

FINANCIAL CONTRACT NETTING IMPROVEMENT ACT OF  
2000

SEPTEMBER 7, 2000.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 1161]

[Including cost estimate of the Congressional Budget Office]

The Committee on Banking and Financial Services, to whom was referred the bill (H.R. 1161) to revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

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

**SEC. 2. 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);” and

(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. 3. 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);” and

(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. 4. 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. 5. 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)), as amended by section 2(i), is further amended in subparagraph (C)(i), by striking “(11)” and inserting “(12)”.

**SEC. 6. 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. 7. 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. 8. 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 inserting “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 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.”;

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

(1) by striking paragraph (22) and inserting the following new paragraph:

“(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;”;

(2) 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;”;

(3) 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 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.”

(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”;

(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. 9. 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. 10. 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. 11. 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. 12. SIPC STAY.

Section 5(b)(2) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78see(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. 13. 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, con-

vert 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. 14. APPLICATION OF AMENDMENTS.

The amendments made by this Act 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.

#### PURPOSE AND SUMMARY

H.R. 1161, the Financial Contract Netting Improvement Act of 2000 (Act), is based on legislative proposals forwarded to Congress by the nation’s financial regulators in order to guard against systemic risk to the nation’s financial system. The major provisions of this Act come from recommendations made by the President’s Working Group on Financial Markets following a review of current statutory provisions governing the treatment of qualified financial contracts and similar financial contracts upon the insolvency of a counter party. The Working Group for these recommendations consisted of the Securities and Exchange Commission; the Commodity Futures Trading Commission; the Federal Deposit Insurance Corporation; the Department of the Treasury, including the Office of the Comptroller of the Currency; the Board of Governors of the Federal Reserve System; and the Federal Reserve Bank of New York. The recommendations of the Working Group were transmitted to Congress on March 16, 1998.

The provisions forwarded by the Working Group amend the U.S. Bankruptcy Code; the Federal Deposit Insurance Act (FDIA), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); the payment system risk reduction and netting provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA); and the Securities Investor Protection Act of 1971 (SIPA). These amendments address the treatment of certain financial transactions following the insol-

veny of a party to such transactions. The amendments are designed to clarify and improve consistency between the applicable statutes and to minimize risk of a disruption within or between financial markets upon the insolvency of a market participant. In addition, the Bankruptcy Code is amended to provide that certain assets transferred to an eligible entity in connection with an asset-backed securitization generally will be considered as valid transfers and not be included within the bankruptcy estate of the debtor.

#### BACKGROUND AND NEED FOR LEGISLATION

Since its adoption in 1978, the Bankruptcy Code has been amended several times to afford different treatment for certain financial transactions upon the bankruptcy of a debtor, as compared with the treatment of other commercial contracts and transactions. These amendments were designed to further the policy goal of minimizing the systemic risk potentially arising from certain inter-related financial activities and markets. Similar amendments have been made to the FDIA and FDICIA, and both the Federal Deposit Insurance Corporation (FDIC) and the Securities Investor Protection Corporation (SIPC) have issued policy statements and letters clarifying general issues in this regard.

Systemic risk is the risk that the failure of a firm or disruption of a market or settlement system will cause widespread difficulties at other firms, in other market segments or in the financial system as a whole. If participants in certain financial activities are unable to enforce their rights to terminate financial contracts with an insolvent entity in a timely manner, or to offset or net their various contractual obligations, the resulting uncertainty and potential lack of liquidity could increase the risk of an inter-market disruption.

The Committee and Congress have taken steps in the past to ensure that the risk of such systemic events is minimized. For example, both the Bankruptcy Code and the FDIA contain provisions that protect the rights of financial participants to terminate swap agreements, forward contracts, securities contracts, commodity contracts and repurchase agreements following the bankruptcy or insolvency of a counter party to such contracts or agreements. Furthermore, other provisions prevent transfers made under such circumstances from being avoided as preferences or fraudulent conveyances (except when made with actual intent to defraud). Protections also are afforded to ensure that the netting, set off and collateral foreclosure provisions of such transactions and master agreements for such transactions are enforceable.

In addition, FDICIA was enacted in 1991 to protect the enforceability of close-out netting provisions in "netting contracts" between "financial institutions." FDICIA states that the goal of enforcing netting arrangements is to reduce systemic risk within the banking system and financial markets. In simple terms, netting occurs when money payments, entitlements, or obligations arising under one or more contracts or a clearing arrangement are all offset against each other leaving one net amount.

The orderly resolution of insolvencies involving counter parties to such contracts also is an important element in the reduction of systemic risk. The FDIA allows the receiver of an insolvent insured depository institution the opportunity to review the status of certain contracts to determine whether to terminate or transfer the

contracts to new counter parties. These provisions provide the receiver with flexibility in determining the most appropriate resolution for the failed institution and facilitate the reduction of systemic risk by permitting the transfer, rather than termination, of such contracts.

Not only does this Act update legislation initiated by the Committee in 1989 and 1991 but it also builds on recommendations first contained in a comprehensive report (Part 3 of Committee hearing record 103-88) on derivatives issued on October 28, 1993, by the minority staff of the Committee under the direction of then Ranking Minority Member, Representative Leach. During preparation of the report, the staff submitted a series of questions to Federal financial regulatory bodies concerning the adequacy and consistency of the netting provisions contained in the Bankruptcy Code, FIRREA, and FDICIA. In sum, all agencies stated that the netting provisions should be amended and conformed to provide greater certainty to the market. The agencies stated that the differences in coverage provided by the various acts have created legal uncertainty, emanating mainly from the definitional sections of FIRREA and the Bankruptcy Code which limit netting to specific types of contracts expressly enumerated.

In summary, the insolvency provisions of the Act are designed to clarify the treatment of certain financial contracts upon the insolvency of a counter party and to promote the reduction of systemic risk. These provisions further the goals of prior amendments to the Bankruptcy Code and the FDIA on the treatment of those financial contracts and of the payment system risk reduction provisions in FDICIA. The insolvency provisions of the Act have four principal purposes:

To strengthen the provisions of the Bankruptcy Code and the FDIA that protect the enforceability of termination and close-out netting and related provisions of certain financial agreements and transactions.

To harmonize the treatment of these financial agreements and transactions under the Bankruptcy Code and the FDIA.

To amend the FDIA and FDICIA to clarify that certain rights of the FDIC acting as conservator or receiver for a failed insured depository institution (and in some situations, rights of SIPC and receivers of certain uninsured institutions) cannot be defeated by operation of the terms of FDICIA.

To make other substantive and technical amendments to clarify the enforceability of financial agreements and transactions in bankruptcy or insolvency.

All these changes are designed to further minimize systemic risk to the banking system and the financial markets.

#### HEARINGS

On March 17, 1999, Representatives Leach, LaFalce, and Roukema introduced H.R. 1161. On April 11, 2000, the Committee held a hearing on the Working Group legislative recommendations concerning over-the-counter derivatives, hedge funds, and netting proposals as contained in H.R. 1161. 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, Kirland & 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.

#### COMMITTEE CONSIDERATION AND VOTES

On July 27, 2000, the full Committee met in open session to consider H.R. 1161, the Financial Contract Netting Improvement Act of 2000. A quorum being present, the Committee by voice vote passed H.R. 1161 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 1, 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 7, 2000.*

Hon. JAMES A. LEACH,  
*Chairman, Committee on Banking and Financial Services, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1161, the 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.

Sincerely,

BARRY B. ANDERSON  
(For Dan L. Crippen, Director).

Enclosure.

#### *H.R. 1161—Financial Contract Netting Improvement Act of 2000*

Summary: H.R. 1161 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. The purpose of netting is to reduce the risks, especially the systemic risk associated with activities in derivatives markets, that the failure of one entity will disrupt and endanger financial markets. H.R. 1161 would affect direct spending, but CBO estimates that any such changes would be less than \$500,000 annually.

H.R. 1161 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. H.R. 1161 would impose a new private-sector mandate as defined in UMRA, but CBO estimates that the direct costs of the mandate would be below the an-

nual threshold established by UMRA for private-sector mandates (\$109 million in 2000, adjusted annually for inflation).

Estimated cost to the Federal Government: H.R. 1161 would require 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. 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. 1161. 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. 1161 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.

Although enacting this bill could eliminate certain bankruptcy proceedings, CBO estimates that any reduction in workload would not have a significant impact on the budgets of the Executive Office for United States Trustees or the federal court system.

Pay-as-You-Go Considerations: Under the Balanced Budget and Emergency Deficit Control Act, 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 the FDIC issuing regulations under H.R. 1161 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. 1161 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated Impact on the Private Sector: By requiring insured depository institutions to keep more detailed records for certain financial contracts, H.R. 1161 would impose a new private-sector mandate as defined by UMRA. CBO estimates that the cost of that mandate would not exceed the statutory threshold (\$109 million in 2000, adjusted annually for inflation). Section 9 would authorize the Federal Deposit Insurance Corporation to prescribe additional recordkeeping requirements for certain qualified financial contracts (QFCs) held by depository institutions.

Under the Federal Deposit Insurance Act (FDIA), QFCs are defined for five types of financial contracts: securities contracts, commodity contracts, forward contracts, repurchase agreements, and swap agreements. FDIA provides special rules for the treatment of

QFCs held by an insured depository institution in default for which the FDIC is appointed conservator or receiver. Upon appointment of the FDIC as receiver for an institution, parties to QFCs receive certain benefits and rights which are not available to parties to other types of contracts.

According to the FDIC, the principal purpose of a new record-keeping rule under the bill would be to make certain information on QFCs readily available in the event that the FDIC is appointed as conservator or receiver of an insolvent institution. Under the bill (and in current practice), the FDIC would have the authority to transfer qualified financial contracts of an insolvent institution to another financial institution within 24 hours of being appointed as receiver. Other parties to the QFCs of the insolvent institution would not be able to terminate and net those contracts until the end of the 24-hour grace period. The FDIC does not expect that a recordkeeping rule under the bill would require institutions to collect new information. Rather, the FDIC anticipates that institutions would have to ensure that certain data that they already collect (and record) on QFCs are organized in a manner that would be accessible to the FDIC. Consequently, CBO expects that the direct costs of the mandate would not exceed the threshold established in UMBRA.

