

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 protect 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 identi-

fiable 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 of such customer's allowed net equity claim from customer property, the unpaid portion of such claim is a claim entitled to distribution under section 726 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2619; Pub. L. 97-222, §19, July 27, 1982, 96 Stat. 240; Pub. L. 98-353, title III, §489, July 10, 1984, 98 Stat. 383; Pub. L. 109-8, title XV, §1502(a)(4), Apr. 20, 2005, 119 Stat. 216.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Sections 765 and 766 of the House amendment represent a consolidation and redraft of sections 765, 766, 767, and 768 of the House bill and sections 765, 766, 767, and 768 of the Senate amendment. In particular, section 765(a) of the House amendment is derived from section 765(a) of the House bill and section 767(a) of the Senate amendment. Under section 765(a) of the House amendment customers are notified of the opportunity to immediately file proofs of claim and to identify specifically identifiable securities, property, or commodity contracts. The customer is also afforded an opportunity to instruct the trustee regarding the customer's desires concerning disposition of the customer's commodity contracts. Section 767(b) [probably should be 765(b)] makes clear that the trustee must comply with instructions received to the extent practicable, but in the event the trustee has transferred commodity contracts to a commodity broker, such instructions shall be forwarded to the broker.

Section 766(a) of the House amendment is derived from section 768(c) of the House bill and section 767(f) of the Senate amendment. Section 766(b) of the House amendment is derived from section 765(d) of the House bill, and section 767(g) of the Senate amendment. Sec-

tion 766(c) of the House amendment is derived from section 768(a) of the House bill and section 767(e) of the Senate amendment. Section 766(d) of the House amendment is derived from section 768(b) of the House bill and the second sentence of section 767(e) of the Senate amendment.

Section 766(e) of the House amendment is derived from section 765(c) of the House bill and sections 767(c) and (d) of the Senate amendment. The provision clarifies that the trustee may liquidate a commodity contract only if the commodity contract cannot be transferred to a commodity broker under section 766(c), cannot be identified to a particular customer, or has been identified with respect to a particular customer, but with respect to which the customer's instructions have not been received.

Section 766(f) of the House amendment is derived from section 766(b) of the House bill and section 767(h) of the Senate amendment. The term "all securities and other property" is not intended to include a commodity contract. Section 766(g) of the House amendment is derived from section 766(a) of the House bill. Section 766(h) of the House amendment is derived from section 767(a) of the House bill and section 765(a) of the Senate amendment. In order to induce private trustees to undertake the difficult and risky job of liquidating a commodity broker, the House amendment contains a provision insuring that a pro rata share of administrative claims will be paid. The provision represents a compromise between the position taken in the House bill, subordinating customer property to all expenses of administration, and the position taken in the Senate amendment requiring the distribution of customer property in advance of any expenses of administration. The position in the Senate amendment is rejected since customers, in any event, would have to pay a brokerage commission or fee in the ordinary course of business. The compromise provision requires customers to pay only those administrative expenses that are attributable to the administration of customer property.

Section 766(i) of the House amendment is derived from section 767(b) of the House bill and contains a similar compromise with respect to expenses of administration as the compromise detailed in connection with section 766(h) of the House amendment. Section 766(j) of the House amendment is derived from section 767(c) of the House bill. No counterpart is contained in the Senate amendment. The provision takes account of the rare case where the estate has customer property in excess of customer claims and administrative expenses attributable to those claims. The section also specifies that to the extent a customer is not paid in full out of customer property, that the unpaid claim will be treated the same as any other general unsecured creditor.

Section 768 of the Senate amendment was deleted from the House amendment as unwise. The provision in the Senate amendment would have permitted the trustee to distribute customer property based upon an estimate of value of the customer's account, with no provision for recapture of excessive disbursements. Moreover, the section would have exonerated the trustee from any liability for such an excessive disbursement. Furthermore, the section is unclear with respect to the customer's rights in the event the trustee makes a distribution less than the share to which the customer is entitled. The provision is deleted in the House amendment so that this difficult problem may be handled on a case-by-case basis by the courts as the facts and circumstances of each case require.

Section 769 of the Senate amendment is deleted in the House amendment as unnecessary. The provision was intended to codify *Board of Trade v. Johnson*, 264 U.S. 1 (1924) [11.1924, 44 S.Ct. 232]. *Board of Trade against Johnson* is codified in section 363(f) of the House amendment which indicates the only five circumstances in which property may be sold free and clear of an interest in such property of an entity other than the estate.

Section 770 of the Senate amendment is deleted in the House amendment as unnecessary. That section would have permitted commodity brokers to liquidate com-

modity contracts, notwithstanding any contrary order of the court. It would require an extraordinary circumstance, such as a threat to the national security, to enjoin a commodity broker from liquidating a commodity contract. However, in those circumstances, an injunction must prevail. Failure of the House amendment to incorporate section 770 of the Senate amendment does not imply that the automatic stay prevents liquidation of commodity contracts by commodity brokers. To the contrary, whenever by contract, or otherwise, a commodity broker is entitled to liquidate a position as a result of a condition specified in a contract, other than a condition or default of the kind specified in section 365(b)(2) of title 11, the commodity broker may engage in such liquidation. To this extent, the commodity broker's contract with his customer is treated no differently than any other contract under section 365 of title 11.

SENATE REPORT NO. 95-989

[Section 765] Subsection (a) of this section [enacted as section 766(h)] provides that with respect to liquidation of commodity brokers which are not clearing organizations, the trustee shall distribute customer property to customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other claims. This section grants customers' claims first priority in the distribution of the estate. Subsection (b) [enacted as section 766(i)] grants the same priority to member property and other customer property in the liquidation of a clearing organization. A fundamental purpose of these provisions is to ensure that the property entrusted by customers to their brokers will not be subject to the risks of the broker's business and will be available for disbursement to customers if the broker becomes bankrupt.

As a result of section 765, a customer need not trace any funds in order to avoid treatment as a general creditor as was required by the Seventh Circuit in *In re Rosenbaum Grain Corporation*.

Section 766 lists certain transfers which are not voidable by the trustee of a commodity broker. Subsection (a) exempts transfers approved by the Commission by rule or order, either before or after the transfer. It is expected that the Commission will use this power sparingly and only when necessary to effectuate the remedial purposes of this legislation, bearing in mind that the immediate transfer of customer accounts from bankrupt commodity brokers to solvent commodity brokers is one of the primary goals of this subchapter. The committee considered and rejected a provision in subsection (b) that would have exempted payments made to a commodity broker. The Commission may not by rule exempt such transfers. The Commission's prompt attention to the promulgation of such rules and regulations is expected.

Subsection (b) [enacted as section 764(c)] provides for the nonavoidability of margin payments made by a commodity broker, other than a clearing organization. If such payments are made by or to a clearing organization, they are nonavoidable pursuant to subsection (c). All other margin payments made by a commodity broker, other than a clearing organization, are nonavoidable if they meet the conditions set forth in subsection (b). Subsections (b)(1) and (b)(2) parallel the requirements for avoidance of fraudulent transfers and obligations under section 548. Subsection (b)(3) adds a requirement that there be collusion between the transferee and transferor in order for such payments to be voidable. It would be unfair to permit recovery from an innocent commodity broker since such brokers are, for the most part, simply conduits for margin payments and do not retain margin for use in their operations. Subsection (b)(4) would permit recovery of a subsequent transferee only if it had actual knowledge at the time of that subsequent transfer of the scheme to defraud. Again it should be noted that if the transfer is a margin payment and the subsequent transferee is a clearing organization, the transfer is nonavoidable under section 766(c).

Subsection (c) [enacted as section 548(d)(2)] overrules *Seligson v. New York Produce Exchange*, and provides as a matter of law that margin payments made by or to a clearing organization are not voidable.

Section 767 sets forth the procedures to be followed by the trustee. It should be emphasized that many of the duties imposed on the trustee are required to be discharged by the trustee immediately upon his appointment. The earlier these duties are discharged the less potential market disruption can result.

The initial duty of the trustee is to endeavor to transfer to another commodity broker or brokers all identified customer accounts together with the customer property margining such accounts, to the extent the trustee deems appropriate. Although it is preferable for all such accounts to be transferred, exigencies may dictate a partial transfer. The requirement that the value of the accounts and property transferred not exceed the customer's distribution share may necessitate a slight delay until the trustee can submit to the court, for its disapproval, an estimate of each customer's distribution share pursuant to section 768.

Subsection (c) [enacted as section 766(e)] provides that contemporaneously with the estimate of the distribution share and the transfer of identified customer accounts and property, subsection (c) provides that the trustee should make arrangements for the liquidation of all commodity contracts maintained by the debtor that are not identifiable to specific customers. These contracts would, of course, include all such contracts held in the debtor's proprietary [sic] account.

At approximately the same time, the trustee should notify each customer of the debtor's bankruptcy and instruct each customer immediately to submit a claim including any claim to a specifically identifiable security or other property, and advise the trustee as to the desired disposition of commodity contracts carried by the debtor for the customer.

