

**\*\* Senate Counteroffer \*\***

**June 24, 2010**

**Title: Title VII**

**Matter: Derivatives Regulation**

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**The Senate accepts the following House proposals for amendments to the Base text:**

1. House #1: Amend base text to specifically reference CFTC authority to interpret definitions (Base text § 711, Page 599, line 3).
2. House #2: Strike base text provision on regulatory consultation and replace with House provision (with minor revisions) and appropriate conforming changes (Base text §712, page 599, line 5-18; House bill §3002, page 558 through 559 line 18).
3. House #4: Strike base text provision allowing futures associations and national securities associations to enforce rules on advertising (Base text §712, page 604 lines 1 and 15).
4. House #5: Strike base text provision that is duplicated on pages 736 and 950 (Base text §712, page 606, line 22 through page 607, line 17).
5. House #6: Add House provision that requires maintenance of records and information sharing with the CFTC and SEC for all uncleared security based swap agreements. The provision names the Financial Services Oversight Council as the resolver of disputes between the CFTC and SEC in joint rulemaking for security based swap agreements. (Base text § 712, page 607 and House bill § 3002, page 563-564).
6. House #7: Replace base text provision regarding portfolio margining for certain brokers, dealers and futures commission merchants, and appropriate conforming changes (new §713, page 608 line 17 through page 609 line 2).
7. House #8: Add provision that allows the CFTC and SEC to prepare in advance of the effective date in regards to rules, regulations, studies, etc. (Base text §712 , page 608, line 16).
8. With modifications, House #9: Add House studies on (1) the effects of position limits on trading exchanges, (2) the feasibility of requiring the use of standardized algorithmic descriptions for financial derivatives, (3) international swaps regulation, and (4) the application of swaps definition to stable value funds. The provision also adds a memorandum of understanding between the CFTC and the Federal Energy Regulatory Commission. (House bill §3005, page 566, line 7 through page 569 line 24 and § 3009).

9. House #10: Strike base text provision and replace with House provision for associated person of a swap dealer or major participant (Base text §721, page 622, line 24 through page 623 line 13).
10. House #11: Strike base text provision that excludes employee pension plans from the definition of major swap participant (Base text §721, page 636).
11. With modifications, House #12: Strikes base text provision and replaces with new provision that qualifies “highly leveraged financial entities” as those that are not subject to capital requirements set by a federal banking regulator in definition of major swap participant. (Base text §721, page 637, line 8).
12. House #13: Add House provision requiring CFTC to consider a person’s relative position in uncleared as opposed to cleared swaps in determining “substantial position.” Gives the regulator the authority to consider collateral position of major swap participants. (Base text §721, page 637, line 20; House bill §3101, page 585 line 10-11).
13. House #15: Add provision that includes Federal Housing Finance Agency in the definition of “prudential regulator” (Base text §721, page 639, line 21).
14. House #18: Amend base text provision for definition of swap data repository (Base text §721, page 651, line 14-17)
15. House #19: Amend base text provision for definition of swap dealer (Base text §721, page 652, line 1)
16. House #20: Amend base text provision definition of “swap dealer”, providing for a *de minimis* exception, and appropriate conforming changes (Base text §721, page 652, line 18).
17. With modifications, House #21: Add language to adjust swap execution facility definition (Base text §721, page 652, line 21 and lines 23-24)
18. With modifications, House #23: Strike base text provision relating to clearing requirements and replace with House provision with modifications (including treatment for end users, affiliates, and small institutions) (Base text §721, page 663, line 25 through page 681, line 8; House bill §3103, page 595 line 15 through page 604, line 24).
19. House #24: Amend base text provision to recognize that not all issuers will have audit committees and may rely on the appropriate committee of the issuer’s board or governing body with appropriate conforming changes (Base text §723, page 681, lines 20-21).
20. House #25: Strike base text provision requiring CFTC registration of depository institutions and clearing agencies (Base text §725, page 693, lines 3-12).

21. House #26: Add provision to require the SEC to share information with the CFTC regarding clearing agencies that are deemed to be registered with the CFTC (Base text §725, page 694, line 9).
22. House #27: Amend base text provision regarding derivatives clearing organizations' governance arrangements to permit the consideration of the views of owners and participants (Base text §725, page 710, line 23).
23. House #28: Strike base text provision giving CFTC ability to modify core principles (Base text §725 page 712, lines 12-16).
24. House #29: Amend base text to conform statutory references in the Commodity Exchange Act (Base text §725, page 714, lines 1-2, etc.)
25. House #30: Amend base text to make derivatives clearing organization reports on security-based swap agreements open to inspection and examination by the SEC. (Base text §725, page 714, line 3)
26. House #31: Add provision to clarify that a derivatives clearing organization will not be compelled to accept the counterparty credit risk of another clearing organization (Base text §725, page 719, line 9).
27. House #33: Amend base text provision to ensure books and records of large swap reporters are open to inspection and examination by the SEC for swaps (Base text §730, page 739, line 13)
28. With modifications, House #36: Amend base text provisions on capital and margin requirements for swap dealers and major swap participants to delete references to "depository institution" and replace with references to whether or not there is a Prudential Regulator and appropriate conforming changes (Base text §731, page 744, lines 2-5 and lines 15-18).
29. House #37: Amend base text provisions referring to "appropriate Federal banking agency" to refer to "Prudential Regulator" (Base text §731, page 744, lines 7-8; page 750, lines 7, 9-10 and 18-19).
30. House #38: Strike base text provision that states that capital and margin requirements will be set to help ensure the safety and soundness of the swap dealer or major participant (Base text §731, page 744, line 9-10 and line 23-24)
31. House #39: Strike base text provision which names the SEC (along with the CFTC) to set margin and capital for swap dealers and major swap participants that a not depository institutions in the Commodities and Exchange Act (Base text §731, page 744, line 20-21)
32. With modifications, House #40: Strike base text and replace with revised House provision regarding risk-based capital and margin standards with appropriate conforming

changes (Base text §731, page 745, line 1 through page 747, line 16; House bill § 3107, page 634, line 19 through page 637, line 2).

33. House #41: Strike base text provision for margin to eliminate redundancy (Base text §731, page 748, line 25 through page 750, line 2)
34. House #42: Amend base text provision to require regulators to permit the use of non-cash collateral to meet margin requirements (§731, page 750, line 9).
35. House #43: Strikes base text provision for requested margin (Base text §731, page 751, line 10 through page 752, line 4)
36. House #44: Add provision that each swap dealer and major swap participant shall keep books and records related to open to inspection and examination by the SEC (Base text §731, page 753, line 4)
37. House #45: Amend Base text provision to establish a standard of conduct for swap dealers and major swap participants when providing advice to state entities and pension funds. The provision also establishes business conduct and disclosure standards for counterparties. (Base text §731 page 754, line 8)
38. House #46: Add provision requiring the Commission to prescribe rules governing the duties of swap dealers and major swap participants (Base text § 731, page 761, line 11).
39. House #47: Amend base text provision Requiring futures commission merchants to have a Chief Compliance Officer responsible for performing duties and responsibilities set forth in regulation to be adopted by the CFTC or a futures association registered under 17 (Base text §732, page 765, line 1 through page 767, line 19).
40. House #48: Add provision preventing swap execution facilities from listing agricultural swaps outside the current regulatory structure with appropriate conforming changes (Base text §733, page 768, line 16).
41. With modifications, House #49: Add provision clarifying that a swap execution facility is responsible for enforcing position limits on the swap execution facility only (not across all swap execution facilities), whether self- or Commission-imposed, with appropriate conforming changes (§733, page 773, line 6).
42. House #50: Strike base text provision regarding position enforcement for swap execution facilities. (Base text §733, page 773, line 7-16)
43. House #51: Add provision that each swap execution facility shall keep books and records open to inspection and examination by the SEC (Base text §733, page 775, line 6)

44. House #52: Add provision to provide a transition period for exempt boards of trade to permit them to continue operating subject to 5d of the Commodity Exchange Act for up to 1 year after the effective date of the subtitle (Base text §734, page 781, line 12).
45. House #53: Add provision to core principles for designated contract markets to require publicly traded boards of trade to endeavor to recruit diverse boards of directors (Base text §735, page 791, line 17).
46. With modifications, House #54: Add House provision, with modifications, setting position limits (Base text §737, page 793, line 15 through page 796, line 13; House bill §3113, page 664, line 15 through 671, line 9).
47. House #56: Add House provision that states that a person can not be liable under the Act for a transaction with a Foreign Board of Trade if the person has reason to believe a number of factors, including the FBOT is legally organized under the laws of a foreign country. (House Bill § 742 page 679, line 20 through page 680, line 7)
48. With modifications, House #57: Amend base text enforcement authority provision to grant exclusive authority to the CFTC and Prudential regulator, respectively. (Base text §741, page 806, line 12-25)
49. House #58: Amend Base text provision by replacing “shall” with “may” in regards to the prudential regulators’ role in notifying the Commission that a swap dealer or major swap participant may have violated a nonprudential requirement of the Act (Base text § 741, page 807, line 11)
50. House #60: Amend Base text provision to provide for a 90-day transition period for the CFTC to complete its rulemaking in regard to retail foreign exchange. (House Bill §742, page 819, line 17)
51. House #61: Amend Base text provision to require registered entities to provide notice of certification to its members regarding a new contract or instrument listed for clearing or accepted for trading (Base text § 745, page 822, line 21)
52. House #62: Add Base text provision to add a public comment period during a stay of certification for rules. (Base text §745, page 823, line 25)
53. House #68: Replace Base text provision on confidentiality to provide that only information revealing a whistleblower’s identity is subject to confidentiality restrictions, not all information a whistleblower provides. (Base text bill § 748, page 846, line 10, through page 847, line 8)
54. House #69: Amend Base text provision to remove an unnecessary reference to ‘privileged’ (Base text bill § 748, page 848, line 24)

55. House #71: Amend Base text provision to add swaps to private rights of action under the Commodities Exchange Act (Base text § 749, page 854 lines 1-3)
56. House #72: Strike Base text provision and add House provision for international harmonization which requires consultation and cooperation among the CFTC, SEC and Prudential regulators. The CFTC is required to consult and coordinate with foreign regulatory authorities for standards on futures. (Base text bill § 752, page 858, lines 5-19 and House bill § 3004, page 565)
57. With modifications, House #73: Add provision that states that in prohibiting manipulation no rule shall restrict the ability of a person to hedge or require the disclosure of non-public information. (Base text § 753, page 859, after line 14)
58. With modifications, House #74: Add provision to clarify that mistakenly transmitting false, misleading or inaccurate information about a swap to a price reporting service does not constitute "manipulation" (Base text §753, page 861, line 2)
59. House #76: Strike Base text provision stating that findings of the Commission shall be conclusive (Base text §753, page 868, lines 11-12)
60. House #77: Amend Base text provision to insert "knowingly" before fail to clarify mens rea standard. (Base text bill § 753, pages 868 and 869)
61. House #78: Strike Base text provision automatically making a person guilty of a misdemeanor for failure to obey or comply with an order of the Commission (Base text §753, page 869, line 1)
62. House # 79: Strike Base text provision of "less than 6 months" to remove the mandatory prison sentence for failing to or refusing to obey or comply with a cease and desist order. (Base text bill § 753, page 869)
63. House #82: Amend base text provision to revise the definition of major security-based swap participant to delete exclusion for pension funds (§761 page 873, line 21 through page 874, line 8)
64. House #83: Strikes base text provision and replaces with new provision that qualifies "highly leveraged financial entities" as those that are not subject to capital requirements set by a federal banking regulator in definition of major swap participant. (Base text §761, page 874, line 18).
65. House #84: Add House provision requiring CFTC to consider a person's relative position in uncleared as opposed to cleared swaps in determining "substantial position." Gives the regulator the authority to consider collateral position of major swap participants. (Base text §721, page 637, line 20; House bill §3101, page 585 line 10-11).

66. House #87: Amend base text provision for definition of swap dealer (Base text §761, page 880, lines 5-7)
67. House #88: Amend base text provision definition of “swap dealer”, providing for a *de minimis* exception, and appropriate conforming changes (Base text §761, page 880, lines 5-7)
68. House #90: Amend base text provision that defines of security-based swap data repository to clarify it applies to entities that are providing a centralized recordkeeping facility (§ page 881, lines 19-23)
69. With modifications, House #91: Add language to adjust swap execution facility definition (Base text §761, page 882, line 6 and 8-9)
70. House #92: Add provision to permit the SEC to define the term “commercial risk” and other terms under the Securities Exchange Act (Base text §761, page 883, line 6)
71. With modifications, House #94: Strike base text provision relating to clearing requirements and replace with House provision with modifications (including treatment for end users, affiliates, and small institutions) (Base text §763, page 890, line 18 through page 908, line 3)
72. House #95: Amend base text provision to recognize that not all issuers will have audit committees and may rely on the appropriate committee of the issuer’s board or governing body with appropriate conforming changes (Base text §763 page 908, lines 10-11)
73. House #96: Strike base text provision requiring automatic registration exemption for derivatives clearing organizations (Base text §763, page 918, lines 9-24)
74. House #97: Add provision to deem as registered with the SEC existing depository institutions and derivatives clearing organizations already registered under the CFTC (Base text §763 page 918, line 25)
75. House #98: Strike Base text provision which removes the security-based swap Swap Execution Facility (SEF) position limit core principle (Base text §763, page 923, line 22 through page 924, line 25)
76. House #99: Add provision regarding the segregation requirements for uncleared swaps to confirm the Commodity Exchange Act and Securities Exchange Act in the bill. (Base text §763, page 936)
77. With modifications, House #101: Amend base text provisions on capital and margin requirements for swap dealers and major swap participants to delete references to “depository institution” and replace with references to whether or not there is a Prudential Regulator and appropriate conforming changes (Base text §764, page 960, lines 8-11 and lines 8-10).

