

111TH CONGRESS
1ST SESSION

S. 961

To authorize the regulation of credit default swaps and other swap agreements, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 4, 2009

Mr. LEVIN (for himself and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To authorize the regulation of credit default swaps and other swap agreements, and for other purposes.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Authorizing the Regu-
5 lation of Swaps Act”.

6 **SEC. 2. REPEAL OF PROHIBITION ON CERTAIN REGULA-**
7 **TION OF SWAP AGREEMENTS.**

8 The following provisions of law are repealed:

9 (1) Sections 206A, 206B, and 206C of the
10 Gramm-Leach-Bliley Act (15 U.S.C. 78c note).

1 (2) Section 2A of the Securities Act of 1933
2 (15 U.S.C. 77b–1).

3 (3) Section 17(d) of the Securities Act of 1933
4 (15 U.S.C. 77q(d)).

5 (4) Section 3A of the Securities Exchange Act
6 of 1934 (15 U.S.C. 78e–1).

7 (5) Section 9(i) of the Securities Exchange Act
8 of 1934 (15 U.S.C. 78i(i)).

9 (6) Section 15(i) of the Securities Exchange
10 Act of 1934 (15 U.S.C. 78o(i)), as added by section
11 303(f) of the Commodity Futures Modernization Act
12 of 2000 (Public Law 106–554; 114 Stat. 2763A–
13 455).

14 (7) Section 16(g) of the Securities Exchange
15 Act of 1934 (15 U.S.C. 78p(g)).

16 (8) Section 20(f) of the Securities Exchange
17 Act of 1934 (15 U.S.C. 78t(f)).

18 (9) Section 21A(g) of the Securities Exchange
19 Act of 1934 (15 U.S.C. 78u–1(g)).

20 (10) Sections 301(b) and 304 of the Com-
21 modity Futures Modernization Act of 2000 (Public
22 Law 106–554; 114 Stat. 2763A–451, 2763A–457).

23 (11) Sections 403, 404, and 407 of the Legal
24 Certainty for Bank Products Act of 2000 (7 U.S.C.
25 27a, 27b, 27e).

1 ments, procedures, or standards, relating to any
2 swap agreement—

3 (A) that is entered into, purchased, or sold
4 (or as to which the transaction, purchase, or
5 sale is effected) by any financial institution, en-
6 tity, or person (for its own account or for the
7 account of others) that is subject to the juris-
8 diction of the Federal financial regulator; and

9 (B) that is subject to the jurisdiction of
10 the Federal financial regulator.

11 (b) EXCHANGES AND TRADING FACILITIES.—In car-
12 rying out subsection (a)—

13 (1) the Securities and Exchange Commission
14 (and not any other Federal financial regulator) shall
15 exercise oversight and carry out regulatory or over-
16 sight activity over—

17 (A) any exchange or clearing agency (as
18 those terms are defined in section 3(a) of the
19 Securities Exchange Act of 1934 (15 U.S.C.
20 78c(a)); and

21 (B) any swap agreement traded on or
22 cleared through such exchange or clearing agen-
23 cy; and

24 (2) the Commodity Futures Trading Commis-
25 sion (and not any other Federal financial regulator)

1 shall exercise oversight and carry out regulatory or
2 oversight activity over—

3 (A) any trading facility or registered entity
4 (as those terms are defined in section 1a of the
5 Commodity Exchange Act (7 U.S.C. 1a)); and

6 (B) any swap agreement executed on, trad-
7 ed on, or cleared through such trading facility
8 or registered entity.