This requirement is placed upon the trustee to insure that producers who have hedged their production in the commodities market are allowed the opportunity to preserve their positions. The theory of the commodity market is that it exists for producers and buyers of commodities and not for the benefit of the speculators whose transactions now comprise the overwhelming majority of trades. Maintenance of positions by hedges may require them to put up additional margin payments in the hours and days following the commodity broker bankruptcy, which they may be unable or unwilling to do. In such cases, their positions will be quickly liquidated by the trustee, but they must have the opportunity to make those margin payments before they are summarily liquidated out of the market to the detriment of their growing crop. The failure of the customer to advise the trustee as to disposition of the customer's commodity contract will not delay a transfer of a contract pursuant to subsection (b) so long as the contract can otherwise be identified to the customer. Nor will the failure of the customer to submit a claim prevent the customer from recovering the net equity in that customer's account, absent a claim the customer cannot participate in the determination of the net equity in the account.

If the customer submits instructions pursuant to subsection (a) after the customer's commodity contracts are transferred to another commodity broker, the trustee must transmit the instruction to the transferee. If the customer's commodity contracts are not transferred before the customer's instructions are received, the trustee must attempt to comply with the instruction, subject to the provisions of section 767(d).

Under subsection (d) [enacted as section 766(e)], the trustee has discretion to liquidate any commodity contract carried by the debtor at any time. This discretion must be exercised with restraint in such cases, consistent with the purposes of this subchapter and good business practices. The committee intends that hedged accounts will be given special consideration before liquidation as discussed in connection with subsection (c).

Subsection (e) [enacted as section 766(c)] instructs the trustee as to the disposition of any security or

other property, not disposed of pursuant to subsection (b) or (d), that is specifically identifiable to a customer and to which the customer is entitled. Such security or other property must be returned to the customer or promptly transferred to another commodity broker for the benefit of the customer. If the value of the security or other property retained or transferred, together with any other distribution made by the trustee to or on behalf of the customer, exceeds the customer's distribution share the customer must deposit cash with the trustee equal to that difference before the return or transfer of the security or other property.

Subsection (f) [enacted as section 766(a)] requires the trustee to answer margin calls on specifically identifiable customer commodity contracts, but only to the extent that the margin payment, together with any other distribution made by the trustee to or on behalf of the customer, does not exceed the customer's distribution share.

Subsection (g) [enacted as section 766(b)] requires the trustee to liquidate all commodity futures contracts prior to the close of trading in that contract, or the first day on which notice of intent to deliver on that contract may be tendered, whichever occurs first. If the customer desires that the contract be kept open for delivery, the contract should be transferred to another commodity broker pursuant to subsection (b).

If for some reason the trustee is unable to transfer a contract on which delivery must be made or accepted and is unable to close out such contract, the trustee is authorized to operate the business of the debtor for the purpose of accepting or making tender of notice of intent to deliver the physical commodity underlying the contract, facilitating delivery of the physical commodity or disposing of the physical commodity in the event of a default. Any property received, not previously held, by the trustee in connection with its operation of the business of the debtor for these purposes, is not by the terms of this subchapter specifically included in the definition of customer property.

Finally, subsection (h) [enacted as section 766(f)] requires the trustee to liquidate the debtor's estate as soon as practicable and consistent with good market practice, except for specifically identifiable securities or other property distributable under subsection (e).

Section 768 is an integral part of the commodity broker liquidation procedures outlined in section 767. Prompt action by the trustee to transfer or liquidate customer commodity contracts is necessary to protect customers, the debtor's estate, and the marketplace generally. However, transfers of customer accounts and property valued in excess of the customer's distribution share are prohibited. Since a determination of the customer's distribution share requires a determination of the customer's net equity and the total dollar value of customer property held by or for the account of the debtor, it is possible that the customer's distribution share will not be determined, and thus the customer's contracts and property will not be transferred, on a timely basis. To avoid this problem, and to expedite transfers of customer property, section 768 permits the trustee to make distributions to customers in accordance with a preliminary estimate of the debtor's customer property and each customer's distribution share.

It is acknowledged that the necessity for prompt action may not allow the trustee to assemble all relevant facts before such an estimate is made. However, the trustee is expected to develop as accurate an estimate as possible based on the available facts. Further, in order to permit expeditious action, section 768 does not require that notice be given to customers or other creditors before the court approves or disapproves the estimate. Nor does section 768 require that customer claims be received pursuant to section 767(a) before the trustee may act upon and in accordance with the estimate. If the estimate is inaccurate, the trustee is absolved of liability for a distribution which exceeds the customer's actual distribution share so long as the distribution did not exceed the customer's estimated distribution share. However, a trustee may have a claim

back against a customer who received more than its actual distribution share.

HOUSE REPORT NO. 95-595

Section 765(a) indicates that a customer must file a proof of claim, including any claim to specifically identifiable property, within such time as the court fixes.

Subsection (c) [of section 765 (enacted as section 766(e))] sets forth the general rule requiring the trustee to liquidate contractual commitments that are either not specifically identifiable or with respect to which a customer has not instructed the trustee during the time fixed by the court. Subsection (d) [enacted as section 766(b)] indicates an exception to the time limits in the rule by requiring the trustee to liquidate any open contractual commitment before the last day of trading or the first day during which delivery may be demanded, whichever first occurs, if transfer cannot be effectuated.

Section 766(a) [enacted as section 766(g)] indicates that the trustee may distribute securities or other property only under section 768. This does not preclude a distribution of cash under section 767(a) or distribution of any excess customer property under section 767(c) to the general estate.

Subsection (b) [enacted as section 766(f)] indicates that the trustee shall liquidate all securities and other property that is not specifically identifiable property as soon as practicable after the commencement of the case and in accordance with good market practice. If securities are restricted or trading has been suspended, the trustee will have to make an exempt sale or file a registration statement. In the event of a private placement, a customer is not entitled to "bid in" his net equity claim. To do so would enable him to receive a greater percentage recovery than other customers.

Section 767(a) [enacted as section 766(h)] provides for the trustee to distribute customer property pro rata according to customers' net equity claims. The court will determine an equitable portion of customer property to pay administrative expenses. Paragraphs (2) and (3) indicate that the return of specifically identifiable property constitutes a distribution of net equity.

Subsection (b) [enacted as section 766(i)] indicates that if the debtor is a clearing organization, customer property is to be segregated into customers' accounts and proprietary accounts and distributed accordingly without offset. This protects a member's customers from having their claims offset against the member's proprietary account. Subsection (c)(1) [enacted as section 766(j)(1)] indicates that any excess customer property will pour over into the general estate. This unlikely event would occur only if customers fail to file proofs of claim. Subsection (c)(2) [enacted as section 766(j)(2)] indicates that to the extent customers are not paid in full, they are entitled to share in the general estate as unsecured creditors, unless subordinated by the court under proposed 11 U.S.C. 510.

Section 768(a) [enacted as section 766(c)] requires the trustee to return specifically identifiable property to the extent that such distribution will not exceed a customer's net equity claim. Thus, if the customer owes money to a commodity broker, this will be offset under section 761(15)(A)(ii). If the value of the specifically identifiable property exceeds the net equity claim, then the customer may deposit cash with the trustee to make up the difference after which the trustee may return or transfer the customer's property.

Subsection (c) [enacted as section 766(a)] permits the trustee to answer all margin calls, to the extent of the customer's net equity claim, with respect to any specifically identifiable open contractual commitment. It should be noted that any payment under subsections (a) or (c) will be considered a reduction of the net equity claim under section 767(a). Thus the customer's net equity claim is a dynamic amount that varies with distributions of specifically identifiable property or margin payments on such property. This approach differs from the priority given to specifically identifiable property under subchapter III of chapter 7 by limiting

the priority effect to a right to receive specific property as part of, rather than in addition to, a ratable share of customer property. This policy is designed to protect the small customer who is unlikely to have property in specifically identifiable form as compared with the professional trader. The CFTC is authorized to make rules defining specifically identifiable property under section 302 of the bill, in title III.

AMENDMENTS

2005—Subsec. (h). Pub. L. 109-8, §1502(a)(4)(A), substituted "507(a)(2)" for "507(a)(1)" in introductory provisions.

Subsec. (i). Pub. L. 109-8, §1502(a)(4)(B), substituted "507(a)(2)" for "507(a)(1)" in pars. (1) and (2).

1984—Subsec. (j)(2). Pub. L. 98-353 substituted "section 726" for "section 726(a)".

1982—Subsec. (a). Pub. L. 97-222, §19(a), inserted "to such customer" after "distribution".

Subsec. (b). Pub. L. 97-222, §19(b), struck out "that is being actively traded as of the date of the filing of the petition" after "any open commodity contract" and inserted "the" after "rules of".

Subsec. (d). Pub. L. 97-222, §19(c), substituted "the amount to which the customer of the debtor is entitled under subsection (h) or (i) of this section, then such" for "such amount, then the" and "the trustee then shall" for "the trustee shall".

Subsec. (h). Pub. L. 97-222, §19(d), inserted provision that 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.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109-8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as a note under section 101 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.

§ 767. Commodity broker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants

Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, financial participant, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of such rights.

(Added Pub. L. 109-8, title IX, §907(l), Apr. 20, 2005, 119 Stat. 181.)

EFFECTIVE DATE

Section effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as an Effective Date of 2005 Amendment note under section 101 of this title.