

## **H.R. 5585, THE FINANCIAL NETTING IMPROVEMENTS ACT OF 2006, TO EXPAND SAFE HARBORS**

New York  
November 28, 2006

The House of Representatives on November 15, 2006 voted unanimously to pass H.R. 5585, the Financial Netting Improvements Act of 2006 (the “Act”), in the form passed by the Senate at the end of September of this year. The Act will become effective upon the President’s signature.

The Act builds on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and is intended to further clarify the treatment of certain financial contracts upon the insolvency of a counterparty and to promote a reduction of systemic risk. In order to accomplish these goals, the Act amends the Bankruptcy Code (the “Code”), the Federal Deposit Insurance Act (the “FDIA”), the Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”), the Federal Credit Union Act (the “FCUA”) and the Securities Investor Protection Act of 1970.

This memorandum briefly summarizes H.R. 5585’s more significant amendments to each of the Code, the FDIA, FDICIA and the FCUA. Each statute will be analyzed separately.

### **The Code**

The Act expands the Code’s definitions of “securities contract”, “financial participant” and “swap agreement”. To the extent that a similar defined term is used in the FDIA, generally the definitions are harmonized.

- “Securities contract”:
  - The definition now expressly includes:
  - “any extension of credit for the clearance or settlement of securities transactions”; and
  - “any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction.”
- “Financial participant”:

- The definition is revised to clarify that, to qualify as a financial participant, an entity can aggregate across counterparties the total gross dollar value in notional or actual principal amount of qualifying contracts that must be outstanding on the date of filing or on any given day during the previous 15-month period to reach the required threshold of \$1,000,000,000.
- “Swap agreement”:

  - The list of transactions is expanded to include:
  - “an emissions swap, option, future, or forward agreement”;
  - “an inflation swap, option, future, or forward agreement”;
  - “spot” contracts on all “commodities,” and not just spot foreign exchange and precious metals agreements as under current law.

The Act clarifies the rights of counterparties to exercise rights under security agreements and offset rights free from the automatic stay.

- In particular, the protected rights are the “contractual rights” of protected counterparties under “any security agreement or other credit enhancement” related to any commodity contract, forward contract, securities contract, repurchase agreement, swap agreement or master netting agreement or “any contractual right to offset or net out any termination value, payment amount, or other transfer obligation” arising under or in connection with such contracts or agreements.

The Act amends Section 546 of the Code to expand preference and constructive fraudulent conveyance protection beyond margin and settlement payments to all transfers to (or for the benefit of) protected counterparties in connection with a securities contract, commodity contract, forward contract, or repurchase agreement, which were made before the commencement of bankruptcy proceedings.

## **The FDIA**

The Act amends the definitions of “securities contract” and “swap agreement” in a manner consistent with the amendments to the Code described above.

Section 6 of the Act amends the anti-“walkaway clause” of the FDIA to clarify the ability of the FDIC, as receiver, to enforce contracts.

## **FDICIA**

The Act amends Section 403 and 404 of FDICIA to confirm the enforceability of bilateral netting contracts and clearing organization netting contracts, notwithstanding other provisions of federal law, by adding language to ensure that parties can exercise termination, liquidation, and acceleration rights, as well as netting rights, under a netting contract.

## **The FCUA**

The Act amends the FCUA in a manner consistent with the amendments to the FDIA described above.

\* \* \* \* \*

The foregoing is only a brief summary of some of the more significant changes to be made by H.R. 5585.

FINANCIAL NETTING IMPROVEMENTS ACT OF 2006

SEPTEMBER 12, 2006 —Ordered to be printed

Mr. OXLEY, from the Committee on Financial Services,  
submitted the following

R E P O R T

[To accompany H R 5585]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 5585) to improve the netting process for financial contracts, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 5585 makes technical changes to the netting and financial contract provisions incorporated by Title IX of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, to update the language to reflect current market and regulatory practices, and help reduce systemic risk in the financial

markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency.

#### BACKGROUND AND NEED FOR LEGISLATION

H.R. 5585 makes technical changes to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, by strengthening and clarifying the enforceability of early termination and close-out netting provisions and related collateral arrangements in U.S. insolvency proceedings. This bill will also help improve harmonization between U.S. insolvency laws and other jurisdictions. The netting provisions incorporated by Title IX of Pub. L. No. 109-8, as well as these technical changes, reflect years of work by the President's Working Group on Financial Markets.

#### HEARINGS

There were no hearings on H.R. 5585 in the 109th Congress.

#### COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on June 14, 2006, and ordered H.R. 5585, the Financial Netting Improvements Act of 2006, reported to the House by a voice vote.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. No record votes were taken during the consideration of this legislation. A motion by Mr. Oxley to report the bill to the House with a favorable recommendation was agreed to by a voice vote. During the consideration of the bill, the following amendment was offered:

An amendment by Mr. Watt, No. 1, striking section 7, had a point of order sustained against its consideration.

#### COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has held hearings and made findings that are reflected in this report.

#### PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

H.R. 5585 makes technical changes to the netting and financial contract provisions incorporated by Title IX of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, to update the language to reflect current market and regulatory practices, and help reduce systemic risk in the financial markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX  
EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

*H.R. 5585—Financial Netting Improvements Act of 2006*

Summary: H.R. 5585 would amend banking, bankruptcy, and securities laws related to the disposition of financial contracts in the event of insolvency. In such cases, certain types of financial contracts are processed on a net basis to reduce the risk—especially the systemic risk associated with activities in derivatives markets—that the failure of one entity will disrupt and endanger financial markets. That process, known as financial netting, involves settling mutual obligations at their net value as opposed to each obligation's gross dollar value. H.R. 5585 would update existing laws regarding netting to ensure that some of the newer forms of contractual arrangements are resolved in the same manner as other similar contracts. The bill also would increase the statutory filing fee paid by those filing for bankruptcy under Chapter 7 of the bankruptcy code in order to raise the compensation paid to private trustees appointed to manage a debtor's estate under such bankruptcy relief.

Enacting H.R. 5585 could affect direct spending, but CBO estimates that any such changes would not be significant. H.R. 5585 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: Most financial experts believe that the practice of netting financial transactions reduces the systemic risk that could result from the failure of banks, thrifts, or credit unions that hold derivative or other similar contracts. Thus, it is possible that clarifying the applicability of the netting requirement to some of the newer types of financial contracts could reduce the potential cost of some failures in the future. Based on information from federal regulatory agencies, CBO estimates that the impact of H.R. 5585 on the cost of resolving failed banks, thrifts, or credit unions would likely be small because the provisions in current law would cover most of the contracts used by insured institutions.

Increasing filing fees and trustee compensation under Chapter 7 of the bankruptcy code would have no budgetary impact. Under current law, \$45 of the \$245 fee paid by those filing for Chapter 7 relief is collected by the government on behalf of a private trustee, placed in a (nonbudgetary) deposit account, and paid to the private trustee. Those amounts are not owned by the Federal Government and are not recorded on the budget. H.R. 5585 would increase the Chapter 7 filing fee by \$55 and increase the trustee's compensation by a corresponding amount.

Intergovernmental and private-sector impact: H.R. 5585 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Kathleen Gramp and Gregory Waring; Impact on state, local, and tribal governments: Sarah Puro; Impact on the private sector: Fatimot Ladipo and Judy Ruud.

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

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional Authority of Congress to enact this legislation is provided by Article 1, section 8, clause 1 (relating to the general welfare of the United States), clause 3 (relating to the power to regulate interstate commerce), and clause 4 (relating to the power to establish uniform laws on the subject of Bankruptcies).

#### APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

#### SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

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

This section sets forth the short title of this legislation—the “Financial Netting Improvements Act of 2006”.

##### *Section 2. Treatment of certain agreements by conservators or receivers or depository institutions*

This section amends the Federal Deposit Insurance Act's (FDIA) and Federal Credit Union Act's (FCUA) definitions of “securities contract”, “forward contract” and “swap agreement” to make a

number of technical and clarifying changes. It is intended that the legislative history and case law surrounding those terms, to the date of this amendment, be incorporated into the legislative history of the FDIA and FCUA.

