ATTN: Greg Davison, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et. seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI EASA Emergency AD No.: 2010–0037–E, dated March 8, 2010, and Aircraft Industries, a.s. Mandatory Bulletin MB No.: L23/052a, dated March 2, 2010, for related information.

Material Incorporated by Reference

(i) You must use Aircraft Industries, a.s. Mandatory Bulletin MB No.: L23/052a, dated March 2, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Aircraft Industries, a.s.—Na záhonech1177, 686 04 Kunovice, Czech Republic; telephone: +420 572 817 660; fax: +420 572 816 112; E-mail: *ots@let.cz*; Internet: *www.let.cz.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

(4) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on March 29, 2010.

Steven R. Thompson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–7591 Filed 4–5–10; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 190

RIN 3038–AC94

Account Class

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (the "Commission") is amending its regulations (the "Regulations")[1] to create a sixth and separate "account class,"[2] applicable only to the bankruptcy of a commodity broker that is a futures commission merchant ("FCM"), for positions in cleared over-the-counter ("OTC") derivatives (and money, securities, and/or other property margining, guaranteeing, or securing such positions).

Further, the Commission is amending the Regulations to codify the appropriate allocation, in a bankruptcy of any commodity broker, of positions in commodity contracts of one account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), which, pursuant to an order issued by the Commission under Section 4d of the Commodity Exchange Act (the "Act"),[3] are commingled with positions in commodity contracts of the futures account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions).

DATES: *Effective Date:* The final rules are effective as of May 6, 2010.

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Associate Director, Division of Clearing and Intermediary Oversight, 202–418–5092, *rwasserman@cftc.gov;* or Nancy Schnabel, Special Counsel, Division of Clearing and Intermediary Oversight, 202–418–5344, *nschnabel@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On August 13, 2009, the Commission published a Notice of Proposed Rulemaking, which contained the following three proposals (the "Notice").[4] First, the Notice proposed amending Regulation 190.01(a), as well as adding new Regulation 190.01(oo), to create a sixth and separate account class, applicable only to the bankruptcy of a commodity broker that is an FCM, for positions in "cleared OTC derivatives" (and money, securities, and/or other property margining, guaranteeing, or securing such positions).[5] Second, the Notice proposed further amending Regulation 190.01(a) to codify the appropriate allocation, in a bankruptcy of any commodity broker, of positions in commodity contracts of one account class (and relevant collateral), which, pursuant to an order issued by the Commission under Section 4d of the Act[6] (a "Section 4d Order"), are commingled with positions in commodity contracts of the futures account class (and relevant collateral). Third, the Notice proposed making certain conforming amendments to Regulation 190.07(b)(2)(viii) and Form 4 (Proof of Claim) in Appendix A to Regulation Part 190 (Bankruptcy Forms).

Although, as mentioned above, the Notice proposed creating a new account class for positions in cleared OTC derivatives (and relevant collateral), the Notice declined to propose substantive requirements, applicable prior to the bankruptcy of a commodity broker that is an FCM, for the treatment of such positions (and relevant collateral). Rather, the Notice stated that "the Commission proposes to define 'cleared OTC derivatives' in such a manner as to specify the sources from which such substantive requirements may

[1] The regulations of the Commission can be found at 17 CFR Chapter 1.

[2] In general, the concept of "account class" governs the manner in which the trustee calculates the net equity (*i.e.,* claims against the estate) and the allowed net equity (*i.e., pro rata* share of the estate) for each customer of a commodity broker in bankruptcy.

[3] The Act can be found at 7 U.S.C. 1–23.

[4] 74 FR 40794 (August 13, 2009).

[5] The Notice proposed defining "cleared OTC derivatives" as:

Positions in commodity contracts that have not been entered into or traded on a contract market (as such term is defined in § 1.3(h) of this chapter) or on a derivatives transaction execution facility (within the meaning of Section 5a of the Act), but which nevertheless are submitted by a commodity broker that is a futures commission merchant (as such term is defined in § 1.3(p) of this chapter) for clearing by a clearing organization (as such term is defined in this section), along with the money, securities, and/or other property margining, guaranteeing, or securing such positions, which are required to be segregated, in accordance with a rule, regulation, or order issued by the Commission, or which are required to be held in a separate account for cleared OTC derivatives only, in accordance with the rules or bylaws of a clearing organization (as such term is defined in this section).

Id. at 40799.

[6] 7 U.S.C. 6d.

originate."[7] According to the Notice, the rules or bylaws of a DCO constitute one such source.

The public comment period on the Notice ended on September 14, 2009. The Commission received four comments[8] during the comment period: (i) One from an alternative investment industry trade association;[9] (ii) one from a futures industry trade association;[10] (iii) one from the holding company of four designated contract markets (each, a "DCM") and three DCOs;[11] and (iv) one from a DCM.[12]

Collectively, the comments raise the following five concerns with the Notice:

- The Commission may not have authority to promulgate the proposed amendments in the Notice;
- The Commission should make the proposed account class for cleared OTC derivatives applicable to the bankruptcy of a commodity broker that is a DCO, not simply to the bankruptcy of a commodity broker that is an FCM;
- The Commission should change the definition of cleared OTC derivatives in the Notice to better comport with the definition of "cleared-only contracts"[13] in the Interpretative Statement that the Commission issued on September 26, 2008 (the "Statement on Cleared OTC Derivatives");[14]
- The Commission should establish objective standards for issuing Section 4d Orders; and
- The Commission should specify substantive requirements with respect to the treatment of positions in cleared OTC derivatives (and money, securities, and/or other property margining, guaranteeing, or securing such positions), if a DCO requires such positions (and relevant collateral) to be held in a separate account for cleared OTC derivatives.