9 (c) RULES OF CONSTRUCTION.—Nothing in this Act
10 may be construed as—

11 (1) limiting or reducing the authority of a Fed-
12 eral financial regulator in effect on the date of en-
13 actment of this Act with respect to swap agree-
14 ments;

15 (2) affecting the authority of the Commodity
16 Futures Trading Commission under section 2(h)(3)
17 or 4(c) of the Commodity Exchange Act (7 U.S.C.
18 2(h)(3), 6(c)), or affecting any exemption granted
19 under that section 4(c); or

20 (3) requiring any swap agreement to be—

21 (A) conducted on or subject to the rules of
22 a board of trade which has been designated or
23 registered by the Commodity Futures Trading
24 Commission as a contract market or derivatives
25 transaction execution facility; or

1 (B) traded through an exchange or broker
2 or dealer registered or required to be registered
3 under the Securities Exchange Act of 1934 (15
4 U.S.C. 78a et seq.).

5 (d) CONSISTENT TREATMENT OF SWAP AGREE-
6 MENTS.—Prior to taking action under subsection (a)(2),
7 each Federal financial regulator shall consult, work, and
8 cooperate with other Federal financial regulators to pro-
9 mote consistency in the treatment of swap agreements.

10 **SEC. 4. DEFINITIONS.**

11 For the purposes of this Act, the following definitions
12 shall apply:

13 (1) FEDERAL FINANCIAL REGULATOR.—

14 (A) IN GENERAL.—The term “Federal fi-
15 nancial regulator” means—

16 (i) the Commodity Futures Trading
17 Commission;

18 (ii) the Federal Deposit Insurance
19 Corporation;

20 (iii) the Board of Governors of the
21 Federal Reserve System;

22 (iv) the National Credit Union Admin-
23 istration;

24 (v) the Office of the Comptroller of
25 the Currency;

- 1 (vi) the Office of Thrift Supervision;
2 (vii) the Securities and Exchange
3 Commission; and
4 (viii) any other Federal agency that is
5 authorized under any provision of Federal
6 law to regulate any financial institution or
7 type or class of financial instrument or of-
8 fering thereof.

9 (2) PURCHASE; SALE.—The terms “purchase”
10 and “sale”, when used with respect to a swap agree-
11 ment, means the execution, termination (prior to its
12 scheduled maturity date), assignment, exchange, or
13 similar transfer or conveyance of, or extinguishing of
14 rights or obligations under a swap agreement, as the
15 context may require.

16 (3) SWAP AGREEMENT.—

17 (A) IN GENERAL.—The term “swap agree-
18 ment” means any agreement, contract, or
19 transaction between eligible contract partici-
20 pants (as defined in section 1a(12) of the Com-
21 modity Exchange Act (7 U.S.C. 1a(12))), the
22 material terms of which (other than price and
23 quantity) are subject to individual negotiation
24 and that—

1 (i) is a put, call, cap, floor, collar, or
2 similar option of any kind for the purchase
3 or sale of, or based on the value of, 1 or
4 more interest or other rates, currencies,
5 commodities, indices, quantitative meas-
6 ures, or other financial or economic inter-
7 ests or property of any kind;

8 (ii) provides for any purchase, sale,
9 payment, or delivery (other than a dividend
10 on an equity security) that is dependent on
11 the occurrence, nonoccurrence, or the ex-
12 tent of the occurrence of any event or con-
13 tingency associated with a potential finan-
14 cial, economic, or commercial consequence;

15 (iii) provides on an executory basis for
16 the exchange, on a fixed or contingent
17 basis, of 1 or more payments based on the
18 value or level of 1 or more interest or other
19 rates, currencies, commodities, securities,
20 instrument of indebtedness, indices, quan-
21 titative measures, or other financial or eco-
22 nomic interests or property of any kind, or
23 any interest therein or based on the value
24 thereof, and that transfers, as between the
25 parties to the transactions, in whole or in

1 part, the financial risk associated with a
2 future change in any such value or level
3 without also conveying a current or future
4 direct or indirect ownership interest in an
5 asset (including any enterprise or invest-
6 ment pool) or liability that incorporates the
7 financial risk so transferred, including any
8 such agreement, contract, or transaction
9 commonly known as an “interest rate
10 swap”, including a rate floor, rate cap,
11 rate collar, cross-currency rate swap, basis
12 swap, currency swap, equity index swap,
13 equity swap, debt index swap, debt swap,
14 credit spread, credit default swap, credit
15 swap, weather swap, or commodity swap;

16 (iv) provides for the purchase or sale,
17 on a fixed or contingent basis, of any com-
18 modity, currency, instrument, interest,
19 right, service, good, articles, or property of
20 any kind; or

21 (v) is any combination or permutation
22 of, or option on, any agreement, contract,
23 or transaction described in any of clauses
24 (i) through (iv).

