

FINANCIAL CONTRACT NETTING IMPROVEMENT ACT OF  
1998

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

REPORT

[To accompany H.R. 4393]

[Including cost estimate of the Congressional Budget Office]

The Committee on Banking and Financial Services, to whom was referred the bill (H.R. 4393) to revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

H.R. 4393, the Financial Contract Netting Improvement Act of 1998 (Act), contains legislative proposals forwarded to Congress by the nation's financial regulators in order to guard against systemic risk to the nation's financial system. Except for Section 14, the provisions of this Act are based on recommendations made by the President's Working Group on Financial Markets following a review of current statutory provisions governing the treatment of qualified financial contracts and similar financial contracts upon the insolvency of a counterparty. The Working Group consists of the Securities and Exchange Commission; the Commodity Futures Trading Commission; the Federal Deposit Insurance Corporation; the Department of the Treasury, including the Office of the Comptroller of the Currency; the Board of Governors of the Federal Reserve System; and the Federal Reserve Bank of New York. The recommendations of the Working Group were transmitted to Congress by Treasury Secretary Rubin in his role as Chairman of the Working Group on March 16, 1998.

The provisions, forwarded by Secretary Rubin, amend the U.S. Bankruptcy Code; the Federal Deposit Insurance Act (FDIA), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); the payment system risk reduction and netting provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA); and the Securities Investor Protection Act of 1971 (SIPA). These amendments address the treatment of certain financial transactions following the insolvency of a party to such transactions. The amendments are designed to clarify and improve consistency between the applicable statutes and to minimize risk of a disruption within or between financial markets upon the insolvency of a market participant.

Section 14 of H.R. 4393 incorporates an amendment to the Federal Reserve Act transmitted to the Committee on Banking and Financial Services (the Committee) on July 30, 1998, by Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System. This section expands the kinds of assets that the Federal Reserve can use as collateral to back currency. In his transmittal letter to the Committee, Chairman Greenspan stated that the current "limitations on eligible currency collateral could become potentially problematic for the implementation of monetary policy under unusual circumstances", citing as an example problems stemming from the century date change.

## BACKGROUND AND NEED FOR LEGISLATION

### INSOLVENCY PROVISIONS

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

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

The Committee and Congress have taken steps in the past to ensure that the risk of such systemic events is minimized. For example, both the Bankruptcy Code and the FDIA contain provisions that protect the rights of financial participants to terminate swap agreements, forward contracts, securities contracts, commodity contracts and repurchase agreements following the bankruptcy or insolvency of a counterparty to such contracts or agreements. Furthermore, other provisions prevent transfers made under such cir-

cumstances from being avoided as preferences or fraudulent conveyances (except when made with actual intent to defraud). Protections also are afforded to ensure that the netting, set off and collateral foreclosure provisions of such transactions and master agreements for such transactions are enforceable.

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

The orderly resolution of insolvencies involving counterparties to such contracts also is an important element in the reduction of systemic risk. The FDIC allows the receiver of an insolvent insurance depository institution the opportunity to review the status of certain contracts to determine whether to terminate or transfer the contracts to new counterparties. These provisions provide the receiver with flexibility in determining the most appropriate resolution for the failed institution and facilitate the reduction of systemic risk by permitting the transfer, rather than termination, of such contracts.

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

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

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

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

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

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

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

#### CURRENCY COLLATERAL REQUIREMENT

Current law requires that the Federal Reserve collateralize Federal Reserve notes when they are issued. The list of eligible collateral includes Treasury and Federal agency securities, gold certificates, Special Drawing Right certificates, and foreign currencies. In addition, the legally eligible backing for currency includes discount window loans made under section 13 of the Federal Reserve Act. Over the years, sections were added to the Act that permit lending under provisions other than section 13 and against a broader range of collateral than allowed under section 13. However, the currency collateralization requirement was not similarly amended, thus limiting the types of loans the Federal Reserve can use to back the currency.

The Federal Reserve has expressed concern that in recent years the amount of excess currency collateral has been dwindling primarily because of the development of retail sweep accounts—accounts which have been created by depository institutions to reduce their reserve holdings with the Federal Reserve System. Since the Federal Reserve uses reserves to purchase eligible collateral they serve as a source of excess collateral for currency. The amount of reserves that banks hold at the Federal Reserve has decreased from \$28 billion in 1993 to \$8 billion today, again with the reduction being attributed to the use of retail sweep accounts. As additional sweep programs are implemented by depository institutions, the amount of reserves will further decrease, thereby decreasing the margin of excess currency collateral.

According to the Federal Reserve, the smaller margin of available collateral poses a potential problem for the Federal Reserve in its conduct of monetary policy and its duties to avoid systemic risk to the nation's financial system. In a Federal Reserve staff analysis which accompanied Chairman Greenspan's transmittal letter for the legislation, this potential conflict between the pursuit of both goals was described as follows:

For example, one or more banks could experience operational problems (perhaps owing to computer failures related to the century date change) that require a large volume of temporary funding from the discount window. Such banks might not be able to tender the types of collateral that would qualify for loans under Section 13. Consequently, any such loans would need to be made under other provisions of the Act and under current law would not be eligible to back currency.

If the aggregate need for such loans exceeded excess currency collateral, the Federal Reserve would be faced with an

unpalatable choice. Were the Federal Reserve to extend the credit, it would not be able to absorb all of the resulting excess reserves by selling Treasury securities from its portfolio, because selling the necessary amount would cause a deficiency in currency collateral. The increase in excess reserves would reduce short-term interest rates, causing an unintended shift in the stance of monetary policy. The situation would persist until the loans were repaid. Were the Federal Reserve instead to refuse to make the discount loans in order to maintain the stance of monetary policy and continue to collateralize the currency, the depository institutions seeking credit would not be able to meet their obligations, with possible adverse implications for the financial system as well as the individual depository institutions.

To avoid this "unpalatable choice" between conducting an efficacious monetary policy and protecting the nation's financial system from systemic risk, the Federal Reserve proposes to amend the Federal Reserve Act to authorize the Federal Reserve to collateralize the currency with all types of discount window loans. Section 14 of H.R. 4393 incorporates such an amendment.

#### INTRODUCTION OF LEGISLATION

On July 16, 1998, Representatives Leach, LaFalce, McCollum and Roukema introduced H.R. 4239, which contained the Working Group's recommendations as transmitted by Secretary Rubin. Before the Committee markup of the legislation, staff of the Working Group forwarded a number of modifications further perfecting the legislation. The insolvency provisions contained in H.R. 4393, as introduced on August 4, 1998, and reported, incorporate the provisions of H.R. 4239 with these modifications. The changes incorporated into H.R. 4239 include a clarification of what kinds of financial contracts will receive differential treatment under the various Federal insolvency laws. In addition, the Bankruptcy Code is amended to provide that certain assets transferred to an eligible entity in connection with an asset-backed securitization generally will not be included within the bankruptcy estate of the debtor. H.R. 4393 also incorporates the amendment recommended by the Federal Reserve Board to expand the kinds of assets the Federal Reserve can use as collateral to back Federal Reserve notes.

#### HEARINGS

The Committee held two hearings on the derivatives market generally, H.R. 4062, the Financial Derivatives Supervisory Improvement Act, and the provisions of this Act.

The first hearing was held on July 17, 1998. Appearing before the Committee were: Dennis Oakley, Managing Director of Global Markets, Chase Manhattan Bank; Mark C. Brickell, Managing Director, J.P. Morgan & Co., Incorporated; George M. James, Managing Director, Morgan Stanley Dean Witter & Company; Charles Smithson, Managing Director, CIBC World Markets; Susan Schmidt Bies, Exec. Vice President of Risk Management, First Tennessee National Corporation; Wendy Gramm, Distinguished Senior Fellow, James Buchanan Center, George Mason University and

former CFTC Chairperson; John C. Coffee, Jr., Adolf A. Berle, Professor, Columbia University Law School; Robert Mackay, Vice President, National Economic Research Associates; Martin Regalia, Vice President for Economic Policy and Chief Economist, U.S. Chamber of Commerce; M. Scott Gordon, Chairman of the Board of Directors, Chicago Mercantile Exchange; Patrick H. Arbor, Chairman of the Board, Chicago Board of Trade; and Daniel Rappaport, Chairman, New York Mercantile Exchange.

Witnesses at this hearing focused their testimony on H.R. 4062 and the derivatives market in general. However, Mr. James of Morgan Stanley Dean Witter discussed the insolvency issues surrounding the Act, and stated that the recommended bankruptcy legislation has the full support of the financial services industry and reflects consensus among the industry, financial regulators, and Congress. He stated that the legislation is necessary to provide market participants with certainty that their contractual arrangements will be honored in case of insolvency and to minimize systemic risk. Given the recent changes in financial accounting standards, the amendments made in the bill to the bankruptcy code regarding asset securitization, he maintained, underscore the urgency of the legislation. The bill, he said, would bring bankruptcy and bank insolvency laws into line with current market transactions without threatening the protection of debtors.

A second hearing was held on July 24, 1998. Testifying before the Committee were: John D. Hawke, Under Secretary, U.S. Department of the Treasury; Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System; Brooksley Born, Chairperson, Commodity Futures Trading Commission; Richard Lindsey, Director of Market Regulation, Securities and Exchange Commission; Michael L. Brosnan, Deputy Comptroller for Risk Evaluation, Office of the Comptroller of the Currency; Kenneth Ryder, Executive Director of Research, Statistics and Analysis, Office of Thrift Supervision; Douglas H. Jones, Senior Deputy General Counsel, Federal Deposit Insurance Corporation; Douglas E. Harris, Partner, Arthur Andersen; and Richard A. Miller, Partner, White & Case.

