

and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Because this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to revise Class E airspace at Scammon Bay Airport, Scammon Bay, AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9T, *Airspace Designations and Reporting Points*, signed August 27, 2009, and effective September 15, 2009, is to be amended as follows:

* * * * *

Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Scammon Bay, AK [Revised]

Scammon Bay Airport, AK
(Lat. 61°50'40" N., long. 165°34'25" W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Scammon Bay Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Scammon Bay Airport, AK.

* * * * *

Issued in Anchorage, AK, on December 3, 2009.

Michael A. Tarr,

Acting Manager, Alaska Flight Services Information Area Group.

[FR Doc. E9–29846 Filed 12–15–09; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 190

RIN 3038–AC90

Operation, in the Ordinary Course, of a Commodity Broker in Bankruptcy

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (the “Commission”) proposes amending its regulations (17 CFR Chapter 1, hereinafter, the “Regulations”) regarding the operation of a commodity broker in bankruptcy, in order to permit the trustee in such bankruptcy to operate, with the written permission of the Commission, the business of such commodity broker in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of such commodity broker under appropriate circumstances, as determined by the Commission.

DATES: Submit comments on or before January 15, 2010.

ADDRESSES: You may submit comments, identified by RIN number, by any of the following methods:

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *Agency Web Site:* <http://www.cftc.gov>. Follow the instructions for submitting comments on the Web site.

• *E-mail:* secretary@cftc.gov. Include the RIN number in the subject line of the message.

• *Fax:* 202–418–5521.

• *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

• *Hand Delivery/Courier:* Same as mail above.

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. Authority of the Commission To Promulgate and Amend Regulation 190.04(d)

The Commission is empowered by Section 20 of the Commodity Exchange Act (the “Act”) to provide “[n]otwithstanding title 11 of the United States Code * * * with respect to a commodity broker that is a debtor under chapter 7 of title 11 of the United States Code, by rule or regulation * * * (3) the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition under such chapter, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation.”¹

The Commission exercised such power to promulgate Regulation 190.04(d), which specifies the procedures that a trustee must follow in liquidating open commodity contracts carried by a commodity broker in bankruptcy. Similarly, the Commission will exercise such power when amending Regulation 190.04(d).

Currently, Regulation 190.04(d)(2) denies a trustee the authority to purchase or sell new commodity contracts on behalf of customers of a commodity broker in bankruptcy, except to: (1) Offset an open commodity contract; (2) transfer any transferable notice (received by either the trustee or the commodity broker) applicable to an open commodity contract; and (3) cover, in its discretion and with the approval of the Commission, inventory or commodity contracts of the commodity broker that cannot be immediately liquidated due to market conditions (including price limits).²

¹ 17 U.S.C. 24.

² 17 CFR 190.04(d)(2).

II. Proposed Amendment To Allow the Trustee To Operate, in the Ordinary Course, a Commodity Broker in Bankruptcy

A. Background

In the proposing release to the original Regulation Part 190 (the "Proposing Release"), the Commission specified the purposes that it intended Regulation Part 190 to achieve, which included:

[T]o limit the period during which the bankruptcy estate is at risk from fluctuations in value of the commodity contracts and other property contained therein; * * * to maximize recovery in kind; and * * * to provide an understandable and workable method for operating the estate pending liquidation.³

In the typical case, a commodity broker in bankruptcy would be insolvent. If a commodity broker is insolvent, then it would not have the capital necessary for operating its business, including for supporting the credit of its customers, or for otherwise performing on its obligations.⁴ Thus, preventing a trustee from purchasing or selling new commodity contracts, whether for the commodity broker or the customers thereof, would generally (i) minimize the risk of loss to customers of the commodity broker, and (ii) therefore, maximize the scope of recovery for such customers.

However, certain purchases or sales of new commodity contracts may actually reduce the risk of loss to customers of a commodity broker in bankruptcy. Therefore, when the Commission promulgated Regulation Part 190 in 1983, the Commission created certain exceptions to Regulation 190.04(d)(2), as described above. By creating such exceptions, the Commission acknowledged that the trustee must be allowed to purchase or sell new commodity contracts, whether for the commodity broker or the customers thereof, in order to: (1) Liquidate open commodity contracts; or (2) transfer an incipient delivery obligation of an open commodity contract. Facilitating such liquidation would limit the period in

which the estate of the commodity broker is at risk for fluctuations in value. Permitting such transfer would tend to maximize recovery of customers of the commodity broker, by allowing the trustee to minimize or avoid claims for losses resulting from the inability of the estate of the commodity broker to fulfill obligations to take or effect delivery on open commodity contracts.

In addition to the exceptions enumerated above, the Commission acknowledged that, if the trustee cannot immediately liquidate the inventory or open commodity contracts of a commodity broker in bankruptcy, because of market conditions (including price limits), then the trustee should be allowed to purchase or sell new commodity contracts, in order to cover or partially cover such inventory or commodity contracts. The Commission intended to permit such cover or partial cover in order to prevent, among other things, the "material erosion in value" of such inventory or commodity contracts, which would diminish the recovery of the customers of the commodity broker.⁵

B. The Proposed Amendment

The Commission is proposing to amend Regulation 190.04(d) to allow the trustee, under appropriate circumstances, to operate the business of a commodity broker in bankruptcy in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of the debtor (the "Amendment"). The appropriateness of a particular set of circumstances would be determined by the Commission in its discretion, and such operation would require the written permission of the Commission. Pursuant to Regulation 190.10(d), the

⁵ In the Proposing Release, the Commission included the following version of Regulation 190.04(d)(2) (referenced in the Proposing Release as Regulation 190.04(d)(3)): Nothing in this Part shall be interpreted to permit the trustee to purchase new commodity contracts for customers of the debtor: Provided, however, That to prevent *material erosion in value*, the trustee may, in its discretion and with the approval of the Commission, cover uncovered inventory or commodity contracts of the debtor which cannot be liquidated immediately because of limit moves or other market conditions.

46 FR 57353, 57561 (November 24, 1981). However, in the adopting release to Regulation Part 190 (the "Adopting Release"), the Commission removed the reference to "material erosion in value" in proposed Regulation 190.04(d)(2), in response to a comment that such reference would "have limited the cases in which cover transactions could be sought by the trustee." Nevertheless, the Commission reiterated in the Adopting Release that the primary purpose of Regulation 190.04(d)(2) was to prevent a "material erosion in value" of uncovered inventory or commodity contracts, by stating that "the Commission * * * believes cover transactions would be limited to this purpose." 48 FR 8716, 8729 (March 1, 1983).

Commission has delegated all the functions of the Commission in Regulation Part 190, except one, to the Director of the Division of Clearing and Intermediary Oversight, and therefore, under this proposed amendment, the Director would also have the power to make such determination and to issue such written permission.⁶

C. Rationale for the Proposed Amendment

Recently, events have demonstrated that a commodity broker may enter into bankruptcy while not insolvent.⁷ For example, on Friday, November 25, 2005, after the closing of the relevant markets, Refco, LLC ("Refco") filed for relief under Subchapter IV of Chapter 7 of the Bankruptcy Code, primarily to satisfy a precondition for the sale of its FCM business to a third party. Previously, the United States Bankruptcy Court for the Southern District of New York ("District Court") had approved the sale of that FCM business. According to the agreement governing the sale, the third party would give the parent entities of Refco (i) a specified sum and (ii) the opportunity to retain the net regulatory capital of Refco.⁸

Shortly after Refco filed for relief under Subchapter IV of Chapter 7 of the Bankruptcy Code, the sale of its FCM business to a third party was consummated. Prior to the re-opening of the relevant markets on Sunday, November 27, 2005, all of the customer accounts of Refco, comprising one hundred percent of the net equity of each customer, were transferred to the third party.

During the Refco proceedings, it was practicable to transfer customer accounts when all relevant markets were closed. However, it may not always be so practicable. For example, on Friday, September 19, 2008, prior to the closing of the relevant markets, Lehman Brothers Inc. ("Lehman") became the subject of a proceeding under the Securities Investor Protection

⁶ Regulation 190.10(d) would apply to the proposed Amendment. Regulation 190.10(d) states:

Until such time as the Commission orders otherwise, the Commission hereby delegates to the Director of the Division of Clearing and Intermediary Oversight, and to such members of the Commission's staff acting under his direction as he may designate, all the functions of the Commission set forth in this part except the authority to approve or disapprove a withdrawal or settlement of a commodity account by a public customer pursuant to § 190.06(g)(3).

⁷ The Bankruptcy Code permits a solvent entity to legally file for relief under Chapter 7 of the Bankruptcy Code. See Collier on Bankruptcy ¶ 109.03[2].

⁸ See *In re: Refco, LLC*, No. 05-60134-rdd, Docket No. 5 (Bankr. S.D.N.Y. Nov. 25, 2005).

³ 46 FR 57535, 57536 (November 24, 1981).

⁴ In general, commodity brokers are required to guarantee all customer positions that they carry, as well as to use their own capital to cover the debit balance of any customer in an omnibus segregated account that they maintain, in order to prevent the commodity broker from using the property belonging to other customers to margin, guarantee, or secure the positions of the customer incurring such debit. See Section 4d of the Act (7 U.S.C. 6d). See also CFTC Letter No. 00-106 (November 22, 2000) (stating that a commodity broker that is a futures commission merchant ("FCM") must cover any deficit in the customer segregated account with its own funds or property, and not the funds or property of other customers).

Act of 1970 (“SIPA”),⁹ primarily to satisfy a precondition for the sale of its securities broker-dealer business and its FCM business to a third party. On Saturday, September 20, 2008, the District Court approved the sale of such securities broker-dealer business and FCM business, in exchange for the third party giving the parent of Lehman a specified sum.¹⁰ Shortly after such approval, the sale was consummated. Soon after the consummation, the customer accounts of Lehman began to be transferred to the third party. However, because the Lehman proceedings under SIPA had commenced in District Court prior to the closing of the relevant markets, customers of Lehman would have been unable to manage their accounts, absent a provision in the Order issued by the District Court permitting the trustee to conduct business in the ordinary course.¹¹

The Commission is proposing the Amendment to enable customers to manage their accounts, after their commodity broker enters into bankruptcy and prior to the transfer of their accounts, in certain circumstances. As the Refco and Lehman proceedings illustrate, there may be cases where a transfer of customer accounts has been arranged pre-bankruptcy, and where a commodity broker in bankruptcy may nevertheless possess the capital necessary to continue operating its business in the ordinary course (*e.g.*, to continue supporting the credit of its customers and performing on its other obligations), pending imminent transfer of customer accounts to another commodity broker. Therefore, permitting the trustee to operate such business in the ordinary course may advance the purpose of Regulation Part 190—namely, “to provide an understandable and workable method for operating the estate pending liquidation.”¹² Thus, the proposed Amendment is consistent with the past practice of the Commission in creating exemptions to Regulation 190.04(d)(2) when necessary to advance the purposes of Regulation Part 190. Additionally, allowing customers to manage their accounts, as much as possible, as if the commodity broker had not entered into bankruptcy would be in the best interests of both the customers and the relevant markets in general.

Whether a commodity broker in bankruptcy has sufficient capital to continue operating its business in the ordinary course is inherently a factual question. Therefore, the Commission reserves the power to limit the application of the proposed Amendment, in its discretion, by: (1) Requiring the trustee to obtain the written permission of the Commission; and (2) determining the circumstances under which the trustee may purchase or sell new commodity contracts on behalf of customers of the commodity broker in bankruptcy.

In deciding whether to apply the proposed Amendment to a particular commodity broker in bankruptcy, the Commission may consider the following factors: (1) Whether the commodity broker has entered into an agreement providing for the imminent transfer of its customer accounts to an entity that is ready, willing and able to accept such transfer promptly; (2) whether the commodity broker has sufficient capital, at the time it becomes subject to bankruptcy proceedings, to continue operating its business in the ordinary course pending the transfer; and (3) whether a commodity broker will have sufficient capital, after the sale of its assets (including its FCM business), to continue operating its business in the ordinary course until all of its customer accounts have been transferred. The Commission anticipates that future bankruptcies of commodity brokers may present new factors for its consideration, and the proposed Amendment is therefore intended to provide the Commission with flexibility to consider such new factors in its discretion.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”)¹³ requires Federal agencies, in promulgating regulations, to consider the impact of those regulations on small businesses. As mentioned above, the proposed Amendment provides a limited exception to Regulation 190.04(d)(2), by permitting a trustee to operate, with the written permission of the Commission, the business of a commodity broker in bankruptcy in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of such commodity broker. The proposed Amendment does not impose a regulatory burden on either a commodity broker pre-bankruptcy or a trustee post-bankruptcy. Moreover, the

proposed Amendment will affect only FCMs (including certain foreign futures commission merchants).¹⁴ The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on such entities in accordance with the RFA.¹⁵ The Commission has previously determined that FCMs are not small entities for the purpose of the RFA.¹⁶ Accordingly, pursuant to 5 U.S.C. 605(b), the Chairman certifies, on behalf of the Commission, that the proposed Amendment will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”)¹⁷ imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed Amendment does not require the new collection of information on the part of any entities that would be subject to the proposed Amendment. Accordingly, for purposes of the PRA, the Commission certifies that the proposed Amendment, if promulgated in final form, would not impose any new reporting or recordkeeping requirements.

C. Cost-Benefit Analysis

Section 15(a) of the Act¹⁸ 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 to determine whether the benefits of the regulation outweigh its costs. Rather,

¹⁴ The proposed Amendment may apply, in the future, to other commodity brokers that execute trades and carry accounts for clearing on behalf of customers—namely, commodity options dealers and leverage transaction merchants. Currently, no such commodity brokers exist. Therefore, even if such commodity brokers would constitute “small entities” for purposes of the RFA, the proposed Amendment can have no current impact on such commodity brokers. However, it is unlikely that such commodity brokers would constitute “small entities” for purposes of the RFA. In defining “small entities” for the purpose of the RFA, the Commission excluded FCMs based on the fiduciary nature of FCM-customer relationships, as well as the minimum financial requirements that apply to FCMs. See 47 FR 18618, 18619 (Apr. 30, 1982). Certain parts of this rationale would also be applicable to commodity options dealers, foreign futures commission merchants, and leverage transaction merchants.