78. House #102: Amend base text provisions referring to “appropriate Federal banking agency” to refer to “Prudential Regulator” (Base text §764, page 967, lines 5-6, 12, and 21-22).
79. With modifications, House #103: Strike base text and replace with revised House provision regarding risk-based capital and margin standards with appropriate conforming changes (Base text §764, page 962, line 2 through page 964, line 22)
80. House #104: Strike base text provision for margin to eliminate redundancy (Base text §764, page 966, line 4 through page 967, line 3)
81. House #105: Amend base text provision to require regulators to permit the use of non-cash collateral to meet margin requirements (Base text §764, page 967, line 11)
82. House #106: Strikes base text provision for requested margin (Base text §764, page 968, line 13 through page 969, line 8)
83. House #108: Add provision requiring the Commission to prescribe rules governing the duties of swap dealers and major swap participants (Base text § 764, page 979, line 17)
84. House #109: Add provision establishing parameters for exemptive authority (Base text §772, page 1001 lines 8-12 and page 1002, lines 7-10)
85. House #110: Amend provision to revise effective dates for the Title to be 360 days (Page 871, lines 2-4 and page 1002, lines 7-10).

**The Senate does not accept the following House proposals for amendments to the Base text:**

1. House #3: Strike base text provision regarding mixed swaps regulation (Base text §712, page 601, lines 12-20; §721, page 648, line 1-16)
2. House #14: Amend base text provision defining “prudential regulator” with modified House provision (Base text §721, page 638, line 7 through page 639, line 15; House bill §3101 page 585, line 24 through page 586, line 21 and page 703, line 14 through page 704, line 11)
3. House #16: Strike base text provision defining mixed swap (Base text §721, page 648, lines 1-16)
4. House #17: Strike base text provision that treats foreign exchange as swaps and forwards (Base text text §721, page 648 line 17 through page 651, line 11)
5. House #22: Strike base text provision and replace with House provision regarding CFTC and FERC jurisdiction and replace with House provision regarding same (Base text §722,

page 659, line 16 through page 661, line 13; House bill §3102, page 591, line 11 through page 592 line 2).

6. House #32: Strike base text provision that is duplicative with paragraph (7) on page 728 relating to information sharing by swap data repositories (Base text §728, page 726, line 17 through page 727, line 3).
7. House #34: Amend base text provision to give the Commission authority to write rules for swap dealers and major swap participants except for rule making and capital and margin (Base text §731, page 741, line 21-24)
8. House #35: Amend base text provision to clarify CFTC authority to prescribe rules relating to registration and regulation of swap dealers and major swap participants (§731, page 743, lines 19-21).
9. House #55: Add House provision that requires the Commission to define a bona fide hedge for exemption from trading positions when determining when excessive speculation is a burden (Base text §737, page 796, line 24; House Bill § 3113, page 671, line 20 through page 673, line 8)
10. House #59: Amend Base text provision and strike a provision to limit the CFTC's ability to make shorter delivery requirements and remove a limitation on the term 'actual delivery' (Base text § 742, page 815, line 22 and page 817, line 11-16)
11. House #63: Amend Base text provision to include 'civil' actions in the definition of 'covered judicial or administrative action.' (Base text § 748, page 834, line 13, etc.)
12. House #64: Amend Base text provision to make clear that 'monetary sanctions' relate only to 'covered' judicial or administrative proceedings. (Base text § 748, page 834, line 20)
13. House #65: Amend base text provision to clarify appellate review of determination of whistleblower awards (Base text §748, page 840, line 9)
14. House #66: Amend Base text provision to provide that appeals of whistleblower awards are made to the U.S. district court, not to the court of appeals. (Base text § 748, page 840, line 16)
15. House #67: Amend Base text provision to remove an unnecessary reference to the Administrative Procedure Act (Base text bill § 748, page 840, lines 19-21)
16. House #70: Amend Base text provision to remove reference to the United States criminal code. (Base text § 748, page 850, line 16-17)
17. House #75: Amend Base text provision to clarify jurisdiction of federal district courts (Base text §753, page 867, lines 6-7, 11)

18. House #80: Strike Base text provision automatically making a person guilty of a felony for failure to obey or comply with an order of the Commission (Base text §753, page 869, line 8)
19. House #81: Add provision regarding conflicts of interest and beneficial ownership of derivatives clearing organizations (Base text §753, page 870, line 23)
20. House #85: Amend base text provision to clarify the definition of security-based swap (Base text §761, page 875, line 23)
21. House #86: Strikes base text provision defining mixed swap (Base text §761, page 877, line 23 through page 878, line 12)
22. House #89: Amend Base text provision defining “prudential regulator” with modified House provision (Base text §761, page 881, line 13-16)
23. House #93: Strike Base text provision incorporating additional terms by reference (Base text §761, page 883, line 14 through page 884, line 2)
24. House #100: Amend base text provision to clarify Commission authority to write rules for swap dealers and major swap participants (Base text §731, page 741, line 21-24)
25. House #107: Amend Base text provision to establish a standard of conduct for swap dealers and major swap participants when providing advice to state entities and pension funds. The provision also establishes business conduct and disclosure standards for counterparties. (Base text §764 page 971, line 19 through page 976, line 6)

**The Senate proposes the following amendments to the Base text:**

1. **FOIA Study**: Requires the Inspector General of the Commission to conduct a study about the disclosure of information by whistleblowers to the Commission.
2. **Reporting/Repositories Requirement**: This amendment would require all swaps/security-based swaps, cleared and uncleared, to be subject to be reported to a repository. The conference base text only requires uncleared swaps to be subject to the reporting requirements.
3. **Transition for Captive Finance Companies**: This amendment would provide a transition period of up to 2 years for captive finance companies to meet the clearing and margin requirements in Title VII. Captive finance companies are affiliates wholly owned by a parent company, whose purpose is to provide financing to dealers and customers buying the parent company’s product.

4. Conflicts of Interest: This amendment would strengthen the Conference base text language on conflicts of interest by requiring (rather than permitting) the CFTC and SEC to adopt rules to mitigate conflicts of interest at clearinghouses, clearing agencies, exchanges, and swap/security-based swap execution facilities. The rules adopted may include numerical limits on the control of, or the voting rights with respect to, these entities.
5. Additional modification to House #33 regarding clearing: This amendment would increase the penalties for violations of the clearing requirement and require (rather than permit) the CFTC and SEC to prescribe anti-evasion rules.
6. Foreign Boards of Trade: This amendment would authorize the CFTC to require foreign boards of trade to register with the CFTC.
7. Further modification to House #33 regarding election of counterparties: This amendment would provide certain counterparties the ability to select the clearinghouse at which a swap will be cleared. For swaps not subject to the clearing requirement, certain counterparties may choose to require clearing of the swap.
8. Business Conduct Standards: This provision would impose business conduct standards on Swap Dealers when they solicit transactions with or offer to enter into swaps with Governmental Entities, Pension Plans, Endowments, and Retirement Plans. The section distinguishes between Special Entity solicited transactions and those where the Swap Dealer solicits the Special Entity. The Swap Dealers must meet certain higher disclosure standards, client portfolio confidentiality and recordkeeping requirements when dealing with Special Entities. The Swap Dealers would be required to meet other disclosure and recordkeeping standards with respect to other swap transactions with all other entities.
9. Bona Fide Hedging: This amendment provides clarifications related to situations involving bona fide hedging. The provision addresses netting long and short positions in similar but different instruments.
10. 716 Amendment: This amendment clarifies several aspects of the Prohibition on Federal Assistance to Swap Entities. The new language clarifies that (1) that swap entities are not prohibited from using the new 13(3) Federal Reserve broad-based lending facility program for liquidity problems in the financial system; (2) that bank major swap participants are not subject to the restrictions on federal assistance such as FDIC insurance of accounts and access to the Federal Reserve Discount Window; (3) Transition period for banks to push out swap entities of up to 24 months at the discretion of the appropriate Federal Banking Agency after considering certain factors such as the effect on mortgage lending, small business lending, jobs and capital formation; (4) FDIC conservatorships, receiverships and bridge banks are exempt from prohibition; and (5) swap entities may not be in the bank, but may be “affiliates” under the Bank Holding Company.

11. **Considerations for Regulation of FX Swaps and Forwards:** This amendment requires the Treasury Secretary to consider certain criteria when determining whether to exempt foreign exchange swaps and foreign exchange forwards from the definition of the term “swap.”
12. **Technical Change:** This amendment adds provisions to conform the real-time reporting requirements in the base text to the clearing requirements in the House offer.
13. **CFTC Whistleblower Program:** These changes will harmonize the CFTC Whistleblower program with the SEC Whistleblower program created in Sec. 922 of Wall Street Reform Act. The changes clarify the process through which deposits are made into the Fund that supports the Whistleblower program. It would also add a clause that waives pre-dispute arbitration agreements, or employment contracts that would force whistleblowers to go through mandatory arbitration, as opposed to coming straight to the Commission with their information.

## **Restoring American Financial Stability Conference Amendment**

Senate Counteroffer to Title VII

[All page and line numbers refer to the conference base  
text of H.R. 4173]

Offered by Senator Dodd

1 On page 610, strike line 9 and all that follows  
2 through page 611, line 24 (relating to striking section  
3 716), and insert the following:

4 **SEC. 716. PROHIBITION AGAINST FEDERAL GOVERNMENT**

5 **BAILOUTS OF SWAPS ENTITIES.**

6 (a) PROHIBITION ON FEDERAL ASSISTANCE.—Not-  
7 withstanding any other provision of law (including regula-  
8 tions), no Federal assistance may be provided to any  
9 swaps entity with respect to any swap, security-based  
10 swap, or other activity of the swaps entity.

11 (b) DEFINITIONS.—In this section:

12 (1) FEDERAL ASSISTANCE.—The term “Federal  
13 assistance” means the use of any funds, including  
14 advances from any Federal Reserve credit facility or  
15 discount window that is not part of a program or fa-  
16 cility with broad-based eligibility under section  
17 13(3)(A) of the Federal Reserve Act, Federal De-

1       posit Insurance Corporation insurance, or guaran-  
2       tees for the purpose of—

3               (A) making any loan to, or purchasing any  
4       stock, equity interest, or debt obligation of, any  
5       swaps entity;

6               (B) purchasing the assets of any swaps en-  
7       tity;

8               (C) guaranteeing any loan or debt issuance  
9       of any swaps entity; or

10              (D) entering into any assistance arrange-  
11       ment (including tax breaks), loss sharing, or  
12       profit sharing with any swaps entity.

13       (2) SWAPS ENTITY.—

14              (A) IN GENERAL.—The term “swaps enti-  
15       ty” means any swap dealer, security-based swap  
16       dealer, major swap participant, major security-  
17       based swap participant, swap execution facility,  
18       designated contract market, security-based  
19       swap execution facility national securities ex-  
20       change, central counterparty, clearing house,  
21       clearing agency, or derivatives clearing organi-  
22       zation that is registered under—

23                      (i) the Commodity Exchange Act (7  
24                      U.S.C. 1 et seq.);

1 (ii) the Securities Exchange Act of  
2 1934 (15 U.S.C. 78a et seq.); or

3 (iii) any other Federal or State law  
4 (including regulations).

5 (B) EXCLUSION.—The term “swaps enti-  
6 ty” does not include any major swap partici-  
7 pant that is a bank.

8 (c) AFFILIATES OF INSURED DEPOSITORY INSTITU-  
9 TIONS.—The prohibition on Federal assistance set forth  
10 under subsection (a) does not apply to and shall not pre-  
11 vent an insured depository institution from having or es-  
12 tablishing an affiliate which is a swaps entity, as long as  
13 such insured depository institution is part of a bank hold-  
14 ing company, financial holding company, grandfathered  
15 savings and loan holding company, or securities holding  
16 company which is registered with the Board of Governors  
17 of the Federal Reserve System and such swaps entity affil-  
18 iate complies with sections 23A and 23B of the Federal  
19 Reserve Act and such other requirements as the Com-  
20 modity Futures Trading Commission or the Securities and  
21 Exchange Commission may, in consultation with the  
22 Board of Governors of the Federal Reserve System, deter-  
23 mine to be necessary and appropriate.

24 (d) TRANSITION PERIOD.—To the extent an insured  
25 depository institution qualifies as a “swaps entity” and

1 would be subject to the Federal assistance prohibition set  
2 forth under subsection (a), the appropriate Federal bank-  
3 ing agency, after consulting with and considering the  
4 views of the Commodity Futures Trading Commission or  
5 the Securities and Exchange Commission, as appropriate,  
6 may permit the insured depository institution up to 24  
7 months to divest or spin off the swaps entity. In estab-  
8 lishing the appropriate transition period to effect such di-  
9 vestiture or spin off, which may include making the swaps  
10 entity an affiliate of the insured depository institution, the  
11 appropriate Federal banking agency shall take into ac-  
12 count and make written findings regarding the potential  
13 impact of such divestiture or spin off on the insured depos-  
14 itory institution's (1) mortgage lending, (2) small business  
15 lending, (3) job creation, and (4) capital formation versus  
16 the potential negative impact on insured depositors and  
17 the Deposit Insurance Fund of the Federal Deposit Insur-  
18 ance Corporation. The appropriate Federal banking agen-  
19 cy may consider such other factors as may be appropriate.  
20 The appropriate Federal banking agency may place such  
21 conditions on the insured depository institution's divesti-  
22 ture or spin off of the swaps entity as it deems necessary  
23 and appropriate.

24 (e) EXCLUDED ENTITIES.—For purposes of this pro-  
25 vision, the term “swaps entity” shall not include any in-

1   sured depository institution under the Federal Deposit In-  
2   surance Act or a covered financial company under title II  
3   of the Restoring American Financial Stability Act of 2010  
4   which is in a conservatorship, receivership, or a bridge  
5   bank operated by the Federal Deposit Insurance Corpora-  
6   tion.

7           Subsection (d) of section 719 as set forth in amend-  
8   ment #9 of the House Offer to Title VII (subsections (a)  
9   through (c) of such section 719 having already been ac-  
10   cepted by the Senate) is amended to read as follows:

11           (d) STABLE VALUE CONTRACTS.—

12                   (1) DETERMINATION.—

13                           (A) STATUS.—Not later than 15 months  
14                           after the date of the enactment of this Act, the  
15                           Securities and Exchange Commission and the  
16                           Commodity Futures Trading Commission shall,  
17                           jointly, conduct a study to determine whether  
18                           stable value contracts fall within the definition  
19                           of a swap. In making the determination re-  
20                           quired under this subparagraph, the Commis-  
21                           sions jointly shall consult with the Department  
22                           of Labor, the Department of the Treasury, and  
23                           the State entities that regulate the issuers of  
24                           stable value contracts.

