

Commission Rule 190.01(s). Customer funds will be converted to U.S. Dollars from whatever currency in which the customer's funds are denominated as of the close of business on the Final Net Equity Determination Date.

The Commission has drafted the bankruptcy convention as a means to give prospective bankruptcy trustees a certain amount of direction in the event of a bankruptcy involving customer funds denominated in currencies other than U.S. Dollars and held in depositories located throughout the world. Such a bankruptcy, however, is likely to be extremely complicated and it is impossible to anticipate every factual variant. Accordingly, the Commission, in adopting this bankruptcy convention, has endeavored to avoid undermining the ability of the trustee to use his or her own discretion and judgment as required by the particular facts of each bankruptcy.

The rule and the framework to the bankruptcy appendix address the risks associated with holding customer funds outside the U.S. or in currencies other than U.S. dollars. Accordingly, the requirement that each customer who seeks to have funds held outside the U.S. must execute a separate subordination agreement has been eliminated.

### III. Comments Regarding the Location of Foreign Futures or Foreign Options Secured Amount

In the proposal, the Commission asked for comments as to whether, in light of the proposed rules, Rule 30.7 should also be amended to expand the types of depositories at which an FCM may hold the funds of foreign futures or options customers. Only NFA provided comments as to the expansion of Rule 30.7. NFA indicated its belief that Rule 30.7 should be expanded to include all depositories permitted under Rule 1.49(d)(3), as well as those already permitted under Rule 30.7. The Commission agrees. Accordingly, Rule 30.7 will be amended to provide that the funds of foreign futures or options customers may, in addition to those depositories already enumerated, be held at a bank or trust company outside the U.S. that has in excess of \$1 billion of regulatory capital or whose commercial paper or long-term debt instrument, or if part of a holding company system, its holding company's commercial paper or long-term debt instrument, is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization.

## IV. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>30</sup> requires that agencies, in proposing 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.<sup>31</sup> The Commission has previously determined that FCMs are not small entities for the purpose of the RFA.<sup>32</sup> Additionally, the Commission has determined that DCOs are not small entities for purposes of the RFA.<sup>33</sup> The Commission notes that no comments were received from the public on the RFA and its relation to the new rule and rule amendments.

### B. Paperwork Reduction Act

This rulemaking contains information collection requirements. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), the Commission has submitted a copy of the new rule and rule amendments to the Office of Management and Budget (OMB) 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(a) of the Act, as amended by Section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) as amended 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, Section 15(a) 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 five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas 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 new rule and rule amendments are intended to provide greater flexibility for FCMs, DCOs, and their customers in their methods of doing business. The Commission is considering the costs and benefits of these rules in light of the specific provisions of Section 15(a) of the Act:

1. *Protection of market participants and the public.* To protect market participants and the public, the rule requires that depositories used to hold customer funds meet certain requirements to assure that customer funds are dealt with properly. Additionally, the rule includes a new framework to the bankruptcy appendix to protect customer funds held in U.S. dollars in the U.S. from being diluted if there is an insufficiency in the funds held outside the U.S. or in a currency other than U.S. dollars due to the sovereign action of a foreign government or court.

2. *Efficiency and competition.* The rules are expected to benefit competition and market efficiency. The rule will help to facilitate continued international growth of the futures industry by permitting customer funds to be denominated in currencies other than U.S. dollars and to be held in offshore depositories.

3. *Financial integrity of futures markets and price discovery.* The rule should have no effect, from the standpoint of imposing costs or creating benefits, on the financial integrity or price discovery function of the futures and options markets.

4. *Sound risk management practices.* The Commission in adopting the rule and amendments has included risk-limiting features, such as requiring FCMs and DCOs to maintain sufficient funds to meet obligations in each currency, and requiring depositories to meet certain criteria, including signing an acknowledgment regarding the segregation requirements under the Act and Commission rules, to minimize the risks to customer funds.

5. *Other public interest considerations.* The rule and amendments contained herein offer greater opportunity for taking full advantage of contracts being offered by domestic designated contract markets and registered DTFs and the ever increasing internationalization of the futures industry, while establishing safeguards for customer funds.

<sup>30</sup> 5 U.S.C. 601 *et seq.*

<sup>31</sup> 47 FR 18618 (April 30, 1982).

<sup>32</sup> 47 FR at 18619.

<sup>33</sup> 66 FR 45604, 45609 (Aug. 29, 2001).