the action: (1) Is not a significant rule under Executive Order 12866; and (2) is not a significant rule under Department of Transportation Regulatory Policy and Procedures. Also, because this regulation is editorial in nature, no impact is expected to result, and a full regulatory evaluation is not required. In addition, the FAA certifies that the rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 121**

Air Carriers, Aircraft, Airmen, Aviation safety, Charter flights.

**The Amendment**

In consideration of the foregoing, the Federal Aviation Administration amends part 121 of title 14 of the Code of Federal Regulations as follows:

## PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

1. The authority citation for part 121 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 40119, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 46105.

2. Amend § 121.310 by revising paragraph (m) to read as follows:

**§ 121.310 Additional emergency equipment.**

* * * * *

(m) Except for an airplane used in operations under this part on October 16, 1987, and having an emergency exit configuration installed and authorized for operation prior to October 16, 1987, for an airplane that is required to have more than one passenger emergency exit for each side of the fuselage, no passenger emergency exit shall be more than 60 feet from any adjacent passenger emergency exit on the same side of the same deck of the fuselage, as measured parallel to the airplane's longitudinal axis between the nearest exit edges.

Issued in Washington, DC, on April 19, 2001.

**Donald P. Byrne,**

*Assistant Chief Counsel, Regulations Division.*

[FR Doc. 01–10238 Filed 4–24–01; 8:45 am]

BILLING CODE 4910–13–M

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 1 and 190

**RIN 3038—AB67**

## Opting Out of Segregation

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rules.

**SUMMARY:** Pursuant to section 111 of the Commodity Futures Modernization Act of 2000, the Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting a new rule allowing futures commission merchants (''FCM'') to offer certain customers the right to elect not to have funds, that are being carried by the FCM for purposes of margining, guaranteeing or securing the customers' trades on or through a registered derivatives transaction execution facility (''DTF''), separately accounted for and segregated. This is sometimes referred to as ''opting out'' of segregation. The CFTC is also adopting amendments to certain existing rules that would, among other things, govern the bankruptcy treatment of a customer that opts out of segregation.

**EFFECTIVE DATE:** June 19, 2001.

**FOR FURTHER INFORMATION CONTACT:** Lawrence B. Patent, Associate Chief Counsel, or Michael A. Piracci, Attorney-Advisor, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. Telephone: (202) 418–5430.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Introduction*

The Commodity Futures Modernization Act of 2000 (''CFMA''),[1] enacted on December 21, 2000, included a new section 5a of the Commodity Exchange Act (the ''Act'')[2] to permit a board of trade, subject to certain conditions, to elect to operate as a registered DTF in lieu of seeking designation as a contract market.[3] In order to operate as a registered DTF, the board of trade must meet certain requirements as to the underlying commodities traded and must restrict access to certain eligible traders. The newly-enacted section 5a(f) of the Act provides that a registered DTF may authorize an FCM to offer its customers that are eligible contract participants[4] the right not to have their funds that are carried by the FCM for purposes of trading on the registered DTF, separately accounted for and segregated. Opting out of segregation is not available to a customer who is not also an eligible contract participant.

### *B. Proposed Rules*

1. New Rule 1.68

On March 13, 2001, the Commission published a proposed new rule allowing FCMs to offer certain customers the right to elect not to have funds, that are being carried by the FCM for purposes of margining, guaranteeing or securing the customers' trades on or through a registered DTF, separately accounted for and segregated, sometimes referred to as ''opting out'' of segregation.[5] The Commission proposed to add new Rule 1.68 to implement the newly-enacted section 5a(f) of the Act. The proposed rule provided that an FCM shall not segregate a customer's funds where: (i) The customer is an eligible contract participant; (ii) the funds are deposited with the FCM for purposes of trading on a registered DTF; (iii) the DTF has authorized the FCM to permit eligible contract participants to elect not to have such funds segregated; and (iv) there is a written agreement signed by the customer[6] in which the customer elects to opt out of segregation and acknowledges that it is aware of the consequences of not having its funds segregated.[7] In particular, the agreement would have been required to explain that, to the extent a customer has a claim against the estate of a bankrupt FCM in connection with trades for which it has opted out of segregation,

[1] Commodity Futures Modernization Act of 2000, Pub. L. 106–554, 114 Stat. 2763 (to be codified as amended in scattered sections of 7 U.S.C.).