The Commission will address below each of the five concerns in turn.

II. Concern That the Commission Does Not Have Authority To Promulgate the Proposed Amendments in the Notice

A. Rationale for Concern

Two commenters stated that certain participants in the OTC derivatives markets have questioned the authority of the Commission to promulgate the proposed amendments in the Notice. In support of their respective statements, both commenters referenced the *Report to the Supervisors of the Major OTC Derivatives Dealers on the Proposals of Centralized CDS Clearing Solutions for the Segregation and Portability of Customer CDS Positions and Related Margin,* dated June 30, 2009 (the "Segregation and Portability Report").[15] One commenter quotes from a portion of the Segregation and Portability Report, which states that there exists a "not insignificant" risk that a court administering the bankruptcy of a commodity broker would disagree with the Statement on Cleared OTC Derivatives.[16] In the Statement on Cleared OTC Derivatives, the Commission determined (i) that cleared-only contracts constituted "commodity contracts"[17] within the meaning of Subchapter IV of Chapter 7 of the Bankruptcy Code ("Subchapter IV"),[18] and (ii) that, therefore, customer positions in cleared-only contracts that, pursuant to a Section 4d Order, are commingled with customer positions in futures contracts should be afforded all protections available under Subchapter IV and Regulation Part 190 in the event of the bankruptcy of a commodity broker that is an FCM. For the reasons explained below, the Commission does not believe that the commenters' concerns are well founded.

B. "Commodity Contract" Definition

In both the Statement on Cleared OTC Derivatives and the Notice, the Commission relied on clear statutory authority that the Commodity Futures Modernization Act of 2000 (the "CFMA")[19] introduced in the Act and in Subchapter IV to conclude that cleared OTC derivatives are "commodity contracts" within the meaning of Section 761(4)(A) of the Bankruptcy Code.[20] The CFMA created the opportunity for OTC derivatives to be cleared.[21] The CFMA also extended Subchapter IV to cleared OTC derivatives. Section 761(4)(A) of the Bankruptcy Code defines "commodity contract," with respect to an FCM, as a "contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market

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[7] 74 FR at 40796.

[8] For purposes of this release, a comment letter is referenced by (i) its author, (ii) its file number (as shown in the comment file associated with the Notice on the Commission's Web site), and (iii) the page (if applicable). The comment file associated with the Notice is available at *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-009.html.*

[9] The Managed Funds Association (representing the global alternative investment industry) ("MFA") (CL01).

[10] The Futures Industry Association (representing the commodity futures and options industry) ("FIA") (CL02).

[11] The CME Group, Inc. (the holding company for: (i) The Chicago Mercantile Exchange Inc. ("CME") and CME Clearing, a division of CME; (ii) the Board of Trade of the City of Chicago, Inc. and its clearing house; (iii) the New York Mercantile Exchange, Inc. and its clearing house; and (iv) the Commodity Exchange, Inc.) ("The CME Group") (CL03).

[12] ELX Futures, L.P. ("ELX") (CL04).

[13] In the Statement on Cleared OTC Derivatives, the Commission defined "cleared-only contracts" as those contracts that "although not executed or traded on a Designated Contract Market or a Derivatives Transaction Execution Facility, are subsequently submitted for clearing through a Futures Commission Merchant * * * to a Derivatives Clearing Organization." 73 FR 65514 (November 4, 2008).

[14] *Id.*

[15] The Segregation and Portability Report is available at *http://www.newyorkfed.org/newsevents/news/markets/2009/an090713.html.*

According to the MFA, the Segregation and Portability Report states that "there is uncertainty as to the proposition that cleared OTC derivatives contracts constitute 'commodity contracts', thereby receiving account class protections under the [Act] and the Bankruptcy Code." *See* MFA CL01 at 3.

According to the FIA, the Segregation and Portability Report "concludes that there are reasonable arguments that cleared OTC derivatives may be viewed as 'commodity contracts' for purposes of Subchapter IV and Part 190. However, *'the risk of a contrary conclusion is not insignificant.'* [Emphasis supplied.]" *See* FIA CL02 at 6.

[16] *Id.* The FIA also quotes from another portion of the Segregation and Portability Report, which states:

We believe there is a significant possibility (in a worst-case scenario) that the proposition that cleared [credit default swap] contracts constitute "commodity contracts" within the meaning of the Bankruptcy Code may be challenged * * * In addition, we also believe that any challenge to the proposition that [credit default swaps] constitute "commodity contracts" would likely result in significant delay for customers seeking the return of margin through the insolvent FCM.

Id.

To properly contextualize these expressed concerns, the Commission makes two observations.

First, while the Segregation and Portability Report repeatedly makes portentous statements concerning the "not insignificant" risk that a court might find that cleared-only contracts (as the Statement on Cleared OTC Derivatives defines such term) are not commodity contracts, the Segregation and Portability Report cites neither to statutory language nor to case law that might be relied upon to support such a conclusion. Indeed, the Report fails to specify any analytical basis for its concerns.

Second, the Segregation and Portability Report's discussion of timing concerns in this context is somewhat incongruous, given that the report contains the following description of its own scope:

We do not principally focus on timing issues in this Report—*e.g., when* customers will be able to recover their margin. Although we note certain instances in which timing concerns may be particularly relevant, our primary focus is on *whether* customers will be able to recover their margin. Timing issues are critical to the analysis of any CCP's customer protection framework. However, we do not focus on them in this Report because of their inherently complex and unpredictable nature.

See the Segregation and Portability Report at 3. In any event, the prosaic observation that the conclusions of the Statement on Cleared OTC Derivatives may be the subject of a challenge, and that such a challenge might take time to resolve, provides no reason for rejecting the proposals contained in the Notice that are based on those conclusions.

[17] 11 U.S.C. 761(4)(A).

[18] 11 U.S.C. Chapter 7, Subchapter IV.

[19] Appendix E of Public Law 106–554, 114 Stat. 2763 (2000).

[20] *See supra* note 17.

[21] *See, e.g.,* Sections 2(d), (e), and (g) of the Act (7 U.S.C. 2(d), (e), (g)).

or board of trade." [22] Section 112(c)(6) of the CFMA amended the definition of "contract market" in Section 761(7) of the Bankruptcy Code to include reference to a "registered entity." [23] It also amended Section 761(8) of the Bankruptcy Code to incorporate by reference the definition of "registered entity" in the Act.[24] Section 1a(29) of the Act defines a "registered entity" to include "(iii) a derivatives clearing organization registered under Section 5b * * *".[25]

Therefore, the Commission believes that the CFMA permitted cleared OTC derivatives, which are subject to the rules of a DCO, to become "commodity contracts," with respect to an FCM, within the meaning of Section 761(4) of the Bankruptcy Code.[26] The Commission further believes that a court administering the bankruptcy of an FCM would consider the abovementioned CFMA interpretation to be a "reasonable" "construction of a statutory scheme" that the Commission has been "entrusted to administer" under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.,* 467 U.S. 837, 844 (1984).[27] Indeed, the Segregation and Portability Report states: "Ultimately, we believe a court is likely to conclude that [credit default swaps] are 'commodity contracts' (on account of which [credit default swap] clearing customers are 'customers' within the meaning of the Bankruptcy Code) * * *".[28]

C. Support for Legislative Changes

One commenter notes that the Commission proposed to Congress on August 17, 2009 certain amendments to the Bankruptcy Code that would achieve the same effect as the amendments proposed in the Notice. The commenter then speculated that the Commission may have been motivated to make such proposal because it believed that it otherwise lacks authority to promulgate the proposed amendments in the Notice.[29] Such speculation is mistaken. As stated above, the Commission believes that cleared OTC derivatives are "commodity contracts" within the meaning of Section 761(4)(A) of the Bankruptcy Code.[30] The commenter references proposals that Chairman Gary Gensler made to Congress. These proposals included the abovementioned amendments to the Bankruptcy Code in order to clarify the status of swaps, in the context of the improvements to regulation of over-the-counter derivatives markets that the Administration proposed [31] and other, more extensive changes to the Bankruptcy Code. The proposal that Congress make explicit what the CFMA left implicit does not mean that the interpretation of the existing statute that the Commission has advanced is not reasonable.[32]

III. Recommendation That the Commission Extend the Application of the Proposed Account Class for Cleared OTC Derivatives

One commenter recommends that the Commission extend the application of the account class for cleared OTC derivatives, as proposed in the Notice, to the bankruptcy of a commodity broker that is a DCO, rather than limit such application to the bankruptcy of a commodity broker that is an FCM. That commenter argues that the absence of such an extension would cause confusion, in the event of a DCO bankruptcy, regarding the treatment of the money, securities, and/or other property that the DCO holds to margin, guarantee, or secure positions in cleared OTC derivatives belonging to customers of DCO members.[33]

While sympathetic to these arguments, the Commission continues to believe that a DCO bankruptcy would be *sui generis.*[34] Therefore, the

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[22] *See supra* note 17.

[23] 11 U.S.C. 761(7).

[24] 11 U.S.C. 761(8).

[25] 7 U.S.C. 1a(29).

[26] *See supra* note 17.

[27] As mentioned above, "account class" governs the manner in which the trustee calculates the net equity (*i.e.,* claims against the estate) and the allowed net equity (*i.e., pro rata* share of the estate) for each customer of a commodity broker in bankruptcy. As the NPRM states, "[t]he Commission is empowered by Section 20 of the Commodity Exchange Act * * * (i) to define the 'net equity' of a customer of a commodity broker in bankruptcy, and (ii) to prescribe, by rule or regulation, the procedures for calculating such 'net equity.'" *See 74 FR at 40795.* The Commission is exercising its powers under Section 20 of the Act in determining whether cleared OTC derivatives could, with respect to an FCM that is a commodity broker, constitute a sixth and separate account class. The plain language of the Bankruptcy Code recognizes the authority of the Commission to make such determination. For example, Section 761(17) of the Bankruptcy Code subjects the definition of "net equity," in the case of a commodity broker, to such "rules and regulations as the Commission promulgates under the Act." Moreover, the legislative history of the 1978 amendments to the Bankruptcy Code supports the authority of the Commission. *Cf.* H.R. Rep. No. 95–595 (1977) (stating that "a final distinction [between Subchapter III of Title 7 of the Bankruptcy Code (11 U.S.C., Title 7, Subchapter III) and Subchapter IV] concerns the creation of a rule-making power in the Commodity Futures Trading Commission to carry out the provisions * * * The bill contains such a rule-making power with respect to * * * net equity * * * The rule-making power was requested by the CFTC and is appropriate in light of the germinal state of regulation in this area").