*The definition of "securities contract" and "forward contract"*

The reference to "repurchase or reverse repurchase" transactions in section 2(a)(1)(A)(ii) is intended to confirm that a repurchase or reverse repurchase transaction included within the definitions of "securities contract" or "forward contract" is not limited by the definition of "repurchase agreement" contained in 12 U.S.C. section 1821(e)(8)(D)(v).

*The definition of "securities contract"*

The reference in sections 2(a)(1)(B) and 2(a)(2)(B) to guarantees "(including by novation)" by or to any securities clearing agency, together with the reference in the definition of "securities contract" (as amended by Pub. L. No. 109-8) to "any other agreement or transaction that is similar" is intended to confirm that the language covers other arrangements that have an effect similar to a guarantee or a novation.

The reference in sections 2(a)(1)(E) and 2(a)(2)(E) to the inclusion of "any extension of credit for the clearance or settlement of securities transactions" is intended to confirm that the definition encompasses credit extended for the execution, clearance and settlement of securities transactions, which provide important liquidity to the securities markets. Also, the inclusion of "any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction" is intended to confirm that similar agreements covered by the definition of securities contract include these transactions which are functionally similar to other enumerated transactions in the definition, even though their form might differ. The common thread of these transactions is that they involve financial intermediaries—stockbrokers, financial institutions, financial participants or securities clearing agencies—that often hedge their risk on these transactions through other market transactions, repledge securities collateral received under these transactions, or both. As such these transactions implicate the systemic risk concerns that are addressed by the safe harbors.

*The definition of "swap agreement"*

Section 2(c) amends the definition of "swap agreement" to include "weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement." The inclusion of "weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement" is intended to confirm that "similar agreements" covered by the definition of "swap agreement" include these transactions.

Section 2(c) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [section 11(e)(8)(D)(vi) of the FDIA/section 207(c)(8)(D)(vi) of the FCUA] and is of a type that

has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap *or other derivatives* markets \* \* \* and that is a forward, swap, future, option, *or spot transaction* on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value." The proposed amendments would change the reference to "swap markets" to "swap or other derivatives markets" in order to avoid any suggestion that new developments are limited to transactions that are technically swaps as opposed to other types of derivatives, such as options. The addition of "or spot transaction" in the provision regarding "similar agreements" is a technical correction intended to refer to spot transactions that are similar to the spot transactions already enumerated in the definition of "swap agreement." However, the reference in the definition of "swap agreement" to spot transactions in commodities is not intended to encompass ordinary sales of goods contracts, but rather financial market transactions in commodities.

The term "swap agreement" includes transactions documented as "contracts for differences," which is another way to document the enumerated transactions.

### *Section 3. Clarifying amendments relating to definition of person*

This section expands the FDIA's and FCUA's definition of "person" for purposes of determining who is eligible for termination, netting and close out rights in the event of insolvency. The revised definition would include any governmental entity in addition to any entity included in the definition of "person" under Section 1 of Title 1 of the United States Code.

### *Section 4. Federal Deposit Insurance Corporation Improvement Act of 1991*

This section amends sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 to clarify that both financial institutions and clearing organizations are subject to the limitations of the entire section 11(e) of the FDIA and section 207 of FCUA.

### *Section 5. Conforming amendments*

This section amends the Federal Bankruptcy Code's definitions of "swap agreement", "forward contract" and "securities contract" to make a number of technical and clarifying changes. This section also makes certain changes to the automatic stay provisions of the Bankruptcy Code and to the avoidance powers of a trustee under the Bankruptcy Code. This section also amends the Securities Investor Protection Act and amends the savings clause included in Pub. L. No. 109-8.

#### *The definition of "swap agreement"*

Section 5(a)(1)(D) amends the definition of "swap agreement" to include a weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an infla-

tion swap, option, future, or forward agreement. The inclusion of "weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement" is intended to confirm that "similar agreements" covered by the definition of "swap agreement" include these transactions.

Section 5(a)(1)(D) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [section 101(53B) of the Bankruptcy Code] and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets \* \* \* and is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value." The proposed amendments would change the reference to "swap markets" to "swap or other derivatives markets" in order to avoid any suggestion that new developments are limited to transactions that are technically swaps as opposed to other types of derivatives, such as options. The addition of "or spot transaction" in the provision regarding "similar agreements" is a technical correction intended to refer to spot transactions that are similar to the spot transactions already enumerated in the definition of "swap agreement." However, the reference in the definition of "swap agreement" to spot transactions in commodities is not intended to encompass ordinary sales of goods contracts, but rather financial market transactions in commodities.

The term "swap agreement" includes transactions documented as "contracts for differences," which is another way to document the enumerated transactions.

#### *The automatic stay*

Section 5(a)(2) amends section 362(b) of the Bankruptcy Code to protect enforcement, free from the automatic stay, of collateral, setoff or netting provisions in commodity contracts, forward contracts, securities contracts, repurchase agreements or swap agreements and in master netting agreements and security agreements or arrangements or other credit enhancements related to one or more swap agreements or master netting agreements. These changes conform the provisions of the Bankruptcy Code to the parallel provisions of the FDIA and FCUA to confirm that Sections 362(b)(6), (7) and (17) protect, free from the automatic stay, all rights previously protected by Sections 362(b)(6), (7) and (17), including self-help foreclosure-on-collateral rights, setoff rights and netting rights (including foreclosure on, and setoff against, cash and securities held to margin or secure claims for margin payments and settlement payments, title transfer arrangements and the right to offset obligations owed against collateral pledged to the debtor). The provisions protect the exercise of "contractual rights" as defined in Sections 555, 556, 559, or 560, as appropriate, which include not only rights evidenced by agreements between the parties, but other rights as set forth in those definitions.

*The definition of “securities contract”*

The reference in section 5(a)(3)(B) to guarantees “(including by novation)” by or to any securities clearing agency, together with the reference in the definition of “securities contract” (as amended by Pub. L. No. 109–8) to “any other agreement or transaction that is similar,” is intended to confirm that the language covers other arrangements that have an effect similar to a guarantee or a novation.

Under section 5(a)(3)(E), the inclusion of “any extension of credit for the clearance or settlement of securities transactions” is intended to confirm that the definition encompasses credit extended for the execution, clearance and settlement of securities transactions, which provide important liquidity to the securities markets. Also, the inclusion of “any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction” is intended to confirm that transactions which are functionally similar to other enumerated transactions in the definition are covered by the definition of “securities contract”, even though their form might differ. The common thread of these transactions is that they involve financial intermediaries—stockbrokers, financial institutions, financial participants or securities clearing agencies—that often hedge their risk on these transactions through other market transactions, repledge securities collateral received under these transactions, or both.

*Trustee avoidance powers*

Section 5(b) amends Sections 546(e) and 546(f) of the Bankruptcy Code, which protect margin payments and settlement payments, to also protect transfers made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, securities clearing agency, or repo participant, in connection with a securities contract, commodity contract, forward contract, or repurchase agreement. This amendment conforms the language of Sections 546(e) and 546(f) to the language in 546(g), regarding the protection of transfers in connection with swap agreements.

*Section 6. Walkaway clauses*

Section 5 amends the “walkaway clause” provision of the FDIA (Section 11(e)(8)(G) of the FDIA) and the FCUA (Section 207(c)(8)(G)), both of which were added by Title IX of S. 256, to clarify the ability of the receiver, to enforce contracts.

*Section 7. Bankruptcy trustee compensation*

Section 7 amends titles 11 and 28 of the United States Code to increase the compensation paid to a case trustee for administering a chapter 7 bankruptcy case from \$60 to \$100. Under current law, the trustee’s \$60 fee is paid out of the statutory and miscellaneous fees that a debtor must pay to commence a chapter 7 bankruptcy case, which currently total \$299. The provision effectuates the increase by: (1) reclassifying the trustee’s compensation to be entirely derived from the statutory filing fee; (2) increasing the statutory filing fee by \$40; and (3) adjusting the percentage of the statutory filing fee allocated to the United States Trustee System Fund and

NB: these amendments were not passed by the Senate.
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the fund established pursuant to 28 U.S.C. § 1931 to ensure that the respective amounts these funds and the Treasury receive remain the same. In addition, section 7 deletes section 10101(a)(2) of the Deficit Reduction Act of 2005, Pub. L. No. 109–171, which was intended to increase the statutory chapter 11 filing fee, but was incorrectly drafted.

In recognition of the fact that the statutory filing fees have been raised recently on two prior occasions, the Committee on the Judiciary urges the Judicial Conference of the United States to be sensitive to the impact these increases have on chapter 7 debtors should the Conference consider prescribing additional fees pursuant to 28 U.S.C. § 1930(b).

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) \* \* \*

\* \* \* \* \*  
 (D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.—  
 For purposes of this subsection, the following definitions shall apply:

(i) \* \* \*

(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, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (*whether or not such repurchase or reverse repurchase transaction*

is a “repurchase agreement”, as defined in clause (v));

\* \* \* \* \*

(IV) means the guarantee (*including by novation*) 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, mortgage loan, interest, group or index, or option (*whether or not such settlement is in connection with any agreement or transaction referred to in subclauses (I) through (XII) (other than subclause (II))*);

\* \* \* \* \*

(VI) means any extension of credit for the clearance or settlement of securities transactions;

(VII) means any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction;

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

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

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

[(IX)] (XI) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), [(or (VIII))] (VIII), (IX), or (X), 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))] (VIII), (IX), or (X); and

[(X)] (XII) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement

obligation in connection with 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] or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a “repurchase agreement”, as defined in clause (v)), consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

\* \* \* \* \*

(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, *precious metals*, or other commodity 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 total return, 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 weather option] *weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement;*

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, [future, or option] *future, option, or spot transaction* on one or more rates, currencies, commodities, equity securities or other

equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

\* \* \* \* \*

Such term is applicable for purposes of this subsection 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, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000] *the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.*

\* \* \* \* \*

(ix) *PERSON.*—The term “person” includes any governmental entity in addition to any entity included in the definition of such term in section 1 of title 1, United States Code.

\* \* \* \* \*

(G) *WALKAWAY CLAUSES NOT EFFECTIVE.*—

(i) \* \* \*

[(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.]

(ii) *LIMITED SUSPENSION OF CERTAIN OBLIGATIONS.*—*In the case of a qualified financial contract referred to in clause (i), any payment or delivery obligations otherwise due from a party pursuant to the qualified financial contract shall be suspended from the time the receiver is appointed until the earlier of—*

*(I) the time such party receives notice that such contract has been transferred pursuant to subparagraph (A); or*

(II) 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver.

(iii) WALKAWAY CLAUSE DEFINED.—For purposes of this subparagraph, the term “walkaway clause” means any provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of such party’s status as a non-defaulting party in connection with the insolvency of an insured depository institution that is a party to the contract or the appointment of or the exercise of rights or powers by a conservator or receiver of such depository institution, and not as a result of a party’s exercise of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law.

\* \* \* \* \*

**SECTION 207 OF THE FEDERAL CREDIT UNION ACT**

**PAYMENT OF INSURANCE**

SEC. 207. (a) \* \* \*

\* \* \* \* \*

(c) PROVISIONS RELATING TO CONTRACTS ENTERED INTO BEFORE APPOINTMENT OF CONSERVATOR OR LIQUIDATING AGENT.—

(1) \* \* \*

\* \* \* \* \*

(8) CERTAIN QUALIFIED FINANCIAL CONTRACTS.—

(A) \* \* \*

\* \* \* \* \*

(D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.—  
For purposes of this subsection, the following definitions shall apply:

(i) \* \* \*

(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, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction

is a “repurchase agreement”, as defined in clause (v);

\* \* \* \* \*

(IV) means the guarantee (*including by novation*) 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, mortgage loan, interest, group or index, or option (*whether or not such settlement is in connection with any agreement or transaction referred to in subclauses (I) through (XII) (other than subclause (II))*);

\* \* \* \* \*

(VI) means any extension of credit for the clearance or settlement of securities transactions;  
 (VII) means any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction;

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

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

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

[(IX)] (XI) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), [(or (VIII))] (VIII), (IX), or (X), 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))] (VIII), (IX), or (X); and

[(X)] (XII) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement

obligation in connection with 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] or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a “repurchase agreement”, as defined in clause (v)), consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

\* \* \* \* \*  
 (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], *precious metals*, or other commodity 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 total return, 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 weather option] *weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement;*

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, [future, or option] *future, option, or spot transaction* on one or more rates, currencies, commodities, equity securities or other

equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

\* \* \* \* \*

Such term is applicable for purposes of this subsection 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, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000] *the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.*

\* \* \* \* \*

(ix) *PERSON.*—The term “person” includes any governmental entity in addition to any entity included in the definition of such term in section 1 of title 1, United States Code.

\* \* \* \* \*

(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

(i) \* \* \*

[(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.]

(u) *LIMITED SUSPENSION OF CERTAIN OBLIGATIONS.*—In the case of a qualified financial contract referred to in clause (i), any payment or delivery obligations otherwise due from a party pursuant to the qualified financial contract shall be suspended from the time the liquidating agent is appointed until the earlier of—

(1) the time such party receives notice that such contract has been transferred pursuant to subparagraph (A); or

(II) 5:00 p.m. (eastern time) on the business day following the date of the appointment of the liquidating agent.

(iii) WALKAWAY CLAUSE DEFINED.—For purposes of this subparagraph, the term “walkaway clause” means any provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of such party’s status as a non-defaulting party in connection with the insolvency of an insured credit union or the appointment of or the exercise of rights or powers by a conservator or liquidating agent of such credit union, and not as a result of a party’s exercise of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law.

\* \* \* \* \*

**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. 403. BILATERAL NETTING.**

(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, [paragraphs (8)(E), (8)(F), and (10)(B) of] section 207(c) of the Federal Credit Union 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 2 financial institutions shall be *terminated, liquidated, accelerated, and* 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 one or more netting contracts between any 2 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, [paragraphs (8)(E), (8)(F), and (10)(B) of] section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).

**SEC. 404. CLEARING ORGANIZATION NETTING.**

(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, [paragraphs (8)(E), (8)(F), and (10)(B) of] section 207(c) of the Federal Credit Union 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 *terminated, liquidated, accelerated, and* 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 one or more netting contracts between any 2 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, [paragraphs (8)(E), (8)(F), and (10)(B) of] section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).

\* \* \* \* \*

**TITLE 11, UNITED STATES CODE**

\* \* \* \* \*

**CHAPTER 1—GENERAL PROVISIONS**

\* \* \* \* \*

**§ 101. Definitions**

In this title the following definitions shall apply:

(1) \* \* \*

\* \* \* \* \*

(22) The term “financial institution” means—

(A) 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, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conser-

vator or entity is acting as agent or custodian for a customer (*whether or not a "customer", as defined in section 741*) in connection with a securities contract (as defined in section 741) such customer; or

\* \* \* \* \*  
 (22A) The term "financial participant" means—

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one 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 not less than \$1,000,000,000 in notional or actual principal amount outstanding [on any day during the previous 15-month period](*aggregated across counterparties*) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) [on any day during the previous 15-month period] at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

\* \* \* \* \*  
 (25) The term "forward contract" means—

(A) a contract (other than a commodity contract, *as defined in section 761*) 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,] *repurchase or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in this section)* consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

\* \* \* \* \*  
 (53B) The term "swap agreement"—

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is—

(I) \* \* \*

\* \* \* \* \*

(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange [or precious

metals], *precious metals, or other commodity agreement;*

\* \* \* \* \*

(VII) a commodity index or a commodity swap, option, future, or forward agreement; [or]

(VIII) a weather swap, [weather derivative, or weather option] *option, future, or forward agreement;*

(IX) *an emissions swap, option, future, or forward agreement;* or

(X) *an inflation swap, option, future, or forward agreement;*

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

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or *other derivatives* markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, [future, or option] *future, option, or spot transaction* on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

\* \* \* \* \*

(B) 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, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000] *the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act.*

\* \* \* \* \*

**CHAPTER 3—CASE ADMINISTRATION**

\* \* \* \* \*

**SUBCHAPTER II—OFFICERS**

\* \* \* \* \*

**§ 330. Compensation of officers**

(a) \* \* \*

(b) **[(1)]** There shall be paid from the filing fee in a case under chapter 7 of this title **[\$45] \$100** to the trustee serving in such case, after such trustee's services are rendered.

**[(2)]** The Judicial Conference of the United States—

**[(A)]** shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

**[(B)]** may prescribe notice of appearance fees and fees charged against distributions in cases under this title; to pay \$15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such \$15 shall be paid in addition to the amount paid under paragraph (1).**]**

NB: these amendments were not passed by the Senate
--

\* \* \* \* \*

**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 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, under the control of, or due from such commodity broker, forward contract merchant, stockbroker, 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 or financial 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, under the control of, or due from such repo participant or financial participant to margin, guarantee, secure or settle repurchase agreements;**]**

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

\* \* \* \* \*

[(17) under subsection (a), of the setoff by a swap participant or financial participant of a mutual debt and claim under or in connection with one 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 or financial participant under or in connection with any swap agreement or against cash, securities, or other property held by, pledged to, under the control of, or due from such swap participant or financial participant to margin, guarantee, secure, or settle any swap agreement;]

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

\* \* \* \* \*

[(27) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one 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 con-

tract or agreement subject to such agreements or against cash, securities, or other property held by, pledged to, 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 that 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; and]

*(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and*

\* \* \* \* \*

## CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

### SUBCHAPTER III—THE ESTATE

\* \* \* \* \*

#### § 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 *(or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, *or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.*

(f) 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 741 or 761 of this title, or settlement payment, as defined in section 741 of this title,] made by or to *(or for the benefit of)* a repo participant or financial participant, in connection with a repurchase agreement and 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, made by or to (*or for the benefit of*) a swap participant or financial participant, 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 (*or for the benefit of*) 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 that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

\* \* \* \* \*

## CHAPTER 7—LIQUIDATION

\* \* \* \* \*

### SUBCHAPTER III—STOCKBROKER LIQUIDATION

#### § 741. Definitions for this subchapter

In this subchapter—

(1) \* \* \*

\* \* \* \* \*

(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] *mortgage loan*, 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, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (*whether or not such repurchase or reverse repurchase transaction is a “repurchase agreement”, as defined in section 101*);

\* \* \* \* \*

(iii) the guarantee (*including by novation*) 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, mortgage loan, interest, group or index, or option (*whether*

or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi));

- \* \* \* \* \*
- (v) any extension of credit for the clearance or settlement of securities transactions;
  - (vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction;
  - [(v)] (vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;
  - [(vi)] (vuv) any combination of the agreements or transactions referred to in this subparagraph;
  - [(vii)] (ix) any option to enter into any agreement or transaction referred to in this subparagraph;
  - [(viii)] (x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), [or (vii)] (vii), (viii), or (ix), 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 subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph 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)] (vii), (viii), or (ix); or
  - [(ix)] (xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and
- \* \* \* \* \*

**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) \* \* \*

\* \* \* \* \*

(iii) As used in this subparagraph, the term “contractual right” includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), 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] a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act), 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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**BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

\* \* \* \* \*

**TITLE IX—FINANCIAL CONTRACT PROVISIONS**

\* \* \* \* \*

**SEC. 912. SAVINGS CLAUSE.**

*The meanings of terms used in this title are applicable for the 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 similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), and the Commodity Exchange Act.*

\* \* \* \* \*

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**TITLE 28, UNITED STATES CODE**

\* \* \* \* \*

**PART II—DEPARTMENT OF JUSTICE**

\* \* \* \* \*

**CHAPTER 39—UNITED STATES TRUSTEES**

\* \* \* \* \*

**§ 589a. United States trustee system fund**

(a) \* \* \*

(b) For the purpose of recovering the cost of services of the United States Trustee System, there shall be deposited as offsetting collections to the appropriation "United States Trustee System Fund", to remain available until expended, the following—

(1)(A) ~~40.46~~ 29.67 percent of the fees collected under section 1930(a)(1)(A); and

\* \* \* \* \*

**PART V—PROCEDURE**

\* \* \* \* \*

**CHAPTER 123—FEES AND COSTS**

\* \* \* \* \*

**§ 1930. Bankruptcy fees**

(a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

(1) For a case commenced under—  
(A) chapter 7 of title 11, ~~245~~ \$300; and

\* \* \* \* \*

**SECTION 406 OF THE JUDICIARY APPROPRIATIONS ACT, 1990**

SEC. 406. (a) \* \* \*

(b) All fees as shall be hereafter collected for any service not of a kind described in any of the items enumerated as items 1 through 7 and as items 9 through 18, as in effect on November 21, 1989, of the bankruptcy miscellaneous fee schedule prescribed by the Judicial Conference of the United States under section 1930(b) of title 28, United States Code, ~~28.87~~ 21.17 percent of the fees collected under section 1930(a)(1)(A) of that title, 35.00 percent of the fees collected under section 1930(a)(1)(B) of that title, and 25 percent of the fees collected under section 1930(a)(3) of that title shall be deposited as offsetting receipts to the fund established under section 1931 of that title and shall remain available to the Judiciary until expended to reimburse any appropriation for the amount paid out of such appropriation for expenses of the Courts of Appeals, District Courts, and other Judicial Services and the Administrative Office of the United States Courts. The Judicial Conference shall report to the Committees on Appropriations of the House of Representatives and the Senate on a quarterly basis be-

NB: these amendments were not passed by the Senate.

NB: these amendments were not passed by the Senate.

NB: these amendments were not passed by the Senate.

ginning on the first day of each fiscal year regarding the sums deposited in said fund.

\* \* \* \* \*

**SECTION 10101 OF DEFICIT REDUCTION ACT OF 2005**

(Public Law 109-171)

**SEC. 10101. BANKRUPTCY FEES.**

(a) **BANKRUPTCY FILING FEES.**—Section 1930(a) of title 28, United States Code, is amended—

(1) \* \* \*

[(2) in paragraph (2) by striking “\$1,000” and inserting “\$2,750”.]

\* \* \* \* \*

○

NB: these amendments were not passed by the Senate.

109<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 5585

To improve the netting process for financial contracts, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 2006

Mr. MCHENRY (for himself and Ms. WASSERMAN SCHULTZ) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To improve the netting process for financial contracts, and  
for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Financial Netting Im-  
5 provements Act of 2006”.

6 **SEC. 2. TREATMENT OF CERTAIN AGREEMENTS BY CON-**

7 **SERVATORS OR RECEIVERS OF DEPOSITORY**

8 **INSTITUTIONS.**

9 (a) **DEFINITION OF SECURITIES CONTRACT.—**

1           (1) FDIC-INSURED DEPOSITORY INSTITU-  
2 TIONS.—Section 11(e)(8)(D)(ii) of the Federal De-  
3 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(ii)) is  
4 amended—

5           (A) in subclause (I)—

6                 (i) by striking “mortgage loan, or”  
7 and inserting “mortgage loan,”; and

8                 (ii) by inserting before the semicolon  
9 “(whether or not such repurchase or re-  
10 verse repurchase transaction is a ‘repur-  
11 chase agreement’, as defined in clause  
12 (v))”;

13           (B) in subclause (IV)—

14                 (i) by inserting “(including by nova-  
15 tion)” after “the guarantee”; and

16                 (ii) by inserting before the semicolon  
17 “(whether or not such settlement is in con-  
18 nection with any agreement or transaction  
19 referred to in subclauses (I) through (XII)  
20 (other than subclause (II))”;

21           (C) in subclause (IX), by striking “or  
22 (VIII)” each place such term appears and in-  
23 serting “(VIII), (IX), or (X)”;

24           (D) by redesignating subclauses (VI),  
25 (VII), (VIII), (IX), and (X) as subclauses

1 (VIII), (IX), (X), (XI), and (XII), respectively;  
2 and

3 (E) by inserting after subclause (V) the  
4 following new subparagraphs:

5 “(VI) means any extension of  
6 credit for the clearance or settlement  
7 of securities transactions;

8 “(VII) means any loan trans-  
9 action coupled with a securities collar  
10 transaction, any prepaid securities  
11 forward transaction, or any total re-  
12 turn swap transaction coupled with a  
13 securities sale transaction;”.

