

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.