1           (B) REGULATIONS.—If the Commissions  
2           determine that stable value contracts fall within  
3           the definition of a swap, the Commissions joint-  
4           ly shall determine if an exemption for stable  
5           value contracts from the definition of swap is  
6           appropriate and in the public interest. The  
7           Commissions shall issue regulations imple-  
8           menting the determinations required under this  
9           paragraph. Until the effective date of such reg-  
10          ulations, and notwithstanding any other provi-  
11          sion of this title, the requirements of this title  
12          shall not apply to stable value contracts.

13           (C) LEGAL CERTAINTY.—Stable value con-  
14          tracts in effect prior to the effective date of the  
15          regulations described in subparagraph (B) shall  
16          not be considered swaps.

17          (2) DEFINITION.—For purposes of this sub-  
18          section, the term “stable value contract” means any  
19          contract, agreement, or transaction that provides a  
20          crediting interest rate and guaranty or financial as-  
21          surance of liquidity at contract or book value prior  
22          to maturity offered by a bank, insurance company,  
23          or other State or federally regulated financial insti-  
24          tution for the benefit of any individual or commin-  
25          gled fund available as an investment in an employee

1 benefit plan (as defined in section 3(3) of the Em-  
2 ployee Retirement Income Security Act of 1974, in-  
3 cluding plans described in section 3(32)) subject to  
4 participant direction, an eligible deferred compensa-  
5 tion plan (as defined in section 457(b) of the Inter-  
6 nal Revenue Code of 1986) that is maintained by an  
7 eligible employer described in section 457(e)(1)(A) of  
8 such Code, an arrangement described in section  
9 403(b) of such Code, or a qualified tuition program  
10 (as defined in section 529 of such Code).

11 On page 621, between lines 21 and 22, insert the fol-  
12 lowing:

13 **SEC. 721. REQUIREMENTS OF SECRETARY OF THE TREAS-**  
14 **URY REGARDING EXEMPTION OF FOREIGN**  
15 **EXCHANGE SWAPS AND FOREIGN EXCHANGE**  
16 **FORWARDS FROM DEFINITION OF THE TERM**  
17 **“SWAP”.**

18 (a) **REQUIRED CONSIDERATIONS.**—In determining  
19 whether to exempt foreign exchange swaps and foreign ex-  
20 change forwards from the definition of the term “swap”,  
21 the Secretary of the Treasury (referred to in this section  
22 as the “Secretary”) shall consider—

23 (1) whether the required trading and clearing of  
24 foreign exchange swaps and foreign exchange for-

1       wards would create systemic risk, lower trans-  
2       parency, or threaten the financial stability of the  
3       United States;

4           (2) whether foreign exchange swaps and foreign  
5       exchange forwards are already subject to a regu-  
6       latory scheme that is materially comparable to that  
7       established by this Act for other classes of swaps;

8           (3) the extent to which bank regulators of par-  
9       ticipants in the foreign exchange market provide  
10      adequate supervision, including capital and margin  
11      requirements;

12          (4) the extent of adequate payment and settle-  
13      ment systems; and

14          (5) the use of a potential exemption of foreign  
15      exchange swaps and foreign exchange forwards to  
16      evade otherwise applicable regulatory requirements.

17      (b) REPORT.—If the Secretary makes a determina-  
18      tion to exempt foreign exchange swaps and foreign ex-  
19      change forwards from the definition of the term “swap”,  
20      the Secretary shall submit to the appropriate committees  
21      of Congress a report that contains—

22           (1) an explanation regarding why foreign ex-  
23      change swaps and foreign exchange forwards are  
24      qualitatively different from other classes of swaps in  
25      a way that would make the foreign exchange swaps

1 and foreign exchange forwards ill-suited for regula-  
2 tion as swaps; and

3 (2) an identification of the objective differences  
4 of foreign exchange swaps and foreign exchange for-  
5 wards with respect to standard swaps that warrant  
6 an exempted status.

7 (c) EFFECT OF DETERMINATION.—A determination  
8 by the Secretary under subsection (b) shall not exempt  
9 any foreign exchange swaps and foreign exchange for-  
10 wards traded on a designated contract market or swap  
11 execution facility from any applicable antifraud and  
12 antimanipulation provision under this title.

13 On page 637, line 3 strike “entity” and all the follows  
14 through line 8, and insert “entity that is highly leveraged  
15 relative to the amount of capital it holds and that is not  
16 subject to capital requirements established by an appro-  
17 priate Federal banking agency; and”.

18 On page 652, line 7, strike the period and insert the  
19 following: “,

20 “provided however, in no event shall an insured  
21 depository institution be considered to be a  
22 swap dealer to the extent it offers to enter into

1           a swap with a customer in connection with orig-  
2           inating a loan with that customer.”

3           On page 652, strike line 19 and all that follows  
4 through page 653, line 6, and insert the following:

5           “(50) SWAP EXECUTION FACILITY.—The term  
6 ‘swap execution facility’ means a trading system or  
7 platform in which multiple participants have the  
8 ability to execute or trade swaps by accepting bids  
9 and offers made by multiple participants in the facil-  
10 ity or system, through any means of interstate com-  
11 merce, including any trading facility, that—

12                   “(A) facilitates the execution of security-  
13 based swaps between persons; and

14                   “(B) is not a designated contract mar-  
15 ket.”.

16           On page 657, between lines 11 and 12, insert the fol-  
17 lowing:

18           (f) EFFECTIVE DATE.—Notwithstanding any other  
19 provision of this Act, the amendments made by section  
20 721(a)(4) shall take effect on June 1, 2010.

21           On page 663, line 5 after “1a.” insert “2(a)(13)”.

1       On page 663, strike line 25 and all that follows  
2 through page 681, line 8, and insert the following:

3           “(1) IN GENERAL.—

4               “(A) STANDARD FOR CLEARING.—It shall  
5 be unlawful for any person to engage in a swap  
6 unless that person submits such swap for clear-  
7 ing to a derivatives clearing organization that is  
8 registered under this Act or a derivatives clear-  
9 ing organization that is exempt from registra-  
10 tion under this Act if the swap is required to  
11 be cleared.

12           “(B) OPEN ACCESS.—The rules of a de-  
13 rivatives clearing organization described in sub-  
14 paragraph (A) shall—

15               “(i) prescribe that all swaps (but not  
16 contracts of sale of a commodity for future  
17 delivery or options on such contracts) sub-  
18 mitted to the derivatives clearing organiza-  
19 tion with the same terms and conditions  
20 are economically equivalent within the de-  
21 rivatives clearing organization and may be  
22 offset with each other within the deriva-  
23 tives clearing organization; and

24               “(ii) provide for non-discriminatory  
25 clearing of a swap (but not a contract of

1 sale of a commodity for future delivery or  
2 option on such contract) executed bilat-  
3 erally or on or through the rules of an un-  
4 affiliated designated contract market or  
5 swap execution facility.

6 “(2) COMMISSION REVIEW.—

7 “(A) COMMISSION-INITIATED REVIEW.—

8 “(i) The Commission on an ongoing  
9 basis shall review each swap, or any group,  
10 category, type, or class of swaps to make  
11 a determination as to whether the swap or  
12 group, category, type, or class of swaps  
13 should be required to be cleared.

14 “(ii) The Commission shall provide at  
15 least a 30-day public comment period re-  
16 garding any determination made under  
17 clause (i).

18 “(B) SWAP SUBMISSIONS.—

19 “(i) A derivatives clearing organiza-  
20 tion shall submit to the Commission each  
21 swap, or any group, category, type, or class  
22 of swaps that it plans to accept for clear-  
23 ing, and provide notice to its members (in  
24 a manner to be determined by the Com-  
25 mission) of the submission.

1           “(ii) Any swap or group, category,  
2           type, or class of swaps listed for clearing  
3           by a derivative clearing organization as of  
4           the date of enactment of this subsection  
5           shall be considered submitted to the Com-  
6           mission.

7           “(iii) The Commission shall—

8                   “(I) make available to the public  
9                   submissions received under clauses (i)  
10                  and (ii);

11                   “(II) review each submission  
12                   made under clauses (i) and (ii), and  
13                   determine whether the swap, or group,  
14                   category, type, or class of swaps de-  
15                   scribed in the submission is required  
16                   to be cleared; and

17                   “(III) provide at least a 30-day  
18                   public comment period regarding its  
19                   determination as to whether the clear-  
20                   ing requirement under paragraph  
21                   (1)(A) shall apply to the submission.

22                   “(C) DEADLINE.—The Commission shall  
23                   make its determination under subparagraph  
24                   (B)(iii) not later than 90 days after receiving a  
25                   submission made under subparagraphs (B)(i)

1 and (B)(ii), unless the submitting derivatives  
2 clearing organization agrees to an extension for  
3 the time limitation established under this sub-  
4 paragraph.

5 “(D) DETERMINATION.—

6 “(i) In reviewing a submission made  
7 under subparagraph (B), the Commission  
8 shall review whether the submission is con-  
9 sistent with section 5b(c)(2).

10 “(ii) In reviewing a swap, group of  
11 swaps, or class of swaps pursuant to sub-  
12 paragraph (A) or a submission made under  
13 subparagraph (B), the Commission shall  
14 take into account the following factors:

15 “(I) The existence of significant  
16 outstanding notional exposures, trad-  
17 ing liquidity and adequate pricing  
18 data.

19 “(II) The availability of rule  
20 framework, capacity, operational ex-  
21 pertise and resources, and credit sup-  
22 port infrastructure to clear the con-  
23 tract on terms that are consistent  
24 with the material terms and trading

1 conventions on which the contract is  
2 then traded.

3 “(III) The effect on the mitiga-  
4 tion of systemic risk, taking into ac-  
5 count the size of the market for such  
6 contract and the resources of the de-  
7 rivatives clearing organization avail-  
8 able to clear the contract.

9 “(IV) The effect on competition,  
10 including appropriate fees and charges  
11 applied to clearing.

12 “(V) The existence of reasonable  
13 legal certainty in the event of the in-  
14 solvency of the relevant derivatives  
15 clearing organization or 1 or more of  
16 its clearing members with regard to  
17 the treatment of customer and swap  
18 counterparty positions, funds, and  
19 property.

20 “(iii) In making a determination  
21 under subparagraph (A) or (B)(iii) that  
22 the clearing requirement shall apply, the  
23 Commission may require such terms and  
24 conditions to the requirement as the Com-  
25 mission determines to be appropriate.

1           “(E) RULES.—Not later than 1 year after  
2           the date of the enactment of the this sub-  
3           section, the Commission shall adopt rules for a  
4           derivatives clearing organization’s submission  
5           for review, pursuant to this paragraph, of a  
6           swap, or a group, category, type, or class of  
7           swaps, that it seeks to accept for clearing.  
8           Nothing in this subparagraph limits the Com-  
9           mission from making a determination under  
10          subparagraph (B)(iii) for swaps described in  
11          subparagraph (B)(ii).

12          “(3) STAY OF CLEARING REQUIREMENT.—

13                 “(A) IN GENERAL.—After making a deter-  
14                 mination pursuant to paragraph (2)(B), the  
15                 Commission, on application of a counterparty to  
16                 a swap or on its own initiative, may stay the  
17                 clearing requirement of paragraph (1) until the  
18                 Commission completes a review of the terms of  
19                 the swap (or the group, category, type, or class  
20                 of swaps) and the clearing arrangement.

21                 “(B) DEADLINE.—The Commission shall  
22                 complete a review undertaken pursuant to sub-  
23                 paragraph (A) not later than 90 days after  
24                 issuance of the stay, unless the derivatives  
25                 clearing organization that clears the swap, or

1 group, category, type, or class of swaps, agrees  
2 to an extension of the time limitation estab-  
3 lished under this subparagraph.

4 “(C) DETERMINATION.—Upon completion  
5 of the review undertaken pursuant to subpara-  
6 graph (A), the Commission may—

7 “(i) determine, unconditionally or sub-  
8 ject to such terms and conditions as the  
9 Commission determines to be appropriate,  
10 that the swap, or group, category, type or  
11 class of swaps, must be cleared pursuant  
12 to this subsection if it finds that such  
13 clearing is consistent with paragraph  
14 (2)(D); or

15 “(ii) determine that the clearing re-  
16 quirement of paragraph (1) shall not apply  
17 to the swap, or group, category, type, or  
18 class of swaps.

19 “(D) RULES.—Not later than 1 year after  
20 the date of the enactment of the Wall Street  
21 Transparency and Accountability Act of 2010,  
22 the Commission shall adopt rules for reviewing,  
23 pursuant to this paragraph, a derivatives clear-  
24 ing organization’s clearing of a swap, or a

1 group, category, type, or class of swaps, that it  
2 has accepted for clearing.

3 “(4) PREVENTION OF EVASION.—

4 “(A) IN GENERAL.—The Commission shall  
5 prescribe rules under this subsection (and issue  
6 interpretations of rules prescribed under this  
7 subsection) as determined by the Commission to  
8 be necessary to prevent evasions of the manda-  
9 tory clearing requirements under this Act.

10 “(B) DUTY OF COMMISSION TO INVES-  
11 TIGATE AND TAKE CERTAIN ACTIONS.—To the  
12 extent the Commission finds that a particular  
13 swap, group, category, type, or class of swaps  
14 would otherwise be subject to mandatory clear-  
15 ing but no derivatives clearing organization has  
16 listed the swap, group, category, type, or class  
17 of swaps for clearing, the Commission shall—

18 “(i) investigate the relevant facts and  
19 circumstances;

20 “(ii) within 30 days issue a public re-  
21 port containing the results of the investiga-  
22 tion; and

23 “(iii) take such actions as the Com-  
24 mission determines to be necessary and in  
25 the public interest, which may include re-

1           quiring the retaining of adequate margin  
2           or capital by parties to the swap, group,  
3           category, type, or class of swaps.

4           “(C) EFFECT ON AUTHORITY.—Nothing in  
5           this paragraph shall—

6                   “(i) authorize the Commission to  
7                   adopt rules requiring a derivatives clearing  
8                   organization to list for clearing a swap,  
9                   group, category, type, or class of swaps if  
10                  the clearing of the swap, group, category,  
11                  type, or class of swaps would threaten the  
12                  financial integrity of the derivatives clear-  
13                  ing organization; and

14                   “(ii) affect the authority of the Com-  
15                   mission to enforce the open access provi-  
16                   sions of paragraph (1)(B) with respect to  
17                   a swap, group, category, type, or class of  
18                   swaps that is listed for clearing by a de-  
19                   rivatives clearing organization.

