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REPORT
114–134

COMMODITY END-USER RELIEF ACT

MAY 29, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONAWAY, from the Committee on Agriculture, submitted the following

R E P O R T

[To accompany H.R. 2289]

[Including cost estimate of the Congressional Budget Office]

The Committee on Agriculture, to whom was referred the bill (H.R. 2289) to reauthorize the Commodity Futures Trading Commission, to better protect futures customers, to provide end-users with market certainty, to make basic reforms to ensure transparency and accountability at the Commission, to help farmers, ranchers, and end-users manage risks, to help keep consumer costs low, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Commodity End-User Relief Act".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

TITLE I—CUSTOMER PROTECTIONS

SEC. 101. ENHANCED PROTECTIONS FOR FUTURES CUSTOMERS.

Section 17 of the Commodity Exchange Act (7 U.S.C. 21) is amended by adding at the end the following:

"(s) A registered futures association shall—

"(1) require each member of the association that is a futures commission merchant to maintain written policies and procedures regarding the maintenance of—

"(A) the residual interest of the member, as described in section 1.23 of title 17, Code of Federal Regulations, in any customer segregated funds account of the member, as identified in section 1.20 of such title, and in any foreign futures and foreign options customer secured amount funds account of the member, as identified in section 30.7 of such title; and

"(B) the residual interest of the member, as described in section 22.2(e)(4) of such title, in any cleared swaps customer collateral account of the member, as identified in section 22.2 of such title; and

"(2) establish rules to govern the withdrawal, transfer or disbursement by any member of the association, that is a futures commission merchant, of the member's residual interest in customer segregated funds as provided in such section 1.20, in foreign futures and foreign options customer secured amount funds, identified as provided in such section 30.7, and from a cleared swaps customer collateral, identified as provided in such section 22.2.".

SEC. 102. ELECTRONIC CONFIRMATION OF CUSTOMER FUNDS.

Section 17 of the Commodity Exchange Act (7 U.S.C. 21), as amended by section 101 of this Act, is amended by adding at the end the following:

"(t) A registered futures association shall require any member of the association that is a futures commission merchant to—

"(1) use an electronic system or systems to report financial and operational information to the association or another party designated by the registered futures association, including information related to customer segregated funds, foreign futures and foreign options customer secured amount funds accounts, and cleared swaps customer collateral, in accordance with such terms, conditions, documentation standards, and regular time intervals as are established by the registered futures association;

"(2) instruct each depository, including any bank, trust company, derivatives clearing organization, or futures commission merchant, holding customer segregated funds under section 1.20 of title 17, Code of Federal Regulations, foreign futures and foreign options customer secured amount funds under section 30.7 of such title, or cleared swap customer funds under section 22.2 of such title, to report balances in the futures commission merchant's section 1.20 customer segregated funds, section 30.7 foreign futures and foreign options customer secured amount funds, and section 22.2 cleared swap customer funds, to the registered futures association or another party designated by the registered futures association, in the form, manner, and interval prescribed by the registered futures association; and

"(3) hold section 1.20 customer segregated funds, section 30.7 foreign futures and foreign options customer secured amount funds and section 22.2 cleared swaps customer funds in a depository that reports the balances in these accounts of the futures commission merchant held at the depository to the registered futures association or another party designated by the registered futures association in the form, manner, and interval prescribed by the registered futures association.".

SEC. 103. NOTICE AND CERTIFICATIONS PROVIDING ADDITIONAL CUSTOMER PROTECTIONS.

Section 17 of the Commodity Exchange Act (7 U.S.C. 21), as amended by sections 101 and 102 of this Act, is amended by adding at the end the following:

"(u) A futures commission merchant that has adjusted net capital in an amount less than the amount required by regulations established by the Commission or a self-regulatory organization of which the futures commission merchant is a member shall immediately notify the Commission and the self-regulatory organization of this occurrence.

"(v) A futures commission merchant that does not hold a sufficient amount of funds in segregated accounts for futures customers under section 1.20 of title 17, Code of Federal Regulations, in foreign futures and foreign options secured amount accounts for foreign futures and foreign options secured amount customers under section 30.7 of such title, or in segregated accounts for cleared swap customers under section 22.2 of such title, as required by regulations established by the Commission or a self-regulatory organization of which the futures commission merchant is a member, shall immediately notify the Commission and the self-regulatory organization of this occurrence.

"(w) Within such time period established by the Commission after the end of each fiscal year, a futures commission merchant shall file with the Commission a report from the chief compliance officer of the futures commission merchant containing an assessment of the internal compliance programs of the futures commission merchant.".

SEC. 104. FUTURES COMMISSION MERCHANT COMPLIANCE.

(a) IN GENERAL.—Section 4d(a) of the Commodity Exchange Act (7 U.S.C. 6d(a)) is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B);

(2) by inserting "(1)" before "It shall be unlawful"; and

(3) by adding at the end the following new paragraph:

"(2) Any rules or regulations requiring a futures commission merchant to maintain a residual interest in accounts held for the benefit of customers in amounts at least sufficient to exceed the sum of all uncollected margin deficits of such customers shall provide that a futures commission merchant shall meet its residual interest requirement as of the end of each business day calculated as of the close of business on the previous business day.".

(b) CONFORMING AMENDMENT.—Section 4d(h) of such Act (7 U.S.C. 6d(h)) is amended by striking "Notwithstanding subsection (a)(2)" and inserting "Notwithstanding subsection (a)(1)(B)".

SEC. 105. CERTAINTY FOR FUTURES CUSTOMERS AND MARKET PARTICIPANTS.

Section 20(a) of the Commodity Exchange Act (7 U.S.C. 24(a)) is amended—

(1) by striking "and" at the end of paragraph (4);

(2) by striking the period at the end of paragraph (5) and inserting "; and"; and

(3) by adding at the end the following:

"(6) that cash, securities, or other property of the estate of a commodity broker, including the trading or operating accounts of the commodity broker and commodities held in inventory by the commodity broker, shall be included in customer property, subject to any otherwise unavoidable security interest, or otherwise unavoidable contractual offset or netting rights of creditors (including rights set forth in a rule or bylaw of a derivatives clearing organization or a clearing agency) in respect of such property, but only to the extent that the property that is otherwise customer property is insufficient to satisfy the net equity claims of public customers (as such term may be defined by the Commission by rule or regulation) of the commodity broker.".

TITLE II—COMMODITY FUTURES TRADING COMMISSION REFORMS

SEC. 201. EXTENSION OF OPERATIONS.

Section 12(d) of the Commodity Exchange Act (7 U.S.C. 16(d)) is amended by striking "2013" and inserting "2019".

SEC. 202. CONSIDERATION BY THE COMMODITY FUTURES TRADING COMMISSION OF THE COSTS AND BENEFITS OF ITS REGULATIONS AND ORDERS.

Section 15(a) of the Commodity Exchange Act (7 U.S.C. 19(a)) is amended—

(1) by striking paragraphs (1) and (2) and inserting the following:

"(1) IN GENERAL.—Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission, through the Office of the Chief Economist, shall assess and publish in the regulation or order the costs and benefits, both qualitative and quantitative, of the proposed regulation or order, and the proposed regulation or order shall state its statutory justification.

"(2) CONSIDERATIONS.—In making a reasoned determination of the costs and the benefits, the Commission shall evaluate—

"(A) considerations of protection of market participants and the public;

"(B) considerations of the efficiency, competitiveness, and financial integrity of futures and swaps markets;

"(C) considerations of the impact on market liquidity in the futures and swaps markets;

"(D) considerations of price discovery;

"(E) considerations of sound risk management practices;

"(F) available alternatives to direct regulation;

"(G) the degree and nature of the risks posed by various activities within the scope of its jurisdiction;

"(H) the costs of complying with the proposed regulation or order by all regulated entities, including a methodology for quantifying the costs (recognizing that some costs are difficult to quantify);

"(I) whether the proposed regulation or order is inconsistent, incompatible, or duplicative of other Federal regulations or orders;

"(J) the cost to the Commission of implementing the proposed regulation or order by the Commission staff, including a methodology for quantifying the costs;

"(K) whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits (including potential economic and other benefits, distributive impacts, and equity); and

"(L) other public interest considerations."; and

(2) by adding at the end the following:

"(4) JUDICIAL REVIEW.—Notwithstanding section 24(d), a court shall affirm a Commission assessment of costs and benefits under this subsection, unless the court finds the assessment to be an abuse of discretion.".

SEC. 203. DIVISION DIRECTORS.

Section 2(a)(6)(C) of the Commodity Exchange Act (7 U.S.C. 2(a)(6)(C)) is amended by inserting ", and the heads of the units shall serve at the pleasure of the Commission" before the period.

SEC. 204. OFFICE OF THE CHIEF ECONOMIST.

(a) IN GENERAL.—Section 2(a) of the Commodity Exchange Act (7 U.S.C. 2(a)) is amended by adding at the end the following:

"(16) OFFICE OF THE CHIEF ECONOMIST.—

"(A) ESTABLISHMENT.—There is established in the Commission the Office of the Chief Economist.

"(B) HEAD.—The Office of the Chief Economist shall be headed by the Chief Economist, who shall be appointed by the Commission and serve at the pleasure of the Commission.

"(C) FUNCTIONS.—The Chief Economist shall report directly to the Commission and perform such functions and duties as the Commission may prescribe.

"(D) PROFESSIONAL STAFF.—The Commission shall appoint such other economists as may be necessary to assist the Chief Economist in performing such economic analysis, regulatory cost-benefit analysis, or research any member of the Commission may request.".

(b) CONFORMING AMENDMENT.—Section 2(a)(6)(A) of such Act (7 U.S.C. 2(a)(6)(A)) is amended by striking "(4) and (5) of this subsection" and inserting "(4), (5), and (16)".

SEC. 205. PROCEDURES GOVERNING ACTIONS TAKEN BY COMMISSION STAFF.

Section 2(a)(12) of the Commodity Exchange Act (7 U.S.C. 2(a)(12)) is amended—

(1) by striking "(12) The" and inserting the following:

"(12) RULES AND REGULATIONS.—

"(A) IN GENERAL.—Subject to the other provisions of this paragraph, the"; and

(2) by adding after and below the end the following new subparagraph:

"(B) NOTICE TO COMMISSIONERS.—The Commission shall develop and publish internal procedures governing the issuance by any division or office of the Commission of any response to a formal, written request or petition from any member of the public for an exemptive, a no-action, or an interpretive letter and such procedures shall provide that the commissioners be provided with the final version of the matter to be issued with sufficient notice to review the matter prior to its issuance.".

SEC. 206. STRATEGIC TECHNOLOGY PLAN.

Section 2(a) of the Commodity Exchange Act (7 U.S.C. 2(a)), as amended by section 204(a) of this Act, is amended by adding at the end the following:

"(17) STRATEGIC TECHNOLOGY PLAN.—

"(A) IN GENERAL.—Every 5 years, the Commission shall develop and submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a detailed plan focused on the acquisition and use of technology by the Commission.

"(B) CONTENTS.—The plan shall—

"(i) include for each related division or office a detailed technology strategy focused on market surveillance and risk detection, market data collection, aggregation, interpretation, standardization, harmonization, normalization, validation, streamlining or other data analytic processes, and internal management and protection of data collected by the Commission, including a detailed accounting of how the funds provided for technology will be used and the priorities that will apply in the use of the funds; and

"(ii) set forth annual goals to be accomplished and annual budgets needed to accomplish the goals.".

SEC. 207. INTERNAL RISK CONTROLS.

Section 2(a)(12) of the Commodity Exchange Act (7 U.S.C. 2(a)(12)), as amended by section 205 of this Act, is amended by adding at the end the following:

"(C) INTERNAL RISK CONTROLS.—The Commission, in consultation with the Chief Economist, shall develop comprehensive internal risk control mechanisms to safeguard and govern the storage of all market data by the Commission, all market data sharing agreements of the Commission, and all academic research performed at the Commission using market data.".

SEC. 208. SUBPOENA DURATION AND RENEWAL.

Section 6(c)(5) of the Commodity Exchange Act (7 U.S.C. 9(5)) is amended—

(1) by striking "(5) SUBPOENA.—For" and inserting the following:

"(5) SUBPOENA.—

"(A) IN GENERAL.—For"; and

(2) by adding after and below the end the following:

"(B) OMNIBUS ORDERS OF INVESTIGATION.—

"(i) DURATION AND RENEWAL.—An omnibus order of investigation shall not be for an indefinite duration and may be renewed only by Commission action.

"(ii) DEFINITION.—In clause (i), the term 'omnibus order of investigation' means an order of the Commission authorizing 1 of more members of the Commission or its staff to issue subpoenas under subparagraph (A) to multiple persons in relation to a particular subject matter area.".

SEC. 209. APPLICABILITY OF NOTICE AND COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT TO GUIDANCE VOTED ON BY THE COMMISSION.

Section 2(a)(12) of the Commodity Exchange Act (7 U.S.C. 2(a)(12)), as amended by sections 205 and 207 of this Act, is amended by adding at the end the following:

"(D) APPLICABILITY OF NOTICE AND COMMENT RULES TO GUIDANCE VOTED ON BY THE COMMISSION.—The notice and comment requirements of section 553 of title 5, United States Code, shall also apply with respect to any Commission statement or guidance, including interpretive rules, general statements of policy, or rules of Commission organization, procedure, or practice, that has the effect of implementing, interpreting or prescribing law or policy and that is voted on by the Commission.".

SEC. 210. JUDICIAL REVIEW OF COMMISSION RULES.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by adding at the end the following:

"SEC. 24. JUDICIAL REVIEW OF COMMISSION RULES.

"(a) A person adversely affected by a rule of the Commission promulgated under this Act may obtain review of the rule in the United States Court of Appeals for the District of Columbia Circuit or the United States Court of Appeals for the circuit where the party resides or has the principal place of business, by filing in the court, within 60 days after publication in the Federal Register of the entry of the rule, a written petition requesting that the rule be set aside.

"(b) A copy of the petition shall be transmitted forthwith by the clerk of the court to an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the rule complained of is entered, as provided in section 2112 of title 28, United States Code, and the Federal Rules of Appellate Procedure.

"(c) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm and enforce or to set aside the rule in whole or in part.

"(d) The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.".

SEC. 211. GAO STUDY ON USE OF COMMISSION RESOURCES.

(a) STUDY.—The Comptroller General of the United States shall conduct a study of the resources of the Commodity Futures Trading Commission that—

(1) assesses whether the resources of the Commission are sufficient to enable the Commission to effectively carry out the duties of the Commission;

(2) examines the expenditures of the Commission on hardware, software, and analytical processes designed to protect customers in the areas of—

(A) market surveillance and risk detection; and

(B) market data collection, aggregation, interpretation, standardization, harmonization, and streamlining;

(3) analyzes the additional workload undertaken by the Commission, and ascertains where self-regulatory organizations could be more effectively utilized; and

(4) examines existing and emerging post-trade risk reduction services in the swaps market, the notional amount of risk reduction transactions provided by the services, and the effects the services have on financial stability, including—

(A) market surveillance and risk detection;

(B) market data collection, aggregation, interpretation, standardization, harmonization, and streamlining; and

(C) oversight and compliance work by market participants and regulators.

(b) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report that contains the results of the study required by subsection (a).

SEC. 212. DISCLOSURE OF REQUIRED DATA OF OTHER REGISTERED ENTITIES.

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

"(j) DISCLOSURE OF REQUIRED DATA OF OTHER REGISTERED ENTITIES.—

"(1) Except as provided in this subsection, the Commission may not be compelled to disclose any proprietary information provided to the Commission, except that nothing in this subsection—

"(A) authorizes the Commission to withhold information from Congress; or

"(B) prevents the Commission from—

"(i) complying with a request for information from any other Federal department or agency, any State or political subdivision thereof, or any foreign government or any department, agency, or political subdivision thereof requesting the report or information for purposes within the scope of its jurisdiction, upon an agreement of confidentiality to protect the information in a manner consistent with this paragraph and subsection (e); or

"(ii) making a disclosure made pursuant to a court order in connection with an administrative or judicial proceeding brought under this Act, in any receivership proceeding involving a receiver appointed in a judicial proceeding brought under this Act, or in any bankruptcy proceeding in which the Commission has intervened or in which the Commission has the right to appear and be heard under title 11 of the United States Code.

"(2) Any proprietary information of a commodity trading advisor or commodity pool operator ascertained by the Commission in connection with Form CPO-PQR, Form CTA-PR, and any successor forms thereto, shall be subject to the same limitations on public disclosure, as any facts ascertained during an investigation, as provided by subsection (a); provided, however, that the Commission shall not be precluded from publishing aggregate information compiled from such forms, to the extent such aggregate information does not identify any individual person or firm, or such person's proprietary information.

"(3) For purposes of section 552 of title 5, United States Code, this subsection, and the information contemplated herein, shall be considered a statute described in subsection (b)(3)(B) of such section 552.

"(4) For purposes of the definition of proprietary information in paragraph (5), the records and reports of any client account or commodity pool to which a commodity trading advisor or commodity pool operator registered under this title provides services that are filed with the Commission on Form CPO-PQR, CTA-PR, and any successor forms thereto, shall be deemed to be the records and reports of the commodity trading advisor or commodity pool operator, respectively.

"(5) For purposes of this section, proprietary information of a commodity trading advisor or commodity pool operator includes sensitive, non-public information regarding—

"(A) the commodity trading advisor, commodity pool operator or the trading strategies of the commodity trading advisor or commodity pool operator;

"(B) analytical or research methodologies of a commodity trading advisor or commodity pool operator;

"(C) trading data of a commodity trading advisor or commodity pool operator; and

"(D) computer hardware or software containing intellectual property of a commodity trading advisor or commodity pool operator;".

SEC. 213. REPORT ON STATUS OF ANY APPLICATION OF METALS EXCHANGE TO REGISTER AS A FOREIGN BOARD OF TRADE; DEADLINE FOR ACTION ON APPLICATION.

(a) REPORT TO CONGRESS.—Within 90 days after the date of the enactment of this section, the Commodity Futures Trading Commission shall submit to the Congress a written report on—

(1) the status of the review by the Commission of any application submitted by a metals exchange to register with the Commission under section 4(b)(1) of the Commodity Exchange Act; and

(2) the status of Commission negotiations with foreign regulators regarding aluminum warehousing.

(b) DEADLINE FOR ACTION.—Not later than September 30, 2016, the Commission shall take action on any such application submitted to the Commission on or before August 14, 2012.

TITLE III—END-USER RELIEF

SEC. 301. RELIEF FOR HEDGERS UTILIZING CENTRALIZED RISK MANAGEMENT PRACTICES.

(a) IN GENERAL.—

(1) COMMODITY EXCHANGE ACT AMENDMENT.—Section 2(h)(7)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(h)(7)(D)(i)) is amended to read as follows:

"(i) IN GENERAL.—An affiliate of a person that qualifies for an exception under subparagraph (A) (including an affiliate entity predominantly engaged in providing financing for the purchase of the merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate enters into the swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity, provided that if the hedge or mitigation of such commercial risk is addressed by entering into a swap with a swap dealer or major swap participant, an appropriate credit support measure or other mechanism must be utilized.".

(b) APPLICABILITY OF CREDIT SUPPORT MEASURE REQUIREMENT.—The requirements in section 2(h)(7)(D)(i) of the Commodity Exchange Act, as amended by subsection (a), requiring that a credit support measure or other mechanism be utilized if the transfer of commercial risk referred to in such section is addressed by entering into a swap with a swap dealer or major swap participant shall not apply with respect to swaps entered into before the date of the enactment of this Act.

SEC. 302. INDEMNIFICATION REQUIREMENTS.

(a) DERIVATIVES CLEARING ORGANIZATIONS.—Section 5b(k)(5) of the Commodity Exchange Act (7 U.S.C. 7a-1(k)(5)) is amended to read as follows:

"(5) CONFIDENTIALITY AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4), the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.".

(b) SWAP DATA REPOSITORIES.—Section 21(d) of such Act (7 U.S.C. 24a(d)) is amended to read as follows:

"(d) CONFIDENTIALITY AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7), the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.".

SEC. 303. TRANSACTIONS WITH UTILITY SPECIAL ENTITIES.

Section 1a(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)) is amended by adding at the end the following:

"(E) CERTAIN TRANSACTIONS WITH A UTILITY SPECIAL ENTITY.—

"(i) Transactions in utility operations-related swaps shall be reported pursuant to section 4r.

"(ii) In making a determination to exempt pursuant to subparagraph (D), the Commission shall treat a utility operations-related swap entered into with a utility special entity, as defined in section 4s(h)(2)(D), as if it were entered into with an entity that is not a special entity, as defined in section 4s(h)(2)(C).".

SEC. 304. UTILITY SPECIAL ENTITY DEFINED.

Section 4s(h)(2) of the Commodity Exchange Act (7 U.S.C. 6s(h)(2)) is amended by adding at the end the following:

"(D) UTILITY SPECIAL ENTITY.—For purposes of this Act, the term 'utility special entity' means a special entity, or any instrumentality, department, or corporation of or established by a State or political subdivision of a State, that—

"(i) owns or operates, or anticipates owning or operating, an electric or natural gas facility or an electric or natural gas operation;

"(ii) supplies, or anticipates supplying, natural gas and or electric energy to another utility special entity;

"(iii) has, or anticipates having, public service obligations under Federal, State, or local law or regulation to deliver electric energy or natural gas service to customers; or

"(iv) is a Federal power marketing agency, as defined in section 3 of the Federal Power Act.".

SEC. 305. UTILITY OPERATIONS-RELATED SWAP.

(a) SWAP FURTHER DEFINED.—Section 1a(47)(A)(iii) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(iii)) is amended—

(1) by striking "and" at the end of subclause (XXI);

(2) by adding "and" at the end of subclause (XXII); and

(3) by adding at the end the following:

"(XXIII) a utility operations-related swap;".

(b) UTILITY OPERATIONS-RELATED SWAP DEFINED.—Section 1a of such Act (7 U.S.C. 1a) is amended by adding at the end the following:

"(52) UTILITY OPERATIONS-RELATED SWAP.—The term 'utility operations-related swap' means a swap that—

"(A) is entered into by a utility to hedge or mitigate a commercial risk;

"(B) is not a contract, agreement, or transaction based on, derived on, or referencing—

"(i) an interest rate, credit, equity, or currency asset class;

"(ii) except as used for fuel for electric energy generation, a metal, agricultural commodity, or crude oil or gasoline commodity of any grade; or

"(iii) any other commodity or category of commodities identified for this purpose in a rule or order adopted by the Commission in consultation with the appropriate Federal and State regulatory commissions; and

"(C) is associated with—

"(i) the generation, production, purchase, or sale of natural gas or electric energy, the supply of natural gas or electric energy to a utility, or the delivery of natural gas or electric energy service to utility customers;

"(ii) fuel supply for the facilities or operations of a utility;

"(iii) compliance with an electric system reliability obligation;

"(iv) compliance with an energy, energy efficiency, conservation, or renewable energy or environmental statute, regulation, or government order applicable to a utility; or

"(v) any other electric energy or natural gas swap to which a utility is a party.".

SEC. 306. END-USERS NOT TREATED AS FINANCIAL ENTITIES.

(a) IN GENERAL.—Section 2(h)(7)(C)(iii) of the Commodity Exchange Act (7 U.S.C. 2(h)(7)(C)(iii)) is amended to read as follows:

"(iii) LIMITATION.—Such definition shall not include an entity—

"(I) whose primary business is providing financing, and who uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company; or

"(II) who is not supervised by a prudential regulator, and is not described in any of subclauses (I) through (VII) of clause (i), and—

"(aa) is a commercial market participant; or

"(bb) enters into swaps, contracts for future delivery, and other derivatives on behalf of, or to hedge or mitigate the commercial risk of, whether directly or in the aggregate, affiliates that are not so supervised or described.".

(b) COMMERCIAL MARKET PARTICIPANT DEFINED.—

(1) IN GENERAL.—Section 1a of such Act (7 U.S.C. 1a), as amended by section 305(b) of this Act, is amended by redesignating paragraphs (8) through (52) as paragraphs (9) through (53), respectively, and by inserting after paragraph (6) the following:

"(8) COMMERCIAL MARKET PARTICIPANT.—The term 'commercial market participant' means any producer, processor, merchant, or commercial user of an exempt or agricultural commodity, or the products or byproducts of such a commodity.".

(2) CONFORMING AMENDMENTS.—

(A) Section 1a of such Act (7 U.S.C. 1a) is amended—

(i) in subparagraph (A) of paragraph (18) (as so redesignated by paragraph (1) of this subsection), in the matter preceding clause (i), by striking "(18)(A)" and inserting "(19)(A)"; and

(ii) in subparagraph (A)(vii) of paragraph (19) (as so redesignated by paragraph (1) of this subsection), in the matter following subclause (III), by striking "(17)(A)" and inserting "(18)(A)".

(B) Section 4(c)(1)(A)(i)(I) of such Act (7 U.S.C. 6(c)(1)(A)(i)(I)) is amended by striking "(7), paragraph (18)(A)(vii)(III), paragraphs (23), (24), (31), (32), (38), (39), (41), (42), (46), (47), (48), and (49)" and inserting "(8), paragraph (19)(A)(vii)(III), paragraphs (24), (25), (32), (33), (39), (40), (42), (43), (47), (48), (49), and (50)".

(C) Section 4q(a)(1) of such Act (7 U.S.C. 6o-1(a)(1)) is amended by striking "1a(9)" and inserting "1a(10)".

(D) Section 4s(f)(1)(D) of such Act (7 U.S.C. 6s(f)(1)(D)) is amended by striking "1a(47)(A)(v)" and inserting "1a(48)(A)(v)".

(E) Section 4s(h)(5)(A)(i) of such Act (7 U.S.C. 6s(h)(5)(A)(i)) is amended by striking "1a(18)" and inserting "1a(19)".

(F) Section 4t(b)(1)(C) of such Act (7 U.S.C. 6t(b)(1)(C)) is amended by striking "1a(47)(A)(v)" and inserting "1a(48)(A)(v)".

(G) Section 5(d)(23) of such Act (7 U.S.C. 7(d)(23)) is amended by striking "1a(47)(A)(v)" and inserting "1a(48)(A)(v)".

(H) Section 5(e)(1) of such Act (7 U.S.C. 7(e)(1)) is amended by striking "1a(9)" and inserting "1a(10)".

(I) Section 5b(k)(3)(A) of such Act (7 U.S.C. 7a-1(k)(3)(A)) is amended by striking "1a(47)(A)(v)" and inserting "1a(48)(A)(v)".

(J) Section 5h(f)(10)(A)(iii) of such Act (7 U.S.C. 7b-3(f)(10)(A)(iii)) is amended by striking "1a(47)(A)(v)" and inserting "1a(48)(A)(v)".

(K) Section 21(f)(4)(C) of such Act (7 U.S.C. 24a(f)(4)(C)) is amended by striking "1a(48)" and inserting "1a(49)".

SEC. 307. REPORTING OF ILLIQUID SWAPS SO AS TO NOT DISADVANTAGE CERTAIN NON-FINANCIAL END-USERS.

Section 2(a)(13) of the Commodity Exchange Act (7 U.S.C. 2(a)(13)) is amended—

(1) in subparagraph (C), by striking "The Commission" and inserting "Except as provided in subparagraph (D), the Commission"; and

(2) by redesignating subparagraphs (D) through (G) as subparagraphs (E) through (H), respectively, and inserting after subparagraph (C) the following:

"(D) REQUIREMENTS FOR SWAP TRANSACTIONS IN ILLIQUID MARKETS.—Notwithstanding subparagraph (C):

"(i) The Commission shall provide by rule for the public reporting of swap transactions, including price and volume data, in illiquid markets that are not cleared and entered into by a non-financial entity that is hedging or mitigating commercial risk in accordance with subsection (h)(7)(A).

"(ii) The Commission shall ensure that the swap transaction information referred to in clause (i) of this subparagraph is available to the public no sooner than 30 days after the swap transaction has been executed or at such later date as the Commission determines appropriate to protect the identity of participants and positions in illiquid markets and to prevent the elimination or reduction of market liquidity.

"(iii) In this subparagraph, the term 'illiquid markets' means any market in which the volume and frequency of trading in swaps is at such a level as to allow identification of individual market participants.".

SEC. 308. RELIEF FOR GRAIN ELEVATOR OPERATORS, FARMERS, AGRICULTURAL COUNTERPARTIES, AND COMMERCIAL MARKET PARTICIPANTS.

The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended by inserting after section 4t the following:

"SEC. 4u. RECORDKEEPING REQUIREMENTS APPLICABLE TO NON-REGISTERED MEMBERS OF CERTAIN REGISTERED ENTITIES.

"Except as provided in section 4(a)(3), a member of a designated contract market or a swap execution facility that is not registered with the Commission and not required to be registered with the Commission in any capacity shall satisfy the recordkeeping requirements of this Act and any recordkeeping rule, order, or regulation under this Act by maintaining a written record of each transaction in a contract for future delivery, option on a future, swap, swaption, trade option, or related cash or forward transaction. The written record shall be sufficient if it includes the final agreement between the parties and the material economic terms of the transaction.".

SEC. 309. RELIEF FOR END-USERS WHO USE PHYSICAL CONTRACTS WITH VOLUMETRIC OPTIONALITY.

Section 1a(48)(B)(ii) of the Commodity Exchange Act (7 U.S.C. 1a(47)(B)(ii)), as so redesignated by section 306(b)(1) of this Act, is amended to read as follows:

"(ii) any purchase or sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled, including any stand-alone or embedded option for which exercise results in a physical delivery obligation;".

SEC. 310. COMMISSION VOTE REQUIRED BEFORE AUTOMATIC CHANGE OF SWAP DEALER DE MINIMIS LEVEL.

Section 1a(50)(D) of the Commodity Exchange Act (7 U.S.C. 1a(49)(D)), as so redesignated by section 306(b)(1) of this Act, is amended—

(1) by striking all that precedes "shall exempt" and inserting the following:

"(D) EXCEPTION.—

"(i) IN GENERAL.—The Commission"; and

(2) by adding after and below the end the following new clause:

"(ii) DE MINIMIS QUANTITY.—The de minimis quantity of swap dealing described in clause (i) shall be set at a quantity of $8,000,000,000, and may be amended or changed only through a new affirmative action of the Commission undertaken by rule or regulation.".

SEC. 311. CAPITAL REQUIREMENTS FOR NON-BANK SWAP DEALERS.

(a) COMMODITY EXCHANGE ACT.—Section 4s(e) of the Commodity Exchange Act (7 U.S.C. 6s(e)) is amended—

(1) in paragraph (2)(B), by inserting "in consultation with the prudential regulators and the Securities and Exchange Commission" before "shall"; and

(2) in paragraph (3)(D)—

(A) in clause (ii), by striking "shall, to the maximum extent practicable," and inserting "shall"; and

(B) by adding at the end the following:

"(iii) FINANCIAL MODELS.—To the extent that swap dealers and major swap participants that are banks are permitted to use financial models approved by the prudential regulators or the Securities and Exchange Commission to calculate minimum capital requirements and minimum initial and variation margin requirements, including the use of non-cash collateral, the Commission shall, in consultation with the prudential regulators and the Securities and Exchange Commission, permit the use of comparable financial models by swap dealers and major swap participants that are not banks.".

SEC. 312. HARMONIZATION WITH THE JUMPSTART OUR BUSINESS STARTUPS ACT.

Within 90 days after the date of the enactment of this Act, the Commodity Futures Trading Commission shall—

(1) revise section 4.7(b) of title 17, Code of Federal Regulations, in the matter preceding paragraph (1), to read as follows:

"(b) Relief available to commodity pool operators. Upon filing the notice required by paragraph (d) of this section, and subject to compliance with the conditions specified in paragraph (d) of this section, any registered commodity pool operator who sells participations in a pool solely to qualified eligible persons in an offering which qualifies for exemption from the registration requirements of the Securities Act pursuant to section 4(2) of that Act or pursuant to Regulation S, 17 CFR 230.901 et seq., and any bank registered as a commodity pool operator in connection with a pool that is a collective trust fund whose securities are exempt from registration under the Securities Act pursuant to section 3(a)(2) of that Act and are sold solely to qualified eligible persons, may claim any or all of the following relief with respect to such pool:"; and

(2) revise section 4.13(a)(3)(i) of such title to read as follows:

"(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold pursuant to section 4 of the Securities Act of 1933 and the regulations thereunder;".

SEC. 313. BONA FIDE HEDGE DEFINED TO PROTECT END-USER RISK MANAGEMENT NEEDS.

Section 4a(c) of the Commodity Exchange Act (7 U.S.C. 6a(c)) is amended—

(1) in paragraph (1)—

(A) by striking "may" and inserting "shall"; and

(B) by striking "future for which" and inserting "future, to be determined by the Commission, for which either an appropriate swap is available or";

(2) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by striking "subsection (a)(2)" and all that follows through "position as" and inserting "paragraphs (2) and (5) of subsection (a) for swaps, contracts of sale for future delivery, or options on the contracts or commodities, a bona fide hedging transaction or position is"; and

(B) in subparagraph (A)(ii), by striking "of risks" and inserting "or management of current or anticipated risks"; and

(3) by adding at the end the following:

"(3) The Commission may further define, by rule or regulation, what constitutes a bona fide hedging transaction, provided that the rule or regulation is consistent with the requirements of subparagraphs (A) and (B) of paragraph (2).".

SEC. 314. CROSS-BORDER REGULATION OF DERIVATIVES TRANSACTIONS.

(a) RULEMAKING REQUIRED.—Within 1 year after the date of the enactment of this Act, the Commodity Futures Trading Commission shall issue a rule that addresses—

(1) the nature of the connections to the United States that require a non-U.S. person to register as a swap dealer or a major swap participant under the Commodity Exchange Act and the regulations issued under such Act;

(2) which of the United States swaps requirements apply to the swap activities of non-U.S. persons and U.S. persons and their branches, agencies, subsidiaries, and affiliates outside of the United States, and the extent to which the requirements apply; and

(3) the circumstances under which a U.S. person or non-U.S. person in compliance with the swaps regulatory requirements of a foreign jurisdiction shall be exempt from United States swaps requirements.

(b) CONTENT OF THE RULE.—

(1) CRITERIA.—In the rule, the Commission shall establish criteria for determining that 1 or more categories of the swaps regulatory requirements of a foreign jurisdiction are comparable to and as comprehensive as United States swaps requirements. The criteria shall include—

(A) the scope and objectives of the swaps regulatory requirements of the foreign jurisdiction;

(B) the effectiveness of the supervisory compliance program administered;

(C) the enforcement authority exercised by the foreign jurisdiction; and

(D) such other factors as the Commission, by rule, determines to be necessary or appropriate in the public interest.

(2) COMPARABILITY.—In the rule, the Commission shall—

(A) provide that any non-U.S. person or any transaction between two non-U.S. persons shall be exempt from United States swaps requirements if the person or transaction is in compliance with the swaps regulatory requirements of a foreign jurisdiction which the Commission has determined to be comparable to and as comprehensive as United States swaps requirements; and

(B) set forth the circumstances in which a U.S. person or a transaction between a U.S. person and a non-U.S. person shall be exempt from United States swaps requirements if the person or transaction is in compliance with the swaps regulatory requirements of a foreign jurisdiction which the Commission has determined to be comparable to and as comprehensive as United States swaps requirements.

(3) OUTCOMES-BASED COMPARISON.—In developing and applying the criteria, the Commission shall emphasize the results and outcomes of, rather than the design and construction of, foreign swaps regulatory requirements.

(4) RISK-BASED RULEMAKING.—In the rule, the Commission shall not take into account, for the purposes of determining the applicability of United States swaps requirements, the location of personnel that arrange, negotiate, or execute swaps.

(5) No part of any rulemaking under this section shall limit the Commission's antifraud or antimanipulation authority.

(c) APPLICATION OF THE RULE.—

(1) ASSESSMENTS OF FOREIGN JURISDICTIONS.—Beginning on the date on which a final rule is issued under this section, the Commission shall begin to assess the swaps regulatory requirements of foreign jurisdictions, in the order the Commission determines appropriate, in accordance with the criteria established pursuant to subsection (b)(1). Following each assessment, the Commission shall determine, by rule or by order, whether the swaps regulatory requirements of the foreign jurisdiction are comparable to and as comprehensive as United States swaps requirements.

(2) SUBSTITUTED COMPLIANCE FOR UNASSESSED MAJOR MARKETS.—Beginning 18 months after the date of enactment of this Act—

(A) the swaps regulatory requirements of each of the 8 foreign jurisdictions with the largest swaps markets, as calculated by notional value during the 12-month period ending with such date of enactment, except those with respect to which a determination has been made under paragraph (1), shall be considered to be comparable to and as comprehensive as United States swaps requirements; and

(B) a non-U.S. person or a transaction between 2 non-U.S. persons shall be exempt from United States swaps requirements if the person or transaction is in compliance with the swaps regulatory requirements of any of such unexcepted foreign jurisdictions.

(3) SUSPENSION OF SUBSTITUTED COMPLIANCE.—If the Commission determines, by rule or by order, that—

(A) the swaps regulatory requirements of a foreign jurisdiction are not comparable to and as comprehensive as United States swaps requirements, using the categories and criteria established under subsection (b)(1);

(B) the foreign jurisdiction does not exempt from its swaps regulatory requirements U.S. persons who are in compliance with United States swaps requirements; or

(C) the foreign jurisdiction is not providing equivalent recognition of, or substituted compliance for, registered entities (as defined in section 1a(41) of the Commodity Exchange Act) domiciled in the United States,

the Commission may suspend, in whole or in part, a determination made under paragraph (1) or a consideration granted under paragraph (2).

(d) PETITION FOR REVIEW OF FOREIGN JURISDICTION PRACTICES.—A registered entity, commercial market participant (as defined in section 1a(7) of the Commodity Exchange Act), or Commission registrant (within the meaning of such Act) who petitions the Commission to make or change a determination under subsection (c)(1) or (c)(3) of this section shall be entitled to expedited consideration of the petition. A petition shall include any evidence or other supporting materials to justify why the petitioner believes the Commission should make or change the determination. Petitions under this section shall be considered by the Commission any time following the enactment of this Act. Within 180 days after receipt of a petition for a rulemaking under this section, the Commission shall take final action on the petition. Within 90 days after receipt of a petition to issue an order or change an order issued under this section, the Commission shall take final action on the petition.

(e) REPORT TO CONGRESS.—If the Commission makes a determination described in this section through an order, the Commission shall articulate the basis for the determination in a written report published in the Federal Register and transmitted to the Committee on Agriculture of the House of Representatives and Committee on Agriculture, Nutrition, and Forestry of the Senate within 15 days of the determination. The determination shall not be effective until 15 days after the committees receive the report.

(f) DEFINITIONS.—As used in this Act and for purposes of the rules issued pursuant to this Act, the following definitions apply:

(1) U.S. PERSON.—The term "U.S. person"—

(A) means—

(i) any natural person resident in the United States;

(ii) any partnership, corporation, trust, or other legal person organized or incorporated under the laws of the United States or having its principal place of business in the United States;

(iii) any account (whether discretionary or non-discretionary) of a U.S. person; and

(iv) any other person as the Commission may further define to more effectively carry out the purposes of this section; and

(B) does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, their agencies or pension plans, or any other similar international organizations or their agencies or pension plans.

(2) UNITED STATES SWAPS REQUIREMENTS.—The term "United States swaps requirements" means the provisions relating to swaps contained in the Commodity Exchange Act (7 U.S.C. 1a et seq.) that were added by title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 8301 et seq.) and any rules or regulations prescribed by the Commodity Futures Trading Commission pursuant to such provisions.

(3) FOREIGN JURISDICTION.—The term "foreign jurisdiction" means any national or supranational political entity with common rules governing swaps transactions.

(4) SWAPS REGULATORY REQUIREMENTS.—The term "swaps regulatory requirements" means any provisions of law, and any rules or regulations pursuant to the provisions, governing swaps transactions or the counterparties to swaps transactions.

(g) CONFORMING AMENDMENT.—Section 4(c)(1)(A) of the Commodity Exchange Act (7 U.S.C. 6(c)(1)(A)) is amended by inserting "or except as necessary to effectuate the purposes of the Commodity End-User Relief Act," after "to grant exemptions,".