[2] 7 U.S.C. 1 *et seq.* (1994), *as amended by* Pub. L. 106–554, 114 Stat. 2763.

[3] Commission rules concerning DTFs will be included in a new Part 37. *See* 66 FR 14262 (March 9, 2001).

[4] Generally, eligible contract participants are: (1) Individuals with more than $10 million in total assets, or more than $5 million in total assets if entering into the transaction to manage risk; (2) financial institutions, investment companies, and insurance companies; (3) companies with more than $10 million in total assets, or a net worth exceeding $1 million if entering into the transaction in connection with the conduct of their businesses; and (4) commodity pools that have more than $5 million in total assets. *See* 7 U.S.C. 1a(12), as amended.

[5] *See* 66 FR 14507 (March 13, 2001).

[6] For purposes of satisfying the requirement that the customer sign the opt-out agreement, an electronic signature will be acceptable provided it satisfies the provisions of Rule 1.4. Commission rules referred to herein are found at 17 CFR Ch. 1 (2000).

[7] An FCM may offer benefits to customers who elect not to have their funds segregated. In making any such offer, however, an FCM may not make any misleading claims or disclosures.

the customer would be treated like a general creditor.[8]

Proposed Rule 1.68 also stated that: (1) The FCM could provide the customer a single monthly account statement with a notation of trades for which segregation does not apply; (2) the FCM's records must clearly distinguish those positions subject to the opt-out agreement and those that remain subject to segregation; (3) the required agreement with a customer to opt out of segregation may provide that it covers all DTFs that have authorized FCMs to offer such treatment of customer funds; and (4) a customer may revoke its election to opt out of segregation by notifying the FCM in writing, which would only be effective for trades entered into after the FCM received such notice from the customer. These provisions were intended to simplify the opt-out process for both FCMs and customers. Proposed Rule 1.68 further provided that in no event may customer funds related to DTF ''opt-out'' trades be commingled with customer funds segregated pursuant to section 4d of the Act and the Commission rules thereunder.

The proposed rule would also have provided that a customer who chose to opt out of segregation would not be permitted to establish a ''third-party custodial account,'' sometimes also referred to as a ''safekeeping account.'' In Financial and Segregation Interpretation No. 10 (''Interpretation No. 10''), the Commission's Division of Trading and Markets (the ''Division'') set forth guidelines for these types of accounts.[9]

2. Other Rule Proposals

The Commission proposed to add Rule 1.3(uu) to define the term ''opt-out customer'' as a customer who is an eligible contract participant and elects not to have funds carried by an FCM for purposes of trading on a DTF separately accounted for and segregated, in accordance with Rule 1.68. The Commission also proposed to amend Rule 1.3(gg), which defines the term ''customer funds.'' The Commission proposed to amend the rule to make clear that the funds of an opt-out customer would not be deemed ''customer funds.''

Rule 1.17(a)(1)(i) provides the standards for determining the minimum adjusted net capital that must be maintained by each person registered as an FCM. The Commission proposed to amend Rule 1.17(a)(1)(i)(B), which contains the volume of business element of these standards, to make clear that the funds of an opt-out customer are to be included in the computation of the FCM's minimum adjusted net capital requirement. The proposed amendment to the rule ensured that opt-out customers, by opting out of segregation, do not have an impact on the financial condition of the FCM, thereby increasing the risk to the other customers of the FCM or to the marketplace. In proposing the amendment, the Commission noted that by including the funds of the opt-out customer for purposes of calculating the minimum adjusted net capital, there is no effect on the current minimum capital requirements for registered FCMs.[10]

The Commission also proposed amending Rule 1.37. Rule 1.37(a) requires an FCM, for each account that it carries, to keep a permanent record that shows the name, address, and occupation of the person for whom the account is being carried, as well as any person guaranteeing the account or exercising trading control with respect to the account. The Commission proposed to maintain this requirement and to redesignate paragraph ''(a)'' as paragraph ''(a)(1).'' The Commission further proposed to add paragraph ''(a)(2),'' to require FCMs to keep a permanent record showing a customer's election pursuant to proposed Rule 1.68. The FCM would be permitted to indicate such a customer's election on the record it is required to keep under redesignated paragraph (a)(1).