20           “(5) REPORTING TRANSITION RULES.—Rules  
21           adopted by the Commission under this section shall  
22           provide for the reporting of data, as follows:

23                   “(A) Swaps entered into before the date of  
24                   the enactment of this subsection shall be re-  
25                   ported to a registered swap data repository or

1 the Commission no later than 180 days after  
2 the effective date of this subsection.

3 “(B) Swaps entered into on or after such  
4 date of enactment shall be reported to a reg-  
5 istered swap data repository or the Commission  
6 no later than the later of—

7 “(i) 90 days after such effective date;

8 or

9 “(ii) such other time after entering  
10 into the swap as the Commission may pre-  
11 scribe by rule or regulation.

12 “(6) CLEARING TRANSITION RULES.—

13 “(A) Swaps entered into before the date of  
14 the enactment of this subsection are exempt  
15 from the clearing requirements of this sub-  
16 section if reported pursuant to paragraph  
17 (5)(A).

18 “(B) Swaps entered into before application  
19 of the clearing requirement pursuant to this  
20 subsection are exempt from the clearing re-  
21 quirements of this subsection if reported pursu-  
22 ant to paragraph (5)(B).

23 “(7) EXCEPTIONS.—

1           “(A) IN GENERAL.—The requirements of  
2 paragraph (1)(A) shall not apply to a swap if  
3 1 of the counterparties to the swap—

4           “(i) is not a financial entity;

5           “(ii) is using swaps to hedge or miti-  
6 gate commercial risk; and

7           “(iii) notifies the Commission, in a  
8 manner set forth by the Commission, how  
9 it generally meets its financial obligations  
10 associated with entering into non-cleared  
11 swaps.

12           “(B) OPTION TO CLEAR.—The application  
13 of the clearing exception in subparagraph (A) is  
14 solely at the discretion of the counterparty to  
15 the swap that meets the conditions of clauses  
16 (i) through (iii) of subparagraph (A).

17           “(C) FINANCIAL ENTITY DEFINITION.—

18           “(i) IN GENERAL.—For the purposes  
19 of this paragraph, the term ‘financial enti-  
20 ty’ means—

21           “(I) a swap dealer;

22           “(II) a security-based swap deal-  
23 er;

24           “(III) a major swap participant;

1                   “(IV) a major security-based  
2 swap participant;

3                   “(V) a commodity pool;

4                   “(VI) a private fund as defined  
5 in section 202(a) of the Investment  
6 Advisers Act of 1940 (15 U.S.C. 80-  
7 b-2(a));

8                   “(VII) an employee benefit plan  
9 as defined in paragraphs (3) and (32)  
10 of section 3 of the Employee Retirement  
11 Income Security Act of 1974  
12 (29 U.S.C. 1002);

13                   “(VIII) a person predominantly  
14 engaged in activities that are in the  
15 business of banking, or in activities  
16 that are financial in nature, as de-  
17 fined in section 4(k) of the Bank  
18 Holding Company Act of 1956.

19                   “(ii) EXCLUSION.—The Commission  
20 shall consider whether to exempt small  
21 banks, savings associations, farm credit  
22 system institutions, and credit unions, in-  
23 cluding—

1                   “(I) depository institutions with  
2                   total assets of \$10,000,000,000 or  
3                   less;

4                   “(II) farm credit system institu-  
5                   tions with total assets of  
6                   \$10,000,000,000 or less; or

7                   “(III) credit unions with total as-  
8                   sets of \$10,000,000,000 or less.

9                   “(D) TREATMENT OF AFFILIATES.—

10                   “(i) IN GENERAL.—An affiliate of a  
11                   person that qualifies for an exception  
12                   under subparagraph (A) (including affiliate  
13                   entities predominantly engaged in pro-  
14                   viding financing for the purchase of the  
15                   merchandise or manufactured goods of the  
16                   person) may qualify for the exception only  
17                   if the affiliate, acting on behalf of the per-  
18                   son and as an agent, uses the swap to  
19                   hedge or mitigate the commercial risk of  
20                   the person or other affiliate of the person  
21                   that is not a financial entity.

22                   “(ii) PROHIBITION RELATING TO CER-  
23                   TAIN AFFILIATES.—The exception in  
24                   clause (i) shall not apply if the affiliate  
25                   is—

- 1 “(I) a swap dealer;
- 2 “(II) a security-based swap deal-
- 3 er;
- 4 “(III) a major swap participant;
- 5 “(IV) a major security-based
- 6 swap participant;
- 7 “(V) an issuer that would be an
- 8 investment company, as defined in
- 9 section 3 of the Investment Company
- 10 Act of 1940 (15 U.S.C. 80a-3), but
- 11 for paragraph (1) or (7) of subsection
- 12 (c) of that Act (15 U.S.C. 80a-3(c));
- 13 “(VI) a commodity pool; or
- 14 “(VII) a bank holding company
- 15 with over \$50,000,000,000 in consoli-
- 16 dated assets.
- 17 “(iii) TRANSITION RULE FOR AFFILI-
- 18 ATES.—An affiliate, subsidiary, or a wholly
- 19 owned entity of a person that qualifies for
- 20 an exception under subparagraph (A) and
- 21 is predominantly engaged in providing fi-
- 22 nancing for the purchase or lease of mer-
- 23 chandise or manufactured goods of the
- 24 person shall be exempt from the margin re-
- 25 quirement described in section 4s(e) and

1 the clearing requirement described in para-  
2 graph (1) with regard to swaps entered  
3 into to mitigate the risk of the financing  
4 activities for not less than a 2-year period  
5 beginning on the date of enactment of this  
6 clause.

7 “(E) ELECTION OF COUNTERPARTY.—

8 “(i) SWAPS REQUIRED TO BE  
9 CLEARED.—With respect to any swap that  
10 is subject to the mandatory clearing re-  
11 quirement under this subsection and en-  
12 tered into by a swap dealer or a major  
13 swap participant with a counterparty that  
14 is not a swap dealer, major swap partici-  
15 pant, security-based swap dealer, or major  
16 security-based swap participant, the  
17 counterparty shall have the sole right to  
18 select the derivatives clearing organization  
19 at which the swap will be cleared.

20 “(ii) SWAPS NOT REQUIRED TO BE  
21 CLEARED.—With respect to any swap that  
22 is not subject to the mandatory clearing  
23 requirement under this subsection and en-  
24 tered into by a swap dealer or a major  
25 swap participant with a counterparty that

1 is not a swap dealer, major swap partici-  
2 pant, security-based swap dealer, or major  
3 security-based swap participant, the  
4 counterparty—

5 “(I) may elect to require clearing  
6 of the swap; and

7 “(II) shall have the sole right to  
8 select the derivatives clearing organi-  
9 zation at which the swap will be  
10 cleared

11 “(F) ABUSE OF EXCEPTION.—The Com-  
12 mission may prescribe such rules or issue inter-  
13 pretations of the rules as the Commission deter-  
14 mines to be necessary to prevent abuse of the  
15 exceptions described in this paragraph. The  
16 Commission may also request information from  
17 those persons claiming the clearing exception as  
18 necessary to prevent abuse of the exceptions de-  
19 scribed in this paragraph.

20 “(8) TRADE EXECUTION.—

21 “(A) IN GENERAL.—With respect to trans-  
22 actions involving swaps subject to the clearing  
23 requirement of paragraph (1), counterparties  
24 shall—

1                   “(i) execute the transaction on a  
2                   board of trade designated as a contract  
3                   market under section 5; or

4                   “(ii) execute the transaction on a  
5                   swap execution facility registered under 5h  
6                   or a swap execution facility that is exempt  
7                   from registration under section 5h(f) of  
8                   this Act.

9                   “(B) EXCEPTION.—The requirements of  
10                  clauses (i) and (ii) of subparagraph (A) shall  
11                  not apply if no board of trade or swap execution  
12                  facility makes the swap available to trade or for  
13                  swap transactions subject to the clearing excep-  
14                  tion under paragraph (7).”.

15                  On page 719, line 11, strike “Not” and insert “In  
16                  order to mitigate conflicts of interest, not”

17                  On page 719, lines 14 and 15, strike “determine  
18                  whether to adopt rules to establish limits on the control  
19                  of” and insert “adopt rules which may include numerical  
20                  limits on the control of, or the voting rights with respect  
21                  to,”.

1 On page 720, between lines 13 and 14, insert the fol-  
2 lowing:

3 (c) CONSIDERATIONS.—In adopting rules pursuant to  
4 this section, the Commodity Futures Trading Commission  
5 shall consider any conflicts of interest arising from the  
6 amount of equity owned by a single investor, the ability  
7 to vote, cause the vote of, or withhold votes entitled to  
8 be cast on any matters by the holders of the ownership  
9 interest, and the governance arrangements of any deriva-  
10 tives clearing organization that clears swaps, or swap exe-  
11 cution facility or board of trade designated as a contract  
12 market that posts swaps or makes swaps available for  
13 trading.

14 On page 721, line 16, strike “exempted” and insert  
15 “excepted”.

16 On page 721, line 18, strike “(10)” and insert “(7)”.

17 On page 722, line 14, strike “exempt” through  
18 “(h)(1)” on line 15, and insert “determined to be required  
19 to be cleared under subsection (h)(2) but are not cleared”.

20 On page 723, between lines 22 and 23, insert the fol-  
21 lowing:

1           “(G) REPORTING OF SWAPS TO REG-  
2           ISTERED SWAP DATA REPOSITORIES.—Each  
3           swap (whether cleared or uncleared) shall be re-  
4           ported to a registered swap data repository.

5           “(H) REGISTRATION OF DERIVATIVES  
6           CLEARING ORGANIZATIONS.—A derivatives  
7           clearing organization may register as a swap  
8           data repository.”.

9           On page 724, strike line 19 and insert the following:  
10           regulatory bodies as may be necessary.

11           “(C) AUTHORITY OF COMMISSION.—The  
12           Commission may, by rule, regulation, or order,  
13           delegate the public reporting responsibilities of  
14           the Commission under this paragraph in ac-  
15           cordance with such terms and conditions as the  
16           Commission determines to be appropriate and  
17           in the public interest.”.

18           On page 726, strike lines 4 through 7, and insert the  
19 following:

20           “(1) DATA IDENTIFICATION.—

21           “(A) IN GENERAL.—In accordance with  
22           subparagraph (B), the Commission shall pre-  
23           scribe standards that specify the data elements

1 for each swap that shall be collected and main-  
2 tained by each registered swap data repository.

3 “(B) REQUIREMENT.—In carrying out  
4 subparagraph (A), the Commission shall pre-  
5 scribe consistent data element standards appli-  
6 cable to registered entities and reporting  
7 counterparties.”.

8 On page 733, between lines 5 and 6, insert the fol-  
9 lowing:

10 “(4) ADDITIONAL DUTIES DEVELOPED BY COM-  
11 MISSION.—

12 “(A) IN GENERAL.—The Commission may  
13 develop 1 or more additional duties applicable  
14 to swap data repositories.

15 “(B) CONSIDERATION OF EVOLVING  
16 STANDARDS.—In developing additional duties  
17 under subparagraph (A), the Commission may  
18 take into consideration any evolving standard of  
19 the United States or the international commu-  
20 nity.

21 “(C) ADDITIONAL DUTIES FOR COMMIS-  
22 SION DESIGNEES.—The Commission shall es-  
23 tablish additional duties for any registrant de-  
24 scribed in section 2(a)(14)(C) in order to mini-

1           mize conflicts of interest, protect data, ensure  
2           compliance, and guarantee the safety and secu-  
3           rity of the swap data repository.”.

4           On page 745, strike line 1 and all that follows  
5 through page 747, line 16, and insert the following:

6                   “(A) SWAP DEALERS AND MAJOR SWAP  
7           PARTICIPANTS THAT ARE BANKS.—The pruden-  
8           tial regulators, in consultation with the Com-  
9           mission and the Securities and Exchange Com-  
10          mission, shall jointly adopt rules for swap deal-  
11          ers and major swap participants, with respect  
12          to their activities as a swap dealer or major  
13          swap participant, for which there is a pruden-  
14          tial regulator imposing—

15                           “(i) capital requirements; and

16                           “(ii) both initial and variation margin  
17          requirements on all swaps that are not  
18          cleared by a registered derivatives clearing  
19          organization.

20                   “(B) SWAP DEALERS AND MAJOR SWAP  
21          PARTICIPANTS THAT ARE NOT BANKS.—The  
22          Commission shall adopt rules for swap dealers  
23          and major swap participants, with respect to  
24          their activities as a swap dealer or major swap

1 participant, for which there is not a prudential  
2 regulator imposing—

3 “(i) capital requirements; and

4 “(ii) both initial and variation margin  
5 requirements on all swaps that are not  
6 cleared by a registered derivatives clearing  
7 organization.

8 “(C) CAPITAL.—In setting capital require-  
9 ments for a person that is designated as a swap  
10 dealer or a major swap participant for a single  
11 type or single class or category of swap or ac-  
12 tivities, the prudential regulator and the Com-  
13 mission shall take into account the risks associ-  
14 ated with other types of swaps or classes of  
15 swaps or categories of swaps engaged in and  
16 the other activities conducted by that person  
17 that are not otherwise subject to regulation ap-  
18 plicable to that person by virtue of the status  
19 of the person as a swap dealer or a major swap  
20 participant.

21 “(3) STANDARDS FOR CAPITAL AND MARGIN.—

22 “(A) To offset the greater risk to the swap  
23 dealer or major swap participant and the finan-  
24 cial system arising from the use of swaps that

1 are not cleared, the requirements imposed  
2 under paragraph (2) shall—

3 “(i) help ensure the safety and sound-  
4 ness of the swap dealer or major swap par-  
5 ticipant; and

6 “(ii) be appropriate for the substan-  
7 tially-higher risk associated with the non-  
8 cleared swaps held as a swap dealer or  
9 major swap participant.”.

10 Beginning on page 754, strike line 8 and all that fol-  
11 lows through page 758, line 9, and insert the following:

12 “(h) BUSINESS CONDUCT STANDARDS.—

13 “(1) IN GENERAL.—Each registered swap deal-  
14 er and major swap participant shall conform with  
15 such business conduct standards as may be pre-  
16 scribed by the Commission by rule or regulation that  
17 relate to—

18 “(A) fraud, manipulation, and other abu-  
19 sive practices involving swaps (including swaps  
20 that are offered but not entered into);

21 “(B) diligent supervision of the business of  
22 the registered swap dealer and major swap par-  
23 ticipant;

1           “(C) adherence to all applicable position  
2 limits; and

3           “(D) such other matters as the Commis-  
4 sion determines to be appropriate.