SEC. 315. EXEMPTION OF QUALIFIED CHARITABLE ORGANIZATIONS FROM DESIGNATION AND REGULATION AS COMMODITY POOL OPERATORS.

(a) EXCLUSION FROM DEFINITION OF COMMODITY POOL.—Section 1a(11) of the Commodity Exchange Act (7 U.S.C. 1a(10)), as so redesignated by section 306(b)(1) of this Act, is amended by adding at the end the following:

"(C) EXCLUSION.—The term 'commodity pool' shall not include any investment trust, syndicate, or similar form of enterprise excluded from the definition of 'investment company' pursuant to sections 3(c)(10) or 3(c)(14) of the Investment Company Act of 1940.".

(b) INAPPLICABILITY OF PROHIBITION ON USE OF INSTRUMENTALITIES OF INTERSTATE COMMERCE BY UNREGISTERED COMMODITY TRADING ADVISOR.—Section 4m of such Act (7 U.S.C. 6m) is amended—

(1) in paragraph (1), in the 2nd sentence, by inserting ": *Provided further*, That the provisions of this section shall not apply to any commodity trading advisor that is: (A) a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940, or a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of the employment or duties of the person with the organization, whose trading advice is provided only to, or with respect to, 1 or more of the following: (i) any such charitable organization, or (ii) an investment trust, syndicate or similar form of enterprise excluded from the definition of 'investment company' pursuant to section 3(c)(10) of the Investment Company Act of 1940; or (B) any plan, company, or account described in section 3(c)(14) of the Investment Company Act of 1940, any person or entity who establishes or maintains such a plan, company, or account, or any trustee, director, officer, employee, or volunteer for any of the foregoing plans, persons, or entities acting within the scope of the employment or duties of the person with the organization, whose trading advice is provided only to, or with respect to, any investment trust, syndicate, or similar form of enterprise excluded from the definition of 'investment company' pursuant to section 3(c)(14) of the Investment Company Act of 1940" before the period; and

(2) by adding at the end the following:

"(4) DISCLOSURE CONCERNING EXCLUDED CHARITABLE ORGANIZATIONS.—The operator of or advisor to any investment trust, syndicate, or similar form of enterprise excluded from the definition of 'commodity pool' by reason of section 1a(10)(C) shall provide, to each donor to the fund, trust, syndicate, or similar form of enterprise, at the time of the donation or within 90 days after the date of the enactment of this subsection, whichever is later, written information describing the material terms of the operation of the fund, trust, syndicate, or similar form of enterprise.".

SEC. 316. SMALL BANK HOLDING COMPANY CLEARING EXEMPTION.

Section 2(h)(7)(C) of the Commodity Exchange Act (7 U.S.C. 2(h)(7)(C)) is amended by adding at the end the following:

"(iv) HOLDING COMPANIES.—A determination made by the Commission under clause (ii) shall, with respect to small banks and savings associations, also apply to their respective bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956), or savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act of 1933)), if the total consolidated assets of the holding company are no greater than the asset threshold set by the Commission in determining small bank and savings association eligibility under clause (ii).".

SEC. 317. CORE PRINCIPLE CERTAINTY.

Section 5h(f) of the Commodity Exchange Act (7 U.S.C. 7b–3(f)) is amended—

(1) in paragraph (1)(B), by inserting "except as described in this subsection" after "Commission by rule or regulation";

(2) in paragraph (2), by amending subparagraph (D) to read as follows:

"(D) have reasonable discretion in establishing and enforcing its rules related to trade practice surveillance, market surveillance, real-time marketing monitoring, and audit trail given that a swap execution facility may offer a trading system or platform to execute or trade swaps through any means of interstate commerce. A swap execution facility shall be responsible for monitoring trading in swaps only on its own facility.";

(3) in paragraph (4)(B), by adding at the end the following: "A swap execution facility shall be responsible for monitoring trading in swaps only on its own facility.";

(4) in paragraph (6)(B)—

(A) by striking "shall—" and all that follows through "compliance with the" and insert "shall monitor the trading activity on its facility for compliance with any"; and

(B) by adding at the end the following: "A swap execution facility shall be responsible for monitoring positions only on its own facility.";

(5) in paragraph (8), by striking "to liquidate" and all that follows and inserting "to suspend or curtail trading in a swap on its own facility.";

(6) in paragraph (13)(B), by striking "cover the operating costs of the swap execution facility for a 1-year period, as calculated on a rolling basis" and inserting "conduct an orderly wind-down of its operations"; and

(7) in paragraph (15)—

(A) in subparagraph (A), by adding at the end the following: "The individual may also perform other responsibilities for the swap execution facility.";

(B) in subparagraph (B)—

(i) in clause (i), by inserting ", a committee of the board," after "directly to the board";

(ii) by striking clauses (iii) through (v) and inserting the following:

"(iii) establish and administer policies and procedures that are reasonably designed to resolve any conflicts of interest that may arise;

"(iv) establish and administer policies and procedures that reasonably ensure compliance with this Act and the rules and regulations issued under this Act, including rules prescribed by the Commission pursuant to this section; and"; and

(iii) by redesignating clause (vi) as clause (v);

(C) in subparagraph (C), by striking "(B)(vi)" and inserting "(B)(v)"; and

(D) in subparagraph (D)—

(i) in clause (i)—

(I) by striking "In accordance with rules prescribed by the Commission, the" and inserting "The"; and

(II) by striking "and sign"; and

(ii) in clause (ii)—

(I) in the matter preceding subclause (I), by inserting "or senior officer" after "officer";

(II) by amending subclause (I) to read as follows:

"(I) submit each report described in clause (i) to the Commission; and"; and

(III) in subclause (II), by inserting "materially" before "accurate".

SEC. 318. TREATMENT OF FEDERAL HOME LOAN BANK PRODUCTS.

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

(1) in subparagraph (B), by striking "and";

(2) in subparagraph (C), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(D) is the Federal Housing Finance Agency for any Federal Home Loan Bank (as defined in section 2 of the Federal Home Loan Bank Act).".

SEC. 319. TREATMENT OF CERTAIN FUNDS.

(a) AMENDMENT TO THE DEFINITION OF COMMODITY POOL OPERATOR.—Section 1a(12) of the Commodity Exchange Act (7 U.S.C. 1a(11)), as so redesignated by section 306(b)(1) of this Act, is amended by adding at the end the following:

"(C)(i) The term 'commodity pool operator' does not include a person who serves as an investment adviser to an investment company registered pursuant to section 8 of the Investment Company Act of 1940 or a subsidiary of such a company, if the investment company or subsidiary invests, reinvests, owns, holds, or trades in commodity interests limited to only financial commodity interests.

"(ii) For purposes of this subparagraph only, the term 'financial commodity interest' means a futures contract, an option on a futures contract, or a swap, involving a commodity that is not an exempt commodity or an agricultural commodity, including any index of financial commodity interests, whether cash settled or involving physical delivery.

"(iii) For purposes of this subparagraph only, the term 'commodity' does not include a security issued by a real estate investment trust, business development company, or issuer of asset-backed securities, including any index of such securities.".

(b) AMENDMENT TO THE DEFINITION OF COMMODITY TRADING ADVISOR.—Section 1a(13) of such Act (7 U.S.C. 1a(12)), as so redesignated by section 306(b)(1) of this Act, is amended by adding at the end the following:

"(E) The term 'commodity trading advisor' does not include a person who serves as an investment adviser to an investment company registered pursuant to section 8 of the Investment Company Act of 1940 or a subsidiary of such a company, if the commodity trading advice relates only to a finan-

cial commodity interest, as defined in paragraph (11)(C)(ii) of this section. For purposes of this subparagraph only, the term 'commodity' does not include a security issued by a real estate investment trust, business development company, or issuer of asset-backed securities, including any index of such securities.".

TITLE IV—TECHNICAL CORRECTIONS

SEC. 401. CORRECTION OF REFERENCES.

(a) Section 2(h)(8)(A)(ii) of the Commodity Exchange Act (7 U.S.C. 2(h)(8)(A)(ii)) is amended by striking "5h(f) of this Act" and inserting "5h(g)".

(b) Section 5c(c)(5)(C)(i) of such Act (7 U.S.C. 7a-2(c)(5)(C)(i)) is amended by striking "1a(2)(i))" and inserting "1a(19)(i))".

(c) Section 23(f) of such Act (7 U.S.C. 26(f)) is amended by striking "section 7064" and inserting "section 706".

SEC. 402. ELIMINATION OF OBSOLETE REFERENCES TO DEALER OPTIONS.

(a) IN GENERAL.—Section 4c of the Commodity Exchange Act (7 U.S.C. 6c) is amended by striking subsections (d) and (e) and redesignating subsections (f) and (g) as subsections (d) and (e), respectively.

(b) CONFORMING AMENDMENTS.—

(1) Section 2(d) of such Act (7 U.S.C. 2(d)) is amended by striking "(g) of" and inserting "(e) of".

(2) Section 4f(a)(4)(A)(i) of such Act (7 U.S.C. 6f(a)(4)(A)(i)) is amended by striking ", (d), (e), and (g)" and inserting "and (e)".

(3) Section 4k(5)(A) of such Act (7 U.S.C. 6k(5)(A)) is amended by striking ", (d), (e), and (g)" and inserting "and (e)".

(4) Section 5f(b)(1)(A) of such Act (7 U.S.C. 7b-1(b)(1)(A)) is amended by striking ", (e) and (g)" and inserting "and (e)".

(5) Section 9(a)(2) of such Act (7 U.S.C. 13(a)(2)) is amended by striking "through (e)" and inserting "and (c)".

SEC. 403. UPDATED TRADE DATA PUBLICATION REQUIREMENT.

Section 4g(e) of the Commodity Exchange Act (7 U.S.C. 6g(e)) is amended by striking "exchange" and inserting "each designated contract market and swap execution facility".

SEC. 404. FLEXIBILITY FOR REGISTERED ENTITIES.

Section 5c(b) of the Commodity Exchange Act (7 U.S.C. 7a-2(b)) is amended by striking "contract market, derivatives transaction execution facility, or electronic trading facility" each place it appears and inserting "registered entity".

SEC. 405. ELIMINATION OF OBSOLETE REFERENCES TO ELECTRONIC TRADING FACILITIES.

(a) Section 1a(19)(A)(x) of the Commodity Exchange Act (7 U.S.C. 1a(18)(A)(x)), as so redesignated by section 306(b)(1) of this Act, is amended by striking "(other than an electronic trading facility with respect to a significant price discovery contract)".

(b) Section 1a(41) of such Act (7 U.S.C. 1a(40)), as so redesignated by section 306(b)(1) of this Act, is amended—

(1) by adding "and" at the end of subparagraph (D); and

(2) by striking all that follows "section 21" and inserting a period.

(c) Section 4a(e) of such Act (7 U.S.C. 6a(e)) is amended—

(1) in the 1st sentence—

(A) by striking "or by any electronic trading facility";

(B) by striking "or on an electronic trading facility"; and

(C) by striking "or electronic trading facility" each place it appears; and

(2) in the 2nd sentence, by striking "or electronic trading facility with respect to a significant price discovery contract".

(d) Section 4g(a) of such Act (7 U.S.C. 6g(a)) is amended by striking "any significant price discovery contract traded or executed on an electronic trading facility or".

(e) Section 4i of such Act (7 U.S.C. 6i) is amended—

(1) by striking ", or any significant price discovery contract traded or executed on an electronic trading facility or any agreement, contract, or transaction that is treated by a derivatives clearing organization, whether registered or not registered, as fungible with a significant price discovery contract"; and

(2) by striking "or electronic trading facility"

(f) Section 6(b) of such Act (7 U.S.C. 8(b)) is amended by striking "or electronic trading facility" each place it appears.

(g) Section 12(e)(2) of such Act (7 U.S.C. 16(e)(2)) is amended by striking "in the case of—" and all that follows and inserting "in the case of an agreement, contract,

or transaction that is excluded from this Act under section 2(c) or 2(f) of this Act or title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 4(c) of this Act (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act).".

SEC. 406. ELIMINATION OF OBSOLETE REFERENCE TO ALTERNATIVE SWAP EXECUTION FACILITIES.

Section 5h(h) of the Commodity Exchange Act (7 U.S.C. 7b-3(h)) is amended by striking "alternative" before "swap".

SEC. 407. ELIMINATION OF REDUNDANT REFERENCES TO TYPES OF REGISTERED ENTITIES.

Section 6b of the Commodity Exchange Act (7 U.S.C. 13a) is amended in the 1st sentence by striking "as set forth in sections 5 through 5c".

SEC. 408. CLARIFICATION OF COMMISSION AUTHORITY OVER SWAPS TRADING.

Section 8a of the Commodity Exchange Act (7 U.S.C. 12a) is amended—

(1) in paragraph (7)—

(A) by inserting "the protection of swaps traders and to assure fair dealing in swaps, for" after "appropriate for";

(B) in subparagraph (A), by inserting "swaps or" after "conditions in"; and

(C) in subparagraph (B), by inserting "or swaps" after "future delivery"; and

(2) in paragraph (9)—

(A) by inserting "swap or" after "or liquidation of any"; and

(B) by inserting "swap or" after "margin levels on any".

SEC. 409. ELIMINATION OF OBSOLETE REFERENCE TO THE COMMODITY EXCHANGE COMMISSION.

Section 13(c) of the Commodity Exchange Act (7 U.S.C. 13c(c)) is amended by striking "or the Commission".

SEC. 410. ELIMINATION OF OBSOLETE REFERENCES TO DERIVATIVE TRANSACTION EXECUTION FACILITIES.

(a) Section 1a(13)(B)(vi) of the Commodity Exchange Act (7 U.S.C. 1a(12)(B)(vi)), as so redesignated by section 306(b)(1) of this Act, is amended by striking "derivatives transaction execution facility" and inserting "swap execution facility".

(b) Section 1a(35) of such Act (7 U.S.C. 1a(34)), as so redesignated by section 306(b)(1) of this Act, is amended by striking "or derivatives transaction execution facility" each place it appears.

(c) Section 1a(36)(B)(iii)(I) of such Act (7 U.S.C. 1a(35)(B)(iii)(I)), as so redesignated by section 306(b)(1) of this Act, is amended by striking "or registered derivatives transaction execution facility".

(d) Section 2(a)(1)(C)(ii) of such Act (7 U.S.C. 2(a)(1)(C)(ii)) is amended—

(1) by striking ", or register a derivatives transaction execution facility that trades or executes,";

(2) by striking ", and no derivatives transaction execution facility shall trade or execute such contracts of sale (or options on such contracts) for future delivery"; and

(3) by striking "or the derivatives transaction execution facility,".

(e) Section 2(a)(1)(C)(v)(I) of such Act (7 U.S.C. 2(a)(1)(C)(v)(I)) is amended by striking ", or any derivatives transaction execution facility on which such contract or option is traded,".

(f) Section 2(a)(1)(C)(v)(II) of such Act (7 U.S.C. 2(a)(1)(C)(v)(II)) is amended by striking "or derivatives transaction execution facility" each place it appears.

(g) Section 2(a)(1)(C)(v)(V) of such Act (7 U.S.C. 2(a)(1)(C)(v)(V)) is amended by striking "or registered derivatives transaction execution facility".

(h) Section 2(a)(1)(D)(i) of such Act (7 U.S.C. 2(a)(1)(D)(i)) is amended in the matter preceding subclause (I)—

(1) by striking "in, or register a derivatives transaction execution facility"; and

(2) by striking ", or registered as a derivatives transaction execution facility for,".

(i) Section 2(a)(1)(D)(i)(IV) of such Act (7 U.S.C. 2(a)(1)(D)(i)(IV)) is amended by striking "registered derivatives transaction execution facility," each place it appears.

(j) Section 2(a)(1)(D)(ii)(I) of such Act (7 U.S.C. 2(a)(1)(D)(ii)(I)) is amended to read as follows:

"(I) the transaction is conducted on or subject to the rules of a board of trade that has been designated by the Commission as a contract market in such security futures product; or".

(k) Section 2(a)(1)(D)(ii)(II) of such Act (7 U.S.C. 2(a)(1)(D)(ii)(II)) is amended by striking "or registered derivatives transaction execution facility".

(l) Section 2(a)(1)(D)(ii)(III) of such Act (7 U.S.C. 2(a)(1)(D)(ii)(III)) is amended by striking "or registered derivatives transaction execution facility member".

(m) Section 2(a)(9)(B)(ii) of such Act (7 U.S.C. 2(a)(9)(B)(ii)) is amended—

(1) by striking "or registration" each place it appears;

(2) by striking "or derivatives transaction execution facility" each place it appears;

(3) by striking "or register";

(4) by striking ", registering,"; and

(5) by striking ", registration,".

(n) Section 2(c)(2) of such Act (7 U.S.C. 2(c)(2)) is amended by striking "or a derivatives transaction execution facility" each place it appears.

(o) Section 4(a)(1) of such Act (7 U.S.C. 6(a)(1)) is amended by striking "or derivatives transaction execution facility".

(p) Section 4(c)(1) of such Act (7 U.S.C. 6(c)(1)) is amended—

(1) by striking "or registered" after "designated"; and

(2) by striking "or derivatives transaction execution facility".

(q) Section 4a(a)(1) of such Act (7 U.S.C. 6a(a)(1)) is amended—

(1) by striking "or derivatives transaction execution facilities"; and

(2) by striking"or derivatives transaction execution facility".

(r) Section 4a(e) of such Act (7 U.S.C. 6a(e)) is amended—

(1) by striking ", derivatives transaction execution facility," each place it appears; and

(2) by striking "or derivatives transaction execution facility".

(s) Section 4c(e) of such Act (7 U.S.C. 6c(g)), as so redesignated by section 402(a) of this Act, is amended by striking "or derivatives transaction execution facility" each place it appears.

(t) Section 4d of such Act (7 U.S.C. 6d) is amended by striking "or derivatives transaction execution facility" each place it appears.

(u) Section 4e of such Act (7 U.S.C. 6e) is amended by striking "or derivatives transaction execution facility".

(v) Section 4f(b) of such Act (7 U.S.C. 6f(b)) is amended by striking "or derivatives transaction execution facility" each place it appears.

(w) Section 4i of such Act (7 U.S.C. 6i) is amended by striking "or derivatives transaction execution facility".

(x) Section 4j(a) of such Act (7 U.S.C. 6j(a)) is amended by striking "and registered derivatives transaction execution facility".

(y) Section 4p(a) of such Act (7 U.S.C. 6p(a)) is amended by striking ", or derivatives transaction execution facilities".

(z) Section 4p(b) of such Act (7 U.S.C. 6p(b)) is amended by striking "derivatives transaction execution facility,".

(aa) Section 5c(f) of such Act (7 U.S.C. 7a-2(f)) is amended by striking "and registered derivatives transaction execution facility".

(bb) Section 5c(f)(1) of such Act (7 U.S.C. 7a-2(f)(1)) is amended by striking "or registered derivatives transaction execution facility".

(cc) Section 6 of such Act (7 U.S.C. 8) is amended—

(1) by striking "or registered";

(2) by striking "or derivatives transaction execution facility" each place it appears; and

(3) by striking "or registration" each place it appears.

(dd) Section 6a(a) of such Act (7 U.S.C. 10a(a)) is amended—

(1) by striking "or registered";

(2) by striking "or a derivatives transaction execution facility"; and

(3) by inserting "shall" before "exclude" the first place such term appears.

(ee) Section 6a(b) of such Act (7 U.S.C. 10a(b)) is amended—

(1) by striking "or registered"; and

(2) by striking "or a derivatives transaction execution facility".

(ff) Section 6d(1) of such Act (7 U.S.C. 13a-2(1)) is amended by striking "derivatives transaction execution facility,".

SEC. 411. ELIMINATION OF OBSOLETE REFERENCES TO EXEMPT BOARDS OF TRADE.

(a) Section 1a(19)(A)(x) of the Commodity Exchange Act (7 U.S.C. 1a(18)(A)(x)), as so redesignated by section 306(b)(1) of this Act, is amended by striking "or an exempt board of trade".

(b) Section 12(e)(1)(B)(i) of such Act (7 U.S.C. 16(e)(1)(B)(i)) is amended by striking "or exempt board of trade".

SEC. 412. ELIMINATION OF REPORT DUE IN 1986.

Section 26 of the Futures Trading Act of 1978 (7 U.S.C. 16a) is amended by striking subsection (b) and redesignating subsection (c) as subsection (b).

SEC. 413. COMPLIANCE REPORT FLEXIBILITY.

Section 4s(k)(3)(B) of the Commodity Exchange Act (7 U.S.C. 6s(k)(3)(B)) is amended to read as follows:

"(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

"(i) include a certification that, under penalty of law, the compliance report is materially accurate and complete; and

"(ii) be furnished at such time as the Commission determines by rule, regulation, or order, to be appropriate.".

SEC. 414. MISCELLANEOUS CORRECTIONS.

(a) Section 1a(13)(A)(i)(II) of the Commodity Exchange Act (7 U.S.C. 1a(12)(A)(i)(II)), as so redesignated by section 306(b)(1) of this Act, is amended by adding at the end a semicolon.

(b) Section 2(a)(1)(C)(ii)(III) of such Act (7 U.S.C. 2(a)(1)(C)(ii)(III)) is amended by moving the provision 2 ems to the right.

(c) Section 2(a)(1)(C)(iii) of such Act (7 U.S.C. 2(a)(1)(C)(iii)) is amended by moving the provision 2 ems to the right.

(d) Section 2(a)(1)(C)(iv) of such Act (7 U.S.C. 2(a)(1)(C)(iv)) is amended by striking "under or" and inserting "under".

(e) Section 2(a)(1)(C)(v) of such Act (7 U.S.C. 2(a)(1)(C)(v)) is amended by moving the provision 2 ems to the right.

(f) Section 2(a)(1)(C)(v)(VI) of such Act (7 U.S.C. 2(a)(1)(C)(v)(VI)) is amended by striking "III" and inserting "(III)".

(g) Section 2(c)(1) of such Act (7 U.S.C. 2(c)(1)) is amended by striking the 2nd comma.

(h) Section 4(c)(3)(H) of such Act (7 U.S.C. 6(c)(3)(H)) is amended by striking "state" and inserting "State".

(i) Section 4c(c) of such Act (7 U.S.C. 6c(c)) is amended to read as follows:

"(c) The Commission shall issue regulations to continue to permit the trading of options on contract markets under such terms and conditions that the Commission from time to time may prescribe.".

(j) Section 4d(b) of such Act (7 U.S.C. 6d(b)) is amended by striking "paragraph (2) of this section" and inserting "subsection (a)(2)".

(k) Section 4f(c)(3)(A) of such Act (7 U.S.C. 6f(c)(3)(A)) is amended by striking the 1st comma.

(l) Section 4f(c)(4)(A) of such Act (7 U.S.C. 6f(c)(4)(A)) is amended by striking "in developing" and inserting "In developing".

(m) Section 4f(c)(4)(B) of such Act (7 U.S.C. 6f(c)(4)(B)) is amended by striking "1817(a)" and inserting "1817(a))".

(n) Section 5 of such Act (7 U.S.C. 7) is amended by redesignating subsections (c) through (e) as subsections (b) through (d), respectively.

(o) Section 5b of such Act (7 U.S.C. 7a-1) is amended by redesignating subsection (k) as subsection (j).

(p) Section 5f(b)(1) of such Act (7 U.S.C. 7b-1(b)(1)) is amended by striking "section 5f" and inserting "this section".

(q) Section 6(a) of such Act (7 U.S.C. 8(a)) is amended by striking "the the" and inserting "the".

(r) Section 8a of such Act (7 U.S.C. 12a) is amended in each of paragraphs (2)(E) and (3)(B) by striking "Investors" and inserting "Investor".

(s) Section 9(a)(2) of such Act (7 U.S.C. 13(a)(2)) is amended by striking "subsection 4c" and inserting "section 4c".

(t) Section 12(b)(4) of such Act (7 U.S.C. 16(b)(4)) is amended by moving the provision 2 ems to the left.

(u) Section 14(a)(2) of such Act (7 U.S.C. 18(a)(2)) is amended by moving the provision 2 ems to the left.

(v) Section 17(b)(9)(D) of such Act (7 U.S.C. 21(b)(9)(D)) is amended by striking the semicolon and inserting a period.

(w) Section 17(b)(10)(C)(ii) of such Act (7 U.S.C. 21(b)(10)(C)(ii)) is amended by striking "and" at the end.

(x) Section 17(b)(11) of such Act (7 U.S.C. 21(b)(11)) is amended by striking the period and inserting a semicolon.

(y) Section 17(b)(12) of such Act (7 U.S.C. 21(b)(12)) is amended—

(1) by striking "(A)"; and

(2) by striking the period and inserting "; and".

(z) Section 17(b)(13) of such Act (7 U.S.C. 21(b)(13)) is amended by striking "A" and inserting "a".

(aa) Section 17 of such Act (7 U.S.C. 21), as amended by sections 101 through 103 of this Act, is amended by redesignating subsection (q), as added by section 233(5)

of Public Law 97–444, and subsections (s) through (w) as subsections (r) through (x), respectively.

(bb) Section 22(b)(3) of such Act (7 U.S.C. 25(b)(3)) is amended by striking "of registered" and inserting "of a registered".

(cc) Section 22(b)(4) of such Act (7 U.S.C. 25(b)(4)) is amended by inserting a comma after "entity".

BRIEF EXPLANATION

Title I—Customer Protections

The Commodity End-User Relief Act, H.R. 2289, will better protect farmers and ranchers who use the futures markets by cementing several new regulatory customer protections into law. Added protections include mandates to:

- Require regulators to electronically confirm customer fund account balances held at depository institutions. This eliminates the flawed reporting system that allowed the management of Peregrine Financial Group, Inc. to use forged paper documents to steal millions of dollars of customers' money.
- Require firms that move more than a certain percentage of customer funds from one account to another to follow strict reporting and permission requirements before doing so. This provides a new safeguard to prevent a firm from moving funds from one account to another, without regulators knowing about it, as happened during the MF Global, Inc. (MF Global) bankruptcy.
- Require firms who become undercapitalized to immediately notify regulators so they can assess the firm's viability and act, if needed, to protect customer funds.
- Require firms to file an annual report with regulators from the chief compliance officer containing an assessment of a futures commission merchant's (FCM) internal compliance programs.
- Ensure farmers, ranchers, and other futures customers have a full business day to send their margin payments to an FCM, which mitigates costs of over-funding accounts.
- Provide legal clarity for futures customers that the assets of a bankrupt commodity broker would be used to help pay back any misappropriated or illegally transferred customer segregated funds.

Title II—Commodity Futures Trading Commission Reforms

In the past five years, the U.S. Commodity Futures Trading Commission (CFTC) has finalized approximately 50 rules to enforce the new law. In that time span, the CFTC has also issued an unprecedented 258 "no-action" letters, 56 exemptive letters and 43 statements of guidance, interpretation and advice in order to delay, revise, or exempt the application of these regulations upon various market participants. This haphazard patchwork of exemptions has been widely used in lieu of a thorough and well-reasoned rulemaking process. H.R. 2289 reauthorizes the CFTC through 2019 and makes reforms to CFTC operations to help ensure that all Commissioners' voices are heard as a part of a more deliberative rulemaking process. These reforms include:

- Modifying the Commodity Exchange Act's (CEA's) cost-benefit analysis requirements for proposed rules, to more closely track those set forth in Executive Order 13563.
- Making the Commission's division directors answerable to the entire Commission, not just the Chairman's office.

• Creating a new Office of the Chief Economist answerable to the entire Commission, to provide objective economic data and analysis.
• Enhancing the CFTC staff procedures governing the issuance of "no-action" letters to improve Commissioners' oversight of the activities happening outside the official rulemaking process.
• Requiring the CFTC to develop a strategic technology plan every five years focused on market surveillance and risk detection, which must also include a detailed accounting of how funds provided for technology will be used.
• Requiring the Commission and the OCE to develop comprehensive internal risk control mechanisms to safeguard market data.
• Ensuring that every Commissioner has a seat at the table in approving the renewal of omnibus orders of investigation that authorize the issuance of subpoenas.
• Creating a judicial review process similar to that of the Securities and Exchange Commission's (SEC) for rulemakings to ensure the two regulators charged with overseeing the derivatives markets have similar procedures in place to allow market participants to challenge Commission rules.
• Prohibiting the Commission from issuing policy statements, guidance, interpretive rules, or other procedural rules that have the ultimate effect of law, without providing the public the notice and the opportunity to comment as required in the Administrative Procedure Act.
• Directing the Government Accountability Office (GAO) to conduct a study on the sufficiency of CFTC resources and examine prior expenditures of funds on market surveillance and market data collection, standardization, and harmonization. The study will also explore areas where self-regulatory organizations could reduce the CFTC's workload.
• Requiring the Commission to review and take action on the London Metal Exchange's application to register as a foreign board of trade in efforts to mitigate disruptive queues for aluminum and to promote a more efficient and transparent aluminum market.
• Providing greater protection of Commodity Pool Operators' (CPO) and Commodity Trading Advisors' (CTA) proprietary information that is submitted to the Commission on certain mandated disclosure documents.

Title III—End-User Relief

Title III of the Commodity End-User Relief Act addresses the concerns shared with the Committee by many end-users over the past four years. These market participants are not speculators or risk-takers, yet they have borne the brunt of many of the consequences of our new regulations. Agricultural producers, manufacturers, electric and gas utilities, and pension plans have each testified about how their business are facing new barriers to entering these markets—from increased transaction costs, to increased compliance burdens, to fewer trading partners. Title III addresses the following concerns:
• Companies using centralized treasury units to manage and offset the risk of their affiliates will no longer be subject to burdensome and unnecessary clearing requirements.

• Trusted foreign regulators should not—and often cannot—be required to indemnify the CFTC for costs associated with the loss of data from a U.S. Swap Data Repository. The legal concept of indemnification does not exist within the tort law of all foreign jurisdictions. The bill removes that unworkable provision of the CEA, while maintaining the requirement for written confidentiality agreements.

• Government-owned utilities should not be deterred from entering into swaps with non-financial counterparties, such as natural gas producers and independent power generators, in order to hedge against operational risk. The bill codifies municipal utility companies' cost-effective access to the customized, non-financial commodity swaps that utility special entities have used for years.

• Commercial end-users should not be classified and treated like banks, and the bill corrects the definition of "financial entity" to ensure that they are not.

• Non-financial end-users should not be disadvantaged in the marketplace if they use contracts that trade so infrequently that other market participants can identify them through the new public reporting requirements. The bill would ensure that end-users hedging in thinly-traded markets are provided adequate time between completing and reporting a transaction to protect their position.

• Grain elevators, farmers, agriculture counterparties, and commercial market participants should not be subject to overreaching recordkeeping rules that require the recording of all forms of communication that may possibly lead to a trade. The bill specifies that keeping written records of the final material economic terms of an agreement will be sufficient for market participants who are only managing their own money.

• Contracts that contain an option to change the amount of a commodity delivered, but result in actual physical delivery of a commodity should not be regulated as swaps. This impacts utilities that use natural gas to produce electricity, in addition to millions of consumers who use natural gas to heat their homes.

• Non-bank swap dealers should not be required to hold exponentially more capital than their bank counterparts. This bill would ensure that swap dealers without a prudential regulator would be able to use workable capital requirement formulas.

• On December 31, 2017, the *de minimis* exception from the swap dealer definition will be reduced by $5 billion because several years ago, the Commission arbitrarily decided it should. The bill will require a vote on a new regulation to change the current threshold, after the Commission completes a planned study on the issue.

• An oversight in the JOBS Act should not prohibit funds also registered as commodity pool operators from soliciting certain potential new investors. The bill makes a conforming change to CFTC regulations to bring them in line with the JOBS Act.

• End-users' ability to hedge against anticipated business risks should not be limited by the CFTC's arbitrary narrowing of acceptable hedging activities. The bill provides a more workable definition of *bona fide* hedging as it relates to position limits.

• In 50 rulemakings, the Commission still has not set out a rule that defines who is subject to U.S. rules, who is not subject to U.S.

rules, and what to do when international rules conflict. The bill would require the CFTC to finally put in place a comprehensive plan for how to address the international nature of swaps trading and to determine how to share regulatory obligations over transactions that cross international boundaries.

• Universities, churches, and other charitable organizations should have the full benefit of commodities investments that provide diversification, opportunities to hedge, and returns to their respective beneficiaries. The bill extends the long-standing exemptions present in securities laws to the commodities laws, to these charitable organizations, thus harmonizing the overarching regulatory structure and eliminating onerous registration requirements for these entities.

• Mutual funds that are extensively regulated by the SEC and that do not invest in traditional commodity interests should not be subject to unnecessary and duplicative CFTC registration requirements. The bill reverses part of a recent CFTC rule change and restores exclusive SEC jurisdiction over those funds that invest only in financial derivatives.

• Small banks and savings associations that manage risk through swaps entered into with their holding companies should not be subject to unnecessary clearing mandates. The bill addresses this by extending clearing exemptions granted to small banks and savings associations to the holding companies of those associations.

• Swap Execution Facilities (SEFs) should not be subject to regulations that impose significant costs and prescribe onerous burdens that impede development and potentially contribute to their failure. The bill provides SEFs with more flexibility and added certainty to allow for more efficient operations.

• Community financial institutions should be able to maintain affordable access to financial services that help them structure their products to meet the needs of the communities they serve and to prudently manage their balance sheets. The bill assures this continued access by clarifying that Federal Home Loan Bank advances should not be regulated as swaps.

Title IV—Technical Corrections

Working with the CFTC, House Legislative Counsel, and market participants, the Committee has prepared a section of technical edits and changes to the Commodity Exchange Act which correct references, remove obsolete terms, comport ambiguous text to existing practices, fix formatting errors, and remove a study due to Congress in 1986.

Purpose and Need

Title I—Customer Protections

When futures commission merchant (FCM) MF Global, Inc. (MF Global), failed in November of 2011 and Peregrine Financial Group, Inc. (Peregrine or PFG), followed suit in July of 2012, thousands of farmers, ranchers, and futures customers collectively lost more than a billion dollars in customer funds that were thought to be segregated by law apart from the funds of the FCMs. The bankruptcy of these two firms, caused by gross mismanagement or out-

right fraud, resulted in tremendous hardship for a large segment of the U.S. agricultural community and created serious public doubts about the safety of using the futures markets to manage risk. After both failures, the Committee held several hearings and heard from numerous witnesses over the course of the 112th, 113th, and 114th Congresses to examine why these failures occurred and how public confidence could be restored in the futures markets.

As a result of the Committee's work, Title I of H.R. 2289 is designed to better protect futures customers and restore confidence in the marketplace while also providing regulators with enhanced tools to supervise FCMs. Importantly, sections 101, 102 and 103 of H.R. 2289 would codify regulatory changes already implemented by both the National Futures Association (NFA) and the CFTC, therefore the Committee does not intend for any of these sections to require new rulemakings by the NFA or CFTC in order to implement the requirements of the legislation. Section 104, however, contains statutory changes that are in conflict with existing CFTC regulations, so the Committee would expect expedited action from the CFTC to conform its regulations to the legislation when enacted into law to provide for certainty in the marketplace.

Section 101—Enhanced protections for futures customers

After MF Global filed for bankruptcy, it was revealed that in the final days before the firm's failure, customer segregated funds (cash deposits, securities, or other property of customers held by the firm to margin or guarantee futures trading) were used to fund the company's liquidity needs related to aggressive and ultimately ill-advised investments in European sovereign debt securities. Section 101 would provide the NFA and CFTC with the statutory authority to help supervise and prevent future mismanagement involving the illegal transfer of customer segregated funds.

Accordingly, Section 101 would broadly codify regulatory changes proposed by the NFA, and approved by the CFTC in July 2012 (NFA Financial Requirements Section 16), requiring FCMs to strengthen their controls over the treatment and monitoring of funds held for customers trading in the U.S. ("segregated") and foreign ("Part 30 secured") futures and options markets. Notable changes contained in the new NFA rules that would meet the statutory requirements of Section 101 include: (1) FCMs must now hold sufficient funds in Part 30 secured accounts to meet their total obligations to customer trading; (2) FCMs must maintain written policies and procedures governing the maintenance of excess (i.e., proprietary or residual) funds in customer segregated and Part 30 secured trading accounts; (3) any withdrawals of more than 25% of the excess segregated or Part 30 secured funds that are not for the benefit of customers must be pre-approved in writing by the FCM's senior management; and (4) FCMs must file notice with the NFA of any withdrawal of 25% or more of the excess segregated or Part 30 secured amount funds that are not for the benefit of customers.

On July 25, 2012, at a hearing entitled "Oversight of the Swaps and Futures Markets: Recent Events and Impending Regulatory Reforms," the following testimony was provided by witnesses with respect to NFA provisions incorporated in Section 101:

> All of these rule changes promote greater transparency for both customers and regulators and should help prevent a recurrence of the type of problems we saw at MF Global. These rule changes, however, are only the beginning. The MF Global and Peregrine customer losses are a painful reminder that we must continuously improve our surveillance, audit and fraud detection techniques to keep pace with changing technology and an ever-more-complicated financial marketplace.
> —Mr. Daniel Roth, President, NFA

> In direct response to the MFG collapse, the "Corzine Rule" will be implemented on September 1st. The "Corzine Rule" requires the CEO or CFO of the FCM to pre-approve in writing any disbursement of customer segregated funds not made for the benefit of customers and that exceeds 25% of the firm's excess segregated funds. The CME (or other [self-regulatory organizations (SRO)] must be immediately notified of the pre-approval.
> —Mr. Terrance A. Duffy, Executive Chairman & President, CME Group Inc. (CME)

> We also recommended and supported rules adopted by the Chicago Mercantile Exchange and National Futures Association that subject all FCMs to enhanced record-keeping and reporting obligations, including . . . requiring the chief financial officer or other appropriate senior officer to authorize in writing and promptly notify the FCM's [designated self-regulatory organization (DSRO)] whenever an FCM seeks to withdraw more than 25 percent of its excess funds from the customer segregated account in any day. These changes have now been approved by the Commission.
> —Hon. Walt Lukken, President & Chief Executive Officer, Futures Industry Association (FIA)

On March 14, 2013, at a hearing entitled "Examining Legislative Improvements to Title VII of the Dodd-Frank Act," the Hon. Gary Gensler, Chairman, CFTC, provided the following testimony with respect to provisions that were ultimately included in Section 101:

> The Commission also worked closely with market participants on new customer protection rules adopted by the self-regulatory organization (SRO), the National Futures Association (NFA). These include requiring FCMs to hold sufficient funds for U.S. foreign futures and options customers trading on foreign contract markets (in Part 30 secured accounts). Starting last year, they must meet their total obligations to customers trading on foreign markets under the net liquidating equity method. In addition, withdrawals of 25 percent or more of excess segregated funds would necessitate pre-approval in writing by senior management and must be reported to the designated SRO and the CFTC.

On May 21, 2013, testifying before the Committee at a hearing entitled "The Future of the CFTC: Market Perspectives," Mr. Dan-

iel Roth, President, NFA, provided the following testimony with respect to the provisions included in Section 101:

> All FCMs maintain excess segregated funds. These are funds deposited by the FCM into customer segregated accounts to act as a buffer in the event of customer defaults. Because these funds belong to the FCM, the FCM is free to withdraw the excess funds, but after MF Global, NFA and the CME adopted rules to ensure notice to regulators and accountability within the firm. Now all FCMs must provide regulators with immediate notification if they draw down their excess segregated funds by 25% in any given day. Such withdrawals must be approved by the CEO, CFO or a financial principal of the firm and the principal must certify that the firm remains in compliance with segregation requirements. This rule became effective on September 1, 2012.

Section 102—Electronic confirmation of customer funds

On Monday, July 9, 2012, the founder and Chairman of Peregrine, Russell R. Wasendorf Sr., unsuccessfully attempted suicide outside of the firm's Cedar Falls, Iowa, headquarters. He left a note admitting to producing elaborate forgeries of bank documents submitted to regulators. In court filings the next day, the CFTC alleged that Peregrine and Wasendorf "committed fraud by misappropriating customer funds, violated customer fund segregation laws, and made false statements in financial statements filed with the [CFTC]" and that Wasendorf may have falsified certain bank records. According to press reports, Mr. Wasendorf's suicide attempt, which led to the discovery of the fraud, occurred only days after the NFA first required Peregrine to electronically confirm customer balances directly through a third-party electronic auditing system with Peregrine's banks. Prior to this requirement, self regulatory organizations such as the NFA and CME had relied on paper statements from an FCM's bank.