The witnesses, in general, focused their testimony on H.R. 4062 and the derivatives market in general, with the exception of the FDIC which focused its testimony on this Act. Mr. Hawke from Treasury and Mr. Brosnan of the OCC stated that the insolvency reforms contained in the Act would help reduce systemic risk in financial markets. Mr. Brosnan continued by stating that the legislation would clarify and ensure consistent treatment and enhanced enforceability of qualified financial contracts (QFCs) and other similar contracts in instances of counterparty insolvency, and that the legislation includes an important OCC proposal to clarify that a counterparty to a QFC with an uninsured bank would have the same rights as a counterparty to a QFC with an insured bank. Federal Reserve Chairman Greenspan stated that the legislation would shore up the infrastructure of U.S. markets, would enhance U.S. market competitiveness, and would address the concern that the traditional insolvency process can create serious risks to counterparties due to the price volatility of financial assets. The comments of Mr. Jones from the FDIC regarding H.R. 4393 were

extensive. In sum, he stated that as a result of the legislation, market participants will have a better understanding of their rights and will be able to more accurately assess and manage the risks arising from derivative contracts. He stated that without modification, the current status governing netting will not adequately address market innovations. The Act, he said, would benefit the market and fix a problem before it arises.

#### COMMITTEE CONSIDERATION AND VOTES

On August 5, 1998, the full Committee met in open session to consider H.R. 4393, the Financial Contract Netting Improvement Act of 1998. A quorum being present, the Committee by voice vote passed H.R. 4393 final passage and ordered it to be favorably reported to the full House of Representatives for consideration. Also, the Committee adopted, by voice vote, a motion to authorize the Chairman to offer such motions as may be necessary in the House of Representatives to go to conference with the Senate on a similar bill.

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

#### COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings and recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives.

#### CONSTITUTIONAL AUTHORITY

In compliance with clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the constitutional authority for Congress to enact this legislation is derived from the power to Congress to make “uniform laws on the subject of bankruptcies” (Clause 4, Section 8, Article I, Constitution) and the interstate commerce clause (Clause 3, Section 8, Article I, Constitution). In addition, the power “to coin money” and “regulate the value thereof” (Clause 5, Section 8, Article I, Constitution) has been broadly construed to authorize regulation of every phase of the subject of currency, including the Federal regulation and chartering of banks.

#### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

#### ADVISORY COMMITTEE STATEMENT

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

## CONGRESSIONAL ACCOUNTABILITY ACT

The reporting requirement under section 102(b)(3) of the Congressional Accountability Act (P.L. 104-1) is inapplicable because this legislation does not relate to terms and conditions of employment or access to public services or accommodations.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE AND UNFUNDED MANDATES ANALYSIS

The CBO cost estimates and unfunded mandates analysis for the bill were requested but were not available at the time the report was filed. The Committee will provide the analysis in a subsequent addendum to the report.

## SECTION-BY-SECTION ANALYSIS

*Section 1. Short title*

Section 1 cites the Act as the “Financial Contract Netting Improvement Act of 1998”.

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

Subsections (a) through (f) amend the FDIA definitions of “qualified financial contract,” “securities contract,” “commodity contract,” “forward contract,” “repurchase agreement” and “swap agreement” to make them consistent with the definitions in the Bankruptcy Code.

Subsection (b) amends the definitions of “securities contract” to encompass options on securities and margin loans. The inclusion of “margin loans” in the definition is intended to encompass only those loans commonly known in the securities industry as “margin loans” and does not include other loans utilizing securities as collateral, however documented.

Subsection (b) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage load do not constitute “securities contracts.” While a contract for the purchase or sale or a participation may constitute a “securities contract”, the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a “securities contract.”

Subsection (e) amends the definition of “repurchase agreement” to codify the substance of the FDIC’s 1995 regulation defining repurchase agreement to include those on qualified foreign government securities. See 12 C.F.R. § 360.5. The term “qualified foreign government securities” is defined to include those that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). Subsection (e) reflects developments in the repurchase agreement markets which increasingly use foreign government securities as the underlying assets. Any risk presented by this modification is addressed by limiting it to those obligating or guaranteed by OECD member states.

Subsection (e), like subsection (b) for “securities contracts”, specifies that repurchase obligations under a participation in an com-



mercial mortgage loan do not make the participation agreement a “repurchase agreement.” Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a “repurchase agreement.” However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer could constitute a “repurchase agreement.”

Subsection (f) amends the definition of “swap agreement” to include an “interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next forward or other foreign exchange agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit swap, option, future, or forward agreement; a commodity swap, option, future, or forward agreement or any other similar agreement.” This amendment would achieve contractual netting across economically similar over-the-counter products that can be terminated and closed out on a mark-to-market basis.

The definition of “swap agreement” in this subsection (and section 8) does not include transactions that are, in substance, commercial, consumer or industrial loans. Traditional commercial and lending arrangements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as “swaps” under either the FDI Act or the Bankruptcy Code because the parties purport to document or label the transactions as “swap agreements.” In addition, these definitions apply only for purposes of the FDIA and the Bankruptcy Code. These definitions, and the characterization of a certain transaction as a “swap agreement” are not intended to effect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

Subsection (g) amends the FDIA by adding a definition for “transfer,” which is a key term used in the FDIA, to ensure that it is broadly construed to encompass dispositions of property or interests in property. The definition mirrors that in section 101(54) of the Bankruptcy Code.

Subsection (h) makes clarifying technical changes to conform the receivership and conservatorship provisions of the FDIA. This subsection (h) also clarifies that the FDIA expressly protects rights under security agreements, arrangements or other credit enhancement related to one or more qualified financial contracts (QFCs). An example of a security arrangement is a right of set off, and examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Subsection (i) clarifies that no provision of Federal or state law relating to the avoidance or preferential or fraudulent transfer (including the anti-preference provision of the National Bank Act) can be invoked to avoid a transfer made in connection with any QFC of an insured depository institution in conservatorship or receivership, absent actual fraudulent intent on the part of the transferee.

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

Section 3 provides that no provision of law, including FDICIA, shall be construed to limit the power of the FDIC to transfer or to repudiate any QFC in accordance with its powers under the FDIA. As discussed below, there has been some uncertainty regarding whether or not FDICIA limits the authority of the FDIC to transfer or to repudiate QFCs of an insolvent financial institution. Section 3—as well as other provisions in the Act—clarify that FDICIA does not limit the transfer powers of the FDIC with respect to QFCs.

Section 3 denies enforcement to “walkaway” clauses in QFCs. A walkaway clause is defined as a provision that, after calculation of a value of a party’s position or an amount due to or from one of the parties upon termination, liquidation or acceleration of the QFC, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party’s status as a non-defaulting party.

*Section 4. Amendments relating to transfers of qualified financial contracts*

Subsection (a) amends the FDIA to expand the transfer authority of the FDIC to permit transfer of QFCs to “financial institutions” as defined in FDICIA or in regulations. This provision will allow the FDIC to transfer QFCs to a non-depository financial institutions, provided the institution is not subject to bankruptcy or insolvency proceedings.

The new FDIA provisions specifies that when the FDIC transfers QFCs that are subject to the rules of a particular clearing organization, the transfer will not require the clearing organization to accept the transferee as a member of the organization. This provision gives the FDIC flexibility in resolving QFCs subject to the rules of a clearing organization, while preserving the ability of such organizations to enforce appropriate risk reducing membership requirements.

The new FDIA provision also permits transfers to an eligible financial institution that is a non-U.S. person, or the branch or agency of a non-U.S. person if, following the transfer, the contractual rights of the parties would be enforceable substantially to the same extent as under the FDIA.

Subsection (b) amends the notification requirements following a transfer of the QFCs of a failed depository institution to require the FDIC to notify any party to a transferred QFC of such transfer by 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the FDIC acting as receiver or following the date of such transfer by the FDIC acting as a conservator. This amendment is consistent with the policy statement on QFCs issued by the FDIC on December 12, 1989.

Subsection (c) amends the FDIA to clarify the relationship between the FDIA and FDICIA. There has been some uncertainty whether FDICIA permits counterparties to terminate or liquidate a QFC before the expiration of the time period provided by the FDIA during which the FDIC may repudiate or transfer a QFC in a conservatorship or receivership. Subsection (c) provides that a party may not terminate a QFC based solely on the appointment

of the FDIC as receiver until 5:00 p.m. (Eastern Time) on the business day following the appointment of the receiver or after the person has received notice of a transfer under FDIA section 11(d)(9), or based solely on the appointment of the FDIC as conservator, notwithstanding the provisions of FDICIA. This provides the FDIC with an opportunity to undertake an orderly of the insured depository institution.

The amendment also prohibits the enforcement of rights of termination or liquidation that are based solely on the “financial condition” of the depository institution in receivership or conservatorship. For example, termination based on a cross-default provision in a QFC that is triggered upon a default under another contract could be stayed if such other default was caused by an acceleration of amounts due under that other contract, and such acceleration was based solely on the appointment of a conservator or receiver for that depository institution. Similarly, a provision in a QFC permitting termination of the QFC based solely on a downgraded credit rating of a party will not be enforceable in an FDIC receivership or conservatorship because the provision is based solely on the financial condition of the depository institution in default. However, any payment, delivery or other performance-based default, or breach of a representation or covenant putting in question the enforceability of the agreement, will not be deemed to be based solely on financial condition for purposes of this provision. The amendment is not intended to prevent counterparties from taking all actions permitted and recovering all damages authorized upon repudiation of any QFC by a conservator or receiver.