[28] The Segregation and Portability Report does note that "this outcome is not at all certain." *See* the Segregation and Portability Report at 35. However, the Segregation and Portability Report also observes that, in the event that a court administering the bankruptcy of a commodity broker disagrees with the determination of the Commission that cleared-only contracts (as the Statement on Cleared OTC Derivatives defines such term) constitute "commodity contracts" under Subchapter IV, "if the [commodity broker] segregates assets solely for the cleared [credit default swap] customers, then the cleared [credit default swap] customers' interest in those assets may be superior to any interest of the commodities customers or unsecured creditors of the [commodity broker] * * *". *See* the Segregation and Portability Report at 37. Therefore, the Segregation and Portability Report appears to imply that the creation, in the event of the bankruptcy of a commodity broker that is an FCM, of a separate account class for customer positions in cleared OTC derivatives (and money, securities, and/or other property margining, guaranteeing, or securing such positions), as the Notice proposed, may benefit customers, even if a court does not accord such positions (and relevant collateral) full protection under Subchapter IV and Regulation Part 190.

[29] As mentioned above, according to the FIA, the Segregation and Portability Report "concludes that there are reasonable arguments that cleared OTC derivatives may be viewed as 'commodity contracts' for purposes of Subchapter IV and Part 190. However, *'the risk of a contrary conclusion is not insignificant.'* [Emphasis supplied.]" The FIA then further observes:

The Commission may have reached the same conclusion. In its August 17, 2009 recommendations to Congress, the Commission has proposed amendments to the Bankruptcy Code that amend the definition of a "contract market" to remove the reference to "registered entity," which is currently the Commission's basis for finding that cleared-only derivatives contracts are "commodity contracts" under the Bankruptcy Code. Instead, the Commission recommends that the definition of a "commodity contract" be amended to include a "swap that is submitted to a derivatives clearing organization for clearing" by a "swap clearer" (as defined). The broad definition of a "swap" in the Bankruptcy Code would encompass all cleared OTC derivatives contracts.

See FIA CL02 at 6–7.

[30] *See supra* note 17.

[31] Such proposals are available at *http://financialstability.gov/docs/regulatoryreform/titleVII.pdf.*

[32] *See United States* v. *Sepulveda,* 115 F.3d 882, 885 (11th Cir. 1997) (quoting *Hawkins* v. *United States,* 30 F.3d 1077, 1082 (9th Cir. 1994)) (stating that "Congress may, however, 'amend a statute to clarify existing law * * *' Thus, an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite." *See also Wesson* v. *United States,* 48 F.3d 894, 900–901 (5th Cir. 1995); *Fowler* v. *Unified School District No. 259, Sedgwick County, Kansas,* 128 F.3d 1431 (10th Cir. 1997)).

[33] Specifically, The CME Group states:

If, as proposed by the Commission, an FCM were to utilize a separate account for customers' cleared OTC derivatives in the absence of a 4d order, the DCO must also maintain a similar account for holding such positions and their accompanying margins. If the cleared OTC derivatives account class will not apply in the unlikely event of a DCO bankruptcy, then it is unclear what account class would apply to the funds in the DCO's separate account for those OTC derivatives that it clears on behalf of its clearing FCMs' customers.

See The CME Group CL03 at 3.

[34] The proposing release to Regulation Part 190 states:

The Commission is proposing that all open commodity contracts, even those in a deliverable

Continued

Commission believes that the best approach, at present, would be to limit the application of the account class for cleared OTC derivatives to the bankruptcy of a commodity broker that is an FCM.

IV. Recommendation That the Commission Change the Proposed Definition of Cleared OTC Derivatives

One commenter recommends that the Commission change the definition of cleared OTC derivatives, as proposed in the Notice,[35] to better comport with the definition of cleared-only contracts in the Statement on Cleared OTC Derivatives.[36] Specifically, the commenter notes that the definition of cleared OTC derivatives proposed in the Notice appears to require that an FCM *actually submit* a contract for clearing. In contrast, the definition of cleared-only contracts in the Statement on Cleared OTC Derivatives only requires that a contract *is submitted through* an FCM for clearing.[37] The commenter states that, if the Commission adopts the recommendation, the Commission would render patent that it "does not intend to prohibit clearing FCMs from authorizing their customers to directly enter their transactions into the clearing system, in order to meet the definition of cleared OTC derivatives, as long as the transactions are cleared through an FCM."[38] The Commission agrees with this commenter, and has modified, in this release, the definition of cleared OTC derivatives proposed in the Notice in accordance with the recommendation from this commenter.

Another commenter poses two questions about the definition of cleared OTC derivatives proposed in the Notice.[39] All such questions appear related to whether the Commission may deem a contract listed for trading on a contract market (as Regulation 1.3(h) defines such term) to have been executed OTC, if such contract fails to reach a certain liquidity threshold on the contract market. The Commission believes that the definition of cleared OTC derivatives, as proposed in the Notice (*i.e.,* proposed Regulation 190.01(oo)), plainly limits such term to contracts that "have not been entered into or traded on a contract market (as such term is defined in § 1.3(h) of this chapter) * * *." Regulation 1.3(h), in turn, defines "contract market" in terms of a board of trade's designation as a DCM, not in terms of the liquidity of any particular contract.

V. Recommendations That the Commission Establish Objective Standards for Section 4d Orders

Two commenters recommend that the Commission propose objective standards for determining which cleared OTC derivatives would be eligible for a Section 4d Order.[40] The first commenter states that "it would be beneficial to DCOs and the Commission if the Commission were to adopt standards that would define the requirements that must be met for a cleared OTC derivative to qualify for 4d treatment."[41] In contrast, the second commenter states that the Commission must propose such objective standards "[i]n order to assure that 'cleared OTC derivatives' customers receive the benefits intended" by the proposed rules contained in the Notice.[42] The second commenter contends that, without such standards, customers with positions (and money, securities, and/or other property margining, guaranteeing, or securing such positions) in the account class for cleared OTC derivatives may argue, in the bankruptcy of a commodity broker that is an FCM, that: (i) Such positions share certain characteristics with positions in the futures account class; and (ii) thus such customers "should have access to the same pool of assets, *i.e.,* the futures account."[43]

The proposed regulations contained in the Notice (*i.e.,* the proposed amendment to Regulation 190.01(a)) unambiguously state that "positions in commodity contracts of one account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions)" would be treated, in the bankruptcy of any commodity broker, "as being held in the futures account class" only if, "*pursuant to a Commission order,*" such positions are "commingled with positions in commodity contracts of the futures account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions)."[44] Pursuant to that plain language, in the bankruptcy of a commodity broker, the decisive factor as to whether a position in a cleared OTC derivative contract (and relevant collateral) would be treated as belonging to the futures account class is whether the Commission *has* issued a Section 4d Order covering such contract, not whether the Commission *should have* or *could have* issued such a Section 4d Order.[45]

It is outside the purview of this release to propose objective standards for determining which cleared OTC derivative contracts would be eligible

position, be liquidated in the event of a clearing organization bankruptcy because it would be highly unlikely that an exchange could maintain a properly functioning futures market in the event of the collapse of its clearing organization. The Commission has proposed no other rules with respect to the operation of clearing organization debtors * * * Because the bankruptcy of a clearing organization would be unique, the Commission is not proposing a general rule in this regard. The potential for disruption of the Markets, and of the nation's economy as a whole, in the case of a clearing organization bankruptcy, together with the desirability of the Commission's active participation in developing a means of meeting such an emergency, has disposed the Commission to take a case-by-case approach with respect to clearing organizations.

See 46 FR 57535, 57545 (November 24, 1981).

[35] *See supra* note 5.

[36] *See supra* note 13.

[37] *See* The CME Group CL03 at 5.

[38] *Id.*

[39] Specifically, ELX asks:

• "What constitutes a 'cleared only' contract? If an OTC derivative is offered for exchange trading (thus losing the moniker OTC derivative) but fails to trade, or trades fewer than 100 contracts per day, is it considered cleared only?"

• "How much time will a contract be given to reach a liquidity threshold before being deemed 'cleared only' and required to be placed in a new account class?"

See ELX CL04 at 2.

[40] A Section 4d Order would permit positions in a cleared OTC derivative (and relevant collateral) to be included in the futures account class rather than another account class (*e.g.,* the account class for cleared OTC derivatives).

[41] *See* The CME Group CL03 at 7.

[42] *See* FIA CL02 at 3.

[43] *Id.* at 3–5.

[44] 74 FR at 40798–99.

[45] To enhance clarity on this point, the reference in the definition of cleared OTC derivatives, as proposed in the Notice, to positions (and relevant collateral) that are "segregated * * * in accordance with a rule, regulation, or order issued by the Commission," *see id.* at 40799, has been changed in this release to a reference to positions (and relevant collateral) that are "segregated or set aside * * * in accordance with a rule, regulation, or order issued by the Commission." Also, Regulation 190.01(a), as proposed in the Notice, has been changed to include the following emphasized language: "*Provided, further,* that, if positions in commodity contracts *that would otherwise belong to* one account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), are, pursuant to a Commission order, commingled with positions in commodity contracts of the futures account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), then the former positions (and the relevant money, securities, and/or other property) shall be treated, for purposes of this part, as being held in an account of the futures account class."

In making the abovementioned changes, the Commission intends to remove any possible doubt that:

• OTC derivatives subject to a Section 4d Order (including from inception) are "cleared OTC derivatives" within the meaning of Regulation 190.01(oo), but that such derivatives shall be treated, pursuant to Regulation 190.01(a), as belonging to the futures account class and not the cleared OTC derivative account class; and

• OTC derivatives not subject to a Section 4d Order may become "cleared OTC derivatives" within the meaning of Regulation 190.01(oo), but that such derivatives shall be treated, pursuant to Regulation 190.01(a), as belonging to the cleared OTC derivative account class and not the futures account class.

for a Section 4d Order. For the abovementioned reasons, such standards are not necessary to effectuate the purposes of the proposed rules contained in the Notice (including the proposed amendment to Regulation 190.01(a)).[46]

A third commenter poses questions pertaining to the operation of the futures account class after the Commission establishes a separate account class for cleared OTC derivatives.[47] In answer to such questions, the Commission makes the following three observations. First, the Commission will continue to review petitions for Section 4d Orders and will approve such petitions in appropriate cases. Second, the only effect of this release on contracts (and relevant collateral) that, pursuant to a previously issued Section 4d Order, are permitted to be commingled with contracts (and relevant collateral) of the futures account class, is to codify the Statement on Cleared OTC Derivatives and the Interpretative Statement that the Commission issued on November 30, 2004 (the "Statement on Commingling Foreign Futures Positions"),[48] which, in each case, provides that such contracts (and relevant collateral) are to be treated as part of the futures account class. This release does not in any way vitiate any previously issued Section 4d Order. Finally, in the absence of an appropriate order, the Commission does not intend to permit positions in the futures account class and positions in the separate account class for cleared OTC derivatives to be margined as a single portfolio.

VI. Recommendation That the Commission Establish Rules for the Treatment of Positions in Cleared OTC Derivatives (and Relevant Collateral)

In the Notice, the Commission stated that it "[did] not intend to specify substantive requirements for the treatment of cleared OTC derivatives (and the money, securities, and/or other property margining, guaranteeing, or securing such derivatives). Rather, the Commission propose[d] to define 'cleared OTC derivatives' in such a manner as to specify the sources from which such substantive requirements may originate." As the Notice indicates, a DCO rule or bylaw constitutes one possible source for such substantive requirements. Because different DCOs may adopt different substantive requirements, such DCOs may afford varying levels of protection to positions in cleared OTC derivatives (and relevant collateral).[49]

Two commenters disagree with such approach. They recommend that the Commission specify substantive requirements with respect to the treatment of positions in cleared OTC derivatives (and relevant collateral), if the DCO requires such positions (and relevant collateral) to be held in a separate account for cleared OTC derivatives.[50] One commenter observes:

> Depending on how much the requirements for cleared OTC derivatives accounts vary among DCOs, FCMs could find themselves in the position of having to maintain multiple cleared OTC derivatives accounts with respect to different DCOs. Moreover, under the Commission proposal, all cleared OTC derivatives accounts are considered to be part of the same account class, even if the accounts relate to multiple DCOs with varying requirements for such accounts. Therefore, the available funds in the cleared OTC derivatives account class could be diluted for customers of a bankrupt FCM who hold OTC derivatives cleared by a DCO with more stringent requirements because the account class also contains the margins of customers who hold OTC derivatives cleared by a DCO with less stringent requirements.[51]

The Commission does not disagree with the recommendations of the two commenters, and has directed staff to recommend for the Commission's consideration proposals that would impose substantive requirements with respect to the treatment of positions in cleared OTC derivatives (and relevant collateral).

The Commission has decided to promulgate the final rules contained in this release, without waiting to propose the abovementioned requirements, because the Commission believes that it is important, in light of recent market events (including disruptions in global credit markets), to enhance certainty, as soon as possible, with respect to the protections available under Subchapter IV and Regulation Part 190 to positions in cleared OTC derivatives (and relevant collateral), however the FCM and the DCO treat such collateral. Moreover, the Commission believes that it is important to enhance certainty, as soon as possible, regarding the treatment, in a bankruptcy of any commodity broker, of customers with positions (and relevant collateral) subject to a Section 4d Order. Therefore, for the avoidance of doubt, the Commission clarifies that, after the final rules become effective, a position in an OTC derivative (and relevant collateral) that a customer clears through an FCM with a DCO, which position (and collateral) is not subject to a Section 4d Order, would be considered part of the cleared OTC derivative account class, as soon as, but only after, a DCO rule or bylaw that requires such positions (and relevant collateral) to be held in a separate account for cleared OTC derivatives becomes effective, either through self-certification or approval by the Commission.[52] Such rule or bylaw need not specify any particular treatment of such positions (and relevant collateral) at this time in order for such positions to be considered within the OTC derivative account class.

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[46] As the Notice states: "The Commission is proposing [to create an account class for cleared OTC derivatives] at this time because of increased interest among DCOs in clearing OTC derivatives, and the need to enhance certainty regarding the treatment of cleared OTC derivatives in the bankruptcy of a commodity broker in bankruptcy." 74 FR at 40796.

[47] Specifically, ELX asks:

- "[W]hether the DCO will be permitted to cross margin the new account class envisioned by the Proposed Rules against related products in different account classes * * *"
- "Will 4d exemptions still be granted after the new account class is created?"
- "What will be the status of previously granted 4d exemptions, and will they be grandfathered or required to be transferred into the new account class?"

ELX CL04 at 2.

[48] The Statement on Cleared OTC Derivatives can be found at 73 FR 65514 (November 4, 2008). The Statement on Commingling Foreign Futures Positions can be found at 69 FR 69510 (November 30, 2004).

[49] As The CME Group accurately observed, the proposed definition of "cleared OTC derivatives" in the Notice would permit, for example, "one DCO [to] model its rule on the requirements for 4d segregated accounts which limit the instruments in which such funds may be invested to those set forth in Regulation 1.25," and "another DCO [to] use Regulation 30.7 requirements as its guide, and choose not to specify permissible investments." The CME Group CL03 at 6.