Section 102 would provide broad statutory authority to codify regulatory changes first proposed in 2012 by a special committee composed of futures industry SROs (including CME, NFA, Inter-Continental Exchange, the Kansas City Board of Trade, and the Minneapolis Grain Exchange) to require: (1) confirmation of the balances of customer segregated bank accounts for all FCMs using a web-based electronic confirmation process; (2) all FCMs to provide their designated-SRO with direct online access to confirm segregated and secured funds balances at the banks which hold the FCM's customer segregated and secured funds; and (3) any bank that fails to provide electronic online access will not be considered an acceptable depository for holding customer segregated and secured funds.

Notably, in light of the Peregrine fraud, Section 102 would also provide the statutory authority for regulations that require FCMs to file segregation and Part 30 secured amount computations on a daily basis with the NFA. Additionally, FCMs must file with the NFA detailed information regarding the banks holding customer funds and the investments made with customer funds as of the 15th and last business day of each month.

On July 25, 2012, at a hearing entitled "Oversight of the Swaps and Futures Markets: Recent Events and Impending Regulatory Reforms," the following testimony was provided by witnesses with respect to provisions the Committee decided to include in Section 102:

> NFA intends to expand this approach, once it is implemented, to receive daily reports from all depositories for customer segregated accounts, including clearing FCMs. We will develop a program to compare these balances with those reported by the firms in their daily segregation reports. While there may be reconciling items due to pending additions and withdrawals, the system will generate an immediate alert for any material discrepancies. We have also agreed with the CME to perform an immediate confirmation of all customer segregated bank accounts for all of our FCM Members using the e-confirmation process I referred to earlier. The completion of this work within the next week or so should help ensure that another Peregrine is not lurking in the industry.
> —Mr. Daniel Roth, President, NFA
>
> First, FIA strongly supports providing regulators with the independent ability to electronically review and confirm customer segregated balances across every FCM at any time. Second, FIA supports the creation of an automated confirmation process for segregated funds that will provide regulators with timely information that customer funds are secure. Technology solutions can help prevent this type of event from occurring again.
> —Hon. Walt Lukken, President and Chief Executive Officer, FIA

On October 2, 2013, testifying before the Committee at a hearing entitled "The Future of the CFTC: Perspectives on Customer Protections," Mr. Daniel Roth, President, NFA, provided the following testimony:

> For years, NFA and other SROs confirmed FCM reports regarding the customer segregated funds held by the FCM through traditional paper confirmations mailed to the banks holding those funds. These confirmations were done as part of the annual examination process. In early 2012 NFA began confirming bank balances electronically through an e-confirm process. That change led to the discovery of the fraud at PFG, but e-confirms were still done as part of the annual examination. We had to find a better way and we did. We partnered with the CME and developed a process by which NFA and the CME confirm all balances in all customer segregated bank accounts on a daily basis. FCMs file daily reports with NFA and the CME, reflecting the amount of customer funds the FCM is holding. Through a third-party vendor, NFA and CME get daily reports from banks for the over 2,000 customer segregated bank accounts maintained by FCMs. We then perform an automated comparison of the reports from the FCMs and the reports from the banks to identify any suspicious discrepancies. In short, Mr. Chairman, the process

> by which we monitor FCMs for segregated fund compliance is now far ahead of where it was just one year ago. We have recently expanded this system to also obtain daily confirmations from clearing firms and will expand it again by the end of the year to include clearinghouses as well.

Section 103—Notice and certifications providing additional customer protections

On October 22, 2012, the CFTC proposed additional rules to enhance several aspects of supervision in order to better protect customers of FCMs. Just over a year later, these new rules were finalized and adopted by the CFTC. In order to codify the CFTC's authority to increase customer protections, Section 103 would require that FCMs notify both the CFTC and the appropriate SRO when they become under-capitalized or under-segregated. By legally requiring that an FCM notify authorities as soon as the firm is faced with an undercapitalization scenario, regulators will have the power to step in and take preventative or corrective action to protect customer segregated funds. This would help prevent the same type of harm to customers that occurred when MF Global illegally transferred hundreds of millions of dollars of customer segregated funds to cover its trading shortfalls.

Similarly, Section 103 requires FCMs to file a report at the end of each fiscal year that details an assessment of an FCM's internal compliance programs so the Commission can evaluate whether the controls are adequate or need to be improved or modified.

On October 2, 2013, testifying before the Committee at a hearing entitled "The Future of the CFTC: Perspectives on Customer Protections," Mr. Daniel Roth, President, NFA, provided the following testimony with respect to the CFTC's provisions included in Section 103:

> The Commission also proposed its own changes to customer protection rules in a 107-page Federal Register release last year. Certain parts of the Commission's proposals have provoked strong opposition both from the industry and from end-users of the markets, particularly in the agricultural sector. As described below, NFA shares many of the concerns raised by others, but we fully support many of the Commission's proposals. For example, the Commission's proposed rules would:
>
> • Require SROs to expand their testing of FCM internal controls and develop more sophisticated measures of the risks posed by each FCM;
>
> • Require that FCM certified annual financial reports and reports from the chief compliance officer be filed within 60 days of the firm's fiscal year end;
>
> • Require that an FCM that is undercapitalized provide immediate notice to the Commission and its DSRO . . .

Section 104—Futures Commission Merchant compliance

In October 2013, the CFTC adopted rules regarding the posting of margin that it said were designed to prevent a MF Global level failure from recurring and to protect customers in the event of such a failure. The rule adopted by the CFTC requires FCMs to deposit their own funds into the customer segregated account to cover each

undermargined customer's shortfall. This deposit is known as the "residual interest" and it affects when customers must respond to a margin call by their FCM.

Specifically, the CFTC has required FCMs to deposit enough of the firm's money in the customer segregated account to cover any customer's undermargined accounts, as calculated, by the start of the next business day. The rule also contained a phased-in compliance schedule through December 31, 2018, that would have temporarily allowed FCM's to make their residual interest deposit by 6:00 p.m. the next business day.

While customers previously had three business days to respond to a margin call, market participants worried that the new rule would incentivize FCMs to require customers to meet all margin calls by 9:00 a.m. at the start of the next business day. Market participants asked the CFTC to amend the rule and permanently set the residual interest deadline to 6:00 PM on the day following a trade, eliminating the 9:00 a.m. deadline.

On March 18, 2015, the CFTC amended its rule by removing the December 31, 2018 termination date of the phased-in compliance period. The rule effectively extends the phase-in period indefinitely, while still maintaining in regulation an eventual 9:00 a.m. residual interest deadline, pending the completion of a study by CFTC staff and a Commission vote. As a result, the deadline would not move to earlier than 6:00 pm the day of settlement, without an affirmative CFTC action and an opportunity for public comment.

On March 25, 2015, at a hearing entitled "Reauthorizing the CFTC: Market Participant Views," Mr. Terrance A. Duffy, Executive Chairman & President, CME, provided the following testimony with respect to the provisions included in Section 104:

> CME remains fully committed to protecting Futures Commission Merchants ("FCM") customers against the full range of wrongful FCM misconduct that may result in loss of customer funds. In 2012, the CFTC proposed a rule that, under a phased-in schedule, would have required an FCM to maintain at all times a sufficient amount of its own funds ("residual interest") in customer-segregated accounts to equal or exceed the total amount of its customers' margin deficiencies. As noted in prior testimony, no system exists to enable an FCM to continuously and accurately calculate customer margin deficiencies in real time. The net result would be that either FCMs would be forced to post their own collateral into customer accounts, or customers would be forced to over-collateralize their margin accounts at all times. Neither outcome constitutes an efficient use of capital and would effectively render derivatives markets prohibitively expensive and unusable for end-users.
>
> We applaud the CFTC for moving away from the "at all times" requirement and further eliminating last week the automatic acceleration in 2018 of the posting deadline to a time occurring earlier than 6:00 pm the day of settlement. This Committee codified in the Reauthorization Bill passed by the House last Congress a provision that would permanently establish the residual interest posting deadline at the end of each business day, calculated as of the

close of business the previous business day. CME again supports the inclusion of such a provision in any Reauthorization Bill considered by the Committee during the current Congress.

In order to address the significant concerns voiced by market participants, regulators, and other stakeholders, the Committee directs the CFTC, in carrying out the requirements of Section 104, to consider an FCM in compliance with any requirements to use its own proprietary funds, in the form of residual interest, to satisfy margin deficits of the FCM's customers if such requirements are met at the end of the first business day following a trade date.

Section 105—Certainty for futures customers and market participants

CFTC Regulation 190.08(a)(1)(ii)(J) (17 C.F.R. 190) defines customer property as including "cash, securities or other property of the debtor's estate, including the debtor's trading or operating accounts and commodities of the debtor held in inventory, but only to the extent that the property enumerated is insufficient to satisfy in full all claims of public customers." The Committee's plain reading of this CFTC regulation is that property of the debtor FCM, even though not held as customer property, becomes customer property to the extent necessary to satisfy net equity claims of "public customers," who are defined in Regulation 190.01 as all customers *other than* certain control persons, affiliates, and related parties (i.e.: non-public customers). In effect, in order to protect the funds of customers held in segregation, Regulation 190.08 subordinates the claims of non-public customers and non-customer creditors, other than properly perfected liens on such property of the debtor, to the claims of public customers with respect to the property of the FCM that was not held (and not required to be held) as customer property.

However, in 2000, doubts as to the validity of Regulation 190.08(a)(1)(ii)(J) arose after a federal bankruptcy court (*In re Griffin Trading Co.*, 245 B.R. 291 (Bankr. N.D. Ill. 2000)) rejected an attempt by the trustee to use a bankrupt commodity broker's estate to pay shortfalls in the customer accounts. Among the issues in the case, which was later settled and the court's holding vacated therefore resulting in no binding judicial precedent, was whether the CFTC's broad definition of "customer property" in Regulation 190.08 would determine which assets could be used to repay customers. The court found that the CFTC exceeded its statutory authority in enacting Regulation 190.08 with a definition of customer property more expansive than that used in the U.S. bankruptcy code. Further, the court found that, "any shortfall in the customer property as defined in [the bankruptcy code] must be treated as a general unsecured claim." This vacated court decision has left uncertainty about whether, in the event that customer assets are insufficient to cover all customer claims, customers can have first priority to an FCM's general estate assets until all customer claims are paid in full.

On March 24, 2015, testifying at a hearing entitled "Reauthorizing the CFTC: Market Participant Views," Mr. Daniel Roth, President, NFA, provided the following testimony with respect to the need for the provisions included in Section 105:

> The CFTC, a long time ago, had adopted a rule that provided that if an FCM was in bankruptcy, and if there was a shortfall in segregated funds, then customers received priority over all the other creditors of the FCM, and that was a good rule. That rule has served the industry well, it has served the customers well.
>
> Unfortunately, a few years ago a lower court opinion cast some doubt on the validity of that rule. The court had questioned the CFTC's authority to adopt the rule that it had adopted. Last year's bill contained language to clarify that point, and to make clear that the Commission did have the authority to adopt that rule. We supported that rule—that provision then, we support it now. We hope it is in the bill that comes out of this Committee this year.

In order to provide clarity for the marketplace and make clear that the CFTC did not exceed its authority to promulgate Regulation 190.08 under Section 20(a) of the CEA, the Committee intends for Section 105 to provide for the broad use of the assets of a commodity broker's estate, other than secured property (such as property held at a clearinghouse, including offset or netting rights of creditors with respect to such type of property), to satisfy shortfalls in customer property beyond what was held in customer segregated accounts at the time of a firm's failure.

Title 2—Commodity Futures Trading Commission Reforms

Section 201—Extension of operations

The most recent reauthorization for CFTC budgetary appropriations was approved in 2008 as a part of the Food, Conservation and Energy Act (P.L. 110–246), prior to the financial crisis of 2008 and the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111–203) (Dodd-Frank Act). That statutory authorization expired September 30, 2013. Although the CFTC relied on unauthorized appropriations between 2005 and 2008, successful legislative reauthorizations occurred in 1978, 1983, 1986, 1992, 1995, and 2000. Section 201 would reauthorize the Commission to receive budgetary appropriations through 2019.

Section 202—Consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders

Section 15(a) of the Commodity Exchange Act sets forth requirements for the CFTC to consider the costs and benefits of the Commission's actions. In its proposed rules, however, the CFTC identifies the limitations of Section 15(a) in requiring cost-benefit analysis, stating "[b]y its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission 'consider' the costs and benefits of its actions."

Consequently, the CFTC's Office of Inspector General (OIG) issued an investigative report in April of 2011 that examined the cost-benefit analysis performed by the Commission in connection with the Dodd-Frank Act rulemakings. In that report, the OIG stated "[I]t is clear that the Commission staff viewed section 15(a)

compliance to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of the Chief Economist . . . [w]e do not believe this approach enhanced the economic analysis performed. . . .''

On January 18, 2011, President Obama issued Executive Order No. 13563, which requires non-independent executive branch agencies to conduct cost-benefit analyses to ensure that both the quantitative and qualitative costs and benefits of proposed rulemakings are taken into account. The Executive Order also requires that regulations be accessible, consistent, written in plain language, and easy to understand. Because the CFTC is an independent agency, it was not required to abide by the order for any of its Dodd-Frank Act rulemakings.

As the CFTC continues to advance new rules that govern a large sector of the derivatives marketplace for the first time, this section raises the legal standard for cost-benefit analysis and evaluation. Further, the legislation is intended to operate consistently with Executive Order 13563. However, so as to not disrupt the regulatory process, this legislation is not retroactive in nature and would not impact previously proposed or finalized rules promulgated by the CFTC.

On March, 14, 2013, at a hearing entitled ''Examining Legislative Improvements to Title VII of the Dodd-Frank Act,'' the following testimony was provided with respect to provisions included in Section 202:

> SIFMA has encouraged regulators to conduct comprehensive cost-benefit analysis for all Dodd-Frank Rules. This is consistent with the Obama Administration's efforts to promote better cost benefit analysis for Federal agencies through Executive Order 13563, which requires all agencies proposing or adopting regulations to include cost-benefit analyses in an attempt to minimize burdens, maximize net benefits and specify performance objectives. The President also stated that regulations should be subject to meaningful public comment, be harmonized across agencies, ensure objectivity and be subject to periodic review. In 2012, in testimony before the House Committee on Government Reform, SEC Chairman Schapiro stated ''I continue to be committed to ensuring that the Commission engages in sound, robust economic analysis in its rulemaking, in furtherance of the Commission's statutory mission, and will continue to work to enhance both the process and substance of that analysis.'' Congressman Conaway has introduced legislation (H.R. 1003) that would require the CFTC's cost-benefit analysis to be both quantitative and qualitative and specifies in greater detail the costs and benefits that the CFTC must take into account as part of their cost-benefit analyses.
>
> —Hon. Kenneth E. Bentsen, Acting President and CEO, the Securities Industry and Financial Markets Association (SIFMA)

> Finally, because of our experience with the $25 million sub-threshold, we are intrigued by another bipartisan bill

> recently introduced in the House. The legislation, H.R. 1003, would require the CFTC to quantify the costs and benefits of future regulations and orders. Sadly, the legislation is prospective, but we believe that had such an analysis been made, it could have prevented the turmoil currently being caused by the $25 million special entity subthreshold.
> —Mr. Terrance P. Naulty, General Manager and CEO, Owensboro Municipal Utilities (Owensboro, KY)

On May 21, 2013, at a hearing entitled "The Future of the CFTC: Market Perspectives," Mr. Stephen O'Connor, the then-Chairman, International Swaps and Derivatives Association, Inc. (ISDA), provided the following testimony with respect to provisions included in Section 202:

> An appropriate cost-benefit analysis was both required and desirable prior to finalization of rules; however in a number of instances the CFTC's analysis did not comply with the regulatory standard. As the Jun. 2012 report by the CFTC Inspector General stated: "Generally speaking, it appears CFTC employees did not consider quantifying costs when conducting cost-benefit analyses for the definitions rule. As indicated in the rule's preamble, the costs and benefits associated with coverage under the various definitions (in light of the various regulatory burdens that could eventually be associated with coverage) were not addressed . . ." The lack of an appropriate cost-benefit analysis makes it especially important that the application and implementation of the final rules be phased in a flexible manner. Doing so would help ensure that rules achieve the purposes for which they are intended and do not impose burdensome costs on the financial system. It would also help regulators to identify and avoid unintended consequences of their actions. And it would encourage regulators to properly allocate limited resources.

Section 203—Division Directors

In order to ensure Division Directors are responsive to the entire Commission, this section requires that the heads of each of the units of the Commission serve at the pleasure of the Commission. Given this language is modeled after identical language currently in the CEA applicable to the General Counsel and the Executive Director, the Committee expects this section to be implemented in a similar manner to those two positions.

Section 204—Office of the Chief Economist

In order to enhance the legitimacy of economic analysis of rules promulgated by the Commission, this section establishes an Office of the Chief Economist with structure and power mirroring that of the Office of General Counsel. Again, to prevent the Chief Economist from serving solely at the pleasure of the Chairman, this section establishes that the Chief Economist will be appointed by the Commission, report directly to the Commission, and perform functions at the request of Commissioners in a manner similar to the General Counsel and the Executive Director.

Section 205—Procedures governing actions taken by commission staff

As of April 9, 2015, CFTC staff issued 258 no-action letters, 56 exemptive letters and 43 statements of guidance, interpretation and advice to implement the Dodd-Frank Act mandates. At least 24 of these no-action letters are self-described as permanent. At times, "no-action" letters provide market participants with guidance on how the Enforcement Division staff of the CFTC would act in the event of market emergencies or would interpret recently proposed rules, at least in the short term. However, it appears that over the past three years, staff "no-action" letters have become commonplace to revise the implementation of key regulations of the Dodd-Frank Act, and as such do not require a vote of the Commission. Additionally, regardless of a designation as permanent, "no-action" letters are still non-binding in the legal sense that CFTC staff could decide to withdraw the letter at any time or the Commission could take a different position and overrule the letter.

On July 23, 2013, at a hearing entitled "The Future of the CFTC: Commission Perspectives," CFTC Commissioner Scott O'Malia provided the following testimony with respect to problems with this approach:

> [I]nstead of undertaking Commission action to amend problematic rules, CFTC staff has issued an unprecedented number of no-action letters, some of which are indefinite and have no expiration. So far, CTFC staff has issued over 100 no-action letters granting relief from its new regulations under Dodd-Frank, and I won't be surprised if this number continues to grow. No-action letters are not voted on by the Commission and are not published in the Federal Register. They do not include comment periods and many impose conditions on affected parties. This process is at odds with basic principles of the APA, like public participation and the opportunity to be heard. It also goes against President Obama's Executive Orders Nos. 13563 and 13579, mandating that administrative agencies "create an unprecedented level of openness in Government" and "establish a system of transparency, public participation, and collaboration."

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," CFTC Commissioner Chris Giancarlo provided the following testimony with respect to the provisions included in Section 205:

> Congressman, I think you have put your finger on it. The problem with the abuse of the no-action letter process is it erodes the public's confidence in the agency's undertaking of its responsibilities, and secondly, it thwarts our ability—it stymies our ability as an agency to inculcate a compliance culture in the companies that we oversee. It really hurts our own reputation and it makes it harder for us to do our job in terms of the companies we regulate.

In order to bring policy making back to a more open and transparent manner, Section 205 requires that the Commission be provided with sufficient notice to review the matter prior to any divi-

sion or office of the Commission issuing a response to a formal, written petition for an exemptive, no-action or interpretive letter. The Committee would view any attempt to needlessly delay providing notice to the Commission until a regulatory deadline, or until need for no-action relief is imminent (so as to avoid the statutorily required sufficient notice review period) as a violation of the requirements contained in Section 205.

Section 206—Strategic technology plan

On July 23, 2013, at a hearing entitled "The Future of the CFTC: Commission Perspectives," Commissioner O'Malia provided the following testimony with respect to the need for provisions the Committee included in Section 206:

> A critically important component to any solution for the Commission's approach to its greatly expanded mission is the use of technology in order to accept, sort, aggregate, and analyze the new sources of market information provided for under the Dodd-Frank Act. I'd like to highlight two major challenges in data and technology: (1) problems faced by market participants in the swap data reporting rules and (2) problems faced by the Commission in understanding the massive data flows as a result of our enhanced oversight of the swaps and futures markets . . . [g]iven the Commission's expanded regulatory responsibilities, it is imperative for the Commission to develop a technology plan that can assist the Commission with meeting its regulatory objective. I believe the Commission must develop a five-year strategic plan that is focused on technology, with annual milestones and budgets. To keep up to speed with the challenges of enhanced regulatory oversight, this technology plan would require each CFTC division to develop a technology budget that reflects the regulatory needs and responsibilities of that particular division.

In order to solve the problems enumerated by Commissioner O'Malia, Section 206 requires the Commission to develop and file a strategic technology plan every 5 years with the House and Senate Agriculture Committees. The plan shall include a detailed technology strategy focused on market surveillance and risk detection, market data collection, aggregation, interpretation, normalization, standardization, harmonization, streamlining, and internal management and protection of data collected by the Commission. The report must also include a detailed accounting of how appropriated funds provided for technology will be used, and set annual goals to be accomplished along with the annual budgets necessary to accomplish those goals.

Section 207—Internal risk controls

On December 14, 2012, it was widely reported that CME wrote a letter to the CFTC expressing concern that confidential and sensitive market data had been shared with non-CFTC employees who then used the data to write academic papers. CME attorneys claimed that the use of the data for the preparation of non-Commission sponsored publications was a violation of federal law

meant to protect trade secrets. At least two academic papers written on the subject of high-frequency trading were either co-written or advised by Andrei Kirilenko during his time as the CFTC Chief Economist. Upon leaving the CFTC in late 2012, Kirilenko took a position at MIT. As a result of the CME letter and corresponding internal investigation, the CFTC halted the research program which allowed outside academic researchers and economists almost unlimited access to proprietary trading information across various markets, and the CFTC OIG launched an internal investigation.

On July 23, 2013, at a hearing entitled "The Future of the CFTC: Commission Perspectives," Commissioner O'Malia provided the following testimony:

> Currently, the Commission's Inspector General is investigating whether or not market data was properly controlled by the Office of the Chief Economist when visiting scholars/contractors were assisting the Office of the Chief Economist in research efforts. While I support collaborative study programs that bring in new and innovative thinking, it is vital that the Commission has policies and procedures in place to protect against the illegal release of market data.

On March 21, 2014, a heavily redacted version of the CFTC's OIG report was released to the public. In this report, the OIG found that:

> The administrative review revealed that there had been poor recordkeeping with regard to the so-called "on-boarding" process for OCE economists. The deficiencies included inadequate documentation of security clearances, issues regarding nondisclosure agreements, and non-submission of employment data to the National Finance Center, as well as incomplete personnel forms, one contract lacking the contractor's signature, and other administrative errors. There were no indications of fraud by OCE economists, or that OCE economists were not actually appointed by the Chief Economist, just a number of administrative errors pertaining to the Agency's so-called on-boarding process. The review also uncovered information security concerns. Specifically, personally owned external hard drives and thumb drives were found in close vicinity to the computers that served the OCE economists. In addition, badges for former CFTC OCE economists were located in the Chief Economist's desk.

With respect to the potentially harmful data breaches that occurred at the CFTC and the need to correct them to ensure integrity of the marketplace, the OIG's report concluded that:

> We agree that the physical and information technology concerns exist; however, they are Agency-wide, and are currently being addressed at least in part in connection with an OIG audit of CFTC's Fiscal Year 2013 implementation of the Federal Information Security Management Act. The absence of controls is significant: lacking a reliable way to determine whether confidential information was improperly taken from the CFTC, we will not jump to

> the conclusion that misconduct did or did not occur based on contradictory opinions of Agency employees. We can make no finding.

To guard against these sorts of leaks, this section requires the Commission, led by the Chief Economist, to develop internal risk control mechanisms to safeguard the storage and privacy of market data by the Commission. Special attention should be given to market data sharing agreements and academic research performed at the Commission using market data.

Section 208—Subpoena duration and renewal

On July 23, 2013, at a hearing entitled "The Future of the CFTC: Commission Perspectives," Commissioner O'Malia provided the following testimony with respect to his concerns on the operation of the Commission's omnibus orders of investigation:

> CFTC regulations ensure that the Commission is made accountable for all enforcement matters by requiring a Commission order to initiate investigations by the Division of Enforcement. Just recently, I dissented on an enforcement matter that involved a radical procedural shift in the authorization of investigations for potential violations of the CEA. What I found troubling is that the Division of Enforcement sought to circumvent the powers of the Commission by proposing to bring investigations on a summary basis through the use of an "absent objection" process. I was surprised to be advised by the Commission's Office of General Counsel that the Commission cannot block a staff-initiated absent objection circulation because this process is not a Commission "vote." To ensure fairness in terms of true separation of functions, Congress gave power to the members of the Commission to reconsider CFTC staff recommendations by independently assessing facts and legal justifications for initiating various actions. In other words, Congress intended that any decision to bring an investigation by the CFTC is reflective of a shared opinion of the majority of the Commissioners, rather than a unilateral assessment by the Division of Enforcement's staff. The new absent objection process described by the Office of General Counsel is a clear abrogation of the Commission's powers and a violation of Commission rules relating to investigations.

In order to ensure continuing investigations by the Commission's Division of Enforcement are warranted and properly reviewed by the Commission, Section 208 provides that Commission omnibus orders of investigation shall be for a finite period and renewed only by Commission vote.

Section 209—Applicability of notice and comment requirements of the Administrative Procedure Act to guidance voted on by the Commission

As the Committee learned from numerous witnesses through testimony and saw firsthand through press reports and letters from foreign financial regulators, the Commission voted on guidance to interpret key provisions of the cross-border provisions of the Dodd-

Frank Act instead of conducting rulemaking under the Administrative Procedure Act (APA). The Commission now has a set of guidelines to govern the cross-border application of the Dodd-Frank Act, setting up probable legal conflicts between the CFTC's guidance and the SEC's proposed cross border rule that followed all requirements of the law and allowed for extensive public comment. Concerns about "guidance" that has the practical effect of an official rulemaking was described in testimony before the Committee on March 14, 2013, by the Hon. Kenneth E. Bentsen, Acting President and CEO, SIFMA, when he stated that:

> [E]qually significant, the CFTC has issued its proposed cross-border release as "guidance" rather than as formal rulemaking process subject to the Administrative Procedure Act. By doing so, the CFTC avoids the need to conduct a cost-benefit analysis, which is critical for ensuring that the CFTC appropriately weighs any costs imposed on market participants as a result of implementing an overly broad and complex U.S. person definition against perceived benefits.

On July 23, 2013, at a hearing entitled "The Future of the CFTC: Commission Perspectives," Commissioner O'Malia voiced additional concerns in testimony about the approach taken by the Commission:

> I believe that putting the label of "guidance" on this document did not change its content or consequences. The courts have held that when agency action has the practical effect of binding parties within its scope, it has the force and effect of law, regardless of the name it is given. Legally binding regulations that impose new obligations on affected parties—"legislative rules"—must conform to the APA. As a threshold matter, the cross-border swaps guidance rests on thin statutory authority, because Congress limited the extraterritorial application of U.S. swap regulations, and therefore the CFTC's jurisdiction, to foreign activities that have a "direct and significant" impact on the U.S. economy. Despite the statutory limitation, the cross-border swaps guidance sets out standards that it applies to virtually all cross-border activities in the swaps markets, in a broad manner similar to the application of the swap dealer definition to market participants. For practical reasons, market participants cannot afford to ignore detailed regulations imposed upon their activities that may result in enforcement or other penalizing action. Accordingly, I believe that the cross-border swaps guidance has a practical binding effect on market participants and it should have been promulgated as a legislative rule under the APA. Similarly, I cannot support any future interpretive guidance that would be more properly issued as a notice-and-comment rulemaking.

In an attempt to address concerns highlighted above, Section 209 applies the notice and comment provisions of the APA to any future guidance, statements and interpretive rules, general statements of policy, and rules of Commission organization, procedure, or prac-

tice, that implement, interpret or prescribe law or policy that are voted on by the Commission. Importantly, to ensure responsiveness to the regulated marketplace, the Committee does not intend for Section 209 to apply to any guidance provided by Commission staff in response to inquiries from the public.

Section 210—Judicial Review of Commission Rules

In order to address concerns from stakeholders regarding the process by which to fairly and efficiently challenge CFTC final rules in court, Section 210 aligns the CFTC judicial review process with that of the SEC set forth in section 25(b) of the Securities Exchange Act of 1934. As such, the Committee intends for Section 210 to allow for the review of a CFTC final rule in the United States Court of Appeals for the District of Columbia Circuit or the U.S. Court of Appeals for the circuit where the adversely affected party resides or situates its principal place of business. Section 210 also provides that a court may affirm and enforce or set aside a rule in whole or in part.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," Mr. Andrew Soto, Senior Managing Counsel, Regulatory Affairs, American Gas Association (AGA), provided the following testimony with respect to the need for provisions included in Section 210:

> First, AGA recommends that Congress amend the Commodity Exchange Act (CEA) to provide clear and defined procedures for challenging CFTC rules and orders in court. Although the CEA currently contains provisions allowing for judicial review by a U.S. Court of Appeals of certain agency actions, the provisions are very limited and provide no defined avenue for challenging CFTC rules and orders generally. A broad judicial review provision allowing for the direct challenge of CFTC rules and orders would have both a rehabilitative effect on the current process and a prophylactic effect on future agency action. Specific judicial review provisions would allow interested parties to challenge particular agency actions that are unreasonable and hold the CFTC accountable for its decisions. In addition, judicial review would have an important prophylactic effect by requiring the agency to think through its decisions before they are made to ensure that they are sustainable in court, thus enabling the agency to be a more conscientious and prudent regulator. In the absence of specific judicial review provisions, the general review provisions of the Administrative Procedure Act (APA) would apply, requiring parties seeking to challenge CFTC rules to file a claim before a U.S. District Court, move for summary judgment (as a hearing would likely be unnecessary), obtain a ruling and then, if necessary, seek further judicial review before a U.S. Court of Appeals. In the recent litigation over the CFTC's position limits rule, which followed the review provisions of the APA, the CFTC's General Counsel acknowledged the efficiency and desirability of direct review by the U.S. Court of Appeals of agency rules, and stated that the agency would have no objection to such direct review assuming Congress were to authorize it. Accordingly, provi-

> sions allowing for direct review by a U.S. Court of Appeals of rules and orders of the CFTC would enable both the industry and the agency to benefit from the administrative economy, procedural efficiency and certainty of having a dedicated forum in which agency decisions are reviewed.

Section 211—GAO study on use of Commission resources

In each of the hearings held this Congress related to the CFTC, Members of the Committee and witnesses alike have raised concerns about the CFTC's budget. Some have questioned whether the CFTC has the resources available to fulfill its oversight obligation. Others have asked if the CFTC's regulatory approach over the last five years has led to unnecessary burdens on the agency as it seeks to centralize functions that had previously been handled at Self-Regulatory Organizations.

Although Chairman Massad expressed his view that a larger budget was necessary to fulfill his regulatory obligations, others who have testified before the Committee have noted that the CFTC's approach to regulation has imposed significant internal work to the CFTC that could be better done in other ways. This additional work load comes at a cost to the Commission in manpower, time, and other resources.

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," Mr. Doug Christie, President, Cargill Cotton, on behalf of the Commodity Markets Council (CMC), testified that the CFTC's current proscriptive regulatory approach, specifically when it comes to new mandates proposed by the position limits rule, can pose burdens on the Commission that were higher than the more collaborative approach the Commission has historically utilized:

> I think it is obviously difficult to set an absolute level of what funding should be, but one comment I would make on that is that historically, when we have looked at regulatory issues or position limits in particular, it has been more of a collaborative relationship between the CFTC, market participants, the exchanges, and even industry associations involved in that process. And I think that brought some efficiency and some clarity and—to that process that a lot recordkeeping maybe doesn't necessarily do as effective a job as having a more of a conversational approach. So I think to the extent that it is driven by recordkeeping and reporting, that may carry a cost burden that is higher than when it is more collaborative and more shared across all market participants.

On March 25, 2015, at a hearing entitled "Reauthorizing the CFTC: Market Participant Views," witnesses testified to the additional burdens to be potentially placed on the CFTC by the proposed changes to how bona fide hedge exemptions are granted:

> To add another—when it goes to the interpretation of what is the role of the CTFC, especially in granting hedge exemptions for non-enumerated commodities, in the proposed rules, now the CFTC would take that responsibility away from the exchanges, like mine, and from Mr. Duffy's exchange. I think the—in the comments that I made up

> front, the decades of experience it takes in working and interfacing with each one of our commodity market participants to understand the nuances of each one of those, it is a big undertaking that the CFTC would need to undertake to ensure that they are not disrupting a commercial entity's ability to hedge in a timely manner by taking on that responsibility. And, by doing that, they are going to need more funds, and substantially more staff, if that is the way this lands, as opposed to the way it works today.
> —Benjamin Jackson, President and COO, ICE Futures U.S.
>
> [W]e have to have a DSRO to do the risk management. So even if you gave it to somebody else, you will duplicate the cost, because we are going to do it just for the risk management needs. So there is certain proposals that Congress, or a Government agency, may think of that they—that somebody else should do, and not us, that adds a burden of cost to the Government that doesn't need to happen—that has not happened. Second of all, on the position limits regime is a great example. We have the expertise—these position limits—it goes back to your earlier question. The credibility of our institutions are out there, and everybody—for everybody to see. We need to make sure that we continue to manage this position limits issue, and do it in an effective way that takes the burden away from the Government, and the cost away from the taxpayer.
> —Mr. Terrance A. Duffy, Executive Chairman & President, CME

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," all three Commissioners expressed divergent opinions on the CFTC's budget. Notably, Commissioner Giancarlo said:

> As a longstanding consistent supporter of the Dodd-Frank reforms, I believe we absolutely must have the resources to do a job that has been greatly expanded. However, I am also sensitive to the fact that our budget has increased 123 percent since 2008. I support the current funding levels, and about—in question of going above those levels really turns on whether, I think as you put it, the job we need to do. And I have some questions as to whether in some cases we are doing the job we need to do, or we are doing other jobs. I have, in my White Paper, outlined ways in which I think our swaps transaction reforms are overly complex, do not accord with the Dodd-Frank reforms. I am also concerned that our position limits proposal creates an enormous amount of make-work for the Commission that could be done in other ways at less taxpayer expense.

To obtain an impartial view on whether the CFTC has enough resources and whether its new regulatory approaches have unnecessarily burdened the agency, the Committee charges the Government Accountability Office (GAO) to conduct a study to look into these questions. The Committee expects GAO, as part of its study, to closely examine and report on whether the CFTC has efficiently

used its resources related to hiring and firing practices within the Commission, especially related to positions that are duplicative, outdated in their purpose, or underutilized. As well, the GAO should closely examine and report on whether the CFTC is efficiently using its resources related to the implementation of rules, regulations, and processes, especially related to regulations that are duplicative (both inside and outside of the Commission), outdated in their purpose, or underutilized. The efficient expenditure of funds related to computer programs, technology upgrades, consultants, and other noteworthy usages of Commission funds should also be closely examined.

Section 212—Disclosure of required data of other registered entities

The Dodd Frank Act allowed members of the Financial Stability Oversight Council ("FSOC"), including the CFTC, to collect sensitive and confidential data for the purpose of assessing financial stability, and also included important provisions directing FSOC members to maintain the confidentiality of such data. The Dodd-Frank Act specifically amended the Investment Advisers Act of 1940 to protect the confidentiality of reports that the SEC requires for SEC-registered investment advisers, but no corresponding amendments were made to the CEA for CFTC reports. Similar amendments to the CEA are appropriate to ensure that consistent confidentiality protections would extend to the reports, documents, records and sensitive and proprietary information of CPOs, CTAs, and their clients, collected through CFTC Form CPO–PQR or Form CTA–PR.

The current inconsistency between the confidentiality protections afforded to reports by investment advisers as opposed to reports by CPOs and CTAs creates two potential difficulties. First, it may expose data from CFTC-regulated entities to greater risk of public disclosure. Firms invest significant research, time and resources into developing proprietary information and there are both commercial and policy reasons to protect the confidentiality of such information. Second, it creates a potential unlevel regulatory playing field, disadvantaging the CFTC in its efforts to collect, analyze, and share data. This provision will simply harmonize between the SEC and the CFTC, the protections extended to that that valuable information.

Working within the existing framework of the CEA, Section 212 amends section 8 of the Commodity Exchange Act to provide clear circumstances under which the CFTC can disclose proprietary information submitted on Form CPO–PQR and Form CTA–PR. In order to protect this proprietary information, the provision requires that the Commission only disclose this information to a foreign government, Federal department, agency or State, upon an agreement of confidentiality. The language also makes clear that the CFTC may disclose information pursuant to a court order, including a bankruptcy proceeding under title 11 of the United States Code. The provision makes no changes to existing requirements that the Commission disclose such information to Congress upon request.

This section also defines the scope of proprietary information that is subject to confidential protection, including trading strategies, analytical or research methodologies, trading data, computer hardware or software containing intellectual property, and any ad-

ditional information the Commission determines to be proprietary. Such information will also be exempt from requests made under the Freedom of Information Act (FOIA).

This section imposes no restriction on Congress or this Committee's ability to perform oversight of the CFTC, commodities markets or those who participate in those markets, and it imposes no burdens on the disclosure of information to Congress upon request. However, the Committee recognizes the importance of strong data security procedures and protecting all proprietary information that it may obtain. To that end, the Committee is committed to reviewing its current procedures and practices and establishing any additional internal procedures and practices to maintain the confidentiality of proprietary information that it may obtain.

Section 213—Report on status of any application of metals exchange to register as a foreign board of trade; deadline for action on application

The Committee is well aware of the persistence of long queues for delivery of aluminum at warehouses in the United States licensed by the London Metals Exchange (LME). Such queues have attracted considerable regulatory and Congressional oversight and potential regulatory enforcement inquiries. Queues are also problematic in non-U.S. warehouses licensed by the LME. The Committee is encouraged that as part of their review of LME's foreign board of trade application, the Agency has deferred action until further review and stated that it will continue to monitor and analyze progress toward eliminating disruptive queues. The Committee recognizes and encourages the efforts of the CFTC to continue to review the relationship of long queues for delivery of aluminum at warehouses to the pricing of aluminum, and how those issues impact market integrity and market participants. Given the continuing interest of the Committee in seeing this commodity market act as a place of transparent price discovery, we urge the CFTC to continue working domestically and with foreign regulators toward eliminating persistent and disruptive market queues. The Committee also recognizes the overseas regulators' oversight responsibility to ensure warehousing arrangements are operating in a way that enables regulators to satisfy their regulatory obligations, including the obligation to ensure that markets operate in an orderly manner. Given the continuing interest of the Committee, as expressed in the legislation, it is the intent of the legislation to exercise appropriate Congressional oversight and support the CFTC in its important review. The legislation requires an action by the CFTC on LME's FBOT application no later than September 30, 2016.

Title 3—End-User Relief

Section 301—Relief for hedgers utilizing centralized risk management practices

"Inter-affiliate" swaps are contracts executed between entities under common corporate ownership. Section 301 would amend the CEA to provide an exemption for inter-affiliate swaps from the clearing and execution requirements of the Dodd-Frank Act so long as the swap transaction hedges or mitigates the commercial risk of

an entity that is not a financial entity. The section also requires that an "appropriate credit support measure or other mechanism" be utilized between the entity seeking to hedge against commercial risk if it transacts with a swap dealer or major swap participant, but the credit support measure requirement is effective prospectively from the date H.R. 2289 is enacted into law.

Importantly, with respect to Section 301's use of the phrase "credit support measure or other mechanism," the Committee unequivocally does not intend for the CFTC to interpret this statutory language as a mandate to require initial or variation margin for swap transactions. The Committee intends for the CFTC to recognize that credit support measures and other mechanisms have been in use between counterparties and affiliates engaged in swap transactions for many years in different formats, and therefore, there is no need to engage in a rulemaking to define such broad terminology.

Section 301 originated from the need to provide relief for a parent company that has multiple affiliates within a single corporate group. Individually, these affiliates may seek to offset their business risks through swaps. However, rather than having each affiliate separately go to the market to engage in a swap with a dealer counterparty, many companies will employ a business model in which only a single or limited number of entities, such as a treasury hedging center, face swap dealers. These designated external facing entities will then allocate the transaction and its risk mitigating benefits to the affiliate seeking to mitigate its underlying risk.

Companies that use this business model argue that it reduces the overall credit risk a corporate group poses to the market because they can net their positions across affiliates, reducing the number of external facing transactions overall. In addition, it permits a company to enhance its efficiency by centralizing its risk management expertise in a single or limited number of affiliates.

Should these inter-affiliate transactions be treated as all other swaps, they could be subject to clearing, execution and margin requirements. Companies that use inter-affiliate swaps are concerned that this could substantially increase their costs, without any real reduction in risk in light of the fact that these swaps are purely for internal use. For example, these swaps could be "double-margined"—when the centralized entity faces an external swap dealer, and then again when the same transaction is allocated internally to the affiliate that sought to hedge the risk.

The uncertainty that exists regarding the treatment of inter-affiliate swaps spans multiple rulemakings that have been proposed or that will be proposed pursuant to the Dodd-Frank Act. Section 301 provides certainty and clarity as to what inter-affiliate transactions are and how they are not to be regulated as swaps when the parties to the transaction are under common control.

On March 14, 2013, at a hearing entitled "Examining Legislative Improvements to Title VII of the Dodd-Frank Act," the following testimony was provided with respect to efforts to address the problem with inter-affiliate swaps:

> [I]nter-affiliate swaps provide important benefits to corporate groups by enabling centralized management of market, liquidity, capital and other risks inherent in their

businesses and allowing these groups to realize hedging efficiencies. Since the swaps are between affiliates, rather than with external counterparties, they pose no systemic risk and therefore there are no significant gains to be achieved by requiring them to be cleared or subjecting them to margin posting requirements. In addition, these swaps are not market transactions and, as a result, requiring market participants to report them or trade them on an exchange or swap execution facility provides no transparency benefits to the market—if anything, it would introduce useless noise that would make Dodd-Frank's transparency rules less helpful.

—Hon. Kenneth E. Bentsen, Acting President and CEO, SIFMA

This legislation would ensure that inter-affiliate derivatives trades, which take place between affiliated entities within a corporate group, do not face the same demanding regulatory requirements as market-facing swaps. The legislation would also ensure that end-users are not penalized for using central hedging centers to manage their commercial risk. There are two serious problems facing end-users that need addressing. First, under the CFTC's proposed inter-affiliate swap rule, financial end-users would have to clear purely internal trades between affiliates unless they posted variation margin between the affiliates or met specific requirements for an exception . . . [i]f these end-users have to post variation margin, there is little point to exempting inter-affiliate trades from clearing requirements, as the costs could be similar. And let's not forget the larger point—internal end-user trades do not create systemic risk and, hence, should not be regulated the same as those trades that do. Second, many end-users—approximately one-quarter of those we surveyed—execute swaps through an affiliate. This of course makes sense, as many companies find it more efficient to manage their risk centrally, to have one affiliate trading in the open market, instead of dozens or hundreds of affiliates making trades in an uncoordinated fashion. Using this type of hedging unit centralizes expertise, allows companies to reduce the number of trades with the street and improves pricing. These advantages led me to centralize the treasury function at Westinghouse while I was there. However, the regulators' interpretation of the Dodd-Frank Act confronts nonfinancial end-users with a choice: either dismantle their central hedging centers and find a new way to manage risk, or clear all of their trades. Stated another way, this problem threatens to deny the end-user clearing exception to those end-users who have chosen to hedge their risk in an efficient, highly-effective and risk-reducing way. It is difficult to believe that this is the result Congress hoped to achieve.

—Ms. Marie N. Hollein, C.T.P., President and CEO, Financial Executives International, on behalf of the Coalition for Derivatives End-Users

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," Mr. Lael Campbell, Director, Excelon Corporation (Excelon), on behalf of Edison Electric Institute (EEI), provided the following testimony with respect to the provisions included in Section 301:

> In the absence of a more expansive clearing exemption for inter-affiliate trades, the costs of clearing likely would deter most market participants from entering into inter-affiliate transactions. For example, without an exemption, additional affiliates in a corporate family would need to become clearing members or open accounts with a Futures Commission Merchant, and all affiliates would need to develop and implement redundant risk management procedures and trade processing services.

On January 14, 2015, the House of Representatives passed H.R. 37, the Promoting Job Creation and Reducing Small Business Burdens Act by a vote of 271–154. H.R. 37 contained identical language to Section 301. Additionally, in the 113th Congress, effectively identical language to Section 301 passed the House by voice vote when offered as a stand-alone bill, H.R. 5471.

Section 302—Indemnification requirements

Section 302 strikes the indemnification requirements found in Sections 725 and 728 of the Dodd-Frank Act related to swap data gathered by swap data repositories (SDRs) and derivatives clearing organizations (DCOs). The section does maintain, however, that before an SDR, DCO, or the CFTC shares information with domestic or international regulators, they have to receive a written agreement stating that the regulator will abide by certain confidentiality agreements.

Swap data repositories serve as electronic warehouses for data and information regarding swap transactions. Historically, SDRs have regularly shared information with foreign regulators as a means to cooperate, exchange views and share information related to OTC derivatives CCPs and trade repositories. Prior to the Dodd-Frank Act, international guidelines required regulators to maintain the confidentiality of information obtained from SDRs, which facilitated global information sharing that is critical to international regulators' ability to monitor for systemic risk.

Under Sections 725 and 728 of the Dodd-Frank Act, when a foreign regulator requests information from a U.S. registered SDR or DCO, the SDR or DCO is required to receive a written agreement from the foreign regulator stating that it will abide by certain confidentiality requirements and will "indemnify" the Commissions for any expenses arising from litigation relating to the request for information. In short, the concept of "indemnification"—requiring a party to contractually agree to pay for another party's possible litigation expenses— is only well established in U.S. tort law, and does not exist in practice or in legal concept in foreign jurisdictions.

These indemnification provisions—which were not included in the financial reform bill passed by the House of Representatives in December 2009—threaten to make data sharing arrangements with foreign regulators unworkable. Foreign regulators will most likely refuse to indemnify U.S. regulators for litigation expenses in ex-

change for access to data. As a result, foreign regulators may establish their own data repositories and clearing organizations to ensure they have access to data they need to perform their supervisory duties. This would lead to the creation of multiple databases, needlessly duplicative data collection efforts, and the possibility of inconsistent or incomplete data being collected and maintained across multiple jurisdictions.

In testimony before the House Committee on Financial Services in March of 2012, the then-Director of International Affairs for the SEC, Mr. Ethiopis Tafara, endorsed a legislative solution to the problem, stating that:

> The SEC recommends that Congress consider removing the indemnification requirement added by the Dodd-Frank Act . . . the indemnification requirement interferes with access to essential information, including information about the cross-border OTC derivatives markets. In removing the indemnification requirement, Congress would assist the SEC, as well as other U.S. regulators, in securing the access it needs to data held in global trade repositories. Removing the indemnification requirement would address a significant issue of contention with our foreign counterparts . . .

At the same hearing, the then-General Counsel for the CFTC, Mr. Dan Berkovitz, acknowledged that they too have received growing concerns from foreign regulators, but that they intend to issue interpretive guidance, stating that "access to swap data reported to a trade repository that is registered with the CFTC will not be subject to the indemnification provisions of the Commodity Exchange Act if such trade repository is regulated pursuant to foreign law and the applicable requested data is reported to the trade repository pursuant to foreign law."

To provide clarity to the marketplace and remove any legal barriers to swap data being easily shared with various domestic and foreign regulatory agencies, this section would remove the indemnification requirements found in Sections 725 and 728 of the Dodd-Frank Act related to swap data gathered by SDRs and DCOs.

On March 14, 2013, at a hearing entitled "Examining Legislative Improvements to Title VII of the Dodd-Frank Act," Mr. Larry Thompson, Managing Director and General Counsel, Depository Trust and Clearing Corporation, provided the following testimony with respect to provisions of H.R. 742, which were included in Section 302:

> The Swap Data Repository and Clearinghouse Indemnification Correction Act of 2013 would make U.S. law consistent with existing international standards by removing the indemnification provisions from sections 728 and 763 of Dodd-Frank. DTCC strongly supports this legislation, which we believe represents the only viable solution to the unintended consequences of indemnification. H.R. 742 is necessary because the statutory language in Dodd-Frank leaves little room for regulators to act without U.S. Congressional intervention. This point was reinforced in the CFTC/SEC January 2012 Joint Report on International Swap Regulation, which noted that the Commissions "are

> working to develop solutions that provide access to foreign regulators in a manner consistent with the DFA and to ensure access to foreign-based information." It indicates legislation is needed, saying that "Congress may determine that a legislative amendment to the indemnification provision is appropriate." H.R. 742 would send a clear message to the international community that the United States is strongly committed to global data sharing and determined to avoid fragmenting the current global data set for over-the-counter (OTC) derivatives. By amending and passing this legislation to ensure that technical corrections to indemnification are addressed, Congress will help create the proper environment for the development of a global trade repository system to support systemic risk management and oversight.

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," Commissioner Giancarlo provided the following testimony with respect to the provisions included in Section 302:

> Under Sections 725, 728 and 763 of the Dodd-Frank Act, when a foreign regulator requests information from a U.S. registered swap data repository (SDR) or derivatives clearing organization (DCO), the SDR or DCO is required to receive a written agreement from the foreign regulator stating that it will abide by certain confidentiality requirements and will "indemnify" the CFTC for any expenses arising from litigation relating to the request for information. In short, the concept of "indemnification"—requiring a party to contractually agree to pay for another party's possible litigation expenses—is only well established in U.S. tort law, and does not exist in practice or in legal concept in many foreign jurisdictions, thereby introducing complications to data-sharing arrangements with foreign governments and raising the possibility of data fragmentation at the international level.
>
> Correcting this unworkable framework in the Dodd-Frank Act is not controversial, and Congress should absolutely provide a legislative fix to this issue, just as the Securities and Exchange Commission (SEC) has endorsed in testimony before Congressional Committees in the 112th Congress. Similarly, in the 113th Congress, H.R. 742 was introduced to provide a narrow fix on this issue and passed the House on June 12, 2013, by a vote of 420–2. The same provision should be included in any CFTC reauthorization legislation introduced by this Congress.

In the 113th Congress, the House of Representatives passed H.R. 742, the Swap Data Repository and Clearinghouse Indemnification Act, by a vote of 420–2, which contained language identical to Section 302.

Sections 303, 304, 305—Transactions with the utility special entities; utility special entity defined; utility operations-related swap

Sections 303, 304, and 305 of H.R. 2289 would preserve the ability of government-owned utilities, classified in the bill as "utility special entities," to have uninterrupted and cost-effective access to the customized, non-financial commodity swaps that utility special entities have used for years. In effect, the counterparties of utility special entities would now be subject to the much higher $8 billion *de minimis* swap dealer registration threshold. Importantly, the legislation does not include an exemption for interest rate, credit, equities, currency asset classes, or agriculture commodities, other than commodities used for electric energy or natural gas production or generation. Instead, H.R. 2289 creates a new category of swap known as the "utility operations-related swap" and provides relief to counterparties of utility special entities only when those specific types of swaps are used. To ensure transparency, the bill still requires all special entity swap transactions to be reported to the CFTC.

On May 23, 2012, the CFTC published a rule further defining who is considered a "swap dealer" under the Dodd-Frank Act, which directly impacted many swap counterparties of government-owned non-profit utilities. The rule became effective on July 23, 2012, with registration as a swap dealer not being required until on or after October 12, 2012. The CFTC's swap dealer rule includes an exception for entities from having to register as a swap dealer if their outstanding annual gross notional swap positions do not exceed either of the two following thresholds:

1. $3 billion (subject to an initial three year phase-in level of $8 billion), referred to as the "general *de minimis* threshold"; and
2. $25 million with regard to swaps where an entity's counterparty is a "special entity" as defined in Section 731 of the Dodd-Frank Act, referred to as the "special entity *de minimis* threshold."

On October 12, 2012, after several public power groups petitioned the CFTC to relieve their counterparties from compliance with the much lower registration threshold, CFTC staff issued a non-binding "no-action relief" letter instead, which increased the "special entity sub-threshold" to $800 million from $25 million.

As mentioned above, a "special entity" is broadly defined in Section 731 of the Dodd-Frank Act to include any government-owned enterprise, such as public school boards, state governments, and any publicly-owned producer or supplier of electricity or natural gas. Casting such a broad net in defining "special entity" was a policy decision made by the drafters of the Dodd-Frank Act which sought to protect taxpayers from the use of complex financial swaps by their municipality. For example, the use of fixed-for-floating interest rate swaps tied to municipal bonds issued by Jefferson County, Alabama, contributed to the county's multi-billion dollar debt that rapidly expanded during the 2008 financial crisis, later resulting in what was at the time the largest municipal bankruptcy filing in U.S. history.

Prior to enactment of the Dodd-Frank Act, however, many publicly-owned utilities relied on their non-financial counterparties, such as natural gas producers, independent power generators, and

investor-owned utility companies to enter into swaps in order to hedge against operational risks. Many of these utilities have heard from numerous counterparties who are evaluating their future business plans in light of the final CFTC rules. These counterparties are strictly limiting their business, or completely cutting all ties with utility special entities given the special entity sub-threshold and uncertainty surrounding the new regulatory regime for the swaps marketplace.

Unless counterparties can determine with certainty that their swap activities with special entities will not result in them being classified as a "swap dealer" under the Dodd-Frank Act, it appears that numerous counterparties may avoid doing business with them altogether. This ultimately limits competition and forces special entities to do business with financial institutions or large swap dealers, which concentrates risk and may raise costs for many utility special entities eventually leading to increased costs for ratepayers. The Committee recognizes that on March 21, 2014, the Commission staff provided a "no-action letter" to utility special entities so they are not subjected to the $25 million *de minimis* threshold. However, permanent statutory relief that would be provided in Sections 303, 304, and 305 is still needed due to the questionable legal certainty contained in this—and all—CFTC no-action letters, which state that "[a]s with all no-action letters, the Division retains the authority, in its discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein."

On September 26, 2014, the CFTC issued a final rule to correct the missteps that would be remedied by Sections 303, 304, and 305. While the regulatory change is welcomed by the Committee, statutory certainty can provide millions of consumers across the country with greater certainty that their utility rates will not increase due to the Dodd-Frank Act.

On March 14, 2013, at a hearing entitled "Examining Legislative Improvements to Title VII of the Dodd-Frank Act," Mr. Terrance P. Naulty, General Manager and CEO, Owensboro Municipal Utilities, provided the following testimony with respect to the provisions included in Sections 303, 304, and 305:

> Government-owned utilities depend on nonfinancial commodity transactions, trade options, and "swaps," as well as the futures markets, to hedge commercial risks that arise from their utility facilities, operations, and public service obligations. Together, nonfinancial commodity markets play a central role in the ability of government-owned utilities to secure electric energy, fuel for generation, and natural gas supplies for delivery to consumers at reasonable and stable prices . . . [t]he CFTC has said that it retained the $25 million threshold in light of the special protections that the Dodd-Frank Act affords to special entities. However, the statute does not require—even mention—special protections for special entities in regard to the swap dealer definition. As noted above, the law imposes requirements on swap dealers and major swap participants advising or entering into swaps with special entities. Nowhere does the law mention deeming a participant to be a swap dealer solely based on its volume of swaps with government-

> owned entities. Government-owned utilities understand the operations-related swap transactions they use to manage their commercial risks and do not need the special protections provided by the $25 million sub-threshold. In fact, and ironically, these "protections" are likely to limit the ability of these utilities to hedge operational and price risks rather than to protect these utilities and their customers from risk. On July 12, 2012, APPA, the Large Public Power Council (LPPC), the American Public Gas Association (APGA), the Transmission Access Policy Study Group (TAPS), and the Bonneville Power Administration (BPA), filed with the CFTC a "Petition for Rulemaking to Amend CFTC Regulation 1.3(ggg)(4)." . . . The legislation [H.R. 1038] largely mirrors the intent and effect of the NFP EEU petition to the CFTC, providing narrowly targeted relief for operations-related swaps for government-owned utilities. Specifically, the legislation would provide that the CFTC, in making a determination to exempt a swap dealer under the *de minimis* exception, shall treat a utility operations-related swap with a utility special entity the same as a utility operations-related swaps with any entity that is not a special entity. . . . [t]he legislation carefully defines which entities would qualify as a "utility special entity." It also specifically defines the types of swaps that could and could not be considered a "utility operations-related swap." For example, the legislation specifically prohibits interest, credit, equity, and currency swaps from being considered as a utility operations-related swap. Likewise, except in relation to their use as a fuel, commodity swaps in metal, agricultural, crude oil, or gasoline would not qualify either. Finally, the legislation also confirms that utility operations-related swaps are fully subject to swap reporting requirements. When implemented, this legislation should provide the certainty to nonfinancial entities that they can enter into swap transactions with government-owned utilities without fear of being deemed a swap dealer. It truly levels the playing field. And, it does nothing to otherwise alter the CFTC's implementation of the Dodd-Frank Act.

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," Commissioner Giancarlo provided the following testimony with respect to the provisions included in Sections 303, 304 and 305:

> The Dodd-Frank Act requires that American towns and municipalities be labeled as "special entities" when they enter into swaps transactions. The purpose was to provide specific protections for municipalities who used complex financial swaps of the type that ensnared Jefferson County, Alabama, and led it to file what—at the time—was the largest municipal bankruptcy in U.S. history. Congress never intended, however, and Dodd-Frank does not include requirements to limit the ability of our not-for-profit utilities to manage ordinary risks associated with generating electricity or producing natural gas.

> Unfortunately, the CFTC's first shot at the "special entity" rule contained onerous restrictions on ordinary risk management activities by America's not-for-profit taxpayer-owned utilities. It generated an enormous amount of public comment. Many commenters asserted that the rule would cause trading counterparties to avoid dealing with special entity utilities due to the increased regulatory compliance and registration burdens of being labeled as a swap dealer. That meant that these utilities would have had far fewer tools to control fluctuations in operational costs or supply and demand, resulting in increased electricity and other energy costs for American consumers.
>
> The CFTC's original special entity proposal also led to two identical pieces of legislation to correct the CFTC's action in Congress, one passed the House unanimously, and the other was introduced in the Senate with 14 co-sponsors evenly split between both political parties.
>
> Fortunately, in September of last year, the Commission finalized a rule change that recognized Congressional concern. It provided the relief that our not-for-profit taxpayer-owned utilities need to manage risks in the production of natural gas and electricity. Without the rule change, a regulatory action inspired by the Dodd-Frank Act would have increased utility rates for millions of Americans. In times of economic uncertainty, that would have been an unacceptable result. The legislative solutions offered during the last Congress, however, would still provide added certainty to the marketplace, and I support making the CFTC's regulatory changes permanent in statute.

In the 113th Congress, the House of Representatives passed H.R. 1038, the Public Power Risk Management Act, by a vote of 423–0, which contained substantially similar language to sections 303, 304, and 305.

Section 306—End-Users not treated as financial entities

Section 306 is intended to remove non-financial end-users that were unintentionally captured in the definition of "financial entity" in Section 2(h)(7)(C) of the Commodity Exchange Act due to a cross-reference to Section 4(k) of the Bank Holding Company Act of 1956. By defining "commercial market participants" using long-standing CFTC terminology found in the Joint CFTC–SEC Rule Defining Swap (CFTC Reference: 77 FR 48207) and current CFTC Regulations governing Trade Options (CFTC Regulations Part 32.3(a)(1)(ii)), the Committee seeks to provide narrow relief to entities not supervised by a prudential regulator and that are commercial market participants or enter into swaps, futures and other derivatives on behalf of, or to hedge the commercial risk of, non-financial affiliates.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," Mr. Richard F. McMahon, Jr., Vice President, EEI, provided the following testimony with respect to the need for the provisions included in Section 306:

> The Dodd-Frank Act defines the term "financial entity", in part, as an entity that is "predominantly engaged in ac-

tivities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956." Incorporating banking concepts into a definition that also applies to commercial commodity market participants has had unintended consequences. Unlike our members, banks and bank holding companies generally cannot take or make delivery of physical commodities. However, banks and bank holding companies can invest and trade in certain commodity derivatives. As a result, the definition of "financial in nature" includes investing and trading in futures and swaps as well as other physical transactions that are settled by instantaneous transfer of title of the physical commodity. An entity that falls under the definition of a "financial entity" is generally not entitled to the end-user exemption-an exemption that Congress included to benefit commercial commodity market participants—and can therefore be subject to many of the requirements placed upon swap dealers and major swap participants. In addition, the CFTC has used financial entity as a material term in numerous rules, no-action relief, and guidance, including, most recently, its cross-border guidance. The Dodd-Frank Act allows affiliates or subsidiaries of an end-user to rely on the end-user exception when entering into the swap on behalf of the end-user. However, swaps entered into by end-user hedging affiliates who fall under the definition of "financial entity" cannot take advantage of the end-user exemption, despite the fact that the transactions are entered into on behalf of the end-user. Many energy companies structure their businesses so that a single legal entity within the corporate family acts as a central hedging, trading and marketing entity—allowing companies to centralize functions such as credit and risk management. However, when the banking law definitions are applied in this context, these types of central entities may be viewed as engaging in activity that is "financial in nature," even with respect to physical transactions. Hence, some energy companies may be precluded from electing the end-user clearing exception for swaps used to hedge their commercial risks and be subject to additional regulations applicable to financial entities. Importantly, two similar energy companies may be treated differently if, for example, one entity uses a central affiliate to conduct these activities and another conducts the same activity in an entity that also owns physical assets or that has subsidiaries that own physical assets. Accordingly, Congress should amend the definition of "financial entity" to ensure that commercial end-users are not inadvertently regulated as "financial entities."

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," Mr. Lael Campbell, Director, Excelon, on behalf of EEI, provided the following testimony with respect to the provisions included in Section 306:

Many energy companies structure their business so that a single legal entity within the corporate family acts as a central hedging, trading and marketing entity—allowing companies to centralize functions such as credit and risk management. However, when the banking law definitions are applied in this context, these types of central entities may be viewed as engaging in activity that is "financial in nature," even with respect to physical transactions. Hence, some energy companies may be precluded from electing the end-user clearing exception for swaps used to hedge their commercial risks and be subject to additional regulations applicable to financial entities. Importantly, two similar energy companies may be treated differently if, for example, one entity uses a central affiliate to conduct these activities and another conducts the same activity in an entity that also owns physical assets or that has subsidiaries that own physical assets.

Section 307—Reporting of illiquid swaps so as not to disadvantage certain non-financial end-users

Real-time public reporting of swap transactions as required by the CFTC may ultimately lead to more efficient prices for commercial end-users. However, based on the fact that liquidity diminishes for longer-dated contracts further out in time, there is a point where the benefits derived from public reporting do not outweigh the detriment to those who are trading in illiquid markets. While transparency is helpful in establishing a price between buyers and sellers, if market participants become easier to identify in certain sparsely traded swaps, other market participants will be able to take advantage of their positions and increase their cost of doing business for future trades. These sparsely traded swaps are used by a handful of companies with excellent credit ratings to provide long-term protection against price fluctuations for commodities such as oil and jet fuel.

While the goal of increasing market transparency was well intended, the CFTCs final rule on reporting requirements does not differentiate between the appropriate times needed for reporting between different types of swaps contracts. Instead, this rule has led to a change in market behavior that affects long-established business models which traditionally allowed companies to protect against commodity price increases. Effective risk management helped these companies keep prices low for consumers. Southwest Airlines Co. (Southwest Airlines) offers a prime example of how this new CFTC regulation has impacted its business and its customers. Following enactment of the CFTC's reporting requirements, Southwest Airlines' exact market positions became known by competitors due to near instantaneous reporting of market positions. As a result, Southwest Airlines was forced to pay more in order to protect against the fluctuating cost of fuel.

There is precedent in CFTC policy in recognizing the sensitivity around transaction counterparty identities in public data reporting. The Commission has for years issued publicly a weekly "Commitment of Traders Report" (COT). In describing the issuance of this report, the Commission states: "The [COT] reports provide a breakdown of each Tuesday's open interest for markets in which 20 or

more traders hold positions equal to or above the reporting levels established by the CFTC." In other words, when the number of market participants in a reportable contract drops below a certain level, the Commission has recognized there can be damage to counterparty anonymity when there are a limited number of participants in a given market, and therefore does not issue a report for that contract. Because the Committee believes that the number of participants and transactions in a given market diminishes for longer-dated contracts, the Commission shall create a standard for reporting all swap asset classes based off of when liquidity in a contract lowers to the level of being able to easily identify market participants.

As such, Section 307 would correct the unintended consequences of the new CFTC reporting regime while still maintaining the goal of increasing market transparency. This section preserves the real-time reporting of these sparsely traded swaps directly to the CFTC to ensure that government regulators have the information they need to police the markets. By simply making a technical change to the timeframe in which end-users are required to release their trading information to the general public, Section 307 achieves market transparency in a manner that does not harm long-standing business models and that helps keep costs low for millions of Americans.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," Mr. Chris Monroe, Treasurer, Southwest Airlines, provided the following testimony with respect to the need for provisions included in Section 307:

> One key to our unparalleled success has been our ability to hedge fuel through legitimate end-user derivatives purchased in the futures markets. Hedging at Southwest is enterprise risk management—essential in our view given our $6 billion annual fuel bill. To hedge, we commonly enter into transactions many months or years in advance of needing the physical product. Trading in these illiquid markets allows us to manage our fuel costs, which in turn helps us to keep fares low and maintain large jet (Boeing 737) flights in the communities we serve. I am here today to highlight a few issues that have begun to impact these important markets that companies such as Southwest relay on to manage risk. One area where we are seeing a negative commercial impact is the Commodity Futures Trading Commission's ("CFTC's") Real-Time Public Reporting of Swap Transaction Data Rule ("Real-Time Reporting Rule") . . . [i]mportantly, trades between a legitimate commercial end-user and a dealer must be reported within the dealer's shorter time limit. Given that the vast majority of bilateral trades entered into by commercial end-users are transacted with a dealer, this means nearly all commercial end-user trades are reported on the accelerated time limit. The dealer time delays may be sufficient for liquid markets, but the timeframes are not sufficient for illiquid markets, which, as I said before, is where Southwest commonly trades. Only a few market participants trade that far out the curve, which makes the contracts highly illiquid, even in contracts that may be liquid in the front

> months such as crude oil. Additionally, Southwest has a particularly identifiable trading strategy, a hedging "DNA" if you will, which makes us quite visible in a market with few participants. This is particularly harmful. When a dealer has to report illiquid trades to the market quickly, the dealer is less likely to be able to lay off the risk of that trade in the prescribed time. If the dealer is still holding a large amount of the risk when the trade is shown to the public, the dealer can be front-run and, as a result, take a loss on the trade. That increased risk to the dealer will either curtail trades or materially increase the costs of the trade to the end-users. If an end-user like Southwest can no longer access the markets to hedge fuel it would be contrary to the purposes of the legislation and in our view hostile to Congressional intent.

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," witnesses provided the following testimony with respect to the provisions included in Section 307:

> As I mentioned, liquidity in the swaps market is very different. There are a number of very important market participants, such as Southwest Airlines, that are engaged in transactions that just can't settle in a day, 2 days, 3 days, and it may take longer, and our rules need to be much open to that. It should not be an exception to our rule that there are transactions like that. Our rule framework should accommodate transactions like that. And market participants shouldn't have to come cap in hand to the CFTC with a question that says, Mother, may I, to engage in a transaction that is just part of their everyday business of serving their customers. We—our rule framework should allow for that because that is the nature of the swaps market. It is very different than futures; it is the nature of the swaps market.
>
> —Commissioner Giancarlo

> I think you are referring to the relief on the real-time reporting obligation that—and there was relief given to Southwest Air. I think we should try and deal with issues like that on more of a broad basis than an individualized basis, and if there is, in fact, an unintended effect of liquidity based on reporting, it does stand to reason that it could be impactful for other market participants as well. So it does make you wonder, well, does something need to be addressed in the timing of the reporting of those particularly long-dated swaps. So I think it is something we should revisit. . . . And incidentally, Congressman, I expect we will probably get requests, and you might have that on your mind when you asked that question, but I wouldn't be surprised if we get requests from others.
>
> —Commissioner Wetjen

In November 2014, the Commission granted time-limited no-action relief to Southwest Airlines and its counterparties to allow additional time to comply with their reporting obligation for transactions in long-dated Brent and WTI crude oil swaps and

swaptions. Section 307 extends this relief to similarly situated market participants.

Section 308—Relief for grain elevator operators, farmers, agricultural counterparties, and commercial market participants

As a service to their customers, farmer-owned cooperative FCMs have a network of branch operations embedded in locations such as grain elevators, whose primary business is handling the cash grain volume of their farmer customers. As a branch office of a cooperatively-owned FCM, these commercial grain elevators have chosen to provide brokerage services as a means of providing access to risk management tools for their farmer customers who want to hedge their production volume through futures and/or options.

In response to the Dodd-Frank Act, the CFTC greatly expanded record keeping requirements by making it necessary for brokers to retain all forms of written and oral communication that might "lead to the execution of a transaction in a commodity interest." Given the infrequent and low volume of futures/options transactions handled by "branches" associated with those FCMs, complying with the recording requirements under this vague regulation would not be economically feasible. The necessary investment to put in place and maintain a system to record every form of communication that might "lead to the execution of a transaction" would exceed not only any profits, but in many cases the total revenues of those FCM branches. Local branches could no longer provide brokerage services resulting in reduced risk management options, and their use, by farmers and ranchers.

Section 308 does not eliminate a grain elevator's record keeping responsibilities, but merely relieves them from purchasing and maintaining costly technology to record and save all incoming communication that may lead to a transaction in a commodity interest. Grain elevators and other end-users will still be required to maintain a written record of such transactions that include all of the transactions' material economic terms. Without Section 308, the vague, sweeping language of the CFTC's current regulation will result in significant time and financial costs to commercial grain elevators attempting to comply with the rule. Rather than facilitating the collection of useful transaction records, the rule is likely to result in grain elevators' no longer providing useful brokerage services to their customers. As a result, countless farmers and ranchers will lose access to valuable risk management tools that allow them to hedge their production volume.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," the following witnesses provided testimony with respect to provisions included in Section 308:

> A significant and concerning expansion of current data requirements beyond the scope of Dodd-Frank is related to record-keeping requirements in Part 1 of Commission regulations. In accordance with Dodd-Frank, the CFTC expanded the futures record-keeping requirements that existed for certain markets participants to swaps. However, they also significantly expanded the written requirements, as well as created a new requirement to record oral conversations. Compliance costs have already been incredibly substantial now that compliance with the written require-

ments is mandatory and will only increase once compliance with the oral recording requirement comes into effect later this year. Again, the market is searching for a reason for and measurable benefit of all of this new information that must be maintained and archived in a particular way. In addition, the rule is vague as to which communications must be retained, so in an abundance of caution, market participants are effectively saving every e-mail, news article, or any other piece of information that might "lead to the execution of a transaction" and soon will have to begin recording every phone call that might "lead to the execution of a transaction." This vague "lead to . . ." language appears nowhere in any prior iteration of Rule 1.35 or in any prior CFTC Advisory relating to the rule, and operates to expand substantially the scope and burdens of the rule. Also, the application of the requirements to members of an exchange seems to have no regulatory rationale and only serves as a disincentive to be an exchange member. Finally, the cost figures contained in the cost-benefit analysis in the final rule are not justified. Compliance costs are exponentially higher than they estimate, and in some cases the technology is not even available to market participants. Requests for clarification have not yet been answered, and CMC will be submitting a written request soon in a continued effort to clarify and hopefully narrow the scope of what must be retained and, therefore, reduce what we view as unnecessary compliance costs.

—Mr. Lance Kotschwar, Senior Compliance Attorney, The Gavilon Group, LLC (Gavilon), on behalf of the CMC

Given the infrequent and low volume of futures/options transactions handled by "branches" associated with those FCMs, complying with the oral recording requirements (recording of all phone calls) under this regulation would not be economically feasible. The necessary investment to put in place and maintain a system to comply with the regulations would exceed not only any profits, but in many cases the total revenues of those FCM branches—to the point that those local branches could no longer provide brokerage services. The effect would be reduced risk management options, and their use, by farmers and ranchers.

—Mr. Scott Cordes, President, CHS Hedging, Inc. (CHS Hedging), on behalf of the National Council of Farmer Cooperatives (NCFC)

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," the following witnesses provided testimony with respect to provisions included in Section 308:

[A]lthough unregistered members of a designated contract market (DCM) or swap execution facility (SEF) are now exempted from the requirement to retain text messages, unregistered members must still retain written and electronic records of pre-trade communications. As a result of these unnecessary burdens, end-users may opt not to become members of a DCM or SEF, despite the policy goal of the Dodd-Frank Act to encourage more on-exchange ac-

> tivity. For this same reason end-users may also forgo a direct clearing membership arrangement, despite growing global concerns with rising costs of clearing that a direct clearing membership would help mitigate.
> —Mr. Lael Campbell, Director, Excelon, on behalf of EEI
>
> If further relief and clarification is not provided, [the CFTC's recordkeeping requirements] will discourage membership in DCMs and SEFs, which will in effect reduce transparency in the marketplace, limit the ability of commercial firms to utilize modern and efficient means of communication, and lead to legal and regulatory uncertainty for end-users and customers.
> —Mr. Doug Christie, President, Cargill Cotton, on behalf of the CMC

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," Commissioner Wetjen provided the following testimony with respect to the provisions included in Section 308:

> There are two key points, I think, for me. The first is, if you are an entity that has not triggered registration because you are not engaged in the sort of activities that would require that, or if you have consciously chosen to change your activities in a way so that you don't have to register with the CFTC, and you are an end-user, that is meaningful to me. The second thing that I am looking at very carefully is, regardless of how we finalize this rule, it should be not—it should not be done in a way that unnecessarily or unintentionally impedes access by an end-user to a particular marketplace.

Section 309—Relief for end-users who use physical contracts with volumetric optionality

Forward contracts that result in the physical delivery of commodities are expressly exempted from the definition of a "swap" under the CEA. Section 309 would clarify the application of this exemption in order to prevent unnecessary and costly regulations on companies that enter into transactions to ensure the efficient physical delivery of commodities necessary to conduct their core business operations. Without clarification, the CFTC could impose costly regulations on risk management transactions, which increase companies' operating costs and ultimately result in increased costs to consumers across the nation.

Risk management contracts that allow for an adjustment of the quantity of a commodity delivered do not pose a threat to the stability of financial markets and should not be regulated the same as financial derivatives. These contracts do provide companies with an efficient and cost effective means of acquiring the commodities they need to conduct their daily business, such as providing affordable sources of energy to millions of American households. The misguided regulation of these harmless transactions will actually have the effect of increasing companies' costs of doing business, will consolidate risk in the marketplace because some businesses will be forced out of the market, and will ultimately raise costs for everyday American consumers. Such costly and unnecessary regulation

defies the intent of Congress and needlessly subjects a large segment of the energy marketplace to burdensome regulation under the Dodd-Frank Act.

The Dodd-Frank Act, passed to reform the U.S. financial system, should not result in increased utility rates for consumers of natural gas, electricity, and other forms of energy used to heat homes, run factories, and power the American economy. Without relief, many utilities and energy companies will not be able to effectively manage risk—which will only increase their costs and possibly lead to higher energy rates for millions of Americans—an unacceptable result during a period of tremendous economic uncertainty.

As such, Section 309 would exempt forward contracts between end-users that allow for deferred delivery or shipment of a non-financial commodity, so long as the contract results in an actual physical settlement obligation. The Committee notes that optionality includes both allowing a counterparty to reduce the amount of commodity delivered and allowing a counterparty to increase the amount of commodity delivered.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," the following witnesses provided testimony with respect to provisions included in Section 309:

> Because gas consumption to residential and commercial customers is largely weather driven (consumption increases as the weather gets colder) and predicting the weather is not an exact science, gas supply contracts with delivery flexibility help AGA members make sure gas supplies are, or can be made, available when the customers actually need the gas without having to pay excessively higher prices at the actual time of need and/or other fees associated with pipeline imbalance penalties. There remain disagreements and confusion within the natural gas industry as to which types of gas supply transactions, if any, will be subject to CFTC regulation. These transactions are normal commercial merchandising transactions that parties use to buy and sell natural gas for ultimate delivery to end-use customers. They would not normally be considered speculative, financial transactions as the parties contemplate physical delivery of the commodity. Nevertheless, transactions that contain some option or choice for one or the other counterparty, raise questions for some as to whether they would be considered commodity options regulated as swaps, meet a three part test and a seven-part test to be excluded as options embedded in forward contracts, be viewed as trade options subject to a lessened reporting burden, or be considered facility use agreements that meet a three-part test and then a five-part test and not subject to regulation at all.
>
> —Andrew K. Soto, Senior Managing Counsel, Regulatory Affairs, AGA

> Recently, however, in light of the CFTC's seven-part interpretation in the rule, some NCFC members have raised concerns over the appropriate treatment of forward contracts commonly used in physical supply arrangements that contain volumetric optionality. If the CFTC were to

> take a narrow view of the seven-part interpretation, it may view as options many other routine physical supply contracts in which the predominant feature is delivery. Such an interpretation would require those common commercial forward contracts to come under the regulations intended for swaps such as reporting and position limits. The uncertainty of the CFTC interpretation of these types of contracts, all previously covered under the forward contracting exclusion, will require NCFC members to expend significant labor and costs to review hundreds of sales transactions to determine if they continue to meet the forward contract exclusion. Again, this is an unnecessary resource and cost burden on end-users that should be avoided. We hope CFTC will interpret this exclusion consistently with its historical understanding and prior guidance. —Mr. Scott Cordes, President, CHS Hedging, on behalf of the NCFC

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," Lael Campbell, Director, Excelon, on behalf of EEI, testified with respect to provisions included in Section 309:

> Trade options and physically delivered forward transactions with embedded optionality serve the purpose of providing the option holder flexibility to respond to changing supply and demand circumstances, such as ensuring delivery of fuel to a generation plant when fuel is needed. EEI members create a physical supply portfolio designed so that they can provide electric service to their retail consumers at low rates. Contracts for physical delivery of commodities such as electricity or natural gas are vital to the business of EEI members. Treating every-day transactions that are used to manage operational and physical supply risks as swaps' has significantly, and unnecessarily, increased end-user regulatory and compliance costs associated with these transactions, with no recognizable offsetting public benefit.

Section 310—Commission vote required before automatic change of swap dealer de minimis level

Section 310 would simply require the CFTC Commissioners to vote before changing the current $8 billion swap dealer *de minimis* exemption from registering as a swap dealer. Without Section 310, a CFTC rule will automatically set the *de minimis* exemption at $3 billion, potentially requiring dozens of end-users to register with the Commission in the coming years as "swap dealers" and imposing costly new regulations on public utilities, energy companies, and other end-users that played no part in the financial crisis.

As the regulations currently stand, if a company does more than $8 billion worth of swap business per year (known as the *de minimis* level of swap dealing), it must register with the CFTC as a "swap dealer." The CFTC's regulations will arbitrarily lower the registration threshold to $3 billion starting five years from October of 2012 (and possibly sooner) with no Commission vote, despite

rules requiring a Commission "study" to determine if the swap dealer registration threshold is appropriately set at $8 billion.

An arbitrary 60% decline in the swap dealer registration threshold from $8 billion to $3 billion creates significant uncertainty for non-financial companies that engage in relatively small levels of swap dealing to manage business risk for themselves and their customers. Lowering the swap dealer registration threshold below its current level of $8 billion could drive many non-financial companies out of the business of offering their customers risk management products, which will limit risk management options for end-users, and ultimately consolidate marketplace risk in only a few large swap dealers. This consolidation runs counter to the goals of the Dodd-Frank Act to reduce systemic risk in the marketplace.

CFTC regulations should not arbitrarily change the swap dealer registration *de minimis* level without a formal rulemaking process. The regulations themselves require a formal study by the Commission to determine if the current $8 billion level is appropriate. However, the study is completely irrelevant because the *de minimis* level is moved to $3 billion in five years regardless of the study's findings. Because provisions embedded deep within CFTC regulations failed to mandate that the Commission must vote to determine what policy is best for future market conditions, the markets could be forced to adhere to outdated policies for years to come. Further, as demonstrated in the context of utility special entities, a *de minimis* exception threshold that is too low can significantly disrupt markets, hinder competition, and leave non-financial businesses with limited ways to manage their economic and operational risks. Section 310 would result in a Commission review of whether lowering the *de minimis* exception threshold would drive participants out of the swap market, limit competition and potentially harm end-users. In particular, pursuant to Section 310, the Committee expects that the Commission would periodically review the *de minimis* exception threshold to consider whether, in light of changes in prices and market structure, the *de minimis* exception threshold should also be increased to greater than $8 billion to ensure non-financial end-users are able to obtain risk management solutions from a broad range of counterparties.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," the following witnesses provided testimony with respect to the need for the provisions included in Section 310:

> Current regulations have arbitrarily established a *de minimis* level, the breach of which requires registration as a swap dealer, at $8 billion with a drop to $3 billion following an unpredictable CFTC decision making process. The only certainty in the process is that a lack of action will result in the *de minimis* level declining in 5 years. This $3 billion level is also arbitrary and would significantly affect the number of firms defined and regulated as swap dealers. Changes should not be made through such a long and ill-defined process, which includes several unpredictable and difficult to follow steps for market participants. We need a more predictable process.
>
> —Mr. Lance Kotschwar, Senior Compliance Attorney, Gavilon, on behalf of the CMC

> A new category of market participants, swap dealers, was created by the Dodd-Frank Act. These swap dealers must register with the CFTC and are subject to extensive record-keeping, reporting, business conduct standards, clearing, and—in the future—regulatory capital and margin requirements. However, the Act directed the CFTC to exempt from designation as a swap dealer entities that engage in a *de minimis* quantity of swap dealing. The CFTC issued a proposed rule on the *de minimis* threshold for comment in early 2011. After review of hundreds of comments, a series of Congressional hearings and after dozens of meetings with market participants, the CFTC set this *de minimis* threshold at $8 billion. However, it will then be reduced automatically to $3 billion in 2018 absent CFTC action. We oppose such a dramatic reduction in the *de minimis* threshold without deliberate CFTC action. Inaction is always easier than action, and inaction should not be the default justification for such a major regulatory action. In addition, we believe the CFTC should not have the authority to change the *de minimis* level without a formal rulemaking process that allows stakeholders to provide input on what the appropriate threshold should be. Absent these procedural changes, we are concerned a deep reduction in the *de minimis* level could result in commercial end-users being misclassified as swap dealers, hindering end-users' ability to hedge market risk while imposing unnecessary costs that eventually will be borne by consumers.
>
> —Mr. Richard F. McMahon, Jr., Vice President, EEI

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," Mr. Doug Christie, President, Cargill Cotton, on behalf of the CMC, testified with respect to provisions included in Section 310:

> CMC members are concerned that a lower swap dealer *de minimis* level will cause companies to exit the swap business because the extra costs of swap dealer registration are not sustainable for most non-financial companies. This in turn would lead to fewer counterparties available to offer end users risk management solutions. A lower swap dealer *de minimis* level would lead to further consolidation of the swap business toward only a hand-full of registered swap dealers, mostly Wall Street banks. This threat is not purely hypothetical: when the CFTC initially proposed a lower dealing threshold for counterparties of municipal utilities, those utilities found that liquidity rapidly disappeared and the number of available counterparties diminished. Eventually the CFTC was forced to retreat and increase the *de minimis* level for energy swaps with municipal utilities to $8 billion dollars. It is likely that a lower *de minimis* level would have the same effect, not only for utilities but all companies that use swaps to manage risk.

Section 311—Capital requirements for non-bank swap dealers

Under currently-proposed CFTC regulations for capital and margin, non-bank swap dealers would be forced by the CFTC to adhere to an inflexible capital requirement standard (based partially on the capital requirements from the soon-to-be outdated Basel II Accords first proposed in 2004, which have since been eclipsed by the Basel III Accords proposed in 2011). According to testimony received from Mr. William J. Dunaway, CFO, INTL FCStone, Inc., before the Committee on May 21, 2013, under the CFTC's proposal, a firm could be assessed a capital charge beyond their net position in a contract, especially in relation to commodity swaps. Furthermore, the CFTC's capital requirements stand in stark contrast to the SEC's capital requirements for security-based swap dealing due to the SEC's allowance for dealers to utilize pre-approved internal capital models. As a result, the Committee learned that, under a worst case scenario, "the same derivatives portfolio that would require a bank-affiliated Swap Dealer to hold $10 Million in regulatory capital using standard internal models would require us to set aside up to $1 Billion in capital. . . ."

On March 25, 2015, at a hearing entitled "Reauthorizing the CFTC: Market Participant Views," Mr. Mark Maurer, CEO, INTL FCStone Markets LLC (IFM), provided the following testimony with respect to the provisions included in Section 311:

> [T]he competitive advantage given to bank-affiliated Swap Dealers under proposed rules is extraordinary. IFM will be required to hold regulatory capital potentially hundreds of times more than that required for a bank-affiliated Swap Dealer for the same portfolio of positions. This disparate treatment to non-bank Swap Dealers like IFM is in part because the proposed rules allow bank-affiliated Swap Dealers to use internal models to calculate risk associated with customer positions, while IFM and other non-banks cannot use their internal models. These models are in some cases the very same models used by the banks.
>
> The use of internal models is important because internal models generally provide for more sophisticated netting of commodity positions to determine applicable market risk capital charges. As a result of limited netting under the CFTC's "standardized approach," a non-bank Swap Dealer will have to hold market risk capital against economically offsetting commodity swap positions, resulting in a higher capital requirement overall relative to the capital requirement for a bank-affiliated Swap Dealer using an internal model. This increased capital requirement would have the perverse effect of actually incentivizing a non-bank affiliated Swap Dealer to not fully offset the risk of a customer OTC transaction and thus incurring potentially unlimited market risk.
>
> Under the "standardized approach" proposed by the CFTC to calculate Swap Dealer capital requirements . . . many of the commodity derivatives that we make available to our agricultural customers are subject to higher capital requirements than any other derivatives asset class. Agricultural products are at the heart and soul of the U.S. and

> global infrastructure, and requiring more capital for derivatives in agricultural products is counterproductive to the hedging needs of America's agricultural businesses. We will have to hold more capital for agricultural products than interest rate swaps, because the rules treat "commodities" disparately from other asset classes, and in addition, as a non-bank Swap Dealer, we will not be allowed to use our internal models, simply because we are not affiliated with a bank.
>
> Taken in conjunction, the same derivatives portfolio that would require a bank-affiliated Swap Dealer to hold $10 Million in regulatory capital using standard internal models would require us to set aside up to $1 Billion in capital in a worst case scenario. Regulatory capital requirements of this magnitude are . . . not economically feasible for a company of any size.
>
> . . .
>
> As other non-banks register [as Swap Dealers], particularly those in the agricultural and energy space, additional market participants will be caught in this position and either squeezed out of the market, or at least seriously disadvantaged relative to the bank-affiliated dealers.
>
> Obviously, this regulatory capital disparity is not a small hurdle for the already disadvantaged independent dealers to overcome. If left unchanged, these capital rules will eventually cause nonbank Swap Dealers to exit the business. The direct result will be higher costs for end-users, and then for consumers. Increasing concentration in the industry until only the big banks are left will leave many customers with no place to go. Serving farmers, ranchers and grain elevators has not been a focus or a profitable business model for the large dealers.
>
> Even larger customers who might be able to access to OTC hedging tools through bank affiliated dealers will still face higher costs as the big bank dealers will be able to take advantage of decreased market competition. A larger percentage of customers carried through a handful of large, bank affiliated Swap Dealers will increase systemic risk.

Because this potential disparity in capital charges for non-bank versus bank-affiliated swap dealers could harm more than one market participant, Section 311 would require that the CFTC amend its proposed rule and, in close consultation with the SEC and prudential financial regulators, allow non-bank swap dealers to use capital requirements comparable to those used by bank-affiliated swap dealers.

Section 312—Harmonization with the jumpstart our business startups act

In letters to the CFTC, stakeholders representing a wide variety of market participants, such as SIFMA, the Managed Funds Association (MFA), and the Financial Services Roundtable requested that the Commission harmonize its "private offering" requirements

in CFTC Regulations 4.7 and 4.13(a)(3) with the broadened scope of solicitation permitted by the SEC after it proposed amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933. The SEC's proposed changes to the solicitation rules for securities offerings came about after the Jumpstart Our Business Startups Act (JOBS Act) (P.L. 112–106) was signed into law in April of 2012, which allows for solicitation of accredited investors for private securities offerings in order to raise needed capital for companies to expand and create jobs.

While the JOBS Act mandates consistent treatment of Regulation D, Rule 506 offerings across the federal securities laws, it unintentionally omitted harmonizing changes to the CFTC's regulations, which creates an inconsistency between the SEC's rules and the CFTC's rules governing solicitation. Accordingly, because the relief is needed quickly as to not impede use of the JOBS Act by the marketplace, Section 312 would directly amend CFTC regulations (which would obviate the need for a Commission rulemaking) to provide an exemption for any registered commodity pool operator to engage in the general solicitation for the sale of commodity pools parallel to the exemption provided for general solicitation of securities under the JOBS Act.

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," Commissioner Giancarlo provided the following testimony with respect to the provisions included in Section 312:

> Because relief was needed quickly so as to not impede use of the JOBS Act by the marketplace, I welcomed CFTC staff letter 14–116 issued on September 9, 2014, to provide relief to market participants from certain provisions of CFTC Regulations 4.7(b) and 4.13(a)(3) restricting marketing to the public. However, because permanent changes to our regulations via statutory language provides the most certainty to the marketplace, I support the inclusion of the language from H.R. 4413 and H.R. 4392 from the last Congress which would provide an exemption for any registered commodity pool operator parallel to the exemption provided for general solicitation of securities under the JOBS Act.

Section 313—bona fide hedge defined to protect end-user risk management needs

In 2010, the Dodd-Frank Act instructed the CFTC on how to define what constitutes a *bona fide* hedging transaction (i.e., non-speculative trading) or position so those trades would not count towards any positions limits. The statutory definition states that the reduction of risk inherent to a commercial enterprise is a component in determining what qualifies as a *bona fide* hedging transaction. However, in a change from prior practice, the CFTC's approach in both the originally proposed 2011 position limits rule (which was overturned by a federal district court for the District of Columbia in September 2012) and the position limits rule proposed in November of 2013 was to limit the availability of the *bona fide* hedge exemption to a limited set of transactions, unless the CFTC gave specific approval to a particular form of transaction.

In the most-recently proposed position limits rule, instead of providing a clear *bona fide* exemption from position limits to allow end-users of physical commodities to properly hedge their commercial risk, many risk-reducing practices commonly used in the futures markets today were excluded from the list of *bona fide* hedging transactions prescribed in CFTC Rule 151.5(a)(2). This concern was confirmed by Mr. Jeffrey Sprecher, CEO of IntercontinentalExchange, Inc., in testimony before the Committee on May 21, 2013, when he stated that "[t]he narrow definition of *bona fide* hedge will likely hurt commercial end-users that these markets are intended to serve, and thus support the *bona fide* hedge exemption relied upon historically would bring greater certainty to end-users in executing their risk management operations."

The CFTC's limitation of *bona fide* hedges to only a handful of transaction types places significant limitations on many end-users' ability to hedge risk efficiently. As such, the Committee formulated Section 313 to provide for a workable hedge exemption. The *bona fide* hedge provisions in Section 4a(c) of the CEA are intended to provide market participants with certain relief from position limits and therefore give end-users the flexibility necessary to hedge their legitimate anticipated business risks.

One of the main purposes of Section 313 is to make clear that the statutory requirements with respect to what constitutes a *bona fide* hedge transaction must be reflected in the CFTC's further definition of that term. Specifically, changing "may" to "shall" in Section 4a(c)(1) reflects the intent of the Committee that the CFTC is not authorized to promulgate a further definition of "*bona fide* hedge transaction" that is narrower or more restrictive than what is described in the CEA. In addition, Section 313 is intended to clarify that the CFTC's further definition of "*bona fide* hedge transaction" must include hedges of legitimate anticipated business needs.

Section 313 is also intended to provide more flexibility to market participants as hedging practices evolve. It is Congress' intent that the CFTC provide *bona fide* hedge status to all legitimate risk management practices now and in the future. A narrow definition of what constitutes *bona fide* hedging that is limited to an enumerated list of transactions will place significant limitations on many end-users' ability to hedge risk properly and efficiently. In further defining what constitutes a *bona fide* hedging transaction, the CFTC should provide flexibility such that changes and advances in hedging practices can easily be incorporated into the *bona fide* hedging regime in an efficient and timely manner, without further Commission rulemakings that would add uncertainty to the marketplace.

On July 24, 2013, at a hearing entitled "The Future of the CFTC: End-User Perspectives," the following witnesses provided testimony with respect to the need for provisions included in Section 313:

> Congress provided a definition of a *bona fide* hedge within Dodd-Frank that the CFTC has unnecessarily narrowed, including related to anticipatory hedging, and has created at least five different definitions in various rules of what constitutes a *bona fide* hedge. This is nonsensical and creates unnecessary confusion, while disrupting legitimate

> risk mitigation practices. We are committed to working with Congress to set clearer direction on *bona fide* hedges so that transactions that limit economic risks are viewed as *bona fide* hedges by the CFTC.
> —Mr. Lance Kotschwar, Senior Compliance Attorney, Gavilon, on behalf of the CMC
>
> On September 28, 2012, the U.S. District Court for the District of Columbia vacated final CFTC rules regarding position limits. These vacated rules defined the term *bona fide* hedging. As written in the CFTC's rule that was vacated, the definition was unnecessarily narrow and would have discouraged a significant amount of important and beneficial risk management activity. Specifically, the rule narrowed the existing definition considerably by providing that a transaction or position that would otherwise qualify as a *bona fide* hedge also must fall within one of eight categories of enumerated hedging transactions, a definitional change neither supported in nor required by the Dodd-Frank Act. This restrictive definition of *bona fide* hedging transactions could disrupt the commodity markets, make hedging more difficult and costly, and may increase systemic risk by encouraging end-users to leave a relatively large portion of their portfolios un-hedged.
> —Mr. Richard F. McMahon, Jr., Vice President, EEI

On March 24, 2015, at a hearing entitled "Reauthorizing the CFTC: End-User Views," Mr. Doug Christie, President, Cargill Cotton, on behalf of the CMC testified with respect to provisions included in Section 313:

> The fundamental principle is this: price risk is far more complex than just fixed-price risk, but may include volatility and similar non-linear risks associated with prices, and a transaction to hedge any of these risks in connection with a commercial business should receive *bona fide* hedging treatment. Regulators should not condition *bona fide* hedging treatment as available only when risk crystalizes by virtue of a firm holding a physical position or by entering into a contract. Commercial market practices would be severely impacted if hedging transactions were not deemed *bona fide* hedges.
>
> . . .
>
> By narrowly defining *bona fide* hedging, the traditional hedger will be compromised and thus will not be able to effectively manage its risks. If this happens, risk premiums are going to rise throughout the business, which will be passed along the supply chain. Bid/offer spreads will widen and liquidity will be substantially reduced. This narrow view of hedging, if adopted, will mean that producer prices will decline and the cost to the consumer will increase.

. . .

> Within Title VII of Dodd-Frank and in the Commodity Exchange Act (CEA), Congress explicitly referred to anticipatory and merchandising hedging as *bona fide* hedging methods because they are crucial to the risk management functions of commercial and end-user firms. Anticipatory hedging allows commercial firms to mitigate commercial risk that can reasonably be ascertained to occur in the future as part of normal risk management practices.

On March 25, 2015, at a hearing entitled "Reauthorizing the CFTC: Market Participant Views," the following witnesses provided testimony with respect to provisions included in Section 313:

> There is no evidence that Congress intended for the Agency to make it more difficult through position limits rules for farmers, ranchers, and other commercial end-users to hedge their price risks. By limiting the exemption to a rigid and narrow list of enumerated hedges, the Agency's proposal threatens to inject considerable risk into commercial operations."
> —Mr. Terrance A. Duffy, Executive Chairman & President, CME

> [The CFTC's] prohibitions or limitations on anticipatory hedging are likely to greatly constrain the risk management practices of energy and agricultural firms.
> —Benjamin Jackson, President and COO, ICE Futures U.S.

Section 314—Cross-border regulation of derivatives transactions

As the global financial system has evolved, U.S. institutions have expanded their derivatives operations overseas to provide services to both U.S. and non-U.S. customers. At the same time, foreign institutions have established subsidiaries and branches in the U.S. to offer derivatives directly to U.S. customers. The growth of this cross-border activity makes questions regarding the application of the Dodd-Frank Act to activities that occur outside the U.S. (known as "extraterritorial") complex and critical.

Section 722(d) of Title VII sets forth that provisions of the Dodd-Frank Act shall not apply to activities outside the United States unless those activities: (1) have a direct and significant connection with activities in, or effect on, commerce of the United States, or (2) contravene such rules or regulations as the CFTC prescribes are necessary to prevent evasion of the Dodd-Frank Act. This is consistent with historical practice by both the CFTC and the prudential regulators in their treatment of foreign entities with operations in the U.S. or of U.S. entities with regard to their operations in foreign jurisdictions. Generally, the U.S. regulatory agencies have deferred to foreign regulatory authorities for the supervision of entities located abroad if the agencies found that those entities were subject to a regulatory regime comparable to that imposed by the U.S.

However, in April of 2012, the prudential regulators proposed a rule for the application of margin requirements as required by Title VII for Major Swap Participants and Swap Dealers. Under the pru-

dential regulators' proposal, margin requirements would apply to all transactions of U.S. financial institutions—whether they involve their U.S. or non-U.S. customers. For example, a foreign subsidiary of a U.S. bank in Europe would be subject to the Dodd-Frank Act's margin rules even when dealing with European customers.

On June 29, 2012, the CFTC issued proposed "interpretive guidance" for the cross-border application of Title VII of the Dodd-Frank Act. The proposal of this guidance, approved by all five commissioners, was done without the concurrent release of similar guidance from the SEC for security-based swaps and, as it was not in the form of a proposed rule, did not include a cost-benefit analysis. When the proposed guidance was released, then-CFTC Commissioner Jill Sommers stated that '[CFTC] staff had been guided by what could only be called the Intergalactic Commerce Clause' of the United States Constitution, in that every single swap a U.S. person enters into, no matter what the swap or where it was transacted, was stated to have a direct and significant connection with activities in, or effect on, commerce of the United States. This statutory and constitutional analysis of the extraterritorial application of U.S. law was, in my view, nothing short of extra-statutory and extra-constitutional."

On December 13, 2012, the Committee on Agriculture Subcommittee on General Farm Commodities and Risk Management held a hearing where Commissioners Sommers and Chilton testified alongside top regulators from Japan and the European Commission. Combined, the three regulatory jurisdictions testifying at the hearing represented an overwhelming majority of the global derivatives marketplace. Based on testimony the subcommittee received, there appeared to be a serious lack of coordination between both foreign and domestic regulators.

For example, Mr. Masamichi Kono with the Financial Services Agency of Japan (who at the time was Chairman of the International Organization of Securities Commissions (IOSCO)) testified during the hearing that "much needs to be done" by the CFTC and that "it is important that the details of the applicable laws and regulations are made clear as much as possible before their implementation in order to minimize regulatory uncertainty." Further, with respect to minimizing risk in the marketplace—a goal central to the creation of the Dodd-Frank Act—Mr. Kono testified that:

> [S]uch risks need not be addressed by extraterritorial application of the U.S. laws and regulations; rather, the U.S. authorities could rely on foreign regulators upon establishing of course that the foreign regulators have the required authority and competence to exercise appropriate regulation and oversight over those entities and activities. This is what we consider as the most efficient and effective approach, in line with the principles of international comity between sovereign jurisdictions.

At the same hearing, Mr. Patrick Pearson with the European Commission testified before the Committee about regulatory conflicts between the United States and 27 member nations of the European Union. With respect to the risk posed to global markets if international regulators do not properly coordinate the regulation of the markets, he stated that:

> [T]rades will not be able to be cleared. If they can't be cleared, they won't take place. This means that firms and users will not hedge their risks, or firms will hedge their risks but they will only take place within one jurisdiction, which means that risk will be concentrated in one jurisdiction on the planet. That could be the United States. If your firms can't hedge their risks outside of the United States, they'll have to hedge them here. The consequences of that is obviously a fragmented market and a significant concentration of financial risk in the U.S. system, and this is exactly what we tried to prevent with our global regulatory reform.

In the 113th Congress, on March 14, 2013, at a Committee hearing entitled "Examining Legislative Improvements to Title VII of the Dodd-Frank Act," the Hon. Kenneth E. Bentsen, Acting President and CEO, SIFMA, provided the following testimony that informed the drafting of Section 314:

> Though Title VII was signed into law 2½ years ago, we still do not know which swaps activities will be subject to U.S. regulation and which will be subject to foreign regulation. Section 722 of the Dodd-Frank Act limits the CFTC's jurisdiction over swap transactions outside of the United States to those that "have a direct and significant connection with activities in, or effect on, commerce of the U.S." or are meant to evade Dodd-Frank. Section 772 limits the SEC's jurisdiction over security based swap transactions outside of the United States to those meant to evade Dodd-Frank. However, the CFTC and SEC have not yet finalized (or, in the SEC's case, proposed) rules clarifying their interpretation of these statutory provisions. The result has been significant uncertainty in the international marketplace and, due to the aggressive position being taken by the CFTC as described below, a reluctance of foreign market participants to trade with U.S. financial institutions until that uncertainty is resolved. While the CFTC has proposed guidance on the cross-border impact of their swaps rules, that guidance inappropriately recasts the restriction that Congress placed on CFTC jurisdiction over swap transactions outside the United States into a grant of authority to regulate cross-border trades. The CFTC primarily does so with a very broad definition of "U.S. Person," which it applies to persons with even a minimal jurisdictional nexus to the United States. In addition, the CFTC has released several differing interim and proposed definitions of "U.S. Person" for varying purposes, resulting in a great deal of ambiguity and confusion for market participants. SIFMA supports a final definition of U.S. Person that focuses on real, rather than nominal, connections to the United States and that is simple, objective and determinable so a person can determine its status and the status of its counterparties.

On April 18, 2013, the finance ministers of the European Commission, France, Germany, United Kingdom, Japan, Switzerland, Russia, South Africa and Brazil wrote to Treasury Secretary Jacob

Lew stating that "[w]e are already starting to see evidence of fragmentation in this vitally important financial market as a result of lack of regulatory coordination" and "[w]e are concerned that, without clear direction from global policymakers and regulators, derivatives markets will recede into localised and less efficient structures, impairing the ability of business across the globe to manage risk."

On May 21, 2013, testifying before the Committee at a hearing entitled "The Future of the CFTC: Market Perspectives," Mr. Jeffery Sprecher, Founder, Chairman, and CEO, IntercontinentalExchange, Inc., testified with respect to provisions included in Section 314:

> If regulators fail to harmonize, the effects of uncertainty and the prospect for regulatory arbitrage will be damaging. Because markets are global and capital flows across borders, no single country or regulatory regime oversees the derivatives market. In order to make long-term business decisions, market participants require certainty that their transactions will not be judged on conflicting standards. The derivatives markets are international: the majority of companies that operate globally use derivatives to manage price risks, and they conduct these transactions with both U.S. and non-U.S. counterparties. The likely outcome will be that regulators deem other countries' financial regulatory systems as "nonequivalent", which would lead to those countries erecting barriers to its financial markets. It is crucial to understand that if countries erect these barriers, WE markets and market participants will be damaged. Currently, the U.S. derivatives markets are home to vital global benchmark contracts in agriculture, energy, financial asset classes. These have become benchmark contracts because Asian and European market participants have direct access to U.S. markets. Importantly, the long-standing global nature of the derivatives markets and the resulting international competition has led to advances in transparency, risk management, and historically, regulatory cooperation. Over the past year, ICE has been delivering this message to domestic and international regulators, yet regulations continue to diverge, particularly in the U.S. and Europe. We ask the Committee, in its oversight role, to impress upon the Commodity Futures Trading Commission the importance of working with European and Asian counterparts to harmonize regulation and avoid creating unintended, unpredictable impacts on financial markets and their users. The time for agreement is closing.

His testimony was echoed by Mr. Stephen O'Conner, the then-Chairman of ISDA, in his remarks:

> ISDA and our members believe that a globally harmonized approach to cross-border regulation is of paramount importance. What they face now is considerable uncertainty. Uncertainty is never a good thing in financial markets, as there are typically only two things to do in face of that uncertainty. One response is to pull back and wait until such time as greater certainty is provided. On

> a firm level, that means missed opportunity. On a market level, that translates to less efficient, less liquid and more volatile markets, material harm to financing and investing activities and a drag on the economy in general. . . . Harmonization of regulatory approaches, particularly on issues with systemic risk implications, and a concerted program of mutual recognition of regulatory regimes by global regulators are essential parts of the solution to ET.

In the 114th Congress, the Subcommittee on Commodity Exchanges, Energy, and Credit held three separate hearings specifically on issues surrounding the reauthorization of the CFTC in which concerns about the Commission's approach to cross-border issues have been raised. On March 24, 2015, the subcommittee held a hearing entitled "Reauthorizing the CFTC: End-User Views" in which market participants testified to the uncertainty and damaging impact the CFTC's current cross-border guidance is having on their ability to manage risks. At that hearing, Mr. Mark Maurer, Chairman, INTLFCStone Markets, LLC, shared his concerns about the CFTC Cross-Border guidance:

> The CFTC's cross-border guidance proved to be overly complex, resulting in industry challenges and culminating in litigation. We support recognition of non-U.S. regulators' interest in regulating their own markets, with deference to regulators that have comparable regulatory regimes. Better foreign relations are needed going forward to have a cohesive, global swap market.

At that same hearing, in response to a question about areas in which the CFTC could improve, Ms. Lisa Cavallari, Director of Fixed Income Derivatives at Russell Investments said:

> I think—again, when it comes back to the implementation of these particular regulations, the CFTC is critically important in terms of how we go forward, and the intersection of so many rules, not just the—that the CFTC makes, but that has been emphasized in terms of cross-border, these—we need to keep liquid markets and those market participants active. And each one of us at . . . this table actually represents a different end-use, and . . . we need to preserve, and the CFTC can help this, the liquidity of these marketplaces.

On March 25, 2015, the subcommittee held a similar hearing with other market participants, entitled "Reauthorizing the CFTC: Market Participant Views." At that hearing, Mr. Benjamin Jackson, President and COO, ICE Futures U.S., testified about the historical importance of working with foreign regulators to accomplish comprehensive global financial regulations:

> Before financial reform, these conflicts in regulation were the exception, not the norm, because financial regulation was based on a common set of regulatory principles. For example, since 1984, Section 4(b) of the Commodity Exchange Act expressly excluded foreign transactions from CFTC jurisdiction. The CFTC relied on foreign regulators to regulate foreign transactions and worked with regulators to adopt common principles that all regulated mar-

> kets should adopt. Likewise, European regulators took a similar approach to U.S. markets. This approach was very successful, as it led to greater harmonization of regulation, yet allowed foreign regulators to oversee their institutions. We strongly encourage a return to this approach.

On April 14, 2015, the subcommittee held a hearing entitled "Reauthorizing the CFTC: Commissioners' Perspectives" in which Commissioners Bowen, Giancarlo, and Wetjen were invited to provided testimony to the Committee on issues facing the CFTC. During that hearing, Commissioner Giancarlo said:

> Unfortunately, fragmentation of global swaps markets between U.S. persons and non-U.S. persons means smaller and disconnected liquidity pools and less efficient and more volatile pricing for market participants and their end-user customers. It also means greater risk of market failure in the event of economic crisis. By Balkanizing global swaps liquidity, the CFTC's Interpretive Guidance is actually increasing the systemic risk that it was predicated on reducing. Like Smoot-Hawley, the CFTC's Interpretive Guidance is ill-suited to its ostensible purpose of systemic risk reduction. It is, however, wreaking havoc and forcing U.S. financial institutions to retreat from what were once global markets. We simply cannot allow uncoordinated regulatory reforms to permanently divide global swaps markets between U.S. and non-U.S. persons.
>
> The CFTC must replace its cross-border Interpretive Guidance with a formal rulemaking that recognizes outcomes-based substituted compliance for competent non-U.S. regulatory regimes. I support the withdrawal of the CFTC staff's November 2013 Advisory that fails not only the letter and spirit of the "Path Forward," but also contradicts the conceptual underpinnings of the CFTC's Interpretive Guidance.

As of writing this report, global regulators have yet to harmonize their approach to global derivatives regulation. In order to address the serious concerns voiced by both international and domestic regulators, and numerous witnesses who have testified before the Committee over the past three years, Section 314 requires the CFTC to propose and finalize a rule on how U.S. swaps requirements apply to swaps transactions that are not wholly transacted within the United States or between two U.S. Persons. The Committee reminds the Commission of the commitments agreed to by the G–20 Leaders in the Leaders' Declaration agreed to at the 2013 St. Petersburg Summit:

> We also welcome the recent set of understandings by key regulators on cross-border issues related to OTC derivatives reforms, as a major constructive step forward for resolving remaining conflicts, inconsistencies, gaps and duplicative requirements globally, and look forward to speedy implementation of these understandings once regimes are in force and available for assessment. We agree that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective

> regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.

The intent of the Committee is that the CFTC must develop a workable system to evaluate the swaps requirements of foreign jurisdictions to determine if such foreign jurisdictions are comparable to and as comprehensive as U.S. swaps requirements. The Committee firmly agrees with the 2013 G–20 Leaders' Declaration that international swaps regulation is best served by domestic regulators having comparable regimes and deference to regulators in their home jurisdiction, both here in the United States and around the world. The legislation lays out a two-step process to achieve this goal.

First, in Sections (a) and (b), the Committee requires the CFTC to write a rule defining who is a U.S. person and subject to the full weight of the U.S. rules, what criteria will be used to evaluate each category of swaps requirements to determine a foreign jurisdiction's comparability to the United States, and when a U.S. person will be exempted from complying with U.S. rules, because they are in compliance with equivalent foreign rules.

As the Commission undertakes this effort, Sections (b)(3) and (b)(4) provide additional direction for the rulemaking. Section (b)(3) instructs the CFTC to compare regulatory outcomes, as opposed to the actual mechanics of the rule. The Committee agrees with the understanding reached by the OTC Derivatives Regulators Group regarding equivalence and substituted compliance and put forth in their November 2014 report to G–20 leaders:

> [A] flexible, outcomes-based approach should form the basis of final assessments regarding equivalence and substituted compliance. The final assessments of a foreign regime for equivalence or substituted compliance should be based on regulatory outcomes of that foreign regime, taking into account the different frameworks, local market practices and characteristics across jurisdictions. An equivalence or substituted compliance assessment also should be based on an understanding that similar regulatory outcomes may be achieved through the implementation of detailed rules or an applicable supervisory framework, or both. Such assessments may be made on a broad category-by-category basis, rather than on the foreign regime as a whole. An equivalence or substituted compliance assessment should fully take into account international standards, where they are appropriate, regulatory arbitrage, investor protection, risk importation, prudential and other relevant considerations.

Section (b)(4) directs the CFTC to consider risks to the U.S. financial markets when developing its rulemaking on who is a U.S. Person and how U.S. Swaps rules apply to market participants. As expressed in our hearing on April 14, 2015, the Committee is concerned about the issuance of the Cross-Border interpretive guidance and the staff interpretations of the guidance that have dramatically altered the scope of its application. Section (b)(4) requires the Commission to base its rulemaking on risks to the U.S. market-

place that meet the direct and significant test put forward in Section 722 of the Dodd-Frank Act:

> The provisions of this Act relating to swaps . . . shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States . . .

This direction is in line with the testimony provided by Commissioner Bowen at the April 14, 2015 hearing, when Mr. Emmer of Minnesota asked "does the location of the individual negotiating a trade have a direct and significant impact on U.S. commerce, if the trade occurs between foreign counterparties in a foreign jurisdiction?" Commissioner Bowen replied:

> I would suggest that we should follow where the risks actually lie. And so whether the person is located in New York versus London, in some respects, may not be indicative as to where the real risk is. And so we have global markets, the concept of a U.S. person, frankly, may be irrelevant because transactions will be taking place in cyberspace.

Second, Section (c) requires the Commission to utilize the criteria established in the rulemaking to evaluate foreign jurisdictions and determine if the rules they have imposed are, in fact, comparable to and as comprehensive as U.S. swaps rules. The legislation provides the Commission the authority to make these determinations by rule or by order, to ensure the Commission has the flexibility needed to make determinations in a timely fashion. It is the Committee's expectation that the Commission will use the rulemaking process, with notice and comment, for determinations that are more controversial, more complex, or more disruptive to market participants.

The legislation contemplates the eventual completion of swaps rules by other major financial regulators. It provides for recognition as comparable for the rules in the jurisdictions encompassing the eight largest swaps markets by notional value 18 months after the enactment of this Act. It is the Committee's expectation that substituted compliance for the rules of other sophisticated market regulators who are implementing similar reforms be achieved. However, the Committee also recognizes that certain regulators may not complete their rules in a timely manner or may not offer reciprocal recognition to U.S. swaps rules. To that end, subsection (c)(3) provides the Commission with an important option to suspend that recognition.

The subsection provides the Commission with three explicit determinations it can make under which any grant of substituted compliance can be suspended, including: if the foreign jurisdiction's swaps rules are not comparable to and as comprehensive as U.S. swaps rules, if the foreign jurisdiction is not exempting U.S. persons in compliance with U.S. rules from foreign rules, or if the foreign jurisdiction is not providing equivalent recognition or substituted compliance for U.S. registered entities.

These three determinations are intended to support the CFTC Chairman as he is negotiating with his foreign counterparts on

similar cross-border issues and to enable the Commission to hold foreign regulators accountable if they are not negotiating in good faith and also working towards an outcomes-based substituted compliance regime.

In the subcommittee's March 24, 2015 hearing, we heard testimony from two witnesses on the importance of the current cross-border negotiations over CCP recognition. Mr. Terrence Duffy, Executive Chairman and President, CME, said:

> Among the most critical issues facing the Commission today is the potential for the United States to be denied status as a country whose regulations are equivalent to Europe's . . . Historically, both the U.S. and EU have mutually recognized each other's regulatory regimes to promote cross-border access.
>
> Recently, however, the European Commission has taken a different approach. Under European law, U.S. clearinghouses and exchanges—like CME—must first be recognized by European regulators in order to be treated the same as EU clearinghouses and exchanges. The European Commission is conditioning its recognition of U.S. derivatives laws as equivalent to European law on demands for harmful regulatory changes by the U.S. that would impose competitive burdens on U.S., but not EU, clearinghouses and exchanges, and would harm both U.S. and EU market participants.
>
> After more than two years of negotiation and delay, the EU still has refused to grant U.S. equivalence. . . . By contrast, the European Commission recently granted "equivalent" status to several jurisdictions in Asia, including Singapore, which has the same margin regime as the U.S. . . . The European Commission's discriminatory approach to U.S. access to EU markets is creating significant competitive disadvantages for U.S. markets and the participants that use those markets. Without an EU recognition of equivalence, U.S. clearinghouses will not be able to clear EU-mandated derivatives . . .
>
> Make no mistake that a continued decrease in participation in U.S. futures products will harm both EU and U.S. market participants, reducing liquidity and impeding the ability of farmers, ranchers and other U.S. and EU businesses to conduct prudent risk management.

Similarly, Mr. Gerald Corcoran, Chairman of the Board, FIA testified:

> We operate in global markets and to assume otherwise is very dangerous given that market participants are best served with deep liquidity. If global regulations are not well coordinated the markets will fragment within regulatory jurisdictions and become far less liquid, to the detriment of the ultimate end-users. To date, much of the public regulatory scrutiny has focused on the cross-border regulation of trade execution parties, both the client and the swap dealers, but there are also cross-border challenges within the regulation of the infrastructure that is expected to support the clearing of derivatives. For exam-

ple, the "Dodd-Frank Act" specifically provides the CFTC with the ability to exempt comparably regulated foreign clearinghouses from registration with the U.S. regulator yet the CFTC has never established a means by which clearinghouses, also known as central counterparties (CCPs), might seek such exemptions. Thus any foreign CCP clearing swaps for U.S. entities must register with the CFTC, as well as their home country regulator. U.S. based CCPs who are registered with the CFTC and do business with European participants are required under EU law to be "recognized" by having equivalent regulations to those in Europe. Assuming that each regulatory jurisdiction is unlikely to prescribe identical requirements, the practicality of such dual registration or recognition hinges upon the various jurisdictions' ability to acknowledge regulatory differences and rely upon each other as front line regulators. I would like to highlight one specific example of a current regulatory coordination challenge we are facing: Europe and the U.S. have developed differing requirements relative to margin methodologies that CCPs must apply. As clearing members of CCPs in each country, we are perplexed by recent suggestions that the competing methodologies should be run simultaneously. As such, clearing members and their clients would be subjected to the model resulting in the highest margin requirement on any given day. This overly-complex and operationally risky policy seems to overlook the implication to those who post margin—the client and the clearing member. There has been very little transparency or involvement of the clearing members to date in the discussion between the CFTC and EU authorities.

The Committee does not intend Section 314 to offer relief for market participants from all swaps regulatory obligations. It is the Committee's expectation that market participants with a direct and significant impact on the United States should comply with U.S. Rules or another set of rules that has been deemed to be comparable to and as comprehensive as U.S. rules. However, the Committee firmly believes that no market participant should be subject to multiple sets of regulations that are incompatible with one another and would require a participant to break one rule to meet another.

In the 113th Congress, the House of Representatives passed H.R. 1256, the Swap Jurisdiction Certainty Act, by a vote of 301–124, which contained similar requirements to Section 314.

Section 315—Exemption of qualified charitable organizations from designation and regulation as commodity pool operators

As a result of the Dodd-Frank Act's addition of swaps to the commodity pool definition, certain colleges and universities currently face uncertainty as to whether the practices of universities managing their endowment funds together with funds of affiliated organizations (such as university newspapers, clubs, charitable remainder trusts and other organizations within the university community) and entering into swaps in the ordinary course of managing their investment exposure and operational risk (e.g., interest rates

or energy prices) would cause university endowments to be commodity pools and universities themselves to be CPOs or CTAs, subject to CFTC regulation.

Many colleges, universities and other charitable organizations faced similar uncertainty with respect to the Investment Advisors Act of 1940, and this uncertainty was addressed by the Philanthropy Protection Act of 1995 ("PPA"). Since that time, university endowments have relied on the changes made by the PPA to provide an exemption from SEC registration in recognition of the special status of these funds.

Similarly, church benefits boards often use investment managers or advisers that engage in commodities transactions. Church benefits boards also have the ability to pool plan assets with other funds for the benefit of the church ("church plan-related accounts"), purely for investment management purposes. While securities laws clearly exempt church plans and church plan-related accounts from SEC registration requirements. The CEA and CFTC rules are not so clear.

Section 315 will harmonize the exemptions between securities laws and the CEA and CFTC regulations. It will prevent university endowments, church pension plans and church plan-related accounts from having to be registered as commodity pools. Likewise, Section 315 will prevent the universities and church benefits boards from having to register as CPOs or CTAs. These exemptions would reduce the cost to churches, universities and charitable organizations, and would also ensure they have the full benefit of commodities investments that provide diversification, opportunities to hedge, and returns to their respective beneficiaries.

Section 316—Small bank holding company clearing exemption

Under the Dodd-Frank Act, end-users that are not considered a "financial entity" are exempt from the Act's swaps clearing mandate. The Act directed the CFTC to determine whether to exempt small banks and savings associations with assets less than $10 billion from the definition of "financial entity," thereby making them eligible for the end-user exemption from the swaps clearing mandate. In July 2012, the CFTC issued a final rule exempting "small financial institutions" with total assets of $10 billion or less from classification as a "financial entity."

Most banks are structured under a holding company. The holding companies use swaps to manage risk across the small banks and savings associations that they own. Entering into swaps with the holding company is commonplace, with many small banks and savings associations entering into swaps exclusively with the holding company. These non-speculative swaps between holding companies and their small banks and savings associations pose minimal risk to the marketplace. Having to clear these swaps would impose significant costs on the small banks and savings associations. If the holding companies are not exempted from the Act's swaps clearing mandate, small banks and savings associations may have to either forgo the use of swaps at the holding company, or undertake tremendous operational expense for the ability to enter into as little as one swap. Section 316 extends the Commission's exemption for small banks and savings associations to the holding companies that own them.

Section 317—Core principle certainty

The Dodd-Frank Act required that cleared swaps must be executed through a swap execution facility (SEF). SEFs are facilities, trading systems or platforms in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system. The Dodd-Frank Act's swaps clearing mandate is predicated on the vibrant operation of SEFs. Regulations that impose significant costs and prescribe onerous burdens on SEFs thereby impeding their development and potentially contributing to their failure should be discouraged.

The Dodd-Frank Act provided a core principles-based framework for SEFs. SEF Core Principle 4 requires SEFs to monitor trading in swaps to prevent manipulation, price distortion and disruptions of the delivery or cash settlement process, among other things. Certain rules promulgated under Core Principle 4 require a SEF to look beyond its own market to gain the information necessary to perform these functions. For example, a SEF that executes a credit default swap on a Ford Motor Company bond must also monitor trading in the underlying Ford Motor Company bonds to prevent manipulation, price distortion and disruption in its market. While a SEF has the ability to monitor trades it executes, asking it to monitor manipulation in another marketplace in which it may provide no execution services is an undue, unfair and unwarranted burden. As the CFTC admits on its website, only it can perform cross-market surveillance.

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," Commissioner Giancarlo provided the following testimony with respect to the provisions included in Section 317:

> Congress should clarify SEF Core Principle 4 to make clear that a SEF is not required to monitor markets beyond its own. . . . The CFTC should also revise its rules to this effect.

Similarly, SEF Core Principle 6 requires a SEF to "adopt for each of the contracts of the facility, as necessary and appropriate, position or accountability for speculators." As with a SEF's ability to monitor trades, a SEF's ability to monitor positions held by market participants is limited. A SEF can only know about the transactions completed at its own facility and has no way of knowing what the portfolio of swaps a market participant may hold. Mr. Shawn Bernardo, testifying on behalf of the Wholesale Market Brokers Association, Americas, explained:

> Position limits or accountability levels apply market-wide to an entity's overall position in a given swap, commodity, or instrument subject to limits and ownership and control provisions. To monitor an entity's positions and take action to enforce such a market-wide requirement, a SEF would need to have access to information about an entity's overall positions in the swap and underlying instrument or commodity, which it does not have.

Section 317 would require a SEF "be responsible for monitoring positions only on its own facility."

SEF Core Principle 13 requires a SEF to have "financial resources [in an amount that] exceeds the total amount that would enable the [SEF] to cover the operating costs of the [SEF] for a 1-year period, as calculated on a rolling basis." This is the same financial resources requirement imposed on designated contract markets (DCM). However, the market impact of a SEF failure is not nearly comparable to the effect of a DCM failure. A SEF failure will not likely create a liquidity crisis because participants can easily move their trading to another SEF. This is in contrast with the futures market where a DCM owns the products traded on it. The failure of one DCM will likely harm liquidity absent regulatory action to transfer those products and corresponding open interest to another DCM. Further, a failed SEF would likely be able to wind-down its business in far less than one year. Accordingly, forcing a SEF to retain capital to cover one year of operating expenses is unwarranted.

On April 14, 2015, at a hearing entitled "Reauthorizing the CFTC: Commissioner Views," Commissioner Giancarlo provided the following testimony with respect to the provisions included in Section 317:

> Congress should reexamine this core principle and only require a SEF to hold enough capital to conduct an orderly wind-down of its operations. It would not take a SEF one year to terminate employees and contracts and conduct an orderly wind-down of its operations. It would not be unreasonable to expect a SEF to conduct such a wind-down in three months. This approach would release significant capital back to the SEF for innovation, lower barriers to entry, reduce costs and increase competition.

The Dodd-Frank Act narrowly prescribed the extensive duties and responsibilities of a SEF's chief compliance officer without consideration for a SEF's potential limited resources. Because SEFs maintain relatively small corporate structures, certain duties and responsibilities of their chief compliance officers have proven to be unduly burdensome. For these reasons, SEF chief compliance officers require greater flexibility to fulfil their obligations under the Dodd-Frank Act.

Section 317 provides a swap execution facility SEF with flexibility in developing and implementing its surveillance and monitoring rules, narrows SEF's monitoring responsibility to swaps trading only on its own facility, replaces the requirement that a SEF hold funds to cover its operating costs for 1 year with a requirement that it hold funds to conduct an orderly wind-down of its operations, and provides flexibility for SEF chief compliance officers and procedures for SEF annual reports to the CFTC.

Section 318—Treatment of Federal Home Loan Bank products

The 12 regional Federal Home Loan Banks (FHLBanks), created by Congress in 1932, are member-owned cooperative institutions regulated by the Federal Housing Finance Agency (FHFA). FHLBank members include banks, credit unions, insurance companies and community development financial institutions. The mission of the FHLBanks is to provide their members with reliable wholesale funding and liquidity to support housing finance, com-

munity development, and economic growth. The FHLBanks' lending to their member financial institutions have been critical to the flow of credit, including residential mortgage credit, particularly through the financial crisis.

The Dodd-Frank Act generally exempts "identified banking products" (including loans) from regulation as "swaps," or derivatives, even if these loans contain features such as caps, floors or options that are sometimes included in derivatives. FHLBanks are not included as "banks" for purposes of this exemption and the FHFA is not included as an appropriate federal regulator for the purposes of the exemption. Regardless, FHLBank loans to its members (advances) have been afforded a similar exemption as commercial bank loans through CFTC regulatory guidance due to the cooperative nature and regulatory structure of the FHLBank System.

However, the scope of the FHLBanks' exemption is unclear. In its regulatory guidance, the CFTC exempted certain loans entered into by FHLBanks. The CFTC also exempted a number of loans embedded with derivative-like features subject to certain limitations, but it didn't specifically impose those limitations on the FHLBanks' use of those loans. Therefore, it's unclear whether FHLBanks' loans are subject to those limitations. Subjecting FHLBank advances to the multitude of the Dodd-Frank Act requirements could increase the cost of funds to lenders nationwide.

Section 318 resolves any ambiguities by adding language to the CEA definitively categorizing FHLBank advances as "identified banking products" and, in so doing, assuring that FHLBank advances are not considered swaps under the Dodd-Frank Act. Section 318 ensures that community financial institutions will keep affordable access to financial services that help them to structure their products to meet the needs of the communities they serve and to prudently manage their balance sheets.

Section 319—Treatment of certain funds

From 1985 until 2012, CFTC Regulation 4.5 excluded "otherwise regulated entities"—registered funds, insurance company separate accounts, bank trust and custodial accounts, and retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA)—from CPO regulation because they were already regulated by the SEC. As a part of a 2012 rulemaking, the CFTC significantly broadened the reach of its oversight of registered funds. As a result, more than 70 fund companies managing over 5,000 mutual funds have had to register with the CFTC as CPOs, resulting in increased costs for registered funds and the Americans who invest in them.

Additional regulation by the CFTC is unnecessary, particularly for those funds that do not resemble or compete with traditional commodity pools. Registered funds and their advisers are comprehensively regulated by the SEC, including regulations that govern the funds' derivatives holdings.

In a statement submitted for the March 24, 2015 "Reauthorizing the CFTC: End-User Views" hearing record, the Investment Company Institute addressed its concerns regarding Regulation 4.5:

> In February 2012, the CFTC voted to significantly narrow the exclusion from CPO regulation in Rule 4.5 under the CEA as it relates to registered funds and rescind an

exemption from CPO registration that previously was available to sponsors of private investment funds. During the public comment period, ICI and many other stakeholders warned the agency that its proposals were overbroad, and offered a myriad of recommendations for tailoring the rules to achieve the CFTC's stated regulatory objectives without placing undue burdens on registered and private funds and their sponsors/advisers, as well as on the CFTC's limited resources. Unfortunately, the CFTC proceeded to adopt the rules largely as proposed. As anticipated by commenters, these rule changes have had significant implications for many asset management firms—in addition to the many new obligations imposed on these firms by the Dodd-Frank Act. Indeed, we understand that over 700 additional firms, which collectively operate thousands of registered and private funds, have now registered as CPOs. Many more firms may be required to register in the future. Unfortunately, most of the costs imposed by this additional regulation will be indirectly borne by fund shareholders.

The timing of these rule changes was unfortunate and unnecessary. The changes were not mandated by the Dodd-Frank Act, although the CFTC attempted to link them to the Act by describing them as being "consistent with the tenor" of that Act. Their promulgation has required ICI members and other stakeholders to expend significant time and resources on complying with the amended Rule 4.5 exclusion or, if they were unable to rely on the exclusion, registering as a CPO and complying with the applicable requirements.

ICI, both individually and jointly with other trade associations, has submitted more than 20 requests to the CFTC and NFA for clarification, confirmation, and interpretive or no-action relief necessary to facilitate compliance as a result of the amended rule. Many of these requests remain unanswered, months or even years after their submission. The registered fund industry is characterized by a strong culture of compliance, and the uncertainty created by these outstanding requests has made it unnecessarily challenging and costly for registered funds and their advisers to navigate their compliance obligations under CFTC regulations. These efforts have come at a time when ICI, its members and other stakeholders are devoting time and resources to understanding and complying with the many significant new rules that were required by the Dodd-Frank Act.

Section 319 exempts registered funds already subject to SEC regulation from having to register with the CFTC as CPOs if their funds' only investment in commodity interests is limited to "financial commodities" (e.g., S&P 500 swaps). It reduces the unnecessary regulation and costs created by the Rule 4.5 amendments without undermining investor protection. Section 319 allows the CFTC to continue to regulate funds that resemble or compete with tradi-

tional commodity pools, while restoring exclusive SEC jurisdiction over those funds that invest only in financial derivatives.

Title IV—Technical Corrections

Committee staff, CFTC staff, and House Legislative Counsel staff worked together to develop Title IV and fix a number of statutory oversights and drafting errors.

Section 401—Correction of references

Section 5h(f) refers to SEF core principles, whereas section 5h(g) is the intended provision under which a SEF can be exempt from registration due to being "subject to comparable, comprehensive supervision and regulation."

Section 1a(2)(i) does not exist, and the provision is meant to reference the definition of "excluded commodity" in section 1a(19)(i).

This amendment corrects a typographical error in the cross-reference to the Administrative Procedure Act.

Section 402—Elimination of obsolete references to dealer options

The provisions refer to activity that occurred prior to 1978. Dealer options are no longer traded, and the Commission deleted the corresponding regulation (32.23) as part of its commodity options rulemaking.

Section 403—Updated trade data publication requirement

The term "exchange" is not a defined term in the CEA, and this updated language reflects the current trade data publication requirements under the CEA.

Section 404—Flexibility for registered entities

This amendment allows all registered entities to delegate functions under core principles to a third-party service provider. For consistency in regulation SEFs, DCOs and SDRs should be allowed to delegate these functions as DCMs are currently able to do.

Section 405—Elimination of obsolete references to electronic trading facilities

The CFMA added the term "electronic trading facility" to support two forms of trading that were abolished by the Dodd-Frank Act. There is no longer a need for this term in the CEA.

Section 406—Elimination of obsolete reference to alternative swap execution facilities

Initially, the Dodd-Frank Act referred to SEFs as "alternative swap execution facilities". "Alternative" was dropped in later versions of the legislation.

Section 407—Elimination of redundant references to types of registered entities

The reference to registered entities is sufficient. The deleted language is unnecessary.

Section 408—Clarification of Commission authority over swaps trading

These amendments clarify the Commission's authority under Section 8a over swaps trading.

Section 409—Elimination of obsolete reference to the Commodity Exchange Commission

This strikes an obsolete reference to the Commodity Exchange Commission.

Section 410—Elimination of obsolete references to derivative transaction execution facilities

Derivatives Transaction Execution Facility (DTEF) was a type of registered entity created by the CFMA in 2000. It was abolished by the Dodd-Frank Act in 2010.

Section 411—Elimination of obsolete references to exempt boards of trade

Exempt Boards of Trade (EBOTs) were abolished by the Dodd-Frank Act in 2010.

Section 412—Elimination of report due in 1986

Section 16a of the CEA requires the CFTC to submit a study to the Congressional Agriculture Committees on the function of the National Futures Association. This section would eliminate this language.

Section 413—Compliance report flexibility

The timing requirement under current Section 4s(k)(3)(B)(i) has proven to be unworkable. This amendment gives the Commission administrative flexibility over timing.

Section 414—Miscellaneous corrections

Section 414 is a collection of additional miscellaneous statutory corrections that fix drafting errors from prior legislation.

COMMITTEE CONSIDERATION

I. HEARINGS

The Committee on Agriculture and Subcommittee on Commodity Exchanges, Energy and Credit held four hearings during the 114th Congress in anticipation of legislation to reauthorize the Commodity Futures Trading Commission (CFTC).

On March 12, 2015, the Full Committee on Agriculture held a hearing entitled, "To Review the 2015 Agenda for the Commodity Futures Trading Commission" where the Committee heard from CFTC Chairman Timothy Massad.

On March 24, 2015, the Subcommittee head a hearing entitled, "Reauthorizing the CFTC: End-User Views" where the following witnesses testified on matters included in H.R. 2289:

- Mr. Douglas Christie, President, Cargill Cotton, Cordova, TN; on behalf of the Commodity Markets Council
- Mr. Lael E. Campbell, Director Regulatory & Government Affairs, Constellation, an Exelon Company, Washington, D.C.; on behalf of the Edison Electric Institute

• Ms. Lisa A. Cavallari, Director, Fixed Income Derivatives, Russell Investments, Seattle, WA; on behalf of the American Benefits Council

• Mr. Mark Maurer, Chief Executive Officer, INTL FCStone Markets, LLC, Chicago, IL

• Mr. Howard Peterson, Jr., President & Owner, Peterson Oil Service, Worcester, MA; on behalf of the New England Fuel Institute

On March 25, 2015, the Subcommittee on Commodity Exchanges, Energy, and Credit held a hearing entitled, "Reauthorizing the CFTC: Market Participant Views" where the following witnesses testified on matters included in H.R. 2289:

• Mr. Terrence A. Duffy, Executive Chairman & President, CME Group, Chicago, IL

• Mr. Benjamin Jackson, President and Chief Operating Officer, ICE Futures U.S., New York, NY

• Mr. Daniel J. Roth, President and CEO, National Futures Association, Chicago, IL

• Mr. Gerald F. Corcoran, Chairman of the Board & Chief Executive Officer, R.J. O'Brien & Associates, LLC, Chicago, IL; on behalf of the Futures Industry Association

• Mr. Shawn Bernardo, Chief Executive Officer, tpSEF—Tullett Prebon, Jersey City, NJ; on behalf of the Wholesale Market Brokers Association, Americas

On April 14, 2015, the Subcommittee on Commodity Exchanges, Energy, and Credit held a hearing entitled, "Reauthorizing the CFTC: Commissioners' Perspectives" where the following witnesses testified on matters included in H.R. 2289:

• The Honorable Sharon Y. Bowen, Commissioner, Commodity Futures Trading Commission, Washington, D.C.

• The Honorable J. Christopher Giancarlo, Commissioner, Commodity Futures Trading Commission, Washington, D.C.

• The Honorable Mark P. Wetjen, Commissioner, Commodity Futures Trading Commission, Washington, D.C.

In addition to the Committee's work in the 114th Congress outlined above, during the 113th Congress, the Committee held four hearings to gather input regarding the reauthorization of the CFTC from CFTC Commissioners, end-users, and a variety of market participants. The Committee also held a legislative hearing to examine seven legislative proposals to improve Title VII of the Dodd-Frank Act. Two of those measures were eventually signed into law and the remaining five were individually passed by the House with bipartisan support, and/or were included in H.R. 4413, the Customer Protection and End-User Relief Act, and ultimately in this legislation where noted under Purpose and Need.

In the 112th Congress, the Committee also considered a variety of bills addressing concerns similar to those addressed in the Commodity End-User Relief Act of 2015. The Committee was the first to hear testimony from Jon Corzine following the collapse of MF Global, and later heard the views of foreign regulators regarding the cross-border application of U.S. swaps rules. The Committee held an additional 10 hearings regarding derivatives markets, end-users, and the implementation of Title VII of the Dodd-Frank Act.

II. FULL COMMITTEE

On May 14, 2015, the Committee on Agriculture met pursuant to notice, with a quorum present to consider H.R. 2289. Chairman Conaway made an opening statement as did Ranking Member Peterson, Subcommittee Chairman Austin Scott, and Subcommittee Ranking Member David Scott.

Chairman Conaway placed H.R. 2289 before the Committee and, without objection a first reading of the bill was waived and it was open to amendment by title.

Chairman Conaway recognized Mr. Peterson to offer and explain his amendment to strike most of the text of the base bill and substitute a version of the bill that included only certain sections of the base bill. Discussion occurred and by a voice vote, the amendment failed.

Mr. Lucas offered an amendment to clarify when the CFTC can disclose proprietary information submitted to the Commission on forms CPO–PQR and Form CTA–PR. The amendment was adopted by voice vote.

Ms. Delbene offered an amendment to clarify that the Commission's assessment of costs and benefits regarding rules and orders will be affirmed by a court unless that assessment is found to be an abuse of discretion. The amendment was adopted by voice vote.

Mr. Goodlatte offered an amendment that directs the CFTC to report to Congress within 90 days of enactment the status of ongoing review of Foreign Board of Trade applications and the status of the CFTC's negotiations with foreign regulators regarding aluminum warehousing. The amendment also requires the CFTC to take final action on any such application by September 30, 2016. The amendment was adopted by a voice vote.

Mr. Davis offered an amendment to address recent changes to CFTC Rule 4.5 and restore exclusive jurisdiction over those funds that invest only in financial derivatives to the U.S. Securities and Exchange Commission, while allowing the CFTC to continue to regulate funds that resemble or compete with traditional commodity pools. The amendment was adopted by a voice vote.

Ms. Kuster offered an amendment to amend section 1 a(10) of the Commodity Exchange Act by removing commodity pool operator registration requirements for investment trusts, syndicates, or similar forms of enterprises that are already exempt from the definition of investment company in the Investment Company Act of 1940. The amendment was adopted by a voice vote.

Mr. Emmer offered an amendment to amend section 2(h)(7)(C) of the Commodity Exchange Act by clarifying that the CFTC's decisions to exempt small banks and savings associations from classification as a financial entity will also be extended to similarly-sized holding companies of those associations. The amendment was adopted by a voice vote.

Mr. Austin Scott offered an amendment to amend section 5h(f) of the Commodity Exchange Act to narrow a Swap Execution Facility's (SEF) monitoring responsibility over "trading in swaps" to swaps trading "only on its own facility." It also replaces the requirement that a SEF hold funds to cover its operating costs for one year with the requirement that it hold funds to conduct an orderly wind-down of operations. It further modifies the duties of a

SEF chief compliance officer and the procedures for SEF annual reports to the CFTC. The amendment was adopted by a voice vote.

Mr. Lucas offered an amendment to clarify that for the purposes of any Federal Home Loan Bank, the Federal Housing Finance Agency is an "appropriate Federal banking agency." The amendment was adopted by a voice vote.

Mr. Bost offered an amendment to allow the CFTC to suspend a determination that a foreign jurisdiction's swaps requirements are comparable to or as comprehensive as the U.S. swaps requirements when a foreign jurisdiction has not provided equivalent recognition or substituted compliance for registered entities domiciled in the United States. The amendment was adopted by a voice vote.

There being no further amendments, Mr. David Scott moved that H.R. 2289, as amended, be adopted and reported favorably to the House with the recommendation that it do pass. By a voice vote, the bill was adopted.

At the conclusion of the meeting, Chairman Conaway advised Members that pursuant to the rules of the House of Representatives Members had until May 18, 2015, to file any supplemental, minority, additional, or dissenting views with the Committee.

Without objection, staff was given permission to make any necessary clerical, technical or conforming changes to reflect the intent of the Committee. Chairman Conaway thanked all the Members and adjourned the meeting.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the House of Representatives, H.R. 2289 was reported by voice vote with a majority quorum present. There was no request for a recorded vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee on Agriculture's oversight findings and recommendations are reflected in the body of this report.

BUDGET ACT COMPLIANCE (SECTIONS 308, 402, AND 423)

The provisions of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a)(1) of the Congressional Budget Act of 1974 (relating to estimates of new budget authority, new spending authority, new credit authority, or increased or decreased revenues or tax expenditures) are not considered applicable. The estimate and comparison required to be prepared by the Director of the Congressional Budget Office under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and sections 402 and 423 of the Congressional Budget Act of 1974 submitted to the Committee prior to the filing of this report are as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 28, 2015.

Hon. K. MICHAEL CONAWAY,
Chairman, Committee on Agriculture,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2289, the Commodity End-User Relief Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

KEITH HALL, *Director.*

Enclosure.

H.R. 2289—Commodity End-User Relief Act

Summary: H.R. 2289 would authorize appropriations to operate the Commodity Futures Trading Commission (CFTC) through 2019 and to make changes in some of the agency's operating procedures. The bill also would amend the Commodity Exchange Act to provide greater protections for customer funds held by entities that broker transactions in commodity futures and to relax requirements on certain participants in swap transactions. (A swap is a contract that calls for an exchange of cash between two participants, based on an underlying rate or index or on the performance of an asset.)

CBO estimates that implementing H.R. 2289 would cost $1.1 billion over the 2016–2020 period, assuming appropriation of the necessary amounts. CBO expects that enacting H.R. 2289 would affect direct spending; therefore, pay-as-you-go procedures apply. However, CBO estimates that those effects would not be significant. Enacting H.R. 2289 would not affect revenues.

H.R. 2289 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary effect of H.R. 2289 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	2016	2017	2018	2019	2020	2016–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
CFTC Reauthorization:						
Estimated Authorization Level	256	263	270	278	0	1,067
Estimated Outlays	228	263	264	272	25	1,052
Other Provisions:						
Estimated Authorization Level	15	7	7	8	8	45
Estimated Outlays	13	8	7	7	8	44
Total Changes:						
Estimated Authorization Level	271	270	277	286	8	1,112
Estimated Outlays	241	271	271	279	33	1,096

Notes: Components may not sum to totals because of rounding.
CFTC = Commodity Futures Trading Commission.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the end of fiscal year 2015, the necessary amounts will be appropriated near the beginning of each fiscal

year, and outlays will follow spending patterns for similar activities at the CFTC.

Spending subject to appropriation

CFTC reauthorization: H.R. 2289 would authorize appropriations for CFTC operations through 2019; for 2015, the CFTC received an appropriation of $250 million. Based on the agency's current budget and adjusting for anticipated inflation, CBO estimates that extending the authorization of appropriations for the current functions of the CFTC through 2019 would cost about $1.1 billion over the 2015–2020 period, assuming those amounts are appropriated each year.

Other provisions: H.R. 2289 also would direct the CFTC to:

- Change certain procedures in its rulemaking process and to improve safeguards of market data in the agency's control;
- Report price and volume data for swap transactions when the volume of trading is at a level that individual market participants could be identified (known as "illiquid markets"); and
- Issue rules that define the application of United States regulations to swap transactions undertaken between a U.S. entity and a foreign entity.

Based on information from the CFTC, CBO estimates that the agency would require 30 additional personnel annually to handle the increased workload under these provisions, an increase of about 4 percent over the agency's 2014 staffing level. We estimate that salaries, benefits, and overhead for those additional staff, as well as new administrative expenses, would cost $44 million over the 2015–2020 period, assuming appropriation of the necessary amounts.

Direct spending and revenues

H.R. 2289 would affect federally owned utilities by changing the way CFTC regulates certain electric and natural gas utility contracts. CBO estimates that the net effect on direct spending as a result of those changes would not be significant over the 2015–2025 period. Enacting H.R. 2289 would not affect revenues.

Pay–As–You–Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Enacting H.R. 2289 would affect direct spending; however, CBO estimates that those effects would not be significant.

Intergovernmental and private-sector impact: H.R. 2289 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Susan Willie; Impact on State, Local, and Tribal Governments: J'nell Blanco Suchy; Impact on the Private Sector: Logan Smith.

Estimate approved by: Theresa Gullo, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to reauthorize the Commodity

Futures Trading Commission, to better protect futures customers, to provide end users with market certainty, to make basic reforms to ensure transparency and accountability at the Commission, to help farmers, ranchers, and end users manage risks, to help keep consumer costs low, and for other purposes.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee report incorporates the cost estimate prepared by the Director of the Congressional Budget Office pursuant to sections 402 and 423 of the Congressional Budget Act of 1974.

ADVISORY COMMITTEE STATEMENT

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

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

FEDERAL MANDATES STATEMENT

The Committee adopted as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

EARMARK STATEMENT REQUIRED BY CLAUSE 9 OF RULE XXI OF THE RULES OF HOUSE OF REPRESENTATIVES

H.R. 2289 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI of the Rules of the House Representatives.

DUPLICATION OF FEDERAL PROGRAMS

This bill does not establish or reauthorize a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that H.R. 2289 specifically directs CFTC to conduct one rule making proceedings within the meaning of 5 U.S.C. 551.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

* * * * * * *

SEC. 1a. DEFINITIONS.

As used in this Act:

(1) ALTERNATIVE TRADING SYSTEM.—The term "alternative trading system" means an organization, association, or group of persons that—

(A) is registered as a broker or dealer pursuant to section 15(b) of the Securities Exchange Act of 1934 (except paragraph (11) thereof);

(B) performs the functions commonly performed by an exchange (as defined in section 3(a)(1) of the Securities Exchange Act of 1934);

(C) does not—

(i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on the alternative trading system; or

(ii) discipline subscribers other than by exclusion from trading; and

(D) is exempt from the definition of the term "exchange" under such section 3(a)(1) by rule or regulation of the Securities and Exchange Commission on terms that require compliance with regulations of its trading functions.

(2) APPROPRIATE FEDERAL BANKING AGENCY.—The term "appropriate Federal banking agency"—

(A) has the meaning given the term in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(B) means the Board in the case of a noninsured State bank; [and]

(C) is the Farm Credit Administration for farm credit system institutions[.]*; and*

(D) is the Federal Housing Finance Agency for any Federal Home Loan Bank (as defined in section 2 of the Federal Home Loan Bank Act).

(3) ASSOCIATED PERSON OF A SECURITY-BASED SWAP DEALER OR MAJOR SECURITY-BASED SWAP PARTICIPANT.—The term "associated person of a security-based swap dealer or major security-based swap participant" has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

(4) ASSOCIATED PERSON OF A SWAP DEALER OR MAJOR SWAP PARTICIPANT.—

(A) IN GENERAL.—The term "associated person of a swap dealer or major swap participant" means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves—

(i) the solicitation or acceptance of swaps; or

(ii) the supervision of any person or persons so engaged.

(B) EXCLUSION.—Other than for purposes of section 4s(b)(6), the term "associated person of a swap dealer or major swap participant" does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

(5) BOARD.—The term "Board" means the Board of Governors of the Federal Reserve System.

(6) BOARD OF TRADE.—The term "board of trade" means any organized exchange or other trading facility.

(7) CLEARED SWAP.—The term "cleared swap" means any swap that is, directly or indirectly, submitted to and cleared by a derivatives clearing organization registered with the Commission.

(8) COMMERCIAL MARKET PARTICIPANT.—The term "commercial market participant" means any producer, processor, merchant, or commercial user of an exempt or agricultural commodity, or the products or byproducts of such a commodity.

[(8)**]** *(9)* COMMISSION.—The term "Commission" means the Commodity Futures Trading Commission established under section 2(a)(2).

[(9)**]** *(10)* COMMODITY.—The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by the first section of Public Law 85–839 (7 U.S.C. 13–1)) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

[(10)**]** *(11)* COMMODITY POOL.—

(A) IN GENERAL.—The term "commodity pool" means any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any—

(i) commodity for future delivery, security futures product, or swap;

(ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

(iii) commodity option authorized under section 4c; or

(iv) leverage transaction authorized under section 19.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term "commodity pool" any investment trust, syndicate, or similar form of enterprise if the Commission determines that

the rule or regulation will effectuate the purposes of this Act.

(C) EXCLUSION.—The term "commodity pool" shall not include any investment trust, syndicate, or similar form of enterprise excluded from the definition of "investment company" pursuant to sections 3(c)(10) or 3(c)(14) of the Investment Company Act of 1940.

[(11)**]** *(12)* COMMODITY POOL OPERATOR.—

(A) IN GENERAL.—The term "commodity pool operator" means any person—

(i) engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any—

(I) commodity for future delivery, security futures product, or swap;

(II) agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

(III) commodity option authorized under section 4c; or

(IV) leverage transaction authorized under section 19; or

(ii) who is registered with the Commission as a commodity pool operator.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term "commodity pool operator" any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise if the Commission determines that the rule or regulation will effectuate the purposes of this Act.

(C)(i) The term "commodity pool operator" does not include a person who serves as an investment adviser to an investment company registered pursuant to section 8 of the Investment Company Act of 1940 or a subsidiary of such a company, if the investment company or subsidiary invests, reinvests, owns, holds, or trades in commodity interests limited to only financial commodity interests.

(ii) For purposes of this subparagraph only, the term "financial commodity interest" means a futures contract, an option on a futures contract, or a swap, involving a commodity that is not an exempt commodity or an agricultural commodity, including any index of financial commodity interests, whether cash settled or involving physical delivery.

(iii) For purposes of this subparagraph only, the term "commodity" does not include a security issued by a real estate investment trust, business development company, or issuer of asset-backed securities, including any index of such securities.

[(12)**]** *(13)* COMMODITY TRADING ADVISOR.—

(A) IN GENERAL.—Except as otherwise provided in this paragraph, the term "commodity trading advisor" means any person who—

(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in—

(I) any contract of sale of a commodity for future delivery, security futures product, or swap;

(II) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i)*;*

(III) any commodity option authorized under section 4c; or

(IV) any leverage transaction authorized under section 19;

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i);

(iii) is registered with the Commission as a commodity trading advisor; or

(iv) the Commission, by rule or regulation, may include if the Commission determines that the rule or regulation will effectuate the purposes of this Act.

(B) EXCLUSIONS.—Subject to subparagraph (C), the term "commodity trading advisor" does not include—

(i) any bank or trust company or any person acting as an employee thereof;

(ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher;

(iii) any floor broker or futures commission merchant;

(iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees;

(v) the fiduciary of any defined benefit plan that is subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);

(vi) any contract market or ⟦derivatives transaction execution facility⟧ *swap execution facility*; and

(vii) such other persons not within the intent of this paragraph as the Commission may specify by rule, regulation, or order.

(C) INCIDENTAL SERVICES.—Subparagraph (B) shall apply only if the furnishing of such services by persons referred to in subparagraph (B) is solely incidental to the conduct of their business or profession.

(D) ADVISORS.—The Commission, by rule or regulation, may include within the term "commodity trading advisor", any person advising as to the value of commodities or issuing reports or analyses concerning commodities if the Commission determines that the rule or regulation will effectuate the purposes of this paragraph.

(E) The term "commodity trading advisor" does not include a person who serves as an investment adviser to an investment company registered pursuant to section 8 of the Investment Company Act of 1940 or a subsidiary of such a company, if the commodity trading advice relates only to a financial commodity interest, as defined in paragraph (11)(C)(ii) of this section. For purposes of this subparagraph only, the term "commodity" does not include a security issued by a real estate investment trust, business development company, or issuer of asset-backed securities, including any index of such securities.

[(13)**]** *(14)* CONTRACT OF SALE.—The term "contract of sale" includes sales, agreements of sale, and agreements to sell.

[(14)**]** *(15)* COOPERATIVE ASSOCIATION OF PRODUCERS.—The term "cooperative association of producers" means any cooperative association, corporate, or otherwise, not less than 75 percent in good faith owned or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with the Act of February 18, 1922 (42 Stat. 388, chapter 57; 7 U.S.C. 291 and 292), including any organization acting for a group of such associations and owned or controlled by such associations, except that business done for or with the United States, or any agency thereof, shall not be considered either member or nonmember business in determining the compliance of any such association with this Act.

[(15)**]** *(16)* DERIVATIVES CLEARING ORGANIZATION.—

(A) IN GENERAL.—The term "derivatives clearing organization" means a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction—

(i) enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties;

(ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the derivatives clearing organization; or

(iii) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such agreements, contracts, or transactions executed by the participants.

(B) EXCLUSIONS.—The term "derivatives clearing organization" does not include an entity, facility, system, or organization solely because it arranges or provides for—

(i) settlement, netting, or novation of obligations resulting from agreements, contracts, or transactions, on a bilateral basis and without a central counterparty;

(ii) settlement or netting of cash payments through an interbank payment system; or

(iii) settlement, netting, or novation of obligations resulting from a sale of a commodity in a transaction in the spot market for the commodity.

[(16)] *(17)* ELECTRONIC TRADING FACILITY.—The term "electronic trading facility" means a trading facility that—

(A) operates by means of an electronic or telecommunications network; and

(B) maintains an automated audit trail of bids, offers, and the matching of orders or the execution of transactions on the facility.

[(17)] *(18)* ELIGIBLE COMMERCIAL ENTITY.—The term "eligible commercial entity" means, with respect to an agreement, contract or transaction in a commodity—

(A) an eligible contract participant described in clause (i), (ii), (v), (vii), (viii), or (ix) of paragraph [(18)(A)] *(19)(A)* that, in connection with its business—

(i) has a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity;

(ii) incurs risks, in addition to price risk, related to the commodity; or

(iii) is a dealer that regularly provides risk management or hedging services to, or engages in market-making activities with, the foregoing entities involving transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity;

(B) an eligible contract participant, other than a natural person or an instrumentality, department, or agency of a State or local governmental entity, that—

(i) regularly enters into transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity; and

(ii) either—

(I) in the case of a collective investment vehicle whose participants include persons other than—

(aa) qualified eligible persons, as defined in Commission rule 4.7(a) (17 CFR 4.7(a));

(bb) accredited investors, as defined in Regulation D of the Securities and Exchange Commission under the Securities Act of 1933 (17 CFR 230.501(a)), with total assets of $2,000,000; or

(cc) qualified purchasers, as defined in section 2(a)(51)(A) of the Investment Company Act of 1940;

in each case as in effect on the date of the enactment of the Commodity Futures Modernization Act of 2000, has, or is one of a group of vehicles under common control or management having in the aggregate, $1,000,000,000 in total assets; or

(II) in the case of other persons, has, or is one of a group of persons under common control or management having in the aggregate, $100,000,000 in total assets; or

(C) such other persons as the Commission shall determine appropriate and shall designate by rule, regulation, or order.

[(18)] *(19)* ELIGIBLE CONTRACT PARTICIPANT.—The term "eligible contract participant" means—

(A) acting for its own account—

(i) a financial institution;

(ii) an insurance company that is regulated by a State, or that is regulated by a foreign government and is subject to comparable regulation as determined by the Commission, including a regulated subsidiary or affiliate of such an insurance company;

(iii) an investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the investment company or the foreign person is itself an eligible contract participant);

(iv) a commodity pool that—

(I) has total assets exceeding $5,000,000; and

(II) is formed and operated by a person subject to regulation under this Act or a foreign person performing a similar role or function subject as such to foreign regulation (regardless of whether each investor in the commodity pool or the foreign person is itself an eligible contract participant) provided, however, that for purposes of section 2(c)(2)(B)(vi) and section 2(c)(2)(C)(vii), the term "eligible contract participant" shall not include a commodity pool in which any participant is not otherwise an eligible contract participant;

(v) a corporation, partnership, proprietorship, organization, trust, or other entity—

(I) that has total assets exceeding $10,000,000;

(II) the obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by an entity described in subclause (I), in clause (i), (ii), (iii), (iv), or (vii), or in subparagraph (C); or

(III) that—

(aa) has a net worth exceeding $1,000,000; and

(bb) enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

(vi) an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), a governmental employee benefit

plan, or a foreign person performing a similar role or function subject as such to foreign regulation—

(I) that has total assets exceeding $5,000,000; or

(II) the investment decisions of which are made by—

(aa) an investment adviser or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or this Act;

(bb) a foreign person performing a similar role or function subject as such to foreign regulation;

(cc) a financial institution; or

(dd) an insurance company described in clause (ii), or a regulated subsidiary or affiliate of such an insurance company;

(vii)(I) a governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

(II) a multinational or supranational government entity; or

(III) an instrumentality, agency, or department of an entity described in subclause (I) or (II);

except that such term does not include an entity, instrumentality, agency, or department referred to in subclause (I) or (III) of this clause unless (aa) the entity, instrumentality, agency, or department is a person described in clause (i), (ii), or (iii) of paragraph ⟦(17)(A)⟧ *(18)(A)*; (bb) the entity, instrumentality, agency, or department owns and invests on a discretionary basis $50,000,000 or more in investments; or (cc) the agreement, contract, or transaction is offered by, and entered into with, an entity that is listed in any of subclauses (I) through (VI) of section 2(c)(2)(B)(ii);

(viii)(I) a broker or dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or a foreign person performing a similar role or function subject as such to foreign regulation, except that, if the broker or dealer or foreign person is a natural person or proprietorship, the broker or dealer or foreign person shall not be considered to be an eligible contract participant unless the broker or dealer or foreign person also meets the requirements of clause (v) or (xi);

(II) an associated person of a registered broker or dealer concerning the financial or securities activities of which the registered person makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5(b), 78q(h));

(III) an investment bank holding company (as defined in section 17(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(i));

(ix) a futures commission merchant subject to regulation under this Act or a foreign person performing a

similar role or function subject as such to foreign regulation, except that, if the futures commission merchant or foreign person is a natural person or proprietorship, the futures commission merchant or foreign person shall not be considered to be an eligible contract participant unless the futures commission merchant or foreign person also meets the requirements of clause (v) or (xi);

(x) a floor broker or floor trader subject to regulation under this Act in connection with any transaction that takes place on or through the facilities of a registered entity [(other than an electronic trading facility with respect to a significant price discovery contract) or an exempt board of trade], or any affiliate thereof, on which such person regularly trades; or

(xi) an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—

(I) $10,000,000; or

(II) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual;

(B)(i) a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), acting as broker or performing an equivalent agency function on behalf of another person described in subparagraph (A) or (C); or

(ii) an investment adviser subject to regulation under the Investment Advisers Act of 1940, a commodity trading advisor subject to regulation under this Act, a foreign person performing a similar role or function subject as such to foreign regulation, or a person described in clause (i), (ii), (iv), (v), (viii), (ix), or (x) of subparagraph (A) or in subparagraph (C), in any such case acting as investment manager or fiduciary (but excluding a person acting as broker or performing an equivalent agency function) for another person described in subparagraph (A) or (C) and who is authorized by such person to commit such person to the transaction; or

(C) any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person.

[(19)] *(20)* EXCLUDED COMMODITY.—The term "excluded commodity" means—

(i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;

(ii) any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—

(I) not based in substantial part on the value of a narrow group of commodities not described in clause (i); or

(II) based solely on one or more commodities that have no cash market;

(iii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

(iv) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—

(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and

(II) associated with a financial, commercial, or economic consequence.

[(20)**]** *(21)* EXEMPT COMMODITY.—The term "exempt commodity" means a commodity that is not an excluded commodity or an agricultural commodity.

[(21)**]** *(22)* FINANCIAL INSTITUTION.—The term "financial institution" means—

(A) a corporation operating under the fifth undesignated paragraph of section 25 of the Federal Reserve Act (12 U.S.C. 603), commonly known as "an agreement corporation";

(B) a corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611 et seq.), commonly known as an "Edge Act corporation";

(C) an institution that is regulated by the Farm Credit Administration;

(D) a Federal credit union or State credit union (as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));

(E) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813));

(F) a foreign bank or a branch or agency of a foreign bank (each as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101(b)));

(G) any financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956);

(H) a trust company; or

(I) a similarly regulated subsidiary or affiliate of an entity described in any of subparagraphs (A) through (H).

[(22)**]** *(23)* FLOOR BROKER.—

(A) IN GENERAL.—The term "floor broker" means any person—

(i) who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person—

(I) any commodity for future delivery, security futures product, or swap; or

(II) any commodity option authorized under section 4c; or

(ii) who is registered with the Commission as a floor broker.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term "floor broker" any person in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged who trades for any other person if the Commission determines that the rule or regulation will effectuate the purposes of this Act.

[(23)] *(24)* FLOOR TRADER.—

(A) IN GENERAL.—The term "floor trader" means any person—

(i) who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, purchases, or sells solely for such person's own account—

(I) any commodity for future delivery, security futures product, or swap; or

(II) any commodity option authorized under section 4c; or

(ii) who is registered with the Commission as a floor trader.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term "floor trader" any person in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged who trades solely for such person's own account if the Commission determines that the rule or regulation will effectuate the purposes of this Act.

[(24)] *(25)* FOREIGN EXCHANGE FORWARD.—The term "foreign exchange forward" means a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.

[(25)] *(26)* FOREIGN EXCHANGE SWAP.—The term "foreign exchange swap" means a transaction that solely involves—

(A) an exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and

(B) a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.

[(26)] *(27)* FOREIGN FUTURES AUTHORITY.—The term "foreign futures authority" means any foreign government, or any department, agency, governmental body, or regulatory organization empowered by a foreign government to administer or enforce a law, rule, or regulation as it relates to a futures or options matter, or any department or agency of a political subdivision of a foreign government empowered to administer or enforce a law, rule, or regulation as it relates to a futures or options matter.

[(27)] *(28)* FUTURE DELIVERY.—The term "future delivery" does not include any sale of any cash commodity for deferred shipment or delivery.

[(28)] *(29)* FUTURES COMMISSION MERCHANT.—

(A) IN GENERAL.—The term "futures commission merchant" means an individual, association, partnership, corporation, or trust—

(i) that—

(I) is—

(aa) engaged in soliciting or in accepting orders for—

(AA) the purchase or sale of a commodity for future delivery;

(BB) a security futures product;

(CC) a swap;

(DD) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

(EE) any commodity option authorized under section 4c; or

(FF) any leverage transaction authorized under section 19; or

(bb) acting as a counterparty in any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i); and

(II) in or in connection with the activities described in items (aa) or (bb) of subclause (I), accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; or

(ii) that is registered with the Commission as a futures commission merchant.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term "futures commission merchant" any person who engages in soliciting or accepting orders for, or acting as a counterparty in, any agreement, contract, or transaction subject to this Act, and who accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom, if the Commission determines that the rule or regulation will effectuate the purposes of this Act.

[(29)**]** *(30)* HYBRID INSTRUMENT.—The term "hybrid instrument" means a security having one or more payments indexed to the value, level, or rate of, or providing for the delivery of, one or more commodities.

[(30)**]** *(31)* INTERSTATE COMMERCE.—The term "interstate commerce" means commerce—

(A) between any State, territory, or possession, or the District of Columbia, and any place outside thereof; or

(B) between points within the same State, territory, or possession, or the District of Columbia, but through any place outside thereof, or within any territory or possession, or the District of Columbia.

[(31)**]** *(32)* INTRODUCING BROKER.—

(A) IN GENERAL.—The term "introducing broker" means any person (except an individual who elects to be and is

registered as an associated person of a futures commission merchant)—

(i) who—

(I) is engaged in soliciting or in accepting orders for—

(aa) the purchase or sale of any commodity for future delivery, security futures product, or swap;

(bb) any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

(cc) any commodity option authorized under section 4c; or

(dd) any leverage transaction authorized under section 19; and

(II) does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom; or

(ii) who is registered with the Commission as an introducing broker.

(B) FURTHER DEFINITION.—The Commission, by rule or regulation, may include within, or exclude from, the term "introducing broker" any person who engages in soliciting or accepting orders for any agreement, contract, or transaction subject to this Act, and who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom, if the Commission determines that the rule or regulation will effectuate the purposes of this Act.

[(32)**]** *(33)* MAJOR SECURITY-BASED SWAP PARTICIPANT.—The term "major security-based swap participant" has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

[(33)**]** *(34)* MAJOR SWAP PARTICIPANT.—

(A) IN GENERAL.—The term "major swap participant" means any person who is not a swap dealer, and—

(i) maintains a substantial position in swaps for any of the major swap categories as determined by the Commission, excluding—

(I) positions held for hedging or mitigating commercial risk; and

(II) positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(ii) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(iii)(I) is a financial entity that is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and

(II) maintains a substantial position in outstanding swaps in any major swap category as determined by the Commission.

(B) DEFINITION OF SUBSTANTIAL POSITION.—For purposes of subparagraph (A), the Commission shall define by rule or regulation the term "substantial position" at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person's relative position in uncleared as opposed to cleared swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

(C) SCOPE OF DESIGNATION.—For purposes of subparagraph (A), a person may be designated as a major swap participant for 1 or more categories of swaps without being classified as a major swap participant for all classes of swaps.

(D) EXCLUSIONS.—The definition under this paragraph shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.

[(34)] *(35)* MEMBER OF A REGISTERED ENTITY; MEMBER OF A DERIVATIVES TRANSACTION EXECUTION FACILITY.—The term "member" means, with respect to a registered entity [or derivatives transaction execution facility], an individual, association, partnership, corporation, or trust—

(A) owning or holding membership in, or admitted to membership representation on, the registered entity [or derivatives transaction execution facility]; or

(B) having trading privileges on the registered entity [or derivatives transaction execution facility].

A participant in an alternative trading system that is designated as a contract market pursuant to section 5f is deemed a member of the contract market for purposes of transactions in security futures products through the contract market.

[(35)] *(36)* NARROW-BASED SECURITY INDEX.—

(A) The term "narrow-based security index" means an index—

(i) that has 9 or fewer component securities;

(ii) in which a component security comprises more than 30 percent of the index's weighting;

(iii) in which the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or

(iv) in which the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with 15 or more component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.

(B) Notwithstanding subparagraph (A), an index is not a narrow-based security index if—

(i)(I) it has at least 9 component securities;

(II) no component security comprises more than 30 percent of the index's weighting; and

(III) each component security is—

(aa) registered pursuant to section 12 of the Securities Exchange Act of 1934;

(bb) one of 750 securities with the largest market capitalization; and

(cc) one of 675 securities with the largest dollar value of average daily trading volume;

(ii) a board of trade was designated as a contract market by the Commodity Futures Trading Commission with respect to a contract of sale for future delivery on the index, before the date of the enactment of the Commodity Futures Modernization Act of 2000;

(iii)(I) a contract of sale for future delivery on the index traded on a designated contract market [or registered derivatives transaction execution facility] for at least 30 days as a contract of sale for future delivery on an index that was not a narrow-based security index; and

(II) it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months;

(iv) a contract of sale for future delivery on the index is traded on or subject to the rules of a foreign board of trade and meets such requirements as are jointly established by rule or regulation by the Commission and the Securities and Exchange Commission;

(v) no more than 18 months have passed since the date of the enactment of the Commodity Futures Modernization Act of 2000 and—

(I) it is traded on or subject to the rules of a foreign board of trade;

(II) the offer and sale in the United States of a contract of sale for future delivery on the index

was authorized before the date of the enactment of the Commodity Futures Modernization Act of 2000; and

(III) the conditions of such authorization continue to be met; or

(vi) a contract of sale for future delivery on the index is traded on or subject to the rules of a board of trade and meets such requirements as are jointly established by rule, regulation, or order by the Commission and the Securities and Exchange Commission.

(C) Within 1 year after the date of the enactment of the Commodity Futures Modernization Act of 2000, the Commission and the Securities and Exchange Commission jointly shall adopt rules or regulations that set forth the requirements under subparagraph (B)(iv).

(D) An index that is a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over 3 consecutive calendar months pursuant to clause (iii) of subparagraph (B) shall not be a narrow-based security index for the 3 following calendar months.

(E) For purposes of subparagraphs (A) and (B)—

(i) the dollar value of average daily trading volume and the market capitalization shall be calculated as of the preceding 6 full calendar months; and

(ii) the Commission and the Securities and Exchange Commission shall, by rule or regulation, jointly specify the method to be used to determine market capitalization and dollar value of average daily trading volume.

[(36)**]** *(37)* OPTION.—The term "option" means an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty".

[(37)**]** *(38)* ORGANIZED EXCHANGE.—The term "organized exchange" means a trading facility that—

(A) permits trading—

(i) by or on behalf of a person that is not an eligible contract participant; or

(ii) by persons other than on a principal-to-principal basis; or

(B) has adopted (directly or through another nongovernmental entity) rules that—

(i) govern the conduct of participants, other than rules that govern the submission of orders or execution of transactions on the trading facility; and

(ii) include disciplinary sanctions other than the exclusion of participants from trading.

[(38)**]** *(39)* PERSON.—The term "person" imports the plural or singular, and includes individuals, associations, partnerships, corporations, and trusts.

[(39)**]** *(40)* PRUDENTIAL REGULATOR.—The term "prudential regulator" means—

(A) the Board in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is—

(i) a State-chartered bank that is a member of the Federal Reserve System;

(ii) a State-chartered branch or agency of a foreign bank;

(iii) any foreign bank which does not operate an insured branch;

(iv) any organization operating under section 25A of the Federal Reserve Act or having an agreement with the Board under section 225 of the Federal Reserve Act;

(v) any bank holding company (as defined in section 2 of the Bank Holding Company Act of 1965 (12 U.S.C. 1841)), any foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(b)(7)) that is treated as a bank holding company under section 8(a) of the International Banking Act of 1978 (12 U.S.C. 3106(a)), and any subsidiary of such a company or foreign bank (other than a subsidiary that is described in subparagraph (A) or (B) or that is required to be registered with the Commission as a swap dealer or major swap participant under this Act or with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant);

(vi) after the transfer date (as defined in section 311 of the Dodd-Frank Wall Street Reform and Consumer Protection Act), any savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a)) and any subsidiary of such company (other than a subsidiary that is described in subparagraph (A) or (B) or that is required to be registered as a swap dealer or major swap participant with the Commission under this Act or with the Securities and Exchange Commission as a security-based swap dealer or major security-based swap participant); or

(vii) any organization operating under section 25A of the Federal Reserve Act (12U.S.C. 611 et seq.) or having an agreement with the Board under section 25 of the Federal Reserve Act (12 U.S.C. 601 et seq.);

(B) the Office of the Comptroller of the Currency in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is—

(i) a national bank;

(ii) a federally chartered branch or agency of a foreign bank; or

(iii) any Federal savings association;

(C) the Federal Deposit Insurance Corporation in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is—

(i) a State-chartered bank that is not a member of the Federal Reserve System; or

(ii) any State savings association;

(D) the Farm Credit Administration, in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is an institution chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.); and

(E) the Federal Housing Finance Agency in the case of a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is a regulated entity (as such term is defined in section 1303 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992).

[(40)**]** *(41)* REGISTERED ENTITY.—The term "registered entity" means—

(A) a board of trade designated as a contract market under section 5;

(B) a derivatives clearing organization registered under section 5b;

(C) a board of trade designated as a contract market under section 5f;

(D) a swap execution facility registered under section 5h; *and*

(E) a swap data repository registered under section 21**[**; and**]**.

[(F) with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.**]**

[(41)**]** *(42)* SECURITY.—The term "security" means a security as defined in section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) or section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)).

[(42)**]** *(43)* SECURITY-BASED SWAP.—The term "security-based swap" has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

[(43)**]** *(44)* SECURITY-BASED SWAP DEALER.—The term "security-based swap dealer" has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)).

[(44)**]** *(45)* SECURITY FUTURE.—The term "security future" means a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of the enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 as in effect on the date of the enactment of the Futures Trading Act of 1982). The term "security future" does not include any agreement, contract, or transaction excluded from this Act under section 2(c), 2(d), 2(f), or 2(g) of this Act (as in effect on the date of the enactment of the Commodity Futures Mod-

ernization Act of 2000) or title IV of the Commodity Futures Modernization Act of 2000.

[(45)] *(46)* SECURITY FUTURES PRODUCT.—The term "security futures product" means a security future or any put, call, straddle, option, or privilege on any security future.

[(46)] *(47)* SIGNIFICANT PRICE DISCOVERY CONTRACT.—The term "significant price discovery contract" means an agreement, contract, or transaction subject to section 2(h)(5).

[(47)] *(48)* SWAP.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "swap" means any agreement, contract, or transaction—

(i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;

(ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

(iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as—

(I) an interest rate swap;
(II) a rate floor;
(III) a rate cap;
(IV) a rate collar;
(V) a cross-currency rate swap;
(VI) a basis swap;
(VII) a currency swap;
(VIII) a foreign exchange swap;
(IX) a total return swap;
(X) an equity index swap;
(XI) an equity swap;
(XII) a debt index swap;
(XIII) a debt swap;
(XIV) a credit spread;

(XV) a credit default swap;
(XVI) a credit swap;
(XVII) a weather swap;
(XVIII) an energy swap;
(XIX) a metal swap;
(XX) an agricultural swap;
(XXI) an emissions swap; [and]
(XXII) a commodity swap; *and*
(XXIII) a utility operations-related swap;

(iv) that is an agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap;

(v) including any security-based swap agreement which meets the definition of "swap agreement" as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein; or

(vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).

(B) EXCLUSIONS.—The term "swap" does not include—

(i) any contract of sale of a commodity for future delivery (or option on such a contract), leverage contract authorized under section 19, security futures product, or agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i);

[(ii) any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled;]

(ii) any purchase or sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled, including any stand-alone or embedded option for which exercise results in a physical delivery obligation;

(iii) any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to—

(I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and

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

(iv) any put, call, straddle, option, or privilege relating to a foreign currency entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a));

(v) any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a fixed basis that is subject to—

(I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and

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

(vi) any agreement, contract, or transaction providing for the purchase or sale of 1 or more securities on a contingent basis that is subject to the Securities Act of 1933 (15 U.S.C. 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), unless the agreement, contract, or transaction predicates the purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

(vii) any note, bond, or evidence of indebtedness that is a security, as defined in section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1));

(viii) any agreement, contract, or transaction that is—

(I) based on a security; and

(II) entered into directly or through an underwriter (as defined in section 2(a)(11) of the Securities Act of 1933 (15 U.S.C. 77b(a)(11)) by the issuer of such security for the purposes of raising capital, unless the agreement, contract, or transaction is entered into to manage a risk associated with capital raising;

(ix) any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States; and

(x) any security-based swap, other than a security-based swap as described in subparagraph (D).

(C) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—

(i) IN GENERAL.—Except as provided in clause (ii), the term "swap" includes a master agreement that provides for an agreement, contract, or transaction that is a swap under subparagraph (A), together with each supplement to any master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a swap pursuant to subparagraph (A).

(ii) EXCEPTION.—For purposes of clause (i), the master agreement shall be considered to be a swap only with respect to each agreement, contract, or transaction covered by the master agreement that is a swap pursuant to subparagraph (A).

(D) MIXED SWAP.—The term "security-based swap" includes any agreement, contract, or transaction that is as described in section 3(a)(68)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)) and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occur-

rence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(iii)).

(E) TREATMENT OF FOREIGN EXCHANGE SWAPS AND FORWARDS.—

(i) IN GENERAL.—Foreign exchange swaps and foreign exchange forwards shall be considered swaps under this paragraph unless the Secretary makes a written determination under section 1b that either foreign exchange swaps or foreign exchange forwards or both—

(I) should be not be regulated as swaps under this Act; and

(II) are not structured to evade the Dodd-Frank Wall Street Reform and Consumer Protection Act in violation of any rule promulgated by the Commission pursuant to section 721(c) of that Act.

(ii) CONGRESSIONAL NOTICE; EFFECTIVENESS.—The Secretary shall submit any written determination under clause (i) to the appropriate committees of Congress, including the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives. Any such written determination by the Secretary shall not be effective until it is submitted to the appropriate committees of Congress.

(iii) REPORTING.—Notwithstanding a written determination by the Secretary under clause (i), all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 4r within such time period as the Commission may by rule or regulation prescribe.

(iv) BUSINESS STANDARDS.—Notwithstanding a written determination by the Secretary pursuant to clause (i), any party to a foreign exchange swap or forward that is a swap dealer or major swap participant shall conform to the business conduct standards contained in section 4s(h).

(v) SECRETARY.—For purposes of this subparagraph, the term "Secretary" means the Secretary of the Treasury.

(F) EXCEPTION FOR CERTAIN FOREIGN EXCHANGE SWAPS AND FORWARDS.—

(i) REGISTERED ENTITIES.—Any foreign exchange swap and any foreign exchange forward that is listed and traded on or subject to the rules of a designated contract market or a swap execution facility, or that is cleared by a derivatives clearing organization, shall not be exempt from any provision of this Act or amendments made by the Wall Street Transparency and Accountability Act of 2010 prohibiting fraud or manipulation.

(ii) RETAIL TRANSACTIONS.—Nothing in subparagraph (E) shall affect, or be construed to affect, the applicability of this Act or the jurisdiction of the Commission with respect to agreements, contracts, or transactions in foreign currency pursuant to section 2(c)(2).

[(48)] *(49)* SWAP DATA REPOSITORY.—The term "swap data repository" means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.

[(49)] *(50)* SWAP DEALER.—

(A) IN GENERAL.—The term "swap dealer" means any person who—

(i) holds itself out as a dealer in swaps;

(ii) makes a market in swaps;

(iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or

(iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps,

provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.

(B) INCLUSION.—A person may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or activities.

(C) EXCEPTION.—The term "swap dealer" does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

[(D) DE MINIMIS EXCEPTION.—The Commission]

(D) EXCEPTION.—

(i) IN GENERAL.—The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.

(ii) DE MINIMIS QUANTITY.—The de minimis quantity of swap dealing described in clause (i) shall be set at a quantity of $8,000,000,000, and may be amended or changed only through a new affirmative action of the Commission undertaken by rule or regulation.

(E) CERTAIN TRANSACTIONS WITH A UTILITY SPECIAL ENTITY.—

(i) Transactions in utility operations-related swaps shall be reported pursuant to section 4r.

(ii) In making a determination to exempt pursuant to subparagraph (D), the Commission shall treat a utility

operations-related swap entered into with a utility special entity, as defined in section 4s(h)(2)(D), as if it were entered into with an entity that is not a special entity, as defined in section 4s(h)(2)(C).

[(50)] *(51)* SWAP EXECUTION FACILITY.—The term "swap execution facility" means a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—

(A) facilitates the execution of swaps between persons; and

(B) is not a designated contract market.

[(51)] *(52)* TRADING FACILITY.—

(A) IN GENERAL.—The term "trading facility" means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions—

(i) by accepting bids or offers made by other participants that are open to multiple partipants in the facility or system; or

(ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm.

(B) EXCLUSIONS.—The term "trading facility" does not include—

(i) a person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple bids and multiple offers within a predetermined, nondiscretionary automated trade matching and execution algorithm;

(ii) a government securities dealer or government securities broker, to the extent that the dealer or broker executes or trades agreements, contracts, or transactions in government securities, or assists persons in communicating about, negotiating, entering into, executing, or trading an agreement, contract, or transaction in government securities (as the terms "government securities dealer", "government securities broker", and "government securities" are defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a))); or

(iii) facilities on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding.

Any person, group of persons, dealer, broker, or facility described in clause (i) or (ii) is excluded from the meaning of the term "trading facility" for the purposes of this Act

without any prior specific approval, certification, or other action by the Commission.

(C) SPECIAL RULE.—A person or group of persons that would not otherwise constitute a trading facility shall not be considered to be a trading facility solely as a result of the submission to a derivatives clearing organization of transactions executed on or through the person or group of persons.

(53) UTILITY OPERATIONS-RELATED SWAP.—The term "utility operations-related swap" means a swap that—

(A) is entered into by a utility to hedge or mitigate a commercial risk;

(B) is not a contract, agreement, or transaction based on, derived on, or referencing—

(i) an interest rate, credit, equity, or currency asset class;

(ii) except as used for fuel for electric energy generation, a metal, agricultural commodity, or crude oil or gasoline commodity of any grade; or

(iii) any other commodity or category of commodities identified for this purpose in a rule or order adopted by the Commission in consultation with the appropriate Federal and State regulatory commissions; and

(C) is associated with—

(i) the generation, production, purchase, or sale of natural gas or electric energy, the supply of natural gas or electric energy to a utility, or the delivery of natural gas or electric energy service to utility customers;

(ii) fuel supply for the facilities or operations of a utility;

(iii) compliance with an electric system reliability obligation;

(iv) compliance with an energy, energy efficiency, conservation, or renewable energy or environmental statute, regulation, or government order applicable to a utility; or

(v) any other electric energy or natural gas swap to which a utility is a party.

* * * * * * *

SEC. 2. JURISDICTION OF COMMISSION; LIABILITY OF PRINCIPAL FOR ACT OF AGENT; COMMODITY FUTURES TRADING COMMISSION; TRANSACTION IN INTERSTATE COMMERCE.

(a) JURISDICTION OF COMMISSION; COMMODITY FUTURES TRADING COMMISSION.—

(1) JURISDICTION OF COMMISSION.—

(A) IN GENERAL.—The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f), with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving swaps or

contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market designated pursuant to section 5 or a swap execution facility pursuant to section 5h or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

(B) LIABILITY OF PRINCIPAL FOR ACT OF AGENT.—The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

(C) Notwithstanding any other provision of law—

(i)(I) Except as provided in subclause (II), this Act shall not apply to and the Commission shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities (as defined in section 2(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982), including any group or index of such securities, or any interest therein or based on the value thereof.

(II) This Act shall apply to and the Commission shall have jurisdiction with respect to accounts, agreements, and transactions involving, and may permit the listing for trading pursuant to section 5c(c) of, a put, call, or other option on 1 or more securities (as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982), including any group or index of such securities, or any interest therein or based on the value thereof, that is exempted by the Securities and Exchange Commission pursuant to section 36(a)(1) of the Securities Exchange Act of 1934 with the condition that the Commission exercise concurrent jurisdiction over such put, call, or other option; provided, however, that nothing in this paragraph shall be construed to affect the jurisdiction and authority of the Securities and Exchange Commission over such put, call, or other option.

(ii) This Act shall apply to and the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is com-

monly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty") and transactions involving, and may designate a board of trade as a contract market in[, or register a derivatives transaction execution facility that trades or executes,] contracts of sale (or options on such contracts) for future delivery of a group or index of securities (or any interest therein or based upon the value thereof): *Provided, however*, That no board of trade shall be designated as a contract market with respect to any such contracts of sale (or options on such contracts) for future delivery[, and no derivatives transaction execution facility shall trade or execute such contracts of sale (or options on such contracts) for future delivery], unless the board of trade [or the derivatives transaction execution facility,] and the applicable contract, meet the following minimum requirements:

(I) Settlement of or delivery on such contract (or option on such contract) shall be effected in cash or by means other than the transfer or receipt of any security, except an exempted security under section 3 of the Securities Act of 1933 or section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security, as defined in section 3(a)(29) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982);

(II) Trading in such contract (or option on such contract) shall not be readily susceptible to manipulation of the price of such contract (or option on such contract), nor to causing or being used in the manipulation of the price of any underlying security, option on such security or option on a group or index including such securities; and

(III) Such group or index of securities shall not constitute a narrow-based security index.

(iii) If, in its discretion, the Commission determines that a stock index futures contract, notwithstanding its conformance with the requirements in clause (ii) of this subparagraph, can reasonably be used as a surrogate for trading a security (including a security futures product), it may, by order, require such contract and any option thereon be traded and regulated as security futures products as defined in section 3(a)(56) of the Securities Exchange Act of 1934 and section 1a of this Act subject to all rules and regulations applicable to security futures products under this Act and the securities laws as defined in section 3(a)(47) of the Securities Exchange Act of 1934.

(iv) No person shall offer to enter into, enter into, or confirm the execution of any contract of sale (or option on such contract) for future delivery of any security, or interest therein or based on the value thereof, except an exempted security [under or] *under* section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 on the date of enactment of the Futures Trading Act of 1982),

or except as provided in clause (ii) of this subparagraph or subparagraph (D), any group or index of such securities or any interest therein or based on the value thereof.

(v)(I) Notwithstanding any other provision of this Act, any contract market in a stock index futures contract (or option thereon) other than a security futures product[, or any derivatives transaction execution facility on which such contract or option is traded,] shall file with the Board of Governors of the Federal Reserve System any rule establishing or changing the levels of margin (initial and maintenance) for such stock index futures contract (or option thereon) other than security futures products.

(II) The Board may at any time request any contract market [or derivatives transaction execution facility] to set the margin for any stock index futures contract (or option thereon), other than for any security futures product, at such levels as the Board in its judgment determines are appropriate to preserve the financial integrity of the contract market [or derivatives transaction execution facility], or its clearing system, or to prevent systemic risk. If the contract market [or derivatives transaction execution facility] fails to do so within the time specified by the Board in its request, the Board may direct the contract market [or derivatives transaction execution facility] to alter or supplement the rules of the contract market [or derivatives transaction execution facility] as specified in the request.

(III) Subject to such conditions as the Board may determine, the Board may delegate any or all of its authority, relating to margin for any stock index futures contract (or option thereon), other than security futures products, under this clause to the Commission.

(IV) It shall be unlawful for any futures commission merchant to, directly or indirectly, extend or maintain credit to or for, or collect margin from any customer on any security futures product unless such activities comply with the regulations prescribed pursuant to section 7(c)(2)(B) of the Securities Exchange Act of 1934.

(V) Nothing in this clause shall supersede or limit the authority granted to the Commission in section 8a(9) to direct a contract market [or registered derivatives transaction execution facility], on finding an emergency to exist, to raise temporary margin levels on any futures contract, or option on the contract covered by this clause, or on any security futures product.

(VI) Any action taken by the Board, or by the Commission acting under the delegation of authority under subclause [III] *(III)*, under this clause directing a contract market to alter or supplement a contract market rule shall be subject to review only in the Court of Appeals where the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. The review shall be based on the examination of all information before the Board or the Commission, as the case may be, at the time the deter-

mination was made. The court reviewing the action of the Board or the Commission shall not enter a stay or order of mandamus unless the court has determined, after notice and a hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(D)(i) Notwithstanding any other provision of this Act, the Securities and Exchange Commission shall have jurisdiction and authority over security futures as defined in section 3(a)(55) of the Securities Exchange Act of 1934, section 2(a)(16) of the Securities Act of 1933, section 2(a)(52) of the Investment Company Act of 1940, and section 202(a)(27) of the Investment Advisers Act of 1940, options on security futures, and persons effecting transactions in security futures and options thereon, and this Act shall apply to and the Commission shall have jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), contracts, and transactions involving, and may designate a board of trade as a contract market [in, or register a derivatives transaction execution facility] that trades or executes, a security futures product as defined in section 1a of this Act: *Provided, however,* That, except as provided in clause (vi) of this subparagraph, no board of trade shall be designated as a contract market with respect to[, or registered as a derivatives transaction execution facility for,] any such contracts of sale for future delivery unless the board of trade and the applicable contract meet the following criteria:

(I) Except as otherwise provided in a rule, regulation, or order issued pursuant to clause (v) of this subparagraph, any security underlying the security future, including each component security of a narrow-based security index, is registered pursuant to section 12 of the Securities Exchange Act of 1934.

(II) If the security futures product is not cash settled, the board of trade on which the security futures product is traded has arrangements in place with a clearing agency registered pursuant to section 17A of the Securities Exchange Act of 1934 for the payment and delivery of the securities underlying the security futures product.

(III) Except as otherwise provided in a rule, regulation, or order issued pursuant to clause (v) of this subparagraph, the security future is based upon common stock and such other equity securities as the Commission and the Securities and Exchange Commission jointly determine appropriate.

(IV) The security futures product is cleared by a clearing agency that has in place provisions for linked and coordinated clearing with other clearing agencies that clear security futures products, which permits the security futures product to be purchased on a designated contract market, [registered derivatives transaction execution facility,] national securities exchange registered under section 6(a) of the Securities Exchange Act of 1934, or national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 and offset on another designated contract market, [registered derivatives transaction execution facility,] national securities

exchange registered under section 6(a) of the Securities Exchange Act of 1934, or national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934.

(V) Only futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators or associated persons subject to suitability rules comparable to those of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 solicit, accept any order for, or otherwise deal in any transaction in or in connection with the security futures product.

(VI) The security futures product is subject to a prohibition against dual trading in section 4j of this Act and the rules and regulations thereunder or the provisions of section 11(a) of the Securities Exchange Act of 1934 and the rules and regulations thereunder, except to the extent otherwise permitted under the Securities Exchange Act of 1934 and the rules and regulations thereunder.

(VII) Trading in the security futures product is not readily susceptible to manipulation of the price of such security futures product, nor to causing or being used in the manipulation of the price of any underlying security, option on such security, or option on a group or index including such securities;

(VIII) The board of trade on which the security futures product is traded has procedures in place for coordinated surveillance among such board of trade, any market on which any security underlying the security futures product is traded, and other markets on which any related security is traded to detect manipulation and insider trading, except that, if the board of trade is an alternative trading system, a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 of which such alternative trading system is a member has in place such procedures.

(IX) The board of trade on which the security futures product is traded has in place audit trails necessary or appropriate to facilitate the coordinated surveillance required in subclause (VIII), except that, if the board of trade is an alternative trading system, a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 of which such alternative trading system is a member has rules to require such audit trails.

(X) The board of trade on which the security futures product is traded has in place procedures to coordinate trading halts between such board of trade and markets on which any security underlying the security futures product is traded and other markets on which any related security is traded, except that, if the board of trade is an alternative trading system, a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 or national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 of which such alternative trading

system is a member has rules to require such coordinated trading halts.

(XI) The margin requirements for a security futures product comply with the regulations prescribed pursuant to section 7(c)(2)(B) of the Securities Exchange Act of 1934, except that nothing in this subclause shall be construed to prevent a board of trade from requiring higher margin levels for a security futures product when it deems such action to be necessary or appropriate.

(ii) It shall be unlawful for any person to offer, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a security futures product unless—

[(I) the transaction is conducted on or subject to the rules of a board of trade that—

[(aa) has been designated by the Commission as a contract market in such security futures product; or

[(bb) is a registered derivatives transaction execution facility for the security futures product that has provided a certification with respect to the security futures product pursuant to clause (vii);]

(I) the transaction is conducted on or subject to the rules of a board of trade that has been designated by the Commission as a contract market in such security futures product; or

(II) the contract is executed or consummated by, through, or with a member of the contract market [or registered derivatives transaction execution facility]; and

(III) the security futures product is evidenced by a record in writing which shows the date, the parties to such security futures product and their addresses, the property covered, and its price, and each contract market member [or registered derivatives transaction execution facility member] shall keep the record for a period of 3 years from the date of the transaction, or for a longer period if the Commission so directs, which record shall at all times be open to the inspection of any duly authorized representative of the Commission.

(iii)(I) Except as provided in subclause (II) but notwithstanding any other provision of this Act, no person shall offer to enter into, enter into, or confirm the execution of any option on a security future.

(II) After 3 years after the date of the enactment of the Commodity Futures Modernization Act of 2000, the Commission and the Securities and Exchange Commission may by order jointly determine to permit trading of options on any security future authorized to be traded under the provisions of this Act and the Securities Exchange Act of 1934.

(iv)(I) All relevant records of a futures commission merchant or introducing broker registered pursuant to section 4f(a)(2), floor broker or floor trader exempt from registration pursuant to section 4f(a)(3), associated person exempt from registration pursuant to section 4k(6), or board of trade designated as a contract market in a security futures product pursuant to section 5f shall be subject to such reasonable periodic or special examinations by representa-

tives of the Commission as the Commission deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act, and the Commission, before conducting any such examination, shall give notice to the Securities and Exchange Commission of the proposed examination and consult with the Securities and Exchange Commission concerning the feasibility and desirability of coordinating the examination with examinations conducted by the Securities and Exchange Commission in order to avoid unnecessary regulatory duplication or undue regulatory burdens for the registrant or board of trade.

(II) The Commission shall notify the Securities and Exchange Commission of any examination conducted of any futures commission merchant or introducing broker registered pursuant to section 4f(a)(2), floor broker or floor trader exempt from registration pursuant to section 4f(a)(3), associated person exempt from registration pursuant to section 4k(6), or board of trade designated as a contract market in a security futures product pursuant to section 5f, and, upon request, furnish to the Securities and Exchange Commission any examination report and data supplied to or prepared by the Commission in connection with the examination.

(III) Before conducting an examination under subclause (I), the Commission shall use the reports of examinations, unless the information sought is unavailable in the reports, of any futures commission merchant or introducing broker registered pursuant to section 4f(a)(2), floor broker or floor trader exempt from registration pursuant to section 4f(a)(3), associated person exempt from registration pursuant to section 4k(6), or board of trade designated as a contract market in a security futures product pursuant to section 5f that is made by the Securities and Exchange Commission, a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–3(a)), or a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)).

(IV) Any records required under this subsection for a futures commission merchant or introducing broker registered pursuant to section 4f(a)(2), floor broker or floor trader exempt from registration pursuant to section 4f(a)(3), associated person exempt from registration pursuant to section 4k(6), or board of trade designated as a contract market in a security futures product pursuant to section 5f, shall be limited to records with respect to accounts, agreements, contracts, and transactions involving security futures products.

(v)(I) The Commission and the Securities and Exchange Commission, by rule, regulation, or order, may jointly modify the criteria specified in subclause (I) or (III) of clause (i), including the trading of security futures based on securities other than equity securities, to the extent such modification fosters the development of fair and orderly markets in security futures products, is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(II) The Commission and the Securities and Exchange Commission, by order, may jointly exempt any person from compliance with the criterion specified in clause (i)(IV) to the extent such exemption fosters the development of fair and orderly markets in se-

curity futures products, is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(vi)(I) Notwithstanding clauses (i) and (vii), until the compliance date, a board of trade shall not be required to meet the criterion specified in clause (i)(IV).

(II) The Commission and the Securities and Exchange Commission shall jointly publish in the Federal Register a notice of the compliance date no later than 165 days before the compliance date.

(III) For purposes of this clause, the term "compliance date" means the later of—

(aa) 180 days after the end of the first full calendar month period in which the average aggregate comparable share volume for all security futures products based on single equity securities traded on all designated contract markets and registered derivatives transaction execution facilities equals or exceeds 10 percent of the average aggregate comparable share volume of options on single equity securities traded on all national securities exchanges registered pursuant to section 6(a) of the Securities Exchange Act of 1934 and any national securities associations registered pursuant to section 15A(a) of such Act; or

(bb) 2 years after the date on which trading in any security futures product commences under this Act.

(vii) It shall be unlawful for a board of trade to trade or execute a security futures product unless the board of trade has provided the Commission with a certification that the specific security futures product and the board of trade, as applicable, meet the criteria specified in subclauses (I) through (XI) of clause (i), except as otherwise provided in clause (vi).

(E)(i) To the extent necessary or appropriate in the public interest, to promote fair competition, and consistent with promotion of market efficiency, innovation, and expansion of investment opportunities, the protection of investors, and the maintenance of fair and orderly markets, the Commission and the Securities and Exchange Commission shall jointly issue such rules, regulations, or orders as are necessary and appropriate to permit the offer and sale of a security futures product traded on or subject to the rules of a foreign board of trade to United States persons.

(ii) The rules, regulations, or orders adopted under clause (i) shall take into account, as appropriate, the nature and size of the markets that the securities underlying the security futures product reflects.

(F)(i) Nothing in this Act is intended to prohibit a futures commission merchant from carrying security futures products traded on or subject to the rules of a foreign board of trade in the accounts of persons located outside of the United States.

(ii) Nothing in this Act is intended to prohibit any eligible contract participant located in the United States from purchasing or carrying securities futures products traded on or subject to the rules of a foreign board of trade, exchange, or market to the same extent such person may be authorized to purchase or carry other securities traded on a foreign board of trade, exchange, or market so long as any underlying security for such security futures products is traded principally on, by, or through any exchange or market located outside the United States.

(G)(i) Nothing in this paragraph shall limit the jurisdiction conferred on the Securities and Exchange Commission by the Wall Street Transparency and Accountability Act of 2010 with regard to security-based swap agreements as defined pursuant to section 3(a)(78) of the Securities Exchange Act of 1934, and security-based swaps.

(ii) In addition to the authority of the Securities and Exchange Commission described in clause (i), nothing in this subparagraph shall limit or affect any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i).

(H) Notwithstanding any other provision of law, the Wall Street Transparency and Accountability Act of 2010 shall not apply to, and the Commodity Futures Trading Commission shall have no jurisdiction under such Act (or any amendments to the Commodity Exchange Act made by such Act) with respect to, any security other than a security-based swap.

(I)(i) Nothing in this Act shall limit or affect any statutory authority of the Federal Energy Regulatory Commission or a State regulatory authority (as defined in section 3(21) of the Federal Power Act (16 U.S.C. 796(21)) with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by the Federal Energy Regulatory Commission or a State regulatory authority and is—

(I) not executed, traded, or cleared on a registered entity or trading facility; or

(II) executed, traded, or cleared on a registered entity or trading facility owned or operated by a regional transmission organization or independent system operator.

(ii) In addition to the authority of the Federal Energy Regulatory Commission or a State regulatory authority described in clause (i), nothing in this subparagraph shall limit or affect—

(I) any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i); or

(II) the jurisdiction of the Commission under subparagraph (A) with respect to an agreement, contract, or transaction that is executed, traded, or cleared on a registered entity or trading facility that is not owned or operated by a regional transmission organization or independent system operator (as defined by sections 3(27) and (28) of the Federal Power Act (16 U.S.C. 796(27), 796(28)).

(2)(A) There is hereby established, as an independent agency of the United States Government, a Commodity Futures Trading Commission. The Commission shall be composed of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In nominating persons for appointment, the President shall—

(i) select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the pro-

duction, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights, and interests covered by this Act; and

(ii) seek to ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas. Not more than three of the members of the Commission shall be members of the same political party. Each Commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (i) any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of the Commissioners first taking office after the enactment of this paragraph shall expire as designated by the President at the time of nomination, one at the end of one year, one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years.

(B) The President shall appoint, by and with the advice and consent of the Senate, a member of the Commission as Chairman, who shall serve as Chairman at the pleasure of the President. An individual may be appointed as Chairman at the same time that person is appointed as a Commissioner. The Chairman shall be the chief administrative officer of the Commission and shall preside at hearings before the Commission. At any time, the President may appoint, by and with the advice and consent of the Senate, a different Chairman, and the Commissioner previously appointed as Chairman may complete that Commissioner's term as a Commissioner.

(3) A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

(4) The Commission shall have a General Counsel, who shall be appointed by the Commission and serve at the pleasure of the Commission. The General Counsel shall report directly to the Commission and serve as its legal advisor. The Commission shall appoint such other attorneys as may be necessary, in the opinion of the Commission, to assist the General Counsel, represent the Commission in all disciplinary proceedings pending before it, represent the Commission in courts of law whenever appropriate, assist the Department of Justice in handling litigation concerning the Commission in courts of law, and perform such other legal duties and functions as the Commission may direct.

(5) The Commission shall have an Executive Director, who shall be appointed by the Commission and serve at the pleasure of the Commission. The Executive Director shall report directly to the Commission and perform such functions and duties as the Commission may prescribe.

