

ance 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.

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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, stock-

broker, 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.

### SUBCHAPTER V—CLEARING BANK LIQUIDATION

#### § 781. Definitions

For purposes of this subchapter, the following definitions shall apply:

(1) BOARD.—The term “Board” means the Board of Governors of the Federal Reserve System.

(2) DEPOSITORY INSTITUTION.—The term “depository institution” has the same meaning as in section 3 of the Federal Deposit Insurance Act.

(3) CLEARING BANK.—The term “clearing bank” means an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409<sup>1</sup> of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(Added Pub. L. 106-554, §1(a)(5) [title I, §112(c)(5)(B)], Dec. 21, 2000, 114 Stat. 2763, 2763A-394.)

#### REFERENCES IN TEXT

Section 3 of the Federal Deposit Insurance Act, referred to in par. (2), is classified to section 1813 of Title 12, Banks and Banking.

Section 25A of the Federal Reserve Act, referred to in par. (3), popularly known as the Edge Act, is classified to subchapter II (§611 et seq.) of chapter 6 of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 611 of Title 12 and Tables.

Section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991, referred to in par. (3), which was classified to section 4422 of Title 12, Banks and Banking, was repealed by Pub. L. 111-203, title VII, §740, July 21, 2010, 124 Stat. 1729.

#### § 782. Selection of trustee

(a) IN GENERAL.—

(1) APPOINTMENT.—Notwithstanding any other provision of this title, the conservator or receiver who files the petition shall be the trustee under this chapter, unless the Board designates an alternative trustee.

(2) SUCCESSOR.—The Board may designate a successor trustee if required.

(b) AUTHORITY OF TRUSTEE.—Whenever the Board appoints or designates a trustee, chapter

3 and sections 704 and 705 of this title shall apply to the Board in the same way and to the same extent that they apply to a United States trustee.

(Added Pub. L. 106-554, §1(a)(5) [title I, §112(c)(5)(B)], Dec. 21, 2000, 114 Stat. 2763, 2763A-394.)

#### § 783. Additional powers of trustee

(a) DISTRIBUTION OF PROPERTY NOT OF THE ESTATE.—The trustee under this subchapter has power to distribute property not of the estate, including distributions to customers that are mandated by subchapters III and IV of this chapter.

(b) DISPOSITION OF INSTITUTION.—The trustee under this subchapter may, after notice and a hearing—

(1) sell the clearing bank to a depository institution or consortium of depository institutions (which consortium may agree on the allocation of the clearing bank among the consortium);

(2) merge the clearing bank with a depository institution;

(3) transfer contracts to the same extent as could a receiver for a depository institution under paragraphs (9) and (10) of section 11(e) of the Federal Deposit Insurance Act;

(4) transfer assets or liabilities to a depository institution; and

(5) transfer assets and liabilities to a bridge depository institution as provided in paragraphs (1), (3)(A), (5), and (6) of section 11(n) of the Federal Deposit Insurance Act, paragraphs (9) through (13) of such section, and subparagraphs (A) through (H) and subparagraph (K) of paragraph (4) of such section 11(n), except that—

(A) the bridge depository institution to which such assets or liabilities are transferred shall be treated as a clearing bank for the purpose of this subsection; and

(B) any references in any such provision of law to the Federal Deposit Insurance Corporation shall be construed to be references to the appointing agency and that references to deposit insurance shall be omitted.

(c) CERTAIN TRANSFERS INCLUDED.—Any reference in this section to transfers of liabilities includes a ratable transfer of liabilities within a priority class.

(Added Pub. L. 106-554, §1(a)(5) [title I, §112(c)(5)(B)], Dec. 21, 2000, 114 Stat. 2763, 2763A-395; amended Pub. L. 110-289, div. A, title VI, §1604(b)(3), July 30, 2008, 122 Stat. 2829.)

#### REFERENCES IN TEXT

Section 11 of the Federal Deposit Insurance Act, referred to in subsec. (b)(3), (5), is classified to section 1821 of Title 12, Banks and Banking.

#### AMENDMENTS

2008—Subsec. (b)(5). Pub. L. 110-289, which directed amendment of this section by substituting “bridge depository institution” for “bridge bank”, was executed by making the substitution in introductory provisions and subpar. (A) of subsec. (b)(5), to reflect the probable intent of Congress.

<sup>1</sup> See References in Text note below.