Finally, the Commission proposed to amend Rule 190.07(b), which defines the term ''net equity'' for purposes of calculating the allowed net equity claim of a customer in the event of an FCM bankruptcy. The proposed amendment would make clear that the net equity of an opt-out customer should not include funds the customer has chosen not to have segregated and separately accounted for pursuant to proposed Rule 1.68. The Commission's intention was that, to the extent that a customer has a claim against the estate of a bankrupt FCM in connection with trades for which it has opted out of segregation, the customer would not be entitled to the normal customer priority in bankruptcy and would be treated as a general creditor.

## II. Final Rules

The 30-day comment period on the proposal expired on April 12, 2001. The Commission received six comment letters. The commenters were the Futures Industry Association (''FIA''), the Chicago Mercantile Exchange, Inc. (''CME''), National Futures Association (''NFA''), the Chicago Board of Trade (''CBOT''), the Options Clearing Corporation (''OCC''), and the Securities Industry Association (''SIA''). The commenters generally supported the proposed rules, although each suggested some modifications. The Commission notes its appreciation that most of the comment letters were submitted on time, and in some cases were received earlier than the deadline date. The early submission of comment letters was helpful in assisting the Commission to meet the statutory deadline for adoption of opt-out rules. Additionally, the Commission notes the usefulness of the comment letters in that they contained concise and specific suggestions.

### *A. Bankruptcy Treatment*

FIA, CME, NFA, CBOT, OCC, and SIA all expressed concern that customers who choose to opt out of segregation would, in the event of an FCM bankruptcy, be treated as general creditors and, therefore, would have claims inferior to proprietary accounts carried by an FCM.[11] For purposes of bankruptcy proceedings, proprietary accounts are included in the definition of a non-public customer.[12] Non-public customers receive a portion of the customer estate only after all public customer claims have been satisfied in full.[13] Therefore, under the proposed rules, a non-public customer would have a priority superior to an opt-out customer in the unlikely event that there are customer funds in excess of

[8] Normally, in the event of an FCM's bankruptcy, customer claims have priority with respect to customer property over all other claims, except claims ''attributable to the administration of customer property.'' *See* 11 U.S.C. 766(h); *see also* 17 CFR part 190. To the extent that the customer has claims against the bankrupt FCM's estate for trades to which segregation applies, *e.g.,* trades on or subject to the rules of contract markets, or of DTFs for which opting out of segregation is not permitted, the customer would be eligible for the customer priority. Thus, the same customer may have two different kinds of claims against the estate of a bankrupt FCM. *See* 48 FR 8716 (March 1, 1983).

[9] Financial and Segregation Interpretation No. 10, 1 Comm. Fut. L. Rep. (CCH) ¶ 7120 (May 23, 1984).

[10] Several other provisions of Rule 1.17 include calculations for determining the adjusted net capital required of an FCM in order to undertake various actions, such as prepaying subordinated debt. The Commission proposed to amend these rules to make clear that the funds of an opt-out customer are to be included in calculating the FCM's required adjusted net capital in these situations. *See* Rules 1.17(e)(1)(ii), 1.17(h)(2)(vi)(C)(*2*), 1.17(h)(2)(vii)(A)(*2*), 1.17(h)(2)(vii)(B)(*2*), 1.17(h)(2)(viii)(A)(*2*), 1.17(h)(3)(ii)(B), and 1.17(h)(3)(v)(B); *see also* Rule 1.12(b)(2) (determining the ''early warning'' level of adjusted net capital).

[11] A proprietary account is defined in Rule 1.3(y).

[12] *See* 17 CFR 190.01(bb).

[13] 17 CFR 190.08(b).

the net equity claims of all public customers in the bankrupt estate.

Upon reconsideration of this issue, the Commission agrees that opt-out customers should be entitled to no less protection than non-public customers. Accordingly, the Commission has amended Rule 190.01(bb), the definition of a non-public customer for bankruptcy purposes, to include opt-out customers. Additionally, the Commission will not amend Rule 190.07(b), the definition of net equity, as proposed, but will retain it as it currently reads. As a result, eligible contract participants may have two net equity claims against the estate of an FCM for purposes of bankruptcy proceedings: (i) A net equity claim as a non-public customer for claims based on agreements, contracts or transactions traded on or subject to the rules of a DTF for which the customer has opted out; and (ii) a net equity claim as a public customer based on all other commodity interest transactions with the FCM. On the former claims, the customer will have the same priority as proprietary accounts; on the latter claim, the customer will have the normal preferred customer priority.

In its comment letter, NFA also recommended that the Commission consider what bankruptcy issues may arise for security futures products that may be initiated and offset on different markets. Additionally, NFA recommended that the Commission consider the need to implement rules governing the treatment of customer funds in bankruptcy in the event of the insolvency of an exchange or clearing organization. As NFA recognizes in its letter, these issues, while certainly important, are not of immediate concern. Section 125 of the CFMA requires the Commission to undertake a complete study of the Act and the rules thereunder and to solicit the views of the public. In light of that study and the mandate to promptly adopt an opt-out provision, the Commission is deferring addressing these additional bankruptcy issues raised by NFA to a later date.

*B. Definition of Opt-Out Customer*

Pursuant to proposed Rule 1.3(uu), a customer is deemed an opt-out customer only to the extent that the customer has elected to opt out of segregation. In its comment letter, FIA indicated its concern that Rule 1.3(uu) as proposed could be read more broadly. The Commission has revised the text of Rule 1.3(uu) to make clear that a customer is an opt-out customer only as to those funds for which the customer has elected to opt out of segregation and is a customer, as defined in Rule 1.3(k), as to funds that are separately accounted for and segregated pursuant to section 4d of the Act and Rules 1.20–1.30, 1.32 and 1.36.

FIA, in suggesting language to clarify Rule 1.3(uu), appears to indicate that a customer must individually elect to opt out of segregation as to each particular DTF. As discussed above, and in the proposing release, the agreement entered into between an FCM and a customer may provide that it covers agreements, contracts or transactions on all DTFs that have authorized opting out. In such a case, there would be only one agreement that covers all DTFs on which the customer trades. If, however, an FCM chooses to draft the opt-out agreement so that it covers only a specific DTF, and, therefore, a separate agreement would be required for each DTF on which the customer conducts trades, that would also be permissible. However, the Commission does not require this latter arrangement in Rule 1.68 as adopted.[14]

*C. Separate Agreements*

Proposed Rule 1.68(e) would have prohibited a customer that elects to opt out of segregation from establishing a third-party custodial account as described in Interpretation No. 10. This provision was intended to prevent an opt-out customer from securing a priority in customer funds equal to or greater than that of customers whose funds are separately accounted for and segregated. FIA and NFA both suggested that the Commission could achieve this purpose in a more straightforward manner ''by prohibiting certain contractual provisions generally.'' The Commission agrees. Therefore, Rule 1.68 will require a customer who elects to opt out of segregation to agree not to enter into any agreement or understanding with an FCM that would permit the customer to retain a security interest in any assets deposited with the FCM that are not subject to segregation. Further, a customer may not enter into any agreement or understanding with an FCM relating to the manner in which the customer's assets will be held at the FCM that, in the event of bankruptcy, would give the customer a priority that is equal to or greater than the priority afforded customers whose funds are segregated. This prohibition applies to any agreement or understanding, whether or not it is the type discussed in Interpretation No. 10.[15]

*D. Movement of Funds Between Segregated and Opt-Out Accounts*

Rule 1.68(b) provides that under no circumstances may funds related to opt-out accounts be commingled with funds held in segregation. CBOT expressed its agreement with this rule and suggested that where a customer has both segregated and non-segregated accounts, the Commission use the same principles currently applied where a customer has both a regulated and non-regulated account. The Commission agrees. Where a customer has both a segregated and an opt-out account, any positive balance or net liquidating equities in the opt-out account may not be used to offset any deficit which may be in the segregated account.[16]