(6)(A) Except as otherwise provided in this paragraph and in paragraphs [(4) and (5) of this subsection] *(4), (5), and (16)*, the executive and administrative functions of the Commission, including functions of the Commission with respect to the ap-

pointment and supervision of personnel employed under the Commission, the distribution of business among such personnel and among administrative units of the Commission, and the use and expenditure of funds, according to budget categories, plans, programs, and priorities established and approved by the Commission, shall be exercised solely by the Chairman.

(B) In carrying out any of his functions under the provisions of this paragraph, the Chairman shall be governed by general policies, plans, priorities, and budgets approved by the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(C) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission*, and the heads of the units shall serve at the pleasure of the Commission*.

(D) Personnel employed regularly and full time in the immediate offices of Commissioners other than the Chairman shall not be affected by the provisions of this paragraph.

(E) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining the distribution of appropriated funds according to major programs and purposes.

(F) The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any functions of the Chairman under this paragraph.

(7) APPOINTMENT AND COMPENSATION.—

(A) IN GENERAL.—The Commission may appoint and fix the compensation of such officers, attorneys, economists, examiners, and other employees as may be necessary for carrying out the functions of the Commission under this Act.

(B) RATES OF PAY.—Rates of basic pay for all employees of the Commission may be set and adjusted by the Commission without regard to chapter 51 or subchapter III of chapter 53 of title 5, United States Code.

(C) COMPARABILITY.—

(i) IN GENERAL.—The Commission may provide additional compensation and benefits to employees of the Commission if the same type of compensation or benefits are provided by any agency referred to in section 1206(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b(a)) or could be provided by such an agency under applicable provisions of law (including rules and regulations).

(ii) CONSULTATION.—In setting and adjusting the total amount of compensation and benefits for employees, the Commission shall consult with, and seek to maintain comparability with, the agencies referred to in section 1206(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1833b(a)).

(8) No Commissioner or employee of the Commission shall accept employment or compensation from any person, exchange, or clearinghouse subject to regulation by the Commission under this Act during his term of office, nor shall he participate, directly or indirectly, in any registered entity operations or transactions of a character subject to regulation by the Commission.

(9)(A) The Commission shall, in cooperation with the Secretary of Agriculture, maintain a liaison between the Commission and the Department of Agriculture. The Secretary shall take such steps as may be necessary to enable the Commission to obtain information and utilize such services and facilities of the Department of Agriculture as may be necessary in order to maintain effectively such liaison. In addition, the Secretary shall appoint a liaison officer, who shall be an employee of the Office of the Secretary, for the purpose of maintaining a liaison between the Department of Agriculture and the Commission. The Commission shall furnish such liaison officer appropriate office space within the offices of the Commission and shall allow such liaison officer to attend and observe all deliberations and proceedings of the Commission.

(B)(i) The Commission shall maintain communications with the Department of the Treasury, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission for the purpose of keeping such agencies fully informed of Commission activities that relate to the responsibilities of those agencies, for the purpose of seeking the views of those agencies on such activities, and for considering the relationships between the volume and nature of investment and trading in contracts of sale of a commodity for future delivery and in securities and financial instruments under the jurisdiction of such agencies.

(ii) When a board of trade applies for designation **[**or registration**]** as a contract market **[**or derivatives transaction execution facility**]** involving transactions for future delivery of any security issued or guaranteed by the United States or any agency thereof, the Commission shall promptly deliver a copy of such application to the Department of the Treasury and the Board of Governors of the Federal Reserve System. The Commission may not designate **[**or register**]** a board of trade as a contract market **[**or derivatives transaction execution facility**]** based on such application until forty-five days after the date the Commission delivers the application to such agencies or until the Commission receives comments from each of such agencies on the application, whichever period is shorter. Any comments received by the Commission from such agencies shall be included as part of the public record of the Commission's designation proceeding. In designating**[**, registering,**]** or refusing, suspending, or revoking the designation **[**or registration**]** of, a board of trade as a contract market **[**or derivatives transaction execution facility**]** involving transactions for future delivery referred to in this clause or in considering any possible action under this Act (including without limitation emergency action under section 8a(9)) with respect to such transactions, the Commission shall take into consideration all com-

ments it receives from the Department of the Treasury and the Board of Governors of the Federal Reserve System and shall consider the effect that any such designation[, registration,] suspension, revocation, or action may have on the debt financing requirements of the United States Government and the continued efficiency and integrity of the underlying market for government securities.

(iii) The provisions of this subparagraph shall not create any rights, liabilities, or obligations upon which actions may be brought against the Commission.

(10)(A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit copies of that estimate or request to the House and Senate Appropriations Committees and the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry.

(B) Whenever the Commission transmits any legislative recommendations, or testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit copies thereof to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress. In instances in which the Commission voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Commission shall include a description of such actions in its legislative recommendations, testimony, or comments on legislation which it transmits to the Congress.

(C) Whenever the Commission issues for official publication any opinion, release, rule, order, interpretation, or other determination on a matter, the Commission shall provide that any dissenting, concurring, or separate opinion by any Commissioner on the matter be published in full along with the Commission opinion, release, rule, order, interpretation, or determination.

(11) The Commission shall have an official seal, which shall be judicially noticed.

[(12) The]

(12) RULES AND REGULATIONS.—

(A) IN GENERAL.—Subject to the other provisions of this paragraph, the Commission is authorized to promulgate such rules and regulations as it deems necessary to govern the operating procedures and conduct of the business of the Commission.

(B) NOTICE TO COMMISSIONERS.—The Commission shall develop and publish internal procedures governing the issuance by any division or office of the Commission of any response to a formal, written request or petition from any member of the public for an exemptive, a no-action, or an interpretive letter and such procedures shall provide that the commissioners be provided with the final version of the matter to be issued with sufficient notice to review the matter prior to its issuance.

(C) INTERNAL RISK CONTROLS.—The Commission, in consultation with the Chief Economist, shall develop comprehensive internal risk control mechanisms to safeguard and govern the storage of all market data by the Commission, all market data sharing agreements of the Commission, and all academic research performed at the Commission using market data.

(D) APPLICABILITY OF NOTICE AND COMMENT RULES TO GUIDANCE VOTED ON BY THE COMMISSION.—The notice and comment requirements of section 553 of title 5, United States Code, shall also apply with respect to any Commission statement or guidance, including interpretive rules, general statements of policy, or rules of Commission organization, procedure, or practice, that has the effect of implementing, interpreting or prescribing law or policy and that is voted on by the Commission.

(13) PUBLIC AVAILABILITY OF SWAP TRANSACTION DATA.—

(A) DEFINITION OF REAL-TIME PUBLIC REPORTING.—In this paragraph, the term "real-time public reporting" means to report data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.

(B) PURPOSE.—The purpose of this section is to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.

(C) GENERAL RULE.— ⟦The Commission⟧ *Except as provided in subparagraph (D), the Commission* is authorized and required to provide by rule for the public availability of swap transaction and pricing data as follows:

(i) With respect to those swaps that are subject to the mandatory clearing requirement described in subsection (h)(1) (including those swaps that are excepted from the requirement pursuant to subsection (h)(7)), the Commission shall require real-time public reporting for such transactions.

(ii) With respect to those swaps that are not subject to the mandatory clearing requirement described in subsection (h)(1), but are cleared at a registered derivatives clearing organization, the Commission shall require real-time public reporting for such transactions.

(iii) With respect to swaps that are not cleared at a registered derivatives clearing organization and which are reported to a swap data repository or the Commission under subsection (h)(6), the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person.

(iv) With respect to swaps that are determined to be required to be cleared under subsection (h)(2) but are not cleared, the Commission shall require real-time public reporting for such transactions.

(D) REQUIREMENTS FOR SWAP TRANSACTIONS IN ILLIQUID MARKETS.—Notwithstanding subparagraph (C):

(i) The Commission shall provide by rule for the public reporting of swap transactions, including price and volume data, in illiquid markets that are not cleared and entered into by a non-financial entity that is hedging or mitigating commercial risk in accordance with subsection (h)(7)(A).

(ii) The Commission shall ensure that the swap transaction information referred to in clause (i) of this subparagraph is available to the public no sooner than 30 days after the swap transaction has been executed or at such later date as the Commission determines appropriate to protect the identity of participants and positions in illiquid markets and to prevent the elimination or reduction of market liquidity.

(iii) In this subparagraph, the term "illiquid markets" means any market in which the volume and frequency of trading in swaps is at such a level as to allow identification of individual market participants.

[(D)**]** *(E)* REGISTERED ENTITIES AND PUBLIC REPORTING.—The Commission may require registered entities to publicly disseminate the swap transaction and pricing data required to be reported under this paragraph.

[(E)**]** *(F)* RULEMAKING REQUIRED.—With respect to the rule providing for the public availability of transaction and pricing data for swaps described in clauses (i) and (ii) of subparagraph (C), the rule promulgated by the Commission shall contain provisions—

(i) to ensure such information does not identify the participants;

(ii) to specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts;

(iii) to specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public; and

(iv) that take into account whether the public disclosure will materially reduce market liquidity.

[(F)**]** *(G)* TIMELINESS OF REPORTING.—Parties to a swap (including agents of the parties to a swap) shall be responsible for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.

[(G)**]** *(H)* REPORTING OF SWAPS TO REGISTERED SWAP DATA REPOSITORIES.—Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.

(14) SEMIANNUAL AND ANNUAL PUBLIC REPORTING OF AGGREGATE SWAP DATA.—

(A) IN GENERAL.—In accordance with subparagraph (B), the Commission shall issue a written report on a semiannual and annual basis to make available to the public information relating to—

(i) the trading and clearing in the major swap categories; and

(ii) the market participants and developments in new products.

(B) USE; CONSULTATION.—In preparing a report under subparagraph (A), the Commission shall—

(i) use information from swap data repositories and derivatives clearing organizations; and

(ii) consult with the Office of the Comptroller of the Currency, the Bank for International Settlements, and such other regulatory bodies as may be necessary.

(C) AUTHORITY OF THE COMMISSION.—The Commission may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.

(15) ENERGY AND ENVIRONMENTAL MARKETS ADVISORY COMMITTEE.—

(A) ESTABLISHMENT.—

(i) IN GENERAL.—An Energy and Environmental Markets Advisory Committee is hereby established.

(ii) MEMBERSHIP.—The Committee shall have 9 members.

(iii) ACTIVITIES.—The Committee's objectives and scope of activities shall be—

(I) to conduct public meetings;

(II) to submit reports and recommendations to the Commission (including dissenting or minority views, if any); and

(III) otherwise to serve as a vehicle for discussion and communication on matters of concern to exchanges, firms, end users, and regulators regarding energy and environmental markets and their regulation by the Commission.

(B) REQUIREMENTS.—

(i) IN GENERAL.—The Committee shall hold public meetings at such intervals as are necessary to carry out the functions of the Committee, but not less frequently than 2 times per year.

(ii) MEMBERS.—Members shall be appointed to 3-year terms, but may be removed for cause by vote of the Commission.

(C) APPOINTMENT.—The Commission shall appoint members with a wide diversity of opinion and who represent a broad spectrum of interests, including hedgers and consumers.

(D) REIMBURSEMENT.—Members shall be entitled to per diem and travel expense reimbursement by the Commission.

(E) FACA.—The Committee shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

(16) OFFICE OF THE CHIEF ECONOMIST.—

(A) ESTABLISHMENT.—There is established in the Commission the Office of the Chief Economist.

(B) HEAD.—The Office of the Chief Economist shall be headed by the Chief Economist, who shall be appointed by

the Commission and serve at the pleasure of the Commission.

(C) FUNCTIONS.—The Chief Economist shall report directly to the Commission and perform such functions and duties as the Commission may prescribe.

(D) PROFESSIONAL STAFF.—The Commission shall appoint such other economists as may be necessary to assist the Chief Economist in performing such economic analysis, regulatory cost-benefit analysis, or research any member of the Commission may request.

(17) STRATEGIC TECHNOLOGY PLAN.—

(A) IN GENERAL.—Every 5 years, the Commission shall develop and submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a detailed plan focused on the acquisition and use of technology by the Commission.

(B) CONTENTS.—The plan shall—

(i) include for each related division or office a detailed technology strategy focused on market surveillance and risk detection, market data collection, aggregation, interpretation, standardization, harmonization, normalization, validation, streamlining or other data analytic processes, and internal management and protection of data collected by the Commission, including a detailed accounting of how the funds provided for technology will be used and the priorities that will apply in the use of the funds; and

(ii) set forth annual goals to be accomplished and annual budgets needed to accomplish the goals.

(b) For the purposes of this Act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the commodity trade whereby commodities and commodity products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

(c) AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN FOREIGN CURRENCY, GOVERNMENT SECURITIES, AND CERTAIN OTHER COMMODITIES.—

(1) IN GENERAL.—Except as provided in paragraph (2), nothing in this Act (other than section[,] 5b, or 12(e)(2)(B)) governs or applies to an agreement, contract, or transaction in—

(A) foreign currency;

(B) government securities;

(C) security warrants;
(D) security rights;
(E) resales of installment loan contracts;
(F) repurchase transactions in an excluded commodity; or
(G) mortgages or mortgage purchase commitments.

(2) COMMISSION JURISDICTION.—

(A) AGREEMENTS, CONTRACTS, AND TRANSACTIONS TRADED ON AN ORGANIZED EXCHANGE.—This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction described in paragraph (1) that is—

(i) a contract of sale of a commodity for future delivery (or an option on such a contract), or an option on a commodity (other than foreign currency or a security or a group or index of securities), that is executed or traded on an organized exchange;
(ii) a swap; or
(iii) an option on foreign currency executed or traded on an organized exchange that is not a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934.

(B) AGREEMENTS, CONTRACTS, AND TRANSACTIONS IN RETAIL FOREIGN CURRENCY.—

(i) This Act applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction in foreign currency that—

(I) is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a))); and
(II) is offered to, or entered into with, a person that is not an eligible contract participant, unless the counterparty, or the person offering to be the counterparty, of the person is—

(aa) a United States financial institution;
(bb)(AA) a broker or dealer registered under section 15(b) (except paragraph (11) thereof) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o–5); or
(BB) an associated person of a broker or dealer registered under section 15(b) (except paragraph (11) thereof) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o–5) concerning the financial or securities activities of which the broker or dealer makes and keeps records under section 15C(b) or 17(h) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–5(b), 78q(h));
(cc)(AA) a futures commission merchant that is primarily or substantially engaged in the business activities described in section 1a of this Act, is registered under this Act, is not

a person described in item (bb) of this subclause, and maintains adjusted net capital equal to or in excess of the dollar amount that applies for purposes of clause (ii) of this subparagraph; or

(BB) an affiliated person of a futures commission merchant that is primarily or substantially engaged in the business activities described in section 1a of this Act, is registered under this Act, and is not a person described in item (bb) of this subclause, if the affiliated person maintains adjusted net capital equal to or in excess of the dollar amount that applies for purposes of clause (ii) of this subparagraph and is not a person described in such item (bb), and the futures commission merchant makes and keeps records under section 4f(c)(2)(B) of this Act concerning the futures and other financial activities of the affiliated person;

(dd) a financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956); or

(ff) a retail foreign exchange dealer that maintains adjusted net capital equal to or in excess of the dollar amount that applies for purposes of clause (ii) of this subparagraph and is registered in such capacity with the Commission, subject to such terms and conditions as the Commission shall prescribe, and is a member of a futures association registered under section 17.

(ii) The dollar amount that applies for purposes of this clause is—

(I) $10,000,000, beginning 120 days after the date of the enactment of this clause;

(II) $15,000,000, beginning 240 days after such date of enactment; and

(III) $20,000,000, beginning 360 days after such date of enactment.

(iii) Notwithstanding items (cc) and (gg) of clause (i)(II) of this subparagraph, agreements, contracts, or transactions described in clause (i) of this subparagraph, and accounts or pooled investment vehicles described in clause (vi), shall be subject to subsection (a)(1)(B) of this section and sections 4(b), 4b, 4c(b), 4o, 6(c) and 6(d) (except to the extent that sections 6(c) and 6(d) prohibit manipulation of the market price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any market), 6c, 6d, 8(a), 13(a), and 13(b) if the agreements, contracts, or transactions are offered, or entered into, by a person that is registered as a futures commission merchant or retail foreign exchange dealer, or an affiliated person of a futures commission merchant registered

under this Act that is not also a person described in any of item (aa), (bb), (ee), or (ff) of clause (i)(II) of this subparagraph.

(iv)(I) Notwithstanding items (cc) and (gg) of clause (i)(II), a person, unless registered in such capacity as the Commission by rule, regulation, or order shall determine and a member of a futures association registered under section 17, shall not—

(aa) solicit or accept orders from any person that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of clause (i)(II);

(bb) exercise discretionary trading authority or obtain written authorization to exercise discretionary trading authority over any account for or on behalf of any person that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of clause (i)(II); or

(cc) operate or solicit funds, securities, or property for any pooled investment vehicle that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of clause (i)(II).

(II) Subclause (I) of this clause shall not apply to—

(aa) any person described in any of item (aa), (bb), (ee), or (ff) of clause (i)(II);

(bb) any such person's associated persons; or

(cc) any person who would be exempt from registration if engaging in the same activities in connection with transactions conducted on or subject to the rules of a contract market **[**or a derivatives transaction execution facility**]**.

(III) Notwithstanding items (cc) and (gg) of clause (i)(II), the Commission may make, promulgate, and enforce such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions of, or to accomplish any of the purposes of, this Act in connection with the activities of persons subject to subclause (I).

(IV) Subclause (III) of this clause shall not apply to—

(aa) any person described in any of item (aa) through (ff) of clause (i)(II);

(bb) any such person's associated persons; or

(cc) any person who would be exempt from registration if engaging in the same activities in connection with transactions conducted on or subject

to the rules of a contract market [or a derivatives transaction execution facility].

(v) Notwithstanding items (cc) and (gg) of clause (i)(II), the Commission may make, promulgate, and enforce such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions of, or to accomplish any of the purposes of, this Act in connection with agreements, contracts, or transactions described in clause (i) which are offered, or entered into, by a person described in item (cc) or (gg) of clause (i)(II).

(vi) This Act applies to, and the Commission shall have jurisdiction over, an account or pooled investment vehicle that is offered for the purpose of trading, or that trades, any agreement, contract, or transaction in foreign currency described in clause (i).

(C)(i)(I) This subparagraph shall apply to any agreement, contract, or transaction in foreign currency that is—

(aa) offered to, or entered into with, a person that is not an eligible contract participant (except that this subparagraph shall not apply if the counterparty, or the person offering to be the counterparty, of the person that is not an eligible contract participant is a person described in any of item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II)); and

(bb) offered, or entered into, on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(II) Subclause (I) of this clause shall not apply to—

(aa) a security that is not a security futures product; or

(bb) a contract of sale that—

(AA) results in actual delivery within 2 days; or

(BB) creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business.

(ii)(I) Agreements, contracts, or transactions described in clause (i) of this subparagraph, and accounts or pooled investment vehicles described in clause (vii), shall be subject to subsection (a)(1)(B) of this section and sections 4(b), 4b, 4c(b), 4o, 6(c) and 6(d) (except to the extent that sections 6(c) and 6(d) prohibit manipulation of the market price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any market), 6c, 6d, 8(a), 13(a), and 13(b).

(II) Subclause (I) of this clause shall not apply to—

(aa) any person described in any of item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II); or

(bb) any such person's associated persons.

(III) The Commission may make, promulgate, and enforce such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of

the provisions of or to accomplish any of the purposes of this Act in connection with agreements, contracts, or transactions described in clause (i) of this subparagraph if the agreements, contracts, or transactions are offered, or entered into, by a person that is not described in item (aa) through (ff) of subparagraph (B)(i)(II).

(iii)(I) A person, unless registered in such capacity as the Commission by rule, regulation, or order shall determine and a member of a futures association registered under section 17, shall not—

(aa) solicit or accept orders from any person that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) of this subparagraph entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II);

(bb) exercise discretionary trading authority or obtain written authorization to exercise written trading authority over any account for or on behalf of any person that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) of this subparagraph entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II); or

(cc) operate or solicit funds, securities, or property for any pooled investment vehicle that is not an eligible contract participant in connection with agreements, contracts, or transactions described in clause (i) of this subparagraph entered into with or to be entered into with a person who is not described in item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II).

(II) Subclause (I) of this clause shall not apply to—

(aa) any person described in item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II);

(bb) any such person's associated persons; or

(cc) any person who would be exempt from registration if engaging in the same activities in connection with transactions conducted on or subject to the rules of a contract market **[**or a derivatives transaction execution facility**]**.

(III) The Commission may make, promulgate, and enforce such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions of, or to accomplish any of the purposes of, this Act in connection with the activities of persons subject to subclause (I).

(IV) Subclause (III) of this clause shall not apply to—

(aa) any person described in item (aa) through (ff) of subparagraph (B)(i)(II);

(bb) any such person's associated persons; or

(cc) any person who would be exempt from registration if engaging in the same activities in connection with transactions conducted on or subject to the rules

of a contract market [or a derivatives transaction execution facility].

(iv) Sections 4(b) and 4b shall apply to any agreement, contract, or transaction described in clause (i) of this subparagraph as if the agreement, contract, or transaction were a contract of sale of a commodity for future delivery.

(v) This subparagraph shall not be construed to limit any jurisdiction that the Commission may otherwise have under any other provision of this Act over an agreement, contract, or transaction that is a contract of sale of a commodity for future delivery.

(vi) This subparagraph shall not be construed to limit any jurisdiction that the Commission or the Securities and Exchange Commission may otherwise have under any other provision of this Act with respect to security futures products and persons effecting transactions in security futures products.

(vii) This Act applies to, and the Commission shall have jurisdiction over, an account or pooled investment vehicle that is offered for the purpose of trading, or that trades, any agreement, contract, or transaction in foreign currency described in clause (i).

(D) RETAIL COMMODITY TRANSACTIONS.—

(i) APPLICABILITY.—Except as provided in clause (ii), this subparagraph shall apply to any agreement, contract, or transaction in any commodity that is—

(I) entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and

(II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(ii) EXCEPTIONS.—This subparagraph shall not apply to—

(I) an agreement, contract, or transaction described in paragraph (1) or subparagraphs (A), (B), or (C), including any agreement, contract, or transaction specifically excluded from subparagraph (A), (B), or (C);

(II) any security;

(III) a contract of sale that—

(aa) results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved; or

(bb) creates an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer; or

(IV) an agreement, contract, or transaction that is listed on a national securities exchange registered under section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(V) an identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C.27(b)).

(iii) ENFORCEMENT.—Sections 4(a), 4(b), and 4b apply to any agreement, contract, or transaction described in clause (i), as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery.

(iv) ELIGIBLE COMMERCIAL ENTITY.—For purposes of this subparagraph, an agricultural producer, packer, or handler shall be considered to be an eligible commercial entity for any agreement, contract, or transaction for a commodity in connection with the line of business of the agricultural producer, packer, or handler.

(E) PROHIBITION.—

(i) DEFINITION OF FEDERAL REGULATORY AGENCY.—In this subparagraph, the term "Federal regulatory agency" means—

(I) the Commission;

(II) the Securities and Exchange Commission;

(III) an appropriate Federal banking agency;

(IV) the National Credit Union Association; and

(V) the Farm Credit Administration.

(ii) PROHIBITION.—

(I) IN GENERAL.—Except as provided in subclause (II), a person described in subparagraph (B)(i)(II) for which there is a Federal regulatory agency shall not offer to, or enter into with, a person that is not an eligible contract participant, any agreement, contract, or transaction in foreign currency described in subparagraph (B)(i)(I) except pursuant to a rule or regulation of a Federal regulatory agency allowing the agreement, contract, or transaction under such terms and conditions as the Federal regulatory agency shall prescribe.

(II) EFFECTIVE DATE.—With regard to persons described in subparagraph (B)(i)(II) for which a Federal regulatory agency has issued a proposed rule concerning agreements, contracts, or transactions in foreign currency described in subparagraph (B)(i)(I) prior to the date of enactment of this subclause, subclause (I) shall take effect 90 days after the date of enactment of this subclause.

(iii) REQUIREMENTS OF RULES AND REGULATIONS.—

(I) IN GENERAL.—The rules and regulations described in clause (ii) shall prescribe appropriate requirements with respect to—

(aa) disclosure;

(bb) recordkeeping;

(cc) capital and margin;
(dd) reporting;
(ee) business conduct;
(ff) documentation; and
(gg) such other standards or requirements as the Federal regulatory agency shall determine to be necessary.

(II) TREATMENT.—The rules or regulations described in clause (ii) shall treat all agreements, contracts, and transactions in foreign currency described in subparagraph (B)(i)(I), and all agreements, contracts, and transactions in foreign currency that are functionally or economically similar to agreements, contracts, or transactions described in subparagraph (B)(i)(I), similarly.

(d) SWAPS.—Nothing in this Act (other than subparagraphs (A), (B), (C), (D), (G), and (H) of subsection (a)(1), subsections (f) and (g), sections 1a, 2(a)(13), 2(c)(2)(A)(ii), 2(e), 2(h), 4(c), 4a, 4b, and 4b–1, subsections (a), (b), and [(g) of] *(e) of* section 4c, sections 4d, 4e, 4f, 4g, 4h, 4i, 4j, 4k, 4l, 4m, 4n, 4o, 4p, 4r, 4s, 4t, 5, 5b, 5c, 5e, and 5h, subsections (c) and (d) of section 6, sections 6c, 6d, 8, 8a, and 9, subsections (e)(2), (f), and (h) of section 12, subsections (a) and (b) of section 13, sections 17, 20, 21, and 22(a)(4), and any other provision of this Act that is applicable to registered entities or Commission registrants) governs or applies to a swap.

(e) LIMITATION ON PARTICIPATION.—It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5.

(f) EXCLUSION FOR QUALIFYING HYBRID INSTRUMENTS.—

(1) IN GENERAL.—Nothing in this Act (other than section 12(e)(2)(B)) governs or is applicable to a hybrid instrument that is predominantly a security.

(2) PREDOMINANCE.—A hybrid instrument shall be considered to be predominantly a security if—

(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with delivery of the hybrid instrument;

(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to this Act.

(3) MARK-TO-MARKET MARGINING REQUIREMENTS.—For the purposes of paragraph (2)(C), mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt

instrument to secure the repayment obligations of the issuer under the secured debt instrument.

(g) APPLICATION OF COMMODITY FUTURES LAWS.—

(1) No provision of this Act shall be construed as implying or creating any presumption that—

(A) any agreement, contract, or transaction that is excluded from this Act under section 2(c), 2(d), 2(e), 2(f), or 2(g) of this Act or title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 2(h) or 4(c) of this Act; or

(B) any agreement, contract, or transaction, not otherwise subject to this Act, that is not so excluded or exempted,

is or would otherwise be subject to this Act.

(2) No provision of, or amendment made by, the Commodity Futures Modernization Act of 2000 shall be construed as conferring jurisdiction on the Commission with respect to any such agreement, contract, or transaction, except as expressly provided in section 5b of this Act.

(h) CLEARING REQUIREMENT.—

(1) IN GENERAL.—

(A) STANDARD FOR CLEARING.—It shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization that is registered under this Act or a derivatives clearing organization that is exempt from registration under this Act if the swap is required to be cleared.

(B) OPEN ACCESS.—The rules of a derivatives clearing organization described in subparagraph (A) shall—

(i) prescribe that all swaps (but not contracts of sale of a commodity for future delivery or options on such contracts) submitted to the derivatives clearing organization with the same terms and conditions are economically equivalent within the derivatives clearing organization and may be offset with each other within the derivatives clearing organization; and

(ii) provide for non-discriminatory clearing of a swap (but not a contract of sale of a commodity for future delivery or option on such contract) executed bilaterally or on or through the rules of an unaffiliated designated contract market or swap execution facility.

(2) COMMISSION REVIEW.—

(A) COMMISSION-INITIATED REVIEW.—

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

(ii) The Commission shall provide at least a 30-day public comment period regarding any determination made under clause (i).

(B) SWAP SUBMISSIONS.—

(i) A derivatives clearing organization shall submit to the Commission each swap, or any group, category, type, or class of swaps that it plans to accept for clear-

ing, and provide notice to its members (in a manner to be determined by the Commission) of the submission.

(ii) Any swap or group, category, type, or class of swaps listed for clearing by a derivative clearing organization as of the date of enactment of this subsection shall be considered submitted to the Commission.

(iii) The Commission shall—

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

(II) review each submission made under clauses (i) and (ii), and determine whether the swap, or group, category, type, or class of swaps described in the submission is required to be cleared; and

(III) provide at least a 30-day public comment period regarding its determination as to whether the clearing requirement under paragraph (1)(A) shall apply to the submission.

(C) DEADLINE.—The Commission shall make its determination under subparagraph (B)(iii) not later than 90 days after receiving a submission made under subparagraphs (B)(i) and (B)(ii), unless the submitting derivatives clearing organization agrees to an extension for the time limitation established under this subparagraph.

(D) DETERMINATION.—

(i) In reviewing a submission made under subparagraph (B), the Commission shall review whether the submission is consistent with section 5b(c)(2).

(ii) In reviewing a swap, group of swaps, or class of swaps pursuant to subparagraph (A) or a submission made under subparagraph (B), the Commission shall take into account the following factors:

(I) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data.

(II) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.

(III) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the derivatives clearing organization available to clear the contract.

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

(V) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or 1 or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.

(iii) In making a determination under subparagraph (A) or (B)(iii) that the clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.

(E) RULES.—Not later than 1 year after the date of the enactment of this subsection, the Commission shall adopt rules for a derivatives clearing organization's submission for review, pursuant to this paragraph, of a swap, or a group, category, type, or class of swaps, that it seeks to accept for clearing. Nothing in this subparagraph limits the Commission from making a determination under subparagraph (B)(iii) for swaps described in subparagraph (B)(ii).

(3) STAY OF CLEARING REQUIREMENT.—

(A) IN GENERAL.—After making a determination pursuant to paragraph (2)(B), the Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement of paragraph (1) until the Commission completes a review of the terms of the swap (or the group, category, type, or class of swaps) and the clearing arrangement.

(B) DEADLINE.—The Commission shall complete a review undertaken pursuant to subparagraph (A) not later than 90 days after issuance of the stay, unless the derivatives clearing organization that clears the swap, or group, category, type, or class of swaps agrees to an extension of the time limitation established under this subparagraph.

(C) DETERMINATION.—Upon completion of the review undertaken pursuant to subparagraph (A), the Commission may—

(i) determine, unconditionally or subject to such terms and conditions as the Commission determines to be appropriate, that the swap, or group, category, type, or class of swaps must be cleared pursuant to this subsection if it finds that such clearing is consistent with paragraph (2)(D); or

(ii) determine that the clearing requirement of paragraph (1) shall not apply to the swap, or group, category, type, or class of swaps.

(D) RULES.—Not later than 1 year after the date of the enactment of the Wall Street Transparency and Accountability Act of 2010, the Commission shall adopt rules for reviewing, pursuant to this paragraph, a derivatives clearing organization's clearing of a swap, or a group, category, type, or class of swaps, that it has accepted for clearing.

(4) PREVENTION OF EVASION.—

(A) IN GENERAL.—The Commission shall prescribe rules under this subsection (and issue interpretations of rules prescribed under this subsection) as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.

(B) DUTY OF COMMISSION TO INVESTIGATE AND TAKE CERTAIN ACTIONS.—To the extent the Commission finds that a particular swap, group, category, type, or class of swaps would otherwise be subject to mandatory clearing but no

derivatives clearing organization has listed the swap, group, category, type, or class of swaps for clearing, the Commission shall—

(i) investigate the relevant facts and circumstances;

(ii) within 30 days issue a public report containing the results of the investigation; and

(iii) take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of swaps.

(C) EFFECT ON AUTHORITY.—Nothing in this paragraph—

(i) authorizes the Commission to adopt rules requiring a derivatives clearing organization to list for clearing a swap, group, category, type, or class of swaps if the clearing of the swap, group, category, type, or class of swaps would threaten the financial integrity of the derivatives clearing organization; and

(ii) affects the authority of the Commission to enforce the open access provisions of paragraph (1)(B) with respect to a swap, group, category, type, or class of swaps that is listed for clearing by a derivatives clearing organization.

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

(A) Swaps entered into before the date of the enactment of this subsection shall be reported to a registered swap data repository or the Commission no later than 180 days after the effective date of this subsection.

(B) Swaps entered into on or after such date of enactment shall be reported to a registered swap data repository or the Commission no later than the later of—

(i) 90 days after such effective date; or

(ii) such other time after entering into the swap as the Commission may prescribe by rule or regulation.

(6) CLEARING TRANSITION RULES.—

(A) Swaps entered into before the date of the enactment of this subsection are exempt from the clearing requirements of this subsection if reported pursuant to paragraph (5)(A).

(B) Swaps entered into before application of the clearing requirement pursuant to this subsection are exempt from the clearing requirements of this subsection if reported pursuant to paragraph (5)(B).

(7) EXCEPTIONS.—

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

(i) is not a financial entity;

(ii) is using swaps to hedge or mitigate commercial risk; and

(iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its finan-

cial obligations associated with entering into non-cleared swaps.

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

(C) FINANCIAL ENTITY DEFINITION.—

(i) IN GENERAL.—For the purposes of this paragraph, the term "financial entity" means—

(I) a swap dealer;

(II) a security-based swap dealer;

(III) a major swap participant;

(IV) a major security-based swap participant;

(V) a commodity pool;

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

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

(VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.

(ii) EXCLUSION.—The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

(I) depository institutions with total assets of $10,000,000,000 or less;

(II) farm credit system institutions with total assets of $10,000,000,000 or less; or

(III) credit unions with total assets of $10,000,000,000 or less.

[(iii) LIMITATION.—Such definition shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.**]**

(iii) LIMITATION.—Such definition shall not include an entity—

(I) whose primary business is providing financing, and who uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the

parent company or another subsidiary of the parent company; or

(II) who is not supervised by a prudential regulator, and is not described in any of subclauses (I) through (VII) of clause (i), and—

(aa) is a commercial market participant; or

(bb) enters into swaps, contracts for future delivery, and other derivatives on behalf of, or to hedge or mitigate the commercial risk of, whether directly or in the aggregate, affiliates that are not so supervised or described.

(iv) HOLDING COMPANIES.—A determination made by the Commission under clause (ii) shall, with respect to small banks and savings associations, also apply to their respective bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956), or savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act of 1933)), if the total consolidated assets of the holding company are no greater than the asset threshold set by the Commission in determining small bank and savings association eligibility under clause (ii).

(D) TREATMENT OF AFFILIATES.—

[(i) IN GENERAL.—An affiliate of a person that qualifies for an exception under subparagraph (A) (including affiliate entities predominantly engaged in providing financing for the purchase of the merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate, acting on behalf of the person and as an agent, uses the swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity.]

(i) IN GENERAL.—An affiliate of a person that qualifies for an exception under subparagraph (A) (including an affiliate entity predominantly engaged in providing financing for the purchase of the merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate enters into the swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity, provided that if the hedge or mitigation of such commercial risk is addressed by entering into a swap with a swap dealer or major swap participant, an appropriate credit support measure or other mechanism must be utilized.

(ii) PROHIBITION RELATING TO CERTAIN AFFILIATES.—The exception in clause (i) shall not apply if the affiliate is—

(I) a swap dealer;

(II) a security-based swap dealer;

(III) a major swap participant;

(IV) a major security-based swap participant;

(V) an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for

paragraph (1) or (7) of subsection (c) of that Act (15 U.S.C. 80a–3(c));

(VI) a commodity pool; or

(VII) a bank holding company with over $50,000,000,000 in consolidated assets.

(iii) TRANSITION RULE FOR AFFILIATES.—An affiliate, subsidiary, or a wholly owned entity of a person that qualifies for an exception under subparagraph (A) and is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from the margin requirement described in section 4s(e) and the clearing requirement described in paragraph (1) with regard to swaps entered into to mitigate the risk of the financing activities for not less than a 2-year period beginning on the date of enactment of this clause.

(E) ELECTION OF COUNTERPARTY.—

(i) SWAPS REQUIRED TO BE CLEARED.—With respect to any swap that is subject to the mandatory clearing requirement under this subsection and entered into by a swap dealer or a major swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

(ii) SWAPS NOT REQUIRED TO BE CLEARED.—With respect to any swap that is not subject to the mandatory clearing requirement under this subsection and entered into by a swap dealer or a major swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty—

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

(II) shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

(F) ABUSE OF EXCEPTION.—The Commission may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this paragraph. The Commission may also request information from those persons claiming the clearing exception as necessary to prevent abuse of the exceptions described in this paragraph.

(8) TRADE EXECUTION.—

(A) IN GENERAL.—With respect to transactions involving swaps subject to the clearing requirement of paragraph (1), counterparties shall—

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

(ii) execute the transaction on a swap execution facility registered under 5h or a swap execution facility

that is exempt from registration under section [5h(f) of this Act] *5h(g)*.

(B) EXCEPTION.—The requirements of clauses (i) and (ii) of subparagraph (A) shall not apply if no board of trade or swap execution facility makes the swap available to trade or for swap transactions subject to the clearing exception under paragraph (7).

(i) APPLICABILITY.—The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—

(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or

(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

(j) COMMITTEE APPROVAL BY BOARD.—Exemptions from the requirements of subsection (h)(1) to clear a swap and subsection (h)(8) to execute a swap through a board of trade or swap execution facility shall be available to a counterparty that is an issuer of securities that are registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports pursuant to section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o) only if an appropriate committee of the issuer's board or governing body has reviewed and approved its decision to enter into swaps that are subject to such exemptions.

* * * * * * *

SEC. 4. (a) Unless exempted by the Commission pursuant to subsection (c) or by subsection (e), it shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless—

(1) such transaction is conducted on or subject to the rules of a board of trade which has been designated or registered by the Commission as a contract market [or derivatives transaction execution facility] for such commodity;

(2) such contract is executed or consummated by or through a contract market; and

(3) such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided,* That each contract market or derivatives transaction execution facility member shall keep such record for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, which record shall at all

times be open to the inspection of any representative of the Commission or the Department of Justice.

(b)

(1) FOREIGN BOARDS OF TRADE.—

(A) REGISTRATION.—The Commission may adopt rules and regulations requiring registration with the Commission for a foreign board of trade that provides the members of the foreign board of trade or other participants located in the United States with direct access to the electronic trading and order matching system of the foreign board of trade, including rules and regulations prescribing procedures and requirements applicable to the registration of such foreign boards of trade. For purposes of this paragraph, "direct access" refers to an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade. In adopting such rules and regulations, the commission shall consider—

(i) whether any such foreign board of trade is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in the foreign board of trade's home country; and

(ii) any previous commission findings that the foreign board of trade is subject to comparable comprehensive supervision and regulation by the appropriate government authorities in the foreign board of trade's home country.

(B) LINKED CONTRACTS.—The Commission may not permit a foreign board of trade to provide to the members of the foreign board of trade or other participants located in the United States direct access to the electronic trading and order-matching system of the foreign board of trade with respect to an agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, unless the Commission determines that—

(i) the foreign board of trade makes public daily trading information regarding the agreement, contract, or transaction that is comparable to the daily trading information published by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles; and

(ii) the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade)—

(I) adopts position limits (including related hedge exemption provisions) for the agreement, contract, or transaction that are comparable to the position limits (including related hedge exemption provisions) adopted by the registered entity for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles;

(II) has the authority to require or direct market participants to limit, reduce, or liquidate any position the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation as described in section 4a, price distortion, or disruption of delivery or the cash settlement process;

(III) agrees to promptly notify the Commission, with regard to the agreement, contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, of any change regarding—

(aa) the information that the foreign board of trade will make publicly available;

(bb) the position limits that the foreign board of trade or foreign futures authority will adopt and enforce;

(cc) the position reductions required to prevent manipulation, excessive speculation as described in section 4a, price distortion, or disruption of delivery or the cash settlement process; and

(dd) any other area of interest expressed by the Commission to the foreign board of trade or foreign futures authority;

(IV) provides information to the Commission regarding large trader positions in the agreement, contract, or transaction that is comparable to the large trader position information collected by the Commission for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles; and

(V) provides the Commission such information as is necessary to publish reports on aggregate trader positions for the agreement, contract, or transaction traