

Appendix

Chart Summarizing Changes to Part 190 of CFTC Regulations

Section	Subject	Change	Key Changes from Current Rules
190.00	Statutory Authority, Organization, Core Concepts, Scope, and Construction	Section 190.00 sets out the statutory authority, organization, core concepts, scope, and rules of construction for part 190. Section 190.00 serves as a reference guide for the CFTC's intent in bankruptcies, clarifying past issues where the CFTC believes its intent has been misconstrued. Section 190.00 provides notable examples of the requirement of pro rata distribution in response to situations where customers have posted letters of credit to avoid pro rata treatment in a shortfall and clarifying that equitable trusts will not be an available remedy.	New addition.
190.00(c)(3)(i)(C)	Statutory Authority, Organization, Core Concepts, Scope, and Construction	Where a provision in part 190 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.	Clarifies what efforts a trustee must exercise with respect to other requirements.
190.00(d)(3)(v)	Statutory Authority, Organization, Core Concepts, Scope, and Construction	Clarifying that mixed swaps (as defined in 1a(47)(D) of the Act) can be commodity contracts subject to part 190.	Clarification.
190.01	Account Class	Expands definitions of account classes. Noting that "delivery account" applies to each of public and non-public customers, considered separately.	Expanded definition.

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190.01	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 commodity 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 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 definition also requires that the cash or cash equivalents, or the commodity, 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 (a) first delivery notice date in the case of a futures contract; or (b) exercise date in the case of a cleared option.	Expanded definition, changes three calendar days period to seven calendar days, makes explicit that applies to cash transferred from a customer to the trustee after the filing date.
190.01	Physical Delivery	Expands definition to recognize that intangible commodities that may be physically delivered. Clarifies that for cash delivery property, where one fiat currency is exchanged for another, neither such currency would be considered physical delivery property. 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.	Expanded definition. Clarification for cash delivery property and negative price events.
190.02(a)(1)	Request for Exemption	Expanded to include any procedural provision rather than limiting to exemption from or extension to a time limit.	May request exemption from any procedure not only time limits.
190.02(f)	Voluntary Petition for Bankruptcy by Receiver	New power that would explicitly permit a receiver to file a voluntary petition for bankruptcy for an FCM in appropriate cases.	New authority to file voluntary petition.
190.02(g)	Voluntary Petition for Bankruptcy by Receiver	Notes that the definition of “allowed” in filing a voluntary petition under Part 190.02 shall have the meaning ascribed to it in the Bankruptcy Code.	Clarification of voluntary petition procedure.

Section	Subject	Change	Key Changes from Current Rules
190.03(a)(1)	Providing Notices	Authorizes notices by electronic mail; no longer required to submit by overnight hard copy.	Removes hard copy requirements.
190.03(a)(2)	General Approach to Notices	Replaces specific procedures with any “reasonably designed” for giving notice.	Change from specific to general approach.
190.03(b)	Notices to CFTC and DSROs	(1) In voluntary bankruptcy, revises time to “as soon as practicable, and in any event no later than the time of filing;” (2) in involuntary filings, must notify immediately; (3) must provide docket number “as soon as known;” (4) must notify the CFTC of intent to transfer open commodity contracts as soon as possible.	Removes three-day deadline for intent to transfer. Includes revised notice requirements.
190.03(c)	Notices to Customers	Changes notice standard to “all reasonable efforts.” Trustee may then liquidate on the seventh day after the order for relief if the customer has not instructed the trustee in writing before the deadline specified in the notice to return property.	Removes requirement to publish in newspaper, removes the sixth calendar day following second publication requirement.
190.03(c)(2)	Open Commodity Contracts in Hedging Accounts	(1) Trustee given authority as an option but not an obligation to treat open commodity contracts of public customers held in hedging accounts designated as such in the debtor’s records as specifically identifiable property after consulting with the CFTC and when practical under the circumstances; (2) if trustee exercises this option then trustee must notify each relevant customer and request instructions whether to transfer or liquidate the relevant open commodity contracts; (3) trustee must inform customer that if instructions are not given the contracts will not be treated as specifically identifiable property.	Changes from bespoke basis to categorical basis.
190(c)(2)(ii)(B)	Open Commodity Contracts in Hedging Accounts	Clarifies that Trustee may follow previous public customer instructions: (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; and (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.	Additional clarification of requirements of trustee to follow public customer instructions.

