of the transfer, unless this time is extended for a particular account, transferee, or debtor by the Commission.

(4)(i) Any account agreements governing a transferred account (including an account that has been partially transferred) shall be deemed assigned to the transferee by operation of law and shall govern the transferee and customer's relationship until such time as the transferee and customer enter into a new agreement; *provided, however*, that any breach of such agreement by the debtor existing at or before the time of the transfer (including, but not limited to, any failure to segregate sufficient customer property) shall not constitute a default or breach of the agreement on the part of the transferee, or constitute a defense to the enforcement of the agreement by the transferee.

(ii) Paragraph (b)(4)(i) of this section shall not apply where the customer has a pre-existing account agreement with the transferee futures commission merchant. In such a case, the transferred account will be governed by that pre-existing account agreement.

(5) If open commodity contracts or any specifically identifiable property has been, or is to be, transferred in accordance with section 764(b) of the Bankruptcy Code and this section, customer instructions previously received by the trustee with respect to open commodity contracts or with respect to specifically identifiable property, shall be transmitted to the transferee of property, which shall comply therewith to the extent practicable.

(c) *Eligibility for transfer under section 764(b) of the Bankruptcy Code—accounts eligible for transfer.* All commodity contract accounts (including accounts with no open commodity contract positions) are eligible for transfer after the order for relief pursuant to section 764(b) of the Bankruptcy Code, except:

(1) The debtor's own account or the accounts of general partners of the debtor if the debtor is a partnership; and

(2) Accounts that are in deficit.

(d) *Special rules for transfers under section 764(b) of the Bankruptcy Code—(1) Effecting transfer.* The trustee for a commodity broker shall use its best efforts to effect a transfer to one or more other commodity brokers of all eligible commodity contract accounts, open commodity contracts and property held by the debtor for or on behalf of its customers, based on customer claims or record, no later than the seventh calendar day after the order for relief.

(2) *Partial transfers; multiple transferees—(i) Of the customer estate.* If all eligible commodity contract accounts held by a debtor cannot be transferred under this section, a partial transfer may nonetheless be made. The Commission will not disapprove such a transfer for the sole reason that it was a partial transfer. Commodity contract accounts may be transferred to one or more transferees, and, subject to paragraph (d)(4) of this section, may be transferred to different transferees by account class.

(ii) *Of a customer's commodity contract account.* If all of a customer's open commodity contracts and property cannot be transferred under this section, a partial transfer of contracts and property may be made so long as such transfer would not result in an increase in the amount of any customer's net equity claim. One, but not the only, means to effectuate a partial transfer is by liquidating a portion of the open commodity contracts held by a customer such that sufficient value is realized, or margin requirements are reduced to an extent sufficient, to permit the transfer of some or all of the remaining open commodity contracts and property. If any open commodity contract to be transferred in a partial

transfer is part of a spread or straddle, to the extent practicable under the circumstances, each side of such spread or straddle must be transferred or none of the open commodity contracts comprising the spread or straddle may be transferred.

(3) *Letters of credit.* A letter of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract may be transferred with an eligible commodity contract account if it is held by a derivatives clearing organization on a pass-through or other basis or is transferable by its terms, so long as the transfer will not result in a recovery which exceeds the amount to which the customer would be entitled under §§ 190.08 and 190.09. If the letter of credit cannot be transferred as provided for in the foregoing sentence, and the customer does not deliver substitute customer property to the trustee in accordance with § 190.04(d)(3), the trustee may draw upon a portion or all of the letter of credit, the proceeds of which shall be treated as customer property in the applicable account class.

(4) *Physical delivery property.* The trustee shall use reasonable efforts to prevent physical delivery property held for the purpose of making delivery on a commodity contract from being transferred separate and apart from the related commodity contract, or to a different transferee.

(5) *No prejudice to other customers.* No transfer shall be made under this part by the trustee if, after taking into account all customer property available for distribution to customers in the applicable account class at the time of the transfer, such transfer would result in insufficient remaining customer property to make an equivalent percentage distribution (including all previous transfers and distributions) to all customers in the applicable account class, based on—

(i) Customer claims of record; and

(ii) Estimates of other customer claims made in the trustee's reasonable discretion based on available information, in each case as of the calendar day immediately preceding transfer.

(e) *Prohibition on avoidance of transfers under section 764(b) of the Bankruptcy Code*—(1) *Pre-relief transfers*. Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(i) The transfer of commodity contract accounts or customer property prior to the entry of the order for relief in compliance with § 1.17(a)(4) of this chapter unless such transfer is disapproved by the Commission;

(ii) The transfer, withdrawal, or settlement, prior to the order for relief at the request of a public customer, including a transfer, withdrawal, or settlement at the request of a public customer that is a commodity broker, of commodity contract accounts or customer property held from or for the account of such customer by or on behalf of the debtor unless:

(A) The customer acted in collusion with the debtor or its principals to obtain a greater share of customer property or the bankruptcy estate than that to which it would be entitled under this part; or

(B) The transfer is disapproved by the Commission;

(iii) The transfer prior to the order for relief by a clearing organization, or by a receiver that has been appointed for the futures commission merchant (FCM) that is now a debtor, of one or more accounts held for or on behalf of customers of the debtor, or of commodity contracts and other customer property held for or on behalf of customers of the debtor, provided that the transfer is not disapproved by the Commission.

(2) *Post-relief transfers*. Notwithstanding the provisions of paragraphs (c) and (d) of this section, the following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(i) The transfer of a commodity contract account or customer property eligible to be transferred under paragraphs (c) and (d) of this section made by the trustee or by any clearing organization on or before the seventh calendar day after the entry of the order

for relief, as to which the Commission has not disapproved the transfer; or

(ii) The transfer of a commodity contract account or customer property at the direction of the Commission on or before the seventh calendar day after the order for relief, upon such terms and conditions as the Commission may deem appropriate and in the public interest.

(f) *Commission action*. Notwithstanding any other provision of this section (other than paragraphs (d)(2)(ii) and (d)(5) of this section), in appropriate cases and to protect the public interest, the Commission may:

(1) Prohibit the transfer of a particular set or sets of commodity contract accounts and customer property; or

(2) Permit transfers of a particular set or sets of commodity contract accounts and customer property that do not comply with the requirements of this section.

§ 190.08 Calculation of funded net equity.

For purposes of this subpart, funded net equity shall be computed as follows:

(a) *Funded claim*. The funded net equity claim of a customer shall be equal to the aggregate of the funded balances of such customer's net equity claim for each account class.

(b) *Net equity*. Net equity means a customer's total customer claim of record against the estate of the debtor based on the customer property, including any commodity contracts, held by the debtor for or on behalf of such customer less any indebtedness of the customer to the debtor. Net equity shall be calculated as follows:

(1) *Step 1-equity determination*. (i) Determine the equity balance of each commodity contract account of a customer by computing, with respect to such account, the sum of:

(A) The ledger balance;

(B) The open trade balance; and

(C) The realizable market value, determined as of the close of the market on the last preceding market day, of any securities or other property held by or for the debtor from or for such account, plus accrued interest, if any.

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(ii) For the purposes of this paragraph (b)(1), the ledger balance of a customer account shall be calculated by:

(A) Adding:

(1) Cash deposited to purchase, margin, guarantee, secure, or settle a commodity contract;

(2) Cash proceeds of liquidations of any securities or other property referred to in paragraph (b)(1)(i)(C) of this section;

(3) Gains realized on trades; and

(4) The face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract; and

(B) Subtracting from the result:

(1) Losses realized on trades;

(2) Disbursements to or on behalf of the customer (including, for these purposes, transfers made pursuant to §§ 190.04(a) and 190.07); and

(3) The normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees, insurance, and other costs and charges lawfully incurred in connection with the purchase, sale, exercise, or liquidation of any commodity contract in such account.

(iii) For purposes of this paragraph (b)(1), the open trade balance of a customer's account shall be computed by subtracting the unrealized loss in value of the open commodity contracts held by or for such account from the unrealized gain in value of the open commodity contracts held by or for such account.

(iv) For purposes of this paragraph (b)(1), in calculating the ledger balance or open trade balance of any customer, exclude any security futures products, any gains or losses realized on trades in such products, any property received to margin, guarantee, or secure such products (including interest thereon or the proceeds thereof), to the extent any of the foregoing are held in a securities account, and any disbursements to or on behalf of such customer in connection with such products or such property held in a securities account.

(2) *Step 2-customer determination (aggregation).* Aggregate the credit and debit equity balances of all accounts of the same class held by a customer in the same capacity. Paragraphs (b)(2)(i)

through (xii) of this section prescribe which accounts must be treated as being held in the same capacity and which accounts must be treated as being held in a separate capacity.

(i) Except as otherwise provided in this paragraph (b)(2), all accounts that are maintained with a debtor in a person's name and that, under this paragraph (b)(2), are deemed to be held by that person in its individual capacity shall be deemed to be held in the same capacity.

(ii) An account maintained with a debtor by a guardian, custodian, or conservator for the benefit of a ward, or for the benefit of a minor under the Uniform Gift to Minors Act, shall be deemed to be held in a separate capacity from accounts held by such guardian, custodian or conservator in its individual capacity.

(iii) An account maintained with a debtor in the name of an executor or administrator of an estate in its capacity as such shall be deemed to be held in a separate capacity from accounts held by such executor or administrator in its individual capacity.

(iv) An account maintained with a debtor in the name of a decedent, in the name of the decedent's estate, or in the name of the executor or administrator of such estate in its capacity as such shall be deemed to be accounts held in the same capacity.

(v) An account maintained with a debtor by a trustee shall be deemed to be held in the individual capacity of the grantor of the trust unless the trust is created by a valid written instrument for a purpose other than avoidance of an offset under the regulations contained in this part. A trust account which is not deemed to be held in the individual capacity of its grantor under this paragraph (b)(2)(v) shall be deemed to be held in a separate capacity from accounts held in an individual capacity by the trustee, by the grantor or any successor in interest of the grantor, or by any trust beneficiary, and from accounts held by any other trust.

(vi) An account maintained with a debtor by a corporation, partnership, or unincorporated association shall be

deemed to be held in a separate capacity from accounts held by the shareholders, partners or members of such corporation, partnership, or unincorporated association, if such entity was created for purposes other than avoidance of an offset under the regulations contained in this part.

(vii) A hedging account of a person shall be deemed to be held in the same capacity as a speculative account of such person.

(viii) Subject to paragraphs (b)(2)(ix) and (xiv) of this section, the futures accounts, foreign futures accounts, delivery accounts, and cleared swaps accounts of the same person shall not be deemed to be held in separate capacities: *Provided, however*, that such accounts may be aggregated only in accordance with paragraph (b)(3) of this section.

(ix) An omnibus customer account for public customers of a futures commission merchant maintained with a debtor shall be deemed to be held in a separate capacity from any omnibus customer account for non-public customers of such futures commission merchant and from any account maintained with the debtor on its own behalf or on behalf of any non-public customer.

(x) A joint account maintained with the debtor shall be deemed to be held in a separate capacity from any account held in an individual capacity by the participants in such account, from any account held in an individual capacity by a commodity pool operator or commodity trading advisor for such account, and from any other joint account; *provided, however*, that if such account is not transferred in accordance with §§190.04(a) and 190.07, it shall be deemed to be held in the same capacity as any other joint account held by identical participants and a participant's percentage interest therein shall be deemed to be held in the same capacity as any account held in an individual capacity by such participant.