14 (2) INSURED CREDIT UNIONS.—Section  
15 207(c)(8)(D)(ii) of the Federal Credit Union Act  
16 (12 U.S.C. 1787(c)(8)(D)(ii)) is amended—

17 (A) in subclause (I)—

18 (i) by striking “mortgage loan, or”  
19 and inserting “mortgage loan;” and

20 (ii) by inserting before the semicolon  
21 “(whether or not such repurchase or re-  
22 verse repurchase transaction is a ‘repur-  
23 chase agreement’, as defined in clause  
24 (v))”;

25 (B) in subclause (IV)—

1 (i) by inserting “(including by nova-  
2 tion)” after “the guarantee”; and

3 (ii) by inserting before the semicolon  
4 “(whether or not such settlement is in con-  
5 nection with any agreement or transaction  
6 referred to in subclauses (I) through (XII)  
7 (other than subclause (II))”;

8 (C) in subclause (IX), by striking “or  
9 (VIII)” each place such term appears and in-  
10 serting “(VIII), (IX), or (X)”;

11 (D) by redesignating subclauses (VI),  
12 (VII), (VIII), (IX), and (X) as subclauses  
13 (VIII), (IX), (X), (XI), and (XII), respectively;  
14 and

15 (E) by inserting after subclause (V) the  
16 following new subparagraphs:

17 “(VI) means any extension of  
18 credit for the clearance or settlement  
19 of securities transactions;

20 “(VII) means any loan trans-  
21 action coupled with a securities collar  
22 transaction, any prepaid securities  
23 forward transaction, or any total re-  
24 turn swap transaction coupled with a  
25 securities sale transaction;”.

1 (b) DEFINITION OF FORWARD CONTRACT.—

2 (1) FDIC-INSURED DEPOSITORY INSTITU-  
3 TIONS.—Section 11(e)(8)(D)(iv)(I) of the Federal  
4 Deposit Insurance Act (12 U.S.C.  
5 1821(e)(8)(D)(iv)(I)) is amended by striking “trans-  
6 action, reverse repurchase transaction” and inserting  
7 “or reverse repurchase transaction (whether or not  
8 such repurchase or reverse repurchase transaction is  
9 a ‘repurchase agreement’, as defined in clause (v))”.

10 (2) INSURED CREDIT UNIONS.—Section  
11 207(c)(8)(D)(iv)(I) of the Federal Credit Union Act  
12 (12 U.S.C. 1787(c)(8)(D)(iv)(I)) is amended by  
13 striking “transaction, reverse repurchase trans-  
14 action” and inserting “or reverse repurchase trans-  
15 action (whether or not such repurchase or reverse  
16 repurchase transaction is a ‘repurchase agreement’,  
17 as defined in clause (v))”.

18 (c) DEFINITION OF SWAP AGREEMENT.—

19 (1) FDIC-INSURED DEPOSITORY INSTITU-  
20 TIONS.—Section 11(e)(8)(D)(vi) of the Federal De-  
21 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(vi)) is  
22 amended—

23 (A) in subclause (I)—

1 (i) by striking “or precious metals”  
2 and inserting “, precious metals, or other  
3 commodity”; and

4 (ii) by striking “or a weather swap,  
5 weather derivative, or weather option” and  
6 inserting “weather swap, option, future, or  
7 forward agreement; an emissions swap, op-  
8 tion, future, or forward agreement; or an  
9 inflation swap, option, future, or forward  
10 agreement”;

11 (B) in subclause (II)—

12 (i) by inserting “or other derivatives”  
13 after “dealings in the swap”; and

14 (ii) by striking “future, or option”  
15 and inserting “future, option, or spot  
16 transaction”; and

17 (C) by striking “the Securities Act of  
18 1933, the Securities Exchange Act of 1934, the  
19 Public Utility Holding Company Act of 1935,  
20 the Trust Indenture Act of 1939, the Invest-  
21 ment Company Act of 1940, the Investment  
22 Advisers Act of 1940, the Securities Investor  
23 Protection Act of 1970, the Commodity Ex-  
24 change Act, the Gramm-Leach-Bliley Act, and  
25 the Legal Certainty for Bank Products Act of

1           2000” and inserting “the Gramm-Leach-Bliley  
2           Act, the Legal Certainty for Bank Products Act  
3           of 2000, the securities laws (as such term is de-  
4           fined in section 3(a)(47) of the Securities Ex-  
5           change Act of 1934) and the Commodity Ex-  
6           change Act”.

7           (2)   INSURED   CREDIT   UNIONS.—Section  
8           207(c)(8)(D)(vi) of the Federal Credit Union Act  
9           (12 U.S.C. 1787(c)(8)(D)(vi)) is amended—

10                   (A) in subclause (I)—

11                           (i) by striking “or precious metals”  
12                           and inserting “, precious metals, or other  
13                           commodity”; and

14                           (ii) by striking “or a weather swap,  
15                           weather derivative, or weather option” and  
16                           inserting “weather swap, option, future, or  
17                           forward agreement; an emissions swap, op-  
18                           tion, future, or forward agreement; or an  
19                           inflation swap, option, future, or forward  
20                           agreement”;

21                   (B) in subclause (II)—

22                           (i) by inserting “or other derivatives”  
23                           after “dealings in the swap”; and

1 (ii) by striking “future, or option”  
2 and inserting “future, option, or spot  
3 transaction”; and

4 (C) by striking “the Securities Act of  
5 1933, the Securities Exchange Act of 1934, the  
6 Public Utility Holding Company Act of 1935,  
7 the Trust Indenture Act of 1939, the Invest-  
8 ment Company Act of 1940, the Investment  
9 Advisers Act of 1940, the Securities Investor  
10 Protection Act of 1970, the Commodity Ex-  
11 change Act, the Gramm-Leach-Bliley Act, and  
12 the Legal Certainty for Bank Products Act of  
13 2000” and inserting “the Gramm-Leach-Bliley  
14 Act, the Legal Certainty for Bank Products Act  
15 of 2000, the securities laws (as such term is de-  
16 fined in section 3(a)(47) of the Securities Ex-  
17 change Act of 1934) and the Commodity Ex-  
18 change Act”.

19 **SEC. 3. CLARIFYING AMENDMENTS RELATING TO DEFINI-**  
20 **TION OF PERSON.**

21 (a) **FDIC-INSURED DEPOSITORY INSTITUTIONS**  
22 **DEFINITION OF PERSON.**—Section 11(e)(8)(D) of the  
23 Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D))  
24 is amended by adding at the end the following:

1           “(ix) PERSON.—The term ‘person’ includes  
2           any governmental entity in addition to any enti-  
3           ty included in the definition of such term in  
4           section 1 of title 1, United States Code.”.

5           (b) INSURED CREDIT UNIONS DEFINITION OF PER-  
6           SON.—Section 207(c)(8)(D) of the Federal Credit Union  
7           Act (12 U.S.C. 1787(c)(8)(D)) is amended by adding at  
8           the end the following:

9                       “(ix) PERSON.—The term ‘person’ in-  
10                      cludes any governmental entity in addition  
11                      to any entity included in the definition of  
12                      such term in section 1 of title 1, United  
13                      States Code.”.

14           **SEC. 4. FEDERAL DEPOSIT INSURANCE CORPORATION IM-**  
15                       **PROVEMENT ACT OF 1991.**

16           (a) ENFORCEABILITY OF BILATERAL NETTING CON-  
17           TRACTS.—Section 403 of the Federal Deposit Insurance  
18           Corporation Improvement Act of 1991 (12 U.S.C. 4403)  
19           is amended—

20                      (1) in each of subsections (a) and (f), by strik-  
21                      ing “paragraphs (8)(E), (8)(F), and (10)(B) of”  
22                      each place such term appears; and

23                      (2) in subsection (a), by inserting “terminated,  
24                      liquidated, accelerated, and” after “institutions shall  
25                      be”.