The amendment allows the FDIC to meet its obligation to provide notice to parties to transferred QFCs by taking steps reasonably calculated to provide notice to such parties by the required time. This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

Finally, the amendment permits the FDIC to transfer QFCs of a failed depository institution to a bridge bank or a depository institution organized by the FDIC for which a conservator is appointed either (i) immediately upon the organization of such institution or (ii) at the time of a purchase and assumption transaction between the FDIC and the institution. This provision clarifies that such institutions are not to be considered financial institutions that are ineligible to receive such transfers under FDIA section 11(e)(9). This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

*Section 5. Amendments relating to disaffirmance or repudiation of qualified financial contracts*

Section 5 limits the disaffirmance and repudiation authority of the FDIC with respect to QFCs so that such authority is consistent with the FDIC’s transfer authority under FDIA section 11(e)(9). This ensures that no disaffirmance, repudiation or transfer authority of the FDIC may be exercised to “cherry-pick” or otherwise treat independently all the QFCs between a depository institution in default and a person or any affiliate of such person. The FDIC has announced that its policy is not to repudiate or disaffirm QFCs se-

lectively. This unified treatment is fundamental to the reduction of systemic risk.

*Section 6. Clarifying amendment relating to master agreements*

Section 6 states that a master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA. This provision ensures that cross-product netting pursuant to a master agreement will be enforceable under the FDIA. Cross-product netting permits a wide variety of financial transactions between two parties to be netted, thereby maximizing the present and potential future risk-reducing benefits of the netting arrangement between the parties. Express recognition of the enforceability of such cross-product master agreements furthers the policy of increasing legal certainty and reducing systemic risks in the case of an insolvency of a large financial participant. Similar Bankruptcy Code clarifications to recognize cross-product netting both under a master agreement and in the absence of a master agreement are described below.

*Section 7. Federal Deposit Insurance Corporation Improvement Act of 1991*

Subsection (a)(1). FDICIA provides that a netting arrangement will be enforced pursuant to its terms, notwithstanding the failure of a party to the agreement. However, the current netting provisions of FDICIA limit this protection to “financial institutions,” which include depository institutions. This subsection amends the FDICIA definition of covered institutions to include (i) uninsured national and State member banks, irrespective of their eligibility for deposit insurance and (ii) foreign banks (including the foreign bank and its branches or agencies as a combined group or only the foreign bank parent of a branch or agency). The Federal Reserve Board already has by regulation included certain foreign banks in the definition of a “financial institution” for purposes of FDICIA and the latter change will statutorily extend the protections of FDICIA to ensure that U.S. financial organizations participating in netting agreements with foreign banks are covered by the Act, thereby enhancing the safety and soundness of these arrangements.

Subsection (a)(2) amends FDICIA to provide that, for purposes of FDICIA, two or more clearing organizations that enter into a netting contract are considered “members” of each other. This assures the enforceability of netting arrangements involving two or more clearing organizations and a member common to all such organizations, thus reducing systemic risk in the event of the failure of such a member. Under the current FDICIA provisions, the enforceability of such arrangements depends on a case-by-case determination that clearing organizations could be regarded as members of each other for purposes of FDICIA.

Subsection (a)(3) amends the FDICIA definition of netting contract and the general rules applicable to netting contracts. The current FDICIA provisions require that the netting agreement must be governed by the law of the United States or a State to receive the protections of FDICIA. However, many of these agreements,

particularly netting arrangements covering positions taken in foreign exchange dealings, are governed by the laws of a foreign country. This subsection broadens the definition of “netting contract” to include those agreements governed by foreign law, and preserves the FDICIA requirement that a netting contract is not invalid under, or precluded by, Federal law.

Subsections (b) and (c) establish two exceptions to FDICIA’s protection of the enforceability of the provisions of netting contracts between financial institutions and among clearing organization members.

First, the termination provisions of netting contracts will not be enforceable based solely on (i) the appointment of a conservator for an insolvent depository institution under the FDIA or (ii) the appointment of a receiver for such institution under the FDIA, if such receiver transfers or repudiates QFCs in accordance with the FDIA and gives notice of a transfer by 5:00 p.m. on the business day following the appointment of a receiver. This change is made to confirm the FDIC’s flexibility to transfer or repudiate the QFCs of an insolvent depository institution in accordance with the terms of the FDIA. This modification also provides important legal certainty regarding the treatment of QFCs under the FDIA, because the current relationship between the FDIA and FDICIA is unclear.

The second exception provides that FDICIA does not override a stay order under SIPA with respect to foreclosure on securities (but not cash) collateral of a debtor (section 12 makes a conforming change to SIPA).

Subsections (b) and (c) also clarify that a security agreement or other credit enhancement related to a netting contract is enforceable to the same extent as the underlying netting contract.

Subsection (d) adds a new section 407 to FDICIA. This new section provides that, notwithstanding any other law, QFCs with uninsured national banks or uninsured Federal branches or agencies that are placed in receivership or conservatorship will be treated in the same manner as if the contract were with an insured national bank or insured Federal branch for which a receiver or conservator was appointed. This provision will ensure that parties to QFCs with uninsured national banks or uninsured Federal branches or agencies will have the same rights and obligations as parties entering into the same agreements with insured depository institutions. The new section also specifically limits the powers of a receiver or conservator for an uninsured national bank or uninsured Federal branch or agency to those contained in 12 U.S.C. §§ 1821(e) (8), (9), and (11), which address QFCs.

While the amendment would apply the same rules to uninsured national banks and Federal branches and agencies that apply to insured institutions, the provision would not change the rules that apply to insured institutions. Nothing in this section would amend the International Banking Act, the Federal Deposit Insurance Act, the National Bank Act, or other statutory provisions with respect to receivership of insured national banks or Federal branches. It is noted that new section 407 may need to be amended if legislation is enacted to permit the creation of so-called “wholesale financial institutions.”

*Section 8. Bankruptcy Code amendments*

Subsection (a)(1) amends the Bankruptcy Code definitions of “repurchase agreement” and “swap agreement” to conform with the amendments to the FDIA contained in sections 2(e) and 2(f) of the Act.

In connection with the definition of “repurchase agreement,” the term “qualified foreign government securities” is defined to include securities that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). This language reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. Any risk presented by this modification is addressed by limiting it to those obligating or guaranteed by OECD member states.

Subsection (a)(1) specifies that repurchase obligations under a participation in an commercial mortgage loan do not make the participation agreement a “repurchase agreement.” Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a “repurchase agreement.” However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain one year or less after such transfer could constitute a “repurchase agreement.”

The amendments to the definition of “repurchase agreement” are not intended to affect the interpretation of the definition of “securities contract.”

The definition of “swap agreement,” in conjunction with the addition of “spot foreign exchange transactions” that was added to the definition in 1994, will achieve contractual netting across economically similar over-the-counter products that can be terminated and closed out on a mark-to-market basis.

The definition of “swap agreement” originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and use of swap transactions matured. For that reason, the phrase “or any other similar agreement” was included in the definition. The phrase “other similar agreement” encompasses any agreement that is, or in the future becomes, regularly entered into in the swap market that is a forward, swap or option on one or more rates, currencies, commodities, equity or debt securities or instruments, economic indices or measures of economic risk or value. However, traditional commercial and lending arrangements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as “swaps” under either the FDI Act or the Bankruptcy Code because the parties purport to document or label the transactions as “swap agreements.” Subsection (a)(1)(C) specifies that this definition of swap agreement applies only for purposes of the Bankruptcy Code and is inapplicable to the other statutes, rules and regulations enumerated in that section.

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligi-

ble for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code and the FDIA. Similar changes are made in the definition of “forward contract,” “commodity contract” and “repurchase agreement.” An example of a security arrangement is a right of set off; examples of other credit enhancements are letters of credit, guarantees, reimbursement obligations and other similar agreements.

Subsections (a)(2) and (a)(3) amend the Bankruptcy Code definitions of “securities contract” and “forward contract,” respectively, to conform them to the definition in the FDIA, and also to include any security agreements or arrangements or other credit enhancements related to one or more such contracts. Subsection (a)(2), like the amendments to the FDIA amends the definition of “securities contract” to encompass options on securities and margin loans. The inclusion of “margin loans” in the definition is intended to encompass only those loans commonly known in the securities industry as “margin loans” and does not include other loans utilizing securities as collateral, however documented.

Subsection (a)(2) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute “securities contracts.” While a contract for the purchase or sale or a participation may constitute a “securities contract”, the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a “securities contract.”

Subsection (b) amends the Bankruptcy Code definitions of “financial institution” and “forward contract merchant.” The definition for “financial institution” includes Federal Reserve Banks and the receivers or conservators of insolvent depository institutions.

Subsection (b) also adds a new definition of “financial participant” to limit the potential impact of insolvencies upon other major market participants. This definition will allow such market participants to close-out and net agreements with insolvent entities under sections 362(b)(6), 546, 548, 555, and 556 even if the creditor could not qualify as, for example, a commodity broker. The new subsection preserves the limitations of the right to close-out and net such contracts, in most cases, to entities who qualify under the Bankruptcy Code’s counterparty limitations. However, where the counterparty has transactions with a total gross dollar value of at least \$1 billion in notional principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least \$100 million (aggregated across counterparties) in one or more agreements or transactions on any day during the previous 15-month period, the new subsection and corresponding amendments would permit it to exercise netting rights irrespective of its inability otherwise to satisfy those counterparty limitations. This change will help prevent systemic impacts upon the markets from a single failure.

