

Commodity Futures Trading Commission

§ 190.08

(5) *Property.* Cash commodities held in inventory, as collateral or otherwise, shall be valued at their fair market value. Subject to the other provisions of this paragraph (e), all other property shall be valued by the trustee subject to approval by the court, 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 the net proceeds of such sale: *Provided further,* That the sale is made in compliance with all applicable statutes, rules and orders of any court or governmental entity with jurisdiction thereover.

[48 FR 8739, Mar. 1, 1983; 48 FR 15122 and 15123, Apr. 7, 1983, as amended at 67 FR 58298, Sept. 13, 2002]

§ 190.08 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, except for special distributions required under 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) Warehouse receipts, bills of lading, or other documents of title or property held or acquired by the debtor to fulfill a commodity contract;

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

(E) The full proceeds of a letter of credit if such letter of credit was received, acquired or held to margin,

guarantee, secure, purchase or sell a commodity contract;

(F) 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 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) Is property of a type described in paragraph (a)(1)(i)(A) of this section which has been withdrawn and subsequently is recovered by the avoidance powers of the trustee;

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

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

(G) Is property of the debtor that any applicable law, rule, regulation, or order requires to be set aside for the benefit of customers, unless including such property in the customer estate would not significantly increase the customer estate;

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

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

(J) 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)(E) and (a)(1)(ii)(A) through (a)(1)(ii)(H) of this section is insufficient to satisfy in full all claims of public customers.

(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 thereunder;

(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;

(iv) Property delivered to or from a customer to or by another customer to fulfill a commodity contract held for or on behalf of either customer by the debtor if such delivery is effected pursuant to §190.05 by a commodity broker other than the debtor;

(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 maintenance margin requirements 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; and

(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.

(b) *Allocation of property between customer classes.* No portion of the customer estate 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 non-public customers must be treated initially as part of the public customer estate and allocated under paragraph (c)(2) of this section.

(c) *Allocation of 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, or readily traceable on the filing date to customers of such account class, must be allocated to the customer estate of the account class for which it is segregated or to which it is readily traceable.

(2) *All other property.* Money, securities and property received from or for the account of customers on behalf of any account class which is recovered on behalf of the customer estate and which cannot be allocated in accordance with paragraph (c)(1) of this sec-

tion, must be allocated as of the primary liquidation date 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) to (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 other than a commodity contract.* Specifically identifiable property other than an open commodity contract not required to be liquidated under §190.02(f)(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 cash is first deposited with the trustee in an amount 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 so margining an open 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 cash with the trustee in an amount 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*, That adequate security for the nonrecovery 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 specifically identifiable commodity contract which is not required to be liquidated under §190.02(f)(1) or §190.03(b), and which is not otherwise liquidated, may be transferred on behalf of a customer: *Provided*, That such customer must first deposit cash with the trustee in an amount 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 the respect to the customer's net equity claim for such account: and, *Provided further*,

That adequate security for the nonrecovery 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 would have been specifically identifiable under §190.01(kk)(6) if that customer had had no open commodity contracts, the customer may request that the trustee purchase or otherwise obtain the largest whole number of like-kind securities, with a fair market value (inclusive of transaction costs) which does not exceed that portion 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 (d)(3) of this section prior to receipt of a completed proof of customer claim as described in §190.02(d).

(5) *No differential distributions.* No further disbursements may be made to customers for whom transfers have been made pursuant to §190.06 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. Partial distributions, other than the transfers referred to in §190.06 and paragraph (d)(2) of this section, 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 for the nonrecovery of any overpayments by the trustee and distributes an equal percentage of net equity to all public customers.

(6) *Margin payments.* The trustee may make margin payments on behalf of any account which do not exceed the funded balance of that account.

[48 FR 8739, Mar. 1, 1983; 48 FR 15122, Apr. 1, 1983, as amended at 59 FR 17471, Apr. 13, 1994; 67 FR 58298, Sept. 13, 2002]

§ 190.09 Member property.

(a) *Member property.* "Member property" means, in connection with a