¹⁵ 47 FR 18618 (Apr. 30, 1982).

¹⁶ *Id.* at 18619.

¹⁷ 44 U.S.C. 3501 *et seq.*

¹⁸ 7 U.S.C. 19.

⁹ 15 U.S.C. 78aaa–111.

¹⁰ See *In re: Lehman Brothers Holdings Inc., et al.*, No. 08–13555, Docket No. 258 (Bankr. S.D.N.Y. Sept. 20, 2008).

¹¹ See *S.I.P.C. v. Lehman Brothers, Inc.*, No. 08–8119, Docket No. 3 (S.D.N.Y. September 19, 2008).

¹² 46 FR 57535, 57536 (November 24, 1981).

¹³ 5 U.S.C. 601 *et seq.*

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, in its discretion, 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 proposed Amendment, in light of the specific considerations identified in Section 15(a) of the Act, as follows:

1. Protection of Market Participants and the Public

In the event of the bankruptcy of a commodity broker, the proposed Amendment would benefit the customers of such commodity broker, by providing them with the opportunity, under certain circumstances, to manage their accounts prior to the transfer of such accounts to a new commodity broker.

2. Efficiency and Competition

The proposed Amendment is not expected to have an effect on efficiency or competition.

3. Financial Integrity of Futures Markets and Price Discovery

As mentioned above, the proposed Amendment will promote financial integrity of the futures markets by providing customers of a commodity broker in bankruptcy with the opportunity, under certain circumstances, to manage their accounts prior to the transfer of such accounts to a new commodity broker.

4. Sound Risk Management Practices

The proposed Amendment is not expected to have a direct effect on the risk management practices of commodity brokers.

5. Other Public Considerations

Recent events, such as the Refco and Lehman proceedings, have demonstrated that the proposed Amendment is necessary and prudent.

Accordingly, after considering the five factors enumerated in the Act, the Commission has determined to propose the regulations set forth below.

List of Subjects in 17 CFR Part 190

Bankruptcy, Brokers, Commodity futures.

For the reasons stated in the preamble, the Commission proposes to amend 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. Add new paragraph (d)(3) to § 190.04 to read as follows:

§ 190.04 Operation of the debtor’s estate—general.

* * * * *

(d) * * *

(3) *Exception to liquidation only.*

Notwithstanding paragraph (d)(2) of this section, the trustee may, with the written permission of the Commission, operate the business of the debtor in the ordinary course, including the purchase or sale of new commodity contracts on behalf of the customers of the debtor under appropriate circumstances, as determined by the Commission.

* * * * *

Issued in Washington, DC, on December 9, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–29730 Filed 12–15–09; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 382

[Docket No. 2006–1 CRB DSTRA]

Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations governing the rates for the satellite digital audio radio services’ use of the ephemeral recordings statutory license under the Copyright Act for the period 2007 through 2012.

DATES: Comments and objections, if any, are due no later than January 15, 2010.

ADDRESSES: Comments and objections may be sent electronically to crb@loc.gov. In the alternative, send an original, five copies and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means of transmission. Comments and objections may not be delivered by an overnight delivery service other than U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024–0977. If hand delivered by a private party, comments and objections must be brought to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM–401, 101 Independence Avenue, SE., Washington, DC 20559–0600, between 8:30 a.m. and 5 p.m. If delivered by a commercial courier, comments and objections must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street, NE., Washington, DC, and the envelope must be addressed as follows: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, Room LM–403, 101 Independence Avenue, SE., Washington, DC 20559–0600.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor, by telephone at (202) 707–7658 or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

On January 24, 2008, the Copyright Royalty Judges published in the **Federal Register** their determination of royalty rates and terms under the statutory licenses under Sections 112(e) and 114 of the Copyright Act for the period 2007 through 2012 for satellite digital audio radio services (“SDARS”). 73 FR 4080. In *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1226 (DC Cir. 2009), the U.S. Court of Appeals for the DC Circuit affirmed the Judges’ determination in all but one respect, remanding to the Copyright Royalty Judges the single matter of specifying a royalty for the use of the ephemeral recordings statutory license under Section 112(e) of the Copyright Act. By order dated October 22, 2009, the Copyright Royalty Judges established a period commencing on November 2, 2009, and concluding on December 2, 2009, for Sound Exchange, Inc. and Sirius XM Radio Inc. (collectively, the “Parties”) to negotiate and submit a settlement of the ephemeral royalty rate