Subsection (c) adds to the Bankruptcy Code new definitions for the terms “master netting agreement” and “master netting agreement participant.” The definition of “master netting agreement” is designed to protect the termination and close-out netting provisions of cross-product master agreements between parties. Such an agreement may be used (i) to document a wide variety of securities

contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements or (ii) as an umbrella agreement for separate master agreements between the same parties, each of which is used to document a discrete type of transaction. The definition includes security agreements or arrangements or other credit enhancements related to one or more such agreements and clarifies that a master netting agreement will be treated as such even if it documents transactions that are not within the enumerated categories of qualifying transactions (but the provisions of the Bankruptcy Code relating to master netting agreements and the other categories of transactions will not apply to such other transactions).

A “master netting agreement participant” is any entity that is a party to an outstanding master netting agreement with a debtor before the filing of a bankruptcy petition.

Subsection (d) amends section 362(b) of the Bankruptcy Code to protect enforcement, free from the automatic stay, of setoff or netting provisions in swap agreements and in master netting agreements and security agreements or arrangements related to one or more swap agreements or master netting agreements. This provision parallels the other provisions of the Bankruptcy Code that protect netting provisions of securities contracts, commodity contracts, forward contracts, and repurchase agreements. Because the relevant definitions include related security agreements, the reference to “setoff” in this provisions, as well as in section 362(b) (6) and (7) of the Bankruptcy Code, are intended to refer also to rights to foreclose on, and to set off against, obligations to return collateral security swap agreements, master netting arrangements, repurchase agreements, securities contracts, commodity contracts, or forward contracts. Collateral may be pledged to cover the cost of replacing the defaulted transactions in the relevant market, as well as other costs and expenses incurred or estimated to be incurred for the purpose of hedging or reducing the risks arising out of such termination. Enforcement of these agreements and arrangements is consistent with the policy goal of minimizing systemic risk.

Subsection (d) also clarifies that the provisions protecting setoff and foreclosure in relation to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements free from the automatic stay apply to collateral pledged by the debtor that is under the control of the creditor but that cannot technically be “held by” the creditor, such as receivables and book-entry securities, and to collateral that has been repledged by the creditor.

Subsection (e) amends section 546 of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud. This Section of the Act also clarifies the limitations on a trustee’s power to avoid transfers made under swap agreements.

The current codification of section 546 of the Bankruptcy Code contains two subsections designated as “(g)”; subsection (e) corrects this error.

Subsection (f) amends section 548(d) of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where



such transfer is made with actual intent to hinder, delay or defraud. This amendment provides the same protections for transfers made under, or in connection with, master netting agreements as currently is provided for margin payments and settlement payments received by commodity brokers, forward contract merchants, stockbrokers, financial institutions, securities clearing agencies, repo participants, and swap participant under paragraphs (B), (C) and (D) of section 548(d).

Subsections (g), (h), (i) and (j) clarify that the provisions of the Bankruptcy Code that protect (i) rights of liquidation under securities contracts, commodity contracts, forward contracts and repurchase agreements also protect rights of termination or acceleration under such contracts, and (ii) rights to terminate under swap agreements also protect rights of liquidation and acceleration.

Subsection (k) adds a new section 561 to the Bankruptcy Code to protect the contractual right of a master netting agreement participant to enforce any rights of termination, liquidation, acceleration, offset or netting under a master netting agreement. Such rights include rights arising (i) from the rules of a securities exchange or clearing organization, (ii) under common law, law merchant or (iii) by reason of normal business practice. This is consistent with the current treatment of rights under swap agreements under section 560 of the Bankruptcy Code.

For the purposes of Bankruptcy Code sections 555, 556, 559, 560 and 561, it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankruptcy or insolvent party.

The protection of netting and offset rights in sections 560 and 561 is in addition to the protections afforded in sections 362(b)(6), (b)(7) and (b)(17). For example, cross-product netting will be protected from the automatic stay under section 561 even in the absence of a master netting agreement.

Sections 561(b) (2) and (3) limit the exercise of contractual rights to net or to offset obligations where one leg of the obligations sought to be netted relates to commodity contracts. Under subsection (b)(2), netting or offset is not permitted if the obligations are not mutual. This means, for example, that proprietary obligations cannot be netted or offset against obligations held for, or on behalf of, some other party. Even if the obligations are mutual, under subsection (b)(3) netting or offset is not permitted in a commodity broker bankruptcy if the party seeking to net or to offset has no positive net equity in the commodity account at the debtor. Subsections (b)(2) and (b)(3) limit the depletion of assets available for distribution to customers of commodity brokers. This is consistent with the principle of Subchapter IV of Chapter 7 of the Bankruptcy Code, which gives priority to customer claims in the bankruptcy of a commodity broker.

Under the Act, the termination, liquidation or acceleration rights of a master netting agreement participant are subject to limitations contained in other provisions of the Bankruptcy Code relating to securities contracts and repurchase agreements. In particular, if a

securities contract or repurchase agreement is documented under a master netting agreement, a party's termination, liquidation and acceleration rights would be subject to the provisions of the Bankruptcy Code relating to orders authorized under the provisions of SIPA or any statute administered by the SEC. In addition, the netting rights of a party to a master netting agreement would be subject to any contractual terms between the parties limiting or waiving netting or set off rights. Similarly, a waiver by a bank or a counterparty of netting or set off rights in connection with QFCs would be enforceable under the FDIA.

Subsection (1) clarifies that, with respect to municipal bankruptcies, all the provisions of the Bankruptcy Code relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements (which by their terms are intended to apply in all proceedings under title 11) will apply in a Chapter 9 proceeding for a municipality. Although sections 555, 556, 559 and 560 provide that they apply in any proceeding under the Bankruptcy Code, this subsection makes a technical amendment in Chapter 9 to clarify the applicability of these provisions.

Subsection (m) clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a section 304 proceeding ancillary to a foreign insolvency proceeding.

Subsections (n) and (o) amend those provisions in the Bankruptcy Code concerning the liquidation of commodity brokers and stockbrokers. Subchapter III of Chapter 7 of the Bankruptcy Code details specific rules for the liquidation of stockbrokers. Subchapter IV of Chapter 7 of the Bankruptcy Code and regulations of the CFTC detail specific rules for the liquidation of commodity brokers. These authorities are designed to protect customers and customer property of an insolvent stockbroker or commodity broker.

Subsections (n) and (o) clarify the rights of parties to commodity contracts, securities contracts, forward contracts, swap agreements, repurchase agreements and master netting agreements with an insolvent commodity broker or stockbroker. They ensure that noncustomers will not defeat the priority scheme of Subchapter III or IV priority by gaining access to assets held in segregated customer accounts. The subsections also clarify that the exercise of termination and netting rights will not otherwise affect customer property or distributions by the trustee of the insolvent commodity broker or stockbroker after the exercise of such rights.

Subsection (p) amends section 553 of the Bankruptcy Code to clarify that the acquisition by a creditor of set off rights in connection with swap agreements, repurchase agreements, securities contracts, forward contracts, commodity contracts and master netting agreements cannot be avoided as a preference.

This subsection also adds set off of the kinds described in sections 555, 556, 559, 560, and 561 of the Bankruptcy Code to the types of set off excepted from section 553(b).

*Section 9. Recordkeeping requirements*

Section 9 amends section 11(e)(8) of the Federal Deposit Insurance Act to explicitly authorize the FDIC, in consultation with appropriate Federal banking agencies, to prescribe regulations on recordkeeping with respect to QFCs. Adequate recordkeeping for such transactions is essential to effective risk management and to the reduction of systemic risk permitted by the orderly resolution of depository institutions utilizing QFCs.

*Section 10. Exemptions from contemporaneous execution requirement*

Section 10 amends FDIA section 13(e)(2) to provide that an agreement for the collateralization of governmental deposits, bankruptcy estate funds, Federal Reserve Bank or Federal Home Loan Bank extensions of credit or one or more QFCs shall not be deemed invalid solely because such agreement was not entered into contemporaneously with the acquisition of the collateral or because of pledges, delivery or substitution of the collateral made in accordance with such agreement.

The amendment codifies portions of policy statements issued by the FDIC regarding the application of section 13(e), which codifies the “D’Oench Duhme” doctrine. With respect to QFCs, this codification recognizes that QFCs often are subject to collateral and other security arrangements that may require posting and return of collateral on an ongoing basis based on the mark-to-market values of the collateralized transactions. The codification of only portions of the existing FDIC policy statements on these and related issues should not give rise to any negative implication regarding the continued validity of these policy statements.

*Section 11. Damage measure*

Section 11 adds a new section 562 to the Bankruptcy Code providing that damages under any swap agreement, securities contract, forward contract, commodity contract, repurchase agreement or master netting agreement will be calculated as of the earlier of (i) the date of rejection of such agreement by a trustee or (ii) the date of liquidation, termination or acceleration of such contract or agreement.

New section 562 provides important legal certainty and makes the Bankruptcy Code consistent with the current provisions related to the timing of the calculation of damages under QFCs in the FDIA.

*Section 12. Asset-backed securitizations*

Section 12 amends section 541 of the Bankruptcy Code to provide that certain assets transferred to an eligible entity in connection with an asset-backed securitization generally will not be included within the bankruptcy estate of the debtor. This provision recognizes that a valid transfer of such assets to the eligible entity, which is defined as an issuer or an entity engaged exclusively in such securitization transactions, generally eliminates the debtor’s legal or equitable interests in those assets. Accordingly, subject to the avoidance powers in section 548(a), the transfer will be treated as a sale of those assets not subject to avoidance. A significant ex-

ception to this provision is that if the trustee avoids the transfer from the debtor under section 548(a), then those assets will be included within the bankruptcy estate.

*Section 13. SIPA stay*

Section 13 amends SIPA to provide that an order or decree issued pursuant to SIPA shall not operate as a stay of any right of liquidation, termination, acceleration, offset or netting under one or more securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or matter netting agreements (as defined in the Bankruptcy Code and including rights of foreclosure on collateral), except that such order or decree may stay any right to foreclose on securities (but not cash) collateral pledged by the debtor or sold by the debtor under a repurchase agreement (a corresponding amendment to FDICIA is made by section 7). A creditor that was stayed in exercising rights against securities collateral would be entitled to post-insolvency interest to the extent of the collateral.

*Section 14. Federal Reserve collateral requirements*

Section 16 of the Federal Reserve Act (FRA) specifies the types of assets the Federal Reserve may use to back the currency. These assets include U.S. Treasury and agency securities that the Federal Reserve holds in its portfolio and, among other things, discount window loans extended under the provisions of section 13 of the FRA. Over the years, sections were added to the FRA that permit lending under provisions other than section 13 and against a broader range of collateral than allowed under that section. Section 14 of this bill would broaden the range of discount window loans eligible to back currency to include not only those extended under section 13 but also those extended under section 10A of the FRA relating to emergency advances to groups of member banks, section 10B relating to emergency advances to individual member banks, and section 13A relating to the discount of agricultural paper.

*Section 15. Severability; effective date; application of amendments*

Subsection (a) provides that if any provision of or amendment made by this Act is unconstitutional, the remaining provisions of the Act shall not be affected thereby.

Subsection (b) provides that the amendments made by the Act take effect on the date of enactment.

Subsection (c) provides that the amendments made by the Act shall not apply with respect to cases commenced, or to conservator/receiver appointments made, before the date of enactment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL DEPOSIT INSURANCE ACT

SEC. 11. (a) \* \* \*

(e) PROVISIONS RELATING TO CONTRACTS ENTERED INTO BEFORE APPOINTMENT OF CONSERVATOR OR RECEIVER.—

(1) \* \* \*

(8) CERTAIN QUALIFIED FINANCIAL CONTRACTS.—

(A) RIGHTS OF PARTIES TO CONTRACTS.—Subject to [paragraph] paragraphs (9) and (10) of this subsection and notwithstanding any other provision of this Act (other than subsection (d)(9) of this section and section 13(e)), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right [to cause the termination or liquidation] such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

[(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or]

(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);

(C) CERTAIN TRANSFERS NOT AVOIDABLE.—

(i) IN GENERAL.—Notwithstanding paragraph (11), section 5242 of the Revised Statutes (12 U.S.C. 91) or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers, the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

(D) CERTAIN CONTRACTS AND AGREEMENTS DEFINED.— For purposes of this subsection—

(i) QUALIFIED FINANCIAL CONTRACT.—The term “qualified financial contract” means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution or order to be a qualified financial contract for purposes of this paragraph.

[(ii) SECURITIES CONTRACT.—The term “securities contract”—

[(I) has the meaning given to such term in section 741 of title 11, United States Code, except that the term “security” (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934), and any interest in any mortgage loan or mortgage-related security; and

[(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

[(iii) COMMODITY CONTRACT.—The term “commodity contract” has the meaning given to such term in section 761 of title 11, United States Code.

[(iv) FORWARD CONTRACT.—The term “forward contract” has the meaning given to such term in section 101 of title 11, United States Code.

[(v) REPURCHASE AGREEMENT.—The term “repurchase agreement”—

[(I) has the meaning given to such term in section 101 of title 11, the United States Code, except that the items (as described in such section) which may be subject to any such agreement shall be deemed to include mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934), any mortgage loan, and any interest in any mortgage loan; and

[(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

[(vi) SWAP AGREEMENT.—The term “swap agreement”—

[(I) means any agreement, including the terms and conditions incorporated by reference in any such agreement, which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchased or any other similar agreement, and

[(II) includes any combination of such agreements and any option to enter into any such agreement.

[(vii) TREATMENT OF MASTER AGREEMENT AS 1 SWAP AGREEMENT.—Any master agreement for any agree-

ments described in clause (vi)(I) together with all supplements to such master agreement shall be treated as swap agreement.

[(viii) TRANSFER.—The term “transfer” has the meaning given to such term in section 101 of title 11, United States Code.]

(ii) SECURITIES CONTRACT.—The term “securities contract”—

(I) means a contract for the purchase, sale, or loan of a security, or any mortgage loan, mortgage related security (as defined in section 3(a)(41) of the Securities Exchange Act of 1934) or interest therein, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof) or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency, or any other similar agreement;

(II) does not include any participation in or servicing agreement for a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any option entered into on a national securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interest therein, or group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index or option;

(V) means any margin loan;

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

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

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

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI) or (VII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only

with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI) or (VII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause.

(iii) **COMMODITY CONTRACT.**—The term “commodity contract” means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

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

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

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

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII) or (VIII), together with supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII) or (VIII); or

(X) a security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause.

(iv) **FORWARD CONTRACT.**—The term “forward contract” means—

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or inter-



*est which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than 2 days after the date the contract is entered into, including a repurchase agreement, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;*

*(II) any combination of agreements or transactions referred to in subclauses (I) and (III);*

*(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);*

*(IV) a master agreement that provides for an agreement or transaction referred to in subclauses (I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this clause, except that the master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II) or (III); or*

*(V) a security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III) or (IV).*

*(v) REPURCHASE AGREEMENT.—The term “repurchase agreement” (which also applies to a reverse repurchase agreement)—*

*(I) means an agreement, including related terms, that provides for the transfer of certificates of deposit, mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934), any mortgage loan, and any interest in any mortgage loan, eligible bankers’ acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, mortgage-related securities, and mortgage loan, and any interest in any mortgage loan, eligible bankers’ acceptances, or securities as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;*

*(II) does not include any participation in a commercial mortgage loan unless the Corporation de-*

termines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (III);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (II) or (III), together with all supplements, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this section, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II) or (III); and

(VI) means a security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV).

For purposes of this clause, the term “qualified foreign government security” means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development (as determined by regulation or order adopted by the appropriate Federal banking authority).

(vi) **SWAP AGREEMENT.**—The term “swap agreement” means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward or other foreign exchange agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit swap, option, future, or forward agreement; a commodity swap, option, future, or forward agreement or any other similar agreement;

(II) an agreement or transaction similar to any other agreement or transaction referred to in this clause that is presently, or in the future becomes, regularly entered into in the swap agreement market (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on 1 or more rates, currencies, commodities, equity securities or other

*equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value;*

*(III) any combination of agreements or transactions referred to in this clause;*

*(IV) any option to enter into any agreement or transaction referred to in this clause;*

*(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to such master agreement, without regard to whether the master agreement contains an agreement or transaction that is described in any of those subclauses, except that the master agreement shall be considered to be a swap agreement only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and*

*(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subparagraph (I), (II), (III), or (IV).*

*Such term shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement or any instrument defined as a swap agreement herein, under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, and the regulations promulgated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.*

*(vii) TREATMENT OF MASTER AGREEMENT AS 1 AGREEMENT.—Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.*

*(viii) TRANSFER.—The term “transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption.*

(E) CERTAIN PROTECTIONS IN EVENT OF APPOINTMENT OF CONSERVATOR.—Notwithstanding any other provision of this Act (【other than paragraph (12) of this subsection, subsection (d)(9)】 *other than subsections (d)(9) and (d)(10)* of this section, and section 13(e) of this Act), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a depository institution in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

【(ii) any right under any security arrangement relating to such qualified financial contracts; or】

*(ii) any right under any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts described in clause (i);*

(iii) any right to offset or net out any termination values, payment amounts, or other transfer obligations arising under or in connection with such qualified financial contracts.

(F) CLARIFICATION.—*No provision of law shall be construed as limiting the right or power of the Corporation, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Corporation to transfer any qualified financial contract in accordance with paragraphs (9) and (10) of this subsection or to disaffirm or repudiate any such contract in accordance with subsection (e)(1) of this section.*

(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

(i) IN GENERAL.—*Notwithstanding the provisions of subparagraphs (A) and (E), and sections 403 and 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, no walkaway clause shall be enforceable in a qualified financial contract of an insured depository institution in default.*

(ii) WALKAWAY CLAUSE DEFINED.—*For purposes of this subparagraph, the term “walkaway clause” means a provision in a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party’s status as a non-defaulting party.*

(H) RECORDKEEPING REQUIREMENTS.—*The Corporation, in consultation with the appropriate Federal banking agencies, may prescribe regulations requiring more detailed recordkeeping with respect to qualified financial contracts (in-*

*cluding market valuations) by insured depository institutions.*

【(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—

【(A) transfer to 1 depository institution (other than a depository institution in default)—

【(i) all qualified financial contracts between—

【(I) any person or any affiliate of such person; and

【(II) the depository institution in default;

【(ii) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

【(iii) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

【(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

【(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).】

(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—

(A) *IN GENERAL.*—*In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—*

*(i) transfer to 1 financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—*

*(I) all qualified financial contracts between any person or any affiliate of such person and the depository institution in default;*

*(II) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);*

*(III) all claims of such depository institution against such person or any affiliate of such person under any such contract; and*

*(IV) all property securing any claim described in subclause (II) or (III) under any such contract, or any other credit enhancement for any contract described in clause (I); or*

(ii) transfer none of the qualified financial contracts, claims, or property referred to in clause (i) (with respect to such person and any affiliate of such person).