1 (b) ENFORCEABILITY OF CLEARING ORGANIZATION  
2 NETTING CONTRACTS.—Section 404 of the Federal De-  
3 posit Insurance Corporation Improvement Act of 1991 (12  
4 U.S.C. 4404) is amended—

5 (1) in each of subsections (a) and (h), by strik-  
6 ing “paragraphs (8)(E), (8)(F), and (10)(B) of”  
7 each place such term appears; and

8 (2) in subsection (a), by inserting “terminated,  
9 liquidated, accelerated, and” after “organization  
10 shall be”.

11 **SEC. 5. CONFORMING AMENDMENTS.**

12 (a) CLARIFYING DEFINITIONS.—Title 11, United  
13 States Code, is amended—

14 (1) in section 101—

15 (A) in paragraph (22)(A)—

16 (i) by striking “(domestic or foreign)”  
17 after “an entity”; and

18 (ii) by inserting “(whether or not a  
19 ‘customer’, as defined in section 741)”  
20 after “custodian for a customer”;

21 (B) in paragraph (22A)—

22 (i) by striking “on any day during the  
23 previous 15-month period” each place it  
24 appears and inserting “at such time or on  
25 any day during the 15-month period pre-

1 ceding the date of the filing of the peti-  
2 tion”; and

3 (ii) by inserting “(aggregated across  
4 counterparties)” after “principal amount  
5 outstanding”;

6 (C) in paragraph (25)(A)—

7 (i) by inserting “, as defined in sec-  
8 tion 761” after “commodity contract”; and

9 (ii) by striking “repurchase trans-  
10 action, reverse repurchase transaction,”  
11 and inserting “repurchase or reverse re-  
12 purchase transaction (whether or not such  
13 repurchase or reverse repurchase trans-  
14 action is a ‘repurchase agreement’, as de-  
15 fined in this section)”;

16 (D) in paragraph (53B)(A)—

17 (i) in clause (i)—

18 (I) in subclause (II), by striking  
19 “or precious metals” and inserting “,  
20 precious metals, or other commodity”;

21 (II) in subclause (VII), by strik-  
22 ing “or” at the end;

23 (III) in subclause (VIII), by  
24 striking “weather derivative, or weath-

1 er option” and inserting “option, fu-  
2 ture, or forward agreement”; and

3 (IV) by adding at the end the fol-  
4 lowing:

5 “(IX) an emissions swap, option,  
6 future, or forward agreement; or

7 “(X) an inflation swap, option,  
8 future, or forward agreement;”; and

9 (ii) in clause (ii)—

10 (I) in subclause (I), by inserting  
11 “or other derivatives” after “dealings  
12 in the swap”; and

13 (II) in subclause (II), by striking  
14 “future, or option” and inserting “fu-  
15 ture, option, or spot transaction”; and

16 (E) in paragraph (53B)(B), by striking  
17 “the Securities Act of 1933, the Securities Ex-  
18 change Act of 1934, the Public Utility Holding  
19 Company Act of 1935, the Trust Indenture Act  
20 of 1939, the Investment Company Act of 1940,  
21 the Investment Advisers Act of 1940, the Secu-  
22 rities Investor Protection Act of 1970, the Com-  
23 modity Exchange Act, the Gramm-Leach-Bliley  
24 Act, and the Legal Certainty for Bank Products  
25 Act of 2000” and inserting “the Gramm-Leach-

1 Bliley Act, the Legal Certainty for Bank Prod-  
2 ucts Act of 2000, the securities laws (as such  
3 term is defined in section 3(a)(47) of the Secu-  
4 rities Exchange Act of 1934) and the Com-  
5 modity Exchange Act”;

6 (2) in section 362(b)—

7 (A) by striking paragraphs (6) and (7) and  
8 inserting the following:

9 “(6) under subsection (a) of this section, of the  
10 exercise by a commodity broker, forward contract  
11 merchant, stockbroker, financial institution, finan-  
12 cial participant, or securities clearing agency of any  
13 contractual right (as defined in section 555 or 556)  
14 under any security agreement or arrangement or  
15 other credit enhancement forming a part of or re-  
16 lated to any commodity contract, forward contract  
17 or securities contract, or of any contractual right (as  
18 defined in section 555 or 556) to offset or net out  
19 any termination value, payment amount, or other  
20 transfer obligation arising under or in connection  
21 with 1 or more such contracts, including any master  
22 agreement for such contracts;

23 “(7) under subsection (a) of this section, of the  
24 exercise by a repo participant or financial partici-  
25 pant of any contractual right (as defined in section

1 559) under any security agreement or arrangement  
2 or other credit enhancement forming a part of or re-  
3 lated to any repurchase agreement, or of any con-  
4 tractual right (as defined in section 559) to offset or  
5 net out any termination value, payment amount, or  
6 other transfer obligation arising under or in connec-  
7 tion with 1 or more such agreements, including any  
8 master agreement for such agreements;”;

9 (B) by striking paragraph (17) and insert-  
10 ing the following:

11 “(17) under subsection (a) of this section, of  
12 the exercise by a swap participant or financial par-  
13 ticipant of any contractual right (as defined in sec-  
14 tion 560) under any security agreement or arrange-  
15 ment or other credit enhancement forming a part of  
16 or related to any swap agreement, or of any contrac-  
17 tual right (as defined in section 560) to offset or net  
18 out any termination value, payment amount, or  
19 other transfer obligation arising under or in connec-  
20 tion with 1 or more such agreements, including any  
21 master agreement for such agreements;” and

22 (C) by striking paragraph (27) and insert-  
23 ing the following:

24 “(27) under subsection (a) of this section, of  
25 the exercise by a master netting agreement partici-

1       pant of any contractual right (as defined in section  
2       555, 556, 559, or 560) under any security agree-  
3       ment or arrangement or other credit enhancement  
4       forming a part of or related to any master netting  
5       agreement, or of any contractual right (as defined in  
6       section 555, 556, 559, or 560) to offset or net out  
7       any termination value, payment amount, or other  
8       transfer obligation arising under or in connection  
9       with 1 or more such master netting agreements to  
10      the extent that such participant is eligible to exercise  
11      such rights under paragraph (6), (7), or (17) for  
12      each individual contract covered by the master net-  
13      ting agreement in issue; and”;

14           (3) in section 741(7)(A)—

15                   (A) in clause (i)—

16                           (i) by striking “mortgage loan or”  
17                           and inserting “mortgage loan,”; and

18                           (ii) by inserting before the semicolon  
19                           “(whether or not such repurchase or re-  
20                           verse repurchase transaction is a ‘repur-  
21                           chase agreement’, as defined in section  
22                           101)”;

23                   (B) in clause (iii)—

24                           (i) by inserting “(including by nova-  
25                           tion)” after “the guarantee”; and

1 (ii) by inserting before the semicolon  
2 “(whether or not such settlement is in con-  
3 nection with any agreement or transaction  
4 referred to in clauses (i) through (xi))”;

5 (C) in clause (viii), by striking “or (vii)”  
6 each place it appears and inserting “(vii), (viii),  
7 or (ix)”;

8 (D) by redesignating clauses (v) through  
9 (ix) as clauses (vii) through (xi), respectively;  
10 and

11 (E) by inserting after clause (iv) the fol-  
12 lowing:

13 “(v) any extension of credit for  
14 the clearance or settlement of securi-  
15 ties transactions;

16 “(vi) any loan transaction cou-  
17 pled with a securities collar trans-  
18 action, any prepaid forward securities  
19 transaction, or any total return swap  
20 transaction coupled with a securities  
21 sale transaction;”.

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

25 (1) in subsection (e)—

1 (A) by inserting “(or for the benefit of)”  
2 before “a commodity broker”; and

3 (B) by inserting “or that is a transfer  
4 made by or to (or for the benefit of) a com-  
5 modity broker, forward contract merchant,  
6 stockbroker, financial institution, financial par-  
7 ticipant, or securities clearing agency, in con-  
8 nection with a securities contract, as defined in  
9 section 741(7), commodity contract, as defined  
10 in section 761(4), or forward contract,” after  
11 “securities clearing agency,”;

12 (2) in subsection (f)—

13 (A) by striking “that is a margin payment,  
14 as defined in section 741 or 761 of this title,  
15 or settlement payment, as defined in section  
16 741 of this title,”; and

17 (B) by inserting “(or for the benefit of)”  
18 before “a repo participant”;

19 (3) in subsection (g), by inserting “(or for the  
20 benefit of)” before “a swap participant”; and

21 (4) in subsection (j), by inserting “(or for the  
22 benefit of)” after “made by or to”.