Section	Subject	Change	Key Changes from Current Rules
190.03(e) & (f)	Proof of Customer Claim	Allows for trustee discretion to adapt a request for certain information to the facts of a particular case. CFTC has included a revised template form, but notes that it is within trustee's discretion whether to use form.	Deletes question on if claimant is an "affiliate" "insider" or "relative."
190.04(a)	Transfer of Open Contracts	(1) Changes "must immediately" standard to "shall promptly;" (2) retains provision that if a commodity broker demonstrates to the CFTC in a specified period of time that it is in compliance with segregation and financial requirements on the filing date, the CFTC may determine to allow the commodity broker to continue in business.	Increase in discretion.
190.04(b)	Margin Payments	(1) Expansion of payment of margin payments from only "pending liquidation" to "pending transfer or liquidation;" (2) may not make payments on behalf of any commodity contract account that is in deficit; (3) FCMs or clearing organizations may exercise contractual rights based on upstream collateral, but not if an upstream margin payment would exceed the funded balance of the account; (4) trustee may but is no longer required to make margin calls for public customers; (5) a trustee must liquidate as soon as practicable all open commodity contract accounts in any commodity account (a) that is in deficit; (b) for which mark-to-market calculation would result in a deficit; (c) for which the customer fails to meet a margin call made by the trustee in a reasonable time (an hour or such greater period not to exceed one business day at trustee discretion).	May make margin payments pending transfer. Expands liquidation requirements for accounts that are in deficit.
190.04(b)(5)	Assigning Liquidating Positions in Omnibus Account	Trustee should liquidate accounts in risk-reducing manner based on the customer account as a whole.	Increase in trustee discretion.
190.04(c)	Best Efforts to Avoid Delivery	Makes explicit current approach to liquidate promptly commodity contracts that are not settled in cash and are moving into the delivery period.	Clarification of CFTC policy.
190.04(d)	Liquidation of Specifically Identifiable Property	(1) Applies to specifically identifiable property other than open commodity contracts or physical delivery property; (2) must liquidate if drops below 75 percent of fair market value or if failure to liquidate may result in a deficit balance.	Changes benchmark for liquidation from 90 percent fair market value (FMV) to 75 percent FMV. Clarifies existing requirement that liquidation be "in an orderly manner."

Section	Subject	Change	Key Changes from Current Rules
190.04(d)(3)	Customer Letters of Credit	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; amount may be less than face value at trustee's discretion. Any portion of the letter of credit not fully drawn upon will count as having been distributed to customer.	Expanded treatment for letters of credit.
190.04(d)(3)(iv)	Customer Letters of Credit	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	Clarifies trustee discretion in drawing on letters of credit.
190.04(e)(1)(i) & (2)	Approval of Clearing Organization Rules	Deletes requirement for CFTC preapproval of rules regarding liquidation of open commodity contracts.	Removes pre-approval requirement.
190.04(e)(1)(ii)	Non-DCO or Foreign Clearing Member Debtor	Trustee "shall use commercially reasonable efforts to liquidate open commodity contracts."	Increase in trustee discretion.
190.04(e)(3)	FCM or foreign futures intermediary Upstream Rights	Confirms that upstream intermediaries may exercise contractual rights.	Clarification of CFTC policy.
190.05(a) & (b)	Compliance with CEA & Funded Balance Computations	Provides flexibility to trustee by changing standard of compliance to "shall use reasonable efforts to comply" and shall use "reasonable efforts" to compute customer accounts balance until the open commodity contracts and other property in the account have been transferred or liquidated.	Shifts from mandatory to reasonable efforts standard, limits how long must compute account balances.
190.05(c)(1)	Records Retention	Changes period of retention to "until such time as the debtor's case is closed."	Reduced requirement.
190.05(d)	Account Statements	Trustee must use all reasonable efforts to continue to issue account statements.	New requirement.
190.05(f)	Residual Interest Provisions	Trustee must apply residual interest provisions in a manner appropriate.	New requirement.
190.06	Making and Taking Delivery under Commodity Contracts	Trustee may use reasonable efforts to permit relevant customer to make or take delivery outside the administration of the debtor's estate.	New requirement.
190.07(a)(3)	Transfers	No clearing organization or other self regulatory organization may adopt, maintain in effect, or enforce rules that prevent the acceptance by its members of transfers of open commodity contracts and the equity margining or securing of such contracts from FCMs if the CFTC has approved the transfer.	Changes from "interfere with" to prevent the creation of an active obligation.

Section	Subject	Change	Key Changes from Current Rules
190.07(b)(3)	Transfer of Accounts	Transferee may accept open commodity contracts and property and may open accounts on its records prior to completing customer diligence provided that account opening diligence as required is performed as soon as practicable but no later than six months after transfer unless extended by the CFTC.	Reduced requirement.
190.07(d)(4)	Separation of Physical Property and Deliverable Positions	Trustee must use reasonable efforts to prevent physical delivery property from being separated from commodity contract positions under which the property is deliverable.	New requirement.
190.08(b)(1)(ii)(A)(4)	Letters of Credit in Calculation of Allowed Net Equity	Face amount of any letter of credit received, acquired or held to margin, guarantee, secure, purchase or sell a commodity contract as part of the posting customer's ledger balance.	Expanded treatment for letters of credit.
190.08(d)(1)(i)	Timing for Valuation of Transferred Contract	Changes date for valuation to end of the last settlement cycle on the day preceding the transfer.	Changes date for clarification.
190.08(d)(1)(ii)(A)	Weighted Average of Liquidation Prices	Trustee may use the weighted average of liquidation prices of identical commodity contracts liquidated within a 24-hour period or business day.	Expands definition of time period.
190.08(d)(1)(ii)(B)	Liquation in Bulk Auctions	Valued at settlement price calculated by the clearing organization as of the end of the settlement cycle during which the commodity contract was liquidated.	Clarification of calculation.
190.09	Segregation of Customer Funds and Distribution of Customer Property	Trustees must fulfill FCM obligation to put certain funds into segregation on behalf of customers where FCMs have not using the current assets of the debtor. Following SIPA, the CFTC states that any securities customer property that remains after satisfaction in full of securities claims provided for in that section of SIPA proceedings become property of the general estate and become customer property in the FCM bankruptcy proceeding. The CFTC rules allow customers to buy back identifiable property to enable pro rata distribution. The final rule clarifies what will constitute "customer property."	Additional trustee ability.