(B) TRANSFER TO FOREIGN BANK, FOREIGN FINANCIAL INSTITUTION, OR BRANCH OR AGENCY OF A FOREIGN BANK OR FINANCIAL INSTITUTION.—In transferring any qualified financial contracts and related claims and property pursuant to subparagraph (A)(i), the conservator or receiver for such depository institution shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, the contractual rights of the parties to such qualified financial contracts are enforceable substantially to the same extent as permitted under this section.

(C) TRANSFER OF CONTRACTS SUBJECT TO THE RULES OF A CLEARING ORGANIZATION.—In the event that a conservator or receiver transfers any qualified financial contract and related claims and property pursuant to subparagraph (A)(i) and such contract is subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

(D) DEFINITION.—For purposes of this section, the term “financial institution” means a broker or dealer, a depository institution, a futures commission merchant, or any other institution as determined by the Corporation by regulation to be a financial institution.

(10) NOTIFICATION OF TRANSFER.—

(A) IN GENERAL.—If—

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract,

the conservator or receiver shall use such conservator’s or receiver’s best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time) on the business day following such transfer. the conservator or receiver shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver, in the case of a receivership, or the business day following such transfer, in the case of a conservatorship.

(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

(i) RECEIVERSHIP.—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right such person has to terminate, liquidate, or net such contract under paragraph (8)(A) or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of

1991 solely by reason of or incidental to the appointment of a receiver for the depository institution (or the insolvency or financial condition of the depository institution for which the receiver has been appointed)—

(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) **CONSERVATORSHIP.**—A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right such person has to terminate, liquidate, or net such contract under paragraph (8)(E) or sections 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a conservator for the depository institution (or the insolvency or financial condition of the depository institution for which the conservator has been appointed).

(iii) **NOTICE.**—For purposes of this subsection, the Corporation as receiver or conservator of an insured depository institution shall be deemed to have notified a person who is a party to a qualified financial contract with such depository institution if the Corporation has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A) of this subsection.

(C) **TREATMENT OF BRIDGE BANKS.**—The following institutions shall not be considered a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding for purposes of subsection (e)(9)—

(i) a bridge bank; or

(ii) a depository institution organized by the Corporation, for which a conservator is appointed either—

(I) immediately upon the organization of the institution; or

(II) at the time of a purchase and assumption transaction between such institution and the Corporation as receiver for a depository institution in default.

**[(B)] (D) BUSINESS DAY DEFINED.**—For purposes of this paragraph, the term “business day” means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) **DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.**—In exercising the rights of disaffirmance or repudiation of a conservator or receiver with respect to any qualified financial contract to which an insured depository in-

*stitution is a party, the conservator or receiver for such institution shall either—*

*(A) disaffirm or repudiate all qualified financial contracts between—*

*(i) any person or any affiliate of such person; and*

*(ii) the depository institution in default; or*

*(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).*

**[(11)] (12) CERTAIN SECURITY INTERESTS NOT AVOIDABLE.—**No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

**[(12)] (13) AUTHORITY TO ENFORCE CONTRACTS.—**

**(A) IN GENERAL.—**The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment *or the exercise of rights or powers* of a conservator or receiver.

**(B) CERTAIN RIGHTS NOT AFFECTED.—**No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a director's or officer's liability insurance contract or depository institution bond under other applicable law.

**[(13)] (14) EXCEPTION FOR FEDERAL RESERVE AND FEDERAL HOME LOAN BANKS.—**No provision of this subsection shall apply with respect to—

**(A)** any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

**(B)** any security interest in the assets of the institution securing any such extension of credit.

**[(14)] (15) SELLING CREDIT CARD ACCOUNTS RECEIVABLE.—**

**(A)** \* \* \*

\* \* \* \* \*

**[(15)] (16) CERTAIN CREDIT CARD CUSTOMER LISTS PROTECTED.—**

**(A) IN GENERAL.—**If any insured depository institution sells credit card accounts receivable under an agreement negotiated at arm's length that provides for the sale of the institution's credit card customer list, the Corporation shall prohibit any party to a transaction with respect to the institution under this section or section 13 from using the list, except as permitted under the agreement.

**(B) FRAUDULENT TRANSACTIONS EXCLUDED.—**Subparagraph (A) does not limit the Corporation's authority to repudiate any agreement entered into with the intent to



hinder, delay, or defraud the institution, the institution's creditors, or the Corporation.

\* \* \* \* \*

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

\* \* \* \* \*

(e) AGREEMENTS AGAINST INTERESTS OF CORPORATION.—

(1) \* \* \*

[(2) PUBLIC DEPOSITS.—An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 11(a)(2) shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.]

(2) EXEMPTIONS FROM CONTEMPORANEOUS EXECUTION REQUIREMENT.—An agreement to provide for the lawful collateralization of—

(A) deposits of, or other credit extension by, a Federal, State, or local governmental entity, or of any depositor referred to in section 11(a)(2), including an agreement to provide collateral in lieu of a surety bond;

(B) bankruptcy estate funds pursuant to section 345(b)(2) of title 11, United States Code;

(C) extensions of credit, including any overdraft, from a Federal reserve bank or Federal home loan bank; or

(D) 1 or more qualified financial contracts, as defined in section 11(e)(8)(D), shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.

\* \* \* \* \*

**FEDERAL DEPOSIT INSURANCE CORPORATION  
IMPROVEMENT ACT OF 1991**

\* \* \* \* \*

**TITLE IV—MISCELLANEOUS  
PROVISIONS**

**Subtitle A—Payment System Risk  
Reduction**

\* \* \* \* \*

SEC. 402. DEFINITIONS.

For purposes of this subtitle—

(1) \* \* \*

\* \* \* \* \*

(6) DEPOSITORY INSTITUTION.—The term “depository institution” means—

(A) a depository institution as defined in section 19(b)(1)(A) of the Federal Reserve Act (other than clause (vii));

[(B) a branch or agency as defined in section 1(b) of the International Banking Act of 1978;]

(B) *an uninsured national bank or an uninsured State bank that is a member of the Federal Reserve System if the national bank or State member bank is not eligible to make application to become an insured bank under section 5 of the Federal Deposit Insurance Act;*

(C) *a branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency, as those terms are defined in section 1(b) of the International Banking Act of 1978;*

[(C)] (D) a corporation chartered under section 25(a) of the Federal Reserve Act; or

[(D)] (E) a corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act.

\* \* \* \* \*

(11) MEMBER.—The term “member” means a member or participant in a clearing organization, and includes the clearing organization and any other clearing organization with which such clearing organization has a netting contract.

\* \* \* \* \*

(14) NETTING CONTRACT.—

(A) IN GENERAL.—The term “netting contract”—

[(i) means a contract or agreement between 2 or more financial institutions or members, that—

[(I) is governed by the laws of the United States, any State, or any political subdivision of any State, and

[(II) provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) among the parties to the agreement; and]

(i) *means a contract or agreement between 2 or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or closeout values relating to such obligations or entitlements) among the parties to the agreement; and*

\* \* \* \* \*

(15) PAYMENT.—The term “payment” means a payment of United States dollars, another currency, or a composite cur-

*rency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.*

\* \* \* \* \*

**SEC. 403. BILATERAL NETTING.**

**[(a) GENERAL RULE.—**Notwithstanding any other provision of law, the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract.**]**

*(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1971, the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract.*

\* \* \* \* \*

*(f) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to 1 or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and section 5(b)(2) of the Securities Investor Protection Act of 1971).*

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

**[(a) GENERAL NETTING RULE.—**Notwithstanding any other provision of law, the covered contractual payment obligations and covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract.**]**

*(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1971, the covered contractual payment obligations and the covered contractual payment entitlements of a member of a clearing organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract.*

\* \* \* \* \*

*(h) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to 1 or more netting contracts between any 2 members of a clearing organization shall be enforceable in accordance with their terms and shall not be stayed, avoided, or otherwise limited by any State or Federal law other than paragraphs (8)(E), (8)(F),*

and (10)(B) of section 11(e) of the Federal Deposit Insurance Act and section 5(b)(2) of the Securities Investor Protection Act of 1971.

\* \* \* \* \*

**SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED NATIONAL BANKS AND UNINSURED FEDERAL BRANCHES AND AGENCIES.**

(a) *IN GENERAL.*—Notwithstanding any other provision of law, paragraphs (8), (9), and (11) of section 11(e) of the Federal Deposit Insurance Act shall apply to an uninsured national bank or uninsured Federal branch or Federal agency except—

(1) any reference to the “Corporation as receiver” or “the receiver or the Corporation” shall refer to the receiver of an uninsured national bank or uninsured Federal branch or Federal agency appointed by the Comptroller of the Currency;

(2) any reference to the “Corporation” (other than in section 11(e)(8)(D) of such Act), the “Corporation, whether acting as such or as conservator or receiver”, a “receiver”, or a “conservator” shall refer to the receiver or conservator of an uninsured national bank or uninsured Federal branch or Federal agency appointed by the Comptroller of the Currency; and

(3) any reference to an “insured depository institution” or “depository institution” shall refer to an uninsured national bank or an uninsured Federal branch or Federal agency.

(b) *LIABILITY.*—The liability of a receiver or conservator of an uninsured national bank or uninsured Federal branch or agency shall be determined in the same manner and subject to the same limitations that apply to receivers and conservators of insured depository institutions under section 11(e) of the Federal Deposit Insurance Act.

(c) *REGULATORY AUTHORITY.*—

(1) *IN GENERAL.*—The Comptroller of the Currency, in consultation with the Federal Deposit Insurance Corporation, may promulgate regulations to implement this section.

(2) *SPECIFIC REQUIREMENT.*—In promulgating regulations to implement this section, the Comptroller of the Currency shall ensure that the regulations generally are consistent with the regulations and policies of the Federal Deposit Insurance Corporation adopted pursuant to the Federal Deposit Insurance Act.

(d) *DEFINITIONS.*—For purposes of this section, the terms “Federal branch”, “Federal agency”, and “foreign bank” have the same meaning as in section 1(b) of the International Banking Act.

**SEC. [407.] 408. NATIONAL EMERGENCIES.**

The provisions of this subtitle may not be construed to limit the authority of the President under the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).

\* \* \* \* \*

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**TITLE 11, UNITED STATES CODE**

\* \* \* \* \*

## CHAPTER 1—GENERAL PROVISIONS

## § 101. Definitions

In this title—

(1) \* \* \*

\* \* \* \* \*

[(22) “financial institution” means a person that is a commercial or savings bank, industrial savings bank, savings and loan association, or trust company and, when any such person is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741 of this title, such customer;]

*(22) the term “financial institution” means a Federal reserve bank, or a person that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, or receiver or conservator for such person and, when any such Federal reserve bank, receiver, or conservator or person acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741(7) of this title, such customer;*

*(22A) the term “financial participant” means any entity that, at the time it enters into a securities contract, commodity contract or forward contract, or at the time of the filing of the petition, has 1 or more agreements or transactions that is described in section 561(a)(2) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of at least \$1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least \$100,000,000 (aggregated across counterparties) in 1 or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period;*

\* \* \* \* \*

(25) “forward contract” [means a contract] *means—*

*(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction[, or any combination thereof or option thereon;], or any other similar agreement;*

*(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);*

*(C) any option to enter into any agreement or transaction referred to in subparagraph (A) or (B);*

*(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B) or (C),*

together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that the master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B) or (C); or

(E) a security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C) or (D);

[(26) “forward contract merchant” means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;]

(26) the term “forward contract merchant” means a Federal reserve bank, or a person whose business consists in whole or in part of entering into forward contracts as or with merchants or in a commodity, as defined or in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing or in the forward contract trade;

\* \* \* \* \*

(38A) the term “master netting agreement” means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or closeout, under or in connection with 1 or more contracts that are described in any 1 or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to 1 or more of the foregoing. If a master netting agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), the master netting agreement shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any 1 or more of the paragraphs (1) through (5) of section 561(a);

(38B) the term “master netting agreement participant” means an entity that, at any time before the filing of the petition, is a party to an outstanding master netting agreement with the debtor;

\* \* \* \* \*

[(47) “repurchase agreement” (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers’ acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers’ acceptances, or securities with a simultaneous agreement by such

transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;】

(47) the term “repurchase agreement” (which definition also applies to a reverse repurchase agreement)—

(A) means—

(i) an agreement, including related terms, which provides for the transfer of 1 or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, loans or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds; or any other similar agreement; and

(ii) any combination of agreements or transactions referred to in clauses (i) and (iii);

(iii) any option to enter into any agreement or transaction referred to in clause (i) or (ii);

(iv) a master agreement that provides for an agreement or transaction referred to in clauses (i), (ii) or (iii), together with all supplements, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this subparagraph, except that the master agreement shall be considered to be a repurchase agreement under this subparagraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii) or (iii); or

(v) a security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clauses (i), (ii), (iii) or (iv); and

(B) does not include any repurchase obligation under a participation in a commercial mortgage loan, and, for purposes of this paragraph, the term “qualified foreign government security” means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development.

\* \* \* \* \*

【(53B) “swap agreement” means—

【(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity

swap, interest rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);

[(B) any combination of the foregoing; or

[(C) a master agreement for any of the foregoing together with all supplements;]

(53B) the term “swap agreement”—

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement;

(ii) any agreement similar to any other agreement or transaction referred to in this subparagraph that—

(I) is presently, or in the future becomes, regularly entered into in the swap agreement market (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, or option on 1 or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, or economic indices or measures of economic risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into any agreement or transaction referred to in this subparagraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is described in any of such clause, except that the master agreement shall be considered to be a swap agreement only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(C) is applicable for purposes of this title only and shall not be construed or applied to challenge or affect the characterization, definition, or treatment of any swap agreement or any instrument defined as a swap agreement herein,



*under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, and the regulations prescribed by the Securities and Exchange Commission or the Commodity Futures Trading Commission.*

\* \* \* \* \*

**§ 104. Adjustment of dollar amounts**

(a) \* \* \*

\* \* \* \* \*

*(c) EXCEPTION FOR CERTAIN DEFINED TERMS.—No adjustments shall be made under this section to the dollar amounts set forth in the definition of the term “financial participant” in section 101(22A).*

\* \* \* \* \*

**CHAPTER 3—CASE ADMINISTRATION**

\* \* \* \* \*

**SUBCHAPTER I—COMMENCEMENT OF A CASE**

\* \* \* \* \*

**§ 304. Cases ancillary to foreign proceedings**

(a) \* \* \*

\* \* \* \* \*

*(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case ancillary to a foreign proceeding under this section or any other section of this title so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any proceeding under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).*

\* \* \* \* \*

**SUBCHAPTER IV—ADMINISTRATIVE POWERS**

\* \* \* \* \*

**§ 362. Automatic stay**

(a) \* \* \*

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) \* \* \*

\* \* \* \* \*

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, **【**financial institutions,**】** *financial institution, financial participant* or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, *pledged to, and under the control of,* or due from such commodity broker, forward contract merchant, stockbroker, **【**financial institutions,**】** *financial institution, financial participant* or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, *pledged to, and under the control of,* or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

\* \* \* \* \*

**【**(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or**】**

*(17) under subsection (a), of the setoff by a swap participant of any mutual debt and claim under or in connection with 1 or more swap agreements that constitute the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by, pledged to, and under the control of, or due from such swap participant to guarantee, secure, or settle any swap agreement;*

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition[.]; or

(19) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with 1 or more master netting agreements to the extent such participant could offset the claim under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue.

\* \* \* \* \*

(i) *LIMITATION.*—The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (19) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

\* \* \* \* \*

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

\* \* \* \* \*

**SUBCHAPTER I—CREDITORS AND CLAIMS**

\* \* \* \* \*

**§ 502. Allowance of claims or interests**

(a) \* \* \*

\* \* \* \* \*

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 of this title shall be allowed under subsection (a),(b), or (c) of this section or disallowed under subsection (d) or (e) of this section as if such claim had arisen before the date of the filing of the petition.

\* \* \* \* \*

**SUBCHAPTER III—THE ESTATE**

\* \* \* \* \*

**§ 541. Property of the estate**

(a) \* \* \*

(b) Property of the estate does not include—

(1) \* \* \*

\* \* \* \* \*

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A) \* \* \*

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; **[or]**

(5) *any eligible asset (or proceeds thereof), to the extent that such eligible asset was transferred by the debtor, before the date of commencement of the case, to an eligible entity in connection with an asset-backed securitization, except to the extent such asset (or proceeds or value thereof) may be recovered by the trustee under section 550 by virtue of avoidance under section 548(a); or*

**[(5)]** (6) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

\* \* \* \* \*

(e) *DEFINITIONS.—For purposes of this section, the following definitions shall apply:*

(1) *ASSET-BACKED SECURITIZATION.—The term “asset-backed securitization” means a transaction in which eligible assets transferred to an eligible entity are used as the source of payment on securities, the most senior of which are rated investment grade by 1 or more nationally recognized securities rating organizations, issued by an issuer;*

(2) *ELIGIBLE ASSET.—The term “eligible asset” means—*

(A) *financial assets (including interests therein and proceeds thereof), either fixed or revolving, including residential and commercial mortgage loans, consumer receivables, trade receivables, and lease receivables, that, by their terms, convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders;*

(B) *cash; and*

(C) *securities.*

(3) *ELIGIBLE ENTITY.—The term “eligible entity” means—*

(A) *an issuer; or*

(B) *a trust, corporation, partnership, or other entity engaged exclusively in the business of acquiring and transferring eligible assets directly or indirectly to an issuer and taking actions ancillary thereto;*

(4) *ISSUER.*—The term “issuer” means a trust, corporation, partnership, or other entity engaged exclusively in the business of acquiring and holding eligible assets, issuing securities backed by eligible assets, and taking actions ancillary thereto.

(5) *TRANSFERRED.*—The term “transferred” means the debtor, pursuant to a written agreement, represented and warranted that eligible assets were sold, contributed, or otherwise conveyed with the intention of removing them from the estate of the debtor pursuant to subsection (b)(5), irrespective, without limitation of—

(A) whether the debtor directly or indirectly obtained or held an interest in the issuer or in any securities issued by the issuer;

(B) whether the debtor had an obligation to repurchase or to service or supervise the servicing of all or any portion of such eligible assets; or

(C) the characterization of such sale, contribution, or other conveyance for tax, accounting, regulatory reporting, or other purposes.

\* \* \* \* \*

**§ 546. Limitations on avoiding powers**

(a) \* \* \*

\* \* \* \* \*

(e) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(a)(1)(B) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, *financial participant* or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

\* \* \* \* \*

(g) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer **under a swap agreement**, made by or to a swap participant, **in connection with a swap agreement** *under or in connection with any swap agreement* and that is made before the commencement of the case, except under section 548(a)(1) of this title.

(h) *Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, to the extent that under subsection (e), (f), or (g), the trustee may not avoid a transfer made by or to a master netting agreement participant under or in connection with each individual contract covered by any master netting agreement that is made before the commencement of the case, the trustee may not avoid a transfer made by or to such master netting agreement participant under or in connection with the master netting agreement in issue, except under section 548(a)(1) of this title.*

**[(g)] (i)** Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of

this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

\* \* \* \* \*

**§ 548. Fraudulent transfers and obligations**

(a) \* \* \*

\* \* \* \* \*

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

(2) In this section—

(A) “value” means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, *financial participant* or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; **[and]**

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer **[.]**; *and*

(E) *a master netting agreement participant that receives a transfer in connection with a master netting agreement takes for value to the extent of such transfer, but only to the extent that such participant would take for value under paragraph (B), (C), or (D) for each individual contract covered by the master netting agreement in issue.*

\* \* \* \* \*

**§ 553. Setoff**

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that—

(1) \* \* \*

\* \* \* \* \*

(3) the debt owed to the debtor by such creditor was incurred by such creditor—

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor *(except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 555, 556, 559, 560, or 561 of this title)*.

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), ~~362(b)(14),~~ 362(b)(17), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) \* \* \*

\* \* \* \* \*

**§ 555. [Contractual right to liquidate a securities contract]**  
***Contractual right to liquidate, terminate, or accelerate a securities contract***

The exercise of a contractual right of a stockbroker, financial institution, *financial participant*, or securities clearing agency to cause the ~~liquidation~~ *liquidation, termination, or acceleration* of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission, *a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice*. As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency.

**§ 556. [Contractual right to liquidate a commodities contract or forward contract]**  
***Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract***

The contractual right of a commodity broker, *financial participant*, or forward contract merchant to cause the ~~liquidation~~ *liquidation, termination, or acceleration* of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term “contractual right” includes a right set forth in a rule or

bylaw of a clearing organization or contract market or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

\* \* \* \* \*

**§ 559. [Contractual right to liquidate a repurchase agreement] *Contractual right to liquidate, terminate, or accelerate a repurchase agreement***

The exercise of a contractual right of a repo participant to cause the [liquidation] *liquidation, termination, or acceleration* of a repurchase agreement because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. In the event that a repo participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw, applicable to each party to the repurchase agreement, of a national securities exchange, a national securities association, or a securities clearing agency, and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

**§ 560. [Contractual right to terminate a swap agreement] *Contractual right to liquidate, terminate, or accelerate a swap agreement***

The exercise of any contractual right of any swap participant to cause the [termination of a swap agreement] *liquidation, termination, or acceleration of 1 or more swap agreements* because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or [in connection with any swap agreement] *liquidation, termination, or acceleration of 1 or more swap agreements* shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term “contractual right” includes a right, whether or not evi-



denced in writing, arising under common law, under law merchant, or by reason of normal business practice.

**§561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts**

(a) *IN GENERAL.*—Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the termination, liquidation, or acceleration of or to offset, or net termination values, payment amounts or other transfer obligations arising under or in connection with the termination, liquidation, or acceleration of 1 or more—

- (1) securities contracts, as defined in section 741(7);
- (2) commodity contracts, as defined in section 761(4);
- (3) forward contracts;
- (4) repurchase agreements;
- (5) swap agreements; or
- (6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

(b) *EXCEPTION.*—

(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

(2)(A) A party may not exercise a contractual right described in subsection (a) to offset or to net obligations arising under, or in connection with, a commodity contract against obligations arising under, or in connection with, any instrument listed in subsection (a) if the obligations are not mutual.

(B) If a debtor is a commodity broker subject to subchapter IV of chapter 7 of this title, a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract against any claim arising under, or in connection with, other instruments listed in subsection (a) if the party has no positive net equity in the commodity account at the debtor, as calculated under subchapter IV.

(c) *DEFINITION.*—As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right whether or not evidenced in writing arising under common law, under law merchant, or by reason of normal business practice.

**§562. Damage measure in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, or master netting agreements**

If the trustee rejects a swap agreement, securities contract as defined in section 741 of this title, forward contract, repurchase agree-

ment, or master netting agreement pursuant to section 365(a) of this title, or if a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, master netting agreement participant, or swap participant liquidates, terminates, or accelerates any such contract or agreement, damages shall be measured as of the earlier of—

- (1) the date of such rejection; or
- (2) the date of such liquidation, termination, or acceleration.

\* \* \* \* \*

## CHAPTER 7—LIQUIDATION

\* \* \* \* \*

### SUBCHAPTER III—STOCKBROKER LIQUIDATION

\* \* \* \* \*

#### § 741. Definitions for this subchapter

In this subchapter—

- (1) \* \* \*

\* \* \* \* \*

[(7) “securities contract” means contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency;]

- (7) the term “securities contract”—

(A) means—

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan or any interest in a mortgage loan, or a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index or option;

(ii) any option entered into on a national securities exchange relating to foreign currencies;

(iii) the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interest therein, or group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, loan, interest, group or index or option;

(iv) any margin loan;

(v) any other agreement or transaction that is similar to any agreement or transaction referred to in this subparagraph;

(vi) any combination of the agreements or transactions referred to in this subparagraph;

(vii) any option to enter into any agreement or transaction referred to in this subparagraph;

(viii) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that the master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), or (vii); and

(ix) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in or servicing agreement for a commercial mortgage loan.

\* \* \* \* \*

**§ 753. Stockbroker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, securities clearing agencies, swap participants, repo participants, and master netting agreement participants**

Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of rights or affect the provisions of this subchapter regarding customer property or distributions.

\* \* \* \* \*

**SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION**

\* \* \* \* \*

**§ 761. Definitions for this subchapter**

In this subchapter—

(1) \* \* \*

\* \* \* \* \*

(4) “commodity contract” means—

(A) \* \* \*

\* \* \* \* \*

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; **[or]**

(E) with respect to a commodity options dealer, commodity option;

(F) any other agreement or transaction that is similar to any agreement or transaction referred to in this paragraph;

(G) any combination of the agreements or transactions referred to in this paragraph;

(H) any option to enter into any agreement or transaction referred to in this paragraph;

(I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G) or (H), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G) or (H); or

(J) a security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph;

\* \* \* \* \*

**§767. Commodity broker liquidation and forward contract merchants, commodity brokers, stockbrokers, financial institutions, securities clearing agencies, swap participants, repo participants, and master netting agreement participants**

*Notwithstanding any other provision of this title, the exercise of rights by a forward contract merchant, commodity broker, stockbroker, financial institution, securities clearing agency, swap participant, repo participant, or master netting agreement participant under this title shall not affect the priority of any unsecured claim it may have after the exercise of such rights or affect the provisions of this subchapter IV regarding customer property or distributions.*

\* \* \* \* \*

**CHAPTER 9—ADJUSTMENT OF DEBTS OF A MUNICIPALITY**

\* \* \* \* \*

SUBCHAPTER I—GENERAL PROVISIONS

**§ 901. Applicability of other sections of this title**

(a) Sections 301, 344, 347(b), 349, 350(b), 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(1), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, and 1145 of this title apply in a case under this chapter.

\* \* \* \* \*

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

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

(a) \* \* \*

\* \* \* \* \*

(b) COURT ACTION.—

(1) \* \* \*

(2) JURISDICTION AND POWERS OF COURT.—

(A) \* \* \*

\* \* \* \* \*

(C) EXCEPTION FROM STAY.—

(i) *Notwithstanding section 362 of title 11, neither the filing of an application under subsection (a)(3) nor any order or decree obtained by Securities Investor Protection Corporation from the court shall operate as a stay of any contractual rights of a creditor to liquidate, terminate, or accelerate a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, each as defined in title 11, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with 1 or more of such contracts or agreements, or to foreclose on any cash collateral pledged by the debtor whether or not with respect to 1 or more of such contracts or agreements.*

(ii) *Notwithstanding clause (i), such application, order, or decree may operate as a stay of the foreclosure on securities collateral pledged by the debtor, whether or not with respect to 1 or more of such contracts or agreements, or securities sold by the debtor under a repurchase agreement.*

(iii) *As used in this section, the term “contractual right” includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract*

*market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.*

\* \* \* \* \*

**SECTION 16 OF THE FEDERAL RESERVE ACT**

NOTE ISSUES

SEC. 16. Federal Reserve notes, to be issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal Reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal Reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank.

Any Federal Reserve bank may make application to the local Federal Reserve agent for such amount of the Federal Reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal Reserve agent of collateral in amount equal to the sum of the Federal Reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes, drafts, bills of exchange, or [acceptances acquired under the provisions of section 13 of this Act] *acceptances acquired under section 10A, 10B, 13, or 13A of this Act*, or bills of exchange endorsed by a member bank of any Federal Reserve district and purchased under the provisions of section 14 of this Act, or bankers' acceptances purchased under the provisions of said section 14, or gold certificates, or Special Drawing Right certificates, or any obligations which are direct obligations of, or are fully guaranteed as to principal and interest by, the United States or any agency thereof, or assets that Federal Reserve banks may purchase or hold under section 14 of this Act. In no event shall such collateral security be less than the amount of Federal Reserve notes applied for. The Federal Reserve agent shall each day notify the Board of Governors of the Federal Reserve System of all issues and withdrawals of Federal Reserve notes to and by the Federal Reserve bank to which he is accredited. The said Board of Governors of the Federal Reserve System may at any time call upon a Federal Reserve bank for additional security to protect the Federal Reserve notes issued to it. Collateral shall not be required for Federal Reserve notes which are held in the vaults of Federal Reserve banks.

\* \* \* \* \*