

COMMODITY FUTURES MODERNIZATION AND FINANCIAL
CONTRACT NETTING IMPROVEMENT ACT OF 2000

SEPTEMBER 6, 2000.—Ordered to be printed

Mr. LEACH, from the Committee on Banking and Financial
Services, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 4541]

[Including cost estimate of the Congressional Budget Office]

The Committee on Banking and Financial Services, to whom was referred the bill (H.R. 4541) to reauthorize and amend the Commodity Exchange Act to promote legal certainty, enhance competition, and reduce systemic risk in markets for futures and over-the-counter derivatives, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Commodity Futures Modernization and Financial Contract Netting Improvement Act of 2000”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—COMMODITY FUTURES MODERNIZATION

Sec. 101. Short title.

Sec. 102. Purposes.

Sec. 103. Definitions.

Sec. 104. Agreements, contracts, and transactions in foreign currency, government securities, and certain other commodities.

Sec. 105. Legal certainty for excluded derivative transactions.

Sec. 106. Excluded electronic trading facilities.

Sec. 107. Conformity with the Gramm-Leach-Bliley Act; hybrid instruments.

Sec. 108. Futures on securities.

Sec. 109. Transactions in exempt commodities.

Sec. 110. Swap transactions.

Sec. 111. Application of the Commodity Exchange Act.

Sec. 112. Protection of the public interest.

- Sec. 113. Prohibited transactions.
- Sec. 114. Designation of boards of trade as contract markets.
- Sec. 115. Derivatives transaction execution facilities.
- Sec. 116. Derivatives clearing.
- Sec. 117. Common provisions applicable to registered entities.
- Sec. 118. Exempt boards of trade.
- Sec. 119. Suspension or revocation of designation as contract market.
- Sec. 120. Authorization of appropriations.
- Sec. 121. Preemption.
- Sec. 122. Predispute resolution agreements for institutional customers.
- Sec. 123. Consideration of costs and benefits and antitrust laws.
- Sec. 124. Contract enforcement.
- Sec. 125. Special procedures to encourage and facilitate bona fide hedging by agricultural producers.
- Sec. 126. Rule of construction.
- Sec. 127. Authority of agencies to construe the term “contract market”.
- Sec. 128. Technical and conforming amendments.
- Sec. 129. Report to Congress.
- Sec. 130. Effective date.
- Sec. 131. International activities of the Commodity Futures Trading Commission.
- Sec. 132. Antifraud provisions.
- Sec. 133. Retail swap customer protections.

TITLE II—FINANCIAL CONTRACT NETTING IMPROVEMENT

- Sec. 201. Short title.
- Sec. 202. Treatment of certain agreements by conservators or receivers of insured depository institutions.
- Sec. 203. Authority of the Corporation with respect to failed and failing institutions.
- Sec. 204. Amendments relating to transfers of qualified financial contracts.
- Sec. 205. Amendments relating to disaffirmance or repudiation of qualified financial contracts.
- Sec. 206. Clarifying amendment relating to master agreements.
- Sec. 207. Federal Deposit Insurance Corporation Improvement Act of 1991.
- Sec. 208. Bankruptcy code amendments.
- Sec. 209. Recordkeeping requirements.
- Sec. 210. Exemptions from contemporaneous execution requirement.
- Sec. 211. Damage measure.
- Sec. 212. SIPC stay.
- Sec. 213. Asset-backed securitizations.
- Sec. 214. Application of amendments.

TITLE I—COMMODITY FUTURES MODERNIZATION

SEC. 101. SHORT TITLE.

This title may be cited as the “Commodity Futures Modernization Act of 2000”.

SEC. 102. PURPOSES.

The purposes of this title are—

- (1) to reauthorize the appropriation for the Commodity Futures Trading Commission;
- (2) to streamline and eliminate unnecessary regulation for the commodity futures exchanges and other entities regulated under the Commodity Exchange Act;
- (3) to transform the role of the Commodity Futures Trading Commission to oversight of the futures markets;
- (4) to provide a statutory and regulatory framework for allowing the trading of futures on securities;
- (5) to provide the Commission jurisdiction over certain retail foreign exchange transactions and bucket shops that may not be otherwise regulated;
- (6) to promote innovation for futures and derivatives and to reduce systemic risk by enhancing legal certainty in the markets for certain futures and derivatives transactions;
- (7) to reduce systemic risk and provide greater stability to markets during times of market disorder by allowing the clearing of transactions in over-the-counter derivatives through appropriately regulated clearing organizations; and
- (8) to enhance the competitive position of United States financial institutions and financial markets.

SEC. 103. DEFINITIONS.

Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

- (1) by redesignating—
 - (A) paragraphs (1) through (7) as paragraphs (2) through (8), respectively;
 - (B) paragraphs (8) through (12) as paragraphs (16) through (20), respectively;
 - (C) paragraphs (13) through (15) as paragraphs (22) through (24), respectively; and
 - (D) paragraph (16) as paragraph (28);
- (2) by inserting before paragraph (2) (as so redesignated by paragraph (1) of this section) the following new paragraph:

“(1) BANKING PRODUCT.—

“(A) IN GENERAL.—The term ‘banking product’ means any agreement, contract, or transaction that is an identified banking product (as defined in section 206(a) of the Gramm-Leach-Bliley Act).

“(B) EXCLUSION.—The term ‘banking product’ does not include a contract for the sale of a commodity for future delivery traded on a contract market designated under section 5 of this Act or an agreement, contract, or transaction traded on a derivatives transaction execution facility registered under section 5a.”;

(3) by inserting after paragraph (8) (as so redesignated by paragraph (1) of this section) the following new paragraphs:

“(9) DERIVATIVES CLEARING ORGANIZATION.—

“(A) IN GENERAL.—The term ‘derivatives clearing organization’ means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to a derivative agreement, contract, or transaction—

“(i) enables each party to the derivative agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

“(ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by parties in the derivatives clearing organization; or

“(iii) otherwise provides clearing services or arrangements that mutualize or transfer among parties in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the parties.

“(B) EXCLUSIONS.—The term ‘derivatives clearing organization’ does not include an entity, facility, system, or organization solely because it arranges or provides for—

“(i) settlement, netting, or novation of obligations resulting from agreements, contracts, or transactions, on a bilateral basis and without a centralized counterparty;

“(ii) settlement or netting of cash payments through an interbank payment system; or

“(iii) settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

“(10) ELECTRONIC TRADING FACILITY.—The term ‘electronic trading facility’ means a trading facility that—

“(A) operates by means of an electronic network; and

“(B) maintains a real-time audit trail of bids, offers, and the matching of orders or the execution of transactions.

“(11) ELIGIBLE COMMERCIAL PARTICIPANT.—The term ‘eligible commercial participant’ means a party or entity described in paragraph (11)(A)(i), (ii), (v), or (vii) or paragraph (11)(C), who, in connection with its business—

“(A) has a demonstrable capacity or ability, directly or through separate contractual arrangements, to make or take delivery of the underlying physical commodity;

“(B) incurs risks, in addition to price risk, related to the commodity; or

“(C) is a dealer that regularly provides hedging, risk management, or market-making services to the foregoing entities.

“(12) ELIGIBLE CONTRACT PARTICIPANT.—The term ‘eligible contract participant’ means—

“(A) acting for its own account—

“(i) a financial institution;

“(ii) an insurance company regulated by a State (including a subsidiary or affiliate of such an insurance company);

“(iii) an investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the investment company or the foreign person is itself an eligible contract participant);

“(iv) a commodity pool that—

“(I) has total assets exceeding \$5,000,000; and

“(II) is formed and operated by a person subject to regulation under this Act or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of wheth-

er each investor in the commodity pool or the foreign person is itself an eligible contract participant);

“(v) a corporation, partnership, proprietorship, organization, trust, or other entity—

“(I) that has total assets exceeding \$10,000,000;

“(II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or

“(III) that—

“(aa) has a net worth exceeding \$1,000,000; and

“(bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity’s business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity’s business;

“(vi) an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation—

“(I) that has total assets exceeding \$5,000,000; or

“(II) the investment decisions of which are made by—

“(aa) an investment advisor or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or this Act;

“(bb) a foreign person performing a similar role or function subject as such to foreign regulation;

“(cc) a financial institution; or

“(dd) an insurance company regulated by a State (including a subsidiary or affiliate of such an insurance company);

“(vii)(I) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

“(II) a multinational or supranational government entity; or

“(III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);

“(viii) a broker or dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the broker or dealer or foreign person is a natural person or proprietorship, the broker or dealer or foreign person shall not be considered to be an eligible contract participant unless the broker or dealer or foreign person also meets the requirements of clause (v) or (xi);

“(ix) a futures commission merchant subject to regulation under this Act or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the futures commission merchant or foreign person is a natural person or proprietorship, the futures commission merchant or foreign person shall not be considered to be an eligible contract participant unless the futures commission merchant or foreign person also meets the requirements of clause (v) or (xi);

“(x) a floor broker or floor trader subject to regulation under this Act in connection with any transaction that takes place on or through the facilities of a registered entity or an exempt board of trade, or any affiliate thereof, on which such person regularly trades; or

“(xi) an individual who has total assets in an amount in excess of—

“(I) \$10,000,000; or

“(II) \$5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by such individual with total assets exceeding \$10,000,000;

“(B)(i) a person described in any of clauses (i) through (x) of subparagraph (A) or in subparagraph (C), acting as broker or performing an equivalent agency function on behalf of another person described in subparagraph (A) or (C);

“(ii) an investment adviser subject to regulation under the Investment Advisers Act of 1940, a commodity trading advisor subject to regulation

under this Act, a foreign person performing a similar role or function subject as such to foreign regulation, or a person described in any of clauses (i) through (x) of subparagraph (A) or in subparagraph (C), in any such case acting as investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction; or

“(iii) a commodity trading advisor subject to regulation under this Act, having assets under management of not less than \$25,000,000 and acting as investment manager or fiduciary for another person and authorized by such person to commit such person to the transaction; or

“(C) any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.

“(13) EXCLUSION-ELIGIBLE COMMODITY.—

“(A) IN GENERAL.—The term ‘exclusion-eligible commodity’ means—

“(i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;

“(ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—

“(I) not based in substantial part on the value of a narrow group of commodities not described in clause (i); or

“(II) based solely on 1 or more commodities that have no cash market;

“(iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

“(iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—

“(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and

“(II) associated with a financial, commercial, or economic consequence.

“(B) REFERENCE TO EXCLUDED COMMODITY.—Any reference in this Act to the term ‘excluded commodity’ shall be deemed to be a reference to ‘exclusion-eligible commodity’.

“(14) EXEMPT COMMODITY.—The term ‘exempt commodity’ means a commodity that is not an excluded commodity or an agricultural commodity.

“(15) FINANCIAL INSTITUTION.—The term ‘financial institution’ means—

“(A) a corporation operating under the fifth undesignated paragraph of section 25 of the Federal Reserve Act (12 U.S.C. 603), commonly known as ‘an agreement corporation’;

“(B) a corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611 et seq.), commonly known as an ‘Edge Act corporation’;

“(C) an institution that is regulated by the Farm Credit Administration;

“(D) a Federal credit union or State credit union (as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

“(E) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

“(F) a foreign bank or a branch or agency of a foreign bank (each as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101(b)));

“(G) any financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956);

“(H) a trust company; or

“(I) a similarly regulated subsidiary or affiliate of an entity described in any of subparagraphs (A) through (H).”;

(3) by inserting after paragraph (20) (as so redesignated by paragraph (1)) the following new paragraph:

“(21) HYBRID INSTRUMENT.—

“(A) IN GENERAL.—The term ‘hybrid instrument’ means a deposit instrument offered by a financial institution, or a security, having 1 or more payments indexed to the value, level, or rate of 1 or more commodities.

“(B) DEPOSIT INSTRUMENT DEFINED.—The term ‘deposit instrument’ means an instrument representing an interest described in paragraph (1), (2), (3), (4), or (5) of section 3(l) of the Federal Deposit Insurance Act, other than in subparagraph (A), (B), or (C) at the end of paragraph (5).”;

(4) by inserting after paragraph (24) (as so redesignated by paragraph (1)) the following new paragraphs:

“(25) NONEXEMPT SECURITY.—The term ‘nonexempt security’ means a security that is not an exempted security under section 3 of the Securities Act of 1933 or section 3(a)(12) of the Securities Exchange Act of 1934 (other than any municipal security, as defined in section 3(a)(29) of the Securities Exchange Act of 1934).

“(26) OPTION.—The term ‘option’ means an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an ‘option’, ‘privilege’, ‘indemnity’, ‘bid’, ‘offer’, ‘put’, ‘call’, ‘advance guaranty’, or ‘decline guaranty’.

“(27) ORGANIZED EXCHANGE.—The term ‘organized exchange’ means a trading facility that—

“(A) permits trading by persons other than—

“(i) eligible contract participants trading on a principal-to-principal basis; or

“(ii) eligible contract participants described in subclause (I), (II), (III), (IV), (V) or (VI) of section 2(c)(2)(B), acting as a broker or performing an equivalent agency function on behalf of eligible contract participants; or

“(B) has adopted (directly or through another nongovernmental entity) rules that—

“(i) govern the conduct of participants, other than rules that govern the submission of orders or execution of transactions on the trading facility; or

“(ii) include disciplinary sanctions other than the exclusion of participants from trading.”; and

(5) by adding at the end the following new paragraphs:

“(29) REGISTERED ENTITY.—The term ‘registered entity’ means—

“(A) a board of trade designated as a contract market under section 5;

“(B) a derivatives transaction execution facility registered under section 5a; or

“(C) a derivatives clearing organization registered under section 5b.

“(30) SECURITY.—The term ‘security’ has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) as in effect on date of the enactment of this paragraph.

“(31) TRADING FACILITY.—

“(A) IN GENERAL.—The term ‘trading facility’ means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple participants in the facility or system.

“(B) EXCLUSIONS.—The term ‘trading facility’ does not include—

“(i) a person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple orders within a predetermined, nondiscretionary automated trade matching algorithm;

“(ii) a government securities dealer or government securities broker, to the extent that the dealer or broker executes or trades agreements, contracts, or transactions in government securities, or assists persons in communicating about, negotiating, entering into, executing, or trading an agreement, contract, or transaction in government securities (as the terms ‘government securities dealer’, ‘government securities broker’, and ‘government securities’ are defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)));

“(iii) facilities on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding; or

“(iv) a person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that—

“(I) enables participants to enter into bilateral transactions with other participants; and

“(II) incorporates credit screens or filters that prevent any participant from executing a transaction with another participant unless both participants have approved the extension of credit to the other.”.

SEC. 104. AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN FOREIGN CURRENCY, GOVERNMENT SECURITIES, AND CERTAIN OTHER COMMODITIES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) is amended by adding at the end the following:

“(c) AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN FOREIGN CURRENCY, GOVERNMENT SECURITIES, AND CERTAIN OTHER COMMODITIES.—

“(1) IN GENERAL.—Except as provided in paragraph (2), nothing in this Act (other than section 5b or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in—

- “(A) foreign currency;
- “(B) government securities;
- “(C) security warrants;
- “(D) security rights;
- “(E) resales of installment loan contracts;
- “(F) repurchase transactions in an excluded commodity; or
- “(G) mortgages or mortgage purchase commitments.

“(2) COMMISSION JURISDICTION.—

“(A) AGREEMENTS, CONTRACTS, AND TRANSACTIONS THAT ARE FUTURES TRADED ON AN ORGANIZED EXCHANGE.—This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction described in paragraph (1) that is—

- “(i) a contract of sale of a commodity for future delivery (or an option thereon), or an option on a commodity (other than foreign currency or a security), that is executed or traded on an organized exchange; or
- “(ii) an option on foreign currency and is executed or traded on an organized exchange that is not a national securities exchange.

“(B) AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN RETAIL FOREIGN CURRENCY.—This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction in foreign currency that—

- “(i) is a contract of sale for future delivery (or an option on such a contract) or an option; and
- “(ii) is offered to, or entered into with, a person that is not an eligible contract participant, unless the counterparty, or the person offering to be the counterparty, of the person is—

- “(I) a financial institution;
- “(II) a broker or dealer registered under section 15(b) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o-5) or a futures commission merchant registered under this Act;
- “(III) an associated person of a broker or dealer registered under section 15(b) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o-5), or an affiliated person of a futures commission merchant registered under this Act, concerning the financial or securities activities of which the registered person makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-5(b), 78q(h)) or section 4f(c)(2)(B) of this Act;
- “(IV) an insurance company that is subject to State regulation (including a subsidiary or affiliate of such an insurance company);
- “(V) a financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956); or
- “(VI) an investment bank holding company (as defined in section 17(i) of the Securities Exchange Act of 1934).”.

SEC. 105. LEGAL CERTAINTY FOR EXCLUDED DERIVATIVE TRANSACTIONS.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 104) is amended by adding at the end the following:

“(d) EXCLUDED DERIVATIVE TRANSACTIONS.—

“(1) IN GENERAL.—Nothing in this Act (other than section 5b or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in an excluded commodity if—

- “(A) the agreement, contract, or transaction is entered into only between persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and
- “(B) the agreement, contract, or transaction is not executed or traded on a trading facility.

“(2) ELECTRONIC TRADING FACILITY EXCLUSION.—Nothing in this Act (other than section 5a, 5b, or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in an excluded commodity if—

- “(A) the agreement, contract, or transaction is—
- “(i) entered into—

“(I) on a principal-to-principal basis between parties trading for their own accounts or as described in section 1a(12)(B)(ii) of this Act; and

“(II) only between eligible contract participants (as defined in subparagraphs (A), (B)(ii), and (C) section 1a(12)) at the time at which the persons enter into the agreement, contract, or transaction; or

“(ii) entered into only between eligible contract participants described in subclause (I), (II), (III), (IV), (V), or (VI) of section 2(c)(2)(B)(ii) acting as a broker or performing a similar agency function on behalf of persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and

“(B) the agreement, contract, or transaction is executed or traded on an electronic trading facility.”.

SEC. 106. EXCLUDED ELECTRONIC TRADING FACILITIES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 105) is amended by adding at the end the following:

“(e) EXCLUDED ELECTRONIC TRADING FACILITIES.—

“(1) IN GENERAL.—Nothing in this Act (other than section 12(e)(2)(B)) governs or is applicable to an electronic trading facility that limits transactions authorized to be conducted on its facilities to those satisfying the requirements of sections 2(d)(2) and 2(h)(3)(B) of this Act.

“(2) EFFECT ON AUTHORITY TO ESTABLISH AND OPERATE.—Nothing in this Act shall prohibit a board of trade designated by the Commission as a contract market or derivatives transaction execution facility, or an exempt board of trade, from establishing and operating an electronic trading facility excluded under this Act pursuant to paragraph (1).”.

SEC. 107. CONFORMITY WITH THE GRAMM-LEACH-BLILEY ACT; HYBRID INSTRUMENTS.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 106) is amended by adding at the end the following:

“(f) EXCLUSION FOR QUALIFYING HYBRID INSTRUMENTS.—

“(1) IN GENERAL.—Nothing in this Act (other than section 12(e)(2)(B)) governs or is applicable to—

“(A) a banking product or security sold or provided by an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii); or

“(B) a hybrid instrument that is predominantly a security or a deposit instrument.

“(2) EXCEPTION.—Paragraph (1)(A) shall not apply to any swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act) with any party who is not an eligible contract participant unless such swap agreement is entered into after final regulations have been prescribed under section 49 of the Federal Deposit Insurance Act.

“(3) PREDOMINANCE.—A hybrid instrument shall be considered to be predominantly a security or deposit instrument if—

“(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with delivery of the hybrid instrument;

“(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

“(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

“(D) the hybrid instrument is not marketed as a contract of sale for future delivery of a commodity (or option on such a contract) subject to this Act.

“(4) MARK-TO-MARKET MARGINING REQUIREMENTS.—For the purposes of paragraph (3)(C), mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.”.

SEC. 108. FUTURES ON SECURITIES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 107) is amended by adding at the end the following:

“(g) Notwithstanding any other provision of law:

“(1) This Act shall not apply to and the Commission shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to the transaction acquires a put, call, or other option on 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934, on the date of enactment of the Futures Trading Act of 1982), including any group or index of securities and any interest in or based on the value of securities.

“(2) Nothing in this subsection governs or applies to—

“(A) an agreement, contract, or transaction in a commodity that is excluded under subsection (c) or (d);

“(B) an electronic trading facility that is excluded under subsection (e);

or

“(C) a hybrid instrument that is covered by an exclusion under subsection (f) or an exemption granted by the Commission under section 4(c) (whether or not the hybrid instrument is otherwise subject to this Act).

“(3) Except as provided in paragraph (4) of this subsection, or unless excluded by paragraph (2) of this subsection, a person shall not offer to enter into, enter into, or confirm the execution of any contract of sale (or option on the contract) for future delivery of any security or interest in or based on the value of a non-exempt security.

“(4)(A) Except as excluded by paragraph (2) of this subsection, this Act shall apply to and the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, or decline guaranty), and transactions involving, and may designate a board of trade as a contract market under section 5 or register the board of trade as a derivatives transaction execution facility under section 5a in, contracts of sale (or options on the contracts) for future delivery of 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934), including any group or index of securities and any interest in or based on the value of securities.

“(B) The Commission shall not designate a board of trade as a contract market under section 5 or register a board of trade as a derivatives transaction execution facility under section 5a with respect to any such contracts of sale (or options on the contracts) for future delivery unless the board of trade demonstrates and the Commission expressly finds that the specific contract (or option on the contract) with respect to which the application for the designation or recognition has been made meets the following requirements:

“(i) Settlement of or delivery on the contract (or option on the contract) shall be effected in cash or by means other than the transfer or receipt of a nonexempt security.

“(ii) SUSCEPTIBILITY TO PRICE MANIPULATION.—Trading in a contract (or option on such a contract) described in subparagraph (A) shall not be readily susceptible to—

“(I) manipulation of the price of the contract (or option on such a contract); or

“(II) causing or being used in the manipulation of the price of any underlying security, option on a security, or option on a group or index that includes a security.

“(iii) If the contract is based on a single nonexempt security, an option on the security underlying the contract would meet all Securities and Exchange Commission requirements for listing on a national securities exchange.

“(iv) If the contract is based on any group or index of nonexempt securities comprised of fewer than 5 securities, or on an index in which a single nonexempt security predominates, an option on each security comprising the group or index would meet all requirements for listing on a national securities exchange.

“(v)(I) IN GENERAL.—The contract will be traded on a board of trade that establishes the level of margin for futures contracts (or options on the contracts) based on a single nonexempt security, an index of fewer than 5 non-exempt securities, or an index in which a single nonexempt security predominates, at a level consistent with the level of margin on comparable option contracts listed on any national securities exchange.

“(II) CONSISTENCY.—For the purposes of subclause (I), a margin for designated futures on securities and options on securities shall be considered to be consistent if the margin provides a similar level of protection against defaults by counterparties, taking into account any differences in—

“(aa) the price volatility of the contracts;

“(bb) the frequency with which margin requirements are made; and
 “(cc) the period of time within which margin calls must be met.

“(vi) The contract will be traded on a board of trade that prohibits a person who acts as a floor broker for any contract of sale (or options on the contract) for future delivery of a nonexempt security, an index based on fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, from trading that contract for the broker’s own account during the same trading session.

“(vii) The contract will be traded on a board of trade that collects, maintains, and promptly provides to the Securities and Exchange Commission such information as the Commission and the Securities and Exchange Commission jointly consider necessary to perform the enforcement responsibilities described in paragraph (6).

“(5) The Commission shall consult with the Securities and Exchange Commission with respect to any application submitted by a board of trade for designation as a contract market or derivatives transaction execution facility with respect to any contract of sale (or option on the contract) for future delivery of a nonexempt security or a group or index of such securities. If, not later than 15 days after the consultation, the Securities and Exchange Commission objects to the designation of a board of trade as a contract market or derivatives transaction execution facility in the contract (or option on the contract) on the ground that any requirement of paragraph (4)(B) is not met, the Commission shall afford the Securities and Exchange Commission an opportunity for an oral hearing to be transcribed before the Commission, and shall give appropriate weight to the views of the Securities and Exchange Commission. The oral hearing shall be held before Commission action upon the application for the designation, and not less than 30 nor more than 45 days after the Securities and Exchange Commission has objected. If such an oral hearing is held, the Securities and Exchange Commission fails to withdraw its objections, and the Commission issues an order designating a board of trade as a contract market or recognizes the board of trade as a derivatives transaction execution facility with respect to any such contract (or option on the contract), the Securities and Exchange Commission may seek judicial review of the order in accordance with the procedural requirements set forth in section 6(c). If, pursuant to section 6, there is a hearing on the record with respect to an application for such designation, the Securities and Exchange Commission may participate in that hearing as an interested party.

“(6) Notwithstanding any other provision of this Act, the Securities and Exchange Commission may enforce against a person that purchases or sells any contract of sale (or option on the contract) for future delivery of any nonexempt security, any index comprised of fewer than 5 nonexempt securities, or any index in which a single nonexempt security predominates to the same extent as if the person had purchased or sold an option on the security or index under the following provisions of the securities laws and regulations with respect to the following categories of conduct:

“(A) Section 10(b) and 21A of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b), 78u–1) with respect to insider trading.

“(B) Section 16(b) of such Act (15 U.S.C. 78p(b)) with respect to unfair use of information in short swing trading by a corporate insider.

“(C) Section 9 of such Act (15 U.S.C. 78i) with respect to manipulation of securities prices.

“(D) Section 10(b) of such Act (15 U.S.C. 78j(b)) and section 204A of the Investment Adviser’s Act of 1940 (15 U.S.C. 80b–4a) with respect to frontrunning.

“(E) Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) with respect to the pricing and integrity of tender offers.

“(F) Rule 144 of the rules of the Securities and Exchange Commission (17 C.F.R. 230.144) with respect to trading in restricted securities.

“(7)(A) Notwithstanding any other provision of this Act, any contract market or derivatives transaction execution facility in a nonexempt security or stock index futures contract (or option thereon) shall file with the Board of Governors of the Federal Reserve System any rule establishing or changing the levels of margin (initial and maintenance) for the nonexempt security or stock index futures contract (or option on the contract).

“(B) The Board may at any time request any contract market or derivatives transaction execution facility to set the level of margin for any nonexempt security or stock index futures contract (or option on the contract) at such levels as the Board in its judgment determines are appropriate to preserve the financial integrity of the contract market or derivatives transaction execution facility or

its clearing system or to prevent systemic risk. If the contract market or derivatives transaction execution facility fails to do so within the time specified by the Board in its request, the Board may direct the contract market or derivatives transaction execution facility to alter or supplement the rules of the contract market or derivatives transaction execution facility as specified in the request.

“(C) Subject to such conditions as the Board may determine, the Board may delegate any or all of its authority under this paragraph to the Commission or an intermarket margin board as provided in subparagraph (D).

“(D) INTERMARKET MARGIN BOARD.—

“(i) ESTABLISHMENT.—With the concurrence of the Securities and Exchange Commission and the Commission, the Board may establish an intermarket margin board, consisting of representatives of any or all of the three agencies.

“(ii) DUTIES.—The intermarket margin board may set and maintain margin levels and rules pertaining to margin for futures on a single nonexempt security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, listed on a contract market or derivatives transaction execution facility. In discharging these duties, the intermarket margin board shall endeavor to make the levels of margin for futures and options on a single nonexempt security consistent taking into account any material differences in such contracts, including—

“(I) the price volatility of the contracts;

“(II) the frequency with which margin calls are made; and

“(III) the period of time within which margin calls must be met.

“(E) This paragraph shall not be construed to supersede or limit the authority granted to the Commission in section 8a(9) to direct a contract market or derivatives transaction execution facility, on finding an emergency to exist, to raise temporary emergency margin levels on any futures contract or option on the contract covered by this paragraph.

“(F) Any action taken by the Board under this paragraph, or by the Commission acting under the delegation of authority under subparagraph (C), directing a contract market or derivatives transaction execution facility to alter or supplement a contract market or derivatives transaction execution facility rule shall be subject to review only in the United States Court of Appeals for the judicial circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. The review shall be based on the examination of all information before the Board or the Commission, as the case may be, at the time the determination was made. The court reviewing the action of the Board or the Commission shall not enter a stay or order of mandamus unless the court determines, after notice and a hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

“(8) This subsection shall not be construed to prohibit—

“(A) an agreement, contract, or transaction excluded from this Act by paragraph (2); or

“(B) any hybrid instrument that is covered by the terms of any exemption granted by the Commission under section 4(c) (whether or not any such hybrid instrument is otherwise subject to this Act).

“(9)(A) No futures commission merchant, commodity trading advisor, or introducing broker shall recommend to any customer the purchase or sale of any contract of sale for future delivery of a single nonexempt security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, unless the futures commission merchant, commodity trading advisor, or introducing broker complies with the rules described in subparagraph (B) of a registered futures association of which such merchant, advisor, or broker is a member.

“(B) Within 9 months of the date of enactment of the Commodity Futures Modernization Act of 2000, a registered futures association shall adopt rules requiring a futures commission merchant, a commodity trading advisor, or an introducing broker which recommends to any customer the purchase or sale of any contract of sale for future delivery of a single nonexempt security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates to ascertain through reasonable due diligence that the recommendation is suitable for that customer in light of the customer's financial position and trading goals. The registered futures association shall consult with the Commission and the Securities and Exchange Commission prior to the adoption of any such rule, and shall submit any such rule to the Commission for approval in the manner and according to the procedures described in section

17(j) of this Act, provided, that in such case the rule shall become effective if the Commission fails to disapprove such rule within 90 days of submission.

“(10)(A) Nothing in this Act shall be construed to require or authorize the Commission to review or approve, directly or indirectly, any contract, rule, regulation, or action adopted by a foreign board of trade, exchange, or market, or a clearinghouse for such a board of trade, exchange, or market, relating to any transaction involving a contract of sale for future delivery (or option on such a contract) in or involving any security, including any foreign government debt security, or group or index of such securities, if—

“(i)(I) in the case of a contract of sale for future delivery (or option on such a contract) in or involving a single equity security, the United States is not the primary trading market for the underlying security; or

“(II) in the case of a contract of sale for future delivery (or option on such a contract) in or involving a group or index of equity securities, less than 25 percent of the weighting of the group or index is derived from securities for which the United States is the primary trading market for the securities underlying the contract for future delivery (or option on the contract); and

“(ii) settlement of or delivery on the contract for future delivery (or option on such a contract) is to be effected in cash or by means other than the transfer or receipt of a security in the United States other than an exempted security.

“(B) Within 90 days after the date of the enactment of this paragraph, the Commission shall adopt such procedures as it deems appropriate pursuant to which, consistent with this Act, the Commission shall authorize the offer and sale in the United States of any contract of sale for future delivery (or option on such a contract) of a security, other than a security of the type described in subparagraph (A)(i)(I) or a group or index of securities of the type described in subparagraph (A)(i)(II), traded on or subject to the rules of a foreign board of trade, exchange, or market, or a clearinghouse for such a board of trade, exchange, or market, except that such procedures shall not require a foreign board of trade, exchange, or market, or a clearinghouse for such a board of trade, exchange, or market to apply for designation as a contract market under this Act with respect to such a contract for future delivery (or option on such a contract).”

SEC. 109. TRANSACTIONS IN EXEMPT COMMODITIES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 108) is amended by adding at the end the following.

“(h) **LEGAL CERTAINTY FOR CERTAIN TRANSACTIONS IN EXEMPT COMMODITIES.**—

“(1) Except as provided in paragraph (2) of this subsection, nothing in this Act shall apply to a contract, agreement or transaction in an exempt commodity which—

“(A) is entered into solely between persons that are eligible contract participants at the time they enter into the agreement, contract, or transaction; and

“(B) is not entered into on a trading facility.

“(2) An agreement, contract, or transaction described in paragraph (1) of this subsection shall be subject to—

“(A) sections 5b and 12(e)(2)(B) of this Act;

“(B) sections 4b and 4n of this Act and the regulations of the Commission pursuant to section 4c(b) of this Act proscribing fraud in connection with commodity option transactions, to the extent such agreement, contract, or transaction is not between eligible commercial participants and would otherwise be subject to those provisions; and

“(C) sections 6(c) and 9(a)(2) of this Act to the extent they prohibit manipulation of the market price of any commodity in interstate commerce, to the extent such agreement, contract, or transaction would otherwise be subject to those provisions.

“(3) Except as provided in paragraph (4) of this subsection, nothing in this Act shall apply to an agreement, contract, or transaction in an exempt commodity (other than a metal commodity enumerated in section 1a(3) of this Act) which—

“(A) is entered into solely between persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and

“(B) is executed or traded on an electronic trading facility.

“(4) An agreement, contract, or transaction described in paragraph (3) shall be subject to—

“(A) sections 5b and 12(e)(2)(B) of this Act;

“(B) sections 4b and 4n of this Act and the regulations of the Commission pursuant to section 4c(b) of this Act proscribing fraud in connection with commodity option transactions and section 6(c) and 9(a)(2) of this Act, to the extent these provisions prohibit manipulation of the market price of any commodity in interstate commerce, to the extent such agreement, contract, or transaction would otherwise be subject to those provisions; and

“(C) such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions related to the commodity executed or traded on the electronic trading facility.”.

SEC. 110. SWAP TRANSACTIONS.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 109) is amended by adding at the end the following new subsection:

“(i) EXCLUDED SWAP TRANSACTIONS.—

“(1) IN GENERAL.—No provision of this Act (other than section 5b or 12(e)(2)(B)) shall apply to or govern any agreement, contract, or transaction in a commodity other than an agricultural commodity enumerated in section 1a(3) if—

“(A) the agreement, contract, or transaction is entered into only between persons that are eligible contract participants at the time they enter into the agreement, contract, or transaction; and

“(B) the material economic terms of the agreement, contract, or transaction are subject to individual negotiation and are not specified by the rules terms or conditions of a trading facility.

“(2) EXCLUSION.—Paragraph (1) shall not apply to—

“(A) a contract for the sale of a commodity for future delivery traded on a contract market designated under section 5; or

“(B) any agreement, contract, or transaction traded on a derivatives transaction execution facility registered under section 5a.”.

SEC. 111. APPLICATION OF THE COMMODITY EXCHANGE ACT.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 3, 4, 4a) (as amended by section 110) is amended by adding at the end the following new subsection:

“(j) APPLICATION OF THE ACT.—No provision of this Act shall be construed as—

“(1) implying or creating any presumption that—

“(A) any agreement, contract, or transaction that is eligible for an exclusion or exemption from regulation under this Act; or

“(B) any agreement, contract, or transaction that is not eligible for an exclusion or exemption from regulation under this Act,

is or would otherwise be subject to this Act; or

“(2) conferring jurisdiction on the Commission with respect to any such agreement, contract, or transaction, except as expressly provided in section 5b.”.

SEC. 112. PROTECTION OF THE PUBLIC INTEREST.

The Commodity Exchange Act is amended by striking section 3 (7 U.S.C. 5) and inserting the following:

“SEC. 3. FINDINGS AND PURPOSE.

“(a) FINDINGS.—The futures contracts and options contracts that are subject to this Act are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, and disseminating pricing information through trading in liquid, fair and financially secure trading facilities.

“(b) PURPOSE.—It is the purpose of this Act to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.”.

SEC. 113. PROHIBITED TRANSACTIONS.

Section 4c of the Commodity Exchange Act (7 U.S.C. 6c) is amended by striking “SEC. 4c.” and all that follows through subsection (a) and inserting the following:

“SEC. 4c. PROHIBITED TRANSACTIONS.**“(a) IN GENERAL.—**

“(1) PROHIBITION.—It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving any commodity if the transaction is used or may be used to—

“(A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;

“(B) determine the price basis of any such transaction in interstate commerce in the commodity; or

“(C) deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

“(2) TRANSACTION.—A transaction referred to in paragraph (1) is a transaction that—

“(A)(i) is, is of the character of, or is commonly known to the trade as, a ‘wash sale’ or ‘accommodation trade’; or

“(ii) is a fictitious sale; or

“(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.”.

SEC. 114. DESIGNATION OF BOARDS OF TRADE AS CONTRACT MARKETS.

The Commodity Exchange Act is amended—

(1) by redesignating section 5b (7 U.S.C. 7b) as section 5e; and

(2) by striking sections 5 and 5a (7 U.S.C. 7, 7a) and inserting the following:

“SEC. 5. DESIGNATION OF BOARDS OF TRADE AS CONTRACT MARKETS.

“(a) APPLICATIONS.—A board of trade applying to the Commission for designation as a contract market shall submit an application to the Commission that includes any relevant materials and records the Commission may require consistent with this Act.

“(b) CRITERIA FOR DESIGNATION.—

“(1) IN GENERAL.—To be designated as a contract market, the board of trade shall demonstrate to the Commission that the board of trade meets the criteria specified in this subsection.

“(2) PREVENTION OF MARKET MANIPULATION.—The board of trade shall have the capacity to prevent market manipulation through market surveillance, compliance, and enforcement practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

“(3) FAIR AND EQUITABLE TRADING.—The board of trade shall establish and enforce trading rules to ensure fair and equitable trading through the facilities of the contract market, and the capacity to detect, investigate, and discipline any person that violates the rules. Such rules may authorize—

“(A) an exchange of—

“(i) futures in connection with a cash commodity transaction;

“(ii) futures for cash commodities;

“(iii) transfer trades or office trades; or

“(iv) futures for swaps; and

“(B) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

“(4) TRADE EXECUTION FACILITY.—The board of trade shall—

“(A) establish and enforce rules defining, or specifications detailing, the manner of operation of the trade execution facility maintained by the board of trade, including rules or specifications describing the operation of any electronic matching platform; and

“(B) demonstrate that the trading facility operates in accordance with the rules or specifications.

“(5) FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into by or through the facilities of the contract market.

“(6) DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

“(7) PUBLIC ACCESS.—The board of trade shall provide the public with access to the rules, regulations, and contract specifications of the board of trade.

“(8) ABILITY TO OBTAIN INFORMATION.—The board of trade shall establish and enforce rules that will allow the board of trade to obtain any necessary information to perform any of the functions described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

“(c) EXISTING CONTRACT MARKETS.—A board of trade that is designated as a contract market on the effective date of the Commodity Futures Modernization Act of 2000 shall be considered to be a designated contract market under this section.

“(d) CORE PRINCIPLES FOR CONTRACT MARKETS.—

“(1) IN GENERAL.—To maintain the designation of a board of trade as a contract market, a board of trade shall comply with the core principles specified in this subsection.

“(2) COMPLIANCE WITH RULES.—The board of trade shall monitor and enforce compliance with the rules of the contract market, including the terms and conditions of any contracts to be traded and any limitations on access to the contract market.

“(3) CONTRACTS NOT READILY SUBJECT TO MANIPULATION.—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

“(4) MONITORING OF TRADING.—The board of trade shall monitor trading to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process.

“(5) POSITION LIMITATIONS OR ACCOUNTABILITY.—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, the board of trade shall adopt position limitations or position accountability for speculators, where necessary and appropriate.

“(6) EMERGENCY AUTHORITY.—The board of trade shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to—

“(A) liquidate or transfer open positions in any contract;

“(B) suspend or curtail trading in any contract; and

“(C) require market participants in any contract to meet special margin requirements.

“(7) AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public information concerning—

“(A) the terms and conditions of the contracts of the contract market; and

“(B) the mechanisms for executing transactions on or through the facilities of the contract market.

“(8) DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

“(9) EXECUTION OF TRANSACTIONS.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions.

“(10) TRADE INFORMATION.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information for purposes of assisting in the prevention of customer and market abuses and providing evidence of any violations of the rules of the contract market.

“(11) FINANCIAL INTEGRITY OF CONTRACTS.—The board of trade shall establish and enforce rules providing for the financial integrity of any contracts traded on the contract market, including rules to ensure the financial integrity of any futures commission merchants and introducing brokers and the protection of customer funds.

“(12) PROTECTION OF MARKET PARTICIPANTS.—The board of trade shall establish and enforce rules to protect market participants from abusive practices committed by any party acting as an agent for the participants.

“(13) DISPUTE RESOLUTION.—The board of trade shall establish and enforce rules regarding and provide facilities for alternative dispute resolution as appropriate for market participants and any market intermediaries.

“(14) GOVERNANCE FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this paragraph).

“(15) CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules to minimize conflicts of interest in the decisionmaking process of the contract market and establish a process for resolving such conflicts of interest.

“(16) COMPOSITION OF BOARDS OF MUTUALLY OWNED CONTRACT MARKETS.—In the case of a mutually owned contract market, the board of trade shall ensure that the composition of the governing board reflects market participants.

“(17) RECORDKEEPING.—The board of trade shall—

“(A) maintain full records of all activities related to the business of the contract market in a form and manner acceptable to the Commission for a period of at least 5 years;

“(B) make the records readily available during at least the first 2 years of the 5-year period and provide the records to the Commission at the expense of the person required to maintain the records; and

“(C) keep the records open to inspection by any representative of the Commission or the Department of Justice.

“(18) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall endeavor to avoid—

“(A) adopting any rules or taking any actions that result in any unreasonable restraints of trade; or

“(B) imposing any material anticompetitive burden on trading on the contract market.

“(e) CURRENT AGRICULTURAL AND METAL COMMODITIES.—

“(1) Subject to paragraph (2), a contract for purchase or sale for future delivery of an agricultural or metal commodity enumerated in section 1a(3) that is available for trade on a contract market, as of the date of the enactment of this subsection, may be traded only on a contract market designated under this section.

“(2) In order to promote responsible economic or financial innovation and fair competition, the Commission, on application by any person, after notice and public comment and opportunity for hearing, may prescribe rules and regulations to provide for the offer and sale of contracts for future delivery or options thereon to be conducted on a derivatives transaction execution facility.”.

SEC. 115. DERIVATIVES TRANSACTION EXECUTION FACILITIES.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by inserting after section 5 (as amended by section 112(2)) the following:

“SEC. 5a. DERIVATIVES TRANSACTION EXECUTION FACILITIES.

“(a) IN GENERAL.—In lieu of compliance with the contract market designation requirements of section 5, a board of trade may elect to operate as a registered derivatives transaction execution facility if the facility is—

“(1) designated as a contract market and meets the requirements of this section; or

“(2) registered as a derivatives transaction execution facility under subsection (c).

“(b) REQUIREMENTS FOR TRADING FUTURES CONTRACTS OR OTHER DERIVATIVES TRANSACTIONS.—

“(1) IN GENERAL.—A registered derivatives transaction execution facility under subsection (a) may trade any futures contract (or option on such a contract) on or through the facility only by satisfying the requirements of this section.

“(2) REQUIREMENTS FOR UNDERLYING COMMODITIES.—A registered derivatives transaction execution facility may trade any futures contract only if—

“(A) the underlying commodity has a nearly inexhaustible deliverable supply;

“(B) the underlying commodity has a deliverable supply that is sufficiently large that the contract is highly unlikely to be susceptible to the threat of manipulation;

“(C) the underlying commodity has no cash market; or

“(D) the Commission determines, based on the market characteristics, surveillance history, self-regulatory record, and capacity of the facility that trading in the futures contract is highly unlikely to be susceptible to the threat of manipulation.

“(3) ELIGIBLE TRADERS.—To trade on a registered derivatives transaction execution facility, a person shall—

“(A) be authorized by the board of trade to trade on the facility; and

“(B)(i) be an eligible contract participant; or

“(ii) be a person trading through a futures commission merchant that—

“(I) is registered with the Commission;

“(II) is a member of a futures self-regulatory organization;

“(III) is a clearing member of a derivatives clearing organization; and

“(IV) has net capital of at least \$20,000,000.

“(4) TRADING BY CONTRACT MARKETS.—A board of trade that is designated as a contract market shall, to the extent that the contract market also operates a registered derivatives transaction execution facility—

“(A) provide a physical location for the contract market trading of the board of trade that is separate from trading on the derivatives transaction execution facility of the board of trade; or

“(B) if the board of trade uses the same electronic trading system for trading on the contract market and derivatives transaction execution facility of the board of trade, identify whether the electronic trading is taking place on the contract market or the derivatives transaction execution facility.

“(c) CRITERIA FOR REGISTRATION.—

“(1) IN GENERAL.—To be registered as a registered derivatives transaction execution facility, the board of trade shall demonstrate to the Commission that the board of trade meets the criteria specified in this paragraph.

“(2) DETERRENCE OF ABUSES.—The board of trade shall establish and enforce trading rules that will deter abuses and has the capacity to detect, investigate, and enforce those rules, including means to—

“(A) obtain information necessary to perform the functions required under this section; or

“(B) use technological means to—

“(i) provide market participants with impartial access to the market; and

“(ii) capture information that may be used in establishing whether rule violations have occurred.

“(3) TRADING PROCEDURES.—The board of trade shall establish and enforce rules or terms and conditions defining, or specifications detailing, trading procedures to be used in entering and executing orders traded on the facilities of the board of trade. Such rules may authorize—

“(A) an exchange of—

“(i) futures in connection with a cash commodity transaction;

“(ii) futures for cash commodities;

“(iii) transfer trades or office trades; or

“(iv) futures for swaps; and

“(B) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the registered derivatives transaction execution facility or a derivatives clearing organization.

“(4) FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce rules or terms and conditions providing for the financial integrity of transactions entered on or through the facilities of the board of trade, including rules or terms and conditions to ensure the financial integrity of any futures commission merchants and introducing brokers and the protection of customer funds.

“(d) CORE PRINCIPLES FOR REGISTERED DERIVATIVES TRANSACTION EXECUTION FACILITIES.—

“(1) IN GENERAL.—To maintain the registration of a board of trade as a derivatives transaction execution facility, a board of trade shall comply with the core principles specified in this subsection.

“(2) COMPLIANCE WITH RULES.—The board of trade shall monitor and enforce the rules of the facility, including any terms and conditions of any contracts traded on or through the facility and any limitations on access to the facility.

“(3) MONITORING OF TRADING.—The board of trade shall monitor trading in the contracts of the facility to ensure orderly trading in the contract and to maintain an orderly market while providing any necessary trading information to the Commission to allow the Commission to discharge the responsibilities of the Commission under the Act.

“(4) DISCLOSURE OF GENERAL INFORMATION.—The board of trade shall disclose publicly and to the Commission information concerning—

“(A) contract terms and conditions;

“(B) trading conventions, mechanisms, and practices;

“(C) financial integrity protections; and

“(D) other information relevant to participation in trading on the facility.

“(5) DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the facility.

“(6) FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary com-

mittee, members, and any other persons with direct access to the facility, including any parties affiliated with any of the persons described in this paragraph.

“(7) CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules to minimize conflicts of interest in the decisionmaking process of the derivatives transaction execution facility and establish a process for resolving such conflicts of interest.

“(8) RECORDKEEPING.—The board of trade shall—

“(A) maintain full records of all activities related to the business of the derivatives transaction execution facility in a form and manner acceptable to the Commission for a period of at least 5 years;

“(B) make the records readily available during at least the first 2 years of the 5-year period and provide the records to the Commission at the expense of the person required to maintain the records; and

“(C) keep the records open to inspection by any representatives of the Commission or the Department of Justice.

“(9) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall endeavor to avoid—

“(A) adopting any rules or taking any actions that result in any unreasonable restraint of trade; or

“(B) imposing any material anticompetitive burden on trading on the derivatives transaction execution facility.

“(e) USE OF BROKER-DEALERS, DEPOSITORY INSTITUTIONS, AND FARM CREDIT SYSTEM INSTITUTIONS AS INTERMEDIARIES.—

“(1) IN GENERAL.—A registered derivatives transaction execution facility may by rule allow a broker-dealer, depository institution, or institution of the Farm Credit System that meets the requirements of paragraph (2) to—

“(A) act as an intermediary in transactions executed on the facility on behalf of customers of the broker-dealer, depository institution, or institution of the Farm Credit System; and

“(B) receive funds of customers to serve as margin or security for such transactions.

“(2) REQUIREMENTS.—The requirements referred to in paragraph (1) are that—

“(A) the broker-dealer be in good standing with the Securities and Exchange Commission, or the depository institution or institution of the Farm Credit System be in good standing with Federal bank regulatory agencies (including the Farm Credit Administration), as applicable; and

“(B) if the broker-dealer, depository institution, or institution of the Farm Credit System carries or holds customer accounts or funds for transactions on the derivatives transaction execution facility for more than 1 business day, the broker-dealer, depository institution, or institution of the Farm Credit System is registered as a futures commission merchant and is a member of a registered futures association.

“(3) IMPLEMENTATION.—The Commission shall cooperate and coordinate with the Securities and Exchange Commission, the Secretary of the Treasury, and Federal banking regulatory agencies (including the Farm Credit Administration) in adopting rules and taking any other appropriate action to facilitate the implementation of this subsection.

“(f) SEGREGATION OF CUSTOMER FUNDS.—Not later than 180 days after the effective date of the Commodity Futures Modernization Act of 2000, consistent with regulations adopted by the Commission, a registered derivatives transaction execution facility may authorize a futures commission merchant to offer any customer of the futures commission merchant that is an eligible contract participant the right to not segregate the customer funds of the futures commission merchant for purposes of trading on or through the facilities of the registered derivatives transaction execution facility.

“(g) ELECTION TO TRADE EXCLUDED COMMODITIES.—

“(1) IN GENERAL.—A board of trade that is a registered derivatives transaction execution facility may trade on the facility any agreements, contracts, or transactions involving excluded commodities that are otherwise excluded from this Act under section 2(c), 2(d), or 2(h).

“(2) EXCLUSIVE JURISDICTION OF THE COMMISSION.—The Commission shall have exclusive jurisdiction over agreements, contracts, or transactions described in paragraph (1) to the extent that the agreements, contracts, or transactions are traded on a derivatives transaction execution facility.”

SEC. 116. DERIVATIVES CLEARING.

(a) IN GENERAL.—Subtitle A of title IV of the Federal Deposit Insurance Corporation Improvement Act of 1991 is amended—

(1) by inserting before the section heading for section 401, the following new heading:

“CHAPTER 1—BILATERAL AND CLEARING ORGANIZATION NETTING”;

(2) in section 402, by striking “this subtitle” and inserting “this chapter”; and
(3) by inserting after section 407, the following new chapter:

“CHAPTER 2—MULTILATERAL CLEARING ORGANIZATIONS**“SEC. 408. DEFINITIONS.**

“For purposes of this chapter, the following definitions shall apply:

“(1) **MULTILATERAL CLEARING ORGANIZATION.**—The term ‘multilateral clearing organization’ means a system utilized by more than 2 participants in which the bilateral credit exposures of participants arising from the transactions cleared are effectively eliminated and replaced by a system of guarantees, insurance, or mutualized risk of loss.

“(2) **OVER-THE-COUNTER DERIVATIVE INSTRUMENT.**—The term ‘over-the-counter derivative instrument’ means—

“(A) any agreement, contract, or transaction, including the terms and conditions incorporated by reference in any such agreement, contract, or transaction, which is an interest rate swap, option, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, and forward rate agreement; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, or forward agreement; an equity index or equity swap, option, or forward agreement; a debt index or debt swap, option, or forward agreement; a credit spread or credit swap, option, or forward agreement; a commodity index or commodity swap, option, or forward agreement; and a weather swap, weather derivative, or weather option;

“(B) any agreement, contract or transaction similar to any other agreement, contract, or transaction referred to in this clause that is presently, or in the future becomes, regularly entered into by parties that participate in swap transactions (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, or option on 1 or more occurrences of any event, rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, economic or other indices or measures of economic or other risk or value;

“(C) any contract of sale of a commodity for future delivery or commodity option described in subsection (c), (d), (f), (h), or (i) of section 2 of the Commodity Exchange Act or exempted under section 4(c) of such Act; and

“(D) any option to enter into any, or any combination of, agreements, contracts or transactions referred to in this subparagraph.

“(3) **OTHER DEFINITIONS.**—The terms ‘State member bank’ and ‘affiliate’ have the meanings given the terms in section 3 of the Federal Deposit Insurance Act.

“SEC. 409. MULTILATERAL CLEARING ORGANIZATIONS.

“(a) IN GENERAL.—Except with respect to clearing organizations described in subsection (b), no person may operate a multilateral clearing organization for over-the-counter derivative instruments, or otherwise engage in activities that constitute such a multilateral clearing organization unless the person is a national bank, State member bank, an affiliate of a national bank or a State member bank, or a corporation chartered under section 25A of the Federal Reserve Act.

“(b) **CLEARING ORGANIZATIONS.**—Subsection (a) shall not apply to any clearing organization that—

“(1) is registered as a clearing agency under the Securities Exchange Act of 1934;

“(2) performs clearing functions for a contract market designated pursuant to the Commodity Exchange Act; or

“(3) is supervised by a foreign financial regulator that an appropriate Federal financial regulatory agency has determined satisfies appropriate standards.”.

(b) **ENFORCEMENT POWERS OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.**—Section 9 of the Federal Reserve Act (12 U.S.C. 221) is amended by adding at the end the following new paragraph:

“(24) **ENFORCEMENT AUTHORITY.**—Section 3(u), subsections (j) and (k) of section 7, subsections (b) through (n), (s), (u), and (v) of section 8, and section 19

of the Federal Deposit Insurance Act shall apply to a State member bank which is not an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in the same manner and to the same extent as such provisions apply to State member insured banks, and any reference in such sections to an insured depository institution shall be deemed to include a reference to any such noninsured State member bank.”

(c) RESOLUTION OF CLEARING BANKS.—The Federal Reserve Act (12 U.S.C. 221 et seq.) is amended by inserting after section 9A the following new section:

“SEC. 9B. RESOLUTION OF CLEARING BANKS.

“(a) CONSERVATORSHIP OR RECEIVERSHIP.—

“(1) APPOINTMENT.—The Board may appoint a conservator or receiver to take possession and control of any uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 to the same extent and in the same manner as the Comptroller of the Currency may appoint a conservator or receiver for a national bank.

“(2) POWERS.—The conservator or receiver for an uninsured State member bank referred to in paragraph (1) shall exercise the same powers, functions, and duties, subject to the same limitations, as a conservator or receiver for a national bank.

“(b) BOARD AUTHORITY.—The Board shall have the same authority with respect to any conservator or receiver appointed under subsection (a), and the uninsured State member bank for which the conservator or receiver has been appointed, as the Comptroller of the Currency has with respect to a conservator or receiver for a national bank and the national bank for which the conservator or receiver has been appointed.

“(c) BANKRUPTCY PROCEEDINGS.—The Board (in the case of an uninsured State member bank which operates, or operates as, such a multilateral clearing organization) may direct a conservator or receiver appointed for such bank to file a petition pursuant to title 11, United States Code, in which case, title 11, United States Code, shall apply to such bank in lieu of otherwise applicable Federal or State insolvency law.”

(d) TECHNICAL AND CONFORMING AMENDMENTS TO TITLE 11, UNITED STATES CODE.—

(1) BANKRUPTCY CODE DEBTORS.—Section 109(b)(2) of title 11, United States Code, is amended by striking “; or” and inserting the following: “, except that 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 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or”.

(2) CHAPTER 7 DEBTORS.—Section 109(d) of title 11, United States Code, is amended to read as follows:

“(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and 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 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.”

(3) DEFINITION OF FINANCIAL INSTITUTION.—Section 101(22) of title 11, United States Code, is amended to read as follows:

“(22) the term ‘financial institution’—

“(A) means 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, a bank or a corporation organized under section 25A of the Federal Reserve Act and, when any such bank or entity is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741, such customer; 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;”.

(4) DEFINITION OF UNINSURED STATE MEMBER BANK.—Section 101 of title 11, United States Code, is amended by inserting after paragraph (54) the following new paragraph—

“(54A) the term ‘uninsured State member bank’ means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation; and”.

(5) SUBCHAPTER V OF CHAPTER 7.—

(A) IN GENERAL.—Section 103 of title 11, United States Code, is amended—

(i) by redesignating subsections (e) through (i) as subsections (f) through (j), respectively; and

(ii) by inserting after subsection (d) the following new subsection:

“(e) SCOPE OF APPLICATION.—Subchapter V of chapter 7 of this title shall apply only in a case under such chapter concerning the liquidation of 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 of the Federal Deposit Insurance Corporation Improvement Act of 1991.”.

(B) CLEARING BANK LIQUIDATION.—Chapter 7 of title 11, United States Code, is amended by adding at the end the following new subchapter:

“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, and includes any wholesale bank.

“(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 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

“§ 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.

“§ 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;

“(5) transfer assets and liabilities to a bridge bank as provided in paragraphs (1), (3)(A), (5), (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 bank 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.

“§ 784. Right to be heard

“The Board or a Federal reserve bank (in the case of a clearing bank that is a member of that bank) may raise and may appear and be heard on any issue in a case under this subchapter.”.

(e) CLERICAL AMENDMENT.—The table of sections for chapter 7 of title 11, United States Code, is amended by adding at the end the following new items:

“SUBCHAPTER V—CLEARING BANK LIQUIDATION

“Sec.

“781. Definitions.

“782. Selection of trustee.

“783. Additional powers of trustee.

“784. Right to be heard.”.

(f) RESOLUTION OF EDGE ACT CORPORATIONS.—The 16th undesignated paragraph of section 25A of the Federal Reserve Act (12 U.S.C. 624) is amended to read as follows:

“(16) APPOINTMENT OF RECEIVER OR CONSERVATOR.—

“(A) IN GENERAL.—The Board may appoint a conservator or receiver for a corporation organized under the provisions of this section to the same extent and in the same manner as the Comptroller of the Currency may appoint a conservator or receiver for a national bank, and the conservator or receiver for such corporation shall exercise the same powers, functions, and duties, subject to the same limitations, as a conservator or receiver for a national bank.

“(B) EQUIVALENT AUTHORITY.—The Board shall have the same authority with respect to any conservator or receiver appointed for a corporation organized under the provisions of this section under this paragraph and any such corporation as the Comptroller of the Currency has with respect to a conservator or receiver of a national bank and the national bank for which a conservator or receiver has been appointed.

“(C) TITLE 11 PETITIONS.—The Board may direct the conservator or receiver of a corporation organized under the provisions of this section to file a petition pursuant to title 11, United States Code, in which case, title 11, United States Code, shall apply to the corporation in lieu of otherwise applicable Federal or State insolvency law.”.

(g) DERIVATIVES CLEARING ORGANIZATIONS.—The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by inserting after section 5a (as added by section 15) the following new section:

“SEC. 5b. DERIVATIVES CLEARING ORGANIZATIONS.

“(a) REGISTRATION REQUIREMENT.—Except as provided in subsection (b), it shall be unlawful for a derivatives clearing organization, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a derivatives clearing organization described in section 1a(8) with respect to a contract of sale of a commodity for future delivery, option on a contract of sale of a commodity for future delivery, or option on a commodity that is not an exclusion-eligible commodity (unless the contract or option is described in subsection (c), (d), (f), (h), or (i) of section 2 or exempted under section 4(c)).

“(b) VOLUNTARY REGISTRATION.—A derivatives clearing organization that clears agreements, contracts, or transactions described in subsection (c), (d), (f), (h), or (i) of section 2 or exempted under section 4(c) may register with the Commission as a derivatives clearing organization.

“(c) REGISTRATION OF DERIVATIVES CLEARING ORGANIZATIONS.—

“(1) APPLICATION.—A person desiring to register as a derivatives clearing organization shall submit to the Commission an application in such form and containing such information as the Commission may require for the purpose of making the determinations required for approval under paragraph (2).

“(2) CORE PRINCIPLES.—

“(A) IN GENERAL.—To be registered and to maintain registration as a derivatives clearing organization, an applicant shall demonstrate to the Commission that the applicant complies with the core principles specified in this paragraph.

“(B) FINANCIAL RESOURCES.—The applicant shall demonstrate that the applicant has adequate financial, operational, and managerial resources to discharge the responsibilities of a derivatives clearing organization without interruption in various market conditions.

“(C) PARTICIPANT AND PRODUCT ELIGIBILITY.—The applicant shall establish—

“(i) appropriate admission and continuing eligibility standards (including appropriate minimum financial requirements) for members of and participants in the organization; and

“(ii) appropriate standards for determining eligibility of agreements, contracts, or transactions submitted to the applicant.

“(D) RISK MANAGEMENT.—The applicant shall have the ability to manage the risks associated with discharging the responsibilities of a derivatives clearing organization through the use of appropriate tools and procedures.

“(E) SETTLEMENT PROCEDURES.—The applicant shall have the ability to—

“(i) complete settlements on a timely basis under varying circumstances;

“(ii) maintain an adequate record of the flow of funds associated with each transaction that the applicant clears; and

“(iii) comply with the terms and conditions of any permitted netting or offset arrangements with other clearing organizations.

“(F) TREATMENT OF FUNDS.—The applicant shall have standards and procedures designed to protect and ensure the safety of member and participant funds.

“(G) DEFAULT RULES AND PROCEDURES.—The applicant shall have rules and procedures designed to allow for efficient, fair, and safe management of events when members or participants become insolvent or otherwise default on their obligations to the derivatives clearing organization.

“(H) RULE ENFORCEMENT.—The applicant shall—

“(i) maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with rules of the applicant and for resolution of disputes; and

“(ii) have the authority and ability to discipline, limit, suspend, or terminate a member’s or participant’s activities for violations of rules of the applicant.

“(I) SYSTEM SAFEGUARDS.—The applicant shall demonstrate that the applicant—

“(i) has established and will maintain a program of oversight and risk analysis to ensure that the automated systems of the applicant function properly and have adequate capacity and security; and

“(ii) has established and will maintain emergency procedures and a plan for disaster recovery, and will periodically test backup facilities sufficient to ensure daily processing, clearing, and settlement of transactions.

“(J) REPORTING.—The applicant shall provide to the Commission all information necessary for the Commission to conduct the oversight function of the applicant with respect to the activities of the derivatives clearing organization.

“(K) RECORDKEEPING.—The applicant shall—

“(i) maintain full records of all activities related to the business of the applicant as a derivatives clearing organization in a form and manner acceptable to the Commission for a period of at least 5 years;

“(ii) make the records readily available during at least the first 2 years of the 5-year period and provide the records to the Commission at the expense of the person required to maintain the records; and

“(iii) keep the records open to inspection by any representative of the Commission or the Department of Justice.

“(L) PUBLIC INFORMATION.—The applicant shall make information concerning the rules and operating procedures governing the clearing and settlement systems (including default procedures) available to market participants.

“(M) INFORMATION SHARING.—The applicant shall—

“(i) enter into and abide by the terms of all appropriate and applicable domestic and international information-sharing agreements; and

“(ii) use relevant information obtained from the agreements in carrying out the clearing organization’s risk management program.

“(N) ANTITRUST CONSIDERATIONS.—Unless appropriate to achieve the purposes of this Act, the derivatives clearing organization shall avoid—

“(i) adopting any rule or taking any action that results in any unreasonable restraint of trade; or

“(ii) imposing any material anticompetitive burden on trading on the contract market.

“(3) ORDERS CONCERNING COMPETITION.—A derivatives clearing organization may request the Commission to issue an order concerning whether a rule or practice of the applicant is the least anticompetitive means of achieving the objectives, purposes, and policies of this Act.

“(d) EXISTING DERIVATIVES CLEARING ORGANIZATIONS.—A derivatives clearing organization shall be deemed to be registered under this section to the extent that—

“(1) the derivatives clearing organization clears agreements, contracts, or transactions for a board of trade that has been designated by the Commission

as a contract market for such agreements, contracts, or transactions before the date of enactment of this section; and

“(2) the Commission has reviewed and approved the rules of the derivatives clearing organization before that date.

“(e) APPOINTMENT OF TRUSTEE.—

“(1) IN GENERAL.—If a proceeding under section 5e results in the suspension or revocation of the registration of a derivatives clearing organization, or if a derivatives clearing organization withdraws from registration, the Commission, on notice to the derivatives clearing organization, may apply to the appropriate United States district court where the derivatives clearing organization is located for the appointment of a trustee.

“(2) ASSUMPTION OF JURISDICTION.—If the Commission applies for appointment of a trustee under paragraph (1)—

“(A) the court may take exclusive jurisdiction over the derivatives clearing organization and the records and assets of the derivatives clearing organization, wherever located; and

“(B) if the court takes jurisdiction under subparagraph (A), the court shall appoint the Commission, or a person designated by the Commission, as trustee with power to take possession and continue to operate or terminate the operations of the derivatives clearing organization in an orderly manner for the protection of participants, subject to such terms and conditions as the court may prescribe.

“(f) LINKING OF REGULATED CLEARING FACILITIES.—

“(1) IN GENERAL.—The Commission shall facilitate the linking or coordination of derivatives clearing organizations registered under this Act with other regulated clearance facilities for the coordinated settlement of cleared transactions.

“(2) COORDINATION.—In carrying out paragraph (1), the Commission shall coordinate with the Federal banking agencies and the Securities and Exchange Commission.”.

SEC. 117. COMMON PROVISIONS APPLICABLE TO REGISTERED ENTITIES.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by inserting after section 5b (as added by section 14) the following:

“SEC. 5c. COMMON PROVISIONS APPLICABLE TO REGISTERED ENTITIES.

“(a) ACCEPTABLE BUSINESS PRACTICES UNDER CORE PRINCIPLES.—

“(1) IN GENERAL.—Consistent with the purposes of this Act, the Commission may issue interpretations, or approve interpretations submitted to the Commission, of sections 5(d), 5a(d), and 5b(d)(2) to describe what would constitute an acceptable business practice under such sections.

“(2) EFFECT OF INTERPRETATION.—An interpretation issued under paragraph (1) shall not provide the exclusive means for complying with such sections.

“(b) DELEGATION OF FUNCTIONS UNDER CORE PRINCIPLES.—

“(1) IN GENERAL.—A contract market or derivatives transaction execution facility may comply with any applicable core principle through delegation of any relevant function to a registered futures association or another registered entity.

“(2) RESPONSIBILITY.—A contract market or derivatives transaction execution facility that delegates a function under paragraph (1) shall remain responsible for carrying out the function.

“(c) NEW CONTRACTS, NEW RULES, AND RULE AMENDMENTS.—

“(1) IN GENERAL.—Subject to paragraph (2), a registered entity may elect to list for trading any new contract or other instrument, or may elect to approve and implement any new rule or rule amendment, by providing to the Commission (and the Secretary of the Treasury, in the case of a contract of sale for future delivery of a government security (or option thereon) or a rule or rule amendment specifically related to such a contract) a written certification that the new contract, new rule, or rule amendment complies with this Act (including regulations under this Act).

“(2) PRIOR APPROVAL.—

“(A) IN GENERAL.—A registered entity may request that the Commission grant prior approval to any new contract or other instrument, new rule, or rule amendment.

“(B) PRIOR APPROVAL REQUIRED.—Notwithstanding any other provision of this section, a designated contract market shall submit to the Commission for prior approval each rule amendment that materially changes the terms and conditions, as determined by the Commission, in any contract of sale for future delivery of a commodity specifically enumerated in section 1a(3) of this Act (or any option thereon) traded through its facilities if such rule

amendment applies to contracts and delivery months which have already been listed for trading and have open interest.

“(C) DEADLINE.—If prior approval is requested under subparagraph (A), the Commission shall take final action on the request not later than 90 days after submission of the request, unless the person submitting the request agrees to an extension of the time limitation established under this subparagraph.

“(3) APPROVAL.—The Commission shall approve any such new contract or instrument, new rule, or rule amendment unless the Commission finds that the new contract or instrument, new rule, or rule amendment would violate this Act.

“(d) VIOLATION OF CORE PRINCIPLES.—

“(1) IN GENERAL.—If the Commission has reason to believe that a registered entity is violating any applicable provision specified in section 5(d), 5a(d), or 5b(d)(2), the Commission shall notify the registered entity in writing of the reasons for the preliminary determination by the Commission of a violation, including any data, materials, and facts the Commission relied on in making the preliminary determination.

“(2) INJUNCTIVE OR ADMINISTRATIVE ACTION.—The Commission may initiate an action for an injunction under section 6c or an administrative proceeding, to demonstrate, by the preponderance of the evidence, that—

“(A) the registered entity is violating any applicable provision specified in section 5(d), 5a(d), or 5b(d)(2); and

“(B) the Commission has recommended an appropriate remedial action to remove the deficiency based on an analysis of the costs and benefits in the public interest of the Commission recommendation.

“(3) BURDEN OF PROOF.—In making a determination that a registered entity is violating any applicable provision specified in section 5(d), 5a(d), or 5b(d)(2), the Commission shall have the burden of proving that the registered entity is violating the applicable core principle.

“(e) RESERVATION OF EMERGENCY AUTHORITY.—Nothing in this section shall limit or in any way affect the emergency powers of the Commission provided in section 8a(9) of this Act.”

SEC. 118. EXEMPT BOARDS OF TRADE.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by inserting after section 5c (as added by section 115) the following:

“SEC. 5d. EXEMPT BOARDS OF TRADE.

“(a) IN GENERAL.—Except as otherwise provided in this section, a contract of sale (or option on such a contract) of a commodity for future delivery traded on or through the facilities of an exempt board of trade shall be exempt from all provisions of this Act, other than section 2(g).

“(b) CRITERIA FOR EXEMPTION.—To qualify for an exemption under subsection (a), a board of trade shall limit trading on or through the facilities of the board of trade to contracts of sale of a commodity for future delivery (or options on such contracts)—

“(1) that have—

“(A) a nearly inexhaustible deliverable supply;

“(B) a deliverable supply that is sufficiently large, and a cash market sufficiently liquid, to render any contract traded on the commodity highly unlikely to be susceptible to the threat of manipulation; or

“(C) no cash market;

“(2) that are entered into only between persons that are eligible contract participants at the time at which the persons enter into the contract; and

“(3) that are not contracts of sale (or options on the contract) for future delivery of any security, including any group or index of securities or any interest in, or interest that is based on the value of, any security.

“(c) ANTIMANIPULATION REQUIREMENTS.—A party to a futures contract or related option that is traded on an exempt board of trade shall be subject to sections 4b, 4n, 6(c), and 9(a)(2), and the Commission shall enforce those provisions with respect to any such trading.

“(d) PRICE DISCOVERY.—If the Commission finds that an exempt board of trade is a significant source of price discovery for any underlying commodity in any transaction traded on or through the facilities of the board of trade, the board of trade shall disseminate publicly on a daily basis trading volume, opening and closing price ranges, open interest, and other trading data as appropriate to the market.

“(e) JURISDICTION.—The Commission shall have exclusive jurisdiction over any account, agreement, or transaction involving a contract of sale of a commodity for fu-

ture delivery, or related option, to the extent that such account, agreement, or transaction is traded on an exempt board of trade.

“(f) **SUBSIDIARIES.**—A board of trade that is designated as a contract market or registered as a derivatives transaction execution facility may operate an exempt board of trade by establishing a separate subsidiary or other legal entity and otherwise satisfying the requirements of this section.”.

SEC. 119. SUSPENSION OR REVOCATION OF DESIGNATION AS CONTRACT MARKET.

Section 5e of the Commodity Exchange Act (7 U.S.C. 7b) (as redesignated by section 112(1)) is amended to read as follows:

“SEC. 5e. SUSPENSION OR REVOCATION OF DESIGNATION AS REGISTERED ENTITY.

“The failure of a registered entity to comply with any provision of this Act, or any regulation or order of the Commission under this Act, shall be cause for the suspension of the registered entity for a period not to exceed 180 days, or revocation of designation as a registered entity in accordance with the procedures and subject to the judicial review provided in section 6(b).”.

SEC. 120. AUTHORIZATION OF APPROPRIATIONS.

Section 12(d) of the Commodity Exchange Act (7 U.S.C. 16(d)) is amended by striking “2000” and inserting “2005”.

SEC. 121. PREEMPTION.

Section 12(e) of the Commodity Exchange Act (7 U.S.C. 16(e)) is amended by striking paragraph (2) and inserting the following:

“(2) the application of any Federal or State law (including any regulation) to an agreement, contract, or transaction in or involving any commodity, product, right, service, or interest, except that this Act shall supersede and preempt—

“(A) in the case of any such agreement, contract, or transaction—

“(i) that is conducted on or subject to the rules of a registered entity or exempt board of trade;

“(ii) that is conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, or any territory or possession of the United States (in accordance with any terms or conditions specified by the Commission by regulation); and

“(iii) that is subject to regulation by the Commission under section 4c or 19; and

“(B) any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability) in the case of—

“(i) an electronic trading facility under section 2(e); or

“(ii) an agreement, contract, or transaction that is excluded or exempt under section 2(c), 2(d), 2(f), or 2(h) or is covered by the terms of an exemption granted by the Commission under section 4(c) (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act); or”.

SEC. 122. PREDISPUTE RESOLUTION AGREEMENTS FOR INSTITUTIONAL CUSTOMERS.

Section 14 of the Commodity Exchange Act (7 U.S.C. 18) is amended by striking subsection (g) and inserting the following:

“(g) **PREDISPUTE RESOLUTION AGREEMENTS FOR INSTITUTIONAL CUSTOMERS.**—Nothing in this section prohibits a registered futures commission merchant from requiring a customer that is an eligible contract participant, as a condition to the commission merchant’s conducting a transaction for the customer, to enter into an agreement waiving the right to file a claim under this section.”.

SEC. 123. CONSIDERATION OF COSTS AND BENEFITS AND ANTITRUST LAWS.

Section 15 of the Commodity Exchange Act (7 U.S.C. 19) is amended by striking “Sec. 15. The Commission” and inserting the following:

“SEC. 15. CONSIDERATION OF COSTS AND BENEFITS AND ANTITRUST LAWS.

“(a) **COSTS AND BENEFITS.**—

“(1) **IN GENERAL.**—Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission shall consider the costs and benefits of the action of the Commission.

“(2) **CONSIDERATIONS.**—The costs and benefits of the proposed Commission action shall be evaluated in light of—

“(A) considerations of protection of market participants and the public;

“(B) considerations of the efficiency, competitiveness, and financial integrity of futures markets;

“(C) considerations of price discovery;

“(D) considerations of sound risk management practices; and

- “(E) other public interest considerations.
- “(3) APPLICABILITY.—This subsection does not apply to the following actions of the Commission:
- “(A) An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission.
- “(B) An emergency action.
- “(C) A finding of fact regarding compliance with a requirement of the Commission.
- “(b) ANTITRUST LAWS.—The Commission”.

SEC. 124. CONTRACT ENFORCEMENT.

Section 22(a) of the Commodity Exchange Act (7 U.S.C. 25(a)) is amended by adding at the end the following:

“(4) CONTRACT ENFORCEMENT BETWEEN ELIGIBLE COUNTERPARTIES.—

“(A) IN GENERAL.—No agreement, contract, or transaction involving a party described in subclauses (I) through (VI) of section 2(c)(2)(B)(ii) or between eligible contract participants shall be void, voidable, or unenforceable, and no such counterparty or eligible contract participant shall be entitled to rescind, or recover any payment made with respect to, such an agreement, contract, or transaction, under this section or any other provision of Federal or State law based solely on the failure of the agreement, contract, or transaction to comply with the terms or conditions of an exemption or exclusion from any provision of this Act or regulations of the Commission.

“(B) EXCEPTION.—This paragraph shall not apply to any swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act) with any party who is not an eligible contract participant unless such swap agreement is entered into after final regulations have been prescribed under section 49 of the Federal Deposit Insurance Act.

SEC. 125. SPECIAL PROCEDURES TO ENCOURAGE AND FACILITATE BONA FIDE HEDGING BY AGRICULTURAL PRODUCERS.

The Commodity Exchange Act, as otherwise amended by this Act, is amended by inserting after section 4o the following:

“SEC. 4p. SPECIAL PROCEDURES TO ENCOURAGE AND FACILITATE BONA FIDE HEDGING BY AGRICULTURAL PRODUCERS.

“(a) AUTHORITY.—The Commission shall consider issuing rules or orders which—

“(1) prescribe procedures under which each contract market is to provide for orderly delivery, including temporary storage costs, of any agricultural commodity enumerated in section 1a(3) which is the subject of a contract for purchase or sale for future delivery;

“(2) increase the ease with which domestic agricultural producers may participate in contract markets, including by addressing cost and margin requirements, so as to better enable such producers to hedge price risk associated with their production;

“(3) provide flexibility in the minimum quantities of such agricultural commodities that may be the subject of a contract for purchase or sale for future delivery that is traded on a contract market, to better allow domestic agricultural producers to hedge such price risk; and

“(4) encourage exchanges to provide information and otherwise facilitate the participation of domestic agricultural producers in contract markets.

“(b) REPORT.—Within 1 year after the date of enactment of this section, the Commission shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report on the steps it has taken to implement this section and on the activities of contract markets pursuant to this section.”.

SEC. 126. RULE OF CONSTRUCTION.

Except as expressly provided in this title or an amendment made by this title, nothing in this title or an amendment made by the title supersedes, affects, or otherwise limits or expands the scope and applicability of laws governing the Securities and Exchange Commission.

SEC. 127. AUTHORITY OF AGENCIES TO CONSTRUE THE TERM “CONTRACT MARKET”.

Each executive agency of the United States Government that has authority to prescribe regulations under a statute that uses the term “contract market” may prescribe regulations construing such term as referring to any contract market, derivatives transaction execution facility, or derivatives clearing organization that is registered with the Commodity Futures Trading Commission.

SEC. 128. TECHNICAL AND CONFORMING AMENDMENTS.

(a) COMMODITY EXCHANGE ACT.—

- (1) Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—
- (A) in paragraph (3), by inserting “aluminum, copper, gold, palladium, platinum, silver,” after “orange juice,”;
 - (B) in paragraphs (4), (5), (8), (9), (12), and (14), by inserting “or derivatives transaction execution facility” after “contract market” each place it appears; and
 - (C) in paragraph (15)—
 - (i) in the paragraph heading, by striking “CONTRACT MARKET” and inserting “REGISTERED ENTITY”; and
 - (ii) by striking “contract market” each place it appears and inserting “registered entity”.
- (2) Section 2 of the Commodity Exchange Act (7 U.S.C. 2, 2a, 4, 4a, 3) is amended—
- (A) by striking “SEC. 2. (a)(1)(A)(i) The” and inserting the following:

“SEC. 2. JURISDICTION OF COMMISSION; LIABILITY OF PRINCIPAL FOR ACT OF AGENT; COMMODITY FUTURES TRADING COMMISSION; TRANSACTION IN INTERSTATE COMMERCE.

“(a) JURISDICTION OF COMMISSION; COMMODITY FUTURES TRADING COMMISSION.—

“(1) JURISDICTION OF COMMISSION.—

“(A) IN GENERAL.—The”; and

(B) in subsection (a)—

 - (i) in paragraph (1) (as amended by subparagraph (A))—
 - (I) by striking subparagraph (B);
 - (II) by striking “subparagraph (B) of this paragraph” and inserting “subsection (c), (d), (e), (f), (g), or (i)”;
 - (III) by striking “contract market designated pursuant to section 5 of this Act” and inserting “contract market designated or derivatives transaction execution facility registered pursuant to section 5 or 5a”;
 - (IV) by redesignating subclauses (I) and (II) as clauses (i) and (ii);
 - (V) by striking clause (ii); and
 - (VI) in clause (iii), by striking “(iii) The” and inserting the following:
 - (ii) in paragraph (7), by striking “contract market” and inserting “registered entity”;
 - (iii) in paragraph (8)(B)(ii)—
 - (I) in the first sentence, by striking “designation as a contract market” and inserting “designation or registration as a contract market or derivatives transaction execution facility”;
 - (II) in the second sentence, by striking “designate a board of trade as a contract market” and inserting “designate or register a board of trade as a contract market or derivatives transaction execution facility”; and
 - (III) in the fourth sentence, by striking “designating, or refusing, suspending, or revoking the designation of, a board of trade as a contract market involving transactions for future delivery referred to in this clause or in considering possible emergency action under section 8a(9) of this Act” and inserting “designating, registering, or refusing, suspending, or revoking the designation or registration of, a board of trade as a contract market or derivatives transaction execution facility involving transactions for future delivery referred to in this clause or in considering any possible action under this Act (including without limitation emergency action under section 8a(9))”, and by striking “designation, suspension, revocation, or emergency action” and inserting “designation, registration, suspension, revocation, or action”; and
 - (iv) by moving paragraphs (2) through (11) 2 ems to the right.
- (3) Section 4 of the Commodity Exchange Act (7 U.S.C. 6) is amended—
- (A) in subsection (a)—
 - (i) in paragraph (1), by striking “designated by the Commission as a ‘contract market’ for” and inserting “designated or registered by the Commission as a contract market or derivatives transaction execution facility for”;
 - (ii) in paragraph (2), by striking “member of such”; and
 - (iii) in paragraph (3), by inserting “or derivatives transaction execution facility” after “contract market”; and
 - (B) in subsection (c)—

- (i) in paragraph (1)—
 - (I) by striking “designated as a contract market” and inserting “designated or registered as a contract market or derivatives transaction execution facility”; and
 - (II) by striking “section 2(a)(1)(B)” and inserting “section 2(g)”; and
 - (ii) in paragraph (2)(B)(ii), by inserting “or derivatives transaction execution facility” after “contract market”.
- (4) Section 4a of the Commodity Exchange Act (7 U.S.C. 6a) is amended—
- (A) in subsection (a)—
 - (i) in the first sentence, by inserting “or derivatives transaction execution facilities” after “contract markets”; and
 - (ii) in the second sentence, by inserting “or derivatives transaction execution facility” after “contract market”;
 - (B) in subsection (b)—
 - (i) in paragraph (1), by inserting “, or derivatives transaction execution facility or facilities,” after “markets”; and
 - (ii) in paragraph (2), by inserting “or derivatives transaction execution facility” after “contract market”; and
 - (C) in subsection (e)—
 - (i) by striking “contract market or” each place it appears and inserting “contract market, derivatives transaction execution facility, or”;
 - (ii) by striking “licensed or designated” each place it appears and inserting “licensed, designated, or registered”; and
 - (iii) by striking “contract market, or” and inserting “contract market or derivatives transaction execution facility, or”.
- (5) Section 4b(a) of the Commodity Exchange Act (7 U.S.C. 6b(a)) is amended by striking “contract market” each place it appears and inserting “registered entity”.
- (6) Sections 4c(g), 4d, 4e, and 4f of the Commodity Exchange Act (7 U.S.C. 6c(g), 6d, 6e, 6f) are amended by inserting “or derivatives transaction execution facility” after “contract market” each place it appears.
- (7) Section 4g of the Commodity Exchange Act (7 U.S.C. 6g) is amended—
- (A) in subsection (b), by striking “clearinghouse and contract market” and inserting “registered entity”; and
 - (B) in subsection (f), by striking “clearinghouses, contract markets, and exchanges” and inserting “registered entities”.
- (8) Section 4h of the Commodity Exchange Act (7 U.S.C. 6h) is amended by striking “contract market” each place it appears and inserting “registered entity”.
- (9) Section 4i of the Commodity Exchange Act (7 U.S.C. 6i) is amended in the first sentence by inserting “or derivatives transaction execution facility” after “contract market”.
- (10) Section 4j of the Commodity Exchange Act (7 U.S.C. 6j) is repealed.
- (11) Section 4l of the Commodity Exchange Act (7 U.S.C. 6l) is amended by inserting “or derivatives transaction execution facilities” after “contract markets” each place it appears.
- (12) Section 4p of the Commodity Exchange Act (7 U.S.C. 6p) (as determined before the redesignation by paragraph (13) of this subsection) is amended—
- (A) in the third sentence of subsection (a), by striking “Act or contract markets” and inserting “Act, contract markets, or derivatives transaction execution facilities”; and
 - (B) in subsection (b), by inserting “derivatives transaction execution facility,” after “contract market.”
- (13) The Commodity Exchange Act (as amended by paragraphs (10), (11), and (12)) is amended by redesignating section 4k through 4p (7 U.S.C. 6k through 6p) as sections 4j through 4o, respectively.
- (14) Section 6 of the Commodity Exchange Act (7 U.S.C. 8, 9, 9a, 9b, 13b, 15) is amended—
- (A) in subsection (a)—
 - (i) in the first sentence—
 - (I) by striking “board of trade desiring to be designated a ‘contract market’ shall make application to the Commission for such designation” and inserting “person desiring to be designated or registered as a contract market or derivatives transaction execution facility shall make application to the Commission for such designation or registration”;
 - (II) by striking “above conditions” and inserting “conditions set forth in this Act”; and

- (III) by striking “above requirements” and inserting “the requirements of this Act”;
 - (ii) in the second sentence, by striking “designation as a contract market within one year” and inserting “designation or registration as a contract market or derivatives transaction execution facility within 180 days”;
 - (iii) in the third sentence—
 - (I) by striking “board of trade” and inserting “person”; and
 - (II) by striking “one-year period” and inserting “180-day period”;
 and
 - (iv) in the last sentence, by striking “designate as a ‘contract market’ any board of trade that has made application therefor, such board of trade” and inserting “designate or register as a contract market or derivatives transaction execution facility any person that has made application therefor, such person”;
 - (B) in subsection (b)—
 - (i) in the first sentence—
 - (I) by striking “designation of any board of trade as a ‘contract market’ upon” and inserting “designation or registration of any contract market or derivatives transaction execution facility on”;
 - (II) by striking “board of trade” each place it appears and inserting “contract market or derivatives transaction execution facility”;
 and
 - (III) by striking “designation as set forth in section 5 of this Act” and inserting “designation or registration as set forth in sections 5 through 5b”;
 - (ii) in the second sentence—
 - (I) by striking “board of trade” the first place it appears and inserting “contract market or derivatives transaction execution facility”;
 - (II) by striking “board of trade” the second and third places it appears and inserting “person”;
 - (iii) in the last sentence, by striking “board of trade” each place it appears and inserting “person”;
 - (C) in subsection (c)—
 - (i) by striking “contract market” each place it appears and inserting “registered entity”;
 - (ii) by striking “contract markets” each place it appears and inserting “registered entities”;
 - (iii) by striking “trading privileges” each place it appears and inserting “privileges”;
 - (D) in subsection (d), by striking “contract market” each place it appears and inserting “registered entity”;
 - (E) in subsection (e), by striking “trading on all contract markets” each place it appears and inserting “the privileges of all registered entities”.
- (15) Section 6a of the Commodity Exchange Act (7 U.S.C. 10a) is amended—
- (A) in the first sentence of subsection (a), by striking “designated as a ‘contract market’ shall” and inserting “designated or registered as a contract market or a derivatives transaction execution facility”;
 - (B) in subsection (b), by striking “designated as a contract market” and inserting “designated or registered as a contract market or a derivatives transaction execution facility”.
- (16) Section 6b of the Commodity Exchange Act (7 U.S.C. 13a) is amended—
- (A) by striking “contract market” each place it appears and inserting “registered entity”;
 - (B) in the first sentence, by striking “designation as set forth in section 5 of this Act” and inserting “designation or registration as set forth in sections 5 through 5c”;
 - (C) in the last sentence, by striking “the contract market’s ability” and inserting “the ability of the registered entity”.
- (17) Section 6c(a) of the Commodity Exchange Act (7 U.S.C. 13a–1(a)) by striking “contract market” and inserting “registered entity”.
- (18) Section 6d(1) of the Commodity Exchange Act (7 U.S.C. 13a–2(1)) is amended by inserting “derivatives transaction execution facility,” after “contract market.”
- (19) Section 7 of the Commodity Exchange Act (7 U.S.C. 11) is amended—
- (A) in the first sentence—
 - (i) by striking “board of trade” and inserting “person”;
 - (ii) by inserting “or registered” after “designated”;

- (iii) by inserting “or registration” after “designation” each place it appears; and
- (iv) by striking “contract market” each place it appears and inserting “registered entity”;
- (B) in the second sentence—
 - (i) by striking “designation of such board of trade as a contract market” and inserting “designation or registration of the registered entity”; and
 - (ii) by striking “contract markets” and inserting “registered entities”; and
- (C) in the last sentence—
 - (i) by striking “board of trade” and inserting “person”; and
 - (ii) by striking “designated again a contract market” and inserting “designated or registered again a registered entity”.
- (20) Section 8(c) of the Commodity Exchange Act (7 U.S.C. 12(c)) is amended in the first sentence by striking “board of trade” and inserting “registered entity”.
- (21) Section 8a of the Commodity Exchange Act (7 U.S.C. 12a) is amended—
 - (A) by striking “contract market” each place it appears and inserting “registered entity”; and
 - (B) in paragraph (2)(F), by striking “trading privileges” and inserting “privileges”.
- (22) Sections 8b and 8c(e) of the Commodity Exchange Act (7 U.S.C. 12b, 12c(e)) are amended by striking “contract market” each place it appears and inserting “registered entity”.
- (23) Section 8e of the Commodity Exchange Act (7 U.S.C. 12e) is amended—
 - (A) by striking “contract market” each place it appears and inserting “registered entity”;
 - (B) in subsection (a), by striking “section 5a(b)” and inserting “sections 5 through 5c”;
 - (C) in subsection (b)—
 - (i) in paragraph (1), by striking “a contract market’s trade monitoring system implemented pursuant to section 5a(b)” and inserting “the trade monitoring system of a registered entity implemented pursuant to sections 5 through 5c”;
 - (ii) by striking paragraph (3) and inserting the following:
 - “(3) REMEDIES.—On becoming final, the Commission deficiency order may require the registered entity to—
 - “(A) institute appropriate improvements in its trade monitoring system necessary to correct the deficiencies in the order;
 - “(B) satisfy stated objective performance criteria to correct the deficiencies;
 - “(C) upgrade or reconfigure existing systems for collecting or processing relevant data on trading and trader or broker activity, including, where appropriate, the commitment of additional resources.”; and
 - (iii) in paragraph (5)—
 - (I) in the paragraph heading, by striking “DESIGNATION AS CONTRACT MARKET” and inserting “DESIGNATION OR REGISTRATION AS REGISTERED ENTITY”;
 - (II) by inserting “or registration” after “designation”; and
 - (III) by striking “board of trade” and inserting “person”;
 - (D) in subsection (d)(2), by striking “section 5b” and inserting “section 5e”; and
 - (E) in the paragraph heading of subsection (e)(2), by striking “CONTRACT MARKETS” and inserting “REGISTERED ENTITIES”.
- (24) Section 9 of the Commodity Exchange Act (7 U.S.C. 13) is amended—
 - (A) by striking “contract market” each place it appears and inserting “registered entity”; and
 - (B) in subsection (a)(2), by striking “section 4o(1),” and inserting “section 4n(1),”.
- (25) Section 14 of the Commodity Exchange Act (7 U.S.C. 18) is amended—
 - (A) in subsection (a)(1)(B), by striking “contract market” and inserting “registered entity”; and
 - (B) in subsection (f), by striking “contract markets” and inserting “registered entities”.
- (26) Section 17 of the Commodity Exchange Act (7 U.S.C. 21) is amended by striking “contract market” each place it appears and inserting “registered entity”.
- (27) Section 22 of the Commodity Exchange Act (7 U.S.C. 25) is amended—

- (A) in subsection (a)—
- (i) in paragraph (1)—
 - (I) by striking “contract market, clearing organization of a contract market, licensed board of trade,” and inserting “registered entity”; and
 - (II) in subparagraph (C)(i), by striking “contract market” and inserting “registered entity”;
 - (ii) in paragraph (2), by striking “sections 5a(11),” and inserting “sections 5(d)(13), 5b(b)(1)(E),”; and
 - (iii) in paragraph (3), by striking “contract market” and inserting “registered entity”; and
- (B) in subsection (b)—
- (i) in paragraph (1)—
 - (I) by striking “contract market or clearing organization of a contract market” and inserting “registered entity”;
 - (II) by striking “section 5a(8) and section 5a(9) of this Act” and inserting “sections 5 through 5c”;
 - (III) by striking “contract market, clearing organization of a contract market, or licensed board of trade” and inserting “registered entity”; and
 - (IV) by striking “contract market or licensed board of trade” and inserting “registered entity”;
 - (ii) in paragraph (3)—
 - (I) by striking “contract market, clearing organization, licensed board of trade,” and inserting “registered entity”; and
 - (II) by striking “contract market, licensed board of trade” and inserting “registered entity”;
 - (iii) in paragraph (4), by striking “contract market, licensed board of trade, clearing organization” and inserting “registered entity”; and
 - (iv) in paragraph (5), by striking “contract market, licensed board of trade, clearing organization,” and inserting “registered entity”.
- (b) FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF 1991.—Section 402(2) of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4402(2)) is amended by striking subparagraph (B) and inserting the following:

“(B) that is registered as a derivatives clearing organization under section 5b of the Commodity Exchange Act.”.

SEC. 129. REPORT TO CONGRESS.

(a) The Commodity Futures Trading Commission (in this section referred to as the “Commission”) shall undertake and complete a study of the Commodity Exchange Act (in this section referred to as “the Act”) and the Commission’s rules, regulations and orders governing the conduct of persons required to be registered under the Act, not later than 1 year after the date of the enactment of this Act. The study shall identify—

- (1) the core principles and interpretations of acceptable business practices that the Commission has adopted or intends to adopt to replace the provisions of the Act and the Commission’s rules and regulations thereunder;
- (2) the rules and regulations that the Commission has determined must be retained and the reasons therefor;
- (3) the extent to which the Commission believes it can effect the changes identified in paragraph (1) of this subsection through its exemptive authority under section 4(c) of the Act; and
- (4) the regulatory functions the Commission currently performs that can be delegated to a registered futures association (within the meaning of the Act) and the regulatory functions that the Commission has determined must be retained and the reasons therefor.

(b) In conducting the study, the Commission shall solicit the views of the public as well as Commission registrants, registered entities, and registered futures associations (all within the meaning of the Act).

(c) The Commission shall transmit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report of the results of its study, which shall include an analysis of comments received.

SEC. 130. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this title shall take effect on the date of enactment of this Act.

(b) JURISDICTION OF COMMISSION.—Section 108, and the amendments made by that section, shall take effect 1 year after the date of enactment of this Act.

SEC. 131. INTERNATIONAL ACTIVITIES OF THE COMMODITY FUTURES TRADING COMMISSION.

(a) **FINDINGS.**—The Congress finds that—

- (1) derivatives markets serving United States industry are increasingly global in scope;
- (2) developments in data processing and communications technologies enable users of risk management services to analyze and compare those services on a worldwide basis;
- (3) financial services regulatory policy must be flexible to account for rapidly changing derivatives industry business practices;
- (4) regulatory impediments to the operation of global business interests can compromise the competitiveness of United States businesses;
- (5) events that disrupt financial markets and economies are often global in scope, require rapid regulatory response, and coordinated regulatory effort across international jurisdictions;
- (6) through its membership in the International Organisation of Securities Commissions, the Commodity Futures Trading Commission has promoted beneficial communication among market regulators and international regulatory cooperation; and
- (7) the Commodity Futures Trading Commission and other United States financial regulators and self-regulatory organizations should continue to foster productive and cooperative working relationships with their counterparts in foreign jurisdictions.

(b) **SENSE OF THE CONGRESS.**—It is the sense of the Congress that, consistent with its responsibilities under the Commodity Exchange Act, the Commodity Futures Trading Commission should, as part of its international activities, continue to coordinate with foreign regulatory authorities, to participate in international regulatory organizations and forums, and to provide technical assistance to foreign government authorities, in order to encourage—

- (1) the facilitation of cross-border transactions through the removal or lessening of any unnecessary legal or practical obstacles;
- (2) the development of internationally accepted regulatory standards of best practice;
- (3) the enhancement of international supervisory cooperation and emergency procedures;
- (4) the strengthening of international cooperation for customer and market protection; and
- (5) improvements in the quality and timeliness of international information sharing.

SEC. 132. ANTIFRAUD PROVISIONS.

(a) **IN GENERAL.**—It shall be unlawful to commit retail derivatives fraud by the use of any means or instruments of transportation or communication in interstate commerce or of the mails.

(b) **DEFINITIONS.**—For purposes of this section, the following definitions shall apply:

- (1) **ELIGIBLE CONTRACT PARTICIPANT.**—The term “eligible contract participant” has the same meaning as in section 1a of the Commodity Exchange Act.
- (2) **FEDERAL FINANCIAL INSTITUTION REGULATOR.**—The term “Federal financial institution regulator” means—
 - (A) any Federal functional regulator (as defined in section 509(2) of the Gramm-Leach-Bliley Act) in the case of any financial institution described in paragraph (3)(A); and
 - (B) the Commodity Futures Trading Commission, in the case of a financial institution described in paragraph (3)(B).
- (3) **FINANCIAL INSTITUTION.**—The term “financial institution”—
 - (A) has the meaning given to such term in subparagraph (A) of section 509(3) of the Gramm-Leach-Bliley Act; and
 - (B) includes any person or entity described in subparagraph (B) of such section 509(3).
- (4) **RETAIL DERIVATIVES FRAUD.**—The term “retail derivatives fraud” means any fraud perpetrated by a party on a counterparty (other than a counterparty that is an eligible contract participant) to any agreement, contract, transaction, warrant, note or option (other than a contract of sale of a commodity for future delivery or an option on such contract (unless such contract or option has been excluded from the Commodity Exchange Act under subsection (c), (d), (f), or (i) of section 2 of such Act), or a security) that is based, in whole or in part, on the value of any interest in, or a quantitative measure relating to 1 or more commodities, securities, currencies, interest or other rates, indices, or other assets, or the occurrence of any event.

(5) SECURITY.—The term “security” has the same meaning as in section 3 of the Securities Exchange Act of 1934.

(c) ENFORCEMENT.—This section shall be enforced by the appropriate Federal financial institution regulator, any appropriate State insurance authority, and the Federal Trade Commission with respect to financial institutions and other persons subject to the jurisdiction of such agency or authority under applicable law, as follows:

(1) Under section 8 of the Federal Deposit Insurance Act, in the case of—

(A) national banks, Federal branches and Federal agencies of foreign banks, and any subsidiaries of such entities (except brokers, dealers, futures commission merchants, persons providing insurance, investment companies, and investment advisers), by the office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, organizations operating under section 25 or 25A of the Federal Reserve Act, and bank holding companies and their nonbank affiliates (other than financial institutions of whom the Securities and Exchange Commission is the federal functional regulator), by the Board of Governors of the Federal Reserve System;

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), insured State branches of foreign banks, and any subsidiaries of such entities (other than subsidiaries of whom the Securities and Exchange Commission is the Federal functional regulator), by the Board of Directors of the Federal Deposit Insurance Corporation; and

(D) savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation, and any subsidiaries of such savings associations (other than a subsidiary of whom the Securities and Exchange Commission is the Federal functional regulator), by the Director of the Office of Thrift Supervision.

(2) Under the Federal Credit Union Act, by the Board of the National Credit Union Administration with respect to any federally insured credit union, and any subsidiary of any such credit union (other than a subsidiary of whom the Securities and Exchange Commission is the Federal functional regulator).

(3) Under the Securities Exchange Act of 1934, by the Securities and Exchange Commission with respect to—

(A) any broker, dealer, or investment bank holding company; or

(B) any associated person of a broker or dealer, concerning the financial or securities activities of which the broker or dealer makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934.

(4) Under the Investment Company Act of 1940, by the Securities and Exchange Commission with respect to investment companies.

(5) Under the Investment Advisers Act of 1940, by the Securities and Exchange Commission with respect to investment advisers.

(6) Under the Commodity Exchange Act, by the Commodity Futures Trading Commission with respect to a commodity trading adviser, commodity pool operator, or futures commission merchant.

(7) Under State insurance law, in the case of any person engaged in providing insurance, by the applicable State insurance authority of the State in which the defrauded person is domiciled.

(8) Under the Federal Trade Commission Act, by the Federal Trade Commission for any other financial institution or other person that is not subject to the jurisdiction of any agency or authority under any other paragraph of this subsection.

(d) CRIMINAL PENALTIES.—Any person who willfully violates subsection (a) shall be fined not more than \$1,000,000, in the case of an individual, or \$2,500,000 in the case of any person other than an individual, or imprisoned not more than 10 years, or both.

SEC. 133. RETAIL SWAP CUSTOMER PROTECTIONS.

(a) IN GENERAL.—The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended by adding at the end the following new section:

“SEC. 49. RETAIL SWAP CUSTOMER PROTECTIONS.

“(a) REGULATIONS AUTHORIZED.—The Board of Governors of the Federal Reserve System and the Secretary of the Treasury may, in consultation with appropriate

Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, jointly prescribe customer protection regulations that apply to sales practices relating to swap agreements (as defined in section 206(b) of the Gramm-Leach-Bliley Act) between financial institutions and retail customers.

“(b) SALES PRACTICE REGULATIONS.—The regulations prescribed under subsection (a) may address—

“(1) the information that financial institutions shall obtain from retail customers in order to determine whether swap agreements recommended by the financial institution to retail customers are appropriate in light of the retail customer’s net worth, ability and willingness to incur losses, risk management needs, financial goals, investment experience and history, and other indicia of appropriateness;

“(2) information that financial institutions shall provide to retail customers to help the retail customers understand the economic characteristics and risks of swap agreements recommended by financial institutions;

“(3) measures to protect retail customers against fraudulent, deceptive, and manipulative acts and practices;

“(4) the extent to which access of retail customers to particular classes of swap agreements should be restricted; and

“(5) such other matters as the Secretary of the Treasury and the Board of Governors of the Federal Reserve System determine are necessary or appropriate for the protection of retail customers of swap agreements.

“(c) DEFINITIONS.—

“(1) FINANCIAL INSTITUTION.—The term ‘financial institution’ means a person described in subclause (I), (II), (III), (IV), (V), or (VI) of section 2(c)(2)(B)(ii) of the Commodity Exchange Act.

“(2) RETAIL CUSTOMER.—The term ‘retail customer’ means a person other than an eligible contract participant (as defined in section 1a(11) of the Commodity Exchange Act).

“(d) ENFORCEMENT.—The regulations prescribed under subsection (a) shall be enforced as follows:

“(1) Subject to section 45 of the Federal Deposit Insurance Act, under section 8 of the Federal Deposit Insurance Act, in the case of—

“(A) any national bank, Federal branch or Federal agency of a foreign bank, or any subsidiary of a national bank (other than any broker, dealer, investment company or investment adviser) by the Comptroller of the Currency;

“(B) any member bank (other than a national bank), branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), commercial lending company owned or controlled by a foreign bank, organization operating under section 25 or 25A of the Federal Reserve Act, any subsidiary of any such entity (other than any broker, dealer, investment company or investment adviser) and any bank holding company and any nonbank affiliate of any such company (other than any broker, dealer, investment company or investment adviser) by the Board of Governors of the Federal Reserve System;

“(C) any insured State nonmember bank, insured State branch of a foreign bank, or any subsidiary of any such entity (other than any broker, dealer, investment company, or investment adviser) by the Board of Directors of the Federal Deposit Insurance Corporation; and

“(D) any savings association the deposits of which are insured by the Corporation, any savings and loan holding company, or any subsidiary of any such savings association or holding company (other than any broker, dealer, investment company or investment adviser) by the Director of the Office of Thrift Supervision.

“(2) Under the Federal Credit Union Act, by the National Credit Union Administration Board with respect to any federally insured credit union, and any subsidiaries of such an entity.

“(3) Under the Securities Exchange Act of 1934, by the Securities and Exchange Commission with respect to any registered broker or dealer, or any associated person thereof that is not otherwise regulated.

“(4) Under the Commodity Exchange Act, by the Commodity Futures Trading Commission, with respect to any registered futures commission merchant, or any affiliated person of any such futures commission merchant that is not otherwise regulated.

“(5) Under State insurance law, in the case of any person engaged in providing insurance, or any affiliate of any such person that is not otherwise regu-

lated, by the applicable State insurance authority of the State in which the person is domiciled.”.

(b) REPORT.—If regulations authorized under the amendment made by subsection (a) have not been prescribed in final form before the end of the 1-year period beginning on the date of the enactment of this Act, the Board of Governors of the Federal Reserve System and the Secretary of the Treasury shall each submit a report to the Congress within 15 days after the end of such period containing an explanation of why such regulations were not prescribed in final form by the end of such period.

TITLE II—FINANCIAL CONTRACT NETTING IMPROVEMENT

SEC. 201. SHORT TITLE.

This title may be cited as the “Financial Contract Netting Improvement Act of 2000”.

SEC. 202. TREATMENT OF CERTAIN AGREEMENTS BY CONSERVATORS OR RECEIVERS OF INSURED DEPOSITORY INSTITUTIONS.

(a) DEFINITION OF QUALIFIED FINANCIAL CONTRACT.—Section 11(e)(8)(D)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(i)) is amended by inserting “, resolution or order” after “any similar agreement that the Corporation determines by regulation”.

(b) DEFINITION OF SECURITIES CONTRACT.—Section 11(e)(8)(D)(ii) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(ii)) is amended to read as follows:

“(ii) SECURITIES CONTRACT.—The term ‘securities contract’—

“(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

“(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

“(III) means any option entered into on a national securities exchange relating to foreign currencies;

“(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

“(V) means any margin loan;

“(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

“(VII) means any combination of the agreements or transactions referred to in this clause;

“(VIII) means any option to enter into any agreement or transaction referred to in this clause;

“(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII); and

“(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause.”.

(c) DEFINITION OF COMMODITY CONTRACT.—Section 11(e)(8)(D)(iii) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(iii)) is amended to read as follows:

“(iii) COMMODITY CONTRACT.—The term ‘commodity contract’ means—

“(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

“(II) with respect to a foreign futures commission merchant, a foreign future;

“(III) with respect to a leverage transaction merchant, a leverage transaction;

“(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

“(V) with respect to a commodity options dealer, a commodity option;

“(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

“(VII) any combination of the agreements or transactions referred to in this clause;

“(VIII) any option to enter into any agreement or transaction referred to in this clause;

“(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

“(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause.”.

(d) DEFINITION OF FORWARD CONTRACT.—Section 11(e)(8)(D)(iv) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(iv)) is amended to read as follows:

“(iv) FORWARD CONTRACT.—The term ‘forward contract’ means—

“(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity 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, or product or byproduct thereof, with a maturity date more than 2 days after the date the contract is entered into, including a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

“(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

“(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

“(IV) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

“(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV).”.

(e) DEFINITION OF REPURCHASE AGREEMENT.—Section 11(e)(8)(D)(v) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(v)) is amended to read as follows:

“(v) REPURCHASE AGREEMENT.—The term ‘repurchase agreement’ (which definition also applies to the term ‘reverse repurchase agreement’)—

“(I) means an agreement, including related terms, which provides for the transfer of 1 or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers’ acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, securities, loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers’ acceptances, securities, loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

“(II) does not include any repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term;

“(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

“(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

“(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

“(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V).

For purposes of this clause, the term ‘qualified foreign government security’ means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development (as determined by regulation or order adopted by the appropriate Federal banking authority).”

(f) DEFINITION OF SWAP AGREEMENT.—Section 11(e)(8)(D)(vi) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(vi)) is amended to read as follows:

“(vi) SWAP AGREEMENT.—The term ‘swap agreement’ means—

“(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or a weather option;

“(II) any agreement or transaction similar to any other agreement or transaction referred to in this clause that is presently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on 1 or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value;

“(III) any combination of agreements or transactions referred to in this clause;

“(IV) any option to enter into any agreement or transaction referred to in this clause;

“(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

“(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subparagraph (I), (II), (III), (IV), or (V).

Such term is applicable for purposes of this title only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, and the regulations promulgated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.”

(g) DEFINITION OF TRANSFER.—Section 11(e)(8)(D)(viii) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(viii)) is amended to read as follows:

“(viii) TRANSFER.—The term ‘transfer’ means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the depository institutions’s equity of redemption.”

(h) TREATMENT OF QUALIFIED FINANCIAL CONTRACTS.—Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)) is amended—

(1) in subparagraph (A), by striking “paragraph (10)” and inserting “paragraphs (9) and (10)”;

(2) in subparagraph (A)(i), by striking “to cause the termination or liquidation” and inserting “such person has to cause the termination, liquidation, or acceleration”;

(3) by amending subparagraph (A)(ii) to read as follows:

“(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);”;

(4) by amending subparagraph (E)(ii) to read as follows:

“(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);”.

(i) AVOIDANCE OF TRANSFERS.—Section 11(e)(8)(C)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(C)(i)) is amended by inserting “section 5242 of the Revised Statutes of the United States (12 U.S.C. 91) or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers,” before “the Corporation”.

SEC. 203. AUTHORITY OF THE CORPORATION WITH RESPECT TO FAILED AND FAILING INSTITUTIONS.

(a) IN GENERAL.—Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)) is amended—

(1) in subparagraph (E), by striking “other than paragraph (12) of this subsection, subsection (d)(9)” and inserting “other than subsections (d)(9) and (e)(10)”;

(2) by adding at the end the following new subparagraphs:

“(F) CLARIFICATION.—No provision of law shall be construed as limiting the right or power of the Corporation, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Corporation to transfer any qualified financial contract in accordance with paragraphs (9) and (10) of this subsection or to disaffirm or repudiate any such contract in accordance with paragraph (1).

“(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

“(i) IN GENERAL.—Notwithstanding the provisions of subparagraphs (A) and (E), and sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, no walkaway clause shall be enforceable in a qualified financial contract of an insured depository institution in default.

“(ii) WALKAWAY CLAUSE DEFINED.—For purposes of this subparagraph, the term ‘walkaway clause’ means a provision in a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party’s status as a nondefaulting party.”

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 11(e)(12)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(12)(A)) is amended by inserting “or the exercise of rights or powers” after “the appointment”.

SEC. 204. AMENDMENTS RELATING TO TRANSFERS OF QUALIFIED FINANCIAL CONTRACTS.

(a) TRANSFERS OF QUALIFIED FINANCIAL CONTRACTS TO FINANCIAL INSTITUTIONS.—Section 11(e)(9) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(9)) is amended to read as follows:

“(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—

“(A) IN GENERAL.—In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—

“(i) transfer to 1 financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—

“(I) all qualified financial contracts between any person or any affiliate of such person and the depository institution in default;

“(II) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

“(III) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

“(IV) all property securing or any other credit enhancement for any contract described in subclause (I) or any claim described in subclause (II) or (III) under any such contract; or

“(ii) transfer none of the qualified financial contracts, claims, property or other credit enhancement referred to in clause (i) (with respect to such person and any affiliate of such person).

“(B) TRANSFER TO FOREIGN BANK, FOREIGN FINANCIAL INSTITUTION, OR BRANCH OR AGENCY OF A FOREIGN BANK OR FINANCIAL INSTITUTION.—In transferring any qualified financial contracts and related claims and property pursuant to subparagraph (A)(i), the conservator or receiver for such depository institution shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

“(C) TRANSFER OF CONTRACTS SUBJECT TO THE RULES OF A CLEARING ORGANIZATION.—In the event that a conservator or receiver transfers any qualified financial contract and related claims, property and credit enhancements pursuant to subparagraph (A)(i) and such contract is subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

“(D) DEFINITION.—For purposes of this section, the term ‘financial institution’ means a broker or dealer, a depository institution, a futures commission merchant, or any other institution as determined by the Corporation by regulation to be a financial institution.”

(b) NOTICE TO QUALIFIED FINANCIAL CONTRACT COUNTERPARTIES.—Section 11(e)(10)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(10)(A)) is amended by amending the flush material following clause (ii) to read as follows: “the conservator or receiver shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date

of the appointment of the receiver, in the case of a receivership, or the business day following such transfer, in the case of a conservatorship.”.

(c) RIGHTS AGAINST RECEIVER AND TREATMENT OF BRIDGE BANKS.—Section 11(e)(10) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(10)) is further amended—

- (1) by redesignating subparagraph (B) as subparagraph (D); and
- (2) by inserting after subparagraph (A) the following new subparagraphs:

“(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

“(i) RECEIVERSHIP.—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right such person has to terminate, liquidate, or net such contract under paragraph (8)(A) or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 solely by reason of or incidental to the appointment of a receiver for the depository institution (or the insolvency or financial condition of the depository institution for which the receiver has been appointed)—

“(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver; or

“(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

“(ii) CONSERVATORSHIP.—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right such person has to terminate, liquidate, or net such contract under paragraph (8)(E) or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a conservator for the depository institution (or the insolvency or financial condition of the depository institution for which the conservator has been appointed).

“(iii) NOTICE.—For purposes of this subsection, the Corporation as receiver or conservator of an insured depository institution shall be deemed to have notified a person who is a party to a qualified financial contract with such depository institution if the Corporation has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A) of this subsection.

“(C) TREATMENT OF BRIDGE BANKS.—The following institutions shall not be considered a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding for purposes of paragraph (9)—

“(i) a bridge bank; or

“(ii) a depository institution organized by the Corporation, for which a conservator is appointed either—

“(I) immediately upon the organization of the institution; or

“(II) at the time of a purchase and assumption transaction between such institution and the Corporation as receiver for a depository institution in default.”.

SEC. 205. AMENDMENTS RELATING TO DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.

(a) IN GENERAL.—Section 11(e) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)) is further amended—

- (1) by redesignating paragraphs (11) through (15) as paragraphs (12) through (16), respectively; and

- (2) by inserting after paragraph (10) the following new paragraph:

“(11) DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In exercising the rights of disaffirmance or repudiation of a conservator or receiver with respect to any qualified financial contract to which an insured depository institution is a party, the conservator or receiver for such institution shall either—

“(A) disaffirm or repudiate all qualified financial contracts between—

“(i) any person or any affiliate of such person; and

“(ii) the depository institution in default; or

“(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).”.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)) is amended in subparagraph (C)(i), by striking “(11)” and inserting “(12)”.

SEC. 206. CLARIFYING AMENDMENT RELATING TO MASTER AGREEMENTS.

Section 11(e)(8)(D)(vii) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(vii)) is amended to read as follows:

“(vii) TREATMENT OF MASTER AGREEMENT AS 1 AGREEMENT.—Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.”.

SEC. 207. FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF 1991.

(a) DEFINITIONS.—Section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4402) is amended—

(1) in paragraph (2)—

(A) by inserting “or exempt from such registration pursuant to an order of the Securities and Exchange Commission” before the semicolon at the end of subparagraph (A)(ii); and

(B) by inserting “or that has been granted an exemption pursuant to section 4(c)(1) of such Act” before the period at the end of subparagraph (B);

(2) in paragraph (6)—

(A) by redesignating subparagraphs (B) through (D) as subparagraphs (C) through (E), respectively;

(B) by inserting after subparagraph (A) the following new subparagraph: “(B) an uninsured national bank or an uninsured State bank that is a member of the Federal Reserve System if the national bank or State member bank is not eligible to make application to become an insured bank under section 5 of the Federal Deposit Insurance Act;”; and

(C) by amending subparagraph (C) (as redesignated) to read as follows:

“(C) a branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency, as those terms are defined in section 1(b) of the International Banking Act of 1978;”;

(3) in paragraph (11), by adding before the period “and any other clearing organization with which such clearing organization has a netting contract”;

(4) by amending paragraph (14)(A)(i) to read as follows:

“(i) means a contract or agreement between two or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or closeout values relating to such obligations or entitlements) among the parties to the agreement; and”;

(5) by adding at the end the following new paragraph:

“(15) PAYMENT.—The term ‘payment’ means a payment of United States dollars, another currency, or a composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.”.

(b) ENFORCEABILITY OF BILATERAL NETTING CONTRACTS.—Section 403 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4403) is amended—

(1) by amending subsection (a) to read as follows:

“(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements between any two financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).”; and

(2) by adding at the end the following new subsection:

“(f) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to 1 or more netting contracts between any two financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code) and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and section 5(b)(2) of the Securities Investor Protection Act of 1970).”.

(c) ENFORCEABILITY OF CLEARING ORGANIZATION NETTING CONTRACTS.—Section 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4404) is amended—

(1) by amending subsection (a) to read as follows:

“(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).”; and

(2) by adding at the end the following new subsection:

“(h) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to 1 or more netting contracts between any two members of a clearing organization shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code) and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and section 5(b)(2) of the Securities Investor Protection Act of 1970).”.

(d) ENFORCEABILITY OF CONTRACTS WITH UNINSURED NATIONAL BANKS AND UNINSURED FEDERAL BRANCHES AND AGENCIES.—The Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401 et seq.) is amended—

(1) by redesignating section 407 as section 407A; and

(2) by adding after section 406 the following new section:

“SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED NATIONAL BANKS AND UNINSURED FEDERAL BRANCHES AND AGENCIES.

“(a) IN GENERAL.—Notwithstanding any other provision of law, paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act shall apply to an uninsured national bank or uninsured Federal branch or Federal agency except—

“(1) any reference to the ‘Corporation as receiver’ or ‘the receiver or the Corporation’ shall refer to the receiver of an uninsured national bank or uninsured Federal branch or Federal agency appointed by the Comptroller of the Currency;

“(2) any reference to the ‘Corporation’ (other than in section 11(e)(8)(D) of such Act), the ‘Corporation, whether acting as such or as conservator or receiver’, a ‘receiver’, or a ‘conservator’ shall refer to the receiver or conservator of an uninsured national bank or uninsured Federal branch or Federal agency appointed by the Comptroller of the Currency; and

“(3) any reference to an ‘insured depository institution’ or ‘depository institution’ shall refer to an uninsured national bank or an uninsured Federal branch or Federal agency.

“(b) LIABILITY.—The liability of a receiver or conservator of an uninsured national bank or uninsured Federal branch or agency shall be determined in the same manner and subject to the same limitations that apply to receivers and conservators of insured depository institutions under section 11(e) of the Federal Deposit Insurance Act.

“(c) REGULATORY AUTHORITY.—

“(1) IN GENERAL.—The Comptroller of the Currency, in consultation with the Federal Deposit Insurance Corporation, may promulgate regulations to implement this section.

“(2) SPECIFIC REQUIREMENT.—In promulgating regulations to implement this section, the Comptroller of the Currency shall ensure that the regulations generally are consistent with the regulations and policies of the Federal Deposit Insurance Corporation adopted pursuant to the Federal Deposit Insurance Act.

“(d) DEFINITIONS.—For purposes of this section, the terms ‘Federal branch’, ‘Federal agency’, and ‘foreign bank’ have the same meaning as in section 1(b) of the International Banking Act.”.

SEC. 208. BANKRUPTCY CODE AMENDMENTS.

(a) DEFINITIONS OF FORWARD CONTRACT, REPURCHASE AGREEMENT, SECURITIES CLEARING AGENCY, SWAP AGREEMENT, COMMODITY CONTRACT, AND SECURITIES CONTRACT.—Title 11, United States Code, is amended—

(1) in section 101—

(A) in paragraph (25)—

(i) by striking “means a contract” and inserting “means—

“(A) a contract”;

(ii) by striking “, or any combination thereof or option thereon;” and inserting “, or any other similar agreement;”; and

(iii) by adding at the end the following:

“(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

“(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

“(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B) or (C); or

“(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), but not to exceed the actual value of such contract on the date of the filing of the petition;”;

(B) in paragraph (46), by striking “on any day during the period beginning 90 days before the date of” and replacing it with “at any time before”;

(C) by amending paragraph (47) to read as follows:

“(47) ‘repurchase agreement’ (which definition also applies to a ‘reverse repurchase agreement’)—

“(A) means—

“(i) an agreement, including related terms, which provides for the transfer of 1 or more certificates of deposit, mortgage-related securities (as defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers’ acceptances, qualified foreign government securities, or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, securities, loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers’ acceptance, securities, loans, or interests of the kind described above, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;

“(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);

“(iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);

“(iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), or (iii); or

“(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), but not to exceed the actual value of such contract on the date of the filing of the petition; and

“(B) does not include a repurchase obligation under a participation in a commercial mortgage loan,

and, for purposes of this paragraph, the term ‘qualified foreign government security’ means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development;”;

(D) in paragraph (48) by inserting “or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission” after “1934”; and

(E) by amending paragraph (53B) to read as follows:

“(53B) ‘swap agreement’—

“(A) means—

“(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate col-

lar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or an equity swap, option, future, or forward agreement; a debt index or a debt swap, option, future, or forward agreement; a credit spread or a credit swap, option, future, or forward agreement; a commodity index or a commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

“(ii) any agreement or transaction similar to any other agreement or transaction referred to in this paragraph that—

“(I) is presently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

“(II) is a forward, swap, future, or option on 1 or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value;

“(iii) any combination of agreements or transactions referred to in this paragraph;

“(iv) any option to enter into an agreement or transaction referred to in this paragraph;

“(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

“(B) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subparagraph (A), but not to exceed the actual value of such contract on the date of the filing of the petition; and

“(C) is applicable for purposes of this title only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, and the regulations prescribed by the Securities and Exchange Commission or the Commodity Futures Trading Commission.”;

(2) by amending section 741(7) to read as follows:

“(7) ‘securities contract’—

“(A) means—

“(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan or any interest in a mortgage loan, a group or index of securities, certificates of deposit or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

“(ii) any option entered into on a national securities exchange relating to foreign currencies;

“(iii) the guarantee by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

“(iv) any margin loan;

“(v) any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph;

“(vi) any combination of the agreements or transactions referred to in this paragraph;

“(vii) any option to enter into any agreement or transaction referred to in this paragraph;

“(viii) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this paragraph, except that such master agreement shall be considered to be a securities contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii); or

“(ix) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, but not to exceed the actual value of such contract on the date of the filing of the petition; and

“(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan.”; and
(3) in section 761(4)—

(A) by striking “or” at the end of subparagraph (D); and

(B) by adding at the end the following:

“(F) any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph;

“(G) any combination of the agreements or transactions referred to in this paragraph;

“(H) any option to enter into an agreement or transaction referred to in this paragraph;

“(I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or

“(J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, but not to exceed the actual value of such contract on the date of the filing of the petition;”.

(b) DEFINITIONS OF FINANCIAL PARTICIPANT AND FORWARD CONTRACT MERCHANT.—Section 101 of title 11, United States Code, is amended—

(1) by inserting after paragraph (22) the following:

“(22A) ‘financial participant’ means an entity that, at the time it enters into a securities contract, commodity contract or forward contract, or at the time of the filing of the petition, has 1 or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of at least \$1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least \$100,000,000 (aggregated across counterparties) in 1 or more such agreement or transaction with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period;”;

(2) by amending paragraph (26) to read as follows:

“(26) ‘forward contract merchant’ means a Federal reserve bank, or an entity whose business consists in whole or in part of entering into forward contracts as or with merchants or in a commodity, as defined or in section 761, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing or in the forward contract trade;”.

(c) DEFINITION OF MASTER NETTING AGREEMENT AND MASTER NETTING AGREEMENT PARTICIPANT.—Section 101 of title 11, United States Code, is amended by inserting after paragraph (38) the following new paragraphs:

“(38A) ‘master netting agreement’ means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or closeout, under or in connection with 1 or more contracts that are described in any 1 or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to 1 or more of the foregoing. If a master netting agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), the master netting agreement shall be deemed to be a master netting agreement only with respect to those agreements

or transactions that are described in any 1 or more of the paragraphs (1) through (5) of section 561(a);

“(38B) ‘master netting agreement participant’ means an entity that, at any time before the filing of the petition, is a party to an outstanding master netting agreement with the debtor.”

(d) SWAP AGREEMENTS, SECURITIES CONTRACTS, COMMODITY CONTRACTS, FORWARD CONTRACTS, REPURCHASE AGREEMENTS, AND MASTER NETTING AGREEMENTS UNDER THE AUTOMATIC-STAY.—

(1) IN GENERAL.—Section 362(b) of title 11, United States Code, is amended—

(A) in paragraph (6), by inserting “, pledged to and under the control of,” after “held by”;

(B) in paragraph (7), by inserting “, pledged to and under the control of,” after “held by”;

(C) by amending paragraph (17) to read as follows:

“(17) under subsection (a), of the setoff by a swap participant of a mutual debt and claim under or in connection with 1 or more swap agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property held by, pledged to and under the control of, or due from such swap participant to margin, guarantee, secure, or settle any swap agreement;”

(D) in paragraph (18) by striking the period at the end and inserting “; or”; and

(E) by inserting after paragraph (18) the following new paragraph:

“(19) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with 1 or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such agreements or against cash, securities, or other property held by, pledged to and under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent such participant is eligible to exercise such offset rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue.”

(2) LIMITATION.—Section 362 of title 11, United States Code, is amended by adding at the end the following:

“(i) LIMITATION.—The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), or (17), or (32) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.”

(e) LIMITATION OF AVOIDANCE POWERS UNDER MASTER NETTING AGREEMENT.—Section 546 of title 11, United States Code, is amended—

(1) in subsection (g) (as added by section 103 of Public Law 101–311)—

(A) by striking “under a swap agreement”; and

(B) by striking “in connection with a swap agreement” and inserting “under or in connection with any swap agreement”; and

(2) by adding at the end the following:

“(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b), the trustee may not avoid a transfer made by or to a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A), and except to the extent the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.”

(f) FRAUDULENT TRANSFERS OF MASTER NETTING AGREEMENTS.—Section 548(d)(2) of title 11, United States Code, is amended—

(1) in subparagraph (C), by striking “and”;

(2) in subparagraph (D), by striking the period and inserting “; and”; and

(3) by adding at the end the following new subparagraph:

“(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except, with respect to a transfer under any individual contract covered thereby, to the extent such

master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.”.

(g) TERMINATION OR ACCELERATION OF SECURITIES CONTRACTS.—Section 555 of title 11, United States Code, is amended—

(1) by amending the section heading to read as follows:

“§ 555. Contractual right to liquidate, terminate, or accelerate a securities contract”;

and

(2) in the first sentence, by striking “liquidation” and inserting “liquidation, termination, or acceleration”.

(h) TERMINATION OR ACCELERATION OF COMMODITIES OR FORWARD CONTRACTS.—Section 556 of title 11, United States Code, is amended—

(1) by amending the section heading to read as follows:

“§ 556. Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract”;

and

(2) in the first sentence, by striking “liquidation” and inserting “liquidation, termination, or acceleration”.

(i) TERMINATION OR ACCELERATION OF REPURCHASE AGREEMENTS.—Section 559 of title 11, United States Code, is amended—

(1) by amending the section heading to read as follows:

“§ 559. Contractual right to liquidate, terminate, or accelerate a repurchase agreement”;

and

(2) in the first sentence, by striking “liquidation” and inserting “liquidation, termination, or acceleration”.

(j) LIQUIDATION, TERMINATION, OR ACCELERATION OF SWAP AGREEMENTS.—Section 560 of title 11, United States Code, is amended—

(1) by amending the section heading to read as follows:

“§ 560. Contractual right to liquidate, terminate, or accelerate a swap agreement”;

(2) in the first sentence, by striking “termination of a swap agreement” and inserting “liquidation, termination, or acceleration of 1 or more swap agreements”; and

(3) by striking “in connection with any swap agreement” and inserting “in connection with the termination, liquidation, or acceleration of 1 or more swap agreements”.

(k) LIQUIDATION, TERMINATION, ACCELERATION, OR OFFSET UNDER A MASTER NETTING AGREEMENT AND ACROSS CONTRACTS.—(1) Title 11, United States Code, is amended by inserting after section 560 the following:

“§ 561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts

“(a) IN GENERAL.—Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment amounts or other transfer obligations arising under or in connection with 1 or more (or the termination, liquidation, or acceleration of 1 or more)—

“(1) securities contracts, as defined in section 741(7);

“(2) commodity contracts, as defined in section 761(4);

“(3) forward contracts;

“(4) repurchase agreements;

“(5) swap agreements; or

“(6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

“(b) EXCEPTION.—

“(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

“(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7—

“(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract against any claim arising under, or in connection with, other instruments, contracts, or agree-

ments listed in subsection (a), except to the extent the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

“(B) another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract entered into or held on behalf of a customer of the debtor against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a).

“(c) RULE OF APPLICATION.—Subparagraphs (A) and (B) of subsection (b)(2) shall not be construed as prohibiting the offset of claims and obligations arising pursuant to—

“(1) a cross-margining arrangement that has been approved by the Commodity Futures Trading Commission or that has been submitted to such Commission pursuant to section 5a(a)(12) of the Commodity Exchange Act and has been permitted to go into effect; or

“(2) another netting arrangement, between a clearing organization (as defined in section 761) and another entity, that has been approved by the Commodity Futures Trading Commission.

“(d) DEFINITION.—As used in this section, the term ‘contractual right’ includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.”

(2) CONFORMING AMENDMENT.—The table of sections of chapter 5 of title 11, United States Code, is amended by inserting after the item relating to section 560 the following:

“561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts.”.

(l) MUNICIPAL BANKRUPTCIES.—Section 901(a) of title 11, United States Code, is amended—

(1) by inserting “555, 556,” after “553,”; and

(2) by inserting “559, 560, 561, 562,” after “557.”.

(m) ANCILLARY PROCEEDINGS.—Section 304 of title 11, United States Code, is amended by adding at the end the following new subsection:

“(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case ancillary to a foreign proceeding under this section or any other section of this title so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any proceeding under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).”.

(n) COMMODITY BROKER LIQUIDATIONS.—Title 11, United States Code, is amended by inserting after section 766 the following:

“§ 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.”.

(o) STOCKBROKER LIQUIDATIONS.—Title 11, United States Code, is amended by inserting after section 752 the following:

“§ 753. Stockbroker 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, securities clearing agency, swap participant, repo participant, financial 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.”.

(p) SETOFF.—Section 553 of title 11, United States Code, is amended—

(1) in subsection (a)(3)(C), by inserting “(except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(32), 555, 556, 559, 560 or 561)” before the period; and

(2) in subsection (b)(1), by striking “362(b)(14)” and inserting “362(b)(17), 362(b)(32), 555, 556, 559, 560, 561”.

(q) SECURITIES CONTRACTS, COMMODITY CONTRACTS, AND FORWARD CONTRACTS.—Title 11, United States Code, is amended—

(1) in section 362(b)(6), by striking “financial institutions,” each place such term appears and inserting “financial institution, financial participant”;

(2) in section 546(e), by inserting “financial participant,” after “financial institution,”;

(3) in section 548(d)(2)(B), by inserting “financial participant,” after “financial institution,”;

(4) in section 555—

(A) by inserting “financial participant,” after “financial institution,”; and

(B) by inserting before the period at the end “, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice”; and

(5) in section 556, by inserting “, financial participant” after “commodity broker”.

(r) CONFORMING AMENDMENTS.—Title 11, United States Code, is amended—

(1) in the table of sections of chapter 5—

(A) by amending the items relating to sections 555 and 556 to read as follows:

“555. Contractual right to liquidate, terminate, or accelerate a securities contract.

“556. Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract.”;

and

(B) by amending the items relating to sections 559 and 560 to read as follows:

“559. Contractual right to liquidate, terminate, or accelerate a repurchase agreement.

“560. Contractual right to liquidate, terminate, or accelerate a swap agreement.”;

and

(2) in the table of sections of chapter 7—

(A) by inserting after the item relating to section 766 the following:

“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.”;

and

(B) by inserting after the item relating to section 752 the following:

“753. Stockbroker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants.”.

SEC. 209. RECORDKEEPING REQUIREMENTS.

Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)) is amended by adding at the end the following new subparagraph:

“(H) RECORDKEEPING REQUIREMENTS.—The Corporation, in consultation with the appropriate Federal banking agencies, may prescribe regulations requiring more detailed recordkeeping with respect to qualified financial contracts (including market valuations) by insured depository institutions.”.

SEC. 210. EXEMPTIONS FROM CONTEMPORANEOUS EXECUTION REQUIREMENT.

Section 13(e)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1823(e)(2)) is amended to read as follows:

“(2) EXEMPTIONS FROM CONTEMPORANEOUS EXECUTION REQUIREMENT.—An agreement to provide for the lawful collateralization of—

“(A) deposits of, or other credit extension by, a Federal, State, or local governmental entity, or of any depositor referred to in section 11(a)(2), including an agreement to provide collateral in lieu of a surety bond;

“(B) bankruptcy estate funds pursuant to section 345(b)(2) of title 11, United States Code;

“(C) extensions of credit, including any overdraft, from a Federal reserve bank or Federal home loan bank; or

“(D) 1 or more qualified financial contracts, as defined in section 11(e)(8)(D),

shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.”.

SEC. 211. DAMAGE MEASURE.

(a) IN GENERAL.—Title 11, United States Code, is amended—
(1) by inserting after section 561 the following:

“§ 562. Damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreements

“If the trustee rejects a swap agreement, securities contract as defined in section 741, forward contract, commodity contract (as defined in section 761) repurchase agreement, or master netting agreement pursuant to section 365(a), or if a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant liquidates, terminates, or accelerates such contract or agreement, damages shall be measured as of the earlier of—

“(1) the date of such rejection; or

“(2) the date of such liquidation, termination, or acceleration.”; and

(2) in the table of sections of chapter 5 by inserting after the item relating to section 561 the following:

“562. Damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreements.”.

(b) CLAIMS ARISING FROM REJECTION.—Section 502(g) of title 11, United States Code, is amended—

(1) by designating the existing text as paragraph (1); and

(2) by adding at the end the following:

“(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.”.

SEC. 212. SIPC STAY.

Section 5(b)(2) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(b)(2)) is amended by adding after subparagraph (B) the following new subparagraph:

“(C) EXCEPTION FROM STAY.—

“(i) Notwithstanding section 362 of title 11, United States Code, neither the filing of an application under subsection (a)(3) nor any order or decree obtained by the Securities Investor Protection Corporation from the court shall operate as a stay of any contractual rights of a creditor to liquidate, terminate, or accelerate a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, each as defined in title 11, United States Code, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with 1 or more of such contracts or agreements, or to foreclose on any cash collateral pledged by the debtor whether or not with respect to 1 or more of such contracts or agreements.

“(ii) Notwithstanding clause (i), such application, order, or decree may operate as a stay of the foreclosure on or disposition of securities collateral pledged by the debtor, whether or not with respect to 1 or more of such contracts or agreements, securities sold by the debtor under a repurchase agreement or securities lent under a securities lending agreement.

“(iii) As used in this section, the term ‘contractual right’ includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.”.

SEC. 213. ASSET-BACKED SECURITIZATIONS.

Section 541 of title 11, United States Code, is amended—

(1) in subsection (b)—

(A) by striking “or” at the end of paragraph (4)(B)(ii);

(B) by redesignating paragraph (5) as paragraph (6); and

(C) by inserting after paragraph (4) the following new paragraph:

“(5) any eligible asset (or proceeds thereof), to the extent that such eligible asset was transferred by the debtor before the date of commencement of the case, to an eligible entity in connection with an asset-backed securitization, except to the extent such asset (or proceeds or value thereof) may be recovered by the trustee under section 550 by virtue of avoidance under section 548(a)(1); or”; and

(2) by adding at the end the following new subsection:

“(e) For purposes of this section, the following definitions shall apply:

“(1) the term ‘asset-backed securitization’ means a transaction in which eligible assets transferred to an eligible entity are used as the source of payment on securities, including all securities issued by governmental units, at least 1 class or tranche of which is rated investment grade by 1 or more nationally recognized securities rating organizations, when the securities are initially issued by an issuer;

“(2) the term ‘eligible asset’ means—

“(A) financial assets (including interests therein and proceeds thereof), either fixed or revolving, whether or not such assets are in existence as of the date of the transfer, including residential and commercial mortgage loans, consumer receivables, trade receivables, assets of governmental units (including payment obligations relating to taxes, receipts, fines, tickets, and other sources of revenue), and lease receivables, that, by their terms, convert into cash within a finite time period, plus any residual interest in property subject to receivables included in such financial assets plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders;

“(B) cash; and

“(C) securities, including all securities issued by governmental units.

“(3) the term ‘eligible entity’ means—

“(A) an issuer; or

“(B) a trust, corporation, partnership, governmental unit, limited liability company (including a single member limited liability company), or other entity engaged exclusively in the business of acquiring and transferring eligible assets directly or indirectly to an issuer and taking actions ancillary thereto;

“(4) the term ‘issuer’ means a trust, corporation, partnership, governmental unit, limited liability company (including a single member limited liability company), or other entity engaged exclusively in the business of acquiring and holding eligible assets, issuing securities backed by eligible assets, and taking actions ancillary thereto; and

“(5) the term ‘transferred’ means the debtor, pursuant to a written agreement, represented and warranted that eligible assets were sold, contributed, or otherwise conveyed with the intention of removing them from the estate of the debtor pursuant to subsection (b)(5) (whether or not reference is made to this title or any section of this title), irrespective, without limitation, of—

“(A) whether the debtor directly or indirectly obtained or held an interest in the issuer or in any securities issued by the issuer;

“(B) whether the debtor had an obligation to repurchase or to service or supervise the servicing of all or any portion of such eligible assets; or

“(C) the characterization of such sale, contribution, or other conveyance for tax, accounting, regulatory reporting, or other purposes.”.

SEC. 214. APPLICATION OF AMENDMENTS.

The amendments made by this title shall apply with respect to cases commenced or appointments made under any Federal or State law after the date of the enactment of this Act, but shall not apply with respect to cases commenced or appointments made under any Federal or State law before the date of the enactment of this Act.

Amend the title so as to read:

A bill to reauthorize and amend the Commodity Exchange Act to promote legal certainty, enhance competition, and reduce systemic risk in markets for futures and over-the-counter derivatives, to revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes.

PURPOSE OF SUMMARY

H.R. 4541, “Commodity Futures Modernization and Financial Contract Netting Improvement Act of 2000”, as amended by the Committee on Banking and Financial Services, is intended to reduce systemic risk to the Nation’s financial markets by providing legal certainty to certain over-the-counter (OTC) derivatives and to update Federal insolvency laws concerning the treatment of derivatives contracts. Both aspects of the legislation are responsive to recommendations from the President’s Working Group on Financial Markets.¹

The purpose of Title I, the “Commodity Futures Modernization Act of 2000”, is threefold. First, Title I reauthorizes the CFTC, the regulatory body established under the Commodity Exchange Act (CEA), for five years. Second, it modernizes the regulatory structure of U.S. futures markets by providing regulatory relief for futures exchanges and their markets and by allowing futures on securities. Third, and of most importance to the Committee, it provides greater legal certainty to certain OTC transactions by explicitly excluding such transactions from the CEA and by providing for the clearing of derivatives contracts by banks and other regulated entities. The purpose of Title II, the “Financial Contract Netting Improvement Act of 2000”, is to update bank insolvency laws and the Bankruptcy Code to minimize risk of a disruption with or between financial markets upon the insolvency of a market participant.²

BACKGROUND AND NEED FOR LEGISLATION

TITLE I—THE COMMODITY FUTURES MODERNIZATION ACT OF 2000

In modernizing the CEA, Title I ensures that as banks and other financial institutions continue to reinvent the risk management business, consumers are protected and the safety and soundness of the financial system are enhanced without diminishing the competitiveness of U.S. markets.

Over the past ten years there has been enormous growth in the use of swaps³ and related off-exchange derivatives. This phenomenal growth can be attributed to the fact that swaps offer genuine economic value to the parties that use them. The overwhelming majority of the trillions of dollars of swaps are financial transactions engaged in by banks. According to recent figures from the OCC, the notional measure of U.S. commercial banks’ derivatives transactions is almost \$35 trillion, and of this amount \$31 trillion represents OTC derivatives activities, yielding some \$2.5

¹The President’s Working Group on Financial Markets (PWG) is composed of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Securities and Exchange Commission (SEC), and the Chairman of the Commodity Trading Commission (CFTC). In addition, the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Bank of New York, the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS) participated in the Working Group reports.

²On July 27, 2000, the Committee also ordered to be reported H.R. 1161, the “Financial Contract Netting Improvement Act of 2000.” Title II incorporates the provisions of H.R. 1161 as reported by the Committee. See the report accompanying H.R. 1161 for further explanation of the purpose and summary of these provisions.

³As noted in the PWG report on *Over-the-Counter Derivatives Markets and the Commodity Exchange Act* the terminology used to describe derivative instruments is not precise. As in the PWG report, the term “OTC derivatives” is meant to include swaps with both terms to be construed broadly.

billion in revenues. The most recent total of banks' credit exposure from off-balance sheet derivatives contracts is \$396 billion.

OTC derivatives have become essential to banks' risk management strategies, their proprietary trading activities, and the services they provide their customers. Large banks have made customized risk management readily available to a wide range of enterprises, providing liquid and creditworthy contracts. At the same time, banks of all sizes in communities across the country have used swaps to insulate themselves against the vicissitudes of interest rate and other economic risks. In sum, banks are central to financial OTC derivatives markets and these markets have become central to a wide range of banking activities.

The United States has been at the forefront of innovation in swap activity to the great benefit of global financial markets. U.S. leadership in swaps, however, has been periodically threatened by the peculiarities of the CEA, which governs the trading of futures contracts on futures exchanges. The CEA does not contain a definition of "futures contract," referring instead to "contracts of sale of a commodity for future delivery." The CEA requires that futures contracts must be traded on a CFTC regulated exchange, unless a statutory exclusion or regulatory exemption from such requirement can be found. A futures contract that must be traded on an exchange under the CEA, but is instead traded over-the-counter, is illegal and unenforceable. The risk that the CFTC or a court might determine that a particular group swap agreement is an illegal off-exchange futures contract is known as "legal uncertainty."

Legal uncertainty raised the prospect that a banking product might be found to be a futures contract, thus subject to commodity futures law and regulation. In the unlikely event that the CFTC or a court determines that a swap is an illegal off-exchange futures contract, systemic difficulties could result. A determination that a swap is a future contract could jeopardize the value of billions of dollars worth of swaps on the books of banks. Legal uncertainty is a potential impediment to the growth of the swaps business in the United States and poses unwarranted and unnecessary risk on the financial system as a whole.

Legal uncertainty for derivatives has for years been of particular concern to the Committee. Outdated statutes that raise questions about the enforceability of contracts with banks and bar improvements in the ways banks reduce risk pose a palpable threat to the safety and soundness of the financial system. U.S. banking regulators warn that uncertainties and unintended consequences associated with the CEA could potentially turn financial disruptions in the global system into financial disasters.

The CFTC itself has tried to address these serious concerns. In 1989 the CFTC established, in its Swaps Policy Statement, that swaps are not appropriately regulated as futures. Since then, the CFTC has generally adhered to this policy in its actions. In addition, no Federal agency, no court, and no Congress has ever found that swaps are futures. As a result, the *de facto* reality is that swaps have never been regulated as futures under the CEA. Every day banks write an enormous volume of swaps contracts that are sustained by this consensus.

On November 9, 1999, the PWG transmitted its report entitled *Over-the-Counter Derivatives Markets and the Commodity Ex-*

change Act. The report made a number of legislative recommendations to clarify that certain off-exchange transactions are not subject to the CEA. H.R. 4541, as reported by the Committee on Agriculture, implements the PWG's legislative recommendations. The Banking Committee amendment builds on the PWG recommendations by expanding the kinds of derivative transactions that are excluded from the CEA and, thus, provides legal certainty.

To address concerns that consumers are adequately protected as these complex financial products become more readily available to a broader class of end users, the Committee amendment also provides a regulatory framework in which these markets can develop. First, retail derivatives fraud is made a criminal offense and relevant agencies are provided with clear civil enforcement powers to pursue fraud. Second, certain swaps provided to retail customers are not given the legal certainty afforded swaps to more sophisticated customers unless the Federal Reserve and the Treasury Department jointly prescribe customer protection regulations.

TITLE II—FINANCIAL CONTRACT NETTING IMPROVEMENT ACT OF 2000

Title II amends the U.S. Bankruptcy Code and a number of Federal banking laws to address the treatment of certain financial transactions following the insolvency of a party to such transactions. The amendments clarify and improve consistency between the applicable statutes and minimize risk of a disruption within or between financial markets upon the insolvency of a market participant. The near failure of Long-Term Capital Management in the fall of 1998 highlights the need for the U.S. to further refine its bankruptcy and insolvency laws in order to avoid systemic risk to the nation's financial system in the event of a failure of a large bank, hedge fund, or securities firm with substantial exposures to interest rate and currency swaps and other complex financial instruments.

EXPLANATION

The Committee on Agriculture reported to the full House its amendment to H.R. 4541 on June 29, 2000. The Committee on Banking and Financial Services (Committee) in its consideration of H.R. 4541 used as the base text the Agriculture Committee amendment, with the committee modifying those provisions in the bill providing legal certainty to OTC transactions, describing margin requirements on futures on securities, making retail derivatives fraud illegal and incorporating the PWG's recommendations on netting. Specifically, H.R. 4541, as reported by the Committee on Agriculture, is amended as follows.

1. In section 107, banking products and securities (when either are offered by banks, broker-dealers, insurance companies, or affiliates of any of these institutions) are excluded from the CEA. The CEA exclusion for swaps (as defined in the Gramm-Leach-Bliley Act) involving counterparties other than eligible contract participants does not take effect unless and until the Federal Reserve Board and the Department of Treasury jointly prescribe retail customer protection regulations as provided for in new section 133.

2. A new anti-fraud section (section 132) is added that: (1) defines retail derivatives fraud in connection with certain derivatives

transactions that are neither futures nor securities as fraud perpetrated on parties that are not eligible contract participants; (2) clarifies which agencies exercise civil enforcement authority over retail derivatives fraud; and (3) imposes criminal penalties for retail derivatives fraud.

3. A new section (section 110) is added which excludes from the CEA nonagricultural swaps if the swap is entered into between persons that are eligible participants and the terms of the swap are subject to individual negotiation and not specified by terms of a trading facility. This new section does not apply to swaps executed on a CFTC-designated or CFTC-registered facility.

4. A new section (Section 111) is added to clarify that nothing in the CEA is to imply or create any presumption that a transaction is or is not subject to the CEA or CFTC jurisdiction because it is or is not eligible for an exclusion or exemption provided for under the CEA or by the CFTC.

5. The section on Contract Enforcement (section 124) is amended to provide that a transaction shall not be unenforceable under Federal or State law based solely on the failure of the transaction to comply with the terms of an exemption or exclusion provided for under the CEA or by the CFTC. The provision applies to transactions between eligible contract participants or involving institutions excluded under the retail foreign exchange provisions of section 104.

6. The definition of “eligible contract participant” is amended to include an individual (acting for his or her own account) with total assets of \$5 million and who enters into a transaction in order to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by such person.

7. The definition of “financial institution” is amended to include a financial holding company, a new category of financial services firm authorized under provisions of the Gramm-Leach-Bliley Act.

8. The term “excluded commodity” is renamed “exclusion-eligible commodity” and the definition for such term is conformed to the scope of the PWG recommendation to exclude from the CEA certain derivatives with a non-finite supply.

9. The exclusive jurisdiction clause of the CEA is amended to ensure that this clause may not be construed to apply to any transaction that is excluded from the CEA by H.R. 4541.

10. The section on futures on securities (section 108) is amended to clarify what criteria are to be taken into consideration when determining if a margin requirement for a futures on securities is consistent with a margin requirement for a comparable options contract listed on any national securities exchange. Because the Committee was working under tight time constraints the Committee devoted most of its consideration to the provisions of the bill relating to legal certainty rather than these provisions relating to futures contracts on non-exempt securities traded on CFTC regulated markets.

11. The section on derivatives clearing (section 116) is modified to include amendments to banking and other laws to allow the Federal Reserve to supervise derivatives clearing by multilateral clearing organizations and clarify the laws that govern the resolution of insolvent clearing banks. These amendments also allow clearing or-

ganizations supervised as banks to clear the full range of transactions that are exclusion- or exemption-eligible.

12. The definition of “trading facility” is amended to exclude electronic systems that facilitate bilateral transactions and prevent any participant from executing a transaction with another participant unless both participants have approved the extension of credit to the other.

13. The principal-to-principal requirement for the exclusions in sections 104, 105, and 106 is modified to clarify that financial institutions, broker-dealers and their affiliates, insurance companies and their affiliates, financial holding companies, and investment bank holding companies can act as agents for eligible contract participants in an excluded trading facility.

14. A new title (Title II) is added incorporating the PWG’s legislative recommendations to clarify the treatment and cross-product netting of derivatives contracts upon the insolvency of a counter party.

HEARINGS

On April 11, 2000, the Committee held a hearing on the Working Group legislative recommendations concerning OTC derivatives, hedge funds, and netting provisions. Appearing before the Committee were: The Honorable Richard H. Baker, Chairman, Subcommittee on Capital Markets, Securities, and Government-Sponsored Enterprises; Lewis A. Sachs, Assistant Secretary for Financial Markets, Department of the Treasury; Patrick M. Parkinson, Associate Director, Division of Research and Statistics, Board of Governors of the Federal Reserve System; Annette L. Nazareth, Director, Division of Market Regulation, U.S. Securities and Exchange Commission; C. Robert Paul, General Counsel, Commodity Futures Trading Commission; Daniel P. Cunningham, Partner, Cravath, Swaine & Moore, on behalf of The International Swaps and Derivatives Association, Inc.; Mr. Shawn Dorsch, President, Chief Operating Officer, and Co-Founder, DNI Holdings, Inc. (Blackbird); Mark D. Young, Partner, Kirkland & Ellis, on behalf of The Chicago Board of Trade; Terrence A. Duffy, Vice Chairman, The Chicago Mercantile Exchange; Mark C. Brickell, Managing Director, J.P. Morgan & Co., Inc.; Michael A. Watkins, Deputy General Counsel, First Union Corporation, on behalf of The ABA Securities Association; Garrett Glass, Chief Market Risk Officer, Bank One Corporation, on behalf of The Financial Services Roundtable; George Crapple, Chairman, The Managed Funds Association; and William P. Miller II, Chairman of the Executive Committee, The End Users of Derivatives Council of the Association for Financial Professionals.

On July 19, 2000, the Committee held a hearing on H.R. 4541: the “Commodity Futures Modernization Act of 2000.” Appearing before the Committee were: Lee Sachs, Assistant Secretary for Financial Markets, Department of the Treasury; Patrick M. Parkinson, Associate Director, Division of Research and Statistics, Board of Governors of the Federal Reserve System; Annette L. Nazareth, Director, Division of Market Regulation, U.S. Securities and Exchange Commission; C. Robert Paul, General Counsel, Commodity Futures Trading Commission; Hal S. Scott, Nomura Professor of International Financial Systems and Director of the International

Financial Systems Program, Harvard Law School; Shawn Dorsch, President, Chief Operating Officer, and Co-Founder, DNI Holdings, Inc. (Blackbird); Mark C. Brickell, Managing Director, J.P. Morgan & Co., Inc.; Richard E. Grove, Jr., Executive Director and CEO, International Swaps and Derivatives Association, Inc.; Dennis Oakley, Managing Partner, Chase Manhattan Bank; Mark D. Young, Kirkland & Ellis on behalf of the Chicago Board of Trade and the Chicago Mercantile Exchange.

COMMITTEE CONSIDERATION AND VOTES

On July 27, 2000, the full Committee met in open session to consider H.R. 4541. A quorum being present, the Committee by voice vote passed H.R. 4541 with an amendment, and ordered it to be favorably reported with an amendment to the full House of Representatives for consideration. Also, the Committee adopted, by voice vote, a motion to authorize the Chairman to offer such motions as may be necessary in the House of Representatives to go to conference with the Senate on a similar bill.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

As provided for in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform.

CONSTITUTIONAL AUTHORITY

In compliance with clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Constitutional Authority of Congress to enact this legislation is derived from Article I, section 8, clause 1 (relating to the general welfare of the United States); Article I, section 8, clause 3 (relating to Congressional power to regulate commerce); Article I, section 8, clause 5 (relating to the power “to coin money” and “regulate the value thereof”); and Article I, section 8, clause 18 (relating to making all laws necessary and proper for carrying into execution powers vested by the Constitution in the government of the United States).

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONGRESSIONAL ACCOUNTABILITY ACT

The reporting requirement under section 102(b)(3) of the Congressional Accountability Act (P.L. 104-1) is inapplicable because this legislation does not relate to terms and conditions of employment or access to public services or accommodations.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE AND UNFUNDED
MANDATES ANALYSIS

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 6, 2000.

Hon. JAMES A. LEACH,
*Chairman, Committee on Banking and Financial Services, U.S.
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4541, the Commodity Futures Modernization and Financial Contract Netting Improvement Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Hadley, who can be reached at 226-2860.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 4541—Commodity Futures Modernization and Financial Contract Netting Improvement Act of 2000

Summary: H.R. 4541 would reauthorize funding for the activities of Commodity Futures Trading Commission (CFTC) during the 2001-2005 period. The bill also would allow trading of futures contracts based on single stocks (single-stock futures) under certain conditions, with oversight being shared by the CFTC and the Securities and Exchange Commission (SEC). In addition, H.R. 4541 would clarify that certain over-the-counter derivative transactions are outside of the jurisdiction of the CFTC. The bill also would establish a new crime related to derivatives fraud and would authorize the Federal Trade Commission (FTC) to combat such fraud. Finally, the bill would amend banking and bankruptcy laws to provide consistent treatment of certain financial contracts and to encourage the settlement by a single payment, on a net basis, of all the contracted-but-not-yet-due claims and liabilities of an insolvent institution.

Assuming appropriation of the necessary amounts, CBO estimates that implementing this legislation would cost \$368 million over the 2001-2005 period. Most of this cost would be incurred by the CFTC; CBO estimates that the SEC would spend \$3 million a year to regulate trading of futures contracts on individual securities and fight derivatives fraud, and that the FTC would spend and additional \$1 million a year to help combat securities fraud.

By imposing new duties on financial institutions regulators, establishing a new crime, and allowing trading of single-stock futures, H.R. 4541 would affect direct spending and receipts; there-

fore, pay-as-you-go procedures would apply. CBO estimates that any impact on direct spending and receipts would not be significant in any year.

H.R. 4541 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs would not exceed the threshold established in the act (\$55 million in 2000, adjusted annually for inflation). CBO's estimate of the impact of H.R. 4541 on the private sector will be provided later in a separate statement.

Estimated cost for the Federal Government: The estimated budgetary impact of H.R. 4541 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—				
	2001	2002	2003	2004	2005
CHANGES IN SPENDING SUBJECT TO APPROPRIATION ¹					
Proposed Changes to CFTC Spending:					
Estimated Authorization Level	67	69	72	74	77
Estimated Outlays	60	68	71	73	76
Proposed Changes to SEC Spending:					
Estimated Authorization Level	3	3	3	3	3
Estimated Outlays	3	3	3	3	3
Proposed Changes to FTC Spending:					
Estimated Authorization Level	1	1	1	1	1
Estimated Outlays	1	1	1	1	1
Total Changes in Spending:					
Estimated Authorization Level	71	73	76	78	81
Estimated Outlays	64	72	75	77	80

¹In addition to authorizing additional spending subject to appropriation, enacting H.R. 4541 would have an insignificant effect on direct spending and receipts.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2001 and that the necessary amounts will be appropriated for each fiscal year. Outlay estimates are based on historical spending rates for the affected agencies. Enactment of H.R. 4541 also would affect direct spending and receipts because it would assign new duties to regulators of financial institutions, it would create a new crime, and would result in additional SEC fee collections. CBO estimates that those additional effects would not be significant.

Spending subject to appropriation

H.R. 4541 would reauthorize funding for activities of the CFTC over the 2001–2005 period. Based on the agency's current budget and adjusting for anticipated inflation, CBO estimates that this reauthorization would cost \$59 million in 2001 and a total of \$343 million over the five-year period.

The bill also would make several changes to the Commodity Exchange Act that would increase the administrative costs of the CFTC. The CFTC would share oversight of single-stock futures transactions with the SEC. CBO estimates that this change to the CFTC's regulatory responsibilities would require the agency to hire new staff. Based on information from the CFTC, CBO estimates that these changes to the CFTC's administrative responsibilities would cost \$1 million a year over the 2001–2005 period. The bill also clarifies that the CFTC does not have jurisdiction over certain over-the-counter derivatives transactions.

H.R. 4541 also would require that the SEC play a significant role in overseeing single-stock futures transactions and combating fraud related to such transactions. Based on information from the SEC, CBO estimates that the SEC would have to hire additional staff to handle these new responsibilities. We estimate this new effort would cost about \$3 million a year during the 2001+2005 period.

H.R. 4541 would require the FTC to combat certain securities fraud among parties who are not regulated by the SEC, CFTC, or banking regulators. Based on information from the FTC, CBO estimates implementing this provision would cost about \$1 million a year.

Although enacting this bill could eliminate certain bankruptcy proceedings, CBO estimates that any subsequent reduction in the workload of federal agencies would not have a significant impact on the budgets of the Executive Office for United States Trustees or the federal court system.

Direct spending

H.R. 4541 would required the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC), to issue regulations to implement the provisions of the legislation concerning bankrupt financial institutions and to combat fraud in certain securities trading. The OCC charges fees to cover all its administrative costs; therefore, additional spending by the OCC would have no net budgetary effect over time. That is not the case with the FDIC, however, which uses deposit insurance premiums paid by all banks to cover the expenses it incurs to supervise state-chartered banks. Because the balances in the deposit insurance funds exceed the levels required under current law, very few banks or savings and loans pay premiums for deposit insurance at this time. Therefore, CBO expects that the FDIC would recover from premium income very little, if any, of the administrative costs associated with implementing H.R. 4541. However, we do not expect these costs to be significant.

The bill would give the FDIC, acting as receiver for insolvent financial institutions, additional flexibility to determine the most appropriate method for resolving a failing bank or savings and loan. As a result, we expect that enacting H.R. 4541 could help reduce the losses associated with closing insured institutions. Although it is difficult to assess the amount of savings, if any, associated with the bill's clarification of the treatment of certain financial transactions affecting failing banks and savings and loans, CBO estimates that the net effect on FDIC outlays would probably be negligible.

Revenues

H.R. 4541 would establish a new federal crime relating to derivatives fraud. As a result, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. Because those prosecuted and convicted under H.R. 4541 could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in subsequent

years. CBO expects that any additional receipts and direct spending would be less than \$500,000 each year.

H.R. 4541 would require the Federal Reserve Board to issue new regulations to implement provisions of the bill to combat fraud in derivatives trading. Budgetary effects of these additional responsibilities on the Federal Reserve would be recorded as a change in revenues. Based on information from the Federal Reserve, CBO estimates that enacting H.R. 4541 would reduce such revenues by less than \$500,000 a year over the 2001–2005 period.

Under current law, the SEC collects a fee equal to $\frac{1}{3000}$ th of a percent of the aggregate value of securities traded through national securities exchanges, brokers, and dealers. Such fees are recorded as revenues. H.R. 4541 would allow the trading of single-stock futures on national securities exchanges. By creating a new category of financial transactions that would be subject to SEC fees, this bill would increase revenues collected by the SEC. However, based on information provided by the CFTC, the SEC, and by private groups, CBO estimates that any increase in such revenues would not be significant.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act (BBEDCA) sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. CBO estimates that enacting H.R. 4541 would affect spending and governmental receipts but that there would be no significant impact in any year.

Under BBEDCA, provisions providing funding necessary to meet the government's deposit insurance commitment are excluded from pay-as-you-go procedures. CBO believes that the administrative costs associated with FDIC issuing regulations under H.R. 4541 are related to safety and soundness of deposit insurance, and thus, would be excluded. In any case, we estimate that those changes would be less than \$500,000 annually.

Estimated impact on State, local, and tribal governments: H.R. 4541 would require state insurance regulators to enforce antifraud and consumer protection regulations with regard to certain derivative and swap transactions. The bill also would preempt state laws affecting bankruptcy proceedings of certain state banks that are members of the Federal Reserve, certain commodities transactions that are conducted in markets regulated by the Commodity Futures Trading Commission (CFTC), and certain commodities contracts that are excluded from regulation by the CFTC. Both the new duties for state insurance regulators and the preemptions of state law would be mandates as defined by UMRA. CBO estimates that the costs of these mandates would not be significant and would not exceed the threshold established in the act (\$55 million in 2000, adjusted annually for inflation).

Estimated impact on the private sector: CBO's estimate of the impact of H.R. 4541 on the private sector will be provided later in a separate statement.

Previous CBO estimates: CBO has transmitted cost estimates for three other bills that would reauthorize the CFTC. Differences in the estimates reflect differences in the bills. On September 6, 2000, CBO transmitted a cost estimate for H.R. 4541 as ordered reported by the House Committee on Commerce on July 27, 2000. On June 29, 2000, CBO transmitted a cost estimate for H.R. 4541 as ordered

reported by the House Committee on Agriculture on June 27, 2000. On July 11, 2000, CBO transmitted a cost estimate for S. 2697, the Commodity Futures Modernization Act of 2000, as ordered reported by the Senate Committee on Agriculture, Nutrition, and Forestry, on June 29, 2000.

Estimate prepared by: Federal Costs: Mark Hadley; Impact on State, Local, and Tribal Governments: Susan Sieg Tompkins.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

SECTION-BY-SECTION ANALYSIS OF H.R. 4541⁴

TITLE I—COMMODITY FUTURES MODERNIZATION ACT OF 2000

Section 101. Short title and table of contents

The title is entitled the “Commodity Futures Modernization Act of 2000.”

Section 102. Purposes

The section lists eight purposes for the title including reauthorizing the CFTC; streamlining the CEA; eliminating unnecessary regulation for futures exchanges; transforming the regulatory role of the CFTC; providing a legislative and regulatory framework for the trading of futures on securities; providing CFTC jurisdiction over the retail foreign exchange market and bucket shops; promoting innovation and reducing systemic risk for OTC derivatives; allowing clearing of OTC derivatives and enhancing the competitive position of the U.S. financial institutions and markets.

Section 103. Definitions

Section 103 adds definitions to section 1a of the CEA for the following terms: “banking product”; “derivatives clearing organizations”; “designated future on a security”; “electronic trading facility”; “eligible commercial participant”, “eligible contract participant”; “exempt commodity”; “exclusion-eligible commodity”; “financial institution”; “hybrid instrument”; “nonexempt security”; “option”; “organized exchange”; “registered entity”; “security”; and “trading facility”.

Section 103 differs from section 3 of the Agriculture Committee reported bill in that it adds a definition for “banking product” and modifies the definitions for “eligible contract participant”, “excluded commodity”, “financial institution”, “hybrid instrument”, “organized exchange”, and “trading facility”. Section 103 defines “banking product” as meaning any agreement, contract, or transaction that is an identified banking product (as defined in section 206(a) of the Gramm-Leach-Bliley Act).

The section modifies the definition of “eligible contract participant” to include natural persons (acting for their own account) with total assets of \$5 million and who enter into a transaction in order to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by such persons. It modifies the definition of “financial institution” to include

⁴ Given that the amendment reported by the Committee on Agriculture was the base text for Committee consideration of H.R. 4541, the Committee has relied on the section-by-section analysis of that amendment as contained in House Report #106–711, Part I.

a financial holding company, a new category of financial services firm authorized under provisions of the Gramm-Leach-Bliley Act. It renames the term “excluded commodity” to “exclusion-eligible commodity” and modifies the definition of such term in keeping with the President’s Working Group recommendation to exclude from the CEA derivatives with a non-finite supply. It excludes from the definition of “trading facility” electronic systems that facilitate bilateral transactions and prevent any participant from executing a transaction with another participant unless both participants have approved the extension of credit to the other.

Section 104. Agreements, contracts, and transactions in foreign currency, government securities and certain other commodities

Section 104 clarifies section 2 of the CEA (the “Treasury Amendment”) with respect to CFTC jurisdiction over foreign currency transactions by adding a new subsection (c).

New paragraph (c)(2) excludes foreign currency transactions from CFTC regulation, other than those conducted on an organized exchange or as between unregulated entities and persons who are not eligible contract participants.

The Committee amendment excludes from the definition of “organized exchange”, a facility that permits trading (1) by eligible contract participants trading on a principal-to-principal basis; or (2) by eligible contract participants that are financial institutions, broker-dealers or the affiliates, insurance companies of their affiliates, financial holding companies, or investment bank holding companies acting as agents on behalf of eligible contract participants.

New subparagraph (c)(2)(B) provides the CFTC with jurisdiction over retail foreign currency futures and options transactions that are not regulated by another federal regulator. This would allow the CFTC to take enforcement action against illegal bucket shops.

Section 105. Legal certainty for excluded derivatives transactions (over-the-counter transactions)

Section 105 amends section 2 of the CEA to create a new subsection (d), which states that nothing in the CEA applies to transactions in an excluded commodity if the transaction (1) is entered into between eligible contract participants and is not conducted on a trading facility; or (2) is between eligible contract participants, trading on a principal-to-principal basis, and the transaction is conducted on an electronic trading facility. In addition, under section 105 of the Committee amendment the “principal-to-principal” requirement does not apply to transactions entered into between eligible contract participants that are specified regulated entities if the transaction is executed or traded on an electronic trading facility.

Section 106. Excluded electronic trading facilities

This section amends section 2 of the CEA to create a new subsection (e) that allows for the electronic trading of excluded commodities. Paragraph (e)(2) states that nothing in the CEA shall prohibit a contract market or derivatives transaction execution facility from establishing and operating an excluded electronic trading facility.

Section 107. Conformity with the Gramm-Leach-Bliley Act; hybrid instruments

This section amends section 2 of the CEA to create a new subsection (f) that provides that nothing in the CEA applies to a hybrid instrument that is predominantly a security or depository instrument, or to banking products or securities offered by certain regulated entities or their affiliates. Banking products, as defined in the Gramm-Leach-Bliley Act, encompasses instruments and transactions that are not properly regulated under the CEA when entered into by the enumerated regulated entities described in the section. New paragraph (f)(2) excepts from this exclusion swap agreements (as defined in section 106(b) of the Gramm-Leach-Bliley Act) with any party who is not an eligible contract participant until the Federal Reserve and Treasury Department promulgate new retail swap customer protection rules as provided for in section 133. New paragraph (f)(3) sets forth conditions for determining predominance to cover any hybrid instrument in which (1) the issuer of the instrument receives payment in full of the purchase price at the time the instrument is delivered; (2) the purchaser is not required to make additional payments; (3) the issuer of the instrument is not subject to mark-to-market margining requirements; and (4) the instrument is not marketed as a futures contract. New paragraph (4) clarifies that mark-to-marketing requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral for the instrument.

Section 108. Futures on securities

This section amends section 2 of the CEA by adding a new subsection (g) that reforms the Shad-Johnson jurisdictional accord.

Paragraph (1) provides that CFTC has no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to the transaction acquires a put, call, or other option on 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934, on the date of enactment of the Futures Trading Act of 1982), including any group or index of securities and any interest in or based on the value of securities.

Paragraph (2) is a savings clause to ensure that excluded OTC equity derivatives remain outside the CEA and jurisdiction of the CFTC.

Paragraph (3) states that it is illegal to provide for the trading of futures on securities except as provided for in the Act.

Paragraph (4) provides CFTC with exclusive jurisdiction for futures on securities and provides criteria for contract market designation of these products including: cash settlement; insusceptibility to price manipulation (both of the contract and the underlying stock or an option on that stock); margin requirements; and making information available to the regulators. With regard to the establishment of margin requirements, the Committee amendment provides that a margin requirement for a futures on securities is to be consistent with a margin requirement for a comparable options contract listed on any national securities exchange. A margin requirement meets this consistency test if the margin provides a similar level of protection against defaults by counterparties taking into account any difference in the price volatility of the con-

tracts, the frequency with which margin requirements are made, and the period of time within which margin calls must be met.

Paragraph (5) requires the CFTC and SEC to consult with regard to the listing of a futures on a security. If the SEC is not satisfied that all requirements regarding a single stock future are being met by a contract market, the CFTC shall give the SEC an opportunity for an oral hearing. If the hearing is held and the SEC's objections are not resolved, the SEC may seek judicial review. Paragraph (6) authorizes the SEC to enforce the securities laws related to insider trading with respect to futures on securities.

Paragraph (7) authorizes the FED to establish an Intermarket Margin Board with the concurrence of the CFTC and SEC. This would allow the CFTC, FED, and SEC to work jointly to set the margin on single stock futures at appropriate levels to preserve market financial integrity or to prevent systemic risk.

Paragraph (8) provides that this subsection shall not be construed to prohibit any agreement, contract, or transaction excluded from this Act by paragraph (2); or any hybrid instrument that is covered by the terms of any exemption granted by CFTC.

Paragraph (9) directs a registered futures association to adopt rules requiring a futures commission merchant (FCM), commodity trading advisor (CTA) or an introducing broker (IB) to determine if a customer is suitable to purchase single stock futures. FCM's already follow a 'know your customer' rule, however, this paragraph will ensure customer protection adheres to suitability standards currently used when selling securities and options on securities.

Paragraph (10) authorizes the offer and sale in the United States of any futures or option contracts on securities (excluding securities described in subparagraphs (A)(i) (I) or (II)), traded on a foreign board of trade without being a designated contract market under the CEA, if (1) for single stock futures, the United States is not the primary trading market for the underlying security; or (2) for stock index futures, less than 25 percent of the index is based on securities that are primarily traded in the United States; and settlement of the futures contract does not involve the transfer or receipt of a security in the United States. The CFTC is required to promulgate appropriate regulations implementing this section within 90 days of enactment.

Section 109. Transactions in exempt commodities

This section amends section 2 of the CEA by adding a new subsection (h) to provide legal certainty for exempt commodities. Exempt commodities must be traded between eligible participants and not traded on a trading facility (except an electronic trading facility). The amendment further provides that transactions in an exempt commodity, other than a metal commodity, can be conducted between eligible contract participants and traded on an electronic trading facility. All transactions are also subject to the clearing system provisions of the bill, state fraud statutes, and the fraud and anti-manipulation provisions of the Act. In addition, CFTC may prescribe rules to ensure the timely dissemination of electronic trading facility data if CFTC determines that the electronic facility performs a significant price discovery function.

Section 110. Swap transactions

This section amends section 2 of the CEA to exclude from the CEA a nonagricultural swap if the swap is entered into between persons that are eligible participants and the terms of the swap are subject to individual negotiation and not specified by terms of a trading facility. This exclusion does not apply to swaps executed on a CFTC-designated or CFTC-registered facility.

Section 111. Application of the Commodity Exchange Act

This section modifies section 2 of the CEA to clarify that nothing in the CEA is to imply or create any presumption that a transaction is or is not subject to the CEA or CFTC jurisdiction because it is or is not eligible for an exclusion or exemption provided for under the CEA or by the CFTC.

Section 112. Protection of the public interest

This section rewrites section 3 of the CEA that lists the responsibilities of the CFTC and purposes of the CEA in protecting the public interest. These include: protecting investors from fraud and manipulation; fostering efficiency and fairness with transparent price dissemination; preventing market manipulation and minimizing the risk of systemic failure; and promoting financial innovation and fair competition.

Section 113. Prohibited transactions

This section rewrites section 4c of the CEA for clarity.

Section 114. Designation of Boards of Trade as contract markets

This section strikes current law sections 5 and 5a and adds a new section 5 to the CEA providing for the designation of boards of trade as contract markets. Subsection (b) contains criteria that boards of trade must meet in order to be designated as a contract market. These include establishing and enforcing rules preventing market manipulation; ensuring fair and equitable trading by authorizing various futures exchange transactions; specifying how the trade execution facility operates, including any electronic matching systems; ensuring the financial integrity of transactions; disciplining members or market participants who violate the rules; allowing for public access to the board of trade rules and enabling the board of trade to obtain information in order to enforce its rules. Existing contract markets are grandfathered in under new subsection (c). The 18 core principles that must be met to maintain designation as a contract market are contained in new subsection (d) and provide that a board of trade must:

- Monitor and enforce compliance with the contract market rules;

- List only contracts that are not susceptible to manipulation;

- Monitor trading to prevent manipulation, price distortion and delivery or settlement disruptions;

- Adopt position limits for speculators and hedgers;

- Adopt rules to provide for the exercise of emergency authority, including the authority to liquidate or transfer open positions, suspend trading and make margin calls;

- Make available the terms and conditions of the contracts and the mechanisms for executing transactions;

Publish daily information on prices, bids, offers, volume, open interest, and opening and closing ranges;

Provide a competitive, open and efficient market and mechanism for executing transactions;

Provide for the safe storage of all trade information in a readily usable manner to assist in fraud prevention;

Provide for the financial integrity of the contracts, the futures commission merchants and customer funds;

Protect market participants from abusive practices;

Provide for alternative dispute resolutions for market participants and intermediaries;

Establish and enforce rules regarding fitness standards for those involved in market governance;

Establish and enforce rules to minimize conflicts of interest in a contract market;

Ensure that the governing board reflects the composition of the market participants (in the case of mutually owned exchanges);

Maintain records and make them available at any time for inspection by the Attorney General; and

Avoid taking any action that restrains trade or imposes anti-competitive burdens on the markets.

Subsection (e) provides that, with respect to futures contracts involving agricultural or metal commodities enumerated in section 1a(3) of the CEA, such contracts may only trade on designated contract markets. However, upon application by any person, the CFTC may prescribe rules and regulations to allow such agricultural or metal commodities to trade on a derivatives transaction execution facility in instances where it would promote responsible economic or financial innovation and fair competition.

Section 114. Derivatives transaction execution facilities

This section amends the CEA by adding a new section 5a authorizing a new trading designation called a derivatives transaction execution facility (DTEF). Under subsection (b), a board of trade may elect to operate as a DTEF rather than a contract market if they meet the DTEF designation requirements. registered DTEF may trade any non-designated futures contract if the commodity underlying the contract has a nearly inexhaustible supply, is not susceptible to manipulation, and does not have a cash market in commercial practice. Eligible DTEF traders include authorized contract market participants and persons trading through registered futures commission merchants with capital of at least \$20,000,000 that are members of a self-regulatory organization (SRO) and a clearing organization. Boards of trade that have been designated as contract markets may operate as DTEFs if they provide a separate location for DTEF trading or, in the case of an electronic system, identify whether the trading is on a DTEF or contract market.

Subsection (c) provides criteria for boards of trade that wish to register as DTEFs, including: establishing and enforcing trading rules, by authorizing various futures exchange transactions, that will deter abuses and provide market participants impartial access to the markets and capture information that may be used in rule enforcement; and defining trading procedures to be used and provide for the financial integrity of DTEF transactions.

To maintain registration as a DTEF, a board of trade must comply with 9 core principles listed in subsection (d):

Maintain and enforce rules

Ensure orderly trading and provide trading information to the CFTC;

Publicly disclose information regarding contract terms, trading practices, and financial integrity protections;

Provide information on prices, bids and offers to market participants as well as daily information in volume and open interest for the actively traded contracts;

Establish and enforce rules regarding fitness standards for those involved in DTEF governance;

Establish and enforce rules to minimum conflicts of interest in a derivatives transaction execution facility;

Maintain records and make them available at any time for inspection by the Attorney General; and

Avoid taking any action that restrains trade or imposes anti-competitive burdens on the markets.

Subsection (e) allows a broker-dealer, bank, or Farm Credit Institution in good standing to act as an intermediary on behalf of its customers and to receive funds serving as margin or security for the customer's transactions. If such entity holds the DTEF customer funds or accounts for more than 1 business day, such entity must be a registered FCM and a member of a registered futures association. The CFTC and SEC are to coordinate in adopting rules to implement this subsection.

Under subsection (f), the CFTC may adopt regulations to allow FCMs to give their customers the right to not segregate customer funds for purposes of trading on the DTEF.

Subsection (g) clarifies that a DTEF may trade derivatives that otherwise would be excluded, exempted or not subject to the CEA and the CFTC has exclusive jurisdiction only when these instruments are traded on a DTEF.

Section 116. Derivatives clearing organizations

This section amends the Federal banking laws, bankruptcy code and the CEA to provide a clear statutory basis for the regulation of clearing systems that develop for OTC derivatives.

Subsection (a) amends the Federal Deposit Insurance Corporation Improvement Act to prohibit persons from operating a multilateral clearing organization for derivative transactions unless the person is a national or state member bank, an affiliate of such a bank or an Edge Act corporation. This prohibition does not apply to a clearing organization that (1) is registered as a clearing agency under the Securities Exchange Act of 1934, (2) performs clearing functions for a CFTC registered market, or (3) is supervised by a foreign financial regulator which satisfies appropriate standards determined by an appropriate Federal financial regulator.

Subsections (b) and (c) amend the Federal Reserve Act (FRA) to provide the FED with enforcement authority over uninsured state member banks and resolution authority over such banks which operate as multilateral clearing organizations.

Subsections (d) and (e) make technical and conforming changes to the Bankruptcy Code.

Subsection (f) amends the FRA to provide the FED resolution authority over insolvent Edge Act corporations.

Subsection (g) amends the CEA to create a new section 5(b) regarding derivatives clearing organizations.

Section 117. Common provisions applicable to registered entities.

The section amends the CEA to create a new section 5c that contains provisions affecting all registered entities (contract markets, DTEFs, and derivatives clearing organizations).

Subsection (a) allows the CFTC to issue or approve interpretations to describe what would constitute an acceptable business practice under the core principals for registered entities.

Subsection (b) allows a registered entity to delegate its self regulatory functions to a registered futures association, while specifying that responsibility for carrying out these functions remain with the registered entity.

Subsection (c) enables the registered entity to trade new products or adopt or amend rules by providing the CFTC (or, in the case of a government security product, the Secretary of the Treasury) a written certification that the new contract or new rule or amendment complies with the CEA. This subsection would allow a registered entity to request that the CFTC grant prior approval of a new contract, new rule or rule amendment. For enumerated commodity products, a contract market (futures exchange) shall submit to the CFTC for prior approval each rule amendment that materially changes the terms and conditions of a contract that has already been listed and has substantial open interest.

Subsection (d) grants the CFTC the authority to informally resolve potential violations of the core principals for registered entities.

Subsection (e) reserves all of CFTC's emergency powers.

Section 118. Exempt boards of trade

This section amends the CEA to create a new section 5d regarding exempt boards of trade. Under subsections (a) and (b), futures contracts traded on an exempt board of trade would be exempt from the CEA (except section 2(g) regarding equity futures) if:

- (1) The commodity underlying the futures contract has an inexhaustible deliverable supply, is not subject to manipulation, or has no cash market;
- (2) Participants are eligible contract participants (large institutional investors); and
- (3) The contracts do not involve securities (including security indices).

Subsection (c) subjects futures contracts traded on an exempt board of trade to the anti-fraud and anti-manipulation provisions of the CEA.

Under subsection (d), if the CFTC finds that an exempt board of trade is a significant source of price discovery for the underlying commodity, the board of trade shall disseminate publicly on a daily basis trading volume, opening and closing price ranges, open interest, and other trading data as appropriate to the market.

Section 119. Suspension or revocation of designation as contract market

This section amends the CEA to authorize the CFTC to suspend the registration of a registered entity for 180 days for any violation of the CEA.

Section 120. Authorization of appropriations

This section amends section 12(d) of the CEA by striking 2000 and reauthorizing appropriations through fiscal year 2005.

Section 121. Preemption

This section rewrites paragraph 12(e)(2) of the CEA for clarity and to conform with changes made in the bill. It restates the current provisions that the CEA supersedes and preempts other laws in the case of transactions conducted on a registered entity or subject to regulation by the CFTC (even if outside the United States), and adds that in the case of excluded electronic trading facilities and any agreements, contracts or transactions that are excluded commodities or covered by a 4(c) exemption, the CEA supersedes and preempts State gaming and bucket shop laws (except State antifraud laws of general applicability).

Section 122. Predispute resolution agreements for institutional customers

This section amends subsection 14(g) of the CEA to clarify that futures commission merchants, as a condition of doing business, may require customers, that are eligible contract participants, to waive their right to file a reparations claim with the CFTC.

Section 123. Consideration of costs and benefits and antitrust laws

This section amends section 15 of the CEA to add a new subsection (a) requiring the CFTC, before promulgating regulations and issuing orders, to consider the costs and benefits of its action. This does not apply to orders associated with an adjudicatory or investigative process, or to emergency actions or findings of fact regarding compliance with CFTC rules.

Section 124. Contract enforcement

This section amends subsection 22(a) of the CEA to provide that a transaction shall not be unenforceable under Federal or State law based solely on the failure of the transaction to comply with the terms of an exemption or exclusion provided for under the CEA or by the CFTC. The provision applies to transactions between eligible contract participants or involving institutions excluded under the retail foreign exchange provisions of section 104. This safe harbor does not apply to any swap agreement (as defined in the Gramm-Leach-Bliley Act) with any party who is not an eligible contract participant unless such swap agreement is entered into after regulations have been prescribed under section 133 of the Commodities Futures Modernization Act of 2000.

Some swaps may not meet the terms of exemptions or exclusions provided for in the legislation. Any failure to provide a statutory exclusion or exemption for these categories of swaps transactions does not reflect, and should not be construed to reflect, a deter-

mination by Congress that these categories of swaps transactions are subject to the Commodity Exchange Act.

Section 125. Special procedures to encourage and facilitate bona fide hedging by agricultural producers

This section authorizes the CFTC to consider several factors to improve domestic agricultural producers' ability to use contract markets for hedging price risk. Specifically, this section authorizes CFTC, in issuing rules or orders, to consider: procedures to facilitate the orderly delivery of agricultural commodities, including temporary storage costs; the ease with which domestic agricultural producers may participate in contract markets, including cost and margin requirements; and flexibility in the minimum quantities of contract size. This section also requires the CFTC to report to the House and Senate Agriculture Committees regarding steps taken to implement this section.

Section 126. Rule of construction

This section provides that nothing in this Act supersedes, affects, or otherwise limits or expands the scope and applicability of laws governing the Securities and Exchange Commission unless expressly provided.

Section 127. Authority of agencies to construe the term "Contract Market"

This section authorizes Federal agencies to prescribe regulations construing the term "contract market." Many statutes other than the CEA, including the Federal securities laws and the Internal Revenue Code, refer to transactions occurring on a contract market. Because the bill amends the CEA to create new categories of regulated entities, this section gives other agencies rulemaking authority to construe the term to cover these entities as well as contract markets.

Section 128. Technical and conforming amendments

This section makes technical and conforming amendments throughout the CEA to reflect changes made by the bill.

Section 129. Report to Congress

This section requires the CFTC to study the CEA and its rules, regulations and orders governing the conduct of CFTC registrants and report to Congress within one year.

Section 130. Effective date

This section provides that Title I shall take effect on the date of enactment, except section 109 (dealing with equity futures), which takes effect one year after enactment.

Section 131. International activities of the Commodity Futures Trading Commission

This section contains Congressional findings about the changing and global nature of derivatives markets, the increase in the use of data processing and communications technologies that enable users of risk management services to analyze and compare services

on a worldwide basis, and the need for financial regulatory policy to be flexible and to avoid compromising U.S. competitiveness.

This section also contains a Sense of Congress regarding the importance of the CFTC, as part of its international activities, to continue to coordinate with foreign regulatory authorities, participate in international regulatory organizations and forums, and provide technical assistance to foreign government authorities in order to encourage and facilitate cross-border transactions, reduce unnecessary obstacles, and enhance international cooperation and information sharing.

Section 132. Antifraud provisions

This section makes it unlawful to commit retail derivatives fraud by the use of any means or instruments of transportation or communication in interstate commerce or the mails. Under the section, retail derivatives fraud is defined, in connection with certain derivatives transactions that are neither futures nor securities, as fraud perpetrated on parties that are not eligible contract participants. This section is enforced by the appropriate Federal financial regulator, state insurance authority, and the Federal Trade Commission with respect to financial institutions subject to their jurisdiction. The section criminal penalties for retail derivatives fraud.

Section 133. Retail swap customer protections

This section adds a new section to the Federal Deposit Insurance Act authorizing the FED and the Treasury Department to jointly prescribe consumer protection regulations that apply to sales practices relating to swap agreements (as defined in section 206(b) of the Gramm-Leach-Bliley Act) between financial institutions and retail customers. If such regulations are not prescribed after one year after enactment, the two agencies must submit a report to the Congress within 15 days explaining why such regulations were not prescribed in final form.

TITLE II—FINANCIAL CONTRACT NETTING IMPROVEMENT ACT OF 2000

Section 201. Short title

Title II is entitled the “Financial Contract Netting Improvement Act of 2000”.

Section 202. Treatment of certain agreements by conservators or receivers of insured depository institutions

Subsections (a) through (f) amend the FDIA definitions of “qualified financial contract,” “securities contract,” “commodity contract,” “forward contract,” “repurchase agreement” and “swap agreement” to make them consistent with the definitions in the Bankruptcy Code.

Subsection (b) amends the definition of “securities contract” to encompass options on securities and margin loans. The inclusion of “margin loans” in the definition is intended to encompass only those loans commonly known in the securities industry as “margin loans” and does not include other loans utilizing securities as collateral, however documented.

Subsection (b) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do

not constitute “securities contracts.” While a contract for the purchase or sale or a participation may constitute a “securities contract”, the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a “securities contract.”

Subsection (e) amends the definition of “repurchase agreement” to codify the substance of the FDIC’s 1995 regulation defining repurchase agreement to include those on qualified foreign government securities. See 12 C.F.R. § 360.5. The term “qualified foreign government securities” is defined to include those that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). Subsection (e) reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. Any risk presented by this modification is addressed by limiting it to those issued or guaranteed by OECD member states.

Subsection (e), like subsection (b) for “securities contracts”, specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a “repurchase agreement.” Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a “repurchase agreement.” However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer would constitute a “repurchase agreement.”

Subsection (f) amends the definition of “swap agreement” to include an “interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward or other foreign exchange or precious metals agreements; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, spread, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or a weather option.” This amendment would achieve contractual netting across economically similar over-the-counter products that can be terminated and closed out on a mark-to-market basis.

These definitions apply only for purposes of the FDIA and the Bankruptcy Code. These definitions, and the characterization of a certain transaction as a “swap agreement”, are not intended to effect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

Subsection (g) amends the FDIA by adding a definition for “transfer,” which is a key term used in the FDIA, to ensure that it is broadly construed to encompass dispositions of property or interests in property. The definition tracks that in section 101 of the Bankruptcy Code.

Subsection (h) makes clarifying technical changes to conform the receivership and conservatorship provisions of the FDIA. This sub-

section (h) also clarifies that the FDIA expressly protects rights under security agreements, arrangements or other credit enhancement related to one or more qualified financial contracts (QFCs). An example of a security arrangement is a right of set off, and examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Subsection (i) clarifies that no provision of Federal or state law relating to the avoidance of preferential or fraudulent transfers (including the anti-preference provision of the National Bank Act) can be invoked to avoid a transfer made in connection with any QFC of an insured depository institution in conservatorship or receivership, absent actual fraudulent intent on the part of the transferee.

Section 203. Authority of the corporation with respect to failed and failing institutions

Section 203 provides that no provision of law, including FDICIA, shall be construed to limit the power of the FDIC to transfer or to repudiate any QFC in accordance with its powers under the FDIA. As discussed below, there has been some uncertainty regarding whether or not FDICIA limits the authority of the FDIC to transfer or to repudiate QFCs of an insolvent financial institution. Section 203—as well as other provisions in the Act—clarify that FDICIA does not limit the transfer powers of the FDIC with respect to QFCs.

Section 203 denies enforcement to “walkaway” clause in QFCs. A walkaway clause is defined as a provision that, after calculation of a value of a party’s position or an amount due to or from one of the parties upon termination, liquidation or acceleration of the QFC, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party’s status as a non-defaulting party.

Section 204. Amendments relating to transfers of qualified financial contracts

Subsection (a) amends the FDIA to expand the transfer authority of the FDIC to permit transfers of QFCs to “financial institutions” as defined in FDICIA or in regulations. This provision will allow the FDIC to transfer QFCs to a non-depository financial institution, provided the institution is not subject to bankruptcy or insolvency proceedings.

The new FDIA provision specifies that when the FDIC transfers QFCs that are subject to the rules of a particular clearing organization, the transfer will not require the clearing organization to accept the transferee as a member of the organization. This provision gives the FDIC flexibility in resolving QFCs subject to the rules of a clearing organization, while preserving the ability of such organizations to enforce appropriate risk reducing membership requirements.

The new FDIA provision also permits transfers to an eligible financial institution that is a non-U.S. person, or the branch or agency of a non-U.S. person if, following the transfer, the contractual rights of the parties would be enforceable substantially to the same extent as under the FDIA.

Subsection (b) amends the notification requirements following a transfer of the QFCs of a failed depository institution to require the

FDIC to notify any party to a transferred QFC of such transfer by 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the FDIC acting as receiver or following the date of such transfer by the FDIC acting as a conservator. This amendment is consistent with the policy statement on QFCs issued by the FDIC on December 12, 1989.

Subsection (c) amends the FDIA to clarify the relationship between the FDIA and FDICIA. There has been some uncertainty whether FDICIA permits counterparties to terminate or liquidate a QFC before the expiration of the time period provided by the FDIA during which the FDIC may repudiate or transfer a QFC in a conservatorship or receivership. Subsection (c) provides that a party may not terminate a QFC based solely on the appointment of the FDIC as receiver until 5:00 p.m. (Eastern Time) on the business day following the appointment of the receiver or after the person has received notice of a transfer under FDIA section 11(d)(9), or based solely on the appointment of the FDIC as conservator, notwithstanding the provisions of FDICIA. This provides the FDIC with an opportunity to undertake an orderly resolution of the insured depository institution.

The amendment also prohibits the enforcement of rights of termination or liquidation that are based solely on the "financial condition" of the depository institution in receivership or conservatorship. For example, termination based on a cross-default provision in a QFC that is triggered upon a default under another contract could be stayed if such other default was caused by an acceleration of amounts due under that other contract, and such acceleration was based solely on the appointment of a conservator or receiver for that depository institution. Similarly, a provision in a QFC permitting termination of the QFC based solely on a downgraded credit rating of a party will not be enforceable in an FDIC receivership or conservatorship because the provision is based solely on the financial condition of the depository institution in default. However, any payment, delivery or other performance-based default, or breach of a representation or covenant putting in question the enforceability of the agreement, will not be deemed to be based solely on financial condition for purposes of this provision. The amendment is not intended to prevent counterparties from taking all actions permitted and recovering all damages authorized upon repudiation of any QFC by a conservator or receiver.

The amendment allows the FDIC to meet its obligation to provide notice to parties to transferred QFCs by taking steps reasonably calculated to provide notice to such parties by the required time. This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Finally, the amendment permits the FDIC to transfer QFCs of a failed depository institution to a bridge bank or a depository institution organized by the FDIC for which a conservator is appointed either (i) immediately upon the organization of such institution or (ii) at the time of a purchase and assumption transaction between the FDIC and the institution. This provision clarifies that such institutions are not to be considered financial institutions that are ineligible to receive such transfers under FDIA section 11(e)(9). This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Section 205. Amendments relating to disaffirmance or repudiation of qualified financial contracts

Section 205 limits the disaffirmance and repudiation authority of the FDIC with respect to QFCs so that such authority is consistent with the FDIC's transfer authority under FDIA section 11(e)(9). This ensures that no disaffirmance, repudiation or transfer authority of the FDIC may be exercised to "cherry-pick" or otherwise treat independently all the QFCs between a depository institution in default and a person or any affiliate of such person. The FDIC has announced that its policy is not to repudiate or disaffirm QFCs selectively. This unified treatment is fundamental to the reduction of systemic risk.

Section 206. Clarifying amendment relating to master agreements

Section 206 states that a master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA. This provision ensures that cross-product netting pursuant to a master agreement will be enforceable under the FDIA. Cross-product netting permits a wide variety of financial transactions between two parties to be netted, thereby maximizing the present and potential future risk-reducing benefits of the netting arrangement between the parties. Express recognition of the enforceability of such cross-product master agreements furthers the policy of increasing legal certainty and reducing systemic risks in the case of an insolvency of a large financial participant. Similar Bankruptcy Code clarifications to recognize cross-product netting both under a master agreement and in the absence of a master agreement are described below.

Section 207. Federal Deposit Insurance Corporation Improvement Act of 1991

Subsection (a)(1) amends the definition of "clearing organization" to include clearinghouses that are subject to exemptions pursuant to orders of the SEC or the CFTC.

Subsection (a)(2). FDICIA provides that a netting arrangement will be enforced pursuant to its terms, notwithstanding the failure of a party to the agreement. However, the current netting provisions of FDICIA limit this protection to "financial institutions," which include depository institutions. Subsection (a)(2) amends the FDICIA definition of covered institutions to include (i) uninsured national and State member banks, irrespective of their eligibility for deposit insurance and (ii) foreign banks (including the foreign bank and its branches or agencies as a combined group, or only the foreign bank parent of a branch or agency). The Federal Reserve Board already has by regulation included certain foreign banks in the definition of a "financial institution" for purposes of FDICIA and the latter change will statutorily extend the protections of FDICIA to ensure that U.S. financial organizations participating in netting agreements with foreign banks are covered by the Act, thereby enhancing the safety and soundness of these arrangements.

Subsection (a)(3) amends FDICIA to provide that, for purposes of FDICIA, two or more clearing organizations that enter into a netting contract are considered "members" of each other. This assures

the enforceability of netting arrangements involving two or more clearing organizations and a member common to all such organizations, thus reducing systemic risk in the event of the failure of such a member. Under the current FDICIA provisions, the enforceability of such arrangements depends on a case-by-case determination that clearing organizations could be regarded as members of each other for purposes of FDICIA.

Subsection (a)(4) amends the FDICIA definition of netting contract and the general rules applicable to netting contracts. The current FDICIA provisions require that the netting agreement must be governed by the law of the United States or a State to receive the protections of FDICIA. However, many of these agreements, particularly netting arrangements covering positions taken in foreign exchange dealings, are governed by the laws of a foreign country. This subsection broadens the definition of “netting contract” to include those agreements governed by foreign law, and preserves the FDICIA requirement that a netting contract is not invalid under, or precluded by, Federal law.

Subsection (a)(5) adds a new definition of “payment” to FDICIA.

Subsections (b) and (c) establish two exceptions to FDICIA’s protection of the enforceability of the provisions of netting contracts between financial institutions and among clearing organization members.

First, the termination provisions of netting contracts will not be enforceable based solely on (i) the appointment of a conservator for an insolvent depository institution under the FDIA or (ii) the appointment of a receiver for such institution under the FDIA, if such receiver transfers or repudiates QFCs in accordance with the FDIA and gives notice of a transfer by 5:00 p.m. on the business day following the appointment of a receiver. This change is made to confirm the FDIC’s flexibility to transfer or repudiate the QFCs of an insolvent depository institution in accordance with the terms of the FDIA. This modification also provides important legal certainty regarding the treatment of QFCs under the FDIA, because the current relationship between the FDIA and FDICIA is unclear.

The second exception provides that FDICIA does not override a stay order under SIPA with respect to foreclosure on securities (but not cash) collateral of a debtor (section 212 makes a conforming change to SIPA). There is also an exception relating to insolvent commodity brokers.

Subsections (b) and (c) also clarify that a security agreement or other credit enhancement related to a netting contract is enforceable to the same extent as the underlying netting contract.

Subsection (d) adds a new section 407 to FDICIA. This new section provides that, notwithstanding any other law, QFCs with uninsured national banks or uninsured Federal branches or agencies that are placed in receivership or conservatorship will be treated in the same manner as if the contract were with an insured national bank or insured Federal branch for which a receiver or conservator was appointed. This provision will ensure that parties to QFCs with uninsured national banks or uninsured Federal branches or agencies will have the same rights and obligations as parties entering into the same agreements with insured depository institutions. The new section also specifically limits the powers of a receiver or conservator for an uninsured national bank or unin-

sured Federal branch or agency to those contained in 12 U.S.C. § 1821(e)(8), (9), (10), and (11), which address QFCs.

While the amendment would apply the same rules to uninsured national banks and Federal branches and agencies that apply to insured institutions, the provision would not change the rules that apply to insured institutions. Nothing in this section would amend the International Banking Act, the Federal Deposit Insurance Act, the National Bank Act, or other statutory provisions with respect to receiverships of insured national banks or Federal branches.

Section 208. Bankruptcy code amendments

Subsection (a)(1) amends the Bankruptcy Code definitions of “repurchase agreement” and “swap agreement” to conform with the amendments to the FDIA contained in sections 202(e) and 20–2(f) of the Act.

In connection with the definition of “repurchase agreement,” the term “qualified foreign government securities” is defined to include securities that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). This language reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. Any risk presented by this modification is addressed by limiting it to those obligating or guaranteed by OECD member states.

Subsection (a)(1) specifies that repurchase obligations under a participation in an commercial mortgage loan do not make the participation agreement a “repurchase agreement.” Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a “repurchase agreement.” However, a repurchase agreement involving the transfer to participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer would constitute a “repurchase agreement.”

The amendments to the definition of “repurchase agreement” are not intended to affect the interpretation of the definition of “securities contract.”

The definition of “swap agreement,” in conjunction with the addition of “spot foreign exchange transactions” that was added to the definition in 1994, will achieve contractual netting across economically similar over-the-counter products that can be terminated and closed out on a mark-to-market basis.

The definition of “swap agreement” originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. For that reason, the phrase “or any other similar agreement” was included in the definition. To clarify this, subsection (a)(1) expands the definition of “swap agreement” to include “any agreement or transaction similar to any other agreement or transaction referred to in [subsection (a)(1)] that is presently, or in the future becomes, regularly entered into in the swap market [. . .] and is a forward, swap, future, or option on one or more rates currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value.” Subsection (a)(1) specifies that this definition

of swap agreement applies only for purposes of the Bankruptcy Code and is inapplicable to the other statutes, rules and regulations enumerated in that section.

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code and the FDIA. Similar changes are made in the definitions of “forward contract,” “commodity contract” and “repurchase agreement.” An example of a security arrangement is a right of setoff; examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Subsections (a)(2) and (a)(3) amend the Bankruptcy Code definitions of “securities contract” and “commodity contract,” respectively, to conform them to the definitions in the FDIA, and also to include any security agreements or arrangements or other credit enhancements related to one or more such contracts. Subsection (a)(2), like the amendments to the FDIA, amends the definition of “securities contract” to encompass options on securities and margin loans. The inclusion of “margin loans” in the definition is intended to encompass only those loans commonly known in the securities industry as “margin loans” and does not include other loans utilizing securities as collateral, however, documented.

Subsection (a)(2) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute “securities contracts.” While a contract for the purchase or sale or a participation may constitute a “securities contract,” the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a “securities contract.”

Subsection (b) amends the Bankruptcy Code definitions of “forward contract merchant” and also adds a new definition of “financial participant” to limit the potential impact of insolvencies upon other major market participants. This definition will allow such market participants to close-out and net agreements with insolvent entities under sections 362(b)(6), 546, 548, 555, and 556 even if the creditor could not qualify as, for example, a commodity broker. Section 116(d) of the Act amends the definition of financial institution to conform to the changes made in this subsection. The new subsection preserves the limitations of the right to close-out and net such contracts, in most cases, to entities who qualify under the Bankruptcy Code’s counter party limitations. However, where the counter party has transactions with a total gross dollar value of at least \$1 billion in notional principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least \$100 million (aggregated across counter parties) in one or more agreements or transactions on any day during the previous 15-month period, the new subsection and corresponding amendments would permit it to exercise netting rights irrespective of its inability otherwise to satisfy those counter party limitations. This change will help prevent systemic impacts upon the markets from a single failure.

Subsection (c) adds to the Bankruptcy Code new definitions for the terms “master netting agreement” and “master netting agreement participant.” The definition of “master netting agreement” is designed to protect the termination and close-out netting provisions of cross-product master agreements between parties. Such an agreement may be used (i) to document a wide variety of securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements or (ii) as an umbrella agreement for separate master agreements between the same parties, each of which is used to document a discrete type of transaction. The definition includes security agreements or arrangements or other credit enhancements related to one or more such agreements and clarifies that a master netting agreement will be treated as such even if it documents transactions that are not within the enumerated categories of qualifying transactions (but the provisions of the Bankruptcy Code relating to master netting agreements and the other categories of transactions will not apply to such other transactions).

A “master netting agreement participant” is any entity that is a party to an outstanding master netting agreement with a debtor before the filing of a bankruptcy petition.

Subsection (d) amends section 362(b) of the Bankruptcy Code to protect enforcement, free from the automatic stay, of setoff or netting provisions in swap agreements and in master netting agreements and security agreements or arrangements related to one or more swap agreements or master netting agreements. This provision parallels the over provisions of the Bankruptcy Code that protect netting provisions of securities contracts, commodity contracts, forward contracts, and repurchase agreements. Because the relevant definitions include related security agreements, the reference to “setoff” in this provision, as well as in section 362(b)(6) and (7) of the Bankruptcy Code, are intended to refer also to rights to foreclose on, and to set off against, obligations to return collateral securing swap agreements, master netting arrangements, repurchase agreements, securities contracts, commodity contracts, or forward contracts. Collateral may be pledged to cover the cost of replacing the defaulted transactions in the relevant market, as well as other costs and expenses incurred or estimated to be incurred for the purpose of hedging or reducing the risks arising out of such termination. Enforcement of these agreements and arrangements is consistent with the policy goal of minimizing systemic risk.

Subsection (d) also clarifies that the provisions protecting setoff and foreclosure in relation to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements free from the automatic stay apply to collateral pledged by the debtor that is under the control of the creditor but that cannot technically be “held by” the creditor, such as receivables and book-entry securities, and to collateral that has been repledged by the creditor.

Subsection (e) amends section 546 of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud. This section of the Act also clarifies the limitation on a trustee’s power to avoid transfers made under swap agreements.

Subsection (f) amends section 548(d) of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud. This amendment provides the same protections for transfers made under, or in connection with, master netting agreements as currently is provided for margin payments and settlement payments received by commodity brokers, forward contract merchants, stockbrokers, financial institutions securities clearing agencies, repo participants, and swap participants under section 546 and 548(d).

Subsections (g), (h), (i) and (j) clarify that the provisions of the Bankruptcy Code that protect (i) rights of liquidation under securities contracts, commodity contracts, forward contracts and repurchase agreements also protect rights of termination or acceleration under such contracts, and (ii) rights to terminate under swap agreements also protect rights of liquidation and acceleration.

Subsection (k) adds a new section 561 to the Bankruptcy Code to protect the contractual right of a master netting agreement participant to enforce any rights of termination, liquidation, acceleration, offset or netting under a master netting agreement. Such rights include rights arising (i) from the rules of a securities exchange or clearing organization, (ii) under common law, law merchant or (iii) by reason of normal business practice. This is consistent with the current treatment of rights under swap agreements under section 560 of the Bankruptcy Code.

For the purposes of Bankruptcy Code sections 555, 556, 559, 560 and 561, it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party.

The protection of netting and offset rights in sections 560 and 561 is in addition to the protections afforded in sections 362(b)(6), (b)(7), (b)(17) and (b)(32). For example, cross-product netting will be protected from the automatic stay under section 561 even in the absence of a master netting agreement.

Sections 561(b)(2) and (3) limit the exercise of contractual rights to net or to offset obligations where one leg of the obligations sought to be netted relates to commodity contracts. Under subsection (b)(2), netting or offset is not permitted if the obligations are not mutual. This means, for example, that proprietary obligations cannot be netted or offset against obligations held for, or on behalf of, some other party. Even if the obligations are mutual, under subsection (b)(3) netting or offset is not permitted in a commodity broker bankruptcy if the party seeking to net or to offset has no positive net equity in the commodity account at the debtor. Subsections (b)(2) and (b)(3) limit the depletion of assets available for distribution to customers of commodity brokers. This is consistent with the principle of Subchapter IV of Chapter 7 of the Bankruptcy Code, which gives priority to customer claims in the bankruptcy of a commodity broker.

Under the Act, the termination, liquidation or acceleration rights of a master netting agreement participant are subject to limitations

contained in other provisions of the Bankruptcy Code relating to securities contracts and repurchase agreements. In particular, if a securities contract or repurchase agreement is documented under a master netting agreement, a party's termination, liquidation and acceleration rights would be subject to the provisions of the Bankruptcy Code relating to orders authorized under the provisions of SIPA or any statute administered by the SEC. In addition, the netting rights of a party to a master netting agreement would be subject to any contractual terms between the parties limiting or waiving netting or set off rights. Similarly, a waiver by a bank or a counter party of netting or set off rights in connection with QFCs would be enforceable under the FDIA.

Subsection (1) clarifies that, with respect to municipal bankruptcies, all the provisions of the Bankruptcy Code relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements (which by their terms are intended to apply in all proceedings under title 11) will apply in a Chapter 9 proceeding for a municipality. Although sections 555, 556, 559 and 560 provide that they apply in any proceeding under the Bankruptcy Code, this subsection makes a technical amendment in Chapter 9 to clarify the applicability of these provisions.

Subsection (m) clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a section 304 proceeding ancillary to a foreign insolvency proceeding.

Subsections (n) and (o) amend those provisions in the Bankruptcy Code concerning the liquidation of commodity brokers and stockbrokers. Subchapter III of Chapter 7 of the Bankruptcy Code details specific rules for the liquidation of stockbrokers. Subchapter IV of Chapter 7 of the Bankruptcy Code and regulations of the CFTC detail specific rules for the liquidation of commodity brokers. These authorities are designed to protect customers and customer property of an insolvent stockbroker or commodity broker.

Subsections (n) and (o) clarify the rights of parties to commodity contracts, securities contracts, forward contracts, swap agreements, repurchase agreements and master netting agreements with an insolvent commodity broker or stockbroker. They ensure that non-customers will not defeat the priority scheme of Subchapter III or IV priority by gaining access to assets held in segregated customer accounts. The subsections also clarify that the exercise of termination and netting rights will not otherwise affect customer property or distributions by the trustee of the insolvent commodity broker or stockbroker after the exercise of such rights.

Subsection (p) amends section 553 of the Bankruptcy Code to clarify that the acquisition by a creditor of setoff rights in connection with swap agreements, repurchase agreements, securities contracts, forward contracts, commodity contracts and master netting agreements cannot be avoided as a preference.

This subsection also adds setoff of the kinds described in sections 555, 556, 559, 560, and 561 of the Bankruptcy Code to the types of set off excepted from section 553(b).

Section 209. Recordkeeping requirements

Section 209 amends section 11(e)(8) of the Federal deposit Insurance Act to explicitly authorize the FDIC, in consultation with appropriate Federal banking agencies, to prescribe regulations on recordkeeping with respect to QFCs. Adequate recordkeeping for such transactions is essential to effective risk management and to the reduction of systemic risk permitted by the orderly resolution of depository institutions utilizing QFCs.

Section 210. Exemptions from contemporaneous execution requirement

Section 210 amends FDIA section 13(e)(2) to provide that an agreement for the collateralization of governmental deposits, bankruptcy estate funds, Federal Reserve Bank or Federal Home Loan Bank extensions of credit or one or more QFCs shall not be deemed invalid solely because such agreement was not entered into contemporaneously with the acquisition of the collateral or because of pledges, delivery or substitution of the collateral made in accordance with such agreement.

The amendment codifies portions of policy statements issued by the FDIC regarding the application of section 13(e), which codifies the “D’Oench Duhme” doctrine. With respect to QFCs, this codification recognizes that QFCs often are subject to collateral and other security arrangements that may require posting and return of collateral on an ongoing basis based on the mark-to-market values of the collateralized transactions. The codification of only portions of the existing FDIC policy statements on these and related issues should not give rise to any negative implication regarding the continued validity of these policy statements.

Section 211. Damage measure

Section 211 adds a new section 562 to the Bankruptcy Code providing that damages under any swap agreement, securities contract, forward contract, commodity contract, repurchase agreement or master netting agreement will be calculated as of the earlier of (i) the date of rejection of such agreement by a trustee or (ii) the date of liquidation, termination or acceleration of such contract or agreement.

New section 562 provides important legal certainty and makes the Bankruptcy Code consistent with the current provisions related to the timing of the calculation of damages under QFCs in the FDIA.

Section 212. SIPC stay

Section 212 amends SIPA to provide that an order or decree issued pursuant to SIPA shall not operate as a stay of any right of liquidation, termination, acceleration, offset or netting under one or more securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements (as defined in the Bankruptcy Code and including rights of foreclosure on collateral), except that such order or decree may stay any right to foreclose on securities (but not cash) collateral pledged by the debtor or sold by the debtor under a repurchase agreement (a corresponding amendment to FDICIA is made by section 7). A creditor that was stayed in exercising rights against se-

curities collateral would be entitled to post-insolvency interest to the extent of the collateral.

Section 213. Asset-backed securitizations

Section 213 amends section 541 of the Bankruptcy Code to provide that certain assets transferred to an eligible entity in connection with an asset-backed securitization generally will not be included within the bankruptcy estate of the debtor. This provision recognizes that a valid transfer of such assets to an “eligible entity”, generally eliminates the debtor’s legal or equitable interests in those assets. Accordingly, subject to the avoidance powers in section 548(a), the transfer will be treated as a sale of those assets not subject to avoidance.

Section 214. Application of amendments

Section 214 provides that the amendments made by the Act shall not apply with respect to cases commenced, or to conservator/receiver appointments made, before the date of enactment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

SEC. 1a. DEFINITIONS.

As used in this Act:

(1) *BANKING PRODUCT.*—

(A) *IN GENERAL.*—*The term “banking product” means any agreement, contract, or transaction that is an identified banking product (as defined in section 206(a) of the Gramm-Leach-Bliley Act).*

(B) *EXCLUSION.*—*The term “banking product” does not include a contract for the sale of a commodity for future delivery traded on a contract market designated under section 5 of this Act or an agreement, contract, or transaction traded on a derivatives transaction execution facility registered under section 5a.*

[(1)] (2) *BOARD OF TRADE.*—The term “board of trade” means any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment.

[(2)] (3) *COMMISSION.*—The term “Commission” means the Commodity Futures Trading Commission established under section 2(a)(2).

[(3)] (4) *COMMODITY.*—The term “commodity” means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, live-

stock, livestock products, and frozen concentrated orange juice, *aluminum, copper, gold, palladium, platinum, silver*, and all other goods and articles, except onions as provided in Public Law 85-839 (7 U.S.C. 13-1), and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.

[(4)] (5) COMMODITY POOL OPERATOR.—The term “commodity pool operator” means any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market *or derivatives transaction execution facility*, except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order.

[(5)] (6) COMMODITY TRADING ADVISOR.—

(A) IN GENERAL.—Except as otherwise provided in this paragraph, the term “commodity trading advisor” means any person who—

(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in—

(I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market *or derivatives transaction execution facility*;

(II) any commodity option authorized under section 4c; or

(III) any leverage transaction authorized under section 19; or

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).

(B) EXCLUSIONS.—Subject to subparagraph (C), the term “commodity trading advisor” does not include—

(i) any bank or trust company or any person acting as an employee thereof;

(ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher;

(iii) any floor broker or futures commission merchant;

(iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees;

(v) the fiduciary of any defined benefit plan that is subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);

(vi) any contract market *or derivatives transaction execution facility*; and

(vii) such other persons not within the intent of this paragraph as the Commission may specify by rule, regulation, or order.

(C) INCIDENTAL SERVICES.—Subparagraph (B) shall apply only if the furnishing of such services by persons referred to in subparagraph (B) is solely incidental to the conduct of their business or profession.

(D) ADVISORS.—The Commission, by rule or regulation, may include within the term “commodity trading advisor”, any person advising as to the value of commodities or issuing reports or analyses concerning commodities if the Commission determines that the rule or regulation will effectuate the purposes of this paragraph.

[(6)] (7) CONTRACT OF SALE.—The term “contract of sale” includes sales, agreements of sale, and agreements to sell.

[(7)] (8) COOPERATIVE ASSOCIATION OF PRODUCERS.—The term “cooperative association of producers” means any cooperative association, corporate, or otherwise, not less than 75 percent in good faith owned or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with the Act of February 18, 1922 (42 Stat. 388, chapter 57; 7 U.S.C. 291 and 292), including any organization acting for a group of such associations and owned or controlled by such associations, except that business done for or with the United States, or any agency thereof, shall not be considered either member or nonmember business in determining the compliance of any such association with this Act.

(9) DERIVATIVES CLEARING ORGANIZATION.—

(A) IN GENERAL.—The term “derivatives clearing organization” means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to a derivative agreement, contract, or transaction—

(i) enables each party to the derivative agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

(ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by parties in the derivatives clearing organization; or

(iii) otherwise provides clearing services or arrangements that mutualize or transfer among parties in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the parties.

(B) EXCLUSIONS.—The term “derivatives clearing organization” does not include an entity, facility, system, or organization solely because it arranges or provides for—

(i) settlement, netting, or novation of obligations resulting from agreements, contracts, or transactions, on a bilateral basis and without a centralized counterparty;

(ii) settlement or netting of cash payments through an interbank payment system; or

(iii) settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

(10) *ELECTRONIC TRADING FACILITY.*—The term “electronic trading facility” means a trading facility that—

(A) operates by means of an electronic network; and

(B) maintains a real-time audit trail of bids, offers, and the matching of orders or the execution of transactions.

(11) *ELIGIBLE COMMERCIAL PARTICIPANT.*—The term “eligible commercial participant” means a party or entity described in paragraph (11)(A)(i), (ii), (v), or (vii) or paragraph (11)(C), who, in connection with its business—

(A) has a demonstrable capacity or ability, directly or through separate contractual arrangements, to make or take delivery of the underlying physical commodity;

(B) incurs risks, in addition to price risk, related to the commodity; or

(C) is a dealer that regularly provides hedging, risk management, or market-making services to the foregoing entities.

(12) *ELIGIBLE CONTRACT PARTICIPANT.*—The term “eligible contract participant” means—

(A) acting for its own account—

(i) a financial institution;

(ii) an insurance company regulated by a State (including a subsidiary or affiliate of such an insurance company);

(iii) an investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the investment company or the foreign person is itself an eligible contract participant);

(iv) a commodity pool that—

(I) has total assets exceeding \$5,000,000; and

(II) is formed and operated by a person subject to regulation under this Act or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant);

(v) a corporation, partnership, proprietorship, organization, trust, or other entity—

(I) that has total assets exceeding \$10,000,000;

(II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or

(III) that—

(aa) has a net worth exceeding \$1,000,000;

and

(bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

(vi) an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation—

(I) that has total assets exceeding \$5,000,000; or

(II) the investment decisions of which are made by—

(aa) an investment advisor or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or this Act;

(bb) a foreign person performing a similar role or function subject as such to foreign regulation;

(cc) a financial institution; or

(dd) an insurance company regulated by a State (including a subsidiary or affiliate of such an insurance company);

(vii)(I) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

(II) a multinational or supranational government entity; or

(III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);

(viii) a broker or dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the broker or dealer or foreign person is a natural person or proprietorship, the broker or dealer or foreign person shall not be considered to be an eligible contract participant unless the broker or dealer or foreign person also meets the requirements of clause (v) or (xi);

(ix) a futures commission merchant subject to regulation under this Act or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the futures commission merchant or foreign person is a natural person or proprietorship, the futures commission merchant or foreign person shall not be considered to be an eligible contract participant unless the futures commission merchant or foreign person also meets the requirements of clause (v) or (xi);

(x) a floor broker or floor trader subject to regulation under this Act in connection with any transaction that takes place on or through the facilities of a registered

entity or an exempt board of trade, or any affiliate thereof, on which such person regularly trades; or

(xi) an individual who has total assets in an amount in excess of—

(I) \$10,000,000; or

(II) \$5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by such individual with total assets exceeding \$10,000,000;

(B)(i) a person described in any of clauses (i) through (x) of subparagraph (A) or in subparagraph (C), acting as broker or performing an equivalent agency function on behalf of another person described in subparagraph (A) or (C);

(ii) an investment adviser subject to regulation under the Investment Advisors Act of 1940, a commodity trading adviser subject to regulation under this Act, a foreign person performing a similar role or function subject as such to foreign regulation, or a person described in any of clauses (i) through (x) of subparagraph (A) or in subparagraph (C), in any such case acting as investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction; or

(iii) a commodity trading adviser subject to regulation under this Act, having assets under management of not less than \$25,000,000 and acting as investment manager or fiduciary for another person and authorized by such person to commit such person to the transaction; or

(C) any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.

(13) *EXCLUSION-ELIGIBLE COMMODITY.*—

(A) *IN GENERAL.*—The term “exclusion-eligible commodity” means—

(i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;

(ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—

(I) not based in substantial part on the value of a narrow group of commodities not described in clause (i); or

(II) based solely on 1 or more commodities that have no cash market;

(iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

(iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or

level of a commodity not described in clause (i) that is—

(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and

(II) associated with a financial, commercial, or economic consequence.

(B) *REFERENCE TO EXCLUDED COMMODITY.*—Any reference in this Act to the term “excluded commodity” shall be deemed to be a reference to “exclusion-eligible commodity”.

(14) *EXEMPT COMMODITY.*—The term “exempt commodity” means a commodity that is not an excluded commodity or an agricultural commodity.

(15) *FINANCIAL INSTITUTION.*—The term “financial institution” means—

(A) a corporation operating under the fifth undesignated paragraph of section 25 of the Federal Reserve Act (12 U.S.C. 603), commonly known as “an agreement corporation”;

(B) a corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611 et seq.), commonly known as an “Edge Act corporation”;

(C) an institution that is regulated by the Farm Credit Administration;

(D) a Federal credit union or State credit union (as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

(E) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(F) a foreign bank or a branch or agency of a foreign bank (each as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101(b)));

(G) any financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956);

(H) a trust company; or

(I) a similarly regulated subsidiary or affiliate of an entity described in any of subparagraphs (A) through (H).

[(8)] (16) *FLOOR BROKER.*—The term “floor broker” means any person who, in or surrounding any pit, ring, post, or other place provided by a contract market or derivatives transaction execution facility for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility.

[(9)] (17) *FLOOR TRADER.*—The term “floor trader” means any person who, in or surrounding any pit, ring, post, or other place provided by a contract market or derivatives transaction execution facility for the meeting of persons similarly engaged, purchases, or sells solely for such person’s own account, any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility.

[(10)] (18) *FOREIGN FUTURES AUTHORITY.*—The term “foreign futures authority” means any foreign government, or any department, agency, governmental body, or regulatory organization empowered by a foreign government to administer or en-

force a law, rule, or regulation as it relates to a futures or options matter, or any department or agency of a political subdivision of a foreign government empowered to administer or enforce a law, rule, or regulation as it relates to a futures or options matter.

[(11)] (19) FUTURE DELIVERY.—The term “future delivery” does not include any sale of any cash commodity for deferred shipment or delivery.

[(12)] (20) FUTURES COMMISSION MERCHANT.—The term “futures commission merchant” means an individual, association, partnership, corporation, or trust 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 market *or derivatives transaction execution facility*; 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.

(21) HYBRID INSTRUMENT.—

(A) IN GENERAL.—The term “hybrid instrument” means a deposit instrument offered by a financial institution, or a security, having 1 or more payments indexed to the value, level, or rate of 1 or more commodities.

(B) DEPOSIT INSTRUMENT DEFINED.—The term “deposit instrument” means an instrument representing an interest described in paragraph (1), (2), (3), (4), or (5) of section 3(l) of the Federal Deposit Insurance Act, other than in subparagraph (A), (B), or (C) at the end of paragraph (5).

[(13)] (22) INTERSTATE COMMERCE.—The term “interstate commerce” means commerce—

(A) between any State, territory, or possession, or the District of Columbia, and any place outside thereof; or

(B) between points within the same state, territory, or possession, or the District of Columbia, but through any place outside thereof, or within any territory or possession, or the District of Columbia.

[(14)] (23) INTRODUCING BROKER.—The term “introducing broker” means any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant) 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 market *or derivatives transaction execution facility* who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

[(15)] (24) MEMBER OF A [CONTRACT MARKET] REGISTERED ENTITY.—The term “member of a [contract market] registered entity” means an individual, association, partnership, corporation, or trust owning or holding membership in, or admitted to membership representation on, a [contract market] registered entity or given members’ trading privileges thereon.

(25) *NONEXEMPT SECURITY*.—The term “nonexempt security” means a security that is not an exempted security under section 3 of the Securities Act of 1933 or section 3(a)(12) of the Securities Exchange Act of 1934 (other than any municipal security, as defined in section 3(a)(29) of the Securities Exchange Act of 1934).

(26) *OPTION*.—The term “option” means an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”.

(27) *ORGANIZED EXCHANGE*.—The term “organized exchange” means a trading facility that—

(A) permits trading by persons other than—

(i) eligible contract participants trading on a principal-to-principal basis; or

(ii) eligible contract participants described in subclause (I), (II), (III), (IV), (V) or (VI) of section 2(c)(2)(B), acting as a broker or performing an equivalent agency function on behalf of eligible contract participants; or

(B) has adopted (directly or through another nongovernmental entity) rules that—

(i) govern the conduct of participants, other than rules that govern the submission of orders or execution of transactions on the trading facility; or

(ii) include disciplinary sanctions other than the exclusion of participants from trading.

[(16)] (28) *PERSON*.—The term “person” imports the plural or singular, and includes individuals, associations, partnerships, corporations, and trusts.

(29) *REGISTERED ENTITY*.—The term “registered entity” means—

(A) a board of trade designated as a contract market under section 5;

(B) a derivatives transaction execution facility registered under section 5a; or

(C) a derivatives clearing organization registered under section 5b.

(30) *SECURITY*.—The term “security” has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) as in effect on date of the enactment of this paragraph.

(31) *TRADING FACILITY*.—

(A) *IN GENERAL*.—The term “trading facility” means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple participants in the facility or system.

(B) *EXCLUSIONS*.—The term “trading facility” does not include—

(i) a person or group of persons solely because the person or group of persons constitutes, maintains, or

provides an electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple orders within a predetermined, nondiscretionary automated trade matching algorithm;

(ii) a government securities dealer or government securities broker, to the extent that the dealer or broker executes or trades agreements, contracts, or transactions in government securities, or assists persons in communicating about, negotiating, entering into, executing, or trading an agreement, contract, or transaction in government securities (as the terms “government securities dealer”, “government securities broker”, and “government securities” are defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)));

(iii) facilities on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding; or

(iv) a person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that—

(I) enables participants to enter into bilateral transactions with other participants; and

(II) incorporates credit screens or filters that prevent any participant from executing a transaction with another participant unless both participants have approved the extension of credit to the other.

【SEC. 2. (a)(1)(A)(i) The】

SEC. 2. JURISDICTION OF COMMISSION; LIABILITY OF PRINCIPAL FOR ACT OF AGENT; COMMODITY FUTURES TRADING COMMISSION; TRANSACTION IN INTERSTATE COMMERCE.

(a) JURISDICTION OF COMMISSION; COMMODITY FUTURES TRADING COMMISSION.—

(1) JURISDICTION OF COMMISSION.—

(A) IN GENERAL.—The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in [subparagraph (B) of this paragraph] subsection (c), (d), (e), (f), (g), or (i), with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a [contract market designated pursuant to section 5 of this Act] contract market designated or derivatives transaction execution facility registered pursuant to section 5 or 5a or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act. Except as hereinabove provided, nothing contained in this section shall [I] (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United

States or of any State, or [(II)] (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

[(ii) Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

[(iii) The]

(B) *LIABILITY OF PRINCIPAL FOR ACT OF AGENT.*—*The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.*

[(B) Notwithstanding any other provision of law—

[(i) This Act shall not apply to and the Commission shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities (as defined in section 2(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982), including any group or index of such securities, or any interest therein or based on the value thereof.

[(ii) This Act shall apply to and the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”) and transactions involving, and may designate a board of trade as a contract market in, contracts of sale (or options on such contracts) for future delivery of a group or index of securities (or any interest therein or based upon the value thereof): *Provided, however,* That no board of trade shall be designated as a contract market with respect to any such contracts of sale (or options on such contracts) for future delivery unless the board of trade making such application demonstrates and the Commission expressly finds that the specific contract (or option on such contract) with respect to which the application has been made meets the following minimum requirements:

[(I) Settlement of or delivery on such contract (or option on such contract) shall be effected in cash or by means other than the transfer or receipt of any security, except an exempted security under section 3 of the Securities Act of 1933 or section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security, as defined in section 3(a)(29) of the Securities Ex-

change Act of 1934 on the date of enactment of the Futures Trading Act of 1982);

[(II) Trading in such contract (or option on such contract) shall not be readily susceptible to manipulation of the price of such contract (or option on such contract), nor to causing or being used in the manipulation of the price of any underlying security, option on such security or option on a group or index including such securities; and

[(III) Such group or index of securities shall be predominately composed of the securities of unaffiliated issuers and shall be a widely published measure of, and shall reflect, the market for all publicly traded equity or debt securities or a substantial segment thereof, or shall be comparable to such measure.

[(iii) Upon application by a board of trade for designation as a contract market with respect to any contract of sale (or option on such contract) for future delivery involving a group or index of securities, the Commission shall provide an opportunity for public comment on whether such contracts (or options on such contracts) meet the minimum requirements set forth in clause (ii) of this subparagraph.

[(iv)(I) The Commission shall consult with the Securities and Exchange Commission with respect to any application which is submitted by a board of trade before December 9, 1982, for designation as a contract market with respect to any contract of sale (or option on such contract) for future delivery of a group or index of securities. If, no later than fifteen days following the close of the public comment period, the Securities and Exchange Commission shall object to the designation of a board of trade as a contract market in such contract (or option on such contract) on the ground that any minimum requirement of clause (ii) of this subparagraph is not met, the Commission shall afford the Securities and Exchange Commission an opportunity for an oral hearing, to be transcribed, before the Commission, and shall give appropriate weight to the views of the Securities and Exchange Commission. Such oral hearing shall be held after the public comment period, prior to Commission action upon such designation, and not less than thirty nor more than forty-five days after the close of the public comment period, unless both the Commission and the Securities and Exchange Commission otherwise agree. If such an oral hearing is held, the Securities and Exchange Commission fails to withdraw its objections, and the Commission issues an order designating a board of trade as a contract market with respect to any such contract (or option on such contract), the Securities and Exchange Commission shall have the right of judicial review of such order in accordance with the standards of section 6(c) of this Act. If, pursuant to section 6 of this Act, there is a hearing on the record with respect to such application for designation, the Securities and Exchange Commission shall have the right to participate in that hearing as an interested party.

[(II) Effective for any application submitted by a board of trade on or after December 9, 1982, for designation as a contract market with respect to any contract of sale (or option on

such contract) for future delivery of a group or index of securities, the Commission shall transmit a copy of such application to the Securities and Exchange Commission for review. The Commission shall not approve any such application if the Securities and Exchange Commission determines that such contract (or option on such contract) fails to meet the minimum requirements set forth in clause (ii) of this subparagraph. Such determination shall be made by order no later than forty-five days after the close of the public comment period under clause (iii) of this subparagraph. In the event of such determination, the board of trade shall be afforded an opportunity for a hearing on the record before the Securities and Exchange Commission. If a board of trade requests a hearing on the record, the hearing shall commence no later than thirty days following the receipt of the request, and a final determination shall be made no later than thirty days after the close of the hearing. A person aggrieved by any such order of the Securities and Exchange Commission may obtain judicial review thereof in the same manner and under such terms and conditions as are provided in section 6(b) of this Act.

[(v) No person shall offer to enter into, enter into, or confirm the execution of any contract of sale (or option on such contract) for future delivery of any security, or interest therein or based on the value thereof, except an exempted security under section 3 of the Securities Act of 1933 or section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982), or except as provided in clause (ii) of this subparagraph, any group or index of such securities or any interest therein or based on the value thereof.

[(vi)(I) Notwithstanding any other provision of this Act, any contract market in a stock index futures contract (or option thereon) shall file with the Board of Governors of the Federal Reserve System any rule establishing or changing the levels of margin (initial and maintenance) for the stock index futures contract (or option thereon).

[(II) The Board may at any time request any contract market to set the margin for any stock index futures contract (or option thereon) at such levels as the Board in its judgment determines are appropriate to preserve the financial integrity of the contract market or its clearing system or to prevent systemic risk. If the contract market fails to do so within the time specified by the Board in its request, the Board may direct the contract market to alter or supplement the rules of the contract market as specified in the request.

[(III) Subject to such conditions as the Board may determine, the Board may delegate any or all of its authority under this clause only to the Commission.

[(IV) Nothing in this clause shall supersede or limit the authority granted to the Commission in section 8a(9) to direct a contract market, on finding an emergency to exist, to raise temporary emergency margin levels on any futures contract or option on the contract covered by this clause.

【(V) Any action taken by the Board, or by the Commission acting under the delegation of authority under subclause III, under this clause directing a contract market to alter or supplement a contract market rule shall be subject to review only in the Court of Appeals where the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. The review shall be based on the examination of all information before the Board or the Commission, as the case may be, at the time the determination was made. The court reviewing the action of the Board or the Commission shall not enter a stay or order of mandamus unless the court has determined, after notice and a hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.】

(2)(A) There is hereby established, as an independent agency of the United States Government, a Commodity Futures Trading Commission. The Commission shall be composed of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In nominating persons for appointment, the President shall—

(i) select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights, and interests covered by this Act; and

(ii) seek to ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas.

Not more than three of the members of the Commission shall be members of the same political party. Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (i) any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of the Commissioners first taking office after the enactment of this paragraph shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years.

(B) The President shall appoint, by and with the advice and consent of the Senate, a member of the Commission as Chairman, who shall serve as Chairman at the pleasure of the President. An individual may be appointed as Chairman at the same time that person is appointed as a Commissioner. The Chairman shall be the chief administrative officer of the Commission and shall preside at hearings before the Commission. At any time, the President may appoint, by and with the advice and consent of the Senate, a different Chairman, and the Commissioner previously appointed as Chairman may complete that Commissioner's term as a Commissioner.

(3) A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

(4) The Commission shall have a General Counsel, who shall be appointed by the Commission and serve at the pleasure of the Commission. The General Counsel shall report directly to the Commission and serve as its legal advisor. The Commission shall appoint such other attorneys as may be necessary, in the opinion of the Commission, to assist the General Counsel, represent the Commission in all disciplinary proceedings pending before it, represent the Commission in courts of law whenever appropriate, assist the Department of Justice in handling litigation concerning the Commission in courts of law, and perform such other legal duties and functions as the Commission may direct.

(5) The Commission shall have an Executive Director, who shall be appointed by the Commission and serve at the pleasure of the Commission. The Executive Director shall report directly to the Commission and perform such functions and duties as the Commission may prescribe.

(6)(A) Except as otherwise provided in this paragraph and in paragraphs (4) and (5) of this subsection, the executive and administrative functions of the Commission, including functions of the Commission with respect to the appointment and supervision of personnel employed under the Commission, the distribution of business among such personnel and among administrative units of the Commission, and the use and expenditure of funds, according to budget categories, plans, programs, and priorities established and approved by the Commission, shall be exercised solely by the Chairman.

(B) In carrying out any of his functions under the provisions of this paragraph, the Chairman shall be governed by general policies, plans, priorities, and budgets approved by the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(C) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(D) Personnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman shall not be affected by the provisions of this paragraph.

(E) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining the distribution of appropriated funds according to major programs and purposes.

(F) The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any functions of the Chairman under this paragraph.

(7) No Commissioner or employee of the Commission shall accept employment or compensation from any person, exchange, or clearinghouse subject to regulation by the Commission under this Act during his term of office, nor shall he par-

ticipate, directly or indirectly, in any **contract market** *registered entity* operations or transactions of a character subject to regulation by the Commission.

(8)(A) The Commission shall, in cooperation with the Secretary of Agriculture, maintain a liaison between the Commission and the Department of Agriculture. The Secretary shall take such steps as may be necessary to enable the Commission to obtain information and utilize such services and facilities of the Department of Agriculture as may be necessary in order to maintain effectively such liaison. In addition, the Secretary shall appoint a liaison officer, who shall be an employee of the Office of the Secretary, for the purpose of maintaining a liaison between the Department of Agriculture and the Commission. The Commission shall furnish such liaison officer appropriate office space within the offices of the Commission and shall allow such liaison officer to attend and observe all deliberations and proceedings of the Commission.

(B)(i) The Commission shall maintain communications with the Department of the Treasury, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission for the purpose of keeping such agencies fully informed of Commission activities that relate to the responsibilities of those agencies, for the purpose of seeking the views of those agencies on such activities, and for considering the relationships between the volume and nature of investment and trading in contracts of sale of a commodity for future delivery and in securities and financial instruments under the jurisdiction of such agencies.

(ii) When a board of trade applies for **designation as a contract market** *designation or registration as a contract market or derivatives transaction execution facility* involving transactions for future delivery of any security issued or guaranteed by the United States or any agency thereof, the Commission shall promptly deliver a copy of such application to the Department of the Treasury and the Board of Governors of the Federal Reserve System. The Commission may not **designate a board of trade as a contract market** *designate or register a board of trade as a contract market or derivatives transaction execution facility* based on such application until forty-five days after the date the Commission delivers the application to such agencies or until the Commission receives comments from each of such agencies on the application, whichever period is shorter. Any comments received by the Commission from such agencies shall be included as part of the public record of the Commission's designation proceeding. In **designating, or refusing, suspending, or revoking the designation of, a board of trade as a contract market involving transactions for future delivery referred to in this clause or in considering possible emergency action under section 8a(9) of this Act** *designating, registering, or refusing, suspending, or revoking the designation or registration of, a board of trade as a contract market or derivatives transaction execution facility involving transactions for future delivery referred to in this clause or in considering any possible action under this Act (including without limitation emergency action under section 8a(9))* with respect to such transactions, the

Commission shall take into consideration all comments it receives from the Department of the Treasury and the Board of Governors of the Federal Reserve System and shall consider the effect that any such [designated, suspension, revocation, or emergency action] *designation, registration, suspension, revocation, or action* may have on the debt financing requirements of the United States Government and the continued efficiency and integrity of the underlying market for government securities.

(iii) The provisions of this subparagraph shall not create any rights, liabilities, or obligations upon which actions may be brought against the Commission.

(9)(A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit copies of that estimate or request to the House and Senate Appropriations Committees and the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry.

(B) Whenever the Commission transmits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit copies thereof to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress. In instances in which the Commission voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Commission shall include a description of such actions in its legislative recommendations, testimony, or comments on legislation which it transmits to the Congress.

(C) Whenever the Commission issues for official publication any opinion, release, rule, order, interpretation, or other determination on a matter, the Commission shall provide that any dissenting, concurring, or separate opinion by any Commissioner on the matter be published in full along with the Commission opinion, release, rule, order, interpretation, or determination.

(10) The Commission shall have an official seal, which shall be judicially noticed.

(11) The Commission is authorized to promulgate such rules and regulations as it deems necessary to govern the operating procedures and conduct of the business of the Commission.

* * * * *

(c) *AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN FOREIGN CURRENCY, GOVERNMENT SECURITIES, AND CERTAIN OTHER COMMODITIES.*—

(1) *IN GENERAL.*—*Except as provided in paragraph (2), nothing in this Act (other than section 5b or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in—*

(A) *foreign currency;*

(B) *government securities;*

- (C) *security warrants;*
- (D) *security rights;*
- (E) *resales of installment loan contracts;*
- (F) *repurchase transactions in an excluded commodity; or*
- (G) *mortgages or mortgage purchase commitments.*

(2) *COMMISSION JURISDICTION.—*

(A) *AGREEMENTS, CONTRACTS, AND TRANSACTIONS THAT ARE FUTURES TRADED ON AN ORGANIZED EXCHANGE.—This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction described in paragraph (1) that is—*

(i) *a contract of sale of a commodity for future delivery (or an option thereon), or an option on a commodity (other than foreign currency or a security), that is executed or traded on an organized exchange; or*

(ii) *an option on foreign currency and is executed or traded on an organized exchange that is not a national securities exchange.*

(B) *AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN RETAIL FOREIGN CURRENCY.—This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction in foreign currency that—*

(i) *is a contract of sale for future delivery (or an option on such a contract) or an option; and*

(ii) *is offered to, or entered into with, a person that is not an eligible contract participant, unless the counterparty, or the person offering to be the counterparty, of the person is—*

(I) *a financial institution;*

(II) *a broker or dealer registered under section 15(b) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o-5) or a futures commission merchant registered under this Act;*

(III) *an associated person of a broker or dealer registered under section 15(b) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o-5), or an affiliated person of a futures commission merchant registered under this Act, concerning the financial or securities activities of which the registered person makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o-5(b), 78q(h)) or section 4f(c)(2)(B) of this Act;*

(IV) *an insurance company that is subject to State regulation (including a subsidiary or affiliate of such an insurance company);*

(V) *a financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956); or*

(VI) *an investment bank holding company (as defined in section 17(i) of the Securities Exchange Act of 1934).*

(d) *EXCLUDED DERIVATIVE TRANSACTIONS.—*

(1) *IN GENERAL.*—Nothing in this Act (other than section 5b or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in an excluded commodity if—

(A) the agreement, contract, or transaction is entered into only between persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and

(B) the agreement, contract, or transaction is not executed or traded on a trading facility.

(2) *ELECTRONIC TRADING FACILITY EXCLUSION.*—Nothing in this Act (other than section 5a, 5b, or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in an excluded commodity if—

(A) the agreement, contract, or transaction is—

(i) entered into—

(I) on a principal-to-principal basis between parties trading for their own accounts or as described in section 1a(12)(B)(ii) of this Act; and

(II) only between eligible contract participants (as defined in subparagraphs (A), (B)(ii), and (C) section 1a(12)) at the time at which the persons enter into the agreement, contract, or transaction; or

(ii) entered into only between eligible contract participants described in subclause (I), (II), (III), (IV), (V), or (VI) of section 2(c)(2)(B)(ii) acting as a broker or performing a similar agency function on behalf of persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and

(B) the agreement, contract, or transaction is executed or traded on an electronic trading facility.

(e) *EXCLUDED ELECTRONIC TRADING FACILITIES.*—

(1) *IN GENERAL.*—Nothing in this Act (other than section 12(e)(2)(B)) governs or is applicable to an electronic trading facility that limits transactions authorized to be conducted on its facilities to those satisfying the requirements of sections 2(d)(2) and 2(h)(3)(B) of this Act.

(2) *EFFECT ON AUTHORITY TO ESTABLISH AND OPERATE.*—Nothing in this Act shall prohibit a board of trade designated by the Commission as a contract market or derivatives transaction execution facility, or an exempt board of trade, from establishing and operating an electronic trading facility excluded under this Act pursuant to paragraph (1).

(f) *EXCLUSION FOR QUALIFYING HYBRID INSTRUMENTS.*—

(1) *IN GENERAL.*—Nothing in this Act (other than section 12(e)(2)(B)) governs or is applicable to—

(A) a banking product or security sold or provided by an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii); or

(B) a hybrid instrument that is predominantly a security or a deposit instrument.

(2) *EXCEPTION.*—Paragraph (1)(A) shall not apply to any swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act) with any party who is not an eligible contract

participant unless such swap agreement is entered into after final regulations have been prescribed under section 49 of the Federal Deposit Insurance Act

(3) **PREDOMINANCE.**—A hybrid instrument shall be considered to be predominantly a security or deposit instrument if—

(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with delivery of the hybrid instrument;

(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(D) the hybrid instrument is not marketed as a contract of sale for future delivery of a commodity (or option on such a contract) subject to this Act.

(4) **MARK-TO-MARKET MARGINING REQUIREMENTS.**—For the purposes of paragraph (3)(C), mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

(g) Notwithstanding any other provision of law:

(1) This Act shall not apply to and the Commission shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to the transaction acquires a put, call, or other option on 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934, on the date of enactment of the Futures Trading Act of 1982), including any group or index of securities and any interest in or based on the value of securities.

(2) Nothing in this subsection governs or applies to—

(A) an agreement, contract, or transaction in a commodity that is excluded under subsection (c) or (d);

(B) an electronic trading facility that is excluded under subsection (e); or

(C) a hybrid instrument that is covered by an exclusion under subsection (f) or an exemption granted by the Commission under section 4(c) (whether or not the hybrid instrument is otherwise subject to this Act).

(3) Except as provided in paragraph (4) of this subsection, or unless excluded by paragraph (2) of this subsection, a person shall not offer to enter into, enter into, or confirm the execution of any contract of sale (or option on the contract) for future delivery of any security or interest in or based on the value of a nonexempt security.

(4)(A) Except as excluded by paragraph (2) of this subsection, this Act shall apply to and the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any

transaction which is of the character of, or is commonly known to the trade as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, or decline guaranty), and transactions involving, and may designate a board of trade as a contract market under section 5 or register the board of trade as a derivatives transaction execution facility under section 5a in, contracts of sale (or options on the contracts) for future delivery of 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934), including any group or index of securities and any interest in or based on the value of securities.

(B) The Commission shall not designate a board of trade as a contract market under section 5 or register a board of trade as a derivatives transaction execution facility under section 5a with respect to any such contracts of sale (or options on the contracts) for future delivery unless the board of trade demonstrates and the Commission expressly finds that the specific contract (or option on the contract) with respect to which the application for the designation or recognition has been made meets the following requirements:

(i) Settlement of or delivery on the contract (or option on the contract) shall be effected in cash or by means other than the transfer or receipt of a nonexempt security.

(ii) SUSCEPTIBILITY TO PRICE MANIPULATION.—Trading in a contract (or option on such a contract) described in subparagraph (A) shall not be readily susceptible to—

(I) manipulation of the price of the contract (or option on such a contract); or

(II) causing or being used in the manipulation of the price of any underlying security, option on a security, or option on a group or index that includes a security.

(iii) If the contract is based on a single nonexempt security, an option on the security underlying the contract would meet all Securities and Exchange Commission requirements for listing on a national securities exchange.

(iv) If the contract is based on any group or index of nonexempt securities comprised of fewer than 5 securities, or on an index in which a single nonexempt security predominates, an option on each security comprising the group or index would meet all requirements for listing on a national securities exchange.

(v)(I) IN GENERAL.—The contract will be traded on a board of trade that establishes the level of margin for futures contracts (or options on the contracts) based on a single nonexempt security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, at a level consistent with the level of margin on comparable option contracts listed on any national securities exchange.

(II) CONSISTENCY.—For the purposes of subclause (I), a margin for designated futures on securities and options on securities shall be considered to be consistent if the margin provides a similar level of protection against defaults by counterparties, taking into account any differences in—

(aa) the price volatility of the contracts;

(bb) the frequency with which margin requirements are made; and

(cc) the period of time within which margin calls must be met.

(vi) The contract will be traded on a board of trade that prohibits a person who acts as a floor broker for any contract of sale (or options on the contract) for future delivery of a nonexempt security, an index based on fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, from trading that contract for the broker's own account during the same trading session.

(vii) The contract will be traded on a board of trade that collects, maintains, and promptly provides to the Securities and Exchange Commission such information as the Commission and the Securities and Exchange Commission jointly consider necessary to perform the enforcement responsibilities described in paragraph (6).

(5) The Commission shall consult with the Securities and Exchange Commission with respect to any application submitted by a board of trade for designation as a contract market or derivatives transaction execution facility with respect to any contract of sale (or option on the contract) for future delivery of a nonexempt security or a group or index of such securities. If, not later than 15 days after the consultation, the Securities and Exchange Commission objects to the designation of a board of trade as a contract market or derivatives transaction execution facility in the contract (or option on the contract) on the ground that any requirement of paragraph (4)(B) is not met, the Commission shall afford the Securities and Exchange Commission an opportunity for an oral hearing to be transcribed before the Commission, and shall give appropriate weight to the views of the Securities and Exchange Commission. The oral hearing shall be held before Commission action upon the application for the designation, and not less than 30 nor more than 45 days after the Securities and Exchange Commission has objected. If such an oral hearing is held, the Securities and Exchange Commission fails to withdraw its objections, and the Commission issues an order designating a board of trade as a contract market or recognizes the board of trade as a derivatives transaction execution facility with respect to any such contract (or option on the contract), the Securities and Exchange Commission may seek judicial review of the order in accordance with the procedural requirements set forth in section 6(c). If, pursuant to section 6, there is a hearing on the record with respect to an application for such designation, the Securities and Exchange Commission may participate in that hearing as an interested party.

(6) Notwithstanding any other provision of this Act, the Securities and Exchange Commission may enforce against a person that purchases or sells any contract of sale (or option on the contract) for future delivery of any nonexempt security, any index comprised of fewer than 5 nonexempt securities, or any index in which a single nonexempt security predominates to the same extent as if the person had purchased or sold an option on the security or index under the following provisions of the se-

curities laws and regulations with respect to the following categories of conduct:

(A) Section 10(b) and 21A of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b), 78u-1) with respect to insider trading.

(B) Section 16(b) of such Act (15 U.S.C. 78p(b)) with respect to unfair use of information in short swing trading by a corporate insider.

(C) Section 9 of such Act (15 U.S.C. 78i) with respect to manipulation of securities prices.

(D) Section 10(b) of such Act (15 U.S.C. 78J(b)) and section 204A of the Investment Adviser's Act of 1940 (15 U.S.C. 80b-4a) with respect to frontrunning.

(E) Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) with respect to the pricing and integrity of tender offers.

(F) Rule 144 of the rules of the Securities and Exchange Commission (17 C.F.R. 230.144) with respect to trading in restricted securities.

(7)(A) Notwithstanding any other provision of this Act, any contract market or derivatives transaction execution facility in a nonexempt security or stock index futures contract (or option thereon) shall file with the Board of Governors of the Federal Reserve System any rule establishing or changing the levels of margin (initial and maintenance) for the nonexempt security or stock index futures contract (or option on the contract).

(B) The Board may at any time request any contract market or derivatives transaction execution facility to set the level of margin for any nonexempt security or stock index futures contract (or option on the contract) at such levels as the Board in its judgment determines are appropriate to preserve the financial integrity of the contract market or derivatives transaction execution facility or its clearing system or to prevent systemic risk. If the contract market or derivatives transaction execution facility fails to do so within the time specified by the Board in its request, the Board may direct the contract market or derivatives transaction execution facility to alter or supplement the rules of the contract market or derivatives transaction execution facility as specified in the request.

(C) Subject to such conditions as the Board may determine, the Board may delegate any or all of its authority under this paragraph to the Commission or an intermarket margin board as provided in subparagraph (D).

(D) INTERMARKET MARGIN BOARD.—

(i) ESTABLISHMENT.—With the concurrence of the Securities and Exchange Commission and the Commission, the Board may establish an intermarket margin board, consisting of representatives of any or all of the three agencies.

(ii) DUTIES.—The intermarket margin board may set and maintain margin levels and rules pertaining to margin for futures on a single nonexempt security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, listed on a contract market or derivatives transaction execution facility. In discharging these duties, the intermarket margin board shall

endeavor to make the levels of margin for futures and options on a single nonexempt security consistent taking into account any material differences in such contracts, including—

- (I) the price volatility of the contracts;*
- (II) the frequency with which margin calls are made;*
- and*
- (III) the period of time within which margin calls must be met.*

(E) This paragraph shall not be construed to supersede or limit the authority granted to the Commission in section 8a(9) to direct a contract market or derivatives transaction execution facility, on finding an emergency to exist, to raise temporary emergency margin levels on any futures contract or option on the contract covered by this paragraph.

(F) Any action taken by the Board under this paragraph, or by the Commission acting under the delegation of authority under subparagraph (C), directing a contract market or derivatives transaction execution facility to alter or supplement a contract market or derivatives transaction execution facility rule shall be subject to review only in the United States Court of Appeals for the judicial circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. The review shall be based on the examination of all information before the Board or the Commission, as the case may be, at the time the determination was made. The court reviewing the action of the Board or the Commission shall not enter a stay or order of mandamus unless the court determines, after notice and a hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(8) This subsection shall not be construed to prohibit—

- (A) an agreement, contract, or transaction excluded from this Act by paragraph (2); or*
- (B) any hybrid instrument that is covered by the terms of any exemption granted by the Commission under section 4(c) (whether or not any such hybrid instrument is otherwise subject to this Act).*

(9)(A) No futures commission merchant, commodity trading advisor, or introducing broker shall recommend to any customer the purchase or sale of any contract of sale for future delivery of a single nonexempt security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates, unless the futures commission merchant, commodity trading advisor, or introducing broker complies with the rules described in subparagraph (B) of a registered futures association of which such merchant, advisor, or broker is a member.

(B) Within 9 months of the date of enactment of the Commodity Futures Modernization Act of 2000, a registered futures association shall adopt rules requiring a futures commission merchant, a commodity trading advisor, or an introducing broker which recommends to any customer the purchase or sale of any contract of sale for future delivery of a single nonexempt

security, an index of fewer than 5 nonexempt securities, or an index in which a single nonexempt security predominates to ascertain through reasonable due diligence that the recommendation is suitable for that customer in light of the customer's financial position and trading goals. The registered futures association shall consult with the Commission and the Securities and Exchange Commission prior to the adoption of any such rule, and shall submit any such rule to the Commission for approval in the manner and according to the procedures described in section 17(j) of this Act, provided, that in such case the rule shall become effective if the Commission fails to disapprove such rule within 90 days of submission.

(10)(A) Nothing in this Act shall be construed to require or authorize the Commission to review or approve, directly or indirectly, any contract, rule, regulation, or action adopted by a foreign board of trade, exchange, or market, or a clearinghouse for such a board of trade, exchange, or market, relating to any transaction involving a contract of sale for future delivery (or option on such a contract) in or involving any security, including any foreign government debt security, or group or index of such securities, if—

(i)(I) in the case of a contract of sale for future delivery (or option on such a contract) in or involving a single equity security, the United States is not the primary trading market for the underlying security; or

(II) in the case of a contract of sale for future delivery (or option on such a contract) in or involving a group or index of equity securities, less than 25 percent of the weighting of the group or index is derived from securities for which the United States is the primary trading market for the securities underlying the contract for future delivery (or option on the contract); and

(ii) settlement of or delivery on the contract for future delivery (or option on such a contract) is to be effected in cash or by means other than the transfer or receipt of a security in the United States other than an exempted security.

(B) Within 90 days after the date of the enactment of this paragraph, the Commission shall adopt such procedures as it deems appropriate pursuant to which, consistent with this Act, the Commission shall authorize the offer and sale in the United States of any contract of sale for future delivery (or option on such a contract) of a security, other than a security of the type described in subparagraph (A)(i)(I) or a group or index of securities of the type described in subparagraph (A)(i)(II), traded on or subject to the rules of a foreign board of trade, exchange, or market, or a clearinghouse for such a board of trade, exchange, or market, except that such procedures shall not require a foreign board of trade, exchange, or market, or a clearinghouse for such a board of trade, exchange, or market to apply for designation as a contract market under this Act with respect to such a contract for future delivery (or option on such a contract).

(h) LEGAL CERTAINTY FOR CERTAIN TRANSACTIONS IN EXEMPT COMMODITIES.—

(1) Except as provided in paragraph (2) of this subsection, nothing in this Act shall apply to a contract, agreement or transaction in an exempt commodity which—

(A) is entered into solely between persons that are eligible contract participants at the time they enter into the agreement, contract, or transaction; and

(B) is not entered into on a trading facility.

(2) An agreement, contract, or transaction described in paragraph (1) of this subsection shall be subject to—

(A) sections 5b and 12(e)(2)(B) of this Act;

(B) sections 4b and 4n of this Act and the regulations of the Commission pursuant to section 4c(b) of this Act proscribing fraud in connection with commodity option transactions, to the extent such agreement, contract, or transaction is not between eligible commercial participants and would otherwise be subject to those provisions; and

(C) sections 6(c) and 9(a)(2) of this Act to the extent they prohibit manipulation of the market price of any commodity in interstate commerce, to the extent such agreement, contract, or transaction would otherwise be subject to those provisions.

(3) Except as provided in paragraph (4) of this subsection, nothing in this Act shall apply to an agreement, contract, or transaction in an exempt commodity (other than a metal commodity enumerated in section 1a(3) of this Act) which—

(A) is entered into solely between persons that are eligible contract participants at the time at which the persons enter into the agreement, contract, or transaction; and

(B) is executed or traded on an electronic trading facility.

(4) An agreement, contract, or transaction described in paragraph (3) shall be subject to—

(A) sections 5b and 12(e)(2)(B) of this Act;

(B) sections 4b and 4n of this Act and the regulations of the Commission pursuant to section 4c(b) of this Act proscribing fraud in connection with commodity option transactions and section 6(c) and 9(a)(2) of this Act, to the extent these provisions prohibit manipulation of the market price of any commodity in interstate commerce, to the extent such agreement, contract, or transaction would otherwise be subject to those provisions; and

(C) such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions related to the commodity executed or traded on the electronic trading facility.

(i) EXCLUDED SWAP TRANSACTIONS.—

(1) IN GENERAL.—No provision of this Act (other than section 5b or 12(e)(2)(B)) shall apply to or govern any agreement, contract, or transaction in a commodity other than an agricultural commodity enumerated in section 1a(3) if—

(A) the agreement, contract, or transaction is entered into only between persons that are eligible contract participants

at the time they enter into the agreement, contract, or transaction; and

(B) the material economic terms of the agreement, contract, or transaction are subject to individual negotiation and are not specified by the rules terms or conditions of a trading facility.

(2) *EXCLUSION.—Paragraph (1) shall not apply to—*

(A) a contract for the sale of a commodity for future delivery traded on a contract market designated under section 5; or

(B) any agreement, contract, or transaction traded on a derivatives transaction execution facility registered under section 5a.

(j) *APPLICATION OF THE ACT.—No provision of this Act shall be construed as—*

(1) implying or creating any presumption that—

(A) any agreement, contract, or transaction that is eligible for an exclusion or exemption from regulation under this Act; or

(B) any agreement, contract, or transaction that is not eligible for an exclusion or exemption from regulation under this Act,

is or would otherwise be subject to this Act; or

(2) conferring jurisdiction on the Commission with respect to any such agreement, contract, or transaction, except as expressly provided in section 5b.

【SEC. 3. Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as “futures” are affected with a national public interest. Such futures transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce. The prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce. Such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price. The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein. Furthermore, transactions which are of the character of, or are commonly known to the trade as, “options” are or may be utilized by commercial and other entities for risk shifting and other purposes. Options transactions are in interstate commerce or affect such commerce and the national economy, rendering regulation of such transactions imperative for the protection of such commerce and the national public interest.】

SEC. 3. FINDINGS AND PURPOSE.

(a) *FINDINGS.*—*The futures contracts and options contracts that are subject to this Act are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, and disseminating pricing information through trading in liquid, fair and financially secure trading facilities.*

(b) *PURPOSE.*—*It is the purpose of this Act to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.*

SEC. 4. (a) Unless exempted by the Commission pursuant to subsection (c), it shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless—

(1) such transaction is conducted on or subject to the rules of a board of trade which has been **designated by the Commission as a “contract market” for** *designated or registered by the Commission as a contract market or derivatives transaction execution facility* for such commodity;

(2) such contract is executed or consummated by or through a **member of such** contract market; and

(3) such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided*, That each contract market or derivatives transaction execution facility member shall keep such record for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, which record shall at all times be open to the inspection of any representative of the Commission or the Department of Justice.

* * * * *

(c)(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade **designated as a contract market**) *designated or registered as a contract market or derivatives transaction execution facility* for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including

any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except section **2(a)(1)(B)** **2(g)**), if the Commission determines that the exemption would be consistent with the public interest.

(2) The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) unless the Commission determines that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market *or derivatives transaction execution facility* to discharge its regulatory or self-regulatory duties under this Act.

* * * * *

SEC. 4a. (a) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets *or derivatives transaction execution facilities* causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market *or derivatives transaction execution facility* as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (1) and (2) of subsection (b) of this section, or from exempting transactions normally known to the trade as “spreads” or “straddles” or “arbitrage” or from fixing limits applying to such transactions or positions different from limits fixed for other trans-

actions or positions. The word “arbitrage” in domestic markets shall be defined to mean the same as a “spread” or “straddle”. The Commission is authorized to define the term “international arbitrage”.

(b) The Commission shall, in such rule, regulation, or order, fix a reasonable time (not to exceed ten days) after the promulgation of the rule, regulation, or order; after which, and until such rule, regulation, or order is suspended, modified, or revoked, it shall be unlawful for any person—

(1) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets, or *derivatives transaction execution facility or facilities*, to which the rule, regulation, or order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such rule, regulation, or order for or with respect to such commodity; or

(2) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market or *derivatives transaction execution facility* in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided*, That such position limit shall not apply to a position acquired in good faith prior to the effective date of such rule, regulation, or order.

* * * * *

(e) Nothing in this section shall prohibit or impair the adoption by any [contract market or] *contract market, derivatives transaction execution facility*, or by any other board of trade [licensed or designated] *licensed, designated, or registered* by the Commission of any bylaw, rule, regulation, or resolution fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery traded on or subject to the rules of such [contract market, or] *contract market or derivatives transaction execution facility*, or under options on such contracts or commodities traded on or subject to the rules of such [contract market or] *contract market, derivatives transaction execution facility*, or such board of trade: *Provided*, That if the Commission shall have fixed limits under this section for any contract or under section 4c of this Act for any commodity option, then the limits fixed by the bylaws, rules, regulations, and resolutions adopted by such [contract market or] *contract market, derivatives transaction execution facility*, or such board of trade shall not be higher than the limits fixed by the Commission. It shall be a violation of this Act for any person to violate any bylaw, rule, regulation, or resolution of any [contract market or] *contract market, derivatives transaction execution facility*, or other board of trade [licensed or designated] *licensed, designated, or registered* by the Commission fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery or under options on such contracts or commodities, if such bylaw, rule, regulation, or resolution has been approved by the Commis-

sion: *Provided*, That the provisions of section 9(c) of this Act shall apply only to those who knowingly violate such limits.

SEC. 4b. (a) It shall be unlawful (1) for any member of a [contract market] *registered entity*, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any [contract market] *registered entity*, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity or the products or by products thereof, or (B) determining the price basis of any transaction in interstate commerce in such commodity, or (C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(i) * * *

* * * * *

[SEC. 4c. (a) It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

[(A) if such transaction is, is of the character of, or is commonly known to the trade as, a “wash sale”, “cross trade”, or “accommodation trade”, or is a fictitious sale; or

[(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.]

SEC. 4c. PROHIBITED TRANSACTIONS.

(a) *IN GENERAL.*—

(1) *PROHIBITION.*—*It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving any commodity if the transaction is used or may be used to—*

(A) *hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;*

(B) *determine the price basis of any such transaction in interstate commerce in the commodity; or*

(C) *deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.*

(2) *TRANSACTION.*—*A transaction referred to in paragraph (1) is a transaction that—*

(A)(i) is, is of the character of, or is commonly known to the trade as, a “wash sale” or “accommodation trade”; or
 (ii) is a fictitious sale; or
 (B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.

* * * * *

(g) The Commission shall adopt rules requiring that a contemporaneous written record be made, as practicable, of all orders for execution on the floor or subject to the rules of each contract market or *derivatives transaction execution facility* placed by a member of the contract market who is present on the floor at the time such order is placed.

SEC. 4d. It shall be unlawful for any person to engage as futures commission merchant or introducing broker in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market or *derivatives transaction execution facility* unless—

(1) such person shall have registered, under this Act, with the Commission as such futures commission merchant or introducing broker and such registration shall not have expired nor been suspended nor revoked; and

(2) such person shall, if a futures commission merchant, whether a member or nonmember of a contract market or *derivatives transaction execution facility*, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held: *Provided, however*, That such money, securities, and property of the customers of such futures commission merchant may, for convenience, be commingled and deposited in the same account or accounts with any bank or trust company or with the clearing house organization of such contract market or *derivatives transaction execution facility*, and that such share thereof as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle the contracts or trades of such customers, or resulting market positions, with the clearing-house organization of such contract market or *derivatives transaction execution facility* or with any member of such contract market or *derivatives transaction execution facility*, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with such contracts and trades: *Provided further*, That in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, such money, securities, and property of the customers of such futures commission merchant may be commingled and deposited as provided in this section with any other money, secu-

rities, and property received by such futures commission merchant and required by the Commission to be separately accounted for and treated and dealt with as belonging to the customers of such futures commission merchant: *Provided further*, That such money may be invested in obligations of the United States, in general obligations of any State or of any political subdivision thereof, and in obligations fully guaranteed as to principal and interest by the United States, such investments to be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

It shall be unlawful for any person, including but not limited to any clearing agency of a contract market *or derivatives transaction execution facility* and any depository, that has received any money, securities, or property for deposit in a separate account as provided in paragraph (2) of this section, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant.

SEC. 4e. It shall be unlawful for any person to act as floor trader in executing purchases and sales, or as floor broker in executing any orders for the purchase or sale, of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market *or derivatives transaction execution facility* unless such person shall have registered, under this Act, with the Commission as such floor trader or floor broker and such registration shall not have expired nor been suspended nor revoked.

SEC. 4f. (a) * * *

(b) Notwithstanding any other provisions of this Act, no person desiring to register as futures commission merchant or as introducing broker shall be so registered unless he meets such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligations as a registrant, and each person so registered shall at all times continue to meet such prescribed minimum financial requirements: *Provided*, That such minimum financial requirements will be considered met if the applicant for registration or registrant is a member of a contract market *or derivatives transaction execution facility* and conforms to minimum financial standards and related reporting requirements set by such contract market in its bylaws, rules, regulations, or resolutions and approved by the Commission as adequate to effectuate the purposes of this subsection.

(c)(1) As used in this subsection:

(i) * * *

* * * * *

(3)(A) * * *

(B) The Commission, in requiring reports pursuant to this paragraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission or to a contract market *or derivatives transaction execution facility* or other self-regulatory organization with

primary responsibility for examining the registered futures commission merchant's financial and operational condition.

* * * * *

SEC. 4g. (a) * * *

(b) Every **clearinghouse and contract market** *registered entity* shall maintain daily trading records. The daily trading records shall include such information as the Commission shall prescribe by rule.

* * * * *

(f) Nothing contained in this section shall be construed to prohibit the Commission from making separate determinations for different **clearinghouses, contract markets, and exchanges** *registered entities* when such determinations are warranted in the judgment of the Commission.

SEC. 4h. It shall be unlawful for any person falsely to represent such person to be a member of a **contract market** *registered entity* or the representative or agent of such member, or to be a registrant under this Act or the representative or agent of any registrant, in soliciting or handling any order or contract for the purchase or sale of any commodity in interstate commerce or for future delivery, or falsely to represent in connection with the handling of any such order or contract that the same is to be or has been executed on, or by or through a member of, any **contract market** *registered entity*.

SEC. 4i. It shall be unlawful for any person to make any contract for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market *or derivatives transaction execution facility*—

(1) * * *

* * * * *

SEC. 4j. (a)(1) The Commission shall issue regulations to prohibit the privilege of dual trading on each contract market which has not been exempted from such regulations under paragraph (3). The regulations issued by the Commission under this paragraph—

(A) shall provide that the prohibition of dual trading thereunder shall take effect not less than thirty days after the issuance of the regulations;

(B) shall provide for exceptions, as the Commission determines necessary and appropriate, to ensure fairness and orderly trading in affected contract markets, including—

(i) transition measures and a reasonable phase-in period,

(ii) exceptions for spread transactions and the correction of trading errors,

(iii) allowance for a customer to designate in writing not less than once annually a named floor broker to execute orders for such customer, notwithstanding the regulations to prohibit the privilege of dual trading required under this paragraph, and

(iv) other measures reasonably designed to accommodate unique or special characteristics of individual boards of trade or contract markets, to address emergency or un-

usual market conditions, or otherwise to further the public interest;

[(C) shall establish procedures for the application for and issuance of exemptions under paragraph (3) which, among other things, shall specify the relevant data required to be submitted by the board of trade with each application;

[(D) shall specify the methodology by which it shall determine the average daily trading volume on a contract market for purposes of paragraph (4) based on a moving daily average of either six or twelve months; and

[(E) shall establish an expeditious procedure to revoke an exemption granted under paragraph (3) providing sufficient notice, opportunity for hearing, and findings to assure fundamental fairness.

[(2) As used in this section, the term “dual trading” means the execution of customer orders by a floor broker during any trading session in which the floor broker executes any trade in the same contract market for—

[(A) the account of such floor broker;

[(B) an account for which such floor broker has trading discretion; or

[(C) an account controlled by a person with whom such floor broker is subject to trading restrictions under section 4j(d).

[(3) The Commission shall exempt a contract market from the regulations issued under paragraph (1), either unconditionally or on stated conditions (including stated periods of time) relevant to the attainment or maintenance of compliance with the standards in subparagraphs (A) and (B), upon finding that—

[(A) the trade monitoring system in place at the contract market satisfies the requirements of section 5a(b) with regard to violations attributable to dual trading at such contract market; or

[(B)(i) there is a substantial likelihood that a dual trading suspension would harm the public interest in hedging or price basing at such contract market, and

[(ii) other corrective actions, such as those described in section 8e, are sufficient and appropriate to bring the contract market into compliance with the standard in subparagraph (A).

[(4)(A) The regulations issued by the Commission under paragraph (1) shall not apply to any contract market in which the Commission determines that the average daily trading volume is less than the threshold trading level established for the contract market under this paragraph.

[(B) The threshold trading level shall be set initially at eight thousand contracts.

[(C) The Commission may, by rule or order—

[(i) increase, or

[(ii) at any time following the date three years after the date of enactment of this paragraph, decrease,

the threshold trading level for specific contract markets after taking into consideration the actual or potential effects of a dual trading ban on the public interest in hedging or price basing at the affected contract market.

[(D) The Commission shall provide the affected contract market with adequate notice of any such increase or decrease.

[(5) Before the Commission denies an application for an exemption under paragraph (3) or exempts a contract market subject to conditions, it shall—

[(A) provide the affected board of trade with notice of the reason or reasons that the application was not approved as submitted, including—

[(i) any reason the Commission has to believe that the trade monitoring system in place at the contract market does not satisfy the requirements of paragraph (3)(A) and the basis for such reason;

[(ii) any corrective action or actions, such as those described in section 8e, that the Commission believes the affected contract market must take to satisfy the requirements of paragraph (3)(A), and an acceptable timetable for such corrective action; and

[(iii) any conditions or limitations that the Commission proposes to attach to the exemption under paragraph (3);

[(B) provide the affected board of trade with an opportunity for a hearing through submission of written data, views, or arguments and, under terms set by the Commission at the request of the board of trade, through an oral presentation of views and comments to the Commission, in order to make the demonstration required under paragraph (3) or otherwise to petition the Commission with respect to its application; and

[(C) make findings, based on the information, views, and arguments placed before it in connection with the application, as to whether—

[(i) the standard in either paragraph (3)(A) or (3)(B) applies, and

[(ii) any conditions or limitations which the Commission proposes to attach under paragraph (3) are appropriate in light of the purposes of this subsection.

The Commission shall publish in the Federal Register notice of any exemptive petitions filed under paragraph (3) and any proposed or final actions the Commission may take on such petitions. Unless the Commission determines that more immediate action is appropriate in the public interest, any Commission order denying an application or exempting a contract market conditionally shall not take effect for at least twenty days following the issuance of the order.

[(6) Violation of an order issued under this subsection shall be considered a violation of an order of the Commission for purposes of—

[(i) establishing liability and assessing penalties against a contract market or any director, officer, agent, or employee thereof under section 6b or 6c; or

[(ii) initiating proceedings under section 5b or 6(a).

[(7) Any board of trade which has applied to the Commission to exempt a contract market from the regulations issued under paragraph (1) may obtain judicial review of any final action of the Commission to deny such application, to issue an exemption subject to conditions, or to revoke an exemption, only in the United States Court of Appeals for the circuit in which the party seeking review

resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, under the standards applicable to rulemaking proceedings under section 553 of title 5, United States Code.

[(8)(A) The Commission shall issue the regulations required under paragraph (1) not later than two hundred and seventy days after the enactment of this section. If, prior to the effective date of the prohibition on dual trading under such regulations, a board of trade submits to the Commission an application for an exemption for a contract market under paragraph (3), the Commission shall not apply the prohibition against dual trading under paragraph (1) to the contract market until the Commission has approved or denied the application.

[(B) The Commission shall approve or deny any application for an exemption under paragraph (3) within seventy-five days after receipt of the application, or as soon as practicable.

[(b) If, in addition to the regulations issued pursuant to subsection (a), the Commission has reason to believe that dual trading-related or facilitated abuses are not being or cannot be effectively addressed by subsection (a), the Commission shall make a determination, after notice and opportunity for hearing, whether or not a floor broker may trade for his own account or any account in which such broker has trading discretion, and also execute a customer's order for future delivery and, if the Commission determines that such trades and such executions shall be permitted, the Commission shall further determine the terms, conditions, and circumstances under which such trades and such executions shall be conducted: *Provided*, That any such determination shall, at a minimum, take into account the effect upon the liquidity of trading of each market: *And provided further*, That nothing herein shall be construed to prohibit the Commission from making separate determinations for different contract markets when such are warranted in the judgment of the Commission, or to prohibit contract markets from setting terms and conditions more restrictive than those set by the Commission.

[(c) The Commission shall within nine months after the effective date of the Commodity Futures Trading Commission Act of 1974, and subsequently when it determines that changes are required, make a determination, after notice and opportunity for hearing, whether or not a futures commission merchant may trade for its own account or any proprietary account, as defined by the Commission, and if the Commission determines that such trades shall be permitted, the Commission shall further determine the terms, conditions, and circumstances under which such trades shall be conducted: *Provided*, That any such determination, at a minimum, shall take into account the effect upon the liquidity of trading of each market: *And provided further*, That nothing herein shall be construed to prohibit the Commission from making separate determinations for different contract markets when such are warranted in the judgment of the Commission, or to prohibit contract markets from setting terms and conditions more restrictive than those set by the Commission.

[(d)(1) Except as provided in paragraph (2), a floor broker may not execute an order of a customer if such floor broker knows the opposite party to the transaction to be a floor broker or floor trader

with whom such trader or broker has a relationship involving trading on such contract market as—

- [(A) a partner in a partnership;
- [(B) an employer or employee; or
- [(C) Such other affiliation as the Commission may specify by rule.

[(2) Paragraph (1) shall not apply—

[(A) if the Commission has adopted rules that the Commission certifies to Congress require procedures and standards designed to prevent violations of this Act attributable to the trading described in paragraph (1); or

[(B) to any contract market that has implemented rules designed to prevent violations of this Act attributable to the trading described in paragraph (1), except that, if the Commission determines, by rule or order, that such rules are not adequate to prevent such violations, paragraph (1) shall become effective with respect to such contract market after a reasonable period determined by the Commission.]

SEC. [4k.] 4j. (1) It shall be unlawful for any person to be associated with a futures commission merchant as a partner, officer, or employee, or to be associated with an introducing broker as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such futures commission merchant or of such introducing broker and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a futures commission merchant or introducing broker to permit such a person to become or remain associated with the futures commission merchant or introducing broker in any such capacity if such futures commission merchant or introducing broker knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, or introducing broker (and such registration is not suspended or revoked) need not also register under this subsection.

(2) It shall be unlawful for any person to be associated with a commodity pool operator as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such commodity pool operator and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a commodity pool operator to permit such a person to become or remain associated with the commodity pool operator in any such capacity if the commodity pool operator knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspen-

sion has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, introducing broker, commodity pool operator, or as an associated person of another category of registrant under this section (and such registration is not suspended or revoked) need not also register under this subsection. The Commission may exempt any person or class of persons from having to register under this subsection by rule, regulation, or order.

(3) It shall be unlawful for any person to be associated with a commodity trading advisor as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of a client's or prospective client's discretionary account or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such commodity trading advisor and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a commodity trading advisor to permit such a person to become or remain associated with the commodity trading advisor in any such capacity if the commodity trading advisor knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, introducing broker, commodity trading advisor, or as an associated person of another category of registrant under this section (and such registration is not suspended or revoked) need not also register under this subsection. The Commission may exempt any person or class of persons from having to register under this subsection by rule, regulation, or order.

(4) Any person desiring to be registered as an associated person of a futures commission merchant, of an introducing broker, of a commodity pool operator, or of a commodity trading advisor shall make application to the Commission in the form and manner prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the applicant. Such person, when registered hereunder, shall likewise continue to report and furnish to the Commission such information as the Commission may require. Such registration shall expire at such time as the Commission may by rule, regulation, or order prescribe.

(5) It shall be unlawful for any registrant to permit a person to become or remain an associated person of such registrant, if the registrant knew or should have known of facts regarding such associated person that are set forth as statutory disqualifications in section 8a(2) of this Act, unless such registrant has notified the Commission of such facts and the Commission has determined that such person should be registered or temporarily licensed.

SEC. [41.] 4k. It is hereby found that the activities of commodity trading advisors and commodity pool operators are affected with a national public interest in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, solicitations, subscriptions, agreements, and other arrangements with clients take place and are negotiated and performed by

the use of the mails and other means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to and their operations are directed toward and cause the purchase and sale of commodities for future delivery on or subject to the rules of contract markets or *derivatives transaction execution facilities*; and

(3) the foregoing transactions occur in such volume as to affect substantially transactions on contract markets or *derivatives transaction execution facilities*.

SEC. [4m.] 4l. (1) It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this Act, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided*, That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor. The provisions of this section shall not apply to any commodity trading advisor who is a (1) dealer, processor, broker, or seller in cash market transactions of any commodity specifically set forth in section 2(a) of this Act prior to the enactment of the Commodity Futures Trading Commission Act of 1974 (or products thereof) or (2) nonprofit, voluntary membership, general farm organization, who provides advice on the sale or purchase of any commodity specifically set forth in section 2(a) of this Act prior to the enactment of the Commodity Futures Trading Commission Act of 1974; if the advice by the person described in clause (1) or (2) of this sentence as a commodity trading advisor is solely incidental to the conduct of that person's business: *Provided*, That such person shall be subject to proceedings under section 14 of this Act.

(2) Nothing in this Act shall relieve any person of any obligation or duty, or affect the availability of any right or remedy available to the Securities and Exchange Commission or any private party arising under the Securities Act of 1933 or the Securities Exchange Act of 1934 governing the issuance, offer, purchase, or sale of securities of a commodity pool, or of persons engaged in transactions with respect to such securities, or reporting by a commodity pool.

SEC. [4n.] 4m. (1) Any commodity trading advisor or commodity pool operator, or any person who contemplates becoming a commodity trading advisor or commodity pool operator, may register under this Act by filing an application with the Commission. Such application shall contain such information, in such form and detail, as the Commission may, by rules and regulations, prescribe as necessary or appropriate in the public interest, including the following:

(A) the name and form of organization, including capital structure, under which the applicant engages or intends to engage in business; the name of the State under the laws of which he is organized; the location of his principal business office and branch offices, if any; the names and addresses of all partners, officers, directors, and persons performing similar functions or, if the applicant be an individual, of such individual; and the number of employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of the applicant and of his partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of the applicant, including the manner of giving advice and rendering of analyses or reports;

(D) the nature and scope of the authority of the applicant with respect to clients' funds and accounts;

(E) the basis upon which the applicant is or will be compensated; and

(F) such other information as the Commission may require to determine whether the applicant is qualified for registration.

(2) Each registration under this section shall expire on the 30th day of June of each year, or at such other time, not less than one year from the effective date thereof, as the Commission may by rule, regulation or order prescribe, and shall be renewed upon application therefor subject to the same requirements as in the case of an original application.

(3)(A) Every commodity trading advisor and commodity pool operator registered under this Act shall maintain books and records and file such reports in such form and manner as may be prescribed by the Commission. All such books and records shall be kept for a period of at least three years, or longer if the Commission so directs, and shall be open to inspection by any representative of the Commission or the Department of Justice. Upon the request of the Commission, a registered commodity trading advisor or commodity pool operator shall furnish the name and address of each client, subscriber, or participant, and submit samples or copies of all reports, letters, circulars, memorandums, publications, writings, or other literature or advice distributed to clients, subscribers, or participants, or prospective clients, subscribers, or participants.

(B) Unless otherwise authorized by the Commission by rule or regulation, all commodity trading advisors and commodity pool operators shall make a full and complete disclosure to their subscribers, clients, or participants of all futures market positions taken or held by the individual principals of their organization.

(4) Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner as may be prescribed by the Commission and shall include complete information as to the current status of all trading accounts in which such participant has an interest.

SEC. [40.] 4n. (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

(2) It shall be unlawful for any commodity trading advisor, associated person of a commodity trading advisor, commodity pool oper-

ator, or associated person of a commodity pool operator registered under this Act to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that such person's abilities or qualifications have in any respect been passed upon, by the United States or any agency or officer thereof. This section shall not be construed to prohibit a statement that a person is registered under this Act as a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, if such statement is true in fact and if the effect of such registration is not misrepresented.

SEC. [4p.] 4o. (a) The Commission may specify by rules and regulations appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable to insure the fitness of persons required to be registered with the Commission. In connection therewith, the Commission may prescribe by rules and regulations the adoption of written proficiency examinations to be given to applicants for registration and the establishment of reasonable fees to be charged to such applicants to cover the administration of such examinations. The Commission may further prescribe by rules and regulations that, in lieu of examinations administered by the Commission, futures associations registered under section 17 of this [Act or contract markets] Act, *contract markets*, or *derivatives transaction execution facilities* may adopt written proficiency examinations to be given to applicants for registration and charge reasonable fees to such applicants to cover the administration of such examinations. Notwithstanding any other provision of this section, the Commission may specify by rules and regulations such terms and conditions as it deems appropriate to protect the public interest wherein exception to any written proficiency examination shall be made with respect to individuals who have demonstrated, through training and experience, the degree of proficiency and skill necessary to protect the interests of customers, clients, pool participants, or other members of the public with whom such individuals deal.

(b) The Commission shall issue regulations to require new registrants, within six months after receiving such registration, to attend a training session, and all other registrants to attend periodic training sessions, to ensure that registrants understand their responsibilities to the public under this Act, including responsibilities to observe just and equitable principles of trade, any rule or regulation of the Commission, any rule of any appropriate contract market, *derivatives transaction execution facility*, registered futures association, or other self-regulatory organization, or any other applicable Federal or state law, rule or regulation.

SEC. 4p. SPECIAL PROCEDURES TO ENCOURAGE AND FACILITATE BONA FIDE HEDGING BY AGRICULTURAL PRODUCERS.

(a) *AUTHORITY.*—*The Commission shall consider issuing rules or orders which—*

- (1) *prescribe procedures under which each contract market is to provide for orderly delivery, including temporary storage costs, of any agricultural commodity enumerated in section 1a(3) which is the subject of a contract for purchase or sale for future delivery;*

(2) increase the ease with which domestic agricultural producers may participate in contract markets, including by addressing cost and margin requirements, so as to better enable such producers to hedge price risk associated with their production;

(3) provide flexibility in the minimum quantities of such agricultural commodities that may be the subject of a contract for purchase or sale for future delivery that is traded on a contract market, to better allow domestic agricultural producers to hedge such price risk; and

(4) encourage exchanges to provide information and otherwise facilitate the participation of domestic agricultural producers in contract markets.

(b) *REPORT.*—Within 1 year after the date of enactment of this section, the Commission shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report on the steps it has taken to implement this section and on the activities of contract markets pursuant to this section.

SEC. 5. The Commission is hereby authorized and directed to designate any board of trade as a “contract market” when, and only when, such board of trade complies with and carries out the following conditions and requirements:

[(1) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodities for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade official inspection service approved by the Secretary of Agriculture or the Commission for the purpose: *Provided,* That any board of trade not so located shall be designated as a “contract market” if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Commission.

[(2) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Commission may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Commission, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Commission may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a

period of three years from the date thereof, or for a longer period if the Commission shall so direct, and shall at all times be open to the inspection of any representative of the Commission or United States Department of Justice.

[(3) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof, of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

[(4) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

[(5) When the governing board thereof does not exclude from membership in, and all privileges on, such board of trade, any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided*, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

[(6) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 6(c), and the orders issued pursuant to the provisions of section 5a of this Act, and for compliance in all other respects with the requirements applicable to such board of trade under this Act.

[(7) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.

[(8) When such board of trade demonstrates that every contract market for which such board of trade is designated complies with the requirements of section 5a(b).

[SEC. 5a. (a) Each contract market shall—

[(1) promptly furnish the Commission copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

[(2) keep all books, records, minutes, and journals of proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the Commission or United States Department of Justice of all such books, records, minutes, and journals of proceedings. Such books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct;

[(3) require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Commission may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the Commission or United States Department of Justice;

[(4) when so directed by order of the Commission, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the Commission finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, it shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as it finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

[(5) require the party making delivery of any commodity on any contract of sale of such commodity for future delivery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Commission finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, it shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to such commodities and markets as it finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

[(6) require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards shall have been officially promulgated and adopted by the Commission;

[(7) require that receipts issued under the United States Warehouse Act (U.S.C., 1934 ed., title 7, secs. 241-273) shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be im-

posed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes: *And provided further*, That this subsection shall apply only to futures contracts for those commodities which may be delivered from a warehouse subject to the United States Warehouse Act;

【(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, that (i) have been approved by the Commission pursuant to paragraph (12) of this section, (ii) have become effective under such paragraph, or (iii) must be enforced pursuant to any Commission rule, regulation, or order; and revoke and not enforce any bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, that has been disapproved by the Commission;

【(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Commission;

【(10) permit the delivery of any commodity, on contracts of sale thereof for future delivery, of such grade or grades, at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce. If the Commission after investigation finds that the rules and regulations adopted by a contract market permitting delivery of any commodity on contracts of sale thereof for future delivery, do not accomplish the objectives of this subsection, then the Commission shall notify the contract market of its finding and afford the contract market an opportunity to make appropriate changes in such rules and regulations. If the contract market within seventy-five days of such notification fails to make the changes which in the opinion of the Commission are necessary to accomplish the objectives of this subsection, then the Commission after granting the contract market an opportunity to be heard, may change or supplement such rules and regulations of the contract market to achieve the above objectives: *Provided*, That any order issued under this paragraph shall not apply to contracts of sale for future delivery in any months in which contracts are currently outstanding and open: *And provided further*, That no requirement for an additional delivery point or points shall be promulgated following hearings until the contract market affected has had notice and opportunity to file exceptions to the proposed order determining the location and number of such delivery point or points;

【(11) provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided*, That (A) the use of such procedure by a customer shall be voluntary, (B) the term

“customer” as used in this paragraph shall not include another member of the contract market, and (C) in the case of a claim arising from a violation in the execution of an order on the floor of a contract market, such procedure shall provide, to the extent appropriate—

【(i) for payment of actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker’s violation, such futures commission merchant may be required to satisfy such award; and

【(ii) where the violation is willful and intentional, for payment to the customer of punitive or exemplary damages, in addition to losses proximately caused by the violation, in an amount equal to no more than two times the amount of such losses. If punitive or exemplary damages are awarded against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of such order is held to be responsible under section 2(a)(1) for the floor broker’s violation, such futures commission merchant may be required to satisfy the award of punitive or exemplary damages if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker’s violation;

【(12)(A) except as otherwise provided in this paragraph, submit to the Commission for its prior approval all bylaws, rules, regulations, and resolutions (“rules”) made or issued by such contract market, or by the governing board thereof or any committee thereof, that relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market, as such terms and conditions are defined by the Commission by rule or regulation, except those rules relating to the setting of levels of margin. Each contract market shall submit to the Commission all other rules (except those relating to the setting of levels of margin and except those that the Commission may specify by regulation) and may make such rules effective ten days after receipt of such submission by the Commission unless, within the ten-day period, the contract market requests review and approval thereof by the Commission or the Commission notifies such contract market in writing of its determination to review such rules for approval. The determination to review such rules for approval shall not be delegable to any employee of the Commission. At least thirty days before approving any rules of major economic significance, as determined by the Commission, the Commission shall publish a notice of such rules in the Federal Register. The Commission shall give interested persons an opportunity to participate in the approval process through the submission of written data, views, or arguments. The determination by the Commission whether any such rules are of major economic significance

shall be final and not subject to judicial review. The Commission shall approve such rules if such rules are determined by the Commission not to be in violation of this Act or the regulations of the Commission and the Commission shall disapprove, after appropriate notice and opportunity for hearing, any such rule which the Commission determines at any time to be in violation of the provisions of this Act or the regulations of the Commission. If the Commission institutes proceedings to determine whether a rule should be disapproved pursuant to this paragraph, it shall provide the contract market with written notice of the proposed grounds for disapproval, including the specific sections of this Act or the Commission's regulations which would be violated. At the conclusion of such proceedings, the Commission shall approve or disapprove such rule. Any disapproval shall specify the sections of this Act or the Commission's regulations which the Commission determines such rule has violated or, if effective, would violate. If the Commission does not approve or institute disapproval proceedings with respect to any rule within one hundred and eighty days after receipt or within such longer period as the contract market may agree to, or if the Commission does not conclude a disapproval proceeding with respect to any rule within one year after receipt or within such longer period as the contract market may agree to, such rule may be made effective by the contract market until such time as the Commission disapproves such rule in accordance with this paragraph.

[(B)(i) The Commission shall issue regulations to specify the terms and conditions under which, in an emergency as defined by the Commission, a contract market may, by a two-thirds vote of its governing board, make a rule (hereinafter referred to as an "emergency rule") effective on a temporary basis without prior Commission approval, or without compliance with the ten-day notice requirement under subparagraph (A), or during any period of review by the Commission, if the contract market makes every effort practicable to notify the Commission of such emergency rule, along with a complete explanation of the emergency involved, prior to making the emergency rule effective. If the contract market does not provide the Commission with such notification and explanation before making the emergency rule effective, the contract market shall provide the Commission with such notification and explanation at the earliest possible date. The Commission may delegate the power to receive such notification and explanation to such individuals as the Commission determines necessary and appropriate.

[(ii) Within ten days of the receipt from a contract market of notification of such an emergency rule and an explanation of the emergency involved, or as soon as practicable, the Commission shall determine whether it is appropriate either—

[(I) to permit such rule to remain in effect during the pendency of the emergency, or

[(II) to suspend the effect of such rule pending review either under the procedures of subparagraph (A) or otherwise.

The Commission shall submit a report on its determination and the basis thereof with respect to such emergency rule to

the affected contract market, to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate. If the report is submitted more than ten days after the Commission's receipt of notification of such an emergency rule from a contract market, the report shall explain why submission within such ten-day period was not practicable. A determination by the Commission to suspend the effect of a rule under this subparagraph shall be subject to judicial review on the same basis as an emergency determination under section 8a(9). Nothing in this paragraph shall be construed to limit the authority of the Commission under section 8a(9);

[(13) provide for disclosure to the contract market and the Commission of any trade, business, or financial partnership, cost-, profit-, or capital-sharing agreements or other formal arrangement among or between floor brokers and traders on such contract market where such partnership agreement or arrangement is material and known to the floor broker or floor trader;

[(14)(A) provide for meaningful representation on the governing board of the contract market's board of trade of a diversity of interests, including—

[(i) futures commission merchants;

[(ii) producers of, and consumers, processors, distributors, or merchandisers of, principal commodities traded on the board of trade;

[(iii) floor brokers and traders; and

[(iv) participants in a variety of pits or principal groups of commodities traded on the exchange.

[(B) provide that no less than 20 percent of the regular voting members of such board be comprised of nonmembers of such contract market's board of trade with—

[(i) expertise in futures trading, or the regulation thereof, or in commodities traded through contracts on the board of trade; or

[(ii) other eminent qualifications making such person capable of participating in and contributing to board deliberations.

[(C) provide that no less than 10 percent of the regular voting members of such board be comprised where applicable of farmers, producers, merchants, or exporters of principal commodities traded on the exchange;

[(15)(A) provide on all major disciplinary committees for a diversity of membership sufficient to ensure fairness and to prevent special treatment or preference for any person in the conduct of disciplinary proceedings and the assessment of penalties.

[(B) Consistent with Commission rules, a major disciplinary committee hearing a disciplinary matter shall include—

[(i) a majority of qualified persons representing a trading status other than that of the subject of the proceeding; and

[(ii) where appropriate to carry out the purposes of this Act, qualified persons who are not members of the exchange.

[(C) For purposes of this paragraph, a trading status on a contract market may include, consistent with Commission rules, such categories as—

[(i) floor brokers and traders;

[(ii) producers, consumers, processors, distributors, or merchandisers of commodities;

[(iii) futures commission merchants; and

[(iv) members of the aforementioned categories who participate in particular contract markets or principal groups of commodities on the board of trade.

[(D) If a contract market takes final disciplinary action against a member for a violation that involves the execution of a customer transaction and results in financial harm to such customer, the contract market shall promptly inform the futures commission merchant identified on the records of such contract market as having cleared such transaction, and such futures commission merchant shall promptly inform the person identified on its records as the owner of the account for which such transaction was executed, of the disciplinary action and the principal facts thereof;

[(16) provide that no member found by the Commission, a contract market, a registered futures association, or a court of competent jurisdiction to have committed any violation of this Act or any other provision of law that would reflect on the fitness of the member may serve on any contract market oversight or disciplinary panel for an appropriate period (as defined by Commission rule); and

[(17)(A) provide for the avoidance of conflict of interest in deliberations by the governing board and any disciplinary and oversight committees. In order to comply with this subparagraph, each contract market shall adopt rules and procedures to require, at a minimum, that

[(i) any member of a governing board or a disciplinary or other oversight committee must abstain from confidential deliberations and voting on any matter where the named party in interest is the member, the member's employer, the member's employee, or any other person that has a business, employment, or family relationship with the member that warrants abstention by the member;

[(ii) any member of a governing board or a disciplinary or other oversight committee must abstain from voting on any significant action that would not be submitted to the Commission for its prior approval, if, as determined in accordance with regulations promulgated by the Commission, the member knowingly has a direct and substantial financial interest in the result of the vote, based either on positions held personally or at an affiliated firm;

[(iii) prior to the deliberations of the governing board, disciplinary board, or other oversight committee, acting directly or indirectly through an authorized member or contract market official, the positions of the members of such board or committee, and positions of the firm or firms with which such members are affiliated, are reviewed: *Provided, however,* That no contract market or official, employee, member, other than the member whose position or posi-

tions are being reviewed, or agent thereof shall be subject to liability, except for liability in an action initiated by the Commission, for having conducted this review and for having taken or not taken further action; and

[(iv) the board or committee shall clearly reflect, in the minutes of such meeting, that the review required in clause (iii) occurred and any decisions by a member to abstain or by the board or committee whether to direct a member or members to abstain from deliberations or voting on the matter before the board or committee.

Any member prohibited from voting on a rule pursuant to this paragraph shall not be included in determining whether there has been a two-thirds vote of members of the governing board or committee as required by subparagraph (12).

[(B) For the purposes of this paragraph, the term “significant action that would not be submitted to the Commission for its prior approval” includes—

[(i) any nonphysical emergency rule; or

[(ii) any changes in margin levels designed to respond to extraordinary market conditions that are likely to have a substantial affect on prices in any contract traded on such contract market, but does not include any rule not submitted for prior Commission approval because such rule is unrelated to terms and conditions of any contract traded on such contract market.

[(C) Notwithstanding the provisions of subparagraph (A)(ii), the Commission shall issue rules establishing the conditions under which a member of a board or committee who is required to abstain from voting on a significant action, as provided in subparagraph (A)(ii), may participate in deliberations on that action prior to such vote, where the member’s participation is consistent with the public interest.

[(b)(1) Each contract market shall maintain and utilize a system to monitor trading to detect and deter violations of the contract market’s rules and regulations committed in the making of trades and the execution of customer orders on the floor or subject to the rules of such contract market. The system shall include—

[(A) physical observation of trading areas;

[(B) audit trail and recordkeeping systems able to capture essential data on the terms, participants, and sequence of transactions (including relevant data on unmatched trades and out-trades);

[(C) systems capable of reviewing, and used to review, data on trades effectively on a regular basis to detect violations committed in making trades and executing customer orders on the floor or subject to the rules of such contract market, including—

[(i) all types of violations attributable to dual trading; and

[(ii) to the full extent feasible, as determined by the Commission, all other types of violations involving the making of trades and the execution of customer orders;

[(D) the use of information gathered through such system on a consistent basis to bring appropriate disciplinary actions against violators;

[(E) the commitment of resources to such system necessary for such system to be effective in detecting and deterring such violations, including adequate staff to develop and prosecute disciplinary actions; and

[(F) the assessment of meaningful penalties against violators and the referral of appropriate cases to the Commission.

[(2) The audit trail system of the contract market shall, consistent with Commission regulations, accurately record—

[(A) the times of trades in increments of no more than one minute in length; and

[(B) the sequence of trades for each floor trader and broker.

[(3) Beginning three years after the date of enactment of this subsection, the audit trail system of each contract market, except as provided in paragraph (5) and except to the extent the Commission determines that circumstances beyond the control of the contract market prevent compliance despite the contract market's affirmative good faith efforts to comply, shall—

[(A) for all trades, record accurately and promptly the essential data on terms, participants, and times as required by the Commission by rule, including the time of execution of such trade, through a means that—

[(i) records such data in a form which cannot be altered except in a manner that will leave a complete and independent record of such alteration;

[(iii) identifies such time, to the extent practicable as determined by the Commission—

[(ii) continually provides such data to the contract market;

[(I) independently of the person making the trade;

[(II) through a mechanism that records the time automatically when entered by the person making the trade; or

[(III) through such other means that will capture a similarly reliable time; and

[(iv) is adequately precise to determine, to the extent practicable as determined by the Commission by rule or order—

[(I) the sequence of all trades by each floor trader; and

[(II) the sequence of all trades by each floor broker; and

[(B) to the extent practicable as determined by the Commission by rule or order, for customer trades, record the time that each order is received on the floor of the board of trade, is received by the floor broker for execution (or when such order is transmitted in an extremely rapid manner to the broker), and is reported from the floor of the board of trade as executed, through a means that—

[(i) records such times in a form which cannot be altered except in a manner that will leave a complete and independent record of such alteration;

[(ii) continually provides such data to the contract market;

[(iii) identifies such time—

[(I) independently of the person making the trade or processing the order;

[(II) through a mechanism that records the time automatically when entered by the person making the trade or processing such order, as appropriate; or

[(III) through such other means as will capture a similarly reliable time; and

[(iv) is adequately precise to determine—

[(I) the sequence in which, for each futures commission merchant, floor broker, or member firm, as applicable, all orders are received on and reported from the floor of the contract market; and

[(II) the sequence in which orders are received by each floor broker for execution.

[(4) The Commission may, by rule, establish standards under which the audit trail systems required under paragraph (3) shall record, to the extent practicable—

[(A) the sequence of all trades made by all floor traders and floor brokers; and

[(B) the interval between the time of receipt and the time of execution of each order by the floor broker executing the order.

[(5)(A) The Commission shall, by rule or order, make exemptions from the requirements of paragraph (3)—

[(i) for an exchange with respect to which the Commission finds that—

[(I) the volume of trading on such exchange is relatively small and the exchange has demonstrated substantial compliance with the objectives of such paragraph; and

[(II) the trade monitoring system at such exchange otherwise maintains a high level of compliance with this subsection; and

[(ii) to the extent determined appropriate by the Commission, for categories of customer orders with respect to which the Commission finds that such orders are transmitted to and reported from the trading pit in an extremely rapid manner such that substantial compliance with the objectives of paragraph (3) can be otherwise achieved.

[(B) For purposes of subparagraph (A)(i)(I) the Commission shall find that the volume of trading at an exchange is relatively small if, among other things, the Commission determines that the average daily trading volume for each contract market for which the board of trade is designated is less than the threshold trading level established for the contract market under section 4j(a)(4).

[(6) Any rule or order adopted by the Commission under paragraphs (4) and (5) shall become effective thirty legislative days or ninety calendar days, whichever is later, after submission of such rule or order to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate. For purposes of this paragraph, the term “legislative day” means any day on which either House of Congress is in session.

[SEC. 5b. The failure or refusal of any board of trade to comply with any of the provisions of this Act, or any of the rules, regulations, or orders of the Commission or the commission thereunder,

shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a “contract market” in accordance with the procedure and subject to the judicial review provided in section 6(b) of this Act.】

SEC. 5. DESIGNATION OF BOARDS OF TRADE AS CONTRACT MARKETS.

(a) *APPLICATIONS.*—A board of trade applying to the Commission for designation as a contract market shall submit an application to the Commission that includes any relevant materials and records the Commission may require consistent with this Act.

(b) *CRITERIA FOR DESIGNATION.*—

(1) *IN GENERAL.*—To be designated as a contract market, the board of trade shall demonstrate to the Commission that the board of trade meets the criteria specified in this subsection.

(2) *PREVENTION OF MARKET MANIPULATION.*—The board of trade shall have the capacity to prevent market manipulation through market surveillance, compliance, and enforcement practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(3) *FAIR AND EQUITABLE TRADING.*—The board of trade shall establish and enforce trading rules to ensure fair and equitable trading through the facilities of the contract market, and the capacity to detect, investigate, and discipline any person that violates the rules. Such rules may authorize—

(A) an exchange of—

(i) futures in connection with a cash commodity transaction;

(ii) futures for cash commodities;

(iii) transfer trades or office trades; or

(iv) futures for swaps; and

(B) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

(4) *TRADE EXECUTION FACILITY.*—The board of trade shall—

(A) establish and enforce rules defining, or specifications detailing, the manner of operation of the trade execution facility maintained by the board of trade, including rules or specifications describing the operation of any electronic matching platform; and

(B) demonstrate that the trading facility operates in accordance with the rules or specifications.

(5) *FINANCIAL INTEGRITY OF TRANSACTIONS.*—The board of trade shall establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into by or through the facilities of the contract market.

(6) *DISCIPLINARY PROCEDURES.*—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

(7) *PUBLIC ACCESS.*—The board of trade shall provide the public with access to the rules, regulations, and contract specifications of the board of trade.

(8) *ABILITY TO OBTAIN INFORMATION.*—The board of trade shall establish and enforce rules that will allow the board of trade to obtain any necessary information to perform any of the functions described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

(c) *EXISTING CONTRACT MARKETS.*—A board of trade that is designated as a contract market on the effective date of the Commodity Futures Modernization Act of 2000 shall be considered to be a designated contract market under this section.

(d) *CORE PRINCIPLES FOR CONTRACT MARKETS.*—

(1) *IN GENERAL.*—To maintain the designation of a board of trade as a contract market, a board of trade shall comply with the core principles specified in this subsection.

(2) *COMPLIANCE WITH RULES.*—The board of trade shall monitor and enforce compliance with the rules of the contract market, including the terms and conditions of any contracts to be traded and any limitations on access to the contract market.

(3) *CONTRACTS NOT READILY SUBJECT TO MANIPULATION.*—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

(4) *MONITORING OF TRADING.*—The board of trade shall monitor trading to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process.

(5) *POSITION LIMITATIONS OR ACCOUNTABILITY.*—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, the board of trade shall adopt position limitations or position accountability for speculators, where necessary and appropriate.

(6) *EMERGENCY AUTHORITY.*—The board of trade shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to—

(A) liquidate or transfer open positions in any contract;

(B) suspend or curtail trading in any contract; and

(C) require market participants in any contract to meet special margin requirements.

(7) *AVAILABILITY OF GENERAL INFORMATION.*—The board of trade shall make available to market authorities, market participants, and the public information concerning—

(A) the terms and conditions of the contracts of the contract market; and

(B) the mechanisms for executing transactions on or through the facilities of the contract market.