[50] FIA states: "In adopting these standards, the Commission should also provide guidance regarding the treatment of funds deposited to margin 'cleared OTC derivatives.'" FIA CL02 at 4.

In addition, The CME Group states:

> Given that the Commission's goal is to ensure that customers clearing OTC derivatives receive bankruptcy protection, and in the interest of providing consistency in the safeguards for OTC customer positions and margins, the Commission should define the minimum requirements that must apply to cleared OTC derivatives accounts for transactions that are cleared through any DCO with respect to those areas that the Commission has already addressed for 4d accounts, including permitted investments, recordkeeping, and acknowledgement letters. The CME Group CL03 at 6–7.

[51] *See* The CME Group CL03 at 6.

[52] *See* Regulations 40.5 and 40.6 (17 CFR 40.5, 40.6).

VII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [53] requires Federal agencies, in promulgating regulations, to consider the impact of those regulations on small businesses. The final rules promulgated in this release will affect only FCMs and DCOs. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations in accordance with the RFA.[54] The Commission has previously determined that FCMs [55] and DCOs [56] are not small entities for the purpose of the RFA. Accordingly, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that the final rules promulgated herein will not have a significant impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [57] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any "collection of information" as defined by the PRA. The final rules promulgated in this release do not require the new collection of information on the part of DCOs or FCMs. Accordingly, for purposes of the PRA, the Commission certifies that the final rules promulgated in this release would not impose any new reporting or recordkeeping requirements.

C. Cost-Benefit Analysis

Section 15(a) of the Act requires that the Commission, before promulgating a regulation under the Act or issuing an order, consider the costs and benefits of its action. By its terms, Section 15(a) of the Act does not require the Commission to quantify the costs and benefits of a new regulation or determine whether the benefits of the regulation outweigh its costs. Rather, Section 15(a) of the Act simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the Act further specifies that costs and benefits shall be evaluated in light of the following considerations: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any one of the five considerations and could determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission has evaluated the costs and benefits of the final rules promulgated in this release in light of (i) the comments that it has received on the Notice and (ii) the specific considerations identified in Section 15(a) of the Act, as follows:

1. Protection of Market Participants and the Public

The final rules promulgated in this release would benefit FCMs and DCOs, as well as customers of the futures and options markets, by providing greater certainty, (i) in a bankruptcy of a commodity broker that is an FCM, regarding the treatment of cleared OTC derivatives, and (ii) in a bankruptcy of any commodity broker, regarding the allocation of positions in commodity contracts (and relevant money, securities, and/or other property) of one account class that are commingled in an FCM or DCO account, pursuant to a Section 4d Order, with positions in commodity contracts (and relevant money, securities, and/or other property) of the futures account class.

2. Efficiency and Competition

The final rules promulgated in this release are not expected to have an effect on efficiency or competition.

3. Financial Integrity of Futures Markets and Price Discovery

The final rules promulgated in this release would enhance the protection, in the bankruptcy of a commodity broker that is an FCM, of customers with positions in cleared OTC derivatives by providing an account class in which to hold such positions (and relevant money, securities, and/or other property). Further, the final rules would enhance certainty regarding the treatment, in a bankruptcy of any commodity broker, of customers with positions (and relevant money, securities, and/or other property) subject to a Section 4d Order, by removing concerns regarding whether the Statement on Cleared OTC Derivatives, as well as the Statement on Commingling Foreign Futures Positions, would be limited to the specific factual patterns addressed therein. Thus, the final rules would contribute to the financial integrity of the futures and options markets as a whole.

4. Sound Risk Management Practices

The final rules promulgated in this release would reinforce the sound risk management practices already required of FCMs and DCOs, by (i) providing an account class, in the bankruptcy of a commodity broker that is an FCM, in which to hold positions in cleared OTC derivatives (and relevant money, securities, and/or other property), and (ii) providing certainty to FCMs and DCOs regarding the allocation between account classes, in a bankruptcy of any commodity broker, of customer positions (and relevant money, securities, and/or other property) subject to a Section 4d Order.

5. Other Public Considerations

Recent market events, including disruptions in global credit markets, render it prudent to enhance certainty regarding the treatment of customer positions (and relevant money, securities, and/or other property) in a commodity broker bankruptcy.

Accordingly, after considering the five factors enumerated in the Act, the Commission has determined to promulgate the final rules as set forth below.

List of Subjects in 17 CFR Part 190

Bankruptcy, Brokers, Commodity futures.

■ For the reasons stated in the preamble, the Commission hereby amends 17 CFR part 190 as follows:

PART 190—BANKRUPTCY

■ 1. The authority citation for part 190 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7a, 12, 19, and 24, and 11 U.S.C. 362, 546, 548, 556, and 761–766, unless otherwise noted.

■ 2. In § 190.01, revise paragraph (a) and add paragraph (oo) to read as follows:

§ 190.01 Definitions.

* * * * *

(a) *Account class* means each of the following types of customer accounts which must be recognized as a separate class of account by the trustee: futures accounts, foreign futures accounts, leverage accounts, commodity option accounts, delivery accounts as defined in § 190.05(a)(2), and, only with respect to the bankruptcy of a commodity broker that is a futures commission merchant, cleared OTC derivatives accounts; *Provided, however,* That to the extent that the equity balance, as defined in § 190.07, of a customer in a

[53] 5 U.S.C. 601 *et seq.*

[54] 47 FR 18618 (April 30, 1982).

[55] *Id.* at 18619.

[56] 66 FR 45604, 45609 (August 29, 2001).

[57] 44 U.S.C. 3501–3520.

commodity option, as defined in § 1.3(hh) of this chapter, may be commingled with the equity balance of such customer in any domestic commodity futures contract pursuant to regulations under the Act, the aggregate shall be treated for purposes of this part as being held in a futures account; *Provided, further,* that, if positions in commodity contracts that would otherwise belong to one account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), are, pursuant to a Commission order, commingled with positions in commodity contracts of the futures account class (and the money, securities, and/or other property margining, guaranteeing, or securing such positions), then the former positions (and the relevant money, securities, and/or other property) shall be treated, for purposes of this part, as being held in an account of the futures account class.

* * * * *

(oo) *Cleared OTC derivatives* shall mean positions in commodity contracts that have not been entered into or traded on a contract market (as such term is defined in § 1.3(h) of this chapter) or on a derivatives transaction execution facility (within the meaning of Section 5a of the Act), but which nevertheless are submitted through a commodity broker that is a futures commission merchant (as such term is defined in § 1.3(p) of this chapter) for clearing by a clearing organization (as such term is defined in this section), along with the money, securities, and/or other property margining, guaranteeing, or securing such positions, which are required to be segregated or set aside, in accordance with a rule, regulation, or order issued by the Commission, or which are required to be held in a separate account for cleared OTC derivatives only, in accordance with the rules or bylaws of a clearing organization (as such term is defined in this section).

■ 4. In § 190.07, revise paragraph (b)(2)(viii) to read as follows:

§ 190.07 Calculation of allowed net equity.

(b) * * *

(2) * * *

(viii) Subject to paragraph (b)(2)(ix) of this section, the futures accounts, leverage accounts, options accounts, foreign futures accounts, and cleared OTC derivatives 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.

* * * * *

■ 5. Amend "bankruptcy appendix form 4—proof of claim" in Appendix A to Part 190 by revising paragraph a in section III to read as follows:

Appendix A to Part 190—Bankruptcy Forms

* * * * *

bankruptcy appendix form 4—proof of claim

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III. * * *

a. Whether the account is a futures, foreign futures, leverage, option (if an option account, specify whether exchange-traded or dealer), "delivery" account, or, only with respect to a bankruptcy of a commodity broker that is a futures commission merchant, a cleared OTC derivatives account. A "delivery" account is one which contains only documents of title, commodities, cash, or other property identified to the claimant and deposited for the purposes of making or taking delivery on a commodity underlying a commodity contract or for payment of the strike price upon exercise of an option.

Issued in Washington, DC, on March 31, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–7742 Filed 4–5–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 570

[Docket No. 5326–F–02]

RIN 2506–AC28

Section 108 Community Development Loan Guarantee Program: Participation of States as Borrowers Pursuant to Section 222 of the Omnibus Appropriations Act, 2009

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: This final rule follows publication of a July 22, 2009, interim rule that implemented section 222 in Division I of the Omnibus Appropriations Act, 2009. Section 222 authorizes HUD, to the extent of its Fiscal Year (FY) 2009 loan guarantee authority, to provide community development loan guarantees, under section 108 of the Housing and Community Development Act of 1974, to States borrowing on behalf of local governments in nonentitlement areas (governments that do not receive annual Community Development Block Grants (CDBGs) from HUD). Section 108 authorizes HUD to guarantee notes issued by such nonentitlement local governments or their designated public agencies supported by the respective State's pledge of its CDBG funds. Prior to the enactment of section 222, HUD lacked authority to guarantee notes issued by States on behalf of local governments in nonentitlement areas. HUD received a single public comment on the July 22, 2009, interim rule, which expressed support for the interim regulatory amendments. HUD is adopting the interim rule without change.

DATES: *Effective Date:* May 6, 2010.

FOR FURTHER INFORMATION CONTACT: Paul Webster, Director, Financial Management Division, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7186, Washington, DC 20410; telephone number 202–708–1871 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On July 22, 2009, at 74 FR 36384, HUD published an interim rule to implement section 222 in Division I of the Omnibus Appropriations Act, 2009, (Pub. L. 111–8) (2009 Appropriations Act). Section 222 authorizes expanded loan guarantee authority under section 108 of the Housing and Community Development Act of 1974 (HCD Act) for Fiscal Year (FY) 2009.

Section 108 of the HCD Act provides local governments with access to long-term (up to 20-year) fixed-rate loans at relatively low interest rates to finance certain categories of eligible CDBG projects. Historically, section 108 guarantee authority has been limited to units of general local government and their public agencies. States have participated in the section 108 program by supporting loan guarantee applications of local governments in nonentitlement areas (governments that do not receive annual CDBG funds from HUD) and by pledging the State's CDBG allocations to secure the obligations issued by the local governments. However, States have not been able to participate in the program as issuers of obligations. One of the administrative provisions of the 2009 Appropriations Act, section 222, authorizes HUD, to the extent allowed under FY 2009 loan guarantee authority, to provide section 108 community development loan