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PREFERENCE DETERMINATIONS CONCERNING BANKRUPTCY
REFORM ACT OF 1978 AND SECURITIES ACT OF 1933,
SECURITIES AND EXCHANGE ACT OF 1934, AND COMMODITY
EXCHANGE ACT

**J.B. Grossman*

I. INTRODUCTION

The Bankruptcy Code's preference rules,¹ particularly those found in sections 547(b) and 548(a)(1)(A),² permit the return of funds paid by a bankruptcy estate debtor out of the estate to third parties prior to the filing of the petition in bankruptcy. Specifically, section 547(b) provides for avoidance of transfers made within ninety days of the filing of the bankruptcy and section 548(a)(1)(A) allows avoidance of fraudulent transfers made within one year of the filing of the bankruptcy for any transfer of an interest of the debtor in property. These preference call back of funds rules could include the return of account equity paid out to trading account owners in security and commodity futures or derivative accounts when, within ninety days of the return of account funds, a trading firm which formerly held those returned customer monies enters bankruptcy.³ Making this conundrum more complicated, Bankruptcy Code section 546(e) places a "contingent" limit on the trustee's right to these preferences over disbursed account equity where these customer monies are paid not to the customer but rather to certain institutional market participants.⁴ In short, payments made

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1. A "preference" in bankruptcy is:

the payment of a debt to one creditor rather than dividing the assets equally among all those to whom he/she/it owes money, often by making a payment to a favored creditor just before filing a petition to be declared bankrupt. Such a preference is prohibited by law, and the favored creditor must pay the money to the bankruptcy trustee. However, the bankruptcy court may give secured creditors (with a judgment, lien, deed of trust, mortgage or collateralized loan) a legal preference over "general" creditors in distributing available funds or assets.

See <http://dictionary.law.com/default2.asp?selected=1577&bold=preference//>.

2. 11 U.S.C. §§ 547(b), 548(a)(1)(A) (2005).

3. 7 AM. JUR.2d *Bankruptcy* § 1802 (2005).

4. Section 546(e) first appeared as 11 U.S.C. § 764(c) in 1978 but pertained to the commodity futures markets only. In 1982 Congress amended the Bankruptcy Code to "clar-

from trading accounts to customers are subject to a trustee's preference claims even though they might not be when those funds are paid into third party market institutions on behalf of the customer. The purpose of preferences is to create equality among creditors, but the imports of these "preferences" often seem to create complexity, uncertainty, and sometimes injustice.⁵

In this article I will articulate the nature of a trustee's authority in bankruptcy to make preference claims on securities and commodity futures account holders over returns of disbursed equity from their accounts. I will then explain for those circumstances when a preference right is permitted, whether any special limitations exist as to the use and redistribution of those preferred funds, and explain what those special rules require concerning the recaptured funds. Finally, I will provide the practitioner with an outline

ify and, in some instances, to broaden the commodities market protections to the securities market." The amended section was re-codified as section 546(d). Pub. L. No. 97-222; see also H.R. 420, 97th Cong. (1982). In 1984 section 546(d) was moved to 546(e). Pub. L. 98-353; see also H.R. 5174, 98th Cong. (1984).

5. Professor Lawrence Ponoroff has commented and explained preferences in Bankruptcy stating:

In light of this premium that traders and other mercantile interests place on the predictability of consequences flowing from particular behavior and the finality of concluded transactions, bankruptcy preferences present an enigma. Inasmuch as they expose to the risk of voidability transactions that are perfectly permissible and wholly unassailable under state law, preferences seem as if they were designed to create uncertainty. Perhaps more so than any other aspect of the commercial law, the concept of a voidable preference highlights the fundamental difference between the values that underlie the parallel state and federal schemes of debt collection. Because of its emphasis on collectivizing the debt collection function, bankruptcy cannot tolerate asset transfers made in contemplation of liquidation and that favor one creditor at the expense of other creditors of the same class. Bankruptcy law must regulate preferences precisely because preferential transfers belie the bankruptcy maxim that "equality is equity."

Lawrence Ponoroff, *Evil Intentions and an Irresolute Endorsement for Scientific Rationalism: Bankruptcy Preferences One More Time*, 1993 WIS. L. REV. 1439, 1444-47 (1993) (footnotes omitted). In footnote 16, Professor Ponoroff states:

[n]otably, the trustee need not prove that the transferee-creditor knew or had reason to know that the effect of the payment would be to prefer that creditor vis a vis other creditors of the same class. Thus, a creditor that acts innocently and in good faith in accepting a payment or the transfer of property from an insolvent debtor to secure an existing indebtedness may still be required to disgorge its lawfully gotten pre-bankruptcy gain. See H.R. REP. NO. 595, 95th Cong., 2nd Sess. 178 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6139 [hereinafter House Report] ("To argue that the creditor's state of mind is an important element of a preference and that creditors should not be required to disgorge what they took in supposed innocence is to ignore the strong bankruptcy policy of equality among creditors.").

Id. at 1446 n.16.

of which trading market institutional recipients of security or commodity futures regulated account funds may not be recalled by the trustee under his or her preference powers.

II. DISCUSSION

A. The Limitation on a Trustee in Bankruptcy's Preference Rights

Section 546(e) limits the trustee's power concerning preferences as follows:

Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title [preference authorizations], the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) [Fraudulent Transfers] of this title.⁶

The limitation does not constrain the trustee from returning "preferred" payments to the estate unless the payments are made into what we will generically call for now, clearing entities or, in the case of securities, settlement agencies. So when may the trustee in bankruptcy apply his or her preference powers in dealing with a security or derivative account, and what are the special payout rules? The answers to our questions must be preceded by our setting out in clear terms what is a security versus what is a derivative. Understanding how the Bankruptcy Code structures itself to provide these special rules for securities and derivatives will be dependent on understanding the different nature of each investment vehicle and how Congress created distinct customer protection rules for funds being held by trading account businesses.

For our purposes we will limit our concept of the relevant regulatory acts for securities to the Securities Act of 1933, 15 U.S.C. § 77a and the Securities and Exchange Act of 1934, 15 U.S.C. § 78a, whose operation is under the direction of the Securities and Exchange Commission (SEC) and for derivatives to the Commodity Exchange Act (CEA), 7 U.S.C. § 1 under the Commodity Futures Trading Commission (CFTC). To best examine these distinct operative regimes and their effect on the preference powers of sections 547 and 548(1)(a) as re-characterized by section 546(e) we will first set forth a definition between securities and commodity futures and other derivatives. For that distinction, we can rely upon the comparison

6. 11 U.S.C. § 546(e) (2005).

found in *Chicago Mercantile Exchange v. SEC*⁷ where the court made the following observations concerning a conceptual difference between securities and commodities and the power of the respective agencies:

A futures contract, roughly speaking, is a fungible promise to buy or sell a particular commodity at a fixed date in the future.

A security, roughly speaking, is an undivided interest in a common venture the value of which is subject to uncertainty.

Securities usually arise out of capital formation and aggregation (entrusting funds to an entrepreneur), while futures are means of hedging, speculation, and price revelation without transfer of capital. So one could think of the distinction between the jurisdiction of the [Securities and Exchange Commission or "SEC"] and that of the Commodity Futures Trading Commission or "CFTC"] as the difference between regulating capital formation and regulating hedging.⁸

1. *Sections 741–752 Apply to Securities and Sections 761–766 Apply to Commodity Futures*

We now return to section 546(e) of the Bankruptcy Code to note the following about that statute's reference to other sections of the Bankruptcy Code. Section 101 is part of the Bankruptcy Code's general definitional section, and, as stated above, sections 741 through 752 comprise a set of rules to be followed in bankruptcy proceedings where the debtor is an entity whose operations are subject to regulation by the SEC under the securities acts. Sections 761 through 766 comprise a set of rules to be followed in bankruptcy proceedings where the debtor is an entity whose operations are subject to regulation under the CFTC and commodity futures enactments. When transactions governed by those financial market rules are also brought into a bankruptcy proceeding, then the Bankruptcy Code in sections 741 through 752 and 761 through 766 provides a very specific scheme for avoidance and payout to securities and derivative customers different than the customary bankruptcy practice.

7. 883 F.2d 537 (7th Cir. 1989).

8. *Id.* at 542–43.

2. *Securities Are to Insurance Funds as Commodity Futures Are to Segregated Accounts*

There is a marked contrast between the application of sections 741 through 752 and the application of sections 761 through 766. This contrast exists because there is a marked distinction as to how customer funds are maintained and protected at a securities regulated entity, such as a broker dealer, as opposed to how customer funds are maintained and protected at a derivative dealer such as a "futures commission merchant," (a nomenclature for a broker dealer in futures). Under the securities acts, customer funds are protected by a congressionally created insurance fund.⁹ Under the commodity futures act, customer funds are protected by a congressionally enacted scheme of "segregated accounts."¹⁰

3. *The Securities Act and the Insurance Fund ("SIPC")*

In 1970 Congress created the Securities Investor Protection Corporation ("SIPC"), as part of the Securities Investor Protection Act of 1970.¹¹ SIPC's object is to restore funds to investors when broker dealer assets are in the hands of a bankruptcy estate or when a broker dealer is found to be otherwise financially troubled and unable to return customer deposits. When a brokerage firm is closed due to bankruptcy or other financial difficulties, SIPC steps in to facilitate the return to investors of the debtor firm the cash, stock, and other securities the customer had at the firm. SIPC sometimes accomplishes this by insurance payments to investors and subrogating itself on behalf of all rightful claims. Without SIPC investors at financially troubled brokerage firms might wait for years while their assets are tied up in court or lose their securities or money forever. The Securities Investor Protection Corporation is the investor's first line of defense in the event a brokerage firm fails owing customer's cash and securities that are missing from customer accounts. From the time Congress created it in 1970 through December 2003, SIPC has advanced \$587 million in order to make possible the recovery of \$14.0 billion in assets for an estimated 628,000 investors. Although not every investor is protected by SIPC, SIPC estimates that no fewer than ninety-nine percent of persons who are eligible have been made whole in the failed brokerage firm cases that it has handled to date.¹²

9. 15 U.S.C. § 78fff-3 (2005).

10. 17 U.S.C. § 6d(a)(2), (b) (2005).

11. 15 U.S.C. § 78ccc (2005).

12. See <http://www.sipc.org/who/sipctrackrecord.cfm>.

4. *The Commodity Futures and Segregated Accounts*

Since the 1936 amendments to the CEA,¹³ the CEA has required registrants holding customer funds to separately account for or segregate those funds.¹⁴ Thus, unlike the securities acts, which protect customer funds by the SIPC insurance fund, under the CEA funds are protected by requiring that they be kept separate from firm (futures commission merchant) funds.

5. *The Bankruptcy Code Provides Special Avoidance Prescriptions Giving Due Considerations to the Securities and Commodity Futures Act's Customer Protection Schemes*

When the Bankruptcy Reform Act of 1978 was promulgated, the drafters determined it was necessary to provide special procedures and rules concerning the trustee's avoidance powers in light of the securities act's investor protection system and SIPC and the commodity futures act's concept of segregated accounts. As such, section 546(e) was written to take into account the special circumstances or pre-existence of the remedial financial acts. Section 101 describes "margins" generally, while section 741 speaks to securities transactions, and section 761 speaks to commodity futures and other derivative transactions, with due consideration given to the congressionally structured customer protection plans of SIPC and segregate accounts. In addition, sections 101 and 741 (not 761), speak to "settlements" in relation to the securities acts only. Because each financial industry has a different customer funds protection scheme, each must be managed differently in bankruptcy proceedings.

6. *The Bankruptcy Code and Securities Act Registrants*

If a debtor is subject to the securities laws as to its business activity, section 742 of the Bankruptcy Code directs that under section 5 of SIPC, the SIPC can initiate a proceeding in a United States district court and take on all the powers a trustee would have under Title 11. In fact, a SIPC proceeding enjoins even a bankruptcy proceeding. If the trustee, and not SIPC, resolves an insolvent estate of a securities registrant, section 749 continues the concept of preference (avoiding) transfers of property out of an estate preceding a filing, but in the case of customer identified property, it establishes specific rules giving the customer account certain preferences as well as providing the SEC specific rights as to transactions after the order of relief.

13. The CEA was first passed Sept. 21, 1922, ch. 369, § 1, 42 Stat. 998, and first amended on June 15, 1936, ch. 545, § 1, 49 Stat. 1491.

14. Section 4d(a)(2) of the CEA, 7 U.S.C. § 6d(a)(2) (2001) and 17 C.F.R. § 1.20 (2004).

For example, section 751 permits the return of customer securities held in his name unless the customer has a negative balance with the broker dealer. Also section 752 permits ratable return to all customers of customer identified monies in priority to all other claims except certain claims attributable to the administration of the estate.

7. *The Bankruptcy Code and Commodity Futures Act Registrants*

If a debtor is subject to the commodity futures and derivative laws as to its business activity, sections 763 and 764 direct the trustee in bankruptcy that customer-segregated accounts are to be treated as the account of the identified customer, not the debtor. Section 764 gives the trustee a power akin to those powers given in section 749 under the securities acts and continues the concept of avoiding transfers of property out of an estate preceding a filing but in the case of customer identified property establishes specific rules giving the customer account certain preferences as well as providing the CFTC specific rights to validate transactions after the order of relief. Section 765 gives the identified customer certain instructional rights as to open commodity futures and derivative contracts. Section 766 then provides a formula for ratable return of specific customer funds, except certain claims attributable to the administration of the estate.

8. *The Trustee's Avoidance Powers Continue in Securities and Commodity Registrant Proceedings, but Are Applied in Very Specific Manners Pursuant to Bankruptcy Code Section 546(e)*

What is important to understand is that the avoidance powers of the trustee are not done away with under section 546(e), but merely altered to insure that when applied in the case of either securities or commodity futures transactions, they are applied in a manner that permits specifically identified customer property to be protected for the identified customer and returned to the customer in a manner separate from resolution of the debtor's general estate.

Section 546(e) does not stop avoidance, but continues to permit avoidance under certain circumstances. In the case of securities and commodity futures, the avoided property must be returned to the specified customer's account. If the customer funds have not been violated by the debtor in its financially hindered state, then the full amount of the identified property can be returned, less administrative costs. If the customer funds have been violated, then all customer funds are returned to the identified customers on a pro rata basis with other like customers.

B. The Purpose and Effect of Section 546(e) as Applied to Margin and Settlement Payments Further Explained

1. *Additional Reason Why Section 546(e) Does Not Prohibit a Trustee's Avoidance Claims Against Clearing and Settlement Entities*

The prohibition against the trustee's power of avoidance that section 546(e) engenders runs against the call back by the trustee of "margin" or "settlement" payments in the securities industry or margin payments in the commodity futures or derivative industries. The rule permits a trustee to reclaim payments made to investors who own the brokerage account. It does not permit the recapture of payments made on behalf of the investor to securities and derivative institutions. Prohibitions against recapturing payments made into clearing and (in the case of securities) the settlement processes were enacted by Congress because once these payments are made, an essential but complicated process of posting and re-posting of trades, and their related cash accounting become deeply embedded into financial matrixes by which the securities or commodity futures industry operates. A call back of these funds would undermine the established clearing system and such an undermining, if permitted, would have a harmful effect on the financial markets, whose stability the legislature has determined is more important than preservation of the purpose of avoidance of fund withdrawals from bankrupt estates.

We have been using the terms clearing entities or, in the case of securities, settlement agencies generically for the purposes of working out the rules and regulations, which govern preference claims when a broker dealer or futures commission merchant enters bankruptcy. In fact, section 546(e) speaks of payments made to a very specific list of entities that have very particular meanings under the relevant acts, to wit., payment "made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case"¹⁵ The margin payments in securities, futures and derivative markets speak to monies forwarded by a broker dealer or futures commission merchant to an exchange clearinghouse or stock or derivative dealer, not to a customer, as margin payments are not made to customers.¹⁶

15. 11 U.S.C. § 546(e) (2005).

16. Section 761(15) defines "margin payment" within the context of commodity futures as, "payment or deposit of cash, a security, or other property, that is commonly known to the commodities trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, settlement payments, variation payments, daily settlement payments, and final settlement payments made as adjustments to settlement prices." Section 741 (5) defines "margin payment" within the context of securities similarly as "payment or deposit of cash, a security, or other property, that is commonly known to the

Settlement payments apply to institutional securities industry transactions (as the section 546(e) realizes) in that the word settlement is generally for payments from the securities clearing process to a stock purchaser or seller.¹⁷ Recalling these payments would cause similar harm as recalling margin payments.¹⁸ It is now time to describe precisely what those institutions are that are protected from the bankruptcy trustee's preference rights.

Since a trustee may not avoid payments to the designated entities, it is necessary to determine just what are the section 506(e) listed entities of commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency. Each entity will be defined and if necessary described. Each prescribed institution, though, will not be explained in the order listed in section 506(e) but arranged in a manner from the easiest to understand to the more difficult.

securities trade as original margin, initial margin, maintenance margin, or variation margin, or as a mark-to-market payment, or that secures an obligation of a participant in a securities clearing agency."

See Section 101(38) for a like definition of margin for forward contracts.

17. Section 741(8) defines settlement payment as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade."

18. In *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846 (10th Cir. 1990), the court said the following on the subject of settlement payments and preferences:

The definition in section 741(8), while somewhat circular, is "extremely broad," *In re Bevill, Bresler & Schulman Asset Management Corp.* (*Bevill, Bresler & Schulman Asset Management Corp. v. Spencer Savings & Loan Ass'n*), 878 F.2d 742, 751 (3d Cir. 1989), in that it clearly includes anything which may be considered a settlement payment. See *In re Blanton* (*Blanton v. Prudential-Bache Securities, Inc.*), 105 B.R. 321, 347 (Bankr.E.D.Va. 1989) (because margin and settlement payment are "very broadly defined by the Bankruptcy Code," court accepts the argument that "any payment by [the debtor] which was used to reduce a deficiency in his margin account constituted either a margin or settlement payment for purposes of the exception under § 546(e)"); see also *In re Bevill, Bresler & Schulman Asset Management Corp.* (*Cohen v. Savings Building & Loan Co.*), 896 F.2d 54, 61 (3d Cir. 1990) (holding that transferring securities to a safekeeping account for a purchaser is a settlement payment; apparently overruling *In re Bevill, Bresler & Schulman, Inc.* (*Hill v. Spencer Savings & Loan Ass'n*), 94 B.R. 817, 828-29 (D.N.J. 1989)). But cf. *In re Edelsberg* (*Edelsberg v. Thompson McKinnon Securities, Inc.*), 101 B.R. 386, 389 (Bankr.S.D.Fla. 1989) (execution of judgment on debt for settlement payment is not itself a settlement payment).

Such an interpretation "is consistent with the legislative intent behind § 546 to protect the nation's financial markets from the instability caused by the reversal of settled securities transactions." *Kaiser Steel Resources, Inc. v. Jacobs*, 110 B.R. at 522.

Kaiser Steel Corp., 913 F.2d at 848.

2. *Definition and Description of a Stockbroker, Financial Institution, and Securities Clearing Agency*

A stockbroker is not defined in the various acts but is used in section 741 to mean a person approved by the SEC and stock exchanges to sell securities to the public.¹⁹ The National Association of Securities Dealers, NASD, registers stockbrokers for the SEC and names that category as a Registered Representative.²⁰ A Registered Representative is the person who interacts on behalf of a broker dealer with public investors. A Financial institution refers to a banking business or mutual fund.²¹ Securities clearing agency is defined in section 101(48) to mean an entity registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 (a national clearing association, for example, the Depository Trust Corporation²²) or whose business is confined to the performance of functions of a clearing agency in exempted securities as defined by section 3(a)(12) of the Securities Exchange Act of 1934—in effect, a place where sold securities are taken from a seller and given to the purchaser through the offices of the investor's broker dealers.

19. See A HANDBOOK OF BUSINESS LAW TERMS, BLACK'S LAW DICTIONARY SERIES (West Group 1999).

20. NASD Rule 1031(b), Definition of Representative:

Persons associated with a member, including assistant officers other than principals, who are engaged in the investment banking or securities business for the member including the functions of supervision, solicitation or conduct of business in securities or who are engaged in the training of persons associated with a member for any of these functions are designated as representatives.

available at http://nasd.complinet.com/nasd/display/display.html?rbid=1198&element_id=1159000424.