(8) *DAILY PUBLICATION OF TRADING INFORMATION.*—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

(9) *EXECUTION OF TRANSACTIONS.*—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions.

(10) *TRADE INFORMATION.*—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information for purposes of assisting in the prevention of customer and market abuses and providing evidence of any violations of the rules of the contract market.

(11) *FINANCIAL INTEGRITY OF CONTRACTS.*—The board of trade shall establish and enforce rules providing for the financial integrity of any contracts traded on the contract market, including rules to ensure the financial integrity of any futures commission merchants and introducing brokers and the protection of customer funds.

(12) *PROTECTION OF MARKET PARTICIPANTS.*—The board of trade shall establish and enforce rules to protect market participants from abusive practices committed by any party acting as an agent for the participants.

(13) *DISPUTE RESOLUTION.*—The board of trade shall establish and enforce rules regarding and provide facilities for alternative dispute resolution as appropriate for market participants and any market intermediaries.

(14) *GOVERNANCE FITNESS STANDARDS.*—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this paragraph).

(15) *CONFLICTS OF INTEREST.*—The board of trade shall establish and enforce rules to minimize conflicts of interest in the decisionmaking process of the contract market and establish a process for resolving such conflicts of interest.

(16) *COMPOSITION OF BOARDS OF MUTUALLY OWNED CONTRACT MARKETS.*—In the case of a mutually owned contract market, the board of trade shall ensure that the composition of the governing board reflects market participants.

(17) *RECORDKEEPING.*—The board of trade shall—

(A) maintain full records of all activities related to the business of the contract market in a form and manner acceptable to the Commission for a period of at least 5 years;

(B) make the records readily available during at least the first 2 years of the 5-year period and provide the records to the Commission at the expense of the person required to maintain the records; and

(C) keep the records open to inspection by any representative of the Commission or the Department of Justice.

(18) *ANTITRUST CONSIDERATIONS.*—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall endeavor to avoid—

(A) adopting any rules or taking any actions that result in any unreasonable restraints of trade; or

(B) imposing any material anticompetitive burden on trading on the contract market.

(e) *CURRENT AGRICULTURAL AND METAL COMMODITIES.*—

(1) Subject to paragraph (2), a contract for purchase or sale for future delivery of an agricultural or metal commodity enu-

merated in section 1a(3) that is available for trade on a contract market, as of the date of the enactment of this subsection, may be traded only on a contract market designated under this section.

(2) In order to promote responsible economic or financial innovation and fair competition, the Commission, on application by any person, after notice and public comment and opportunity for hearing, may prescribe rules and regulations to provide for the offer and sale of contracts for future delivery or options thereon to be conducted on a derivatives transaction execution facility.

SEC. 5a. DERIVATIVES TRANSACTION EXECUTION FACILITIES.

(a) *IN GENERAL.*—In lieu of compliance with the contract market designation requirements of section 5, a board of trade may elect to operate as a registered derivatives transaction execution facility if the facility is—

- (1) designated as a contract market and meets the requirements of this section; or
- (2) registered as a derivatives transaction execution facility under subsection (c).

(b) *REQUIREMENTS FOR TRADING FUTURES CONTRACTS OR OTHER DERIVATIVES TRANSACTIONS.*—

(1) *IN GENERAL.*—A registered derivatives transaction execution facility under subsection (a) may trade any futures contract (or option on such a contract) on or through the facility only by satisfying the requirements of this section.

(2) *REQUIREMENTS FOR UNDERLYING COMMODITIES.*—A registered derivatives transaction execution facility may trade any futures contract only if—

- (A) the underlying commodity has a nearly inexhaustible deliverable supply;
- (B) the underlying commodity has a deliverable supply that is sufficiently large that the contract is highly unlikely to be susceptible to the threat of manipulation;
- (C) the underlying commodity has no cash market; or
- (D) the Commission determines, based on the market characteristics, surveillance history, self-regulatory record, and capacity of the facility that trading in the futures contract is highly unlikely to be susceptible to the threat of manipulation.

(3) *ELIGIBLE TRADERS.*—To trade on a registered derivatives transaction execution facility, a person shall—

- (A) be authorized by the board of trade to trade on the facility; and
- (B) (i) be an eligible contract participant; or
(ii) be a person trading through a futures commission merchant that—
 - (I) is registered with the Commission;
 - (II) is a member of a futures self-regulatory organization;
 - (III) is a clearing member of a derivatives clearing organization; and
 - (IV) has net capital of at least \$20,000,000.

(4) *TRADING BY CONTRACT MARKETS.*—A board of trade that is designated as a contract market shall, to the extent that the

contract market also operates a registered derivatives transaction execution facility—

(A) provide a physical location for the contract market trading of the board of trade that is separate from trading on the derivatives transaction execution facility of the board of trade; or

(B) if the board of trade uses the same electronic trading system for trading on the contract market and derivatives transaction execution facility of the board of trade, identify whether the electronic trading is taking place on the contract market or the derivatives transaction execution facility.

(c) **CRITERIA FOR REGISTRATION.**—

(1) **IN GENERAL.**—To be registered as a registered derivatives transaction execution facility, the board of trade shall demonstrate to the Commission that the board of trade meets the criteria specified in this paragraph.

(2) **DETERRENCE OF ABUSES.**—The board of trade shall establish and enforce trading rules that will deter abuses and has the capacity to detect, investigate, and enforce those rules, including means to—

(A) obtain information necessary to perform the functions required under this section; or

(B) use technological means to—

(i) provide market participants with impartial access to the market; and

(ii) capture information that may be used in establishing whether rule violations have occurred.

(3) **TRADING PROCEDURES.**—The board of trade shall establish and enforce rules or terms and conditions defining, or specifications detailing, trading procedures to be used in entering and executing orders traded on the facilities of the board of trade. Such rules may authorize—

(A) an exchange of—

(i) futures in connection with a cash commodity transaction;

(ii) futures for cash commodities;

(iii) transfer trades or office trades; or

(iv) futures for swaps; and

(B) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the registered derivatives transaction execution facility or a derivatives clearing organization.

(4) **FINANCIAL INTEGRITY OF TRANSACTIONS.**—The board of trade shall establish and enforce rules or terms and conditions providing for the financial integrity of transactions entered on or through the facilities of the board of trade, including rules or terms and conditions to ensure the financial integrity of any futures commission merchants and introducing brokers and the protection of customer funds.

(d) **CORE PRINCIPLES FOR REGISTERED DERIVATIVES TRANSACTION EXECUTION FACILITIES.**—

(1) *IN GENERAL.*—To maintain the registration of a board of trade as a derivatives transaction execution facility, a board of trade shall comply with the core principles specified in this subsection.

(2) *COMPLIANCE WITH RULES.*—The board of trade shall monitor and enforce the rules of the facility, including any terms and conditions of any contracts traded on or through the facility and any limitations on access to the facility.

(3) *MONITORING OF TRADING.*—The board of trade shall monitor trading in the contracts of the facility to ensure orderly trading in the contract and to maintain an orderly market while providing any necessary trading information to the Commission to allow the Commission to discharge the responsibilities of the Commission under the Act.

(4) *DISCLOSURE OF GENERAL INFORMATION.*—The board of trade shall disclose publicly and to the Commission information concerning—

- (A) contract terms and conditions;
- (B) trading conventions, mechanisms, and practices;
- (C) financial integrity protections; and
- (D) other information relevant to participation in trading on the facility.

(5) *DAILY PUBLICATION OF TRADING INFORMATION.*—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the facility.

(6) *FITNESS STANDARDS.*—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members, and any other persons with direct access to the facility, including any parties affiliated with any of the persons described in this paragraph.

(7) *CONFLICTS OF INTEREST.*—The board of trade shall establish and enforce rules to minimize conflicts of interest in the decisionmaking process of the derivatives transaction execution facility and establish a process for resolving such conflicts of interest.

(8) *RECORDKEEPING.*—The board of trade shall—

- (A) maintain full records of all activities related to the business of the derivatives transaction execution facility in a form and manner acceptable to the Commission for a period of at least 5 years;
- (B) make the records readily available during at least the first 2 years of the 5-year period and provide the records to the Commission at the expense of the person required to maintain the records; and
- (C) keep the records open to inspection by any representatives of the Commission or the Department of Justice.

(9) *ANTITRUST CONSIDERATIONS.*—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall endeavor to avoid—

- (A) adopting any rules or taking any actions that result in any unreasonable restraint of trade; or
- (B) imposing any material anticompetitive burden on trading on the derivatives transaction execution facility.

(e) USE OF BROKER-DEALERS, DEPOSITORY INSTITUTIONS, AND FARM CREDIT SYSTEM INSTITUTIONS AS INTERMEDIARIES.—

(1) IN GENERAL.—A registered derivatives transaction execution facility may by rule allow a broker-dealer, depository institution, or institution of the Farm Credit System that meets the requirements of paragraph (2) to—

(A) act as an intermediary in transactions executed on the facility on behalf of customers of the broker-dealer, depository institution, or institution of the Farm Credit System; and

(B) receive funds of customers to serve as margin or security for such transactions.

(2) REQUIREMENTS.—The requirements referred to in paragraph (1) are that—

(A) the broker-dealer be in good standing with the Securities and Exchange Commission, or the depository institution or institution of the Farm Credit System be in good standing with Federal bank regulatory agencies (including the Farm Credit Administration), as applicable; and

(B) if the broker-dealer, depository institution, or institution of the Farm Credit System carries or holds customer accounts or funds for transactions on the derivatives transaction execution facility for more than 1 business day, the broker-dealer, depository institution, or institution of the Farm Credit System is registered as a futures commission merchant and is a member of a registered futures association.

(3) IMPLEMENTATION.—The Commission shall cooperate and coordinate with the Securities and Exchange Commission, the Secretary of the Treasury, and Federal banking regulatory agencies (including the Farm Credit Administration) in adopting rules and taking any other appropriate action to facilitate the implementation of this subsection.

(f) SEGREGATION OF CUSTOMER FUNDS.—Not later than 180 days after the effective date of the Commodity Futures Modernization Act of 2000, consistent with regulations adopted by the Commission, a registered derivatives transaction execution facility may authorize a futures commission merchant to offer any customer of the futures commission merchant that is an eligible contract participant the right to not segregate the customer funds of the futures commission merchant for purposes of trading on or through the facilities of the registered derivatives transaction execution facility.

(g) ELECTION TO TRADE EXCLUDED COMMODITIES.—

(1) IN GENERAL.—A board of trade that is a registered derivatives transaction execution facility may trade on the facility any agreements, contracts, or transactions involving excluded commodities that are otherwise excluded from this Act under section 2(c), 2(d), or 2(h).

(2) EXCLUSIVE JURISDICTION OF THE COMMISSION.—The Commission shall have exclusive jurisdiction over agreements, contracts, or transactions described in paragraph (1) to the extent that the agreements, contracts, or transactions are traded on a derivatives transaction execution facility.

SEC. 5b. DERIVATIVES CLEARING ORGANIZATIONS.

(a) *REGISTRATION REQUIREMENT.*—Except as provided in subsection (b), it shall be unlawful for a derivatives clearing organization, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a derivatives clearing organization described in section 1a(8) with respect to a contract of sale of a commodity for future delivery, option on a contract of sale of a commodity for future delivery, or option on a commodity that is not an exclusion-eligible commodity (unless the contract or option is described in subsection (c), (d), (f), (h), or (i) of section 2 or exempted under section 4(c)).

(b) *VOLUNTARY REGISTRATION.*—A derivatives clearing organization that clears agreements, contracts, or transactions described in subsection (c), (d), (f), (h), or (i) of section 2 or exempted under section 4(c) may register with the Commission as a derivatives clearing organization.

(c) REGISTRATION OF DERIVATIVES CLEARING ORGANIZATIONS.—

(1) *APPLICATION.*—A person desiring to register as a derivatives clearing organization shall submit to the Commission an application in such form and containing such information as the Commission may require for the purpose of making the determinations required for approval under paragraph (2).

(2) CORE PRINCIPLES.—

(A) *IN GENERAL.*—To be registered and to maintain registration as a derivatives clearing organization, an applicant shall demonstrate to the Commission that the applicant complies with the core principles specified in this paragraph.

(B) *FINANCIAL RESOURCES.*—The applicant shall demonstrate that the applicant has adequate financial, operational, and managerial resources to discharge the responsibilities of a derivatives clearing organization without interruption in various market conditions.

(C) *PARTICIPANT AND PRODUCT ELIGIBILITY.*—The applicant shall establish—

(i) appropriate admission and continuing eligibility standards (including appropriate minimum financial requirements) for members of and participants in the organization; and

(ii) appropriate standards for determining eligibility of agreements, contracts, or transactions submitted to the applicant.

(D) *RISK MANAGEMENT.*—The applicant shall have the ability to manage the risks associated with discharging the responsibilities of a derivatives clearing organization through the use of appropriate tools and procedures.

(E) *SETTLEMENT PROCEDURES.*—The applicant shall have the ability to—

(i) complete settlements on a timely basis under varying circumstances;

(ii) maintain an adequate record of the flow of funds associated with each transaction that the applicant clears; and

(iii) comply with the terms and conditions of any permitted netting or offset arrangements with other clearing organizations.

(F) *TREATMENT OF FUNDS.*—The applicant shall have standards and procedures designed to protect and ensure the safety of member and participant funds.

(G) *DEFAULT RULES AND PROCEDURES.*—The applicant shall have rules and procedures designed to allow for efficient, fair, and safe management of events when members or participants become insolvent or otherwise default on their obligations to the derivatives clearing organization.

(H) *RULE ENFORCEMENT.*—The applicant shall—

(i) maintain adequate arrangements and resources for the effective monitoring and enforcement of compliance with rules of the applicant and for resolution of disputes; and

(ii) have the authority and ability to discipline, limit, suspend, or terminate a member's or participant's activities for violations of rules of the applicant.

(I) *SYSTEM SAFEGUARDS.*—The applicant shall demonstrate that the applicant—

(i) has established and will maintain a program of oversight and risk analysis to ensure that the automated systems of the applicant function properly and have adequate capacity and security; and

(ii) has established and will maintain emergency procedures and a plan for disaster recovery, and will periodically test backup facilities sufficient to ensure daily processing, clearing, and settlement of transactions.

(J) *REPORTING.*—The applicant shall provide to the Commission all information necessary for the Commission to conduct the oversight function of the applicant with respect to the activities of the derivatives clearing organization.

(K) *RECORDKEEPING.*—The applicant shall—

(i) maintain full records of all activities related to the business of the applicant as a derivatives clearing organization in a form and manner acceptable to the Commission for a period of at least 5 years;

(ii) make the records readily available during at least the first 2 years of the 5-year period and provide the records to the Commission at the expense of the person required to maintain the records; and

(iii) keep the records open to inspection by any representative of the Commission or the Department of Justice.

(L) *PUBLIC INFORMATION.*—The applicant shall make information concerning the rules and operating procedures governing the clearing and settlement systems (including default procedures) available to market participants.

(M) *INFORMATION SHARING.*—The applicant shall—

(i) enter into and abide by the terms of all appropriate and applicable domestic and international information-sharing agreements; and

(ii) use relevant information obtained from the agreements in carrying out the clearing organization's risk management program.

(N) **ANTITRUST CONSIDERATIONS.**—Unless appropriate to achieve the purposes of this Act, the derivatives clearing organization shall avoid—

(i) adopting any rule or taking any action that results in any unreasonable restraint of trade; or

(ii) imposing any material anticompetitive burden on trading on the contract market.

(3) **ORDERS CONCERNING COMPETITION.**—A derivatives clearing organization may request the Commission to issue an order concerning whether a rule or practice of the applicant is the least anticompetitive means of achieving the objectives, purposes, and policies of this Act.

(d) **EXISTING DERIVATIVES CLEARING ORGANIZATIONS.**—A derivatives clearing organization shall be deemed to be registered under this section to the extent that—

(1) the derivatives clearing organization clears agreements, contracts, or transactions for a board of trade that has been designated by the Commission as a contract market for such agreements, contracts, or transactions before the date of enactment of this section; and

(2) the Commission has reviewed and approved the rules of the derivatives clearing organization before that date.

(e) **APPOINTMENT OF TRUSTEE.**—

(1) **IN GENERAL.**—If a proceeding under section 5e results in the suspension or revocation of the registration of a derivatives clearing organization, or if a derivatives clearing organization withdraws from registration, the Commission, on notice to the derivatives clearing organization, may apply to the appropriate United States district court where the derivatives clearing organization is located for the appointment of a trustee.

(2) **ASSUMPTION OF JURISDICTION.**—If the Commission applies for appointment of a trustee under paragraph (1)—

(A) the court may take exclusive jurisdiction over the derivatives clearing organization and the records and assets of the derivatives clearing organization, wherever located; and

(B) if the court takes jurisdiction under subparagraph (A), the court shall appoint the Commission, or a person designated by the Commission, as trustee with power to take possession and continue to operate or terminate the operations of the derivatives clearing organization in an orderly manner for the protection of participants, subject to such terms and conditions as the court may prescribe.

(f) **LINKING OF REGULATED CLEARING FACILITIES.**—

(1) **IN GENERAL.**—The Commission shall facilitate the linking or coordination of derivatives clearing organizations registered under this Act with other regulated clearance facilities for the coordinated settlement of cleared transactions.

(2) **COORDINATION.**—In carrying out paragraph (1), the Commission shall coordinate with the Federal banking agencies and the Securities and Exchange Commission.

SEC. 5c. COMMON PROVISIONS APPLICABLE TO REGISTERED ENTITIES.

(a) ACCEPTABLE BUSINESS PRACTICES UNDER CORE PRINCIPLES.—

(1) *IN GENERAL.*—Consistent with the purposes of this Act, the Commission may issue interpretations, or approve interpretations submitted to the Commission, of sections 5(d), 5a(d), and 5b(d)(2) to describe what would constitute an acceptable business practice under such sections.

(2) *EFFECT OF INTERPRETATION.*—An interpretation issued under paragraph (1) shall not provide the exclusive means for complying with such sections.

(b) DELEGATION OF FUNCTIONS UNDER CORE PRINCIPLES.—

(1) *IN GENERAL.*—A contract market or derivatives transaction execution facility may comply with any applicable core principle through delegation of any relevant function to a registered futures association or another registered entity.

(2) *RESPONSIBILITY.*—A contract market or derivatives transaction execution facility that delegates a function under paragraph (1) shall remain responsible for carrying out the function.

(c) NEW CONTRACTS, NEW RULES, AND RULE AMENDMENTS.—

(1) *IN GENERAL.*—Subject to paragraph (2), a registered entity may elect to list for trading any new contract or other instrument, or may elect to approve and implement any new rule or rule amendment, by providing to the Commission (and the Secretary of the Treasury, in the case of a contract of sale for future delivery of a government security (or option thereon) or a rule or rule amendment specifically related to such a contract) a written certification that the new contract, new rule, or rule amendment complies with this Act (including regulations under this Act).

(2) PRIOR APPROVAL.—

(A) *IN GENERAL.*—A registered entity may request that the Commission grant prior approval to any new contract or other instrument, new rule, or rule amendment.

(B) *PRIOR APPROVAL REQUIRED.*—Notwithstanding any other provision of this section, a designated contract market shall submit to the Commission for prior approval each rule amendment that materially changes the terms and conditions, as determined by the Commission, in any contract of sale for future delivery of a commodity specifically enumerated in section 1a(3) of this Act (or any option thereon) traded through its facilities if such rule amendment applies to contracts and delivery months which have already been listed for trading and have open interest.

(C) *DEADLINE.*—If prior approval is requested under subparagraph (A), the Commission shall take final action on the request not later than 90 days after submission of the request, unless the person submitting the request agrees to an extension of the time limitation established under this subparagraph.

(3) *APPROVAL.*—The Commission shall approve any such new contract or instrument, new rule, or rule amendment unless the Commission finds that the new contract or instrument, new rule, or rule amendment would violate this Act.

(d) VIOLATION OF CORE PRINCIPLES.—

(1) **IN GENERAL.**—If the Commission has reason to believe that a registered entity is violating any applicable provision specified in section 5(d), 5a(d), or 5b(d)(2), the Commission shall notify the registered entity in writing of the reasons for the preliminary determination by the Commission of a violation, including any data, materials, and facts the Commission relied on in making the preliminary determination.

(2) **INJUNCTIVE OR ADMINISTRATIVE ACTION.**—The Commission may initiate an action for an injunction under section 6c or an administrative proceeding, to demonstrate, by the preponderance of the evidence, that—

(A) the registered entity is violating any applicable provision specified in section 5(d), 5a(d), or 5b(d)(2); and

(B) the Commission has recommended an appropriate remedial action to remove the deficiency based on an analysis of the costs and benefits in the public interest of the Commission recommendation.

(3) **BURDEN OF PROOF.**—In making a determination that a registered entity is violating any applicable provision specified in section 5(d), 5a(d), or 5b(d)(2), the Commission shall have the burden of proving that the registered entity is violating the applicable core principle.

(e) **RESERVATION OF EMERGENCY AUTHORITY.**—Nothing in this section shall limit or in any way affect the emergency powers of the Commission provided in section 8a(9) of this Act.

SEC. 5d. EXEMPT BOARDS OF TRADE.

(a) **IN GENERAL.**—Except as otherwise provided in this section, a contract of sale (or option on such a contract) of a commodity for future delivery traded on or through the facilities of an exempt board of trade shall be exempt from all provisions of this Act, other than section 2(g).

(b) **CRITERIA FOR EXEMPTION.**—To qualify for an exemption under subsection (a), a board of trade shall limit trading on or through the facilities of the board of trade to contracts of sale of a commodity for future delivery (or options on such contracts)—

(1) that have—

(A) a nearly inexhaustible deliverable supply;

(B) a deliverable supply that is sufficiently large, and a cash market sufficiently liquid, to render any contract traded on the commodity highly unlikely to be susceptible to the threat of manipulation; or

(C) no cash market;

(2) that are entered into only between persons that are eligible contract participants at the time at which the persons enter into the contract; and

(3) that are not contracts of sale (or options on the contract) for future delivery of any security, including any group or index of securities or any interest in, or interest that is based on the value of, any security.

(c) **ANTIMANIPULATION REQUIREMENTS.**—A party to a futures contract or related option that is traded on an exempt board of trade shall be subject to sections 4b, 4n, 6(c), and 9(a)(2), and the Commission shall enforce those provisions with respect to any such trading.

(d) *PRICE DISCOVERY.*—If the Commission finds that an exempt board of trade is a significant source of price discovery for any underlying commodity in any transaction traded on or through the facilities of the board of trade, the board of trade shall disseminate publicly on a daily basis trading volume, opening and closing price ranges, open interest, and other trading data as appropriate to the market.

(e) *JURISDICTION.*—The Commission shall have exclusive jurisdiction over any account, agreement, or transaction involving a contract of sale of a commodity for future delivery, or related option, to the extent that such account, agreement, or transaction is traded on an exempt board of trade.

(f) *SUBSIDIARIES.*—A board of trade that is designated as a contract market or registered as a derivatives transaction execution facility may operate an exempt board of trade by establishing a separate subsidiary or other legal entity and otherwise satisfying the requirements of this section.

SEC. 5e. SUSPENSION OR REVOCATION OF DESIGNATION AS REGISTERED ENTITY.

The failure of a registered entity to comply with any provision of this Act, or any regulation or order of the Commission under this Act, shall be cause for the suspension of the registered entity for a period not to exceed 180 days, or revocation of designation as a registered entity in accordance with the procedures and subject to the judicial review provided in section 6(b).

SEC. 6. (a) Any [board of trade desiring to be designated a “contract market” shall make application to the Commission for such designation] person desiring to be designated or registered as a contract market or derivatives transaction execution facility shall make application to the Commission for such designation or registration and accompany the same with a showing that it complies with the [above conditions] conditions set forth in this Act, and with a sufficient assurance that it will continue to comply with the [above requirements] the requirements of this Act. The Commission shall approve or deny an application for [designation as a contract market within one year] designation or registration as a contract market or derivatives transaction execution facility within 180 days of the filing of the application. If the Commission notifies the [board of trade] person that its application is materially incomplete and specifies the deficiencies in the application, the running of the [one-year period] 180-day period shall be stayed from the time of such notification until the application is resubmitted in completed form: *Provided*, That the Commission shall have not less than sixty days to approve or deny the application from the time the application is resubmitted in completed form. If the Commission denies an application, it shall specify the grounds for the denial. In the event of a refusal to [designate as a “contract market” any board of trade that has made application therefor, such board of trade] designate or register as a contract market or derivatives transaction execution facility any person that has made application therefor, such person shall be afforded an opportunity for a hearing on the record before the Commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in subsection (b) of this section.

(b) The Commission is authorized to suspend for a period not to exceed six months or to revoke the [designation of any board of trade as a “contract market” upon] *designation or registration of any contract market or derivatives transaction execution facility* on a showing that such [board of trade] *contract market or derivatives transaction execution facility* is not enforcing or has not enforced its rules of government made a condition of its [designation as set forth in section 5 of this Act] *designation or registration as set forth in sections 5 through 5b* or that such [board of trade] *contract market or derivatives transaction execution facility*, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Commission or the Commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the [board of trade] *contract market or derivatives transaction execution facility* affected and upon a hearing on the record: *Provided*, That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the Commission such [board of trade] *person* appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the Commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such [board of trade] *person* will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of title 28, United States Code. The testimony and evidence taken or submitted before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order. No such order of the Commission shall be modified or set aside by the court of appeals unless it is shown by the [board of trade] *person* that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such [board of trade] *person* for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Commission.

(c) If the Commission has reason to believe that any person (other than a [contract market] *registered entity*) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any [contract market] *registered entity*, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission under this Act, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission or the Commission thereunder, it may serve upon such person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place

not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any **【contract market】** *registered entity*, and directing that all **【contract markets】** *registered entities* refuse all **【trading】** privileges to such person, until further notice of the Commission and to show cause why the registration of such person, if registered with the Commission in any capacity, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Commission or before an Administrative Law Judge designated by the Commission, which Administrative Law Judge shall cause all evidence to be reduced to writing and forthwith transmit the same to the Commission. For the purpose of securing effective enforcement of the provisions of this Act, for the purpose of any investigation or proceeding under this Act, and for the purpose of any action taken under section 12(f), any member of the Commission or any Administrative Law Judge or other officer designated by the Commission (except as provided in the fifth sentence of this subsection) may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry. The attendance of witnesses and the production of any such records may be required from any place in the United States, any State or any foreign country or jurisdiction at any designated place of hearing. A subpoena issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country, except that a subpoena to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found. Upon evidence received, the Commission may (1) prohibit such person from trading on or subject to the rules of any **【contract market】** *registered entity* and require all **【contract markets】** *registered entities* to refuse such person all **【trading】** privileges thereon for such period as may be specified in the order, (2) if such person is registered with the Commission in any capacity, suspend, for a period not to exceed six months, or revoke, the registration of such person, (3) assess such

person a civil penalty of not more than the higher of \$100,000 or triple the monetary gain to such person for each such violation and (4) require restitution to customers of damages proximately caused by violations of such persons. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said **【contract markets】** *registered entities*. After the issuance of the order by the Commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business, or in the case of an order denying registration, the circuit in which the petitioner's principal place of business listed on petitioner's application for registration is located, a written petition, within fifteen days after the notice of such order is given to the offending person praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of title 28, United States Code. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

(d) If any person (other than a **【contract market】** *registered entity*) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any **【contract market】** *registered entity*, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission or the commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in subsection (c), make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than the higher of \$100,000 or triple the monetary gain to such person, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 9 of this Act, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph 9(a) or 9(b): *Provided*, That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under subsection (c). Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

(e)(1) In determining the amount of the money penalty assessed under subsection (c), the Commission shall consider the appropriateness of such penalty to the gravity of the violation.

(2) Unless the person against whom a money penalty is assessed under subsection (c) shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for payment of such penalty that either an appeal as authorized by subsection (c) has been taken or payment of the full amount of the penalty then due has been made, at the end of such fifteen-day period and until such person shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made—

(A) such person shall be prohibited automatically from [trading on all contract markets] *the privileges of all registered entities*; and

(B) if such person is registered with the Commission, such registration shall be suspended automatically.

(3) If a person against whom a money penalty is assessed under subsection (c) takes an appeal and if the Commission prevails or the appeal is dismissed, unless such person shows to the satisfaction of the Commission that payment of the full amount of the penalty then due has been made by the end of thirty days from the date of entry of judgment on the appeal—

(A) such person shall be prohibited automatically from [trading on all contract markets] *the privileges of all registered entities*; and

* * * * *

SEC. 6a. (a) No board of trade which has been [designated as a “contract market” shall] *designated or registered as a contract market or a derivatives transaction execution facility* exclude from membership in, and all privileges on, such board of trade, any association or corporation engaged in cash commodity business having adequate financial responsibility which is organized under the cooperative laws of any State, or which has been recognized as a cooperative association of producers by the United States Government or by any agency thereof, if such association or corporation complies and agrees to comply with such terms and conditions as are or may be imposed lawfully upon other members of such board, and as are or may be imposed lawfully upon a cooperative association of producers engaged in cash commodity business, unless such board of trade is authorized by the Commission to exclude such association or corporation from membership and privileges after hearing held upon at least three days’ notice subsequent to the filing of complaint by the board of trade: *Provided, however,* That if any such association or corporation shall fail to meet its obligations with any established clearing house or clearing agency of any contract market, such association or corporation shall be ipso facto debarred from further trading on such contract market, except such trading as may be necessary to close open trades and to discharge existing contracts in accordance with the rules of such contract market applicable in such cases. Such Commission may prescribe that such association or corporation shall have and retain membership and privileges, with or without imposing conditions, or it may permit such board of trade immediately to bar such association or corporation from membership and privileges. Any order of said Commission entered hereunder shall be reviewable by the court of appeals for the circuit in which such association or corporation, or such board of trade, has its principal place of business, on written

petition either of such association or corporation, or of such board of trade, under the procedure provided in section 6(b) of this Act, but such order shall not be stayed by the court pending review.

(b) No rule of any board of trade **【designated as a contract market】** *designated or registered as a contract market or a derivatives transaction execution facility* shall forbid or be construed to forbid the payment of compensation on a commodity-unit basis, or otherwise, by any federated cooperative association to its regional member-associations for services rendered or to be rendered in connection with any organization work, educational activity, or procurement of patronage, provided no part of any such compensation is returned to patrons (whether members or nonmembers) of such cooperative association, or of its regional or local member-associations, otherwise than as a dividend on capital stock or as a patronage dividend out of the net earnings or surplus of such federated cooperative association.

SEC. 6b. If any **【contract market】** *registered entity* is not enforcing or has not enforced its rules of government made a condition of its **【designation as set forth in section 5 of this Act】** *designation or registration as set forth in sections 5 through 5c*, or if any **【contract market】** *registered entity*, or any director, officer, agent, or employee of any **【contract market】** *registered entity* otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in section 6(b) of this Act, make and enter an order directing that such **【contract market】** *registered entity*, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than \$500,000 for each such violation. If such **【contract market】** *registered entity*, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such **【contract market】** *registered entity*, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$500,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending **【contract market】** *registered entity* or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider the gravity of the offense, and in the case of a **【contract market】** *registered entity* shall further consider whether the amount of the penalty will materially impair **【the contract market's ability】** *the ability of the registered entity* to carry on its operations and duties.

SEC. 6c. (a) Whenever it shall appear to the Commission that any **【contract market】** *registered entity* or other person has engaged, is engaging, or is about to engage in any act or practice constituting

a violation of any provision of this Act or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this Act, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided*, That no restraining order (other than a restraining order which prohibits any person from destroying, altering or disposing of, or refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records or other documents or which prohibits any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property, and other than an order appointing a temporary receiver to administer such restraining order and to perform such other duties as the court may consider appropriate) or injunction for violation of the provisions of this Act shall be issued *ex parte* by said court.

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SEC. 6d. (1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, *derivatives transaction execution facility*, clearinghouse, floor broker, or floor trader) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this Act, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

* * * * *

SEC. 7. Any [board of trade] *person* that has been designated or registered a [contract market] *registered entity* in the manner herein provided may have such designation or registration vacated and set aside by giving notice in writing to the Commission requesting that its designation or registration as a [contract market] *registered entity* be vacated, which notice shall be served at least ninety days prior to the date named therein as the date when the vacation of designation or registration shall take effect. Upon receipt of such notice the Commission shall forthwith order the vacation of the [designation of such board of trade as a contract market] *designation or registration of the registered entity*, effective upon the day named in the notice, and shall forthwith send a copy of the notice and its order to all other [contract markets] *registered entities*. From and after the date upon which the vacation became effective the said [board of trade] *person* can thereafter be [designated again a contract market] *designated or registered again a registered entity* by making application to the Commission in the manner herein provided for an original application.

SEC. 8. (a) * * *

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(c) The Commission may make or issue such reports as it deems necessary, or such opinions or orders as may be required under other provisions of law, relative to the conduct of any [board of trade] *registered entity* or to the transactions of any person found guilty of violating the provisions of this Act or the rules, regulations, or orders of the Commission thereunder in proceedings brought under section 6 of this Act. In any such report or opinion, the Commission may set forth the facts as to any actual transaction or any information referred to in subsection (b) of this section, if such facts or information have previously been disclosed publicly in connection with a congressional proceeding, or in an administrative or judicial proceeding brought under this Act.

* * * * *

SEC. 8a. The Commission is authorized—

(1) * * *

(2) upon notice, but without a hearing and pursuant to such rules, regulations, or orders as the Commission may adopt, to refuse to register, to register conditionally, or to suspend or place restrictions upon the registration of, any person and with such a hearing as may be appropriate to revoke the registration of any person—

(A) * * *

* * * * *

(F) if such person is subject to an outstanding order of the Commission denying [trading] privileges on any [contract market] *registered entity* to such person, denying, suspending, or revoking such person's membership in any [contract market] *registered entity* or registered futures association, or barring or suspending such person from being associated with a registrant under this Act or with a member of a [contract market] *registered entity* or with a member of a registered futures association;

* * * * *

(3) to refuse to register or to register conditionally any person, if it is found, after opportunity for hearing, that—

(A) * * *

* * * * *

(J) such person is subject to an outstanding order denying, suspending, or expelling such person from membership in a [contract market] *registered entity*, a registered futures association, any other self-regulatory organization, or any foreign regulatory body that the Commission recognizes as having a comparable regulatory program or barring or suspending such person from being associated with any member or members of such [contract market] *registered entity*, association, self-regulatory organization, or foreign regulatory body;

* * * * *

(4) in accordance with the procedure provided for in section 6(c) of this Act, to suspend, revoke, or place restrictions upon

the registration of any person registered under this Act if cause exists under paragraph (3) of this section which would warrant a refusal of registration of such person, and to suspend or revoke the registration of any futures commission merchant or introducing broker who shall knowingly accept any order for the purchase or sale of any commodity for future delivery on or subject to the rules of any **[contract market] registered entity** from any person if such person has been denied trading privileges on any **[contract market] registered entity** by order of the Commission under section 6(c) of this Act and the period of denial specified in such order shall not have expired: *Provided*, That such person may appeal from a decision to suspend, revoke, or place restrictions upon registration made pursuant to this paragraph in the manner provided in section 6(c) of this Act;

* * * * *

(6) to communicate to the proper committee or officer of any **[contract market] registered entity**, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, notwithstanding the provisions of section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Commission disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors, or which is necessary or appropriate to effectuate the purposes of this Act: *Provided*, That any information furnished by the Commission under this paragraph shall not be disclosed by such **[contract market] registered entity**, registered futures association, or self-regulatory organization except in any self-regulatory action or proceeding;

(7) to alter or supplement the rules of a **[contract market] registered entity** insofar as necessary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a **[contract market] registered entity** that such **[contract market] registered entity** effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such **[contract market] registered entity** has not made the changes so required, and that such changes are necessary or appropriate for the protection of persons producing, handling, processing, or consuming any commodity traded for future delivery on such **[contract market] registered entity**, or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such **[contract market] registered entity**. Such rules, regulations, or orders may specify changes with respect to such matters as—

(A) terms or conditions in contracts of sale to be executed on or subject to the rules of such **[contract market] registered entity**;

* * * * *

(8) to make and promulgate such rules and regulations with respect to those persons registered under this Act, who are not

members of a **[contract market]** *registered entity*, as in the judgment of the Commission are reasonably necessary to protect the public interest and promote just and equitable principles of trade, including but not limited to the manner, method, and place of soliciting business, including the content of such solicitation;

(9) to direct the **[contract market]** *registered entity*, whenever it has reason to believe that an emergency exists, to take such action as in the Commission’s judgment is necessary to maintain or restore orderly trading in or liquidation of any futures contract, including, but not limited to, the setting of temporary emergency margin levels on any futures contract, and the fixing of limits that may apply to a market position acquired in good faith prior to the effective date of the Commission’s action. The term “emergency” as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. Any action taken by the Commission under this paragraph shall be subject to review only in the United States Court of Appeals for the circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. Such review shall be based upon an examination of all the information before the Commission at the time the determination was made. The court reviewing the Commission’s action shall not enter a stay or order of mandamus unless it has determined, after notice and hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Nothing herein shall be deemed to limit the meaning or interpretation given by a **[contract market]** *registered entity* to the terms “market emergency”, “emergency”, or equivalent language in its own bylaws, rules, regulations, or resolutions;

* * * * *

SEC. 8b. It shall be unlawful for any person, against whom there is outstanding any order of the Commission prohibiting him from trading on or subject to the rules of any **[contract market]** *registered entity*, to make or cause to be made in contravention of such order, any contract for future delivery of any commodity, on or subject to the rules of any **[contract market]** *registered entity*.

SEC. 8c. (a)

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(e)(1) The Commission shall issue regulations requiring each contract market to establish and make available to the public a schedule of major violations of any rule within the disciplinary jurisdiction of such **[contract market]** *registered entity*.

* * * * *

SEC. 8e. COMMISSION OVERSIGHT; DEFICIENCY ORDERS.

(a) ASSESSMENTS.—At least once every two years, to the extent practicable, the Commission shall assess whether the trade moni-

toring system of each **[contract market]** *registered entity* satisfies **[section 5a(b)]** *sections 5 through 5c*.

(b) DEFICIENCY ORDERS.—

(1) CAUSES.—The Commission may issue a proposed deficiency order in accordance with paragraph (2), or take such other administrative or enforcement action as the Commission determines is appropriate, if, based on its assessment or on other information, the Commission at any time has reason to believe that **[a contract market's trade monitoring system implemented pursuant to section 5a(b)]** *the trade monitoring system of a registered entity implemented pursuant to sections 5 through 5c* does not satisfy one or more of the requirements of such section.

* * * * *

(2) CONTENTS.—A proposed deficiency order issued under this subsection shall specify—

(A) the deficiencies the Commission has reason to believe exist in the trade monitoring system of the **[contract market]** *registered entity* and a statement of reasons supporting the Commission's belief that those deficiencies exist;

(B) the corrective action that the Commission believes that the **[contract market]** *registered entity* must take and an acceptable timetable for such corrective action; and

(C) a date, not less than twenty days from the date of issuance of the proposed deficiency order, when such deficiency order will become final, subject to subsection (d).

[(3) REMEDIES.—On becoming final, the Commission deficiency order may—

[(A) require the contract market to—

[(i) institute appropriate improvements in its trade monitoring system necessary to correct the deficiencies noted therein;

[(ii) satisfy stated objective performance criteria to correct such deficiencies;

[(iii) upgrade or reconfigure existing systems for collecting or processing relevant data on trading and trader or broker activity, including, where appropriate, the commitment of additional resources; or

[(B) revoke any exemption of the contract market from the regulations prohibiting the privilege of dual trading under section 4j(a), if the deficiency noted in such deficiency order relates to—

[(i) the audit trail system the contract market is required to maintain under paragraph (2), (3), or (4) of section 5a(b); or

[(ii) the prevention, detection, or disciplining of violations attributable to such trading at such, subject to the standards, exceptions, and duration provisions of section 4j(a); or

[(C) take any combination of the actions described in subparagraphs (A) and (B).]

(3) REMEDIES.—On becoming final, the Commission deficiency order may require the registered entity to—

(A) *institute appropriate improvements in its trade monitoring system necessary to correct the deficiencies in the order;*

(B) *satisfy stated objective performance criteria to correct the deficiencies;*

(C) *upgrade or reconfigure existing systems for collecting or processing relevant data on trading and trader or broker activity, including, where appropriate, the commitment of additional resources.*

(4) REMOVAL.—If the Commission finds, after notice and opportunity for a hearing on the record prior to such deficiency order becoming final, that a named officer, director, committee member, or employee of such **[contract market]** *registered entity* has willfully—

(A) violated this Act, the rules or regulations of the Commission thereunder, or the rules of such **[contract market]** *registered entity*;

(B) abused the authority of such person; or

(C) without reasonable justification or excuse, failed to enforce compliance with any provision of the rules of such **[contract market]** *registered entity* by any member or person associated with a member thereof,

the Commission may issue a deficiency order under this section to remove such officer, director, committee member, or employee.

(5) **[DESIGNATION AS CONTRACT MARKET]** *DESIGNATION OR REGISTRATION AS REGISTERED ENTITY*.—Notwithstanding section 6, during the period that a proposed or final deficiency order under this section is in effect, the Commission may refrain from approving any application for designation or registration as a **[contract market]** *registered entity* made by the **[board of trade]** *person* whose **[contract market]** *registered entity* is the subject of such deficiency order.

(6) DELEGATION.—The Commission shall not delegate the authority to issue deficiency orders under this subsection.

(c) RESCISSION, MODIFICATION, OR DELAY OF DEFICIENCY ORDERS.—Before any proposed deficiency order issued by the Commission under subsection (b) may become final, the Commission shall—

(1) provide the affected **[contract market]** *registered entity* with an opportunity for a hearing through submission of written data, views, or arguments and, under terms set by the Commission at the request of the **[contract market]** *registered entity*, through an oral presentation of views and comments to the Commission, in order to petition the Commission to rescind, modify, or delay such deficiency order; and

(2) rule on such petition, not less than twenty days before the deficiency order takes effect, making findings, as appropriate, as to whether—

(A) the deficiencies cited by the Commission have been corrected or are being corrected under an expeditious timetable acceptable to the Commission;

(B) the trade monitoring system of the **[contract market]** *registered entity* is deficient as noted in the deficiency order; or

(C) the timetable for corrective action by the **contract market** *registered entity* in the proposed deficiency order, and the particular corrective action proposed, is appropriate in light of the deficiencies noted and the purposes of this Act.

(d) PENALTIES.—Violation of a final deficiency order issued under subsection (c) shall be considered a violation of an order of the Commission for purposes of—

(1) establishing liability and assessing penalties against a **contract market** *registered entity* or any director, officer, agent, or employee thereof under section 6b or 6c; or

(2) initiating proceedings under section **5b** 5e or 6(a).

(e) JUDICIAL REVIEW.—

(1) PERSONS.—Any person, other than a **contract market** *registered entity*, aggrieved by a deficiency order issued under subsection (b)(4), may obtain review of such deficiency order when issued by the Commission under the terms and conditions in section 6(b).

(2) **CONTRACT MARKETS** REGISTERED ENTITIES.—Any **contract market** *registered entity* that has petitioned the Commission to rescind, modify, or delay any proposed deficiency order issued under subsection (b) may obtain judicial review of any final such deficiency order only in the United States Court of Appeals for the circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, under the standards applicable to rulemaking proceedings under section 553 of title 5, United States Code.

SEC. 9. (a) It shall be a felony punishable by a fine of not more than \$1,000,000 (or \$500,000 in the case of a person who is an individual) or imprisonment for not more than five years, or both, together with the costs of prosecution, for:

(1) * * *

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any **contract market** *registered entity*, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 4, section 4b, subsections (a) through (e) of subsection 4c, section 4h, section **4o(1)** 4n(1), or section 19.

(3) Any person knowingly to make, or cause to be made, any statement in any application, report, or document required to be filed under this Act or any rule or regulation thereunder or any undertaking contained in a registration statement required under this Act, or by any **contract market** *registered entity* or registered futures association in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, or know-

ingly to omit any material fact required to be stated therein or necessary to make the statements therein not misleading.

(4) Any person willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a [contract market] *registered entity*, board of trade, or futures association designated or registered under this Act acting in furtherance of its official duties under this Act.

* * * * *

(f) It shall be a felony for any person—

(1) who is an employee, member of the governing board, or member of any committee of a board of trade, [contract market] *registered entity*, or registered futures association, in violation of a regulation issued by the Commission, willfully and knowingly to trade for such person's own account, or for or on behalf of any other account, in contracts for future delivery or options thereon on the basis of, or willfully and knowingly to disclose for any purpose inconsistent with the performance of such person's official duties as an employee or member, any material nonpublic information obtained through special access related to the performance of such duties.

(2) willfully and knowingly to trade for such person's own account, or for or on behalf of any other account, in contracts for future delivery or options thereon on the basis of any material nonpublic information that such person knows was obtained in violation of paragraph (1) from an employee, member of the governing board, or member of any committee of a board of trade, [contract market] *registered entity*, or registered futures association.

Such felony shall be punishable by a fine of not more than \$500,000, plus the amount of any profits realized from such trading or disclosure made in violation of this subsection, or imprisonment for not more than five years, or both, together with the costs of prosecution.

* * * * *

SEC. 12. (a) * * *

* * * * *

(d) There are authorized to be appropriated such sums as are necessary to carry out this Act for each of fiscal years 1995 through [2000] 2005.

(e) Nothing in this Act shall supersede or preempt—

(1) criminal prosecution under any Federal criminal statute;

(2) the application of any Federal or State statute, including any rule or regulation thereunder, to any transaction in or involving any commodity, product, right, service, or interest (A) that is not conducted on or subject to the rules of a contract market, or, in the case of any State or local law that prohibits or regulates gaming or the operation of "bucket shops" (other than antifraud provisions of general applicability), that is not a transaction or class of transactions that has received or is covered by the terms of any exemption previously granted by

the Commission under subsection (c) of section 4 of this Act, or (B) (except as otherwise specified by the Commission by rule or regulation) that is not conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, its territories or possessions, or (C) that is not subject to regulation by the Commission under section 4c or 19 of this Act; or]

(2) *the application of any Federal or State law (including any regulation) to an agreement, contract, or transaction in or involving any commodity, product, right, service, or interest, except that this Act shall supersede and preempt—*

(A) *in the case of any such agreement, contract, or transaction—*

(i) *that is conducted on or subject to the rules of a registered entity or exempt board of trade;*

(ii) *that is conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, or any territory or possession of the United States (in accordance with any terms or conditions specified by the Commission by regulation); and*

(iii) *that is subject to regulation by the Commission under section 4c or 19; and*

(B) *any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than anti-fraud provisions of general applicability) in the case of—*

(i) *an electronic trading facility under section 2(e); or*

(ii) *an agreement, contract, or transaction that is excluded or exempt under section 2(c), 2(d), 2(f), or 2(h) or is covered by the terms of an exemption granted by the Commission under section 4(c) (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act); or*

* * * * *

SEC. 14. (a)(1) Any person complaining of any violation of any provision of this Act, or any rule, regulation, or order issued pursuant to this Act, by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding—

(A) * * *

(B) *in the case of any action arising from a willful and intentional violation in the execution of an order on the floor of a [contract market] registered entity, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally*

selected the floor broker with the intent to assist or facilitate the floor broker's violation.

* * * * *

(f) Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all **contract markets** *registered entities* and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

[(g) The provisions of this section shall not become effective until fifteen months after the date of its enactment: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such 15-month period.]

(g) *PREDISPUTE RESOLUTION AGREEMENTS FOR INSTITUTIONAL CUSTOMERS.*—*Nothing in this section prohibits a registered futures commission merchant from requiring a customer that is an eligible contract participant, as a condition to the commission merchant's conducting a transaction for the customer, to enter into an agreement waiving the right to file a claim under this section.*

[SEC. 15. The Commission]

SEC. 15. CONSIDERATION OF COSTS AND BENEFITS AND ANTITRUST LAWS.

(a) *COSTS AND BENEFITS.*—

(1) *IN GENERAL.*—*Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission shall consider the costs and benefits of the action of the Commission.*

(2) *CONSIDERATIONS.*—*The costs and benefits of the proposed Commission action shall be evaluated in light of—*

(A) *considerations of protection of market participants and the public;*

(B) *considerations of the efficiency, competitiveness, and financial integrity of futures markets;*

(C) *considerations of price discovery;*

(D) *considerations of sound risk management practices;*
and

(E) *other public interest considerations.*

(3) *APPLICABILITY.*—*This subsection does not apply to the following actions of the Commission:*

(A) *An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission.*

(B) *An emergency action.*

(C) *A finding of fact regarding compliance with a requirement of the Commission.*

(b) *ANTITRUST LAWS.—The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this Act, as well as the policies and purposes of this Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act.*

* * * * *

SEC. 17. (a) * * *

(b) An applicant association shall not be registered as a futures association unless the Commission finds, under standards established by the Commission, that—

(1) * * *

(2) the rules of the association provide that any person registered under this Act, **contract market** *registered entity*, or any other person designated pursuant to the rules of the Commission as eligible for membership may become a member of such association, except such as are excluded pursuant to paragraph (3) or (4) of this subsection, or a rule of the association permitted under this paragraph. The rules of the association may restrict membership in such association on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest and to carry out the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to, or refuse to continue in such association any person if (i) such person, whether prior or subsequent to becoming registered as such, or (ii) any person associated within the meaning of “associated person” as set forth in section 4k of this Act, whether prior or subsequent to becoming so associated, has been and is suspended or expelled from a **contract market** *registered entity* or has been and is barred or suspended from being associated with all members of such **contract market** *registered entity*, for violation of any rule of such **contract market** *registered entity*;

(3) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall be admitted to or continued in membership in such association, if such person—

(A) has been and is suspended or expelled from a registered futures association or from a **contract market** *registered entity* or has been and is barred or suspended from being associated with all members of such association or from being associated with all members of such **con-**

tract market] *registered entity*, for violation of any rule of such association or [contract market] *registered entity* which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade;

(B) is subject to an order of the Commission denying, suspending, or revoking his registration pursuant to section 6(c) of this Act, or expelling or suspending him from membership in a registered futures association or a [contract market] *registered entity*, or barring or suspending him from being associated with a futures commission merchant;

(C) whether prior or subsequent to becoming a member, by his conduct while associated with a member, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such member, and in entering such a suspension, expulsion, or order, the Commission or any such [contract market] *registered entity* or association shall have jurisdiction to determine whether or not any person was a cause thereof; or

* * * * *

(10) the rules of the association provide a fair, equitable, and expeditious procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: *Provided*, That (A) the use of such procedure by a customer shall be voluntary, (B) the term "customer" as used in this paragraph shall not include another member of the association, and (C) in the case of a claim arising from a violation in the execution of an order on the floor of a [contract market] *registered entity*, such procedure shall provide, to the extent appropriate—

(i) * * *

* * * * *

(o)(1) The Commission may require any futures association registered pursuant to this section to perform any portion of the registration functions under this Act with respect to each member of the association other than a [contract market] *registered entity* and with respect to each associated person of such member, in accordance with rules, notwithstanding any other provision of law, adopted by such futures association and submitted to the Commission pursuant to section 17(j) of this Act, and subject to the provisions of this Act applicable to registrations granted by the Commission.

* * * * *

(q)(1) The Commission shall issue regulations requiring each registered futures association to establish and make available to the public a schedule of major violations of any rule within the disciplinary jurisdiction of such registered futures association.

(2) The regulations issued by the Commission pursuant to this subsection shall prohibit, for a period of time to be determined by the Commission, any member of a registered futures association

who is found to have committed any major violation from service on the governing board of any registered futures association or **contract market** registered entity, or on any disciplinary committee thereof.

* * * * *

SEC. 22. (a)(1) Any person (other than a **contract market, clearing organization of a contract market, licensed board of trade,** registered entity or registered futures association) who violates this Act or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

(A) * * *

* * * * *

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 4c of this Act (other than an option purchased or sold on a **contract market** registered entity or other board of trade);

* * * * *

(2) Except as provided in subsection (b), the rights of action authorized by this subsection and by sections **5a(11),** 5(d)(13), 5b(b)(1)(E), 14, and 17(b)(10) of this Act shall be the exclusive remedies under this Act available to any person who sustains loss as a result of any alleged violation of this Act. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.

(3) In any action arising from a violation in the execution of an order on the floor of a **contract market** registered entity, the person referred to in paragraph (1) shall be liable for—

(A) * * *

(4) **CONTRACT ENFORCEMENT BETWEEN ELIGIBLE COUNTERPARTIES.**—

(A) *IN GENERAL.*—No agreement, contract, or transaction involving a party described in subclauses (I) through (VI) of section 2(c)(2)(B)(ii) or between eligible contract participants shall be void, voidable, or unenforceable, and no such counterparty or eligible contract participant shall be entitled to rescind, or recover any payment made with respect to, such an agreement, contract, or transaction, under this section or any other provision of Federal or State law based solely on the failure of the agreement, contract, or transaction to comply with the terms or conditions of an exemption or exclusion from any provision of this Act or regulations of the Commission.

(B) *EXCEPTION.*—This paragraph shall not apply to any swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act) with any party who is not an eligible contract participant unless such swap agreement is entered into after final regulations have been prescribed under section 49 of the Federal Deposit Insurance Act.

(b)(1)(A) A **[contract market or clearing organization of a contract market]** *registered entity* that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by **[section 5a(8) and section 5a(9) of this Act]** *sections 5 through 5c*, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any **[contract market, clearing organization of a contract market, or licensed board of trade]** *registered entity* that in enforcing any such bylaw, rule, regulation, or resolution violates this Act or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such **[contract market or licensed board of trade]** *registered entity* to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

* * * * *

(3) Any individual who, in the capacity as an officer, director, governor, committee member, or employee of **[a contract market, clearing organization, licensed board of trade,]** *registered entity* or a registered futures association willfully aids, abets, counsels, induces, or procures any failure by any such entity to enforce (or any violation of the Act in enforcing) any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, shall be liable for actual damages sustained by a person who engaged in any transaction specified in subsection (a) of this section on, or subject to the rules of, such **[contract market, licensed board of trade]** *registered entity* or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure or violation.

(4) A person seeking to enforce liability under this section must establish that the **[contract market, licensed board of trade, clearing organization]** *registered entity*, registered futures association, officer, director, governor, committee member, or employee acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss.

(5) The rights of action authorized by this subsection shall be the exclusive remedy under this Act available to any person who sustains a loss as a result of (A) the alleged failure by a **[contract market, licensed board of trade, clearing organization,]** *registered entity* or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this Act, or any Commission rule, regulation, or order.

* * * * *

**FEDERAL DEPOSIT INSURANCE CORPORATION
IMPROVEMENT ACT OF 1991**

* * * * *

TITLE IV—MISCELLANEOUS PROVISIONS

Subtitle A—Payment System Risk Reduction

CHAPTER 1—BILATERAL AND CLEARING ORGANIZATION NETTING

* * * * *

SEC. 402. DEFINITIONS.

For purposes of this [subtitle] chapter—

(1) * * *

* * * * *

(2) **CLEARING ORGANIZATION.**—The term “clearing organization” means a clearinghouse, clearing association, clearing corporation, or similar organization—

(A) that provides clearing, netting, or settlement services for its members and—

(i) in which all members other than the clearing organization itself are financial institutions or other clearing organizations; or

(ii) which is registered as a clearing agency under the Securities Exchange Act of 1934 or exempt from such registration pursuant to an order of the Securities and Exchange Commission; or

[(B) that performs clearing functions for a contract market designated pursuant to the Commodity Exchange Act.]

(B) that is registered as a derivatives clearing organization under section 5b of the Commodity Exchange Act or that has been granted an exemption pursuant to section 4(c)(1) of such Act.

* * * * *

(6) **DEPOSITORY INSTITUTION.**—The term “depository institution” means—

(A) a depository institution as defined in section 19(b)(1)(A) of the Federal Reserve Act (other than clause (vii));

[(B) a branch or agency as defined in section 1(b) of the International Banking Act of 1978;]

(B) an uninsured national bank or an uninsured State bank that is a member of the Federal Reserve System if the national bank or State member bank is not eligible to make application to become an insured bank under section 5 of the Federal Deposit Insurance Act;

(C) a branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency, as those terms are defined in section 1(b) of the International Banking Act of 1978;

[(C)] (D) a corporation chartered under section 25(a) of the Federal Reserve Act; or

[(D)] (E) a corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act.

* * * * *

(11) **MEMBER.**—The term “member” means a member of or participant in a clearing organization, and includes the clearing organization and any other clearing organization with which such clearing organization has a netting contract.

* * * * *

(14) **NETTING CONTRACT.**—

(A) **IN GENERAL.**—The term “netting contract”—

[(i)] means a contract or agreement between 2 or more financial institutions or members, that—

[(I)] is governed by the laws of the United States, any State, or any political subdivision of any State, and

[(II)] provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) among the parties to the agreement; and

(i) means a contract or agreement between two or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or closeout values relating to such obligations or entitlements) among the parties to the agreement; and

* * * * *

(15) **PAYMENT.**—The term “payment” means a payment of United States dollars, another currency, or a composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.

* * * * *

SEC. 403. BILATERAL NETTING.

[(a)] GENERAL RULE.—Notwithstanding any other provision of law, the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract. **]**

(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements between any two financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).

* * * * *

(f) *ENFORCEABILITY OF SECURITY AGREEMENTS.*—The provisions of any security agreement or arrangement or other credit enhancement related to 1 or more netting contracts between any two financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code) and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and section 5(b)(2) of the Securities Investor Protection Act of 1970).

SEC. 404. CLEARING ORGANIZATION NETTING.

[(a) *GENERAL NETTING RULE.*—Notwithstanding any other provision of law, the covered contractual payment obligations and covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract.]

(a) *GENERAL RULE.*—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).

* * * * *

(h) *ENFORCEABILITY OF SECURITY AGREEMENTS.*—The provisions of any security agreement or arrangement or other credit enhancement related to 1 or more netting contracts between any two members of a clearing organization shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code) and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and section 5(b)(2) of the Securities Investor Protection Act of 1970).

* * * * *

SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED NATIONAL BANKS AND UNINSURED FEDERAL BRANCHES AND AGENCIES.

(a) *IN GENERAL.*—Notwithstanding any other provision of law, paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act shall apply to an uninsured national bank or uninsured Federal branch or Federal agency except—

(1) any reference to the “Corporation as receiver” or “the receiver or the Corporation” shall refer to the receiver of an uninsured national bank or uninsured Federal branch or Federal agency appointed by the Comptroller of the Currency;

(2) any reference to the “Corporation” (other than in section 11(e)(8)(D) of such Act), the “Corporation, whether acting as such or as conservator or receiver”, a “receiver”, or a “conservator” shall refer to the receiver or conservator of an uninsured

national bank or uninsured Federal branch or Federal agency appointed by the Comptroller of the Currency; and

(3) any reference to an “insured depository institution” or “depository institution” shall refer to an uninsured national bank or an uninsured Federal branch or Federal agency.

(b) LIABILITY.—The liability of a receiver or conservator of an uninsured national bank or uninsured Federal branch or agency shall be determined in the same manner and subject to the same limitations that apply to receivers and conservators of insured depository institutions under section 11(e) of the Federal Deposit Insurance Act.

(c) REGULATORY AUTHORITY.—

(1) IN GENERAL.—The Comptroller of the Currency, in consultation with the Federal Deposit Insurance Corporation, may promulgate regulations to implement this section.

(2) SPECIFIC REQUIREMENT.—In promulgating regulations to implement this section, the Comptroller of the Currency shall ensure that the regulations generally are consistent with the regulations and policies of the Federal Deposit Insurance Corporation adopted pursuant to the Federal Deposit Insurance Act.

(d) DEFINITIONS.—For purposes of this section, the terms “Federal branch”, “Federal agency”, and “foreign bank” have the same meaning as in section 1(b) of the International Banking Act.

SEC. [407.] 407A. NATIONAL EMERGENCIES.

The provisions of this subtitle may not be construed to limit the authority of the President under the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).

* * * * *

CHAPTER 2—MULTILATERAL CLEARING ORGANIZATIONS

SEC. 408. DEFINITIONS.

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

(1) MULTILATERAL CLEARING ORGANIZATION.—The term “multilateral clearing organization” means a system utilized by more than 2 participants in which the bilateral credit exposures of participants arising from the transactions cleared are effectively eliminated and replaced by a system of guarantees, insurance, or mutualized risk of loss.

(2) OVER-THE-COUNTER DERIVATIVE INSTRUMENT.—The term “over-the-counter derivative instrument” means—

(A) any agreement, contract, or transaction, including the terms and conditions incorporated by reference in any such agreement, contract, or transaction, which is an interest rate swap, option, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, and forward rate agreement; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, or forward agreement; an equity index or equity swap, option, or forward agreement; a debt index or debt swap, option, or forward agreement; a credit spread or credit swap, option,

or forward agreement; a commodity index or commodity swap, option, or forward agreement; and a weather swap, weather derivative, or weather option;

(B) any agreement, contract or transaction similar to any other agreement, contract, or transaction referred to in this clause that is presently, or in the future becomes, regularly entered into by parties that participate in swap transactions (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, or option on 1 or more occurrences of any event, rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, economic or other indices or measures of economic or other risk or value;

(C) any contract of sale of a commodity for future delivery or commodity option described in subsection (c), (d), (f), (h), or (i) of section 2 of the Commodity Exchange Act or exempted under section 4(c) of such Act; and

(D) any option to enter into any, or any combination of, agreements, contracts or transactions referred to in this subparagraph.

(3) OTHER DEFINITIONS.—The terms “State member bank” and “affiliate” have the meanings given the terms in section 3 of the Federal Deposit Insurance Act.

SEC. 409. MULTILATERAL CLEARING ORGANIZATIONS.

(a) IN GENERAL.—Except with respect to clearing organizations described in subsection (b), no person may operate a multilateral clearing organization for over-the-counter derivative instruments, or otherwise engage in activities that constitute such a multilateral clearing organization unless the person is a national bank, State member bank, an affiliate of a national bank or a State member bank, or a corporation chartered under section 25A of the Federal Reserve Act.

(b) CLEARING ORGANIZATIONS.—Subsection (a) shall not apply to any clearing organization that—

(1) is registered as a clearing agency under the Securities Exchange Act of 1934;

(2) performs clearing functions for a contract market designated pursuant to the Commodity Exchange Act; or

(3) is supervised by a foreign financial regulator that an appropriate Federal financial regulatory agency has determined satisfies appropriate standards.

* * * * *

FEDERAL RESERVE ACT

* * * * *

STATE BANKS AS MEMBERS.

SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a

member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.

* * * * *

(24) *ENFORCEMENT AUTHORITY.*—Section 3(u), subsections (j) and (k) of section 7, subsections (b) through (n), (s), (u), and (v) of section 8, and section 19 of the Federal Deposit Insurance Act shall apply to a State member bank which is not an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in the same manner and to the same extent as such provisions apply to State member insured banks, and any reference in such sections to an insured depository institution shall be deemed to include a reference to any such non-insured State member bank.

* * * * *

SEC. 9B. RESOLUTION OF CLEARING BANKS.

(a) *CONSERVATORSHIP OR RECEIVERSHIP.*—

(1) *APPOINTMENT.*—The Board may appoint a conservator or receiver to take possession and control of any uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 to the same extent and in the same manner as the Comptroller of the Currency may appoint a conservator or receiver for a national bank.

(2) *POWERS.*—The conservator or receiver for an uninsured State member bank referred to in paragraph (1) shall exercise the same powers, functions, and duties, subject to the same limitations, as a conservator or receiver for a national bank.

(b) *BOARD AUTHORITY.*—The Board shall have the same authority with respect to any conservator or receiver appointed under subsection (a), and the uninsured State member bank for which the conservator or receiver has been appointed, as the Comptroller of the Currency has with respect to a conservator or receiver for a national bank and the national bank for which the conservator or receiver has been appointed.

(c) *BANKRUPTCY PROCEEDINGS.*—The Board (in the case of an uninsured State member bank which operates, or operates as, such a multilateral clearing organization) may direct a conservator or receiver appointed for such bank to file a petition pursuant to title 11, United States Code, in which case, title 11, United States Code,

shall apply to such bank in lieu of otherwise applicable Federal or State insolvency law.

* * * * *

BANKING CORPORATIONS AUTHORIZED TO DO FOREIGN BANKING BUSINESS

SEC. 25A. Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this section, and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five: *Provided*, That nothing in this section shall be construed to deny the right of the Secretary of the Treasury to use any corporation organized under this section as depositaries in Panama and the Panama Canal Zone, or in the Philippine Islands and other insular possessions and dependencies of the United States.

* * * * *

【Whenever the Board of Governors of the Federal Reserve System shall become satisfied of the insolvency of any such corporation, it may appoint a receiver who shall take possession of all of the property and assets of the corporation and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller of the Currency of the United States: *Provided, however*, That the assets of the corporation subject to the laws of other countries or jurisdictions shall be dealt with in accordance with the terms of such laws.】

(16) APPOINTMENT OF RECEIVER OR CONSERVATOR.—

(A) *IN GENERAL.*—The Board may appoint a conservator or receiver for a corporation organized under the provisions of this section to the same extent and in the same manner as the Comptroller of the Currency may appoint a conservator or receiver for a national bank, and the conservator or receiver for such corporation shall exercise the same powers, functions, and duties, subject to the same limitations, as a conservator or receiver for a national bank.

(B) *EQUIVALENT AUTHORITY.*—The Board shall have the same authority with respect to any conservator or receiver appointed for a corporation organized under the provisions of this section under this paragraph and any such corporation as the Comptroller of the Currency has with respect to a conservator or receiver of a national bank and the national bank for which a conservator or receiver has been appointed.

(C) *TITLE 11 PETITIONS.*—The Board may direct the conservator or receiver of a corporation organized under the provisions of this section to file a petition pursuant to title 11, United States Code, in which case, title 11, United

States Code, shall apply to the corporation in lieu of otherwise applicable Federal or State insolvency law.

* * * * *

TITLE 11, UNITED STATES CODE

* * * * *

CHAPTER 1—GENERAL PROVISIONS

* * * * *

§ 101. Definitions

In this title—

(1) * * *

* * * * *

[(22) “financial institution” means a person that is a commercial or savings bank, industrial savings bank, savings and loan association, or trust company and, when any such person is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741 of this title, such customer;]

(22) *the term “financial institution”—*

(A) means 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, a bank or a corporation organized under section 25A of the Federal Reserve Act and, when any such bank or entity is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741, such customer; 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;

(22A) *“financial participant” means an entity that, at the time it enters into a securities contract, commodity contract or forward contract, or at the time of the filing of the petition, has 1 or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of at least \$1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least \$100,000,000 (aggregated across counterparties) in 1 or more such agreement or transaction with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period;*

* * * * *

(25) **“forward contract” [means a contract] means—**

(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the fu-

ture becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction~~], or any combination thereof or option thereon;~~], or any other similar agreement;

(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B) or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), but not to exceed the actual value of such contract on the date of the filing of the petition;

[(26) “forward contract merchant” 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) of this title, 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;]

(26) “forward contract merchant” means a Federal reserve bank, or an entity whose business consists in whole or in part of entering into forward contracts as or with merchants or in a commodity, as defined or in section 761, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing or in the forward contract trade;

* * * * *

(38A) “master netting agreement” means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or closeout, under or in connection with 1 or more contracts that are described in any 1 or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to 1 or more of the foregoing. If a master netting agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), the master netting agreement shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in

any 1 or more of the paragraphs (1) through (5) of section 561(a);

(38B) “master netting agreement participant” means an entity that, at any time before the filing of the petition, is a party to an outstanding master netting agreement with the debtor;

* * * * *

(46) “repo participant” means an entity that, [on any day during the period beginning 90 days before the date of] at any time before the filing of the petition, has an outstanding repurchase agreement with the debtor;

[(47) “repurchase agreement” (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers’ acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers’ acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;]

(47) “repurchase agreement” (which definition also applies to a “reverse repurchase agreement”)—

(A) means—

(i) an agreement, including related terms, which provides for the transfer of 1 or more certificates of deposit, mortgage-related securities (as defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers’ acceptances, qualified foreign government securities, or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, securities, loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers’ acceptance, securities, loans, or interests of the kind described above, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;

(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);

(iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii);

(iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this para-

graph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), or (iii); or

(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), but not to exceed the actual value of such contract on the date of the filing of the petition; and

(B) does not include a repurchase obligation under a participation in a commercial mortgage loan, and, for purposes of this paragraph, the term “qualified foreign government security” means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development;

(48) “securities clearing agency” means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A;

* * * * *

[(53B) “swap agreement” means—

[(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

[(B) any combination of the foregoing; or

[(C) a master agreement for any of the foregoing together with all supplements;]

(53B) “swap agreement”—

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or an equity swap, option, future, or forward agreement; a debt index or a debt swap, option, future, or forward agreement; a credit spread or a credit swap, option, future, or forward agreement; a commodity index or a commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

(ii) any agreement or transaction similar to any other agreement or transaction referred to in this paragraph that—

(I) is presently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, or option on 1 or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value;

(iii) any combination of agreements or transactions referred to in this paragraph;

(iv) any option to enter into an agreement or transaction referred to in this paragraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(B) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subparagraph (A), but not to exceed the actual value of such contract on the date of the filing of the petition; and

(C) is applicable for purposes of this title only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, and the regulations prescribed by the Securities and Exchange Commission or the Commodity Futures Trading Commission.

* * * * *

(54A) the term “uninsured State member bank” means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation; and

* * * * *

§ 103. Applicability of chapters

(a) * * *

* * * * *

(e) SCOPE OF APPLICATION.—Subchapter V of chapter 7 of this title shall apply only in a case under such chapter concerning the liquidation of 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 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

[(e)] *(f)* Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

[(f)] *(g)* Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

[(g)] *(h)* Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

[(h)] *(i)* Chapter 13 of this title applies only in a case under such chapter.

[(i)] *(j)* Chapter 12 of this title applies only in a case under such chapter.

* * * * *

§ 109. Who may be a debtor

(a) * * *

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act **[(; or)];** *except that 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 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or*

* * * * *

[(d)] Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and 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 of

the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

* * * * *

CHAPTER 3—CASE ADMINISTRATION

* * * * *

SUBCHAPTER I—COMMENCEMENT OF A CASE

* * * * *

§ 304. Cases ancillary to foreign proceedings

(a) * * *

* * * * *

(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case ancillary to a foreign proceeding under this section or any other section of this title so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any proceeding under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

SUBCHAPTER IV—ADMINISTRATIVE POWERS

* * * * *

§ 362. Automatic stay

(a) * * *

* * * * *

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) * * *

* * * * *

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, **[financial institutions,]** *financial institution, financial participant* or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for 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, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, *pledged to and under the control of*, or due from such commodity broker, forward contract merchant, stockbroker, **[financial institutions,]** *financial institution, financial participant* or securities

clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, *pledged to and under the control of*, or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

* * * * *

[(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or]

(17) under subsection (a), of the setoff by a swap participant of a mutual debt and claim under or in connection with 1 or more swap agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property held by, pledged to and under the control of, or due from such swap participant to margin, guarantee, secure, or settle any swap agreement;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition[.]; or

(19) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with 1 or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such agreements or against cash, securities, or other property held by, pledged to and under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent such participant is eligible to exercise such offset rights under paragraph

(6), (7), or (17) for each individual contract covered by the master netting agreement in issue.

* * * * *

(i) *LIMITATION.—The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), or (17), or (32) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.*

* * * * *

CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

* * * * *

SUBCHAPTER III—THE ESTATE

541. Property of the estate.

* * * * *

- 555. Contractual right to liquidate a securities contract.
- 556. Contractual right to liquidate a commodity contract or forward contract. **§**
- 555. *Contractual right to liquidate, terminate, or accelerate a securities contract.*
- 556. *Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract.*

* * * * *

- 559. Contractual right to liquidate a repurchase agreement.
- 560. Contractual right to terminate a swap agreement. **§**
- 559. *Contractual right to liquidate, terminate, or accelerate a repurchase agreement.*
- 560. *Contractual right to liquidate, terminate, or accelerate a swap agreement.*
- 561. *Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts.*
- 562. *Damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreements.*

* * * * *

SUBCHAPTER I—CREDITORS AND CLAIMS

* * * * *

§ 502. Allowance of claims or interests

(a) * * *

* * * * *

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

* * * * *

SUBCHAPTER III—THE ESTATE

§ 541. Property of the estate

(a) * * *

* * * * *

(b) Property of the estate does not include—

(1) * * *

* * * * *

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A) * * *

* * * * *

(B)(i) * * *

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; **[or]**

(5) any eligible asset (or proceeds thereof), to the extent that such eligible asset was transferred by the debtor before the date of commencement of the case, to an eligible entity in connection with an asset-backed securitization, except to the extent such asset (or proceeds or value thereof) may be recovered by the trustee under section 550 by virtue of avoidance under section 548(a)(1); or

[(5)] (6) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) * * *

* * * * *

(e) For purposes of this section, the following definitions shall apply:

(1) the term “asset-backed securitization” means a transaction in which eligible assets transferred to an eligible entity are used as the source of payment on securities, including all securities issued by governmental units, at least 1 class or tranche of which is rated investment grade by 1 or more nationally recognized securities rating organizations, when the securities are initially issued by an issuer;

(2) the term “eligible asset” means—

(A) financial assets (including interests therein and proceeds thereof), either fixed or revolving, whether or not such assets are in existence as of the date of the transfer, including residential and commercial mortgage loans, consumer receivables, trade receivables, assets of governmental units (including payment obligations relating to taxes, receipts, fines, tickets, and other sources of revenue), and lease receivables, that, by their terms, convert into cash within a finite time period, plus any residual interest in property subject to receivables included in such financial assets plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders;

(B) cash; and

(C) securities, including all securities issued by governmental units.

(3) the term “eligible entity” means—

(A) an issuer; or

(B) a trust, corporation, partnership, governmental unit, limited liability company (including a single member limited liability company), or other entity engaged exclusively in the business of acquiring and transferring eligible assets directly or indirectly to an issuer and taking actions ancillary thereto;

(4) the term “issuer” means a trust, corporation, partnership, governmental unit, limited liability company (including a single member limited liability company), or other entity engaged exclusively in the business of acquiring and holding eligible assets, issuing securities backed by eligible assets, and taking actions ancillary thereto; and

(5) the term “transferred” means the debtor, pursuant to a written agreement, represented and warranted that eligible assets were sold, contributed, or otherwise conveyed with the intention of removing them from the estate of the debtor pursuant to subsection (b)(5) (whether or not reference is made to this title or any section of this title), irrespective, without limitation, of—

(A) whether the debtor directly or indirectly obtained or held an interest in the issuer or in any securities issued by the issuer;

(B) whether the debtor had an obligation to repurchase or to service or supervise the servicing of all or any portion of such eligible assets; or

(C) the characterization of such sale, contribution, or other conveyance for tax, accounting, regulatory reporting, or other purposes.

* * * * *

§ 546. Limitations on avoiding powers

(a) * * *

* * * * *

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, 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, *financial participant*, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

* * * * *

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer [under a swap agreement], made by or to a swap participant, [in connection with a swap agreement] *under or in connection with any swap agreement* and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

* * * * *

(j) *Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b), the trustee may not avoid a transfer made by or to a master*

netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A), and except to the extent the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

* * * * *

§ 548. Fraudulent transfers and obligations

(a) * * *

* * * * *

(d)(1) * * *

(2) In this section—

(A) * * *

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, *financial participant*, or securities clearing agency that receives 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, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; **[and]**

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer**【.】**; *and*

(E) *a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except, with respect to a transfer under any individual contract covered thereby, to the extent such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.*

* * * * *

§ 553. Setoff

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that—

(1) * * *

* * * * *

(3) the debt owed to the debtor by such creditor was incurred by such creditor—

(A) * * *

* * * * *

(C) for the purpose of obtaining a right of setoff against the debtor *(except for a setoff of a kind described in section*

362(b)(6), 362(b)(7), 362(b)(17), 362(b)(32), 555, 556, 559, 560 or 561).

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), ~~362(b)(14)~~ 362(b)(17), 362(b)(32), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) * * *

* * * * *

[§ 555. Contractual right to liquidate a securities contract]

§ 555. Contractual right to liquidate, terminate, or accelerate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, *financial participant*, or securities clearing agency to cause the ~~liquidation~~ *liquidation, termination, or acceleration* of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, *a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.*

[§ 556. Contractual right to liquidate a commodities contract or forward contract]

§ 556. Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract

The contractual right of a commodity broker, *financial participant* or forward contract merchant to cause the ~~liquidation~~ *liquidation, termination, or acceleration* of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a clearing organization or contract market or in a resolution of the governing board thereof and a right, whether or not evi-

denced in writing, arising under common law, under law merchant or by reason of normal business practice.

* * * * *

【§ 559. Contractual right to liquidate a repurchase agreement】

§ 559. *Contractual right to liquidate, terminate, or accelerate a repurchase agreement*

The exercise of a contractual right of a repo participant to cause the [liquidation] *liquidation, termination, or acceleration* of a repurchase agreement because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. In the event that a repo participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw, applicable to each party to the repurchase agreement, of a national securities exchange, a national securities association, or a securities clearing agency, and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

【§ 560. Contractual right to terminate a swap agreement】

§ 560. *Contractual right to liquidate, terminate, or accelerate a swap agreement*

The exercise of any contractual right of any swap participant to cause the [termination of a swap agreement] *liquidation, termination, or acceleration of 1 or more swap agreements* because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or [in connection with any swap agreement] *in connection with the termination, liquidation, or acceleration of 1 or more swap agreements* shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term “contractual right” includes a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

§561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts

(a) *IN GENERAL.*—Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment amounts or other transfer obligations arising under or in connection with 1 or more (or the termination, liquidation, or acceleration of 1 or more)—

- (1) securities contracts, as defined in section 741(7);
- (2) commodity contracts, as defined in section 761(4);
- (3) forward contracts;
- (4) repurchase agreements;
- (5) swap agreements; or
- (6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

(b) *EXCEPTION.*—

(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7—

(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a), except to the extent the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

(B) another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract entered into or held on behalf of a customer of the debtor against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a).

(c) *RULE OF APPLICATION.*—Subparagraphs (A) and (B) of subsection (b)(2) shall not be construed as prohibiting the offset of claims and obligations arising pursuant to—

(1) a cross-margining arrangement that has been approved by the Commodity Futures Trading Commission or that has been submitted to such Commission pursuant to section 5a(a)(12) of the Commodity Exchange Act and has been permitted to go into effect; or

(2) another netting arrangement, between a clearing organization (as defined in section 761) and another entity, that has been approved by the Commodity Futures Trading Commission.

(d) *DEFINITION.*—As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board

thereof, and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

§562. Damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreements

If the trustee rejects a swap agreement, securities contract as defined in section 741, forward contract, commodity contract (as defined in section 761) repurchase agreement, or master netting agreement pursuant to section 365(a), or if a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant liquidates, terminates, or accelerates such contract or agreement, damages shall be measured as of the earlier of—

- (1) the date of such rejection; or
- (2) the date of such liquidation, termination, or acceleration.

* * * * *

CHAPTER 7—LIQUIDATION

* * * * *

SUBCHAPTER III—STOCKBROKER LIQUIDATION

741. Definitions for this subchapter.

* * * * *

753. *Stockbroker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, financial participants, securities clearing agencies, swap participants, repo participants, and master netting agreement participants.*

SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION

* * * * *

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.*

SUBCHAPTER V—CLEARING BANK LIQUIDATION

Sec.

781. *Definitions.*

782. *Selection of trustee.*

783. *Additional powers of trustee.*

784. *Right to be heard.*

* * * * *

SUBCHAPTER III—STOCKBROKER LIQUIDATION

§ 741. Definitions for this subchapter

In this subchapter—

- (1) * * *

* * * * *

[(7) “securities contract” means contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value

thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency;】

(7) “securities contract”—

(A) means—

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan or any interest in a mortgage loan, a group or index of securities, certificates of deposit or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

(ii) any option entered into on a national securities exchange relating to foreign currencies;

(iii) the guarantee by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

(iv) any margin loan;

(v) any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph;

(vi) any combination of the agreements or transactions referred to in this paragraph;

(vii) any option to enter into any agreement or transaction referred to in this paragraph;

(viii) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this paragraph, except that such master agreement shall be considered to be a securities contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii); or

(ix) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, but not to exceed the actual value of such contract on the date of the filing of the petition; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan.

* * * * *

§ 753. Stockbroker 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, securities clearing agency, swap participant, repo participant, financial 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.

SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION

§ 761. Definitions for this subchapter

In this subchapter—

(1) * * *

* * * * *

(4) “commodity contract” means—

(A) * * *

* * * * *

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; **[or]**

* * * * *

(F) any other agreement or transaction that is similar to an agreement or transaction referred to in this paragraph;

(G) any combination of the agreements or transactions referred to in this paragraph;

(H) any option to enter into an agreement or transaction referred to in this paragraph;

(I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or

(J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, but not to exceed the actual value of such contract on the date of the filing of the petition;

* * * * *

§ 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.

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, and includes any wholesale bank.*

(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 of the Federal Deposit Insurance Corporation Improvement Act of 1991.*

§ 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.*

§ 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;

(5) transfer assets and liabilities to a bridge bank as provided in paragraphs (1), (3)(A), (5), (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 bank 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.

§ 784. Right to be heard

The Board or a Federal reserve bank (in the case of a clearing bank that is a member of that bank) may raise and may appear and be heard on any issue in a case under this subchapter.

* * * * *

CHAPTER 9—ADJUSTMENT OF DEBTS OF A MUNICIPALITY

* * * * *

§ 901. Applicability of other sections of this title

(a) Sections 301, 344, 347(b), 349, 350(b), 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(1), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, and 1145 of this title apply in a case under this chapter.

* * * * *

FEDERAL DEPOSIT INSURANCE ACT

* * * * *

SEC. 11. (a) * * *

* * * * *

(e) PROVISIONS RELATING TO CONTRACTS ENTERED INTO BEFORE APPOINTMENT OF CONSERVATOR OR RECEIVER.—

(1) * * *

* * * * *

(8) CERTAIN QUALIFIED FINANCIAL CONTRACTS.—

(A) RIGHTS OF PARTIES TO CONTRACTS.—Subject to [paragraph (10)] *paragraphs (9) and (10)* of this subsection and notwithstanding any other provision of this Act (other than subsection (d)(9) of this section and section 13(e)), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right [to cause the termination or liquidation] *such person has to cause the termination, liquidation, or acceleration* of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

[(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or]

(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);

* * * * *

(C) CERTAIN TRANSFERS NOT AVOIDABLE.—

(i) IN GENERAL.—Notwithstanding paragraph [(11)] (12), *section 5242 of the Revised Statutes of the United States (12 U.S.C. 91) or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers*, the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

* * * * *

(D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.—

For purposes of this subsection—

(i) QUALIFIED FINANCIAL CONTRACT.—The term “qualified financial contract” means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, *resolution or order* to be a qualified financial contract for purposes of this paragraph.

[(ii) SECURITIES CONTRACT.—The term “securities contract”—

[(I) has the meaning given to such term in section 741 of title 11, United States Code, except that the term “security” (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934), and any interest in any mortgage loan or mortgage-related security; and

[(II) does not include any participation in a commercial mortgage loan unless the Corporation

determines by regulation, resolution, or order to include any such participation within the meaning of such term.

[(iii) COMMODITY CONTRACT.—The term “commodity contract” has the meaning given to such term in section 761 of title 11, United States Code.

[(iv) FORWARD CONTRACT.—The term “forward contract” has the meaning given to such term in section 101 of title 11, United States Code.

[(v) REPURCHASE AGREEMENT.—The term “repurchase agreement”—

[(I) has the meaning given to such term in section 101 of title 11, the United States Code, except that the items (as described in such section) which may be subject to any such agreement shall be deemed to include mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934), any mortgage loan, and any interest in any mortgage loan; and

[(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

[(vi) SWAP AGREEMENT.—The term “swap agreement”—

[(I) means any agreement, including the terms and conditions incorporated by reference in any such agreement, which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchased or any other similar agreement, and

[(II) includes any combination of such agreements and any option to enter into any such agreement.

[(vii) TREATMENT OF MASTER AGREEMENT AS 1 SWAP AGREEMENT.—Any master agreement for any agreements described in clause (vi)(I) together with all supplements to such master agreement shall be treated as 1 swap agreement.

[(viii) TRANSFER.—The term “transfer” has the meaning given to such term in section 101 of title 11, United States Code.]

(ii) SECURITIES CONTRACT.—The term “securities contract”—

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including

any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index, or option;

(V) means any margin loan;

(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) means any combination of the agreements or transactions referred to in this clause;

(VIII) means any option to enter into any agreement or transaction referred to in this clause;

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause.

(iii) **COMMODITY CONTRACT.**—The term “commodity contract” means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) any combination of the agreements or transactions referred to in this clause;

(VIII) any option to enter into any agreement or transaction referred to in this clause;

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause.

(iv) **FORWARD CONTRACT.**—The term “forward contract” means—

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity 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, or product or byproduct thereof, with a maturity date more than 2 days after the date the contract is entered into, including a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an agreement or transaction referred to in subclause

(I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV).

(v) **REPURCHASE AGREEMENT.**—The term “repurchase agreement” (which definition also applies to the term “reverse repurchase agreement”)—

(I) means an agreement, including related terms, which provides for the transfer of 1 or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers’ acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, securities, loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers’ acceptances, securities, loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a re-

purchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V).

For purposes of this clause, the term “qualified foreign government security” means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development (as determined by regulation or order adopted by the appropriate Federal banking authority).

(vi) SWAP AGREEMENT.—The term “swap agreement” means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or a weather option;

(II) any agreement or transaction similar to any other agreement or transaction referred to in this clause that is presently, or in the future becomes, regularly entered into in the swap market (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on 1 or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value;

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agree-

ment shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subparagraph (I), (II), (III), (IV), or (V).

Such term is applicable for purposes of this title only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, and the regulations promulgated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.

(vii) TREATMENT OF MASTER AGREEMENT AS 1 AGREEMENT.—Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

(viii) TRANSFER.—The term “transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the depository institutions’s equity of redemption.

(E) CERTAIN PROTECTIONS IN EVENT OF APPOINTMENT OF CONSERVATOR.—Notwithstanding any other provision of this Act (【other than paragraph (12) of this subsection, subsection (d)(9)】 *other than subsections (d)(9) and (e)(10)* of this section, and section 13(e) of this Act), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a depository institution in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

[(ii) any right under any security arrangement relating to such qualified financial contracts; or]

(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);

* * * * *

(F) CLARIFICATION.—No provision of law shall be construed as limiting the right or power of the Corporation, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Corporation to transfer any qualified financial contract in accordance with paragraphs (9) and (10) of this subsection or to disaffirm or repudiate any such contract in accordance with paragraph (1).

(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

(i) IN GENERAL.—Notwithstanding the provisions of subparagraphs (A) and (E), and sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, no walkaway clause shall be enforceable in a qualified financial contract of an insured depository institution in default.

(ii) WALKAWAY CLAUSE DEFINED.—For purposes of this subparagraph, the term “walkaway clause” means a provision in a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party’s status as a non-defaulting party.

(H) RECORDKEEPING REQUIREMENTS.—The Corporation, in consultation with the appropriate Federal banking agencies, may prescribe regulations requiring more detailed recordkeeping with respect to qualified financial contracts (including market valuations) by insured depository institutions.

[(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—

[(A) transfer to 1 depository institution (other than a depository institution in default)—

[(i) all qualified financial contracts between—

[(I) any person or any affiliate of such person;

and

[(II) the depository institution in default;

[(ii) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the

claims of general unsecured creditors of such institution);

[(iii) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

[(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

[(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).]

(9) *TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.*—

(A) *IN GENERAL.*—*In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—*

(i) *transfer to 1 financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—*

(I) *all qualified financial contracts between any person or any affiliate of such person and the depository institution in default;*

(II) *all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);*

(III) *all claims of such depository institution against such person or any affiliate of such person under any such contract; and*

(IV) *all property securing or any other credit enhancement for any contract described in subclause (I) or any claim described in subclause (II) or (III) under any such contract; or*

(ii) *transfer none of the qualified financial contracts, claims, property or other credit enhancement referred to in clause (i) (with respect to such person and any affiliate of such person).*

(B) *TRANSFER TO FOREIGN BANK, FOREIGN FINANCIAL INSTITUTION, OR BRANCH OR AGENCY OF A FOREIGN BANK OR FINANCIAL INSTITUTION.*—*In transferring any qualified financial contracts and related claims and property pursuant to subparagraph (A)(i), the conservator or receiver for such depository institution shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security*

agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

(C) *TRANSFER OF CONTRACTS SUBJECT TO THE RULES OF A CLEARING ORGANIZATION.*—In the event that a conservator or receiver transfers any qualified financial contract and related claims, property and credit enhancements pursuant to subparagraph (A)(i) and such contract is subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

(D) *DEFINITION.*—For purposes of this section, the term “financial institution” means a broker or dealer, a depository institution, a futures commission merchant, or any other institution as determined by the Corporation by regulation to be a financial institution.

(10) *NOTIFICATION OF TRANSFER.*—

(A) *IN GENERAL.*—If—

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract,

the conservator or receiver shall use such conservator’s or receiver’s best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time) on the business day following such transfer] *the conservator or receiver shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver, in the case of a receivership, or the business day following such transfer, in the case of a conservatorship.*

(B) *CERTAIN RIGHTS NOT ENFORCEABLE.*—

(i) *RECEIVERSHIP.*—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right such person has to terminate, liquidate, or net such contract under paragraph (8)(A) or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 solely by reason of or incidental to the appointment of a receiver for the depository institution (or the insolvency or financial condition of the depository institution for which the receiver has been appointed)—

(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) *CONSERVATORSHIP.*—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right such person has to terminate, liquidate, or net such contract under paragraph (8)(E) or section 403 or 404 of the Federal

Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a conservator for the depository institution (or the insolvency or financial condition of the depository institution for which the conservator has been appointed).

(iii) NOTICE.—For purposes of this subsection, the Corporation as receiver or conservator of an insured depository institution shall be deemed to have notified a person who is a party to a qualified financial contract with such depository institution if the Corporation has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A) of this subsection.

(C) TREATMENT OF BRIDGE BANKS.—The following institutions shall not be considered a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding for purposes of paragraph (9)—

(i) a bridge bank; or

(ii) a depository institution organized by the Corporation, for which a conservator is appointed either—

(I) immediately upon the organization of the institution; or

(II) at the time of a purchase and assumption transaction between such institution and the Corporation as receiver for a depository institution in default.

[(B)] (D) BUSINESS DAY DEFINED.—For purposes of this paragraph, the term “business day” means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In exercising the rights of disaffirmance or repudiation of a conservator or receiver with respect to any qualified financial contract to which an insured depository institution is a party, the conservator or receiver for such institution shall either—

(A) disaffirm or repudiate all qualified financial contracts between—

(i) any person or any affiliate of such person; and

(ii) the depository institution in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

[(11)] (12) CERTAIN SECURITY INTERESTS NOT AVOIDABLE.—No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution’s insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

[(12)] (13) AUTHORITY TO ENFORCE CONTRACTS.—

(A) IN GENERAL.—The conservator or receiver may enforce any contract, other than a director’s or officer’s liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment *or the exercise of rights or powers* of a conservator or receiver.

* * * * *

[(13)] (14) EXCEPTION FOR FEDERAL RESERVE AND FEDERAL HOME LOAN BANKS.—No provision of this subsection shall apply with respect to—

(A) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

* * * * *

[(14)] (15) SELLING CREDIT CARD ACCOUNTS RECEIVABLE.—

(A) NOTIFICATION REQUIRED.—An undercapitalized insured depository institution (as defined in section 38) shall notify the Corporation in writing before entering into an agreement to sell credit card accounts receivable.

* * * * *

[(15)] (16) CERTAIN CREDIT CARD CUSTOMER LISTS PROTECTED.—

(A) IN GENERAL.—If any insured depository institution sells credit card accounts receivable under an agreement negotiated at arm’s length that provides for the sale of the institution’s credit card customer list, the Corporation shall prohibit any party to a transaction with respect to the institution under this section or section 13 from using the list, except as permitted under the agreement.

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SEC. 13. (a) * * *

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(e) AGREEMENTS AGAINST INTERESTS OF CORPORATION.—

(1) * * *

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[(2) PUBLIC DEPOSITS.—An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 11(a)(2) shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.]

(2) EXEMPTIONS FROM CONTEMPORANEOUS EXECUTION REQUIREMENT.—An agreement to provide for the lawful collateralization of—

(A) deposits of, or other credit extension by, a Federal, State, or local governmental entity, or of any depositor referred to in section 11(a)(2), including an agreement to provide collateral in lieu of a surety bond;

(B) bankruptcy estate funds pursuant to section 345(b)(2) of title 11, United States Code;

(C) extensions of credit, including any overdraft, from a Federal reserve bank or Federal home loan bank; or

(D) 1 or more qualified financial contracts, as defined in section 11(e)(8)(D),

shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.

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SEC. 49. RETAIL SWAP CUSTOMER PROTECTIONS.

(a) **REGULATIONS AUTHORIZED.**—The Board of Governors of the Federal Reserve System and the Secretary of the Treasury may, in consultation with appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, jointly prescribe customer protection regulations that apply to sales practices relating to swap agreements (as defined in section 206(b) of the Gramm-Leach-Bliley Act) between financial institutions and retail customers.

(b) **SALES PRACTICE REGULATIONS.**—The regulations prescribed under subsection (a) may address—

(1) the information that financial institutions shall obtain from retail customers in order to determine whether swap agreements recommended by the financial institution to retail customers are appropriate in light of the retail customer's net worth, ability and willingness to incur losses, risk management needs, financial goals, investment experience and history, and other indicia of appropriateness;

(2) information that financial institutions shall provide to retail customers to help the retail customers understand the economic characteristics and risks of swap agreements recommended by financial institutions;

(3) measures to protect retail customers against fraudulent, deceptive, and manipulative acts and practices;

(4) the extent to which access of retail customers to particular classes of swap agreements should be restricted; and

(5) such other matters as the Secretary of the Treasury and the Board of Governors of the Federal Reserve System determine are necessary or appropriate for the protection of retail customers of swap agreements.

(c) **DEFINITIONS.**—

(1) **FINANCIAL INSTITUTION.**—The term “financial institution” means a person described in subclause (I), (II), (III), (IV), (V), or (VI) of section 2(c)(2)(B)(ii) of the Commodity Exchange Act.

(2) **RETAIL CUSTOMER.**—The term “retail customer” means a person other than an eligible contract participant (as defined in section 1a(11) of the Commodity Exchange Act).

(d) **ENFORCEMENT.**—The regulations prescribed under subsection (a) shall be enforced as follows:

(1) Subject to section 45 of the Federal Deposit Insurance Act, under section 8 of the Federal Deposit Insurance Act, in the case of—

(A) any national bank, Federal branch or Federal agency of a foreign bank, or any subsidiary of a national bank (other than any broker, dealer, investment company or investment adviser) by the Comptroller of the Currency;

(B) any member bank (other than a national bank), branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), commercial lending company owned or controlled by a foreign bank, organization operating under section 25 or 25A of the Federal Reserve Act, any subsidiary of any such entity (other than any broker, dealer, investment company or investment adviser) and any bank holding company and any nonbank affiliate of any such company (other than any broker, dealer, investment company or investment adviser) by the Board of Governors of the Federal Reserve System;

(C) any insured State nonmember bank, insured State branch of a foreign bank, or any subsidiary of any such entity (other than any broker, dealer, investment company, or investment adviser) by the Board of Directors of the Federal Deposit Insurance Corporation; and

(D) any savings association the deposits of which are insured by the Corporation, any savings and loan holding company, or any subsidiary of any such savings association or holding company (other than any broker, dealer, investment company or investment adviser) by the Director of the Office of Thrift Supervision.

(2) Under the Federal Credit Union Act, by the National Credit Union Administration Board with respect to any federally insured credit union, and any subsidiaries of such an entity.

(3) Under the Securities Exchange Act of 1934, by the Securities and Exchange Commission with respect to any registered broker or dealer, or any associated person thereof that is not otherwise regulated.

(4) Under the Commodity Exchange Act, by the Commodity Futures Trading Commission, with respect to any registered futures commission merchant, or any affiliated person of any such futures commission merchant that is not otherwise regulated.

(5) Under State insurance law, in the case of any person engaged in providing insurance, or any affiliate of any such person that is not otherwise regulated, by the applicable State insurance authority of the State in which the person is domiciled.

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SECTION 5 OF THE SECURITIES INVESTOR PROTECTION ACT OF 1970

SEC. 5. PROTECTION OF CUSTOMERS.

(a) * * *

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(b) COURT ACTION.—

(1) * * *

* * * * *

(2) JURISDICTION AND POWERS OF COURT.—

(A) * * *

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(C) EXCEPTION FROM STAY.—

(i) Notwithstanding section 362 of title 11, United States Code, neither the filing of an application under subsection (a)(3) nor any order or decree obtained by the Securities Investor Protection Corporation from the court shall operate as a stay of any contractual rights of a creditor to liquidate, terminate, or accelerate a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, each as defined in title 11, United States Code, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with 1 or more of such contracts or agreements, or to foreclose on any cash collateral pledged by the debtor whether or not with respect to 1 or more of such contracts or agreements.

(ii) Notwithstanding clause (i), such application, order, or decree may operate as a stay of the foreclosure on or disposition of securities collateral pledged by the debtor, whether or not with respect to 1 or more of such contracts or agreements, securities sold by the debtor under a repurchase agreement or securities lent under a securities lending agreement.

(iii) As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.

* * * * *

ADDITIONAL VIEWS

When combined, Sections 107 and 133 of H.R. 4541, as reported by the Committee on Banking and Financial Services, have the effect of preventing parties who are not otherwise "eligible contract participants" from engaging in swaps agreements unless and until the Department of the Treasury and the Federal Reserve Board jointly promulgate rules to protect such now ineligible parties in such participation. This means most retail customers, including many small businesses, will be ineligible absent such rules. No mandates, time constraints, or other limitations have been placed upon the Treasury or the Federal Reserve in formulating such rules, including rules of classification of such customers and rules of participatory exclusion. Although the Department of the Treasury and the Federal Reserve are required to report to the Congress if they have not completed such rules within one year of enactment of H.R. 4541, this reporting requirement does not limit the discretion of these two entities in any manner.

The rationale for the treatment in Sections 107 and 133 is that swaps can be complex instruments requiring a variety of protections for financially unsophisticated consumers, such as plain disclosures; "know your customer" benchmarks for permitted purchases and sales; and warnings as to potential liability. Moreover, swaps come in a great variety of tailored obligations, some of which might, indeed, be so complex as to be inappropriate for all but the most seasoned of investors. It is this very variety which has suggested the delegation of authority to the Department of the Treasury and the Federal Reserve Board to design protections for consumer and small business swaps, since all possible combinations of terms to comprise a swap cannot be addressed by the innately more general capacities of legislation.

In voting for this broad grant to the Department of the Treasury and the Federal Reserve Board, this Member realizes that the swaps market can be a valuable development for the evolving financial world, but cautions that without meaningful consumer protections, this market could fall into disrepute and be the subject of concerted criticism, possibly resulting in crippling legislation. There is already a history involving large corporations in which litigation and regulatory fines were imposed even though the investors were highly experienced. Every effort should be made to assure that any consumer protection rules to be promulgated would prevent repeated incidents for consumers, especially since it is likely the alleged wrongs would be for widely marketed consumer products which are open to class actions.

JOHN J. LAFALCE.

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