1 (B) EXCLUSIONS.—The term “swap agree-
2 ment” does not include—

3 (i) any put, call, straddle, option, or
4 privilege on any security, certificate of de-
5 posit, or group or index of securities, in-
6 cluding any interest therein or based on
7 the value thereof;

8 (ii) any put, call, straddle, option, or
9 privilege entered into on a national securi-
10 ties exchange registered pursuant to sec-
11 tion 6(a) of the Securities Exchange Act of
12 1934 (15 U.S.C. 78f(a)) relating to foreign
13 currency;

14 (iii) any agreement, contract, or
15 transaction providing for the purchase or
16 sale of 1 or more securities on a fixed
17 basis;

18 (iv) any agreement, contract, or trans-
19 action providing for the purchase or sale of
20 1 or more securities on a contingent basis,
21 unless the agreement, contract, or trans-
22 action predicates the purchase or sale on
23 the occurrence of a bona fide contingency
24 that might reasonably be expected to affect
25 or be affected by the creditworthiness of a

1 party other than a party to the agreement,
2 contract, or transaction;

3 (v) any note, bond, or evidence of in-
4 debtedness that is a security; or

5 (vi) any agreement, contract, or trans-
6 action that is—

7 (I) based on a security; and

8 (II) entered into directly or
9 through an underwriter (as defined in
10 section 2(a) of the Securities Act of
11 1933 (15 U.S.C. 77b(a))) by the
12 issuer of the security for the purpose
13 of raising capital, unless such agree-
14 ment, contract, or transaction is en-
15 tered into to manage a risk associated
16 with capital raising.

17 (C) INCLUSION.—The term “swap agree-
18 ment” includes a master agreement that pro-
19 vides for an agreement, contract, or transaction
20 that is a swap agreement pursuant to subpara-
21 graphs (A) and (B), together with all supple-
22 ments to any such master agreement, without
23 regard to whether the master agreement con-
24 tains an agreement, contract, or transaction
25 that is not a swap agreement pursuant to sub-

1 paragraphs (A) and (B), except that the master
2 agreement shall be considered to be a swap
3 agreement only with respect to each agreement,
4 contract, or transaction under the master
5 agreement that is a swap agreement pursuant
6 to subparagraphs (A) and (B).

7 (D) MEANING OF SECURITY.—For pur-
8 poses of this paragraph, the term “security”
9 has the same meaning as in section 2(a)(1) of
10 the Securities Act of 1933 (15 U.S.C.
11 77b(a)(1)) or section 3(a)(10) of the Securities
12 Exchange Act of 1934 (15 U.S.C. 78c(a)(10)).

13 **SEC. 5. CONFORMING AMENDMENTS.**

14 (a) SECURITIES ACT OF 1933.—Section 17(a) of the
15 Securities Act of 1933 (15 U.S.C. 77q(a)) is amended by
16 striking “security-based swap agreement (as defined in
17 section 206B of the Gramm-Leach-Bliley Act)” and in-
18 serting “swap agreement”.

19 (b) SECURITIES EXCHANGE ACT OF 1934.—The Se-
20 curities Exchange Act of 1934 (15 U.S.C. 78a et seq.)
21 is amended—

22 (1) by striking “security-based swap agreement
23 (as defined in section 206B of the Gramm-Leach-
24 Bliley Act)” each place that term appears and in-
25 serting “swap agreement”;

1 (2) by striking “security-based swap agree-
2 ments (as defined in section 206B of the Gramm-
3 Leach-Bliley Act)” each place that term appears and
4 inserting “swap agreements”;

5 (3) in each of sections 9 and 16 (15 U.S.C. 78i,
6 78p)—

7 (A) by striking “security-based swap
8 agreement” each place that term appears and
9 inserting “swap agreement”; and

10 (B) by striking “security-based swap
11 agreements” each place that term appears and
12 inserting “swap agreements”;

13 (4) in section 10(b) (15 U.S.C. 78j(b)), by
14 striking “securities-based swap agreement (as de-
15 fined in section 206B of the Gramm-Leach-Bliley
16 Act)” and inserting “swap agreement”;

17 (5) in section 16(a)(2)(C) (15 U.S.C.
18 78p(a)(2)(C)), by striking “security-based swap
19 agreement (as defined in section 206(b) of the
20 Gramm-Leach-Bliley Act (15 U.S.C. 78c note))”
21 and inserting “swap agreement”; and

22 (6) in section 3(a)(55)(A) (15 U.S.C.
23 78c(a)(55)(A)), by striking “2(c), 2(d), 2(f), or
24 2(g)” and inserting “2(c) or 2(f)”.

25 (c) COMMODITY EXCHANGE ACT.—

1 (1) Section 1a of the Commodity Exchange Act
2 (7 U.S.C. 1a) is amended—

3 (A) in paragraph (12)(A)(x), by striking
4 “or an exempt board of trade”; and

5 (B) in paragraph (31), in the second sen-
6 tence, by striking “2(c), 2(d), 2(f), or 2(g) of
7 this Act” and inserting “2(c) or 2(f)”.

8 (2) Section 2 of the Commodity Exchange Act
9 (7 U.S.C. 2) is amended—

10 (A) in subsection (e)(1), by striking “5d,”;

11 (B) in subsection (e)—

12 (i) in paragraph (1), by striking
13 “2(d)(2), 2(g), or”; and

14 (ii) in paragraph (2), by striking “, or
15 operating as an exempt board of trade”;

16 (C) in subsection (h)(4)(A), by striking
17 “5d,”; and

18 (D) in subsection (i)—

19 (i) in paragraph (1)(A), by striking
20 “2(d), 2(e), 2(f), or 2(g)” and inserting
21 “2(e), or 2(f)”;

22 (ii) in paragraph (2), by striking
23 “Act), 5b of this Act, or 5d of this Act”
24 and inserting “Act) or 5b of this Act”.

1 (3) Section 5a(g)(1) of the Commodity Ex-
2 change Act (7 U.S.C. 7a(g)(1)) is amended by strik-
3 ing “2(c), 2(d), or 2(g)” and inserting “2(c)”.

4 (4) Section 5b of the Commodity Exchange Act
5 (7 U.S.C. 7a–1) is amended—

6 (A) in subsection (a)(1), by striking “2(d),
7 2(f), or 2(g)” and inserting “or 2(f)”; and

8 (B) in subsection (b), by striking “2(c),
9 2(d), 2(f), or 2(g)” and inserting “2(c) or
10 2(f)”.

11 (5) Section 12(e) of the Commodity Exchange
12 Act (7 U.S.C. 16(e)) is amended—

13 (A) in paragraph (1)(B)(i), by striking “or
14 exempt board of trade”; and

15 (B) in paragraph (2)(B), by striking “2(c),
16 2(d), 2(f), or 2(g)” and inserting “2(c) or
17 2(f)”.

18 (d) FEDERAL DEPOSIT INSURANCE CORPORATION
19 IMPROVEMENT ACT.—Section 408(2)(C) of the Federal
20 Deposit Insurance Corporation Improvement Act of 1991
21 (12 U.S.C. 4421(2)(C)) is amended by striking “2(c),
22 2(d), 2(f), or 2(g)” and inserting “2(c) or 2(f)”.

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