

net equity in another account held by the same customer in a separate capacity or held by another customer.

#### AMENDMENTS

1984—Subsec. (a). Pub. L. 98-353 substituted “by the debtor for” for “by” and “treated as” for “deemed to be”.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

### § 764. Voidable transfers

(a) Except as otherwise provided in this section, any transfer by the debtor of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, 549, or 724(a) of this title. For the purpose of such sections, the property so transferred shall be deemed to have been property of the debtor, and, if such transfer was made to a customer or for a customer’s benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before seven days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or

(2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2618; Pub. L. 97-222, §17, July 27, 1982, 96 Stat. 240; Pub. L. 98-353, title III, §487, July 10, 1984, 98 Stat. 383; Pub. L. 111-16, §2(9), May 7, 2009, 123 Stat. 1607.)

#### HISTORICAL AND REVISION NOTES

##### LEGISLATIVE STATEMENTS

Section 764 of the House amendment is derived from the House bill.

##### SENATE REPORT NO. 95-989

Section 764 permits the trustee to void any transfer of property that, except for such transfer, would have been customer property, to the extent permitted under section 544, 545, 547, 548, 549, or 724(a).

##### HOUSE REPORT NO. 95-595

Section 764 indicates the extent to which the avoiding powers may be used by the trustee under subchapter IV of chapter 7. If property recovered would have been customer property if never transferred, then subsection (a) indicates that it will be so treated when recovered.

Subsection (b) prohibits avoiding any transaction that occurs before or within five days after the petition if the transaction is approved by the Commission and concerns an open contractual commitment. This enables the Commission to exercise its discretion to pro-

tect the integrity of the market by insuring that transactions cleared with other brokers will not be undone on a preference or a fraudulent transfer theory.

Subsection (c) insulates variation margin payments and other deposits from the avoiding powers except to the extent of actual fraud under section 548(a)(1). This facilitates prepetition transfers and protects the ordinary course of business in the market.

#### AMENDMENTS

2009—Subsec. (b). Pub. L. 111-16 substituted “seven days” for “five days” in introductory provisions.

1984—Subsec. (a). Pub. L. 98-353 substituted “any transfer by the debtor” for “any transfer”.

1982—Subsec. (a). Pub. L. 97-222, §17(a), substituted “but” for “except”, inserted “such property” after “trustee, and”, and substituted “shall be” for “is” wherever appearing.

Subsec. (b). Pub. L. 97-222, §17(b), substituted “order for relief” for “date of the filing of the petition”.

Subsec. (c). Pub. L. 97-222, §17(c), struck out subsec. (c) which provided that the trustee could not avoid a transfer that was a margin payment to or deposit with a commodity broker or forward contract merchant or was a settlement payment made by a clearing organization and that occurred before the commencement of the case.

#### EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-16 effective Dec. 1, 2009, see section 7 of Pub. L. 111-16, set out as a note under section 109 of this title.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

### § 765. Customer instructions

(a) The notice required by section 342 of this title to customers shall instruct each customer—

(1) to file a proof of such customer’s claim promptly, and to specify in such claim any specifically identifiable security, property, or commodity contract; and

(2) to instruct the trustee of such customer’s desired disposition, including transfer under section 766 of this title or liquidation, of any commodity contract specifically identified to such customer.

(b) The trustee shall comply, to the extent practicable, with any instruction received from a customer regarding such customer’s desired disposition of any commodity contract specifically identified to such customer. If the trustee has transferred, under section 766 of this title, such a commodity contract, the trustee shall transmit any such instruction to the commodity broker to whom such commodity contract was so transferred.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2619; Pub. L. 97-222, §18, July 27, 1982, 96 Stat. 240; Pub. L. 98-353, title III, §488, July 10, 1984, 98 Stat. 383.)

#### HISTORICAL AND REVISION NOTES

For Historical and Revision Notes for this section, see Historical and Revision Notes set out under section 766 of this title.

#### AMENDMENTS

1984—Subsec. (a). Pub. L. 98-353 substituted “notice required by” for “notice under”.

1982—Subsec. (b). Pub. L. 97-222 substituted “commodity contract” for “commitment”.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

**§ 766. Treatment of customer property**

(a) The trustee shall answer all margin calls with respect to a specifically identifiable commodity contract of a customer until such time as the trustee returns or transfers such commodity contract, but the trustee may not make a margin payment that has the effect of a distribution to such customer of more than that to which such customer is entitled under subsection (h) or (i) of this section.

(b) The trustee shall prevent any open commodity contract from remaining open after the last day of trading in such commodity contract, or into the first day on which notice of intent to deliver on such commodity contract may be tendered, whichever occurs first. With respect to any commodity contract that has remained open after the last day of trading in such commodity contract or with respect to which delivery must be made or accepted under the rules of the contract market on which such commodity contract was made, the trustee may operate the business of the debtor for the purpose of—

(1) accepting or making tender of notice of intent to deliver the physical commodity underlying such commodity contract;

(2) facilitating delivery of such commodity;

or  
(3) disposing of such commodity if a party to such commodity contract defaults.

(c) The trustee shall return promptly to a customer any specifically identifiable security, property, or commodity contract to which such customer is entitled, or shall transfer, on such customer's behalf, such security, property, or commodity contract to a commodity broker that is not a debtor under this title, subject to such rules or regulations as the Commission may prescribe, to the extent that the value of such security, property, or commodity contract does not exceed the amount to which such customer would be entitled under subsection (h) or (i) of this section if such security, property, or commodity contract were not returned or transferred under this subsection.

(d) If the value of a specifically identifiable security, property, or commodity contract exceeds the amount to which the customer of the debtor is entitled under subsection (h) or (i) of this section, then such customer to whom such security, property, or commodity contract is specifically identified may deposit cash with the trustee equal to the difference between the value of such security, property, or commodity contract and such amount, and the trustee then shall—

(1) return promptly such security, property, or commodity contract to such customer; or

(2) transfer, on such customer's behalf, such security, property, or commodity contract to a commodity broker that is not a debtor under this title, subject to such rules or regulations as the Commission may prescribe.

(e) Subject to subsection (b) of this section, the trustee shall liquidate any commodity contract that—

(1) is identified to a particular customer and with respect to which such customer has not timely instructed the trustee as to the desired disposition of such commodity contract;

(2) cannot be transferred under subsection (c) of this section; or

(3) cannot be identified to a particular customer.

(f) As soon as practicable after the commencement of the case, the trustee shall reduce to money, consistent with good market practice, all securities and other property, other than commodity contracts, held as property of the estate, except for specifically identifiable securities or property distributable under subsection (h) or (i) of this section.

(g) The trustee may not distribute a security or other property except under subsection (h) or (i) of this section.

(h) Except as provided in subsection (b) of this section, the trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other claims, except claims of a kind specified in section 507(a)(2) of this title that are attributable to the administration of customer property. Such distribution shall be in the form of—

(1) cash;

(2) the return or transfer, under subsection (c) or (d) of this section, of specifically identifiable customer securities, property, or commodity contracts; or

(3) payment of margin calls under subsection (a) of this section.

Notwithstanding any other provision of this subsection, a customer net equity claim based on a proprietary account, as defined by Commission rule, regulation, or order, may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full.

(i) If the debtor is a clearing organization, the trustee shall distribute—

(1) customer property, other than member property, ratably to customers on the basis and to the extent of such customers' allowed net equity claims based on such customers' accounts other than proprietary accounts, and in priority to all other claims, except claims of a kind specified in section 507(a)(2) of this title that are attributable to the administration of such customer property; and

(2) member property ratably to customers on the basis and to the extent of such customers' allowed net equity claims based on such customers' proprietary accounts, and in priority to all other claims, except claims of a kind specified in section 507(a)(2) of this title that are attributable to the administration of member property or customer property.

(j)(1) The trustee shall distribute customer property in excess of that distributed under subsection (h) or (i) of this section in accordance with section 726 of this title.

(2) Except as provided in section 510 of this title, if a customer is not paid the full amount