5           “(2) SPECIAL RULE; DUTIES TO SPECIAL ENTI-  
6 TIES.—

7           “(A) IN GENERAL.—A swap dealer that  
8 provides recommendations regarding or offers  
9 to enter into a swap with a Special Entity shall  
10 have each duty and requirement described in  
11 subparagraphs (C) and (D) to the Special Enti-  
12 ty.

13           “(B) DEFINITION OF SPECIAL ENTITY.—  
14 In this paragraph, the term ‘Special Entity’ in-  
15 cludes—

16                   “(i) a Federal agency;

17                   “(ii) a State, State agency, city, coun-  
18 ty, municipality, or other political subdivi-  
19 sion of a State;

20                   “(iii) any employee benefit plan, as  
21 defined in section 3 of the Employee Re-  
22 tirement Income Security Act of 1974 (29  
23 U.S.C. 1002);

24                   “(iv) any governmental plan, as de-  
25 fined in section 3 of the Employee Retire-

1                   ment Income Security Act of 1974 (29  
2                   U.S.C. 1002); or

3                   “(v) any endowment, including an en-  
4                   dowment that is an organization described  
5                   in section 501(c)(3) of the Internal Rev-  
6                   enue Code of 1986.

7                   “(C) PROHIBITIONS ON SWAP DEALERS.—

8                   “(i) IN GENERAL.—It shall be unlaw-  
9                   ful for a swap dealer—

10                   “(I) to employ any device,  
11                   scheme, or artifice to defraud any  
12                   Special Entity or prospective customer  
13                   who is a Special Entity;

14                   “(II) to engage in any trans-  
15                   action, practice, or course of business  
16                   that operates as a fraud or deceit on  
17                   any Special Entity or prospective cus-  
18                   tomer who is a Special Entity;

19                   “(III) if the swap dealer acts as  
20                   a principal for the account of the  
21                   swap dealer, to knowingly recommend  
22                   or offer to enter into any swap, or se-  
23                   ries of transactions under a master  
24                   agreement, with a Special Entity  
25                   without—

1           “(aa) before the initiation of  
2           the transaction, disclosing to the  
3           Special Entity in writing, which  
4           may be made in a master agree-  
5           ment, the capacity in which the  
6           swap dealer is acting; and

7           “(bb) obtaining the written  
8           consent of the Special Entity in  
9           accordance with procedures es-  
10          tablished by the Special Entity  
11          specifically for granting the con-  
12          sent with respect to the trans-  
13          action or the series of trans-  
14          actions;

15          “(IV) to engage in any act, prac-  
16          tice, or course of business that is  
17          fraudulent, deceptive, or manipulative;  
18          and

19          “(V) to fail to protect the con-  
20          fidentiality of Special Entity informa-  
21          tion or to use the information for pur-  
22          poses of trading against the positions  
23          of 1 or more Special Entities, whether  
24          through swaps or other financial in-  
25          struments, but only if this prohibition

1 does not prevent a swap dealer from  
2 hedging the swap that the swap dealer  
3 enters into with a Special Entity.

4 “(ii) REGULATIONS.—The Commis-  
5 sion shall issue rules and promulgate regu-  
6 lations to prescribe requirements that are  
7 reasonably designed to prevent acts, prac-  
8 tices, and courses of business that are  
9 fraudulent, deceptive, or manipulative  
10 (which would include principal transactions  
11 and confidentiality of Special Entity posi-  
12 tion and portfolio information).

13 “(D) REQUIREMENTS.—

14 “(i) IN GENERAL.—A swap dealer  
15 shall comply with clauses (ii), (iii), and  
16 (iv).

17 “(ii) SPECIAL ENTITY-INITIATED  
18 TRANSACTIONS.—A swap dealer that en-  
19 ters into or offers to enter into a swap  
20 with a Special Entity that is solicited by  
21 the Special Entity and for which the swap  
22 dealer provides no advice and makes no  
23 recommendations regarding the swap to  
24 the Special Entity shall have reasonable

1 grounds to believe that the swap is suitable  
2 for the Special Entity.

3 “(iii) SWAP DEALER-INITIATED  
4 TRANSACTIONS.—In a case in which a  
5 swap dealer solicits a transaction with a  
6 Special Entity or provides advice or makes  
7 recommendations, the swap dealer shall  
8 have reasonable grounds to believe that the  
9 swap is in the best interests of the Special  
10 Entity.

11 “(iv) REASONABLE EFFORTS.—Before  
12 entering into a swap transaction with a  
13 Special Entity, a swap dealer shall make  
14 reasonable efforts to obtain such informa-  
15 tion as is necessary to make a determina-  
16 tion under clause (ii) or (iii), including—

17 “(I) information relating to—

18 “(aa) the financial status of  
19 the Special Entity;

20 “(bb) the tax status of the  
21 Special Entity; and

22 “(cc) the stated hedging or  
23 investment objectives of the Spe-  
24 cial Entity; and

1                   “(II) such other information  
2                   that—

3                   “(aa) is used or considered  
4                   to be necessary for the swap  
5                   dealer in making recommenda-  
6                   tions or offers to enter into  
7                   swaps with the Special Entity;  
8                   and

9                   “(bb) the Commission may  
10                  prescribe by rule or regulation.

11                  “(v) BUSINESS CONDUCT REQUIRE-  
12                  MENTS.—A swap dealer shall satisfy each  
13                  business conduct requirement described in  
14                  paragraph (3) and approval of the trans-  
15                  action by a representative of the Special  
16                  Entity shall not relieve the swap dealer  
17                  from the prohibitions in subparagraph (C)  
18                  or this subparagraph, or the obligations of  
19                  the swap dealer described in paragraph  
20                  (3).

21                  “(3) BUSINESS CONDUCT REQUIREMENTS FOR  
22                  SWAP DEALERS WHEN DEALING WITH SPECIAL EN-  
23                  TITIES.—Business conduct requirements adopted by  
24                  the Commission shall—

1           “(A) establish the standard of care for a  
2 swap dealer or major swap participant to verify  
3 that any Special Entity counterparty meets the  
4 eligibility standards for an eligible contract par-  
5 ticipant;

6           “(B) require disclosure by the swap dealer  
7 or major swap participant to any Special Entity  
8 counterparty to the transaction of—

9                   “(i) information about the material  
10 risks and characteristics of the swap or, as  
11 appropriate, series of transactions under a  
12 master agreement;

13                   “(ii) the source and amount of any  
14 fees, profits, or other material remunera-  
15 tion that the swap dealer or major swap  
16 participant would directly or indirectly ex-  
17 pect to receive in connection with the swap;

18                   “(iii) any other material incentives or  
19 conflicts of interest that the swap dealer or  
20 major swap participant may have in con-  
21 nection with the swap; and

22                   “(iv)(I) for cleared swaps, upon the  
23 request of the counterparty, the daily mark  
24 from the appropriate derivatives clearing  
25 organization; and

1                   “(II) for uncleared swaps, the daily  
2                   mark of the swap dealer or the major swap  
3                   participant;

4                   “(C) require the swap dealer or major  
5                   swap participant to any Special Entity  
6                   counterparty to the transaction to provide writ-  
7                   ten representations to the Special Entity eligi-  
8                   ble contract participant regarding fair pricing  
9                   and the determination that the transaction is  
10                  suitable or in the best interests of the Special  
11                  Entity as required under clause (ii) or (iii) of  
12                  paragraph (2)(D), whichever is applicable, and  
13                  documenting the basis for concluding that the  
14                  transaction is appropriate under clause (ii) or  
15                  (iii) of paragraph (2)(D);

16                  “(D) establish business conduct standards  
17                  that require a swap dealer or major swap par-  
18                  ticipant to communicate with the Special Entity  
19                  in a fair and balanced manner based on prin-  
20                  ciples of fair dealing and good faith, including  
21                  written documentation of compliance with sub-  
22                  paragraph (E);

23                  “(E) establish a standard of conduct that  
24                  requires a swap dealer or major swap partici-  
25                  pant, with respect to a Special Entity

1 counterparty that is an eligible contract partici-  
2 pant within the meaning of subclause (I) or (II)  
3 of section 1a(18)(vii) of this Act, to have made  
4 reasonable independent inquiry and document  
5 in writing that the person approving or author-  
6 izing the transaction—

7 “(i) has sufficient knowledge to evalu-  
8 ate the swap transaction or, as appro-  
9 priate, series of transactions under a mas-  
10 ter agreement and risks;

11 “(ii) is not subject to a statutory dis-  
12 qualification;

13 “(iii) is independent of the swap deal-  
14 er or major swap participant;

15 “(iv) undertakes a duty to identify  
16 and communicate in writing to the Special  
17 Entity what would be in the best interests  
18 of the Special Entity counterparty;

19 “(v) makes appropriate disclosures;  
20 and

21 “(vi) in the case of employee benefit  
22 plans subject to the Employee Retirement  
23 Income Security Act of 1974, is a fiduciary  
24 as defined in section 3 of that Act (29  
25 U.S.C. 1002); and

1           “(F) establish such other standards and  
2 requirements as the Commission may determine  
3 are appropriate in the public interest, for the  
4 protection of investors, or otherwise in further-  
5 ance of the purposes of this Act.

6           “(4) RULES.—The Commission shall prescribe  
7 rules under this subsection governing business con-  
8 duct standards for swap dealers and major swap  
9 participants when dealing with Special Entities.

10           “(5) EFFECT; APPLICATIONS; LEGAL CER-  
11 TAINTY.—

12           “(A) RELATIONSHIP TO THE EMPLOYEE  
13 RETIREMENT INCOME SECURITY ACT OF 1974.—  
14 Nothing in this Act (including any regulation  
15 promulgated under this Act) shall be construed  
16 as limiting the duties or obligations of any per-  
17 son or as affecting their status under the Em-  
18 ployee Retirement Income Security Act of 1974  
19 (29 U.S.C. 1001 et seq.).

20           “(B) PROSPECTIVE APPLICATION; LEGAL  
21 CERTAINTY FOR EXISTING SWAPS.—

22           “(i) PROSPECTIVE APPLICATION.—

23           “(I) IN GENERAL.—Subject to  
24 subclauses (II) and (III), the duties

1 and business standards for swap deal-  
2 ers shall—

3 “(aa) take effect on the date  
4 that is 180 days after the date of  
5 enactment of this subsection; and

6 “(bb) be prospective.

7 “(II) DISCRETION OF COMMIS-  
8 SION.—The Commission shall have  
9 discretion to apply the new law to ex-  
10 isting swap contracts that renew auto-  
11 matically.

12 “(III) USE OF AUTHORITY.—The  
13 authority under this subparagraph, if  
14 exercised, may be used on the first  
15 automatic renewal date after the ef-  
16 fective date or any subsequent renewal  
17 date.

18 “(ii) LEGAL CERTAINTY FOR EXIST-  
19 ING SWAPS.—Unless specifically reserved  
20 in the swap, neither the enactment of the  
21 Wall Street Transparency and Account-  
22 ability Act of 2010, nor any requirement  
23 under that Act or an amendment made by  
24 that Act, shall constitute a termination  
25 event, force majeure, illegality, increased

1 costs, regulatory change, or similar event  
2 under the swap (including any related  
3 credit support arrangement) that would  
4 permit a party to terminate, renegotiate,  
5 modify, amend, or supplement 1 or more  
6 transactions under the swap.

7 “(6) BUSINESS CONDUCT REQUIREMENTS.—  
8 Business conduct requirements adopted by the Com-  
9 mission shall—

10 “(A) establish the standard of care for a  
11 swap dealer or major swap participant to verify  
12 that any counterparty, other than Special Enti-  
13 ties under paragraph (2), meets the eligibility  
14 standards for an eligible contract participant;

15 “(B) require disclosure by the swap dealer  
16 or major swap participant to any counterparty  
17 to the transaction (other than a swap dealer,  
18 major swap participant, security-based swap  
19 dealer, or major security-based swap partici-  
20 pant) of—

21 “(i) information about the material  
22 risks and characteristics of the swap;

23 “(ii) the source and amount of any  
24 fees, profits, or other material remunera-  
25 tion that the swap dealer or major swap

1 participant would directly or indirectly ex-  
2 pect to receive in connection with the swap;

3 “(iii) any other material incentives or  
4 conflicts of interest that the swap dealer or  
5 major swap participant may have in con-  
6 nection with the swap; and

7 “(iv)(I) for cleared swaps, upon the  
8 request of the counterparty, the daily mark  
9 from the appropriate derivatives clearing  
10 organization; and

11 “(II) for uncleared swaps, the daily  
12 mark of the swap dealer or the major swap  
13 participant;

14 “(C) require a standard of conduct for a  
15 swap dealer or major swap participant to com-  
16 municate in a fair and balanced manner based  
17 on principles of fair dealing and good faith;

18 “(D) require a standard of conduct for a  
19 swap dealer or major swap participant, with re-  
20 spect to a counterparty that is an eligible con-  
21 tract participant within the meaning of sub-  
22 clause (I) or (II) of section 1a(18)(vii) of this  
23 Act, to have a reasonable basis to believe that  
24 the counterparty has an independent represent-  
25 ative that—

1                   “(i) has sufficient knowledge to evalu-  
2                   ate the transaction and risks;

3                   “(ii) is not subject to a statutory dis-  
4                   qualification;

5                   “(iii) is independent of the swap deal-  
6                   er or major swap participant;

7                   “(iv) undertakes a duty to act in the  
8                   best interests of the counterparty the inde-  
9                   pendent representative represents;

10                  “(v) makes appropriate disclosures;  
11                  and

12                  “(vi) will provide written representa-  
13                  tions to the eligible contract participant re-  
14                  garding fair pricing and the appropriate-  
15                  ness of the transaction; and

16                  “(E) establish such other standards and  
17                  requirements as the Commission may determine  
18                  are appropriate in the public interest, for the  
19                  protection of investors, or otherwise in further-  
20                  ance of the purposes of this Act.

21                  “(7) RULES.—The Commission shall prescribe  
22                  rules under this subsection governing business con-  
23                  duct standards for swap dealers and major swap  
24                  participants.”.

1       On page 773, line 6, strike “limitation.” and insert  
2 “limitation; and “(ii) monitor positions established on or  
3 through the swap execution facility for compliance with  
4 the limit set by the Commission and the limit, if any, set  
5 by the swap execution facility.”.

6       On page 793, strike line 15 and all that follows  
7 through page 796, line 13, and insert the following:

8           “(2) ESTABLISHMENT OF LIMITATIONS.—

9           “(A) IN GENERAL.—In accordance with  
10 the standards set forth in paragraph (1) of this  
11 subsection and consistent with the good faith  
12 exception cited in subsection (b)(2), with re-  
13 spect to physical commodities other than ex-  
14 cluded commodities as defined by the Commis-  
15 sion, the Commission shall by rule, regulation,  
16 or order establish limits on the amount of posi-  
17 tions, as appropriate, other than bona fide  
18 hedge positions, that may be held by any person  
19 with respect to contracts of sale for future de-  
20 livery or with respect to options on the con-  
21 tracts or commodities traded on or subject to  
22 the rules of a designated contract market.

23           “(B) TIMING.—

1                   “(i) EXEMPT COMMODITIES.—For ex-  
2                   empt commodities, the limits required  
3                   under subparagraph (A) shall be estab-  
4                   lished within 180 days after the date of the  
5                   enactment of this paragraph.

6                   “(ii) AGRICULTURAL COMMODITIES.—  
7                   For agricultural commodities, the limits re-  
8                   quired under subparagraph (A) shall be es-  
9                   tablished within 270 days after the date of  
10                  the enactment of this paragraph.

11                  “(C) GOAL.—In establishing the limits re-  
12                  quired under subparagraph (A), the Commis-  
13                  sion shall strive to ensure that trading on for-  
14                  eign boards of trade in the same commodity will  
15                  be subject to comparable limits and that any  
16                  limits to be imposed by the Commission will not  
17                  cause price discovery in the commodity to shift  
18                  to trading on the foreign boards of trade.

19                  “(3) SPECIFIC LIMITATIONS.—In establishing  
20                  the limits required in paragraph (2), the Commis-  
21                  sion, as appropriate, shall set limits—

22                         “(A) on the number of positions that may  
23                         be held by any person for the spot month, each  
24                         other month, and the aggregate number of posi-

1           tions that may be held by any person for all  
2           months; and

3                   “(B) to the maximum extent practicable,  
4           in its discretion—

5                           “(i) to diminish, eliminate, or prevent  
6                           excessive speculation as described under  
7                           this section;

8                           “(ii) to deter and prevent market ma-  
9                           nipulation, squeezes, and corners;

10                           “(iii) to ensure sufficient market li-  
11                           quidity for bona fide hedgers; and

12                           “(iv) to ensure that the price dis-  
13                           covery function of the underlying market is  
14                           not disrupted.

15                   “(4) SIGNIFICANT PRICE DISCOVERY FUNC-  
16           TION.—In making a determination whether a swap  
17           performs or affects a significant price discovery  
18           function with respect to regulated markets, the Com-  
19           mission shall consider, as appropriate:

20                           “(A) PRICE LINKAGE.—The extent to  
21                           which the swap uses or otherwise relies on a  
22                           daily or final settlement price, or other major  
23                           price parameter, of another contract traded on  
24                           a regulated market based upon the same under-  
25                           lying commodity, to value a position, transfer or

1 convert a position, financially settle a position,  
2 or close out a position.

3 “(B) ARBITRAGE.—The extent to which  
4 the price for the swap is sufficiently related to  
5 the price of another contract traded on a regu-  
6 lated market based upon the same underlying  
7 commodity so as to permit market participants  
8 to effectively arbitrage between the markets by  
9 simultaneously maintaining positions or exe-  
10 cuting trades in the swaps on a frequent and  
11 recurring basis.

12 “(C) MATERIAL PRICE REFERENCE.—The  
13 extent to which, on a frequent and recurring  
14 basis, bids, offers, or transactions in a contract  
15 traded on a regulated market are directly based  
16 on, or are determined by referencing, the price  
17 generated by the swap.

18 “(D) MATERIAL LIQUIDITY.—The extent  
19 to which the volume of swaps being traded in  
20 the commodity is sufficient to have a material  
21 effect on another contract traded on a regulated  
22 market.

23 “(E) OTHER MATERIAL FACTORS.—Such  
24 other material factors as the Commission speci-  
25 fies by rule or regulation as relevant to deter-

1           mine whether a swap serves a significant price  
2           discovery function with respect to a regulated  
3           market.

4           “(5)   ECONOMICALLY   EQUIVALENT   CON-  
5           TRACTS.—

6                   “(A) Notwithstanding any other provision  
7           of this section, the Commission shall establish  
8           limits on the amount of positions, including ag-  
9           gregate position limits, as appropriate, other  
10          than bona fide hedge positions, that may be  
11          held by any person with respect to swaps that  
12          are economically equivalent to contracts of sale  
13          for future delivery or to options on the con-  
14          tracts or commodities traded on or subject to  
15          the rules of a designated contract market sub-  
16          ject to paragraph (2).

17                   “(B) In establishing limits pursuant to  
18          subparagraph (A), the Commission shall—

19                           “(i) develop the limits concurrently  
20                   with limits established under paragraph  
21                   (2), and the limits shall have similar re-  
22                   quirements as under paragraph (3)(B);  
23                   and

1                   “(ii) establish the limits simulta-  
2                   neously with limits established under para-  
3                   graph (2).

4                   “(6) AGGREGATE POSITION LIMITS.—The Com-  
5                   mission shall, by rule or regulation, establish limits  
6                   (including related hedge exemption provisions) on  
7                   the aggregate number or amount of positions in con-  
8                   tracts based upon the same underlying commodity  
9                   (as defined by the Commission) that may be held by  
10                  any person, including any group or class of traders,  
11                  for each month across—

12                  “(A) contracts listed by designated con-  
13                  tract markets;

14                  “(B) with respect to an agreement con-  
15                  tract, or transaction that settles against any  
16                  price (including the daily or final settlement  
17                  price) of 1 or more contracts listed for trading  
18                  on a registered entity, contracts traded on a  
19                  foreign board of trade that provides members or  
20                  other participants located in the United States  
21                  with direct access to its electronic trading and  
22                  order matching system; and

23                  “(C) swap contracts that perform or affect  
24                  a significant price discovery function with re-  
25                  spect to regulated entities.

1           “(7) EXEMPTIONS.—The Commission, by rule,  
2 regulation, or order, may exempt, conditionally or  
3 unconditionally, any person or class of persons, any  
4 swap or class of swaps, any contract of sale of a  
5 commodity for future delivery or class of such con-  
6 tracts, any option or class of options, or any trans-  
7 action or class of transactions from any requirement  
8 it may establish under this section with respect to  
9 position limits.”.

10           On page 796, after line 24, insert the following:

11           (c) BONA FIDE HEDGING TRANSACTION.—Section  
12 4a(c) of the Commodity Exchange Act is amended—

13           (1) by inserting “(1)” after “(c)”; and

14           (2) by adding at the end the following:

15           “(2) For the purposes of implementation of  
16 subsection (a)(2) for contracts of sale for future de-  
17 livery or options on the contracts or commodities,  
18 the Commission shall define what constitutes a bona  
19 fide hedging transaction or position as a transaction  
20 or position that—

21           “(A)(i) represents a substitute for trans-  
22 actions made or to be made or positions taken  
23 or to be taken at a later time in a physical mar-  
24 keting channel; or

1           “(ii) is economically appropriate to the re-  
2           duction of risks in the conduct and manage-  
3           ment of a commercial enterprise, and arises  
4           from the potential change in the value of—

5                   “(I) assets that a person owns, pro-  
6                   duces, manufactures, processes, or mer-  
7                   chandises or anticipates owning, producing,  
8                   manufacturing, processing, or merchan-  
9                   dising;

10                   “(II) liabilities that a person owns or  
11                   anticipates incurring; or

12                   “(III) services that a person provides,  
13                   purchases, or anticipates providing or pur-  
14                   chasing; or

15           “(B) reduces risks attendant to a position  
16           resulting from a swap that—

17                   “(i) was executed opposite a  
18                   counterparty for which the transaction  
19                   would qualify as a bona fide hedging trans-  
20                   action pursuant to subparagraph (A); or

21                   “(ii) meets the requirements of sub-  
22                   paragraph (A).”.

23           (d) EFFECTIVE DATE.—This section and the amend-  
24           ments made by this section shall become effective on the  
25           date of the enactment of this section.

1 On page 798, strike line 2 and all that follows  
2 through "for" on line 3, and insert the following:

3 "(A) REGISTRATION.—The Commission  
4 may adopt rules and regulations requiring reg-  
5 istration with the Commission for a foreign  
6 board of trade that provides the members of the  
7 foreign board of trade or other participants lo-  
8 cated in the United States with direct access to  
9 the electronic trading and order matching sys-  
10 tem of the foreign board of trade, including  
11 rules and regulations prescribing procedures  
12 and requirements applicable to the registration  
13 of such foreign boards of trade. For purposes of  
14 this paragraph, 'direct access' refers to an ex-  
15 plicit grant of authority by a foreign board of  
16 trade to an identified member or other partici-  
17 pant located in the United States to enter  
18 trades directly into the trade matching system  
19 of the foreign board of trade. In adopting such  
20 rules and regulations, the commission shall con-  
21 sider:

22 "(i) whether any such foreign board  
23 of trade is subject to comparable, com-  
24 prehensive supervision and regulation by  
25 the appropriate governmental authorities

1 in the foreign board of trade's home coun-  
2 try; and

3 "(ii) any previous commission findings  
4 that the foreign board of trade is subject  
5 to comparable comprehensive supervision  
6 and regulation by the appropriate govern-  
7 ment authorities in the foreign board of  
8 trade's home country.

9 "(B) LINKED CONTRACTS.—The Commis-  
10 sion may not permit".

11 On page 801, line 19, strike "(B)" and insert "(C)".

12 On page 801, line 20, strike "Subparagraph (A)" and  
13 insert "Subparagraphs (A) and (B)".

14 On page 806, strike lines 12 through 25, and insert  
15 the following:

16 "(a) CFTC.—Except as provided in subsections (b),  
17 (c), and (d), the Commission shall have exclusive authority  
18 to enforce the provisions of subtitle A of the Wall Street  
19 Transparency and Accountability Act of 2010 with respect  
20 to any person.

21 "(b) PRUDENTIAL REGULATORS.—The prudential  
22 regulators shall have exclusive authority to enforce the

1 provisions of section 4s(e) with respect to banks, and  
2 branches or agencies of foreign banks that are swap deal-  
3 ers or major swap participants.”.

4 On page 814, insert the following at the end of line  
5 9:

6 (12) Section 6(e) of the Commodity Exchange  
7 Act (7 U.S.C. 9a), is amended by adding at the end  
8 the following:

9 “(4) Any designated clearing organization that  
10 knowingly or recklessly evades or participates in or  
11 facilitates an evasion of the requirements of section  
12 2(h) shall be liable for a civil money penalty in twice  
13 the amount otherwise available for a violation of sec-  
14 tion 2(h).

15 “(5) Any swap dealer or major swap participant  
16 that knowingly or recklessly evades or participates in  
17 or facilitates an evasion of the requirements of sec-  
18 tion 2(h) shall be liable for a civil money penalty in  
19 twice the amount otherwise available for a violation  
20 of section 2(h).”.

21 On page 837, line 17, strike “shall not take into ac-  
22 count”.

1 On page 837, between lines 17 and 18, insert “(i)  
2 shall take into consideration—”,

3 On page 837, line 18, strike “(i)” insert “(I)”.

4 On page 837, line 22, strike “(ii)” insert “(II)”.

5 On page 838, line 1, strike “(iii)” insert “(III)”.

6 On page 838, line 7, strike “(iv)” insert “(IV)”.

7 On page 838, line 9, strike the period and insert “;  
8 and”

9 On page 838, between lines 9 and 10, insert “(ii)  
10 shall not take into consideration the balance of the  
11 Fund.”.

12 On page 841, line 15, strike “judgment”.

13 On page 841, line 15, insert “sanctions” after “mon-  
14 etary”.

15 On page 841, line 23, strike “and”.

1 On page 841, between lines 23 and 24, insert the fol-  
2 lowing:

3 “(B) ADDITIONAL AMOUNTS.—If the  
4 Amounts deposited into or credited to the Fund  
5 under subparagraph (A) are not sufficient to  
6 satisfy an award made under subsection (b),  
7 there shall be deposited into or credited to the  
8 Fund an amount equal to the unsatisfied por-  
9 tion of the award from any monetary sanction  
10 collected by the Commission in any judicial or  
11 administrative action brought by the Commis-  
12 sion under this Act that is based on information  
13 provided by a whistleblower; and”.

14 On page 841, line 24 strike “(B)” and insert “(C)”.

15 On page 850, line 17, after the first period, insert  
16 the following:

17 “(n) NONENFORCEABILITY OF CERTAIN PROVISIONS  
18 WAVING RIGHTS AND REMEDIES OR REQUIRING ARBI-  
19 TRATION OF DISPUTES.—

20 “(1) WAIVER OF RIGHTS AND REMEDIES.—The  
21 rights and remedies provided for in this section may  
22 not be waived by any agreement, policy form, or con-



1           mation about the Commission's  
2           regulation of commodity futures  
3           and option markets; and

4           “(cc) to make any rec-  
5           ommendations on whether the  
6           Commission should continue to  
7           use the exemption.

8           “(II) REPORT.—Not later than  
9           30 months after the date of enact-  
10          ment of this clause, the Inspector  
11          General shall—

12           “(aa) submit a report on the  
13           findings of the study required  
14           under this clause to the Com-  
15           mittee on Banking, Housing, and  
16           Urban Affairs of the Senate and  
17           the Committee on Financial  
18           Services of the House of Rep-  
19           resentatives; and

20           “(bb) make the report avail-  
21           able to the public through publi-  
22           cation of a report on the website  
23           of the Commission.”.

1       The matter following section 6(c)(1) of the Com-  
2       modity Exchange Act, as proposed to be added by section  
3       753(a) of the conference base text to H.R. 4173, as set  
4       forth in amendment #73 of the House Offer to Title VII  
5       (such matter having already been accepted by the Senate)  
6       is amended to read as follows:

7       “provided no rule or regulation promulgated by the  
8       Commission shall require any person to disclose to  
9       another other person nonpublic information that  
10      may be material to the market price, rate or level of  
11      the of the commodity transaction, except as nec-  
12      essary to make any statement made to the other  
13      person in or in connection with the transaction not  
14      misleading in any material respect.”.

15      Section 6(c)(1)(C) of the Commodity Exchange Act,  
16      as proposed to be added by section 753(a) of the con-  
17      ference base text to H.R. 4173, as set forth in amendment  
18      #74 of the House Offer to Title VII (such section  
19      6(c)(1)(C) having already been accepted by the Senate)  
20      is amended to read as follows:

21                   “(C) GOOD FAITH MISTAKES.—Mistakenly  
22                   transmitting, in good faith, false or misleading  
23                   or inaccurate information to a price reporting

1 service that would not be sufficient to violation  
2 subsection (c)(1)(A).”.

3 On page 882, strike lines 4 through 13, and insert  
4 the following:

5 “(77) SECURITY-BASED SWAP EXECUTION FA-  
6 CILITY.—The term ‘security-based swap execution  
7 facility’ means a trading system or platform in  
8 which multiple participants have the ability to exe-  
9 cute or trade security-based swaps by accepting bids  
10 and offers made by multiple participants in the facil-  
11 ity or system, through any means of interstate com-  
12 merce, including any trading facility, that—

13 “(A) facilitates the execution of security-  
14 based swaps between persons; and

15 “(B) is not a designated contract mar-  
16 ket.”.

17 On page 890, strike line 18 and all that follows  
18 through page 908, line 3, and insert the following:

19 “(a) IN GENERAL.—

20 “(1) STANDARD FOR CLEARING.—It shall be  
21 unlawful for any person to engage in a security-  
22 based swap unless that person submits such secu-  
23 rity-based swap for clearing to a clearing agency

1 that is registered under this Act or a clearing agency  
2 that is exempt from registration under this Act if  
3 the security-based swap is required to be cleared.

4 “(2) OPEN ACCESS.—The rules of a clearing  
5 agency described in paragraph (1) shall—

6 “(A) prescribe that all security-based  
7 swaps submitted to the clearing agency with the  
8 same terms and conditions are economically  
9 equivalent within the clearing agency and may  
10 be offset with each other within the clearing  
11 agency; and

12 “(B) provide for non-discriminatory clear-  
13 ing of a security-based swap executed bilaterally  
14 or on or through the rules of an unaffiliated na-  
15 tional securities exchange or security-based  
16 swap execution facility.

17 “(b) COMMISSION REVIEW.—

18 “(1) COMMISSION-INITIATED REVIEW.—

19 “(A) The Commission on an ongoing basis  
20 shall review each security-based swap, or any  
21 group, category, type, or class of security-based  
22 swaps to make a determination that such secu-  
23 rity-based swap, or group, category, type, or  
24 class of security-based swaps should be required  
25 to be cleared.

1           “(B) The Commission shall provide at  
2           least a 30-day public comment period regarding  
3           any determination under subparagraph (A).

4           “(2) SWAP SUBMISSIONS.—

5           “(A) A clearing agency shall submit to the  
6           Commission each security-based swap, or any  
7           group, category, type, or class of security-based  
8           swaps that it plans to accept for clearing and  
9           provide notice to its members (in a manner to  
10          be determined by the Commission) of such sub-  
11          mission.

12          “(B) Any security-based swap or group,  
13          category, type, or class of security-based swaps  
14          listed for clearing by a clearing agency as of the  
15          date of enactment of this subsection shall be  
16          considered submitted to the Commission.

17          “(C) The Commission shall—

18                 “(i) make available to the public any  
19                 submission received under subparagraphs  
20                 (A) and (B);

21                 “(ii) review each submission made  
22                 under subparagraphs (A) and (B), and de-  
23                 termine whether the security-based swap,  
24                 or group, category, type, or class of secu-

1           rity-based swaps, described in the submis-  
2           sion is required to be cleared; and

3           “(iii) provide at least a 30-day public  
4           comment period regarding its determina-  
5           tion whether the clearing requirement  
6           under subsection (a)(1) shall apply to the  
7           submission.

8           “(3) DEADLINE.—The Commission shall make  
9           its determination under paragraph (2)(C) not later  
10          than 90 days after receiving a submission made  
11          under paragraphs (2)(A) and (2)(B), unless the sub-  
12          mitting clearing agency agrees to an extension for  
13          the time limitation established under this paragraph.

14          “(4) DETERMINATION.—

15                 “(A) In reviewing a submission made  
16                 under paragraph (2), the Commission shall re-  
17                 view whether the submission is consistent with  
18                 section 17A.

19                 “(B) In reviewing a security-based swap,  
20                 group of security-based swaps or class of secu-  
21                 rity-based swaps pursuant to paragraph (1) or  
22                 a submission made under paragraph (2), the  
23                 Commission shall take into account the fol-  
24                 lowing factors:

1           “(i) The existence of significant out-  
2           standing notional exposures, trading liquid-  
3           ity and adequate pricing data.

4           “(ii) The availability of rule frame-  
5           work, capacity, operational expertise and  
6           resources, and credit support infrastruc-  
7           ture to clear the contract on terms that are  
8           consistent with the material terms and  
9           trading conventions on which the contract  
10          is then traded.

11          “(iii) The effect on the mitigation of  
12          systemic risk, taking into account the size  
13          of the market for such contract and the re-  
14          sources of the clearing agency available to  
15          clear the contract.

16          “(iv) The effect on competition, in-  
17          cluding appropriate fees and charges ap-  
18          plied to clearing.

19          “(v) The existence of reasonable legal  
20          certainty in the event of the insolvency of  
21          the relevant clearing agency or 1 or more  
22          of its clearing members with regard to the  
23          treatment of customer and security-based  
24          swap counterparty positions, funds, and  
25          property.

1           “(C) In making a determination under  
2           paragraph (2)(C) that the clearing requirement  
3           shall apply, the Commission may require such  
4           terms and conditions to the requirement as the  
5           Commission determines to be appropriate.

6           “(5) RULES.—Not later than 1 year after the  
7           date of the enactment of this section, the Commis-  
8           sion shall adopt rules for a clearing agency’s submis-  
9           sion for review, pursuant to this subsection, of a se-  
10          curity-based swap, or a group, category, type or  
11          class of security-based swaps, that it seeks to accept  
12          for clearing. Nothing in this paragraph limits the  
13          Commission from making a determination under  
14          paragraph (2)(C) for security-based swaps described  
15          in paragraph (2)(B).

16          “(e) STAY OF CLEARING REQUIREMENT.—

17                 “(1) IN GENERAL.—After making a determina-  
18                 tion pursuant to subsection (b)(2), the Commission,  
19                 on application of a counterparty to a security-based  
20                 swap or on its own initiative, may stay the clearing  
21                 requirement of subsection (a)(1) until the Commis-  
22                 sion completes a review of the terms of the security-  
23                 based swap (or the group, category, type, or class of  
24                 security-based swaps) and the clearing arrangement.

1           “(2) DEADLINE.—The Commission shall com-  
2           plete a review undertaken pursuant to paragraph (1)  
3           not later than 90 days after issuance of the stay, un-  
4           less the clearing agency that clears the security-  
5           based swap, or group, category, type, or class of se-  
6           curity-based swaps, agrees to an extension of the  
7           time limitation established under this paragraph.

8           “(3) DETERMINATION.—Upon completion of  
9           the review undertaken pursuant to paragraph (1),  
10          the Commission may—

11                   “(A) determine, unconditionally or subject  
12                   to such terms and conditions as the Commis-  
13                   sion determines to be appropriate, that the se-  
14                   curity-based swap, or group, category, type, or  
15                   class of security-based swaps, must be cleared  
16                   pursuant to this subsection if it finds that such  
17                   clearing is consistent with subsection (b)(4); or

18                   “(B) determine that the clearing require-  
19                   ment of subsection (a)(1) shall not apply to the  
20                   security-based swap, or group, category, type,  
21                   or class of security-based swaps.

22           “(4) RULES.—Not later than 1 year after the  
23           date of the enactment of this section, the Commis-  
24           sion shall adopt rules for reviewing, pursuant to this  
25           subsection, a clearing agency’s clearing of a security-

1 based swap, or a group, category, type or class of se-  
2 curity-based swaps, that it has accepted for clearing.

3 “(d) PREVENTION OF EVASION.—

4 “(1) IN GENERAL.—The Commission shall pre-  
5 scribe rules under this section (and issue interpreta-  
6 tions of rules prescribed under this section), as de-  
7 termined by the Commission to be necessary to pre-  
8 vent evasions of the mandatory clearing require-  
9 ments under this Act.

10 “(2) DUTY OF COMMISSION TO INVESTIGATE  
11 AND TAKE CERTAIN ACTIONS.—To the extent the  
12 Commission finds that a particular security-based  
13 swap or any group, category, type, or class of secu-  
14 rity-based swaps that would otherwise be subject to  
15 mandatory clearing but no clearing agency has listed  
16 the security-based swap or the group, category, type,  
17 or class of security-based swaps for clearing, the  
18 Commission shall—

19 “(A) investigate the relevant facts and cir-  
20 cumstances;

21 “(B) within 30 days issue a public report  
22 containing the results of the investigation; and

23 “(C) take such actions as the Commission  
24 determines to be necessary and in the public in-  
25 terest, which may include requiring the retain-

1           ing of adequate margin or capital by parties to  
2           the security-based swap or the group, category,  
3           type, or class of security-based swaps.

4           “(3) EFFECT ON AUTHORITY.—Nothing in this  
5           subsection—

6                   “(A) authorize the Commission to adopt  
7                   rules requiring a clearing agency to list for  
8                   clearing a security-based swap or any group,  
9                   category, type, or class of security-based swaps  
10                  if the clearing of the security-based swap or the  
11                  group, category, type, or class of security-based  
12                  swaps would threaten the financial integrity of  
13                  the clearing agency; and

14                   “(B) affect the authority of the Commis-  
15                   sion to enforce the open access provisions of  
16                   subsection (a)(2) with respect to a security-  
17                   based swap or the group, category, type, or  
18                   class of security-based swaps that is listed for  
19                   clearing by a clearing agency.

20           “(e) REPORTING TRANSITION RULES.—Rules adopt-  
21           ed by the Commission under this section shall provide for  
22           the reporting of data, as follows:

23                   “(1) Security-based swaps entered into before  
24                   the date of the enactment of this section shall be re-  
25                   ported to a registered security-based swap data re-

1       pository or the Commission no later than 180 days  
2       after the effective date of this section.

3           “(2) Security-based swaps entered into on or  
4       after such date of enactment shall be reported to a  
5       registered security-based swap data repository or the  
6       Commission no later than the later of—

7           “(A) 90 days after such effective date; or

8           “(B) such other time after entering into  
9       the security-based swap as the Commission may  
10      prescribe by rule or regulation.

11      “(f) CLEARING TRANSITION RULES.—

12           “(1) Security-based swaps entered into before  
13      the date of the enactment of this section are exempt  
14      from the clearing requirements of this subsection if  
15      reported pursuant to subsection (e)(1).

16           “(2) Security-based swaps entered into before  
17      application of the clearing requirement pursuant to  
18      this section are exempt from the clearing require-  
19      ments of this section if reported pursuant to sub-  
20      section (e)(2).

21      “(g) EXCEPTIONS.—

22           “(1) IN GENERAL.—The requirements of sub-  
23      section (a)(1) shall not apply to a security-based  
24      swap if 1 of the counterparties to the security-based  
25      swap—

1           “(A) is not a financial entity;

2           “(B) is using security-based swaps to  
3           hedge or mitigate commercial risk; and

4           “(C) notifies the Commission, in a manner  
5           set forth by the Commission, how it generally  
6           meets its financial obligations associated with  
7           entering into non-cleared security-based swaps.

8           “(2) ABUSE OF EXCEPTION.—The Commission  
9           may prescribe rules under this subsection, or issue  
10          interpretations of the rules, as necessary to prevent  
11          abuse of the exemption in paragraph (1) by security-  
12          based swap dealers and major security-based swap  
13          participants.

14          “(3) OPTION TO CLEAR.—The application of  
15          the clearing exception in paragraph (1) is solely at  
16          the discretion the counterparty to the security-based  
17          swap that meets the conditions of subparagraphs (A)  
18          through (C) of paragraph (1).

19          “(4) FINANCIAL ENTITY DEFINITION.—

20                 “(A) IN GENERAL.—For the purposes of  
21                 this subsection, the term ‘financial entity’  
22                 means—

23                         “(i) a swap dealer;

24                         “(ii) a security-based swap dealer;

25                         “(iii) a major swap participant;



1                   “(ii) farm credit system institutions  
2                   with total assets of \$10,000,000,000 or  
3                   less; or

4                   “(iii) credit unions with total assets of  
5                   \$10,000,000,000 or less.

6                   “(5) TREATMENT OF AFFILIATES.—

7                   “(A) IN GENERAL.—An affiliate of a per-  
8                   son that qualifies for an exception under this  
9                   subsection (including affiliate entities predomi-  
10                  nantly engaged in providing financing for the  
11                  purchase of the merchandise or manufactured  
12                  goods of the person) may qualify for the excep-  
13                  tion only if the affiliate, acting on behalf of the  
14                  person and as an agent, uses the security-based  
15                  swap to hedge or mitigate the commercial risk  
16                  of the person or other affiliate of the person  
17                  that is not a financial entity.

18                  “(B) PROHIBITION RELATING TO CERTAIN  
19                  AFFILIATES.—The exception in subparagraph  
20                  (A) shall not apply if the affiliate is—

21                               “(i) a swap dealer;

22                               “(ii) a security-based swap dealer;

23                               “(iii) a major swap participant;

24                               “(iv) a major security-based swap par-  
25                               ticipant;

1           “(v) an issuer that would be an in-  
2           vestment company, as defined in section 3  
3           of the Investment Company Act of 1940  
4           (15 U.S.C. 80a-3), but for paragraph (1)  
5           or (7) of subsection (c) of that Act (15  
6           U.S.C. 80a-3(c));

7           “(vi) a commodity pool; or

8           “(vii) a bank holding company with  
9           over \$50,000,000,000 in consolidated as-  
10          sets.

11          “(C) TRANSITION RULE FOR AFFILI-  
12          ATES.—An affiliate, subsidiary, or a wholly  
13          owned entity of a person that qualifies for an  
14          exception under subparagraph (A) and is pre-  
15          dominantly engaged in providing financing for  
16          the purchase or lease of merchandise or manu-  
17          factured goods of the person shall be exempt  
18          from the margin requirement described in sec-  
19          tion 15F(e) and the clearing requirement de-  
20          scribed in subsection (a) with regard to secu-  
21          rity-based swaps entered into to mitigate the  
22          risk of the financing activities for not less than  
23          a 2-year period beginning on the date of enact-  
24          ment of this clause.

25          “(6) ELECTION OF COUNTERPARTY.—

1           “(A) SECURITY-BASED SWAPS REQUIRED  
2 TO BE CLEARED.—With respect to any security-  
3 based swap that is subject to the mandatory  
4 clearing requirement under subsection (a) and  
5 entered into by a security-based swap dealer or  
6 a major security-based swap participant with a  
7 counterparty that is not a swap dealer, major  
8 swap participant, security-based swap dealer, or  
9 major security-based swap participant, the  
10 counterparty shall have the sole right to select  
11 the clearing agency at which the security-based  
12 swap will be cleared.

13           “(B) SECURITY-BASED SWAPS NOT RE-  
14 QUIRED TO BE CLEARED.—With respect to any  
15 security-based swap that is not subject to the  
16 mandatory clearing requirement under sub-  
17 section (a) and entered into by a security-based  
18 swap dealer or a major security-based swap  
19 participant with a counterparty that is not a  
20 swap dealer, major swap participant, security-  
21 based swap dealer, or major security-based  
22 swap participant, the counterparty—

23                   “(i) may elect to require clearing of  
24 the security-based swap; and

1                   “(ii) shall have the sole right to select  
2                   the clearing agency at which the security-  
3                   based swap will be cleared.

4                   “(7) ABUSE OF EXCEPTION.—The Commission  
5                   may prescribe such rules or issue interpretations of  
6                   the rules as the Commission determines to be nec-  
7                   essary to prevent abuse of the exceptions described  
8                   in this subsection. The Commission may also request  
9                   information from those persons claiming the clearing  
10                  exception as necessary to prevent abuse of the excep-  
11                  tions described in this subsection.

12                  “(h) TRADE EXECUTION.—

13                  “(1) IN GENERAL.—With respect to trans-  
14                  actions involving security based swaps subject to the  
15                  clearing requirement of subsection (a)(1), counter-  
16                  parties shall—

17                         “(A) execute the transaction on an ex-  
18                         change; or

19                         “(B) execute the transaction on a security-  
20                         based swap execution facility registered under  
21                         section 3D or a security-based swap execution  
22                         facility that is exempt from registration under  
23                         section 3D(e) of this Act.

24                  “(2) EXCEPTION.—The requirements of sub-  
25                  paragraphs (A) and (B) of paragraph (1) shall not

1       apply if no exchange or security-based swap execu-  
2       tion facility makes the security-based swap available  
3       to trade or for security-based swap transactions sub-  
4       ject to the clearing exception under subsection (g).”.

5       On page 909, line 13, strike “exempted” and insert  
6       “excepted”.

7       On page 910, line 11, strike “exempt” through  
8       “(a)(8)” on line 13, and insert “determined to be required  
9       to be cleared under subsection (b) but are not cleared”.

10       On page 944, line 2, strike “exempted” and insert  
11       “excepted”.

12       On page 944, line 4, strike “3C(a)(10)” and insert  
13       “3C(g)”.

14       On page 945, line 2, strike “exempt” through  
15       “3C(a)(1)” on line 3, and insert “determined to be re-  
16       quired to be cleared under section 3C(b) but are not  
17       cleared”.

18       On page 946, between lines 14 and 15, insert the fol-  
19       lowing:

1           “(G) REPORTING OF SWAPS TO REG-  
2           ISTERED SECURITY-BASED SWAP DATA REPOSI-  
3           TORIES.—Each security-based swap (whether  
4           cleared or uncleared) shall be reported to a reg-  
5           istered security-based swap data repository.

6           “(H) REGISTRATION OF CLEARING AGEN-  
7           CIES.—A clearing agency may register as a se-  
8           curity-based swap data repository.”.

9           On page 947, between lines 12 and 13, insert the fol-  
10          lowing:

11           “(C) AUTHORITY OF COMMISSION.—The  
12           Commission may, by rule, regulation, or order,  
13           delegate the public reporting responsibilities of  
14           the Commission under this paragraph in ac-  
15           cordance with such terms and conditions as the  
16           Commission determines to be appropriate and  
17           in the public interest.”.

18          On page 948, strike lines 19 through 23 and insert  
19          the following:

20           “(A) DATA IDENTIFICATION.—

21           “(i) IN GENERAL.—In accordance  
22           with clause (ii), the Commission shall pre-  
23           scribe standards that specify the data ele-

1           ments for each security-based swap that  
2           shall be collected and maintained by each  
3           registered security-based swap data reposi-  
4           tory.

5           “(ii) REQUIREMENT.—In carrying out  
6           clause (i), the Commission shall prescribe  
7           consistent data element standards applica-  
8           ble to registered entities and reporting  
9           counterparties.”.

10          On page 956, between lines 5 and 6, insert the fol-  
11          lowing:

12                   “(D) ADDITIONAL DUTIES DEVELOPED BY  
13          COMMISSION.—

14                   “(i) IN GENERAL.—The Commission  
15                   may develop 1 or more additional duties  
16                   applicable to security-based swap data re-  
17                   positories.

18                   “(ii) CONSIDERATION OF EVOLVING  
19                   STANDARDS.—In developing additional du-  
20                   ties under subparagraph (A), the Commis-  
21                   sion may take into consideration any evolv-  
22                   ing standard of the United States or the  
23                   international community.

1                   “(iii) ADDITIONAL DUTIES FOR COM-  
2                   MISSION DESIGNEES.—The Commission  
3                   shall establish additional duties for any  
4                   registrant described in section 13(m)(2)(C)  
5                   in order to minimize conflicts of interest,  
6                   protect data, ensure compliance, and guar-  
7                   antee the safety and security of the secu-  
8                   rity-based swap data repository.”.

9                   Paragraph (3)(A)(ii) of section 15F(e) of the Securi-  
10                  ties Exchange Act, as added by section 764 of the con-  
11                  ference base text to H.R. 4173, as set forth in amendment  
12                  #103 of the House Offer to Title VII is amended to read  
13                  as follows:

14                               “(ii) be appropriate for the substan-  
15                               tially-higher risk associated with the non-  
16                               cleared security-based swaps held as a se-  
17                               curity-based swap dealer or major security-  
18                               based swap participant.”.

19                  On page 988, line 12, strike “Not” and insert “In  
20                  order to mitigate conflicts of interest, not”.

21                  On page 988, lines 15 and 16, strike “determine  
22                  whether to adopt rules to establish limits on the control

1 of” and insert “adopt rules which may include numerical  
2 limits on the control of, or the voting rights with respect  
3 to,”.

4 On page 989, between lines 17 and 18, insert the fol-  
5 lowing:

6 (c) CONSIDERATIONS.—In adopting rules pursuant to  
7 this section, the Securities and Exchange Commission  
8 shall consider any conflicts of interest arising from the  
9 amount of equity owned by a single investor, the ability  
10 to vote, cause the vote of, or withhold votes entitled to  
11 be cast on any matters by the holders of the ownership  
12 interest, and the governance arrangements of any deriva-  
13 tives clearing organization that clears swaps, or swap exe-  
14 cution facility or board of trade designated as a contract  
15 market that posts swaps or makes swaps available for  
16 trading.

17 On page 1002, between lines 5 and 6, insert the fol-  
18 lowing new section (and redesignate following sections ac-  
19 cordingly):

20 **SEC. 773. CIVIL PENALTIES.**

21 Section 21B of the Securities Exchange Act of 1934  
22 (15 U.S.C. 78p-2) is amended by adding at the end the  
23 following:

1       “(f) SECURITY-BASED SWAPS.—

2               “(1) CLEARING AGENCY.—Any clearing agency  
3       that knowingly or recklessly evades or participates in  
4       or facilitates an evasion of the requirements of sec-  
5       tion 3C shall be liable for a civil money penalty in  
6       twice the amount otherwise available for a violation  
7       of section 3C.

8               “(2) SECURITY-BASED SWAP DEALER OR MAJOR  
9       SECURITY-BASED SWAP PARTICIPANT.—Any secu-  
10       rity-based swap dealer or major security-based swap  
11       participant that knowingly or recklessly evades or  
12       participates in or facilitates an evasion of the re-  
13       quirements of section 3C shall be liable for a civil  
14       money penalty in twice the amount otherwise avail-  
15       able for a violation of section 3C.”.

Dodd

Amendment  
Accepted

Page 652, between lines 7 and 8 insert "provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer. "

Page 610, Strike section 716 and insert the following:

**"SEC. 716. PROHIBITION AGAINST FEDERAL GOVERNMENT BAILOUTS OF SWAPS ENTITIES.**

**"(a) PROHIBITION ON FEDERAL ASSISTANCE.**—Notwithstanding any other provision of law (including regulations), no Federal assistance may be provided to any swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.

**"(b) DEFINITIONS.**—In this section:

**"(1) FEDERAL ASSISTANCE.**—The term "Federal assistance" means the use of any advances from any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under section 13(3)(A) of the Federal Reserve Act, Federal Deposit Insurance Corporation insurance, or guarantees for the purpose of—

"(A) making any loan to, or purchasing any stock, equity interest, or debt obligation of, any swaps entity;

"(B) purchasing the assets of any swaps entity;

"(C) guaranteeing any loan or debt issuance of any swaps entity; or

"(D) entering into any assistance arrangement (including tax breaks), loss sharing, or profit sharing with any swaps entity.

**"(2) SWAPS ENTITY.**—

**(A) IN GENERAL.** --- The term "swaps entity" means any swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, that is registered under ---

"(i) the Commodity Exchange Act (7 U.S.C. 1 et seq.);

"(ii) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

**"(B) EXCLUSION.** --- The term "swaps entity" does not include any major swap participant or major security-based swap participant that is an insured depository institution.

**"(c) AFFILIATES OF INSURED DEPOSITORY INSTITUTIONS.**—The prohibition on Federal assistance contained in subsection (a) does not apply to and shall not prevent an insured depository institution from having or establishing an affiliate which is a swaps entity, as long as such

Fund of the Federal Deposit Insurance Corporation. The appropriate Federal Banking Agency may consider such other factors as may be appropriate. The appropriate Federal Banking Agency may place such conditions on the insured depository institution's divestiture or ceasing of activities of the swaps entity as it deems necessary and appropriate. This transition period may be extended by the appropriate Federal banking agency, after consultation with the CFTC and the SEC for a period of up to one additional year.

**“(g) EXCLUDED ENTITIES.—** For purposes of this section, the term “swaps entity” shall not include any insured depository institution under the Federal Deposit Insurance Act or a covered financial company under title II of the Restoring American Financial Stability Act of 2010, which is in a conservatorship, receivership, or a bridge bank operated by the Federal Deposit Insurance Corporation.

**“(h) BAN ON PROPRIETARY TRADING IN DERIVATIVES.—**An insured depository institution shall comply with the prohibition on proprietary trading in derivatives as required by section 619 of the Restoring American Financial Stability Act of 2010.

**“(i) EFFECTIVE DATE.—**The prohibition in subsection (a) shall be effective two years following the date on which the Wall Street Transparency and Accountability Act of 2010 is effective.”.

contracts. No taxpayer funds shall be used to prevent the receivership of any swap entity resulting from swap or security-based swap activity of the swaps entity.

**(C) NON-FDIC INSURED, NON-SYSTEMICALLY SIGNIFICANT INSTITUTIONS NOT SUBJECT TO HEIGHTENED PRUDENTIAL SUPERVISION AS REGULATED UNDER SECTION 113 OF TITLE I OF H.R. 4173, THE WALL STREET REFORM AND CONSUMER PROTECTION ACT** --. No taxpayer resources shall be used for the orderly liquidation of any non-FDIC insured, non-systemically significant institutions not subject to heightened prudential supervision as regulated under section 113 of Title I of H.R. 4173, the Wall Street Reform and Consumer Protection Act.

**(2) RECOVERY OF FUNDS.**—All funds expended on the termination or transfer of the swap or security-based swap activity of the swaps entity shall be recovered in accordance with applicable law from the disposition of assets of such swap entity or through assessments, including on the financial sector as provided under applicable law.

**(3) NO LOSSES TO TAXPAYERS.**—Taxpayers shall bear no losses from the exercise of any authority under this title.

**(D) PROHIBITION ON UNREGULATED COMBINATION OF SWAPS ENTITIES AND BANKING.**—At no time following adoption of the rules in subsection (i) may a bank or bank holding company be permitted to be or become a swap entity unless it conducts its swap or security-based swap activity in compliance with such minimum standards set by its prudential regulator as are reasonably calculated to permit the swaps entity to conduct its swap or security-based swap activities in a safe and sound manner and mitigate systemic risk.

**(E) RULES.**—In prescribing rules the prudential regulator for a swaps entity shall consider the following factors:

- (1) The expertise and managerial strength of the swaps entity, including systems for effective oversight;
- (2) The financial strength of the swaps entity;
- (3) Systems for identifying, measuring and controlling risks arising from the swaps entity's operations;
- (4) Systems for identifying, measuring and controlling the swaps entity's participation in existing markets; and
- (5) Systems for controlling the swaps entity's participation or entry into in new markets and products.

**(F) AUTHORITY OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL .** -- The Financial Stability Oversight Council may determine that, when other provisions established by H.R. 4173 are insufficient to effectively mitigate systemic risk and protect taxpayers, that swaps entities may no longer access federal assistance with respect to any swap, security-based swap, or other activity of the swaps entity. Any such determination by the Financial Stability Oversight Council of a prohibition of federal assistance shall be made on an institution-by-institution basis, and shall require the vote of not fewer than two-thirds of the members of the Financial Stability Oversight Council, which must include the vote by the Chairman of the Council, the Chairman of the Board of Governors of the Federal Reserve System and the Chairperson of the Federal Deposit Insurance Corporation. Notice and hearing requirements for such determinations shall be consistent with the standards provided in Title I of H.R. 4173, the Wall Street Reform and Consumer Protection Act.