23 (c) SIPC STAY.—Section 5(b)(2)(C)(iii) of the Secu-  
24 rities Investor Protection Act of 1970 (15 U.S.C.  
25 78eee(b)(2)(C)(iii)) is amended—

1 (1) by inserting “a derivatives clearing organi-  
2 zation (as defined in the Commodity Exchange Act),  
3 a multilateral clearing organization (as defined in  
4 the Federal Deposit Insurance Corporation Improve-  
5 ment Act of 1991),” after “rule or bylaw of”; and

6 (2) by striking “or a securities clearance agen-  
7 cy, a right set forth in a bylaw of a clearing organi-  
8 zation or contract market” and inserting “a securi-  
9 ties clearing agency, a contract market designated  
10 under the Commodity Exchange Act, a derivatives  
11 transaction execution facility registered under the  
12 Commodity Exchange Act, or a board of trade (as  
13 defined in the Commodity Exchange Act),”.

14 (d) SAVINGS CLAUSE.—Title IX of the Bankruptcy  
15 Abuse Prevention and Consumer Protection Act of 2005  
16 (Public Law 109–8, 119 Stat. 146) is amended by adding  
17 at the end the following:

18 **“SEC. 912. SAVINGS CLAUSE.**

19 “The meanings of terms used in this title are applica-  
20 ble for the purposes of this title only, and shall not be  
21 construed or applied so as to challenge or affect the char-  
22 acterization, definition, or treatment of any similar terms  
23 under any other statute, regulation, or rule, including the  
24 Gramm-Leach-Bliley Act, the Legal Certainty for Bank  
25 Products Act of 2000, the securities laws (as such term

1 is defined in section 3(a)(47) of the Securities Exchange  
2 Act of 1934), and the Commodity Exchange Act.”.

3 **SEC. 6. WALKAWAY CLAUSES.**

4 (a) FDIC-INSURED DEPOSITORY INSTITUTIONS.—  
5 Section 11(e)(8)(G) of the Federal Deposit Insurance Act  
6 (12 U.S.C. 1821(e)(8)(G)) is amended by striking clause  
7 (ii) and inserting the following new clauses:

8 “(ii) LIMITED SUSPENSION OF CER-  
9 TAIN OBLIGATIONS.—In the case of a  
10 qualified financial contract referred to in  
11 clause (i), any payment or delivery obliga-  
12 tions otherwise due from a party pursuant  
13 to the qualified financial contract shall be  
14 suspended from the time the receiver is ap-  
15 pointed until the earlier of—

16 “(I) the time such party receives  
17 notice that such contract has been  
18 transferred pursuant to subparagraph  
19 (A); or

20 “(II) 5:00 p.m. (eastern time) on  
21 the business day following the date of  
22 the appointment of the receiver.

23 “(iii) WALKAWAY CLAUSE DE-  
24 FINED.—For purposes of this subpara-  
25 graph, the term ‘walkaway clause’ means

1 any provision in a qualified financial con-  
2 tract that suspends, conditions, or extin-  
3 guishes a payment obligation of a party, in  
4 whole or in part, or does not create a pay-  
5 ment obligation of a party that would oth-  
6 erwise exist, solely because of such party's  
7 status as a nondefaulting party in connec-  
8 tion with the insolvency of an insured de-  
9 pository institution that is a party to the  
10 contract or the appointment of or the exer-  
11 cise of rights or powers by a conservator or  
12 receiver of such depository institution, and  
13 not as a result of a party's exercise of any  
14 right to offset, setoff, or net obligations  
15 that exist under the contract, any other  
16 contract between those parties, or applica-  
17 ble law.".

18 (b) INSURED CREDIT UNIONS.—Section  
19 207(c)(8)(G) of the Federal Credit Union Act 12 U.S.C.  
20 1787(c)(8)(G)) is amended by striking clause (ii) and in-  
21 serting the following new clauses:

22 “(ii) LIMITED SUSPENSION OF CER-  
23 TAIN OBLIGATIONS.—In the case of a  
24 qualified financial contract referred to in  
25 clause (i), any payment or delivery obliga-

1 tions otherwise due from a party pursuant  
2 to the qualified financial contract shall be  
3 suspended from the time the liquidating  
4 agent is appointed until the earlier of—

5 “(I) the time such party receives  
6 notice that such contract has been  
7 transferred pursuant to subparagraph  
8 (A); or

9 “(II) 5:00 p.m. (eastern time) on  
10 the business day following the date of  
11 the appointment of the liquidating  
12 agent.

13 “(iii) WALKAWAY CLAUSE DE-  
14 FINED.—For purposes of this subpara-  
15 graph, the term ‘walkaway clause’ means  
16 any provision in a qualified financial con-  
17 tract that suspends, conditions, or extin-  
18 guishes a payment obligation of a party, in  
19 whole or in part, or does not create a pay-  
20 ment obligation of a party that would oth-  
21 erwise exist, solely because of such party’s  
22 status as a nondefaulting party in connec-  
23 tion with the insolvency of an insured cred-  
24 it union or the appointment of or the exer-  
25 cise of rights or powers by a conservator or

1 liquidating agent of such credit union, and  
 2 not as a result of a party's exercise of any  
 3 right to offset, setoff, or net obligations  
 4 that exist under the contract, any other  
 5 contract between those parties, or applica-  
 6 ble law.".

7 ~~SEC. 7. COMPENSATION OF CHAPTER 7 TRUSTEES; CHAP-~~  
 8 ~~TER 7 FILING FEES.~~

9 ~~(a) AMENDMENTS TO TITLE 11 OF THE UNITED~~  
 10 ~~STATES CODE.—~~

11 ~~(1) COMPENSATION OF CHAPTER 7 TRUST-~~  
 12 ~~EES.—Section 330(b)(1) of title 11, United States~~  
 13 ~~Code, is amended by striking "\$45" and inserting~~  
 14 ~~"\$100".~~

15 ~~(2) RELATED AMENDMENTS.—Section 330(b)~~  
 16 ~~of title 11, United States Code, is amended—~~

17 ~~(A) by striking "(1)", and~~

18 ~~(B) by striking paragraph (2).~~

19 ~~(b) AMENDMENTS TO TITLE 28 OF THE UNITED~~  
 20 ~~STATES CODE.—~~

21 ~~(1) CHAPTER 7 FILING FEE.—Section~~  
 22 ~~1930(a)(1)(A) of title 28 of the United States Code,~~  
 23 ~~as amended by section 10101 of Public Law 109-~~  
 24 ~~171, is amended by striking "\$245" and inserting~~  
 25 ~~"\$300", and~~

1           ~~(2) UNITED STATES TRUSTEE FUND.—Section~~  
2           ~~589a(b)(1)(A) of title 28, United States Code, is~~  
3           ~~amended by striking “40.46” and inserting “29.67”.~~

4           ~~(c) RELATED AMENDMENT REGARDING COLLEC-~~  
5           ~~TIONS AND DEPOSITS OF MISCELLANEOUS BANKRUPTCY~~  
6           ~~FEES.—Section 406(b) of the Judiciary Appropriations~~  
7           ~~Act, 1990 (28 U.S.C. 1931 note) is amended by striking~~  
8           ~~“28.87” and inserting “21.17”.~~

9           ~~(d) CONFORMING AMENDMENT.—Section 10101(a)~~  
10          ~~of Public Law 109–171 is amended by striking paragraph~~  
11          ~~(2).~~

12          ~~(e) EFFECTIVE DATE; APPLICATION OF AMEND-~~  
13          ~~MENTS.—The amendments made by this section shall take~~  
14          ~~effect 60 days after the date of the enactment of this Act~~  
15          ~~and shall not apply with respect to cases commenced~~  
16          ~~under title 11 of the United States Code before the date~~  
17          ~~such amendments take effect.~~

18       **SEC. 8. SCOPE OF APPLICATION.**

19           Subject to section 7(e), the amendments made by this  
20 Act shall not apply to any cases commenced under title  
21 11, United States Code, or appointments made under any  
22 Federal or State law, before the date of the enactment  
23 of this Act.