Proposed Rule 1.68(c) would have authorized an FCM to continue to hold trades and related funds for which a customer had previously elected to opt out of segregation in a non-segregated account after the customer revokes its opt-out election. The Commission had provided for this approach in proposed Rule 1.68(c) with the intention that the procedure would be the least burdensome on FCMs. The FIA, in its comment letter, noted, ''that offsetting positions between a customer's segregated account and a non-segregated account would be operationally difficult at best.'' Accordingly, FIA suggested that when an election to opt out of segregation is revoked, an FCM be required to transfer trades held in an opt-out account to a customer's segregated account, so long as the customer's positions in the non-segregated account are fully margined. NFA expressed a similar desire for such a requirement. CBOT indicated that this sort of transfer should not be permitted ''if the FCM has filed, or is in the process of filing, for bankruptcy.'' Because the transfer to a segregated account would result in the increased protection of customer assets and would be administratively more convenient for FCMs, the Commission has modified Rule 1.68(c) to require such a transfer, unless the FCM has filed, or has had filed against it, a petition for bankruptcy.

FIA also expressed a desire for FCMs to be permitted to establish a notice period before a customer's decision to revoke its election to opt out of segregation would become effective. FIA indicated that FCMs require a

[14] A customer is of course permitted to request that an FCM permit it to opt out of segregation as to trading only on specific DTFs. An FCM may grant or deny this request.

[15] OCC stated that ''an opt-out customer should be able to arrange for its own assets to be held separately and not subjected to the claims of other customers.'' SIA expressed a similar view. The Commission does not believe that such a separate holding arrangement would be consistent with opt-out status.

[16] *See* Division Form 1–FR–FCM Instructions at page 10–5.

reasonable time period to make the appropriate changes to books and records. The Commission recognizes that FCMs need time to make the required operational changes where a customer revokes its election to opt out of segregation. To avoid disputes as to what may constitute a reasonable time period, the Commission is adopting a five-business day limit to accomplish the necessary changes.

*E. Applicability to Contract Markets*

In their comment letters, CME, OCC, and SIA suggested that the choice to opt out of segregation should be extended to eligible contract participants trading on a designated contract market as well as on a DTF, because a designated contract market is subject to greater regulatory scrutiny than a DTF and the focus should be on the type of customer rather than the type of market involved. The CFMA, however, only provides for opting out of segregation in connection with trades executed on registered DTFs. Accordingly, at this time, the Commission will defer addressing any extension of opting out to trades on exchanges other than registered DTFs. The Commission may, however, reconsider this issue in connection with the study of the Act and the rules thereunder required by section 125 of the CFMA.

*F. Disclosure to Pool Participants*

NFA, in its comment letter, noted its support for the requirement that customers electing to opt out of segregation enter into a written agreement acknowledging the consequences of such an election. NFA indicated that while this will provide adequate disclosure in the majority of cases, additional disclosure might be considered in the case of commodity pools that qualify as eligible contract participants. Specifically, NFA noted that retail investors might be investing in a commodity pool that qualifies as an eligible contract participant and chooses to opt out of segregation. NFA believes that operators of commodity pools that qualify as eligible contract participants and intend to opt out of segregation should be required to provide prospective pool participants with full disclosure regarding the consequences of investing in a pool that opts out of segregation. The Commission agrees that such disclosure should be required, but also believes that the obligation to do so is implicit in existing Commission Rules 4.24(h)(4)(i) and 4.24(w).

**III. Related Matters**

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (''RFA'') [17] requires that agencies, in promulgating rules, consider the impact of those rules on small businesses. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[18] The Commission has previously determined that FCMs are not small entities for the purpose of the RFA.[19] Additionally, eligible contract participants, as defined in the newly-amended Act, by the nature of the definition, should not be considered small entities. Further, eligible contract participants have the choice as to whether or not to exercise the right not to have certain funds segregated from the FCM's funds. Furthermore, no comments were received from the public on the RFA and its relation to the proposed rules.

*B. Paperwork Reduction Act*

New Rule 1.68 contains information collection requirements. As required by the Paperwork Reduction Act of 1995,[20] the Commission submitted a copy of the proposed rules to the Office of Management and Budget for its review. No comments were received in response to the Commission's invitation in the proposed rules to comment on any potential paperwork burden associated with this regulation.

*C. Cost-Benefit Analysis*

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission, before promulgating a new rule under the Act, consider the costs and benefits of the Commission's action. The Commission is applying the cost-benefit provisions of section 15 for the first time in this rulemaking with respect to a final rule and understands that, by its terms, section 15 as amended does not require the Commission to quantify the costs and benefits of a new rule or determine whether the benefits of the rule outweigh its costs.

