

## PUBLIC STATEMENTS & REMARKS

### Statement of Commissioner Rostin Behnam Regarding Part 190 Bankruptcy Regulations

**April 14, 2020**

I respectfully support the Commodity Futures Trading Commission's (the "Commission" or "CFTC") issuance of a proposed rule (the "Proposal") to amend Part 190 of its regulations, which govern bankruptcy proceedings of commodity brokers. First and foremost, I want to thank Commission staff for all of their hard work on this Proposal. If finalized, it will be the first major update of the CFTC's existing Part 190 since 1983, when it was originally implemented by the Commission.<sup>[1]</sup>

The Proposal is not a response to current market conditions, nor is it a proposal that has only recently been considered; it is the product of years of staff analysis and engagement with market participants, including the Part 190 Subcommittee of the Business Law Section of the American Bar Association, which submitted detailed suggested model Part 190 rules in response to a prior Commission request for information.<sup>[2]</sup> Several agency Chairs going back many years deserve recognition and thanks for pushing to update Part 190 and starting this process. Customer protections are at the heart of the Commodity Exchange Act, and it is imperative that the Commission have clear rules that direct how proceedings occur during a commodity broker bankruptcy. The Commission, market participants, customers, and the public will benefit greatly from this Proposal, and I am proud to have contributed to this effort.

The revision is designed to recognize the many changes in our industry over the past 37 years. The Commission finalized the existing part 190 the same year that the movie *Trading Places* debuted – when futures trading, so distinctly depicted in the film, occurred exclusively in oval trading pits, and markets were less global, less complex, and less sophisticated. To paraphrase former CFTC Chairman Giancarlo, Part 190 is an analog regulation applying to what has since become a digital world.<sup>[3]</sup>

More personally, I was a lead advisor during the U.S. Senate's investigation of the 2011 MF Global bankruptcy, the eighth largest corporate bankruptcy in American history.<sup>[4]</sup> During the Senate investigation, I learned the intricate contours of Part 190, its relationship to the Bankruptcy Code, and how the larger puzzle of creditors, customers, and equity holders, among others, fits together. It was during those frenzied days that I truly appreciated the regulatory principle that *customer margin is sacrosanct property*. As a Commissioner since 2017, I have made customer protections an absolute priority in part because of my experience during those few months. Having spoken with many market participants throughout the bankruptcy proceedings, including those whose money disappeared in the days immediately following, customer protection is my most pressing responsibility.

The strengths and weaknesses of the Commission's bankruptcy regime were further laid bare just a few months later in early 2012 following the bankruptcy of Peregrine Financial Group ("PFG") – a second blow in short order. Important lessons have been learned, both in terms of what works and what does not, and I believe today's Proposal is a positive step to addressing both.

There are a number of changes in today's proposal that are intended to further support provisions of Part 190 that have worked in prior bankruptcies. One of the themes of this refresh is clarity. The goal is to be as clear as possible about the Commission's intentions regarding Part 190 in order to enhance the understanding of Designated Clearing Organizations ("DCOs"), Futures Commission Merchants ("FCMs"), their customers, trustees, and the public at large. Changes in this proposal would foster the longstanding and continuing policy preference for transferring (as opposed to liquidating) the positions of public customers – an important customer protection. Other changes further support existing requirements including that short falls in segregated property should be shored up from the FCM's general assets, and that *public customers are favored over non-public customers*. The proposal also grants trustees enhanced discretion based upon prior positive experience, and codifies practice adopted in past bankruptcies by requiring FCMs to notify the Commission of their intent to file for voluntary bankruptcy.

Other changes address what has not worked or become outdated. In light of lessons learned from MF Global, the Commission is proposing changes to the treatment of letters of credit as collateral, both during business as usual and during bankruptcy, in order to ensure that customers who post letters of credit as collateral have the same proportional loss as customers who post other types of collateral.

The Proposal also addresses a number of changes that have naturally occurred in our markets since the original Part 190 finalization in 1983. The Commission is proposing a new subpart C to part 190, specifically governing the bankruptcy of a clearing organization. As DCOs have grown in importance over time, including being deemed systemically important by the Financial Stability Oversight Council following the financial crisis[5], the Commission believes that it is imperative to have a clear plan in place for exactly how a DCO bankruptcy would be resolved. The Proposal also addresses changes in technology over the past 37 years, and the movement from paper-based to electronic-based means of communication – a stark reminder from the PFG bankruptcy.

I am hopeful that the 90 day comment period will allow sufficient time for the public to digest this extensive Proposal and provide fulsome comments. There can be no higher demand of market participants and the general public than to assist and guide the Commission in its duty, especially for one as important as this Proposal; it is absolutely critical.

If needed, I encourage market participants to request an extension of the comment period. As we all continue to endure the challenges of new realities at home and in the workplace as a result of the Covid-19 pandemic, I firmly believe the Commission needs to be as flexible as necessary to accommodate market participants and the general public in their efforts to provide us with the best comments to rulemakings. I have made my position clear on what and how the Commission should be allocating its resources during these unprecedented times.[6]

As we propose bankruptcy rules that would provide important customer protections, I note with approval that today we are also finalizing another rule related to customer protection. Rule 160.30 re-establishes longstanding detailed requirements for Commission registrants to adopt policies and procedures to address administrative, technical and physical safeguards for the protection of customer records and information.

I would like to close by again thanking staff for all of their hard work in producing this refresh of the Commission's part 190 rules to provide important customer protections, and look forward to considering comments from the public as the Commission considers this critically important rule.

-CFTC-

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[1] *Bankruptcy*, 48 FR 8716 (March 1, 1983).

[2] 82 FR 23765 (May 3, 2017). The ABA Submission can be found at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61331&SearchText>; the accompanying cover note ("ABA Cover Note") can be found at: <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61330&SearchText>.

[3] See Address of CFTC Commissioner J. Christopher Giancarlo to the American Enterprise Institute: 21<sup>st</sup> Century Markets Need 21<sup>st</sup> Century Regulation (Sep. 21, 2016), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-17>,

[4] John Gapper and Isabella Kaminska, *Downfall of MF Global*, Financial Times, Nov. 4, 2011, available at <https://www.ft.com/content/2882d766-06fb-11e1-90de-00144feabdc0>.

[5] [https://www.federalreserve.gov/paymentsystems/designated\\_fmu\\_about.htm](https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm)

[6] Statement of Commissioner Rostin Behnam Regarding COVID-19 and CFTC Digital Assets Rulemaking (March 24, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamsstatement032420>; Statement of Commissioner Rostin Behnam Regarding CFTC's Extension of Currently Open Comment Periods in Response to the COVID-19 Epidemic (April 10, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamsstatement041020>.