



April 14, 2020

Fact Sheet: Notice of Proposed Rulemaking – Part 190 Bankruptcy Regulations

The Commodity Futures Trading Commission is proposing amendments to Part 190 of its regulations, which governs the bankruptcy proceedings for commodity brokers such as futures commission merchants (FCMs) and derivatives clearing organizations (DCOs). This proposal—which is in no way related to the COVID-19 pandemic—is the first substantive update of these rules since they were enacted 37 years ago, and is the product of more than two years of work by Commission staff. In proposing these rules, the Commission is exercising its broad power under the Commodity Exchange Act to make regulations with respect to commodity broker debtors. The proposed amendments are meant to comprehensively update Part 190 to reflect current market practices and lessons learned over the last three decades from past commodity broker bankruptcies.

Building on a Strong Foundation

The CFTC has a strong set of governing rules and supervision programs for FCMs and DCOs, with robust standards for capital and financial resources, risk management, and protection of customer funds. These have been enhanced over the years, and have demonstrated their worth and effectiveness in helping FCMs and DCOs weather the recent extraordinary market volatility. Nonetheless, it is the Commission's responsibility to address the highly rare case of the bankruptcy of an FCM, as well as the unprecedented case of the possible bankruptcy of a DCO.

Major Themes for the Revisions to Part 190

While the proposed revision to Part 190 carries forward significant portions of the existing regulation, there are important proposed changes. The major themes in changes to Part 190 include the following:

Improvements to Customer Protection

- Many changes are designed to enhance the protection of customer property: by strengthening the rules requiring that shortfalls in property segregated for customers be made up from the FCM's general assets, and by clarifying that claims of public customers come before proprietary and affiliate claims, and that public customers are entitled among themselves to a pro rata distribution based on their respective claims.
- Other changes would foster the policy preference for transferring positions of public customers, and those customers' proportionate share of associated collateral, to a solvent FCM instead of liquidating those positions. Transferring or "porting" positions both protects customers, who get to keep their hedging and other positions, and protects markets, by avoiding the forced liquidation of a large volume of positions.

- By clarifying the trustee’s discretion to make reasonable estimates under conditions of imperfect information, the revised rules support distributing more funds to customers more promptly.

A Modernized Rule Set

- Many of the changes follow developments in the technological ecosystem, including exponential changes to the speed of transactions, changes from paper-based to electronic-based communication and recording of “documents of title,” and increased incidence of deliverable assets that are intangible (including digital currencies).
- Many of the changes are intended to update Part 190 in light of shifts in the regulatory framework over the past three decades, including addressing the interaction between Part 190 and recent revisions to the Commission’s customer protection rules.
- Many of these changes also recognize the actual practice in prior FCM bankruptcies.

Enhanced Clarity and Transparency

- A new section is added to set out core concepts for Part 190, in order to enhance the understanding of DCOs, FCMs, their customers, bankruptcy trustees, and the public at large.
- The proposal clarifies that Part 190 is applicable in the context of proceedings under the Securities Investor Protection Act in the case of FCMs that are also broker-dealers, and resolution of a DCO under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Resolution”).

Addressing Challenges to Financial Market Infrastructures

- The Commission is proposing a new subpart C to Part 190, governing the bankruptcy of a DCO. This will establish, in advance, the approach to be taken in order to foster prompt action in the event such a bankruptcy occurs, and in order to establish a clear counterfactual (i.e., “what would creditors receive in liquidation in bankruptcy?”) in the event of a Resolution of a DCO.
- The proposed framework allows the trustee appropriate discretion in dealing with this type of bankruptcy, which has never occurred.

Request for Comment on Proposed Rule

The Commission invites comments on all aspects of the proposed rule and outlines specific questions for comment. Comments must be received on or before 90 days from the Commission’s Open Meeting on April 14, 2020 issuing the 2020 Proposal. The public may submit comments, identified by “Part 190 Bankruptcy Regulations” and RIN 3038-AE67, by any of the following methods:

- **CFTC Comments Portal:** <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.
- **Mail:** Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- **Hand Delivery/Courier:** Follow the same instructions as for Mail, above.