The amended section 15 further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (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.[21] Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas of concern and could in its discretion determine that, notwithstanding its costs, a particular rule 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 main area of concern relevant to the opt-out rules is the first one set forth in the Act, ''protection of market participants and the public.'' The Commission believes that those market participants eligible to opt out of segregation, eligible contract participants trading on a registered DTF, are sophisticated persons that can properly evaluate for themselves, in light of the required disclosure by, and agreement with, an FCM, whether to opt out of segregation. Additionally, FCMs are also able to evaluate whether offering such an election to their customers who are eligible contract participants is appropriate and consistent with sound risk management practices. As for the public interest, the general public and retail customers are protected because any eligible contract participant who opts out of segregation has a priority no better than a holder of a proprietary account in the event of an FCM's bankruptcy. The Commission has endeavored to impose minimal costs (i.e., only necessary disclosure and recordkeeping) on any of the parties that would be involved in the opt-out process so that the perceived benefits can be fully realized. The Commission further notes that opting out of segregation is not required of anyone and has to be a voluntary election of the registered DTF, FCM, and eligible contract participant. The Commission also notes that the CFMA specifically mandates that the Commission adopt rules to facilitate this election. Finally, the Commission did not receive any comments that addressed these issues.

**List of Subjects**

*17 CFR Part 1*

Consumer protection, Definitions, Reporting and recordkeeping requirements.

*17 CFR Part 190*

Bankruptcy, Definitions.

In consideration of the foregoing and pursuant to the authority contained in

[17] 5 U.S.C. 601 *et seq.*

[18] 47 FR 18618 (April 30, 1982).

[19] 47 FR at 18619.

[20] Pub. L. 104–13 (May 13, 1995).

[21] As applied to this rulemaking, price discovery is not a relevant concern.

the Commodity Exchange Act and, in particular, sections 2(a)(1)(A), 4d, 5a(f), and 8a(5) 7 U.S.C. 2(i), 6d, 7a(f), and 12a(5), and 11 U.S.C. 362, 546, 548, 556 and 761–766, the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

## PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

**Authority:** 7 U.S.C. 1a, 2, 2a, 4, 4a, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24.

2. Section 1.3 is amended by adding paragraphs (gg)(3) and (uu) to read as follows:

### § 1.3 Definitions.

* * * * *

(gg) * * *

* * * * *

(3) Notwithstanding paragraphs (gg)(1) and (2) of this section, the term customer funds shall exclude money, securities or property received to margin, guarantee or secure the trades or contracts of opt-out customers, and all money accruing to opt-out customers as the result of such trades or contracts, to the extent that such trades or contracts are made on or subject to the rules of any registered derivatives transaction execution facility that has authorized opting out in accordance with § 37.7 of this chapter.

* * * * *

(uu) *Opt-out customer.* This term means a customer that is an eligible contract participant, as defined in section 1a(12) of the Act, and that, in accordance with § 1.68, has elected not to have funds that are being carried for purposes of trading on or through the facilities of a registered derivatives transaction execution facility, separately accounted for and segregated by the futures commission merchant pursuant to section 4d of the Act and §§ 1.20–1.30, 1.32 and 1.36. A customer is an opt-out customer solely with respect to agreements, contracts or transactions, and the money, securities or property received by a futures commission merchant to margin, guarantee or secure such agreements, contracts or transactions, made on or subject to the rules of any derivatives transaction execution facility that has adopted rules permitting a customer to elect to be an opt-out customer and with respect to which the customer has made such an election. For all other purposes under the Act and the rules thereunder, except where otherwise provided, an opt-out customer shall be a customer as defined in § 1.3(k).