Estimate prepared by: Federal Costs: Mark Hadley; Impact on State, Local, and Tribal Governments: Susan Sieg Tompkins; and Impact on the Private Sector: Jim Vandenberg.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON BANKING AND FINANCIAL SERVICES,  
*Washington, DC, September 7, 2000.*

Hon. TOM BLILEY,  
*Chairman, Committee on Commerce, Washington, DC.*

DEAR TOM: I have received your letter concerning H.R. 1161, which the Committee on Banking and Financial Services on July 27, 2000, voted to favorably report to the House. In your letter you indicate that the Committee on Commerce would agree not to seek further consideration of H.R. 1161. I appreciate your cooperation in this matter and understand that the Commerce Committee's jurisdictional interest in this legislation is not prejudiced by such cooperation. Pursuant to your request I will include a copy of your letter and my response in the report to accompany H.R. 1161.

Thanks again for your assistance.

Sincerely,

JAMES A. LEACH, *Chairman.*

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON COMMERCE,  
*Washington, DC, September 6, 2000.*

Hon. JIM LEACH,  
*Chairman, Committee on Banking and Financial Services, Washington, DC.*

DEAR JIM: I am writing with regard to your committee's recent action on H.R. 1161, the Financial Contract Netting Improvement



Act of 1999. As you know, the Committee on Commerce was named as an additional committee of jurisdiction upon the bill's introduction based upon its jurisdiction over securities and exchanges pursuant to Rule X of the Rules of the House of Representatives.

Because of the importance of this legislation, I recognize your desire to bring it before the House in an expeditious manner, and I will not exercise the Committee's right to further consideration of this legislation. By agreeing to waive its consideration of the bill, however, the Committee on Commerce does not waive its jurisdiction of H.R. 1161. In addition, the Committee on Commerce reserves its authority to seek conferees on any provisions of the bill that are within its jurisdiction during any House-Senate conference that may be convened on this or similar legislation. I appreciate your commitment to support any request by the Commerce Committee for conferees on H.R. 1161 or similar legislation.

I request that you include a copy of this letter and your response in your committee report on the bill and as part of the *Record* during consideration of the legislation on the House floor.

Thank you for your attention to these matters.

Sincerely,

TOM BLILEY, *Chairman.*

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

Section 1 cites the Act as the "Financial Contract Netting Improvement Act of 2000".

##### *Section 2. 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 Develop-

ment (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 agreement; 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.

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 subsection (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 3. Authority of the corporation with respect to failed and failing institutions*

Section 3 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 3—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 3 denies enforcement to “walkaway” clauses 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 4. 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 counter parties 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 counter parties 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 5. Amendments relating to disaffirmance or repudiation of qualified financial contracts*

Section 5 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 6. Clarifying amendment relating to master agreements*

Section 6 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 7. 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 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 12 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 uninsured 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 8. 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 2(e) and 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 Co-

operation 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 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.”

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 “financial institution” and “forward contract merchant.” The definition for “financial institution” includes Federal Reserve Banks and the receivers or conservators of insolvent depository institutions.

Subsection (b) 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. 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 other 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 provisions, 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 limitations 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 sections 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 (l) 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 9. Recordkeeping requirements*

Section 9 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 10. Exemptions from contemporaneous execution requirement*

Section 10 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 11. Damage measure*

Section 11 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 12. SIPA stay*

Section 12 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 securities collateral would be entitled to post-insolvency interest to the extent of the collateral.

#### *Section 13. Asset-backed securitizations*

Section 13 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 14. Application of amendments*

Section 14 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):

**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 re-*



ferred 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 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).

(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.*

*(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 relat-*

ing 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.

\* \* \* \* \*  
 SEC. 13. (a) \* \* \*

\* \* \* \* \*  
 (e) AGREEMENTS AGAINST INTERESTS OF CORPORATION.—

(1) \* \* \*  
 \* \* \* \* \*

[(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.

\* \* \* \* \*

**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 *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 organiza-

tion 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.).

\* \* \* \* \*

**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 future 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 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;

(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 Securi-*

*ties and Exchange Commission or the Commodity Futures Trading Commission.*

\* \* \* \* \*

### 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 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.*

\* \* \* \* \*

**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.

\* \* \* \* \*

**SECTION 5 OF THE SECURITIES INVESTOR PROTECTION ACT OF 1970**

**SEC. 5. PROTECTION OF CUSTOMERS.**

(a) \* \* \*

\* \* \* \* \*

(b) COURT ACTION.—

(1) \* \* \*

\* \* \* \* \*

(2) JURISDICTION AND POWERS OF COURT.—

(A) \* \* \*

\* \* \* \* \*

(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 net-*

*ting 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.*

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