21. The actual term found at section 101(22) reads:
the term "financial institution"—
(A) means—

(i) a Federal reserve bank or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, or receiver or conservator for such entity and, when any such Federal reserve bank, receiver, conservator, or entity is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741 of this title, the customer; or (ii) in connection with a securities contract, as defined in section 741 of this title, an investment company registered under the Investment Company Act of 1940; and
(B) includes any person described in subparagraph (A) which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

22. See <http://www.dtcc.com/Careers/history.htm>.

3. *Definition and Description of the Terms Commodity Broker, Clearing Organization, Commodity Options Dealer, Leverage Transaction Merchant, and Forward Contract Merchant as Used in Section 506(e).*

Section 101(6) of the Bankruptcy Code defines “commodity broker” to mean, futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as those terms are defined in section 761 of the Bankruptcy Code. Section 761, however, does not define “futures commission merchant.” The CEA, does in section 1a.(20) as an entity that:

- (A) is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market²³ or derivatives transaction execution facility;²⁴ and
- (B) in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

Thus, a sort of broker dealer in derivatives.

The term clearing organization is defined in section 761(2) to mean a derivative clearing organization registered under the CEA. Like the term securities clearing agency, it is a place where sold derivatives are booked as being due from a seller and likewise where buyers are listed as obligated to pay for a to be delivered good at a future date. Section 761(6) defines a “commodity options dealer” as “a person that extends credit to, or that accepts cash, a security, or other property from, a customer of such person for the purchase or sale of an interest in a commodity option.”²⁵ A leverage transaction merchant is a concept defined in section 19 of the CEA as the sale of standardized contracts on any commodity by way of a margin ac-

23. The CEA does not define a contract market (although it is a term used extensively in that CEA). PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, *COMMODITIES REGULATION* §1.20 (2d ed. 1989) defines a contract market as, “a board of trade or other exchange that has achieved designation as such by the CFTC, and because it pertains only to such licensed institutions, is not synonymous with board of trade.”

24. Derivative transaction execution facility is not a word of art defined by the CEA, the Securities and Exchange Act of 1934 or the Bankruptcy Code. The definitional section of the Securities and Exchange Act of 1934 does use the term in defining what a stock index future is not. *See* section 3a(55) of that act. The regulations under the Commodity Exchange Act, 17 C.F.R. pt. 37, again by way of definitional inference sets parameters for operation of a Derivative Transaction Execution Facility or boards of trade or trading facility operating as a registered derivatives transaction facility.

25. *See* CEA regulations at 17 C.F.R. pt. 32 and 33 where the CFTC exercises its power to regulate trading in commodity options.

count. Sales of leverage contracts are prohibited except as authorized by the CFTC. Subpart (b) of section 19, permits only contracts in silver, gold, and other precious metals to be registered with the CFTC as a leverage transaction merchant. A forward contract merchant, as defined by section 101(26), means a person whose business consists, in whole or in part, of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) (listing financial vehicles subject to regulation under the CEA) or any similar good, article, service, right, or interest which is presently, or in the future, becomes the subject of dealing in the forward contract trade.

Payments made to any of these organizations, a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency are protected from the trustee's rights under Code sections 544, 545, 547, 548(a)(1)(B), and 548(b) unless the transaction was fraudulently engineered.

III. CONCLUSION

Investors should always be concerned with the capital structure of firms they choose to use for market access because if their chosen firm enters bankruptcy during or soon after their tenure with the firm as a customer, their funds may be subject to being tied up for the term of the administration of the bankrupt trading firm's estate. The trustee's preference powers allow her to bring market investor funds back into the bankrupt broker dealer or futures commission merchant's estate—even if the customer had no relationship to the cause for the bankruptcy. Although the customer funds will be returned without draw down for the creditor debts of the debtor in bankruptcy, the customer may stand to lose a pro rata share of his invested funds with all other like customers if the broker dealer or the futures commission merchant violated the customer account funds. Finally, woven into the fabric of these rules is the market concept that the trustee cannot use her preference powers to recapture (for the benefit of the bankrupt's estate) transactions that have been "processed" by the clearing or settlement process. Although this latter rule protects the integrity of the trading marketplace it very likely will do nothing to protect customer funds—and in fact may act to harm the customer's position in eventual return of all his capital.