(xi) An account maintained with a debtor in the name of a plan that is subject to the terms of the Employee Retirement Income Security Act of 1974 and the regulations in 29 CFR chapter XXV, or similar state, Federal, or foreign laws or regulations applica-

ble to retirement or pension plans, shall be deemed to be held in a separate capacity from an account held in an individual capacity by the plan administrator, any employer, employee, participant, or beneficiary with respect to such plan.

(xii) Except as otherwise provided in this section, an account maintained with a debtor by an agent or nominee for a principal or a beneficial owner shall be deemed to be an account held in the individual capacity of such principal or beneficial owner.

(xiii) With respect to the cleared swaps account class, each individual cleared swaps customer account within each cleared swap omnibus customer account referred to in paragraph (b)(2)(viii) of this section shall be deemed to be held in a separate capacity from each other such individual cleared swaps customer account, subject to the provisions of paragraphs (b)(2)(i) through (xi) of this section.

(xiv) Accounts held by a customer in separate capacities shall be deemed to be accounts of different customers. The burden of proving that an account is held in a separate capacity shall be upon the customer.

(3) *Step 3-setoffs.* (i) The net equity of one customer account may not be offset against the net equity of any other customer account.

(ii) Any obligation to the debtor owed by a customer which is not required to be included in computing the equity of that customer under paragraph (b)(1) of this section (defined as x), must be deducted from any obligation to the customer owed by the debtor which is not required to be included in computing the equity of that customer (defined as y). If the former amount (x) exceeds the latter (y), the excess (x-y) must be deducted from the equity balance of the customer obtained after performing the preceding calculations required by paragraph (b) of this section, provided, that if the customer owns more than one class of accounts with a positive equity balance, the excess (again, x-y) must be allocated and offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity

balances of accounts of different classes held by such customer.

(iii) A negative equity balance obtained with respect to one customer account class must be set off against a positive equity balance in any other account class of such customer held in the same capacity, provided, that if a customer owns more than one class of accounts with a positive equity balance, such negative equity balance must be offset against each positive equity balance in the same proportion as that positive equity balance bears to the total of all positive equity balances in accounts of different classes held by such customer.

(iv) To the extent any indebtedness of the debtor to the customer which is not required to be included in computing the equity of such customer under paragraph (b)(1) of this section exceeds such indebtedness of the customer to the debtor, the customer claim therefor will constitute a general creditor claim rather than a customer property claim, and the net equity therefor shall be separately calculated.

(v) The rules pertaining to separate capacities and permitted setoffs contained in this section shall only be applied subsequent to the entry of an order for relief; prior to that date, the provisions of § 1.22 of this chapter and of sections 4d(a)(2) and 4d(f) of the Act (and, in each case, the regulations in part 1, 22, or 30 of this chapter that implement sections 4d(a)(2) and 4d(f)) shall govern what setoffs are permitted.

(4) *Step 4-correction for distributions.* The value on the date of transfer or distribution of any property transferred or distributed subsequent to the filing date and prior to the primary liquidation date with respect to each class of account held by a customer must be added to the equity obtained for that customer for accounts of that class after performing the steps contained in paragraphs (b)(1) through (3) of this section: *Provided, however,* that if all accounts for which there are customer claims of record and 100% of the equity pertaining thereto is transferred in accordance with § 190.07 and section 764(b) of the Bankruptcy Code, net equity shall be computed based solely upon those allowed customer claims, if

any, filed subsequent to the order for relief which are not claims of record on the filing date.

(5) *Step 5-correction for ongoing events.* Compute any adjustments to the steps in paragraphs (b)(1) through (4) of this section required to correct misestimates or errors including, without limitation, corrections for ongoing events such as the liquidation of unliquidated claims or specifically identifiable property at a value different from the estimated value previously used in computing net equity.

(c) *Calculation of funded balance.* *Funded balance* means a customer's pro rata share of the customer estate with respect to each account class available for distribution to customers of the same customer class.

(1) *Funded balance computation.* The funded balance of any customer claim shall be computed (separately by account class and customer class) by:

(i) Multiplying the ratio of the amount of the net equity claim of such customer (defined as x) less the amounts referred to in paragraph (c)(1)(ii) of this section of such customer for any account class (defined as y) divided by the sum of the net equity claims of all customers for accounts of that class (defined as p) less the amounts referred to in paragraph (c)(1)(ii) of this section of all customers for accounts of that class (defined as q) (thus, $((x-y)/(p-q))$ by the sum of:

(A) The value of letters of credit received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract relating to all customer accounts of the same class;

(B) The value of the money, securities, or other property segregated on behalf of all customer accounts of the same class less the amounts referred to in paragraph (c)(1)(ii) of this section;

(C) The value of any money, securities, or other property which must be allocated under § 190.09 to all customer accounts of the same class; and

(D) The amount of any add-back required under paragraph (b)(4) of this section; and

(ii) Then adding 100% of—

(A) Any margin payment made between the entry of the order for relief (or, in an involuntary case, the date on which the petition for bankruptcy is

filed) and the primary liquidation date; *provided, however*, that if margin is posted to substitute for a letter of credit, such margin does not increase the funded balance; and

(B) For cash delivery property, any cash transferred to the trustee on or after the filing date for the purpose of paying for delivery.

(2) *Corrections to funded balance.* The funded balance must be adjusted to correct for ongoing events including, without limitation:

- (i) Added claimants;
- (ii) Disallowed claims;
- (iii) Liquidation of unliquidated claims at a value other than their estimated value; and
- (iv) Recovery of property.

(d) *Valuation.* In computing net equity, commodity contracts and other property held by or for a commodity broker must be valued as provided in this paragraph (d).

(1) *Commodity contracts*—(i) *Open contracts.* Unless otherwise specified in this paragraph (d), the value of an open commodity contract shall be equal to the settlement price as calculated by the clearing organization pursuant to its rules; *provided, however*, that if an open commodity contract is transferred to another commodity broker, its value on the debtor's books and records shall be determined as of the end of the last settlement cycle on the day preceding such transfer.

(ii) *Liquidated contracts.* Except as specified in paragraphs (d)(1)(ii)(A) and (B) of this section, the value of a commodity contract liquidated on the open market shall equal the actual value realized on liquidation of the commodity contract.

(A) *Weighted average.* If identical commodity contracts are liquidated within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of commodity contracts, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such commodity contracts.

(B) *Bulk liquidation.* The value of a commodity contract liquidated as part of a bulk auction, taken into inventory

or under management by a clearing organization, or similarly liquidated outside of the open market shall be equal to the settlement price calculated by the clearing organization as of the end of the settlement cycle during which the commodity contract was liquidated.

(2) *Securities.* The value of a listed security shall be equal to the closing price for such security on the exchange upon which it is traded. The value of all securities not traded on an exchange shall be equal in the case of a long position, to the average of the bid prices for long positions, and in the case of a short position, to the average of the asking prices for the short positions. If liquidated, the value of such security shall be equal to the actual value realized on liquidation of the security; *provided, however*, that if identical securities are liquidated within a 24-hour period or business day (or such other period as the bankruptcy court may determine is appropriate) as part of a general liquidation of securities, but cannot be liquidated at the same price, the trustee may use the weighted average of the liquidation prices in computing the net equity of each customer for which the debtor held such securities. Securities which are not publicly traded shall be valued by the trustee pursuant to paragraph (d)(5) of this section.

(3) *Commodities held in inventory.* Commodities held in inventory, as collateral or otherwise, shall be valued at their fair market value. If such fair market value is not readily ascertainable based upon public sources of prices, the trustee shall value such commodities pursuant to paragraph (d)(5) of this section.

(4) *Letters of credit.* The value of any letter of credit received, acquired or held to margin, guarantee, secure, purchase, or sell a commodity contract shall be its face amount, less the amount, if any, drawn and outstanding, provided that, if the trustee makes a determination in good faith that a draw on a letter of credit is unlikely to be honored on either a temporary or a permanent basis, the trustee shall value the letter of credit pursuant to paragraph (d)(5) of this section.

(5) *All other property.* Subject to the other provisions of this paragraph (d), all other property shall be valued by the trustee using such professional assistance as the trustee deems necessary in its sole discretion under the circumstances; *provided, however*, that if such property is sold, its value for purposes of the calculations required by this part shall be equal to the actual value realized on the sale of such property; and, provided further, that the sale shall be made in compliance with all applicable statutes, rules, and orders of any court or governmental entity with jurisdiction there over.

§ 190.09 Allocation of property and allowance of claims.

The property of the debtor's estate must be allocated among account classes and between customer classes as provided in this section. (Property connected with certain cross-margining arrangements is subject to the provisions of framework 1 in appendix B to this part.) The property so allocated will constitute a separate estate of the customer class and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(a) *Scope of customer property.* (1) Customer property includes the following:

(i) All cash, securities, or other property or the proceeds of such cash, securities, or other property received, acquired, or held by or for the account of the debtor, from or for the account of a customer, including a non-public customer, which is:

(A) Property received, acquired, or held to margin, guarantee, secure, purchase or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property as that term is defined in paragraphs (1) through (3) in the definition of that term in §190.01;

(D) Cash delivery property, or other cash, securities, or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a customer;

(E) Profits or contractual rights accruing to a customer as the result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn by the trustee, or substitute customer property posted by the customer, pursuant to §190.04(d)(3);

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account; or

(H) Property hypothecated under §1.30 of this chapter to the extent that the value of such property exceeds the proceeds of any loan of margin made with respect thereto; and

(ii) All cash, securities, or other property which:

(A) Is segregated for customers on the filing date;

(B) Is a security owned by the debtor to the extent there are customer claims for securities of the same class and series of an issuer;

(C) Is specifically identifiable to a customer;

(D) Was property of a type described in paragraph (a)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(E) Represents recovery of any debit balance, margin deficit, or other claim of the debtor against a customer;

(F) Was unlawfully converted but is part of the debtor's estate;

(G) Constitutes current assets of the debtor (as of the date of the order for relief) within the meaning of §1.17(c)(2) of this chapter, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, in the greater of—

(1) The amount that the debtor is obligated to set aside as its targeted residual interest amount pursuant to §1.11 of this chapter and the debtor's residual interest policies adopted thereunder, with respect to each of the futures account class, the foreign futures account class, and the cleared swaps account class; or

(2) The debtor's obligations to cover debit balances or under-margined amounts as provided in §§1.20, 1.22, 22.2, and 30.7 of this chapter;

(H) Is other property of the debtor that any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers;

(I) Is property of the debtor's estate recovered by the Commission in any proceeding brought against the principals, agents, or employees of the debtor;

(J) Is proceeds from the investment of customer property by the trustee pending final distribution;

(K) Is a payment from an insurer to the trustee arising from or related to a claim related to the conversion or misuse of customer property; or

(L) Is cash, securities, or other property of the debtor's estate, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, but only to the extent that the property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (K) of this section is insufficient to satisfy in full all claims of public customers. Such property includes "customer property," as defined in section 16(4) of SIPA, 15 U.S.C. 78lll(4), that remains after allocation in accordance with section 8(c)(1)(A)–(D) of SIPA, 15 U.S.C. 78fff–2(c)(1)(A)–(D) and that is allocated to the debtor's general estate in accordance with section 8(c)(1) of SIPA, 15 U.S.C. 78fff–2(c)(1).

(2) Customer property will not include:

(i) Claims against the debtor for damages for any wrongdoing of the debtor, including claims for misrepresentation or fraud, or for any violation of the Act or of the regulations in this chapter;

(ii) Other claims for property which are not based upon property received, acquired, or held by or for the account of the debtor, from or for the account of the customer;

(iii) Forward contracts (unless such contracts are cleared by a clearing organization or, in the case of forward contracts treated as foreign futures, a foreign clearing organization);

(iv) Physical delivery property that is not held by the debtor, and is delivered or received by a customer in accordance with §190.06(a)(2) or §190.16(a) to fulfill the customer's delivery obligation under a commodity contract;

(v) Property deposited by a customer with a commodity broker after the entry of an order for relief which is not necessary to meet the margin require-

ments applicable to the accounts of such customer;

(vi) Property hypothecated pursuant to §1.30 of this chapter to the extent of the loan of margin with respect thereto;

(vii) Money, securities, or property held to margin, guarantee or secure security futures products, or accruing as a result of such products, if held in a securities account; and

(viii) Money, securities, or property held in a securities account to fulfill delivery, under a commodity contract from or for the account of a customer, as described in §190.06(b)(2).

(3) Nothing contained in this section, including, but not limited to, the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (a)(1)(i)(F) and (a)(1)(ii)(A) through (L) of this section.

(b) *Allocation of customer property between customer classes.* No customer property may be allocated to pay non-public customer claims until all public customer claims have been satisfied in full. Any property segregated on behalf of or attributable to non-public customers must be treated initially as part of the public customer estate and allocated in accordance with paragraph (c)(2) of this section.

(c) *Allocation of customer property among account classes—*(1) *Property identified to an account class—*(i) *Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class, or readily traceable on the filing date to customers of such account class, or recovered by the trustee on behalf of or for the benefit of an account class, must be allocated to the customer estate of the account class for which it is segregated, to which it is readily traceable, or for which it is recovered.

(ii) *Excess property.* If, after payment in full of all allowed customer claims in a particular account class, any property remains allocated to that account class, such excess shall be allocated in accordance with paragraph (c)(2) of this section.

(2) *All other property.* Money, securities, and property received from or for the account of customers which cannot be allocated in accordance with paragraph (c)(1)(i) of this section, must be allocated in the following order:

(i) To the estate of the account class for which, after the allocation required in paragraph (c)(1) of this section, the percentage of each public customer net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such class equals the percentage of each public customer's net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(ii) To the estate of the two account classes referred to in paragraph (c)(2)(i) of this section so that the percentage of the net equity claims which are funded for each class remains equal until the percentage of each public customer net equity claim which is funded equals the percentage of each public customer net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until the percentage of each public customer net equity claim which is funded is equal for all classes of accounts; and then,

(iii) Among account classes in the same proportion as the public customer net equity claims for each such account class bears to the total of public customer net equity claims of all account classes until the public customer claims of each account class are paid in full; and, thereafter,

(iv) To the non-public customer estate for each account class in the same order as is prescribed in paragraphs (c)(2)(i) through (iii) of this section for the allocation of the customer estate among account classes.

(d) *Distribution of customer property—*
(1) *Return or transfer of specifically identifiable property.* Specifically identifiable property not required to be liquidated under §190.04(d)(2) may be returned or transferred on behalf of the customer to which it is identified:

(i) If it is margining an open commodity contract, only if substitute customer property is first deposited with the trustee with a value equal to the greater of the full fair market value of

such property on the return date or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security; or

(ii) If it is not margining an open commodity contract, at the option of the customer, either pursuant to the terms of paragraph (d)(1)(i) of this section, or pursuant to the following terms: Such customer first deposits substitute customer property with the trustee with a value equal to the amount by which the greater of the value of the specifically identifiable property to be transferred or returned on the date of such transfer or return or the balance due on the return date on any loan by the debtor to the customer for which such property constitutes security, together with any other disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; *provided, however*, that adequate security to assure the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(2) *Transfers of specifically identifiable commodity contracts under section 766 of the Bankruptcy Code.* Any open commodity contract that is specifically identifiable property and which is not required to be liquidated under §190.04(d), and which is not otherwise liquidated, may be transferred on behalf of a public customer, *provided, however*, that such customer must first deposit substitute customer property with the trustee with a value equal to the amount by which the equity to be transferred to margin such contract together with any other transfers or returns of specifically identifiable property or disbursements made, or to be made, to such customer, plus a reasonable reserve in the trustee's sole discretion, exceeds the estimated aggregate of the funded balances for each class of account of such customer less the

value on the date of its transfer or return of any property transferred or returned prior to the primary liquidation date with respect to the customer's net equity claim for such account; and, provided further, that adequate security to assure the recovery of any overpayments by the trustee is provided to the debtor's estate by the customer.

(3) *Distribution in kind of specifically identifiable securities.* If any securities of a customer are specifically identifiable property as defined in paragraph (1)(i)(A) of the definition of that term in §190.01 of this chapter, but the customer has no open commodity contracts, the customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities (*i.e.*, securities of the same class and series of an issuer), with a fair market value (inclusive of transaction costs) which does not exceed that portion of the funded balance of such customer's allowed net equity claim that constitutes a claim for securities, if like-kind securities can be purchased in a fair and orderly manner.

(4) *Proof of customer claim.* No distribution shall be made pursuant to paragraphs (d)(1) and (3) of this section prior to receipt of a completed proof of customer claim as described in §190.03(e) or (f).

(5) *No differential distributions.* No further disbursements may be made to customers with respect to a particular account class for whom transfers have been made pursuant to §190.07 and paragraph (d)(2) of this section, until a percentage of each net equity claim equivalent to the percentage distributed to such customers is distributed to all public customers in such account class. Partial distributions, other than the transfers referred to in §190.07 and paragraph (d)(2) of this section, with respect to a particular account class made prior to the final net equity determination date must be made pursuant to a preliminary plan of distribution approved by the court, upon notice to the parties and to all customers, which plan requires adequate security to the debtor's estate to assure the recovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers in such account class.

§ 190.10 Current records during business as usual.

A person that is a futures commission merchant is required to maintain current records relating to its customers' accounts, including copies of all account agreements and related account documentation, and "know your customer" materials, pursuant to §§1.31, 1.35, 1.36, and 1.37 of this chapter, which may be provided to another futures commission merchant to facilitate the transfer of open commodity contracts or other customer property held by such person for or on behalf of its customers to the other futures commission merchant, in the event an order for relief is entered with respect to such person.

Subpart C—Clearing Organization as Debtor

§ 190.11 Scope and purpose of this subpart.

(a) This subpart applies to a proceeding commenced under subchapter IV of chapter 7 of the Bankruptcy Code in which the debtor is a clearing organization.

(b) If the debtor clearing organization is organized outside the United States, and is subject to a foreign proceeding, as defined in 11 U.S.C. 101(23), in the jurisdiction in which it is organized, then only the following provisions of this part shall apply:

(1) Subpart A.

(2) Section 190.12.

(3) Section 190.13, but only with respect to futures contracts and cleared swaps contracts cleared by FCM clearing members on behalf of their public customers and the property margining or securing such contracts.

(4) Sections 190.17 and 190.18, but only with respect to claims of FCM clearing members on behalf of their public customers, as well as to property that is or should have been segregated for the benefit of FCM clearing members' public customers, or that has been recovered for the benefit of FCM clearing members' public customers.

§ 190.12 Required reports and records.

(a) *Notices—(1) Means of providing—(i) To the Commission.* Unless instructed

otherwise by the Commission, all mandatory or discretionary notices to be given to the Commission under this subpart shall be directed by electronic mail to *bankruptcyfilings@cftc.gov*. For purposes of this subpart, notice to the Commission shall be deemed to be given only upon actual receipt.

(ii) *To members.* The trustee, after consultation with the Commission, and unless otherwise instructed by the Commission, will establish and follow procedures reasonably designed for giving adequate notice to members under this subpart and for receiving claims or other notices from members. Such procedures should include, absent good cause otherwise, the use of a prominent website as well as communication to members' electronic addresses that are available in the debtor's books and records.

(2) *Of commencement of a proceeding.* A debtor that files a petition in bankruptcy that is subject to this subpart shall, at or before the time of such filing, and a debtor against which such a petition is filed shall, as soon as possible, but in any event no later than three hours after the receipt of notice of such filing, notify the Commission of the filing date, the court in which the proceeding has been or will be filed, and, as soon as available, the docket number assigned to that proceeding by the court.

(b) *Reports and records to be provided to the trustee and the Commission within three hours.* (1) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the later of the commencement of such proceeding or the appointment of the trustee, the debtor shall provide to the trustee copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c) of this chapter, including copies of any reports required under § 39.19(c)(2), (3), and (4) of this chapter (including the most up-to-date version of any recovery and wind-down plans of the debtor maintained pursuant to § 39.39(b) of this chapter) that the debtor filed with the Commission during the preceding 12 months.

(2) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the commencement of such proceeding (or, with respect to the trustee, the appointment of the trustee), the debtor shall provide to the trustee and the Commission copies of the most up-to-date versions of the default management plan and default rules and procedures maintained by the debtor pursuant to § 39.16 and, as applicable, § 39.35 of this chapter.

(c) *Records to be provided to the trustee and the Commission by the next business day.* As soon as practicable following commencement of a proceeding that is subject to this subpart and in any event no later than the next business day, the debtor shall make available to the trustee and the Commission copies of the following records:

(1) All records maintained by the debtor described in § 39.20(a) of this chapter; and

(2) Any opinions of counsel or other legal memoranda provided to the debtor (whether by external or internal counsel) in the five years preceding the commencement of such proceeding relating to the enforceability of the rules and procedures of the debtor in the event of an insolvency proceeding involving the debtor.

§ 190.13 Prohibition on avoidance of transfers.

The following transfers are approved and may not be avoided under sections 544, 546, 547, 548, 549, or 724(a) of the Bankruptcy Code:

(a) *Pre-relief transfers.* Any transfer of open commodity contracts and the property margining or securing such contracts made to another clearing organization that was approved by the Commission, either before or after such transfer, and was made prior to entry of the order for relief; and

(b) *Post-relief transfers.* Any transfers of open commodity contracts and the property margining or securing such contracts made to another clearing organization on or before the seventh calendar day after the entry of the order for relief, that was made with the approval of the Commission, either before or after such transfer.

§ 190.14 Operation of the estate of the debtor subsequent to the filing date.

(a) *Proofs of claim.* The trustee may, in its discretion based upon the facts and circumstances of the case, instruct each customer to file a proof of claim containing such information as is deemed appropriate by the trustee, and seek a court order establishing a bar date for the filing of such proofs of claim.

(b) *Operation of the derivatives clearing organization.* Subsequent to the order for relief, the derivatives clearing organization shall cease making calls for variation settlement or initial margin.

(c) *Liquidation.* (1) The trustee shall liquidate all open commodity contracts that have not been terminated, liquidated, or transferred no later than seven calendar days after entry of the order for relief. Such liquidation of open commodity contracts shall be conducted in accordance with the rules and procedures of the debtor, to the extent applicable and practicable.

(2) In lieu of liquidating securities held by the debtor and making distributions in the form of cash, the trustee may, in its reasonable discretion, make distributions in the form of securities that are equivalent (*i.e.*, securities of the same class and series of an issuer) to the securities originally delivered to the debtor by a clearing member or such clearing member's customer.

(d) *Computation of funded balance.* The trustee shall use reasonable efforts to compute a funded balance for each customer account immediately prior to any distribution of property within the account, which shall be as accurate as reasonably practicable under the circumstances, including the reliability and availability of information.

§ 190.15 Recovery and wind-down plans; default rules and procedures.

(a) *Prohibition on avoidance of actions taken pursuant to recovery and wind-down plans.* Subject to the provisions of section 766 of the Bankruptcy Code and §§ 190.13 and 190.18, the trustee shall not avoid or prohibit any action taken by a debtor subject to this subpart that was reasonably within the scope of and was provided for in any recovery and wind-

down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter.

(b) *Implementation of debtor's default rules and procedures.* In administering a proceeding under this subpart, the trustee shall implement, in consultation with the Commission, the default rules and procedures maintained by the debtor under § 39.16 and, as applicable, § 39.35 of this chapter and any termination, close-out and liquidation provisions included in the rules of the debtor, subject to the reasonable discretion of the trustee and to the extent that implementation of such default rules and procedures is practicable.

(c) *Implementation of recovery and wind-down plans.* In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter, to the extent reasonable and practicable, and consistent with the protection of customers.

§ 190.16 Delivery.

(a) *General.* In the event that a commodity contract, cleared by the derivatives clearing organization, that settles upon expiration or exercise by making or taking delivery of physical delivery property, has moved into delivery position prior to the date and time of the order for relief, or moves into delivery position after that date and time, but before being terminated, liquidated, or transferred, then, in either such event, the trustee must use reasonable efforts to facilitate and cooperate with the completion of delivery on behalf of the clearing member or the clearing member's customer in a manner consistent with § 190.06(a) and the pro rata distribution principle addressed in § 190.00(c)(5).

(b) *Special provisions for delivery accounts.* (1) Consistent with the separation of the physical delivery property account class and the cash delivery account class set forth in § 190.06(b), the trustee shall treat—

(i) Physical delivery property held in delivery accounts as of the filing date,

along with the proceeds from any subsequent sale of such physical delivery property in accordance with §190.06(a)(3) to fulfill a clearing member's or its customer's delivery obligation or any other subsequent sale of such property, as part of the physical delivery account class; and

(ii) Cash delivery property in delivery accounts as of the filing date, along with any physical delivery property for which delivery is subsequently taken on behalf of a clearing member or its customer in accordance with §190.06(a)(3), as part of the separate cash delivery account class.

(2) If the debtor holds any cash or property in the form of cash equivalents in an account with a bank or other person under a name or in a manner that clearly indicates that the account holds property for the purpose of making payment for taking physical delivery, or receiving payment for making physical delivery, of a commodity under any commodity contracts, such property shall (subject to §190.19) be considered customer property in the cash delivery account class if held for making payment for taking delivery, or in the physical delivery account class, if held for the purpose of receiving such payment.

§ 190.17 Calculation of net equity.

(a) *Net equity—separate capacities and calculations.* (1) If a member of the clearing organization clears trades in commodity contracts through a commodity contract account carried by the debtor as a customer account for the benefit of the clearing member's public customers and separately through a house account, the clearing member shall be treated as having customer claims against the debtor in separate capacities with respect to the customer account and house account at the clearing organization, and by account class. A member shall be treated as part of the public customer class with respect to claims based on any commodity customer accounts carried as "customer accounts" by the clearing organization for the benefit of the member's public customers, and as part of the non-public customer class with respect to claims based on its house account.

(2) Net equity shall be calculated separately for each separate customer capacity in which the clearing member has a claim against the debtor, *i.e.*, separately by the member's customer account and house account and by account class.

(b) *Net equity—application of debtor's loss allocation rules and procedures.* (1)(i) The calculation of a clearing member's net equity claim shall include the full application of the debtor's loss allocation rules and procedures, including the default rules and procedures referred to in §39.16 and, if applicable, §39.35 of this chapter.

(ii) The calculation in paragraph (b)(1)(i) of this section will include, with respect to the clearing member's house account, any assessments or similar loss allocation arrangements provided for under those rules and procedures that were not called for before the filing date, or, if called for, have not been paid. Such loss allocation arrangements shall be applied to the extent necessary to address losses arising from default by clearing members.

(2) Appropriate adjustments shall be made to the net equity claims of the clearing members that are so entitled under the following circumstances: Where the debtor's loss allocation rules and procedures would entitle clearing members to additional payments of cash or other property due to—

(i) Portions of mutualized default resources that are prefunded, or assessed and collected, but in either event not used; or

(ii) The debtor's recoveries on claims against others (including, but not limited to, recoveries on claims against clearing members who have defaulted on their obligations to the debtor).

(c) *Net equity—general.* Subject to paragraph (b) of this section, net equity shall be calculated in the manner provided in §190.08, to the extent applicable.

(d) *Calculation of funded balance.* *Funded balance* means a clearing member's pro rata share of customer property other than member property (for accounts for a clearing member's customer accounts) or member property (for a clearing member's house accounts) with respect to each account

class available for distribution to customers of the same customer class, calculated in the manner provided in § 190.08(c) to the extent applicable.

§ 190.18 Treatment of property.

(a) *General.* The property of the debtor's estate must be allocated between member property and customer property other than member property as provided in this section to satisfy claims of clearing members, as customers of the debtor. The property so allocated will constitute a separate estate of the customer class (*i.e.*, member property, and customer property other than member property) and the account class to which it is allocated, and will be designated by reference to such customer class and account class.

(b) *Scope of customer property.* Customer property is the property available for distribution within the relevant account class in respect of claims by clearing members, as customers of the clearing organization, based on customer accounts carried by the debtor for the benefit of such members' public customers or, considered separately, such members' house accounts.

(1) Customer property includes the following:

(i) All cash, securities, or other property, or the proceeds of such cash, securities, or other property, that is received, acquired, or held by or for the account of the debtor, from or for any commodity contract account of a clearing member carried by the debtor, which is:

(A) Property received, acquired, or held, in order to margin, guarantee, secure, purchase, or sell a commodity contract;

(B) Open commodity contracts;

(C) Physical delivery property as that term is defined in paragraphs (1) through (3) of the definition of that term in § 190.01;

(D) Cash, securities or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the commodity customer account of a clearing member or a customer of a clearing member;

(E) Profits or contractual rights accruing as a result of a commodity contract;

(F) Letters of credit, including any proceeds of a letter of credit drawn upon by the trustee, or substitute customer property posted by a clearing member or a customer of a clearing member, pursuant to § 190.04(d)(3); or

(G) Securities held in a portfolio margining account carried as a futures account or a cleared swaps customer account;

(ii) All cash, securities, or other property which:

(A) Is segregated by the debtor on the filing date for the benefit of clearing members' house accounts or clearing members' public customer accounts;

(B) Was of a type described in paragraph (b)(1)(i)(A) of this section that is subsequently recovered by the avoidance powers of the trustee or is otherwise recovered by the trustee on any other claim or basis;

(C) Represents a recovery of any debit balance, margin deficit or other claim of the debtor against any commodity contract account carried for the benefit of a member's house accounts or a member's public customer accounts;

(D) Was unlawfully converted but is part of the debtor's estate; or

(E) Was of a type described in paragraphs (a)(1)(ii)(H) through (K) of § 190.09 (as if the term debtor used therein refers to a clearing organization as debtor);

(iii) Any guaranty fund deposit, assessment, or similar payment or deposit made by a clearing member, or recovered by the trustee, to the extent any remains following administration of the debtor's default rules and procedures, and any other property of a member available under the debtor's rules and procedures to satisfy claims made by or on behalf of public customers of a member; and

(iv) Amounts of its own funds that the debtor had committed as part of its loss allocation rules, to the extent that such amounts have not already been applied under such rules.

(2) Customer property will not include property of the type described in § 190.09(a)(2), as if the term debtor used

therein refers to a clearing organization and to the extent relevant to a clearing organization.

(c) *Allocation of customer property between customer classes.* (1) Where the funded balance for members' house accounts is greater than one hundred percent with respect to any account class:

(i) Any excess should be allocated to customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any account class; and

(ii) Any remaining excess after the application of paragraph (c)(1)(i) of this section should be allocated to member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' house accounts in any other account class.

(2) Where the funded balance for members' public customers in any account class is greater than one hundred percent:

(i) Any excess should be allocated to customer property other than member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' public customers in any other account class; and

(ii) Any remaining excess after the application of paragraph (c)(2)(i) of this section should be allocated to member property to the extent that the funded balance is less than one hundred percent of net equity claims for members' house accounts in any account class.

(d) *Allocation of customer property among account classes—(1) Segregated property.* Subject to paragraph (b) of this section, property held by or for the account of a customer, which is segregated on behalf of a specific account class within a customer class, or readily traceable on the filing date to customers of such account class within a customer class, or recovered by the trustee on behalf of or for the benefit of an account class within a customer class, must be allocated to the customer estate of the account class for which it is segregated, to which it is readily traceable, or for which it is recovered.

(2) *All other property.* Customer property which cannot be allocated in accordance with paragraph (d)(1) of this section, shall be allocated within customer classes, but between account classes, in the following order:

(i) To the estate of the account class for which the percentage of each members' net equity claim which is funded is the lowest, until the funded percentage of net equity claims of such account class equals the percentage of each members' net equity claim which is funded for the account class with the next lowest percentage of the funded claims; and then

(ii) To the estate of the two account classes so that the percentage of the net equity claims which are funded for each such account class remains equal until the percentage of each net equity claim which is funded equals the percentage of each net equity claim which is funded for the account class with the next lowest percentage of funded claims, and so forth, until all account classes within the customer class are fully funded.

(e) *Accounts without separation by account class.* Where the debtor has, prior to the order for relief, kept initial margin for house accounts in accounts without separation by account class, then member property will be considered to be in a single account class.

(f) *Assertion of claims by trustee.* Nothing in this section, including, but not limited to, the satisfaction of customer claims by operation of this section, shall prevent a trustee from asserting claims against any person to recover the shortfall of property enumerated in paragraphs (b)(1)(i)(E) and (b)(1)(ii) and (iii) of this section.

§ 190.19 Support of daily settlement.

(a) Notwithstanding any other provision of this part, funds received (whether from clearing members' house or customer accounts) by a debtor clearing organization as part of the daily settlement required pursuant to § 39.14 of this chapter shall, upon and after an order for relief, be included as customer property that is reserved for and traceable to, and promptly shall be distributed to, members entitled to payments of such funds with respect to

such members' house and customer accounts as part of that same daily settlement. Such funds when received, other than deposits of initial margin described in §39.14(a)(1)(iii) of this chapter, shall be considered member property and, separately, customer property other than member property, in proportion to the ratio of total gains in member accounts with net gains, and total gains in clearing members' customer accounts with net gains, respectively. Deposits of initial margin described in §39.14(a)(1)(iii) of this chapter shall be considered member property and, separately, customer property other than member property, to the extent deposited on behalf of, respectively, clearing members' house accounts and customer accounts.

(b) To the extent there is a shortfall in funds received pursuant to paragraph (a) of this section:

(1) Such funds shall be supplemented with the property described in paragraphs (b)(1)(i) through (iv) of this section, as applicable, to the extent necessary to meet the shortfall, in accordance with the derivatives clearing organization's default rules and procedures adopted pursuant to §39.16 and, as applicable, §39.35 of this chapter, and (with respect to paragraph (b)(1)(ii) of this section) any recovery and wind-down plans maintained pursuant to §39.39 of this chapter and submitted pursuant to §39.19 of this chapter. Such funds shall be included as member property and customer property other than member property in the proportion described in paragraph (a) of this section, and shall be distributed

promptly to members' house accounts and members' customer accounts which accounts are entitled to payment of such funds as part of that daily settlement.

(i) Initial margin held for the account of a member, including initial margin segregated for the customers of such member, that has defaulted on payments required pursuant to a daily settlement, but only to the extent that such margin is permitted to be used pursuant to parts 1, 22, and 30 of this chapter.

(ii) Assets of the debtor, to the extent dedicated to such use as part of the debtor's default rules and procedures, and any recovery and wind-down plans, described in this paragraph (b)(1).

(iii) Prefunded guarantee or default funds maintained pursuant to the debtor's default rules and procedures.

(iv) Payments made by members pursuant to assessment powers maintained pursuant to the debtor's default rules and procedures.

(2) If the funds that are included as customer property pursuant to paragraph (a) of this section, supplemented as described in paragraph (b)(1) of this section, are insufficient to pay in full members entitled to payment of such funds as part of daily settlement, then such funds shall be distributed pro rata to such members' house accounts and customer accounts in proportion to the ratio of total gains in member accounts with net gains, and total gains in customer accounts with net gains, respectively.

APPENDIX A TO PART 190—CUSTOMER PROOF OF CLAIM FORM

Appendix A to Part 190—Customer Proof of Claim Form

[CASE CAPTION]

CLAIM FORM FOR COMMODITY BROKER CUSTOMERS OF [DEBTOR]

Debtor: [INSERT]	
Customer Name:	
Account Number(s):	COURT USE ONLY
Daytime Telephone number:	<input type="checkbox"/> Check this box if this claim amends a previously filed claim.
Email:	Court Claim Number: _____ (If known)
	Filed on: _____
Name and address where payment should be sent (if different from above):	<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
Telephone number:	
Email:	

THIS CLAIM FORM SHOULD BE USED ONLY IF YOU ARE A CUSTOMER HOLDING A CLAIM BASED ON A COMMODITY CONTRACT ACCOUNT (A FUTURES, FOREIGN FUTURES, CLEARED SWAPS OR DELIVERY ACCOUNT) AT THE DEBTOR. A DIFFERENT CLAIM FORM MUST BE USED TO ASSERT OTHER TYPES OF CLAIMS AGAINST THE DEBTOR.

THE DEADLINE FOR FILING ALL CUSTOMER CLAIMS BASED ON COMMODITY CONTRACT ACCOUNTS IS [BAR DATE]. NO CUSTOMER CLAIM WILL BE ALLOWED IF IT IS RECEIVED AFTER THIS DATE. CLAIMS MUST BE RECEIVED BY 11:59 P.M. ([TIME ZONE]) ON _____ TO BE CONSIDERED TIMELY.

[Include case-specific instructions for how to file a claim]

If you require additional space to answer any question, please attach separate pieces of paper and label the answers to the corresponding questions.

I. CLAIM AMOUNT

For each type of commodity contract account that is applicable, state the amount of your claim against the Debtor.

(1) Futures account claim: \$ _____ [§ 190.03(e)(1)]³³¹

(2) Foreign futures account claim: \$ _____ [§ 190.03(e)(1)]

(3) Cleared swaps account claim: \$ _____ [§ 190.03(e)(1)]

(4) Delivery account claim: \$ _____ [§ 190.03(e)(1)]

Of the amount in (4), please note how much is in the form of cash or cash equivalents (\$ _____) and how much is the value of commodities that have been or were/are to be delivered (\$ _____)

(5) Total claim: \$ _____

(6) Date on which your claim is valued (*see instructions*): _____

II. ACCOUNT INFORMATION

For each commodity contract account with the Debtor, please provide the following information. To the extent you have multiple commodity contract accounts with the Debtor, please provide the following information for each account separately in an attachment.

(1) Account number: _____ [§ 190.03(e)(3)(i)]

(2) Name in which the account is held: _____ [§ 190.03(e)(3)(ii)]

(3) Please specify all capacities in which you hold the account (check all that are applicable) [§ 190.03(e)(3)(iv)]:

- ☐ a. Individual capacity
- ☐ b. Guardian, custodian, or conservator for the benefit of a ward or a minor under the Uniform Gift to Minors Act
- ☐ c. Executor or administrator of an estate
- ☐ d. Trustee for a trust beneficiary
- ☐ e. Corporation, partnership, or unincorporated association
- ☐ f. Omnibus customer account of a futures commission merchant
- ☐ g. Part owner of a joint account
- ☐ h. Individual retirement account

³³¹ Bracketed references are to the corresponding provision in § 190.03(e) where the relevant information item is listed.

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- ☐ i. Agent or nominee for a principal or beneficial owner (and not described in Items (a)-(h))
- ☐ j. In any other capacity not described above in Items (a)-(i) (please specify the capacity): _____

If you selected more than one box, please attach an explanation.

(4) Please specify whether the account is a joint account [§ 190.03(e)(3)(v)]:

Check one: ☐ YES ☐ NO

If you selected "YES," please specify your percentage interest in the account, and whether all participants in the joint account are claiming jointly. In addition, please see the instructions for additional information required for joint accounts.

- a. My percentage interest in the joint account is: _____%
- b. Participants in the joint account are claiming:

Check one: ☐ SEPARATELY ☐ JOINTLY

(5) Please specify whether the account is a discretionary account (*i.e.*, does another person have trading authority over the account) [§ 190.03(e)(3)(vi)]:

Check one: ☐ YES ☐ NO

If you selected "YES," please see the instructions for additional information required for discretionary accounts.

(6) Please specify whether the account is an individual retirement account for which there is a custodian [§ 190.03(e)(3)(vii)]:

Check one: ☐ YES ☐ NO

1. If you selected "YES," please see the instructions for additional information required for individual retirement accounts for which there is a custodian.

(7) Please specify whether the account is a cross-margining account for futures and securities [§ 190.03(e)(3)(viii)]:

Check one: ☐ YES ☐ NO

If you selected "YES," please see the instructions for additional information required for cross-margining accounts for futures and securities.

III. **ACCOUNT STATEMENT: OPEN POSITIONS, UNLIQUIDATED SECURITIES
AND OTHER UNLIQUIDATED PROPERTY**

(1) Account balance per most recent account statement: \$ _____ [§ 190.03(e)(3)(iii)]

a. Date of the most recent account statement: _____

PLEASE ATTACH A COPY OF THIS STATEMENT (NOT THE ORIGINAL)

b. Do you agree with the account balance(s) on your most recent account statement(s), as set forth above?

Check one: ☐ YES ☐ NO

If you selected "NO," please explain in an attachment the reasons why you disagree with the account balance reflected on your most recent statement.

c. Has there been activity in the account since the date of the last account statement up to and including the filing date that has affected the balance of the account ("subsequent activity")?

Check one: ☐ YES ☐ NO

If you selected "YES," please provide full information regarding any such subsequent activity in an attachment.

(2) On the date on which your claim is valued, did you have any open positions, unliquidated securities and/or other unliquidated property in or associated with any of your commodity contract accounts? [§ 190.03(e)(7)]

2. **Check one:** ☐ YES ☐ NO

If you selected "YES," please state below the value of your open positions, unliquidated securities and/or other unliquidated property. In addition, please see the instructions for additional information required regarding open positions, unliquidated securities and other unliquidated property.

Value of all open positions, unliquidated securities and/or other unliquidated property:
\$ _____

(3) To the extent you are claiming unliquidated securities or other unliquidated property held in your account, do you wish to receive payment in kind, if possible? [§ 190.03(e)(9)]

Check one: ☐ YES ☐ NO

If you selected "YES," please see the instructions for additional required information.

IV. CONNECTIONS WITH THE DEBTOR [§ 190.03(e)(2)]

(1) Is the customer making this claim one of the following persons (check all that are applicable):

- ☐ a. Officer, director, general partner or owner of ten percent or more of the capital stock of the Debtor.
- ☐ b. An employee, limited partner or special partner of the Debtor whose duties include (1) the management of the business of the Debtor or any part thereof; (2) the handling of the trades or customer funds; (3) the keeping of records pertaining to the trades or funds of customers; or (4) the signing or cosigning of checks or drafts on behalf of Debtor.
- ☐ c. A spouse or minor dependent living in the same household as any person listed in this section.
- ☐ d. A business affiliate that directly or indirectly controls the Debtor, or is directly or indirectly controlled by or is under common control with the Debtor.

(2) Is the customer making the claim on behalf of any account that is owned 10% or more by the Debtor or by any of the persons, alone or jointly, identified in IV.(1)?

Check one: ☐ YES ☐ NO

If you selected "YES," please identify such person(s) and the category identified in IV.(1) under which they fit.

V. SECURITY FUTURES PRODUCTS [§ 190.03(e)(8)]³³²

Is any portion of your claim based on security futures products (i.e. futures whose underlying instrument is either a single security or a narrow-based security index) held in a securities account with the Debtor?

Check one: ☐ YES ☐ NO

If you selected "YES," you will need to file a separate claim in accordance with the procedures established for claims based on securities accounts at the Debtor.

³³² This section is for use only in cases where the debtor is jointly registered as a futures commission merchant and securities broker-dealer.

VI. OTHER ACCOUNTS WITH DEBTOR [§ 190.03(e)(4)]

Do you have any accounts with the Debtor that are not commodity contract accounts listed in response to Section III above?

Check one: ☐ YES ☐ NO

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

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

(Attach additional page(s) if necessary)

VII. OTHER CLAIMS AGAINST DEBTOR [§ 190.03(e)(5)]

Do you have any other claims against the Debtor not already taken into account in the claim and account information provided in response to Sections I, II, III and VI above?

Check one: ☐ YES ☐ NO

If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.

VIII. AMOUNTS OWED TO DEBTOR [§ 190.03(e)(6)]

Do you owe any amounts to the Debtor not already taken into account in the claim and account balance information provided in response to the questions in sections I and II above?

Check one: YES ☐ NO ☐

If you selected "YES," please provide a detailed description in an attachment of any such claim or claims, and attach any supporting documentation you have.

IX. VERIFICATION

CHECK THE APPROPRIATE BOX:

☐ I am the customer ☐ I am the customer's authorized agent.

☐ I am a guarantor, surety, indorser
or other (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above):

Telephone number: _____

Email: _____

Signature (Date)

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR CUSTOMER PROOF OF CLAIM FORM	
<p>Customer's Name and Address: Fill in the name of the person or entity asserting the claim, and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The customer has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).</p>	<p>Date on Which Claim is Valued: Your claim should be valued as of [the last date on which any contracts or property not liquidated to cash balances remained in your account. Do not include the value of any contracts, funds or other property transferred to another commodity broker] [^, the date established by the Court as the date on which customer accounts should be valued].</p>
<ul style="list-style-type: none"> • Types of Customer Accounts: • A “futures account” is an account opened for the purpose of trading futures or options on futures on a U.S. futures exchange. Your account statement for a “futures account” would typically include the term “SEG” in the title or description of the account. • A “foreign futures account” is an account opened for the purpose of trading futures or options on futures on an exchange located outside the U.S. Your account statement for a “foreign futures account” would typically include the term “30.7” in the title or description of the account. • A “cleared swaps account” is an account opened for the purpose of holding swaps traded bilaterally or in off-exchange markets that are submitted to a CFTC-registered derivatives clearing organization for settlement and clearing. A “cleared swaps account” also is an account opened for the purpose of trading swaps or options on swaps on a designated contract market or swap execution facility and cleared by a CFTC-registered derivatives clearing organization. Your account statement for a “cleared swaps account” would typically include the term “swap” in the title or description of the account. • A “delivery account” is an account denominated as such and through which deliveries of commodities, whether tangible or intangible, occur or have occurred under expiring futures contracts. A delivery account also may hold cash balances, title documents for commodities such as metals warehouse receipts, or other commodities, whether tangible or intangible, that are deliverable under an exchange's futures contract. • Your account statement may include multiple types of customer accounts in a single account statement. 	<p>Estimated Claim Amount: If you cannot compute the amount of your claim, you must file an estimated claim. In that case, please be sure to indicate that your claim is an estimated claim.</p> <p>Joint Accounts: If any commodity contract account for which you are making a claim is a joint account, please include an attachment listing the account number and the name, address and contact information for each joint account holder other than yourself.</p> <p>If you are making a claim with respect to multiple joint accounts, and those joint accounts are not owned by the same holders in the same legal capacities and in identical ownership percentages, please complete a separate claim form for each joint account.</p> <p>Discretionary Accounts: If any commodity contract account for which you are making a claim is a discretionary account, please include an attachment listing the account number and the name, address, and contact information for all persons with trading authority over any of those accounts. If different persons have trading authority over different accounts, please provide this information for each such account, listing applicable account numbers.</p> <p>Individual Retirement Accounts for which there is a Custodian: If any commodity contract account for which you are making a claim is an individual retirement account for which there is a custodian, please include an attachment listing the account number and the name, address, and contact information for both the custodian and the account owner.</p> <p>Cross-Margining Accounts for Futures and Securities: If any commodity contract account for which you are making a claim is a cross-margining account for futures and securities, please include an attachment listing the account number and whether the securities positions are held in an account with the debtor or in an account with an affiliate of the debtor. If such positions are held in an account with an affiliate of the debtor, please identify and include contact information for such affiliate.</p>

<p>Other types of derivatives trading accounts that you may have with the debtor, such as accounts holding off-exchange retail forex positions subject to part 5 of the regulations of the CFTC and funds to margin such positions, are not customer accounts entitled to special protection under the Bankruptcy Code.</p> <p>Claim in foreign currencies: If some or all of your claim is based on a currency other than U.S. dollars, please file you claim in U.S. dollars based on the exchange rate in effect as of the petition date ([INSERT]), and identify the exchange rate used in calculating your claim in a separate attachment.</p>	
<p>Open positions, Unliquidated Securities and Other Unliquidated Property: To the extent you have any open positions, unliquidated securities and/or other unliquidated property in a commodity contract account, please include an attachment (i) describing each such open position, unliquidated security and/or other item of unliquidated property (e.g., for positions, by contract, delivery date, long/short, quantity, and strike price for options; for securities, by CUSIP and quantity); (ii) identifying whether such open position, unliquidated security and/or other unliquidated property is specifically identifiable property; and (iii) identifying whether you would prefer, if practicable, payment in kind for each unliquidated security or other item of unliquidated property or to have it liquidated.</p> <p>If the position, unliquidated security or other item of unliquidated property is already reflected in the account statement that you attached in response to Section III of this form, and you agree with the quantity and any value set forth therein, please say so. Otherwise, please (i) state the quantity and value you claim with respect to such open position, unliquidated security and/or other unliquidated property, and explain the basis for that quantity and value; and (ii) attach any documentary evidence supporting such value.</p>	<ul style="list-style-type: none"> • Documentation: • Please attach a copy (not the original) of the most recent account statement for each account on which this claim is based. • Please enclose copies (not originals) of any documentation or correspondence you believe will be of assistance in processing your claim, including, but not limited to, customer confirmations, account statements, and statements of purchase or sale. <p>If, at any time, you complained in writing about the handling of your account to any person or entity or regulatory authority, and the complaint relates to the claim that you are asserting in this claim form, please provide copies of the complaint and all related correspondence, as well as any replies that you received.</p>

<p>Verification: The individual completing this proof of claim must sign and date it. If the claim is filed electronically, the Bankruptcy Code authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration.</p> <ul style="list-style-type: none"> • Print the name and title, if any, of the customer or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. Criminal penalties apply for making a false statement on a proof of claim. 	<p>Credits: An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the customer gave the Debtor credit for any obligations of the customer to the Debtor.</p>
ADDITIONAL INFORMATION	
<p>Acknowledgment of Receipt of Claim</p> <p>[Instructions for acknowledgment of filing]</p>	<p>Offers to Purchase a Claim Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact you and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the Debtor. These entities do not represent the Bankruptcy Court or the Debtor. A customer has no obligation to sell its claim. However, if a customer decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 <i>et seq.</i>), and any applicable orders of the Bankruptcy Court.</p>

APPENDIX B TO PART 190—SPECIAL BANKRUPTCY DISTRIBUTIONS

FRAMEWORK 1—SPECIAL DISTRIBUTION OF CUSTOMER FUNDS WHEN THE CROSS-MARGINING ACCOUNT IS A FUTURES ACCOUNT

(a) This framework 1 applies when a debtor futures commission merchant has participated in a cross-margining (“XM”) program for futures and securities under which the cross-margined positions of its futures customers (as defined in §1.3 of this chapter) and the property received to margin, secure or guarantee such positions are held in one or more accounts pursuant to a Commission order that requires such positions and property to be segregated, pursuant to section 4d(a) of the Act, from the positions and property of:

- (1) The futures commission merchant;
- (2) If applicable, any affiliate carrying the securities positions as a participant in the XM program (“Affiliate”); and

(3) Other futures customers of the futures commission merchant (such segregated accounts, the “XM accounts”).

(b) The futures commission merchant may, and any Affiliate that holds the securities positions in an XM account that it directly carries will, be registered as a broker-dealer under the Exchange Act. The Commission order approving the XM program may limit participating customers to market professionals and will require a participating customer to sign an agreement, in a form approved by the Commission, that refers to this distributional rule.

(c) A futures commission merchant is deemed to receive securities held in an XM account, including securities and other property held by an Affiliate in an XM account, as “futures customer funds” (as defined in §1.3 of this chapter) that margin, guarantee or secure commodity contracts in the XM account (or paired XM accounts at the futures commission merchant and an Affiliate).

Under the agreement signed by the customer, in the event that the futures commission merchant (or Affiliate) is the subject of a SIPA proceeding, the customer agrees that securities in an XM account are excluded from the securities estate for purposes of SIPA, and that its claim for return of the securities will not be treated as a customer claim under SIPA. These restrictions apply to the customer only, and should not be read to limit any action that the trustee may take to seek recovery of property in an XM account carried by an Affiliate as part of the customer estate of the futures commission merchant.

(d) XM accounts, and other futures accounts that are subject to segregation under section 4d(a) of the Act (pursuant to the Commission's regulations in part 1 of this chapter) ("non-XM accounts"), are treated as two subclasses of futures account with two separate pools of segregated futures customer property, an XM pool and a non-XM pool, each of which constitutes a segregated pool under section 4d(a) of the Act. If the futures commission merchant has participated in multiple XM programs, the XM accounts in the different programs are combined and treated as part of the same XM subclass of futures accounts. A futures customer could hold both non-XM and XM accounts.

(e) Customer claims under this part arising out of the XM subclass of accounts are subordinated to customer claims arising out of the non-XM subclass of accounts in certain circumstances in which the futures commission merchant does not meet its segregation requirements. The segregation requirement is the amount of futures customer funds that the futures commission merchant is required by the Act and Commission regulations in part 1 of this chapter or Commission orders to hold on deposit in segregated accounts on behalf of its futures customers (exclusive of

its targeted residual amount obligations pursuant to §1.3 of this chapter).

(f)(1) If there is a shortfall in the non-XM pool and no shortfall in the XM pool, all customer net equity claims, whether or not they arise out of the XM subclass of accounts, will be combined and paid pro rata out of the combined XM and non-XM pools of futures customer property.

(2) If there is a shortfall in the XM pool and no shortfall in the non-XM pool, customer net equity claims arising from the XM subclass of accounts must be satisfied first from the XM pool, and customer net equity claims arising from the non-XM subclass of accounts must be satisfied first from the non-XM pool.

(3) If there is a shortfall in both the non-XM and XM pools:

(i) If the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool is greater than or equal to the XM shortfall as a percentage of the segregation requirement for the XM pool, all customer net equity claims will be paid pro rata out of the combined XM and non-XM pools of futures customer property; and

(ii) If the XM shortfall as a percentage of the segregation requirement for the XM pool is greater than the non-XM shortfall as a percentage of the segregation requirement for the non-XM pool, non-XM customer net equity claims will be paid pro rata out of the available non-XM pool, and XM customer net equity claims will be paid pro rata out of the available XM pool.

(4) In this way, non-XM customers will never be adversely affected by an XM shortfall.

(g) The following examples illustrate the operation of this framework 1. The examples assume that the FCM has two futures customers, one with exclusively XM accounts and one with exclusively non-XM accounts.

1. Sufficient Funds to Meet Non-XM and XM Customer Claims:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	150	300
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	0	
Shortfall (percent)	0	0	
Distribution	150	150	300

There are adequate funds available and both the non-XM and the XM customer claims will be paid in full.

2. Shortfall in Non-XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	150	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	0	
Shortfall (percent)	$50/150=33.3$	0	
<u>Pro rata</u> (percent)	$150/300=50$	$150/300=50$	
<u>Pro rata</u> (dollars)	125	125	
Distribution	125	125	250

Due to the non-XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Each customer will receive his pro rata share of the funds available, or 50% of the \$250 available, or \$125.

3. Shortfall in XM Only:

	Non-XM	XM	Total
Funds in 4d(a) segregation	150	100	250
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	0	50	
Shortfall (percent)	0	$50/150=33.3$	
<u>Pro rata</u> (percent)	$150/300=50$	$150/300=50$	
<u>Pro rata</u> (dollars)	125	125	
Distribution	150	100	250

Due to the XM account, there are insufficient funds available to meet both the non-XM and the XM customer claims in full. Accordingly, the XM funds and non-XM funds are treated as separate pools, and the non-XM customer will be paid in full, receiving \$150 while the XM customer will receive the remaining \$100.

4. Shortfall in Both, With XM Shortfall Exceeding Non-XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	125	100	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	25	50	
Shortfall (percent)	$25/150=16.7$	$50/150=33.3$	
<u>Pro rata</u> (percent)	$150/300=50$	$150/300=50$	
<u>Pro rata</u> (dollars)	112.50	112.50	
Distribution	125	100	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the XM shortfall exceeds the non-XM shortfall. The non-XM

customer will receive the \$125 available with respect to non-XM claims while the XM customer will receive the \$100 available with respect to XM claims.

5. Shortfall in Both, With Non-XM Shortfall Exceeding XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	125	225
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	25	
Shortfall (percent)	50/150=33.3	25/150=16.7	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	112.50	112.50	
Distribution	112.50	112.50	225

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall exceeds the XM shortfall. Each customer will receive 50% of the \$225 available, or \$112.50.

6. Shortfall in Both, Non-XM Shortfall = XM Shortfall:

	Non-XM	XM	Total
Funds in 4d(a) segregation	100	100	200
4d(a) Segregation requirement	150	150	300
Shortfall (dollars)	50	50	
Shortfall (percent)	50/150=33.3	50/150=33.3	
Pro rata (percent)	150/300=50	150/300=50	
Pro rata (dollars)	100	100	
Distribution	100	100	200

There are insufficient funds available to meet both the non-XM and the XM customer claims in full, and the non-XM shortfall equals the XM shortfall. Each customer will receive 50% of the \$200 available, or \$100.

These examples illustrate the principle that pro rata distribution across both accounts is the preferable approach except when a shortfall in the XM account could harm non-XM customers. Thus, pro rata distribution occurs in Examples 1, 2, 5 and 6. Separate treatment of the XM and non-XM accounts occurs in Examples 3 and 4.

FRAMEWORK 2—SPECIAL ALLOCATION OF SHORTFALL TO CUSTOMER CLAIMS WHEN CUSTOMER FUNDS FOR FUTURES CONTRACTS AND CLEARED SWAPS CUSTOMER COLLATERAL ARE HELD IN A DEPOSITORY OUTSIDE OF THE UNITED STATES OR IN A FOREIGN CURRENCY

The Commission has established the following allocation convention with respect to futures customer funds (as §1.3 of this chapter defines such term) and Cleared Swaps Customer Collateral (as §22.1 of this chapter defines such term) (both of which are customer funds (as §1.3 of this chapter defines such term) that are segregated pursuant to the Act and Commission rules thereunder), which applies in certain circumstances when futures customer funds or Cleared Swaps Customer Collateral are held by a futures

commission merchant in a depository outside the United States (“U.S.”) or in a foreign currency. If a futures commission merchant enters into bankruptcy and maintains futures customer funds or Cleared Swaps Customer Collateral in a depository outside the U.S. or in a depository located in the U.S. in a currency other than U.S. dollars, the trustee shall use the following allocation procedures to calculate the claim of each public customer in the futures account class or each public customer in the cleared swaps account class, as applicable, when a sovereign action of a foreign government or court has occurred that contributes to shortfalls in the amounts of futures customer funds or Cleared Swaps Customer Collateral. In the event a sovereign action creates or

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contributes to a shortfall in customer property, applying the allocation convention will result in a reallocation of distributions of futures customer funds or Cleared Swaps Collateral to take into account the impact of the sovereign action. For purposes of this bankruptcy convention, sovereign action of a foreign government or court would include, but not be limited to, the application or en-

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forcement of statutes, rules, regulations, interpretations, advisories, decisions, or orders, formal or informal, by a Federal, state, or provincial executive, legislature, judiciary, or government agency. The trustee should perform the allocation procedures separately with respect to each public customer in the futures account class or cleared swaps account class.

I. Reduction In Distributions For General Shortfall**A. *Determination of losses not attributable to sovereign action***

1. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars at the exchange rate in effect on the Final Net Equity Determination Date, as defined in §190.01(s) (the “Exchange Rate”).
2. Determine the amount of assets available for distribution to futures customers or Cleared Swaps Customers. In making this calculation, include customer funds for futures contracts and Cleared Swaps Customer Collateral that would be available for distribution but for the sovereign action.
3. Convert the amount of customer funds for futures contracts and Cleared Swaps Customer Collateral available for distribution to U.S. Dollars at the Exchange Rate.
4. Determine the Shortfall Percentage that is not attributable to sovereign action, as follows:

Shortfall Percentage =	(1-	[Total Customer Assets])
				Total Customer Claims		

B. *Allocation of Losses Not Attributable to Sovereign Action*

1. Reduce the claim of each futures customer or Cleared Swaps Customer by the Short fall Percentage.

II. Reduction in Distributions for Sovereign Loss**A. *Determination of Losses Attributable to Sovereign Action (“Sovereign Loss”)***

1. If any portion of the claim of a futures customer or Cleared Swaps Customer is required to be kept in U.S. dollars in the U.S., that portion of the claim is not exposed to Sovereign Loss.
2. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one location and that location is:
 - a. The U.S. or a location in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.
 - b. A location in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

3. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in only one currency and that currency is:

a. U.S. dollars or a currency in which there is no Sovereign Loss, then that portion of the claim is not exposed to Sovereign Loss.

b. A currency in which there is Sovereign Loss, then that entire portion of the claim is exposed to Sovereign Loss.

4. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one location and:

a. There is no Sovereign Loss in any of those locations, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those locations, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those locations, then an equal share of that portion of the claim will be exposed to Sovereign Loss in each such location.

5. If any portion of the claim of a futures customer or Cleared Swaps Customer is authorized to be kept in more than one currency and:

a. There is no Sovereign Loss in any of those currencies, then that portion of the claim is not exposed to Sovereign Loss.

b. There is Sovereign Loss in one of those currencies, then that entire portion of the claim is exposed to Sovereign Loss.

c. There is Sovereign Loss in more than one of those currencies, then an equal share of that portion of the claim will be exposed to Sovereign Loss.

B. *Calculation of Sovereign Loss*

1. The total Sovereign Loss for each location is the difference between:

a. The total customer funds for futures contracts or Cleared Swaps Customer Collateral deposited in depositories in that location and

b. The amount of customer funds for futures contracts or Cleared Swaps Customer Collateral in that location that is available to be distributed to futures customers or Cleared Swaps Customers, after taking into account any sovereign action.

2. The total Sovereign Loss for each currency is the difference between:

a. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the day before the sovereign action took place and

b. The value, in U.S. dollars, of the customer funds for futures contracts or Cleared Swaps Customer Collateral held in that currency on the date of the calculation.

C. *Allocation of Sovereign Loss*

1. Each distribution on account of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location will be reduced by:

$$\text{Total Sovereign Loss} \times \frac{\begin{array}{l} \text{Portion of the customer's claim exposed to loss in that} \\ \text{location} \end{array}}{\begin{array}{l} \text{All portions of customer claims exposed to loss in that} \\ \text{location} \end{array}}$$

2. Each distribution on account of the claim of a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a currency will be reduced by:

$$\text{Total Sovereign Loss} \times \frac{\begin{array}{l} \text{Portion of the customer's claim exposed to loss in that} \\ \text{currency} \end{array}}{\begin{array}{l} \text{All portions of customer claims exposed to loss in that} \\ \text{currency} \end{array}}$$

3. A distribution to a futures customer or Cleared Swaps Customer exposed to Sovereign Loss in a location or currency will not be reduced below zero. (The above calculations might yield a result below zero where the FCM kept more customer funds for futures contracts or Cleared Swaps Customer Funds in a location or currency than it was authorized to keep.)

4. Any amount of Sovereign Loss from a location or currency in excess of the total amount of customer funds for futures contracts or Cleared Swaps Customer Funds authorized to be kept in that location or currency (calculated in accord with section II.1 above) ("Total Excess Sovereign Loss") will be allocated among all futures customers or Cleared Swaps Customer that have authorized funds to be kept outside the U.S., or in currencies other than U.S. dollars, with each such futures customer or Cleared Swaps Customer distribution reduced by the following amount:

$$\text{Total Excess Sovereign Loss} \times \left[\frac{\begin{array}{l} \text{This customer's total claim} - \text{The portion of} \\ \text{this Customer's claim required to be kept in} \\ \text{U.S. dollars, in the U.S.} \end{array}}{\begin{array}{l} \text{Total customer claims} - \text{Total of all} \\ \text{customer claims required to be kept in U.S.} \\ \text{dollar, in the U.S.} \end{array}} \right]$$

The following examples illustrate the operation of this convention.

Example 1. No shortfall in any location.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$50	U.S.
B	€50	U.K.
C	€50	Germany
D	£300	U.K.
Location		Actual asset balance
U.S.		\$50
U.K.		£300
U.K.		€50
Germany		€50

Note: Conversion Rates: €1 = \$1; £1=\$1.5.

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in U.S. dollars
A	\$50	1.0	\$50
B	€50	1.0	50
C	€50	1.0	50
D	£300	1.5	450
Total			\$600

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$50	1.0	\$50			\$50
U.K.	£300	1.5	450			450
U.K.	€50	1.0	50			50
Germany	€50	1.0	50			50
Total			\$600		0	\$600

There are no shortfalls in funds held in any location. Accordingly, there will be no reduction in distributions to holders of futures or Cleared Swaps Customer claims.

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Claims:

Customer	Claim in U.S. dollars after allocated non-sovereign shortfall	Allocation of shortfall due to sovereign action	Distributions after all reductions
A	\$50	\$0	\$50
B	50	0	50
C	50	0	50
D	450	0	450
Total	\$600	\$0	\$600

Example 2. Shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$100	U.S.
B	€50	U.K.
C	€100	U.S., Germany, or Japan
Location		Actual asset balance
U.S.		\$50
U.K.		€100
Germany		€50

Note: Conversion Rates: €1=\$1.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

There is a shortfall in the funds held in the U.S. such that only 1/2 of the funds are available. Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Convert each customer's claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US\$
A	\$100	1.0	\$100
B	€50	1.0	50
C	€100	1.0	100
Total			\$250

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$50	1.0	\$50			\$50
U.K.	€100	1.0	100			100
Germany	€50	1.0	50			50
Total			\$200			\$200

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = $(1 - (200/250)) = (1 - 80\%) = 20\%$.

Reduce each distribution to the holder of a futures or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US\$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	\$100	\$20	\$80
B	50	10	40
C	100	20	80
Total	\$250	\$50	\$200

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, distributions to holders of futures or Cleared Swaps Customer claims will not be further reduced.

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US\$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action	Distribution after all reductions
A	\$80		\$80
B	40		40
C	80		80
Total	\$200	\$0	\$200

Example 3. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$150	U.S.
B	€100	U.K.
C	€50	Germany
D	\$100	U.S.
D	€100	U.K. or Germany
Location		Actual asset balance
U.S.		\$250
U.K.		€50
Germany		€100

Note: Conversion Rates: €1=\$1.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert the claim of each futures customer or Cleared Swaps Customer in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US\$
A	\$150	1.0	\$150
B	€100	1.0	100
C	€50	1.0	50
D	\$100	1.0	100
D	€100	1.0	100
Total			\$500

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Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$250	1.0	\$250			\$250
U.K.	€50	1.0	50			50
Germany	€100	1.0	100			100
Total			\$400		\$0	\$400

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = $(1 - 400/500) = (1 - 80\%) = 20\%$.

Reduce each distribution to the holder of a futures customer or Cleared Swaps Customer by the Shortfall Percentage:

Customer	Claim in US\$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	\$150	\$30	\$120
B	100	20	80
C	50	10	40
D	200	40	160
Total	\$500	\$100	\$400

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

There is no shortfall due to sovereign action. Accordingly, the distributions will not be further reduced.

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US\$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action	Distribution after all reductions
A	\$120		\$120
B	80		80
C	40		40
D	160	0	160
Total	\$400	\$0	\$400

Example 4. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$50	U.S.
B	€50	U.K.
C	€50	Germany
D	\$100	U.S.
D	€100	U.K. or Germany
Location		Actual asset balance
U.S.		\$150
U.K.		100
Germany		100

Notice: Conversion Rates: €1 = \$1; £1 = \$1.5.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US\$
A	\$50	1.0	\$50
B	€50	1.0	50
C	€50	1.0	50
D	\$100	1.0	100
D	€100	1.0	100
Total			\$350

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$150	1.0	\$150			\$150
U.K.	€100	1.0	100			100
Germany	€100	1.0	100	50%	50	50
Total			\$350		\$50	\$300

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = $(1 - 350/350) = (1 - 100\%) = 0\%$.

Reduce each distribution to the holder of a futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US\$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	\$50	\$0	\$50
B	50	0	50
C	50	0	50
D	200	0	200
Total	\$350	\$0	\$350

REDUCTION IN DISTRIBUTIONS FOR DUE TO SOVEREIGN ACTION

Due to sovereign action, only 1/2 of the funds in Germany are available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	\$50		
B		\$50	
C			\$50
D	100		100
Total	\$150	\$50	\$150

Calculation of the allocation of the shortfall due to sovereign action—Germany (\$50 shortfall to be allocated):

Customer	Allocation share	Allocation share of actual shortfall	Actual shortfall allocated
C	\$50/\$150	33.3% of \$50	\$16.67
D	\$100/\$150	66.7% of \$50	33.33
Total			\$50.00

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US\$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Distribution after all reductions
A	\$50		\$50
B	50		50
C	50	\$16.67	33.33
D	200	33.33	166.67
Total	\$350.00	\$50.00	\$300.00

Example 5. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action and a shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$100	U.S.
B	€50	U.K.
C	€150	Germany
D	\$100	U.S.
D	£300	U.K.
D	€150	U.K. or Germany
Location		Actual asset balance
U.S.		\$100
U.K.		£300
U.K.		€200
Germany		€150

Conversion Rates: €1 = \$1; £1 = \$1.5.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US\$
A	\$100	1.0	\$100
B	€50	1.0	50
C	€150	1.0	150
D	\$100	1.0	100
D	£300	1.5	450
D	€150	1.0	150
Total			\$1000

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$100	1.0	\$100			\$100
U.K.	£300	1.5	450			450
U.K.	€200	1.0	200			200
Germany	€150	1.0	150	100%	\$150	0
Total			\$900		\$150	\$750

Determine the percentage of shortfall that is not attributable to sovereign action:

$$\text{Shortfall Percentage} = (1 - 900 / 1000) = (1 - 90\%) = 10\%.$$

Reduce each distribution to the holder of a futures customer or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US\$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	\$100	\$10	\$90
B	50	5	45
C	150	15	135
D	700	70	630
Total	\$1000	\$100	\$900

REDUCTION IN DISTRIBUTIONS FOR SHORTFALL DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	\$100		
B		\$50	
C			\$150
D	100	450	150
Total	\$200	\$500	\$300

Calculation of the allocation of the shortfall due to sovereign action Germany (\$150 shortfall to be allocated):

Customer	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	\$150/\$300	50% of \$150	\$75
D	\$150/\$300	50% of \$150	75
Total			\$150

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US\$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Distributions after all reductions
A	\$90		\$90
B	45		45
C	135	\$75	60
D	630	75	555
Total	\$900	\$150	\$750

Example 6. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, due to sovereign action, shortfall in funds held outside the U.S., or in a currency other than U.S. dollars, not due to sovereign action, and a shortfall in funds held in the U.S.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$50	U.S.
B	€50	U.K.
C	\$20	U.S.
C	€50	Germany
D	\$100	U.S.
D	£300	U.K.
D	€100	U.K., Germany, or Japan
E	\$80	U.S.
E	¥10,000	Japan
Location		Actual asset balance
U.S.		\$200
U.K.		£200
U.K.		€100
Germany		€50
Japan		¥10,000

Conversion Rates: €1 = \$1; ¥1 = \$0.01, £1 = \$1.5.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim In US\$
A	\$50	1.0	\$50
B	€50	1.0	50
C	\$20	1.0	20
C	€50	1.0	50
D	\$100	1.0	100
D	£300	1.5	450
D	€100	1.0	100
E	\$80	1.0	80
E	¥10,000	0.01	100
Total			\$1000

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$200	1.0	\$200			\$200
U.K.	£200	1.5	300			300
U.K.	€100	1.0	100			100
Germany	€50	1.0	50	100%	\$50	0
Japan	¥10,000	0.01	100	50%	50	50
Total			\$750		\$100	\$650

Determine the percentage of shortfall that is not attributable to sovereign action:

Shortfall Percentage = $(1 - 750/1000) = (1 - 75\%) = 25\%$.

Reduce each distribution to the holder of a futures or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US\$	Allocation shortfall (non-sovereign)	Distributions in U.S. dollars after allocated shortfall
A	\$50	\$12.50	\$37.50
B	50	12.50	37.50
C	70	17.50	52.50
D	650	162.50	487.50
E	180	45.00	135.00
Total	\$1000.00	\$250.00	\$750.00

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany and only 1/2 of the funds in Japan are available.

Customer	Presumed location of funds			
	U.S.	U.K.	Germany	Japan
A	\$50			
B		\$50		
C	20		\$50	
D	100	450	50	\$50
E	80			100
Total	\$250	\$500	\$100	\$150

Calculation of the allocation of the shortfall due to sovereign action—Germany (\$50 shortfall to be allocated):

Customer Allocation	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	\$50/\$100	50% of \$50	\$25
D	50/100	50% of 50	25
Total			50

Japan (\$50 shortfall to be allocated):

Customer Allocation	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
D	\$50/\$150	33.3% of \$50	\$16.67
E	100/150	66.6% of 50	33.33
Total			\$50.00

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US\$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action from Germany	Allocation of shortfall due to sovereign action from Japan	Distribution on after all reductions
A	\$37.50			37.50
B	37.50			37.50
C	52.50	\$25		27.50
D	487.50	\$25	16.67	445.83
E	135.00		33.33	101.67
Total	\$750.00	\$50.00	\$50.00	\$650.00

Example 7. Shortfall in funds held outside the U.S., or in a currency other than U.S. dollar, due to sovereign action, where the FCM kept more funds than permitted in such location or currency.

Customer	Claim	Location(s) customer has consented to having funds held
A	\$50	U.S.
B	50	U.S.
B	€50	U.K.
C	€50	Germany
D	100	U.S.
C	€100	U.K. or Germany
E	50	U.S.
E	€50	U.K.

Location	Actual asset balance
U.S.	\$250
U.K.	€50
Germany	€200

Conversion Rates: 1 = \$1.

REDUCTION IN DISTRIBUTIONS FOR GENERAL SHORTFALL

Convert each futures customer or Cleared Swaps Customer claim in each currency to U.S. Dollars:

Customer	Claim	Conversion rate	Claim in US\$
A	\$50	1.0	\$50
B	50	1.0	50
B	€50	1.0	50
C	€50	1.0	50
D	€100	1.0	100
D	€100	1.0	100
E	50	1.0	50
E	€50	1.0	50
Total			500.00

Determine assets available for distribution to futures customers or Cleared Swaps Customers, converting to U.S. dollars:

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Location	Assets	Conversion rate	Assets in U.S. dollars	Shortfall due to sovereign action percentage	Actual shortfall due to sovereign action	Amount actually available
U.S.	\$250	1.0	\$250			\$250
U.K.	€50	1.0	50			50
Germany	€200	1.0	200	100%	200	0
Total			\$500		\$200	\$300

Determine the percentage of shortfall that is not attributable to sovereign

Shortfall Percentage = $(1 - 500/500) = (1 - 100\%) = 0\%$.

Reduce each distribution to the holder of a futures or Cleared Swaps Customer claim by the Shortfall Percentage:

Customer	Claim in US\$	Allocation shortfall (non-sovereign)	Distribution in U.S. dollars after allocated shortfall
A	\$50	\$0	\$50
B	100	0	100
C	50	0	50
D	200	0	200
E	100	0	100
Total	\$500	\$0	\$500

REDUCTION IN DISTRIBUTIONS DUE TO SOVEREIGN ACTION

Due to sovereign action, none of the money in Germany is available.

Customer	Presumed location of funds		
	U.S.	U.K.	Germany
A	\$50		
B	50	50	
C			50
D	100		100
E	50	50	
Total	\$250	\$100	\$150

Calculation of the allocation of the shortfall due to sovereign action—Germany (\$200 shortfall to be allocated):

Customer	Allocation share	Allocation Share of actual shortfall	Actual shortfall allocated
C	\$50/\$150	33.3% of \$200	\$66.67
D	\$100/\$150	66.7% of \$200	\$133.33
Total			\$200.00

This would result in the distributions to customers C and D being reduced below zero.

Accordingly, the distributions to customer C and D will only be reduced to zero, or \$50 allocated to C and \$100 allocated to D. This results in a Total Excess Shortfall of \$50.

Actual shortfall	Allocation of shortfall for customer C	Allocation of shortfall for customer D	Total excess shortfall
\$200	\$50	\$100	\$50

This shortfall will be allocated among the remaining futures customers or Cleared Swaps Customers who have authorized funds to be held outside the U.S. or in a currency other than U.S. dollars.

Customer	Total claims of customers permitting funds to be held outside the U.S.	Portion of claim required to be in the U.S.	Allocation share (column B-C/column B Total—all customer claims in U.S.)	Allocation share of actual total excess shortfall	Actual total excess shortfall allocated
B	\$100	\$50	\$50/\$200	25% of \$50	\$12.50
C	50	0	⁽¹⁾		0
D	200	100	\$100/200	50% of \$50	25
E	100	50	50/100	25% of \$50	12.50
Total	\$450.00				\$50.00

¹Claim already reduced to \$0.

DISTRIBUTIONS AFTER REDUCTIONS

Customer	Distribution in US\$ before allocation of sovereign shortfall	Allocation of shortfall due to sovereign action Germany	Allocation of total excess shortfall	Distribution after all reductions
A	\$50			\$50.00
B	100		12.50	87.50
C	50	50		0
D	200	100	25	75.00
E	100		12.50	87.50
Total	\$500.00	\$150.00	\$50.00	\$300.00

PARTS 191–199 [RESERVED]