○

**TITLE IX (FINANCIAL CONTRACTS) OF THE BANKRUPTCY ABUSE  
PREVENTION AND CONSUMER PROTECTION ACT OF 2005 EXPANDS SAFE  
HARBORS**

New York  
March 22, 2005

On March 10, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Act”) was passed by the U.S. Senate. It is expected that the Act will be passed by the House of Representatives in early April and will be signed into law by President Bush shortly thereafter. The Act will generally take effect six months following enactment. Title IX of the Act is intended to clarify the treatment of certain financial contracts upon the insolvency of a counterparty and to promote a reduction of systemic risk. In order to accomplish these goals, the Act amends the Bankruptcy Code (the “Code”), the Securities Investor Protection Act (“SIPA”), the Federal Deposit Insurance Act (the “FDIA”), the Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”) and the Federal Credit Union Act (the “FCUA”).

This memorandum briefly summarizes Title IX’s more significant amendments to each of the Code, the FDIA, FDICIA and the FCUA. Each statute will be analyzed separately.<sup>1</sup>

**The Code**

The Act expands the Code’s definitions of “forward contract”, “repurchase agreement”, “swap agreement”, “commodity contract” and “securities contract”. To the extent that a similar defined term is used in the FDIA, generally the definitions are harmonized.

- “Securities contract”:
  - The definition is expanded to include:

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<sup>1</sup> Cleary Gottlieb has also prepared a memorandum discussing the Act’s amendments to the Code affecting bankruptcy reorganizations generally. To obtain this memorandum, please contact Zygmont Wyka of Cleary Gottlieb via email ([zwyka@cgsh.com](mailto:zwyka@cgsh.com)) or telephone (212-225-3745).

- “a contract for the purchase sale or loan of a mortgage loan or any interest in a mortgage loan”;
- “any repurchase or reverse repurchase transaction on any security, certificate of deposit, mortgage loan, interest in a mortgage loan, group or index of securities, or option on any of the foregoing”;
- “any margin loan”; and
- “any other similar agreement”.
- The definition is also expanded to include combinations of agreements or transactions covered by the definition, options to enter into any agreement or transaction referred to in the definition, master agreements and, subject to some limits, security arrangements (including any guarantee and reimbursement obligation) relating to the above.
- “Forward contract”:
  - The phrase “or any other similar agreement” is added to the definition.
  - The definition is also expanded to include combinations of agreements or transactions covered by the definition, options to enter into any agreement or transaction referred to in the definition, master agreements and, subject to some limits, security arrangements (including any guarantee and reimbursement obligation) relating to the above.
- “Commodity contract”:
  - The definition is expanded to include any other similar agreement.
  - The definition is also expanded to include combinations of agreements or transactions covered by the definition, options to enter into any agreement or transaction referred to in the definition, master agreements and, subject to some limits, security arrangements (including any guarantee and reimbursement obligation) relating to the above.
- “Repurchase agreement”:
  - The types of eligible securities are expanded to include mortgage related securities (as defined in Section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans,

qualified foreign government securities (defined as securities that are direct obligations of, or that are fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development).

- The phrase “or any other similar agreement” is added to the definition.
- The definition is also expanded to include combinations of agreements or transactions covered by the definition, options to enter into any agreement or transaction referred to in the definition, master agreements and, subject to some limits, security arrangements (including any guarantee and reimbursement obligation) relating to the above.
- “Swap agreement”:
  - The list of transactions has been expanded to include:
  - “a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement”;
  - “an equity index or an equity swap, option, future, or forward agreement”;
  - “a debt index or debt swap, option, future, or forward agreement”;
  - “a total return, credit spread or credit swap, option, future, or forward agreement”;
  - “a commodity index or a commodity swap, option, future, or forward agreement”;
  - “a weather swap, weather derivative, or weather option”; and
  - “any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets 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, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures or economic or financial risk value”.

- The definition is also expanded to include combinations of agreements or transactions covered by the definition, options to enter into any agreement or transaction referred to in the definition, master agreements and, subject to some limits, security arrangements (including any guarantee and reimbursement obligation) relating to the above.

The Act expands the counterparties eligible for securities, forward and commodity contract protections.

- “Financial participants” have all the protections accorded previously qualifying counterparties to “securities contracts”, “forward contracts” and “commodity contracts”. “Financial participant” is defined as “(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the filing of the petition, has one or more [“securities contracts”, “commodity contracts”, “forward contracts”, “repurchase agreements”, “swap agreements” or “master netting agreements”] with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than \$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 not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period; or (B) a clearing organization (as that term is defined in Section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991)”.<sup>2</sup>

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<sup>2</sup> Under Section 402 of FDICIA (as modified by the Act), 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 is exempt from such registration by order of the Securities and Exchange Commission; or

(B) that performs clearing functions for a contract market designated pursuant to the Commodity Exchange Act, that has been granted an exemption under section 4(c)(1) of the Commodity Exchange Act, or that is a multilateral clearing organization (as defined in section 408 of this Act)."

In addition, new Section 561 of the Act provides for bilateral “cross-product” netting across “forward contracts”, “repurchase agreements”, “swap agreements”, “commodity contracts” and “securities contract”, as well as by “master netting agreement participants” under “master netting agreements”.

- “Master netting agreement” is defined as “an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or closeout, under or in connection” with a securities contract, forward contract, commodity contract, repurchase agreement or swap agreement.
- “Master netting agreement participant” is defined as “an entity that, at any time before the filing of the petition, is a party to an outstanding master netting agreement with the debtor”.

The Act provides that the Code provisions relating to securities contracts, forward contracts, commodity contracts, repurchase agreements, swap agreements or master netting agreements apply in a case under new Chapter 15, which addresses the rights of foreign debtors seeking recognition of foreign bankruptcy proceedings in the United States and replaces former Code Section 304.

Title V of the Act makes all the provisions relating to securities contracts, forward contracts, commodity contracts, repurchase agreements, swap agreements or master netting agreements applicable in a Chapter 9 proceeding in respect of a municipality.

The Act amends Section 553 of the Code to expressly except certain setoffs in connection with securities contracts, forward contracts, commodity contracts, repurchase agreements, swap agreements or master netting agreements from any avoidance powers of a bankruptcy trustee.

The Act clarifies the damage measure in connection with securities contracts, forward contracts, commodity contracts, repurchase agreements, swap agreements or master netting agreements by adding new Section 562 to the Code, which generally provides that damages will be measured as of the earlier of the date of rejection or the date or dates of liquidation.

## **SIPA**

The Act amends SIPA to essentially codify the Securities Investor Protection Corporation (“SIPC”) correspondence relating to repurchase agreements and securities lending transactions, limiting the SIPC-obtained stay to the foreclosure on, or disposition of, securities collateral pledged by the debtor, securities sold by the debtor under a repurchase agreement, or securities lent under a securities lending agreement.

### **The FDIA**

The Act expands the definitions of “securities contract”, “commodity contract”, “forward contract”, “repurchase agreement” and “swap agreement” in the FDIA in a manner consistent with the amendments to the Code described above.

The Act renders “walkaway” clauses in all qualified financial contracts unenforceable in FDIA proceedings. 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 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.

### **FDICIA**

The Act amends the definition of “netting contract” in FDICIA to eliminate the requirement that a “netting contract” be governed by U.S. law.

The Act adds a provision to FDICIA that protects from stay and avoidance any security agreement or arrangement or other credit enhancement related to one or more netting contracts.

### **The FCUA**

The Act amends the FCUA in a manner consistent with the amendments to the FDIA described above.

\* \* \*

The foregoing is only a brief summary of some of the more significant changes made by Title IX of the Act. A document showing changes made by Title IX of the Act to the provisions of the Code is attached. If you have any questions regarding Title IX of the Act please contact:

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