Section	Subject	Change	Key Changes from Current Rules
190.10(d)	Acceptance of Letters of Credit	(1) For a FCM to accept a letter of credit at any point, the letter of credit must be available for the trustee to draw upon, in full or in part, in the event of a bankruptcy proceeding, the entry of a protective decree under SIPA or the appointment of FDIC as a receiver; (2) if the letter of credit is permitted to be and is passed through a clearing organization, the bankruptcy trustee for such clearing organization or FDIC must be able to draw upon the letter of credit in the above situations.	Applies only to new letters of credits, with requirement to transition of one year from effective date. Moved to CFTC Part 1 Regulations.
190.10(a)	FCM Current Accounts Records	Must maintain records of customer accounts and store in a way that can be provided to another FCM in connection with the transfer of open customer contracts of other customer property.	New requirement, moved to CFTC Part 1 Regulations.
190.10(b)	Designation of Hedging Accounts	FCMs are required to provide customers an opportunity to designate an account as a hedging account when the customer first opens the account. Clients can make a representation to FCM to have current account designated as a hedging account.	New requirement, moved to CFTC Part 1 Regulations.
190.10(c)	Designation of Delivery Accounts	When a FCM facilitates delivery under a customer's physical delivery contract, and such delivery is effected outside of a futures account, foreign futures account, or cleared swaps account, it must be effected through (and the associated property held in) a delivery account.	New requirement, moved to CFTC Part 1 Regulations.
190.11	Bankruptcy of Clearing Organization	Establishes bespoke rules that apply to clearing organizations. Notes that where a debtor clearing organization is organized outside the United States, §§ 190.13, 190.17 and 190.18 would only apply with respect to: (1) claims of FCM clearing members on behalf of their public customers; and (2) 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.	New regime.
190.12(a)(2)	Notice of Clearing Organization Bankruptcy	Must notify in advance of or in time of filing a petition voluntarily, or within three hours if involuntarily. Clearing organization must be prepared to give trustee copies of each of the most recent reports filed with the CFTC under 39.19(c) (1),(2),(3) and 39.39(b) within three hours or as soon as practicable.	New requirement.
190.13	DCO Transfers	DCO transfers require explicit CFTC approval.	New requirement.

Section	Subject	Change	Key Changes from Current Rules
190.14(b)	Continued Operation	Discusses the operation of a debtor clearing organization in bankruptcy and provides that, after the order for relief, the DCO shall cease making calls for either variation or initial margin.	Affirmation of status quo.
190.14(c)(1)	Liquidation of All Open Commodity Contracts	Must be liquidated within seven days of relief unless the CFTC determines otherwise.	New requirement.
190.15	DCO Rules for Insolvency	Trustee may implement DCOs must rules and procedures regarding insolvency and default adopted under 39.16 and 39.35.	New requirement.
190.16(a)	Delivery	Instructs the trustee to use reasonable efforts to facilitate and cooperate with completion of delivery in a manner consistent with § 190.16(a) (which instructs trustees of FCMs in bankruptcy to foster delivery where a contract has entered delivery phase before the filing date or where it is not practicable for the trustee to liquidate a contract moving into delivery position after the filing date)	New requirement.
190.17(b)(2)	Allocation of Members Recovery	DCOs must adjust members' net equity claims in reverse order of the allocation of losses. Notes that it is appropriate to use "reverse the waterfall" rules for recoveries made by a clearing organization (including a debtor clearing organization).	New requirement.
190.18	Scope of Customer Property for DCOs	Follows approach of 190.09 FCM property. DCOs include as customer property any guarantee fund deposit, assessment or similar payment or deposits made by a member, to the extent any remains following the administration of the debtor's default rules and procedures.	New requirement.
190.18(b)(1)	Scope of Customer Property for DCOs	Makes explicit that customer property includes the amounts of its own funds that a debtor DCO had committed as part of its loss allocation rules.	New requirement.
190.19	Use of Daily Settlement	Resources that are intended to flow through to members as part of daily settlement (including both daily variation payments and default resources) should be devoted to that purpose, rather than to the general estate.	New requirement.