3. Section 1.12 is amended by revising paragraph (b)(2) to read as follows:

### § 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

* * * * *

(b) * * *

(2) Six percent of the following amount: The customer funds required to be segregated pursuant to the Act and the regulations in this part, plus the funds of opt-out customers that, but for the election to opt out pursuant to § 1.68, would be required to be segregated, plus the foreign futures or foreign options secured amount, less the market value of commodity options purchased by such customers on or subject to the rules of a contract market or a foreign board of trade for which the full premiums have been paid: *Provided, however,* that the deduction for each such customer shall be limited to the amount of customer funds in such customer's account(s) and foreign futures and foreign options secured amounts;

* * * * *

4. Section 1.17 is amended as follows:

a. By revising paragraph (a)(1)(i)(B), and

b. By amending paragraphs (e)(1)(ii), (h)(2)(vi)(C)(*2*), (h)(2)(vii)(A)(*2*),(h)(2)(vii)(B)(*2*), (h)(2)(viii)(A)(*2*), (h)(3)(ii)(B), and (h)(3)(v)(B) by removing the second instance of the word ''and'' and adding in its place the words '', plus the funds of opt-out customers that, but for the election to opt out pursuant to § 1.68, would be required to be segregated, plus''; the revision as follows:

### § 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.

(a) * * *

(1) * * *

(i) * * *

(B) Four percent of the following amount: The customer funds required to be segregated pursuant to the Act and the regulations in this part, plus the funds of opt-out customers that, but for the election to opt out pursuant to § 1.68, would be required to be segregated, plus the foreign futures or foreign options secured amount, less the market value of commodity options purchased by customers on or subject to the rules of a contract market or a foreign board of trade for which the full premiums have been paid: *Provided, however,* that the deduction for each customer shall be limited to the amount of segregated customer funds in such customer's account(s) and foreign futures and foreign options secured accounts;

* * * * *

5. Section 1.37 is amended by redesignating paragraph (a) as paragraph (a)(1) and by adding paragraph (a)(2) to read as follows:

### § 1.37 Customer's or option customer's name, address, and occupation recorded; record of guarantor or controller of account.

(a) * * *

(2) Each futures commission merchant who receives a customer's election not to have the customer's funds separately accounted for and segregated, in accordance with § 1.68, shall keep a record in permanent form that indicates such customer's election. The record of such a customer election may be indicated on the record required by paragraph (a)(1) of this section.

* * * * *

6. Section 1.68 is added to read as follows:

### § 1.68 Customer election not to have funds, carried by a futures commission merchant for trading on a registered derivatives transaction execution facility, separately accounted for and segregated.

(a) A futures commission merchant shall not separately account for and segregate, in accordance with the provisions of section 4d of the Act and §§ 1.20–1.30, 1.32 and 1.36, funds received from a customer if:

(1) The customer is an eligible contract participant as defined in section 1a(12) of the Act;

(2) The customer's funds are being carried by the futures commission merchant for the purpose of trading on or through the facilities of a derivatives transaction execution facility registered under section 5a(c) of the Act;

(3) The registered derivatives transaction execution facility has authorized, in accordance with § 37.7 of this chapter, futures commission merchants to offer eligible contract participants the right to elect not to have funds that are being carried for purposes of trading on or through the facilities of the registered derivatives transaction execution facility, separately accounted for and segregated by the futures commission merchant; and

(4) The futures commission merchant and the customer have entered into a written agreement, signed by a person with the authority to bind the customer, in which the customer:

(i) Represents and warrants that the customer is an eligible contract participant as defined in section 1a(12) of the Act;

(ii) Elects not to have its funds separately accounted for and segregated in accordance with the provisions of section 4d of the Act and §§ 1.20–1.30, 1.32 and 1.36 with respect to agreements, contracts or transactions traded on or subject to the rules of any registered derivatives transaction execution facility that has authorized such treatment in accordance with § 37.7 of this chapter;

(iii) Acknowledges that it has been informed, and by making this election agrees that:

(A) The customer's funds, related to agreements, contracts or transactions on any registered derivatives transaction execution facility that authorizes the opting out of segregation will not be segregated from the funds of the futures commission merchant in accordance with the provisions of section 4d of the Act and §§ 1.20–1.30, 1.32 and 1.36;

(B) The futures commission merchant may use such funds in the course of the futures commission merchant's business without the prior consent of the customer or any third party;

(C) In the event the futures commission merchant files, or has a petition filed against it, for bankruptcy, the customer, as to those funds that the customer has elected not to have separately accounted for and segregated by the futures commission merchant in accordance with the provisions of section 4d of the Act and §§ 1.20–1.30, 1.32 and 1.36, will not be entitled to the priority for customer claims provided for under the Bankruptcy Code and part 190 of this chapter;

(D) The customer may not retain a security interest in assets excluded from segregation in accordance with this section;

(E) The customer may not enter into any agreement or other understanding with the futures commission merchant relating to the manner in which the customer's assets will be held at the futures commission merchant, that directly or indirectly gives the customer a priority in bankruptcy that is equal or superior to the priority afforded public customers under the Bankruptcy Code and part 190 of this chapter; and

(iv) Acknowledges that the agreement shall remain in effect unless and until the customer abrogates the agreement in accordance with paragraph (c) of this section.

(b) In no event may money, securities or property representing those funds that customers have elected not to have separately accounted for and segregated by the futures commission merchant, in accordance with this section, be held or commingled and deposited with customer funds in the same account or accounts required to be separately accounted for and segregated pursuant to section 4d of the Act and §§ 1.20–1.30, 1.32 and 1.36.

(c)(1) A customer that has entered into an agreement in accordance with paragraph (a)(4) of this section may abrogate that agreement by so informing the futures commission merchant in writing, signed by a person with the authority to bind the customer. The effective date of the abrogation shall not exceed five business days from the futures commission merchant's receipt of the customer's abrogation. The abrogation shall not become effective if the futures commission merchant files, or has had filed against it, a petition for bankruptcy prior to the effective date of the abrogation.

(2) Upon the effective date of the abrogation, permitted under paragraph (c)(1) of this section, provided that the customer's positions in the non-segregated account are fully margined and the customer is not in default with respect to any of its obligations to the futures commission merchant arising out of agreements, contracts or transactions entered on, or subject to the rules of, a registered entity, as defined in section 1a(29) of the Act, the futures commission merchant shall transfer to a customer segregated account:

(i) All trades or positions of the customer with respect to which the customer had previously elected to opt out of segregation; and

(ii) All money, securities, or property held in such account to margin, guarantee or secure such trades or positions.

(d) Each futures commission merchant shall maintain any agreements entered into with customers pursuant to paragraph (a) of this section and any abrogations of such agreements, made pursuant to paragraph (c) of this section, in accordance with § 1.31.

## PART 190—BANKRUPTCY RULES

7. The authority citation for Part 190 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 4a, 6c, 6d, 6g, 7, 7a, 12, 19, 23, and 24, and 11 U.S.C. 362, 546, 548, 556 and 761–766, unless otherwise noted.

8. Section 190.01 is amended by revising paragraph (bb) to read as follows:

**§ 190.01 Definitions.**

* * * * *

(bb) *Non-public customer* means any person enumerated in § 1.3(y), § 1.3(uu) or § 31.4(e) of this chapter, who is defined as a customer under paragraph (k) of this section.

* * * * *

Issued in Washington, DC on April 19, 2001, by the Commission.

**Catherine D. Dixon,**

*Assistant Secretary of the Commission.*

[FR Doc. 01–10222 Filed 4–24–01; 8:45 am]

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## POSTAL SERVICE

## 39 CFR Part 501

## Authorization to Manufacture and Distribute Postage Meters

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** This final rule clarifies and strengthens requirements for manufacturers of postage meters to control meters used for demonstration and loaner purposes.

**DATES:** This rule is effective April 25, 2001.

**FOR FURTHER INFORMATION CONTACT:** James Luff, 703–292–3693.

**SUPPLEMENTARY INFORMATION:** When manufacturers do not follow established policies and procedures for postage meters loaned to customers for temporary use (''loaner meters'') and those used for demonstration purposes, there are potential revenue protection problems as well as costly data entry errors. The potential for postage meter misuse and fraud must be eliminated. To accomplish this objective, the Postal Service must publish procedures for handling loaned and demonstration meters, and manufacturers' employees, dealers, and representatives must follow them.

### List of Subjects in 39 CFR Part 501

Administrative practice and procedure, Postal Service.

For the reasons set out in this document, the Postal Service is amending 39 CFR part 501 as follows:

## PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE METERS

1. The authority citation for part 501 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605; Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended), 5 U.S.C. App. 3.

2. Section 501.22 is amended by adding new paragraphs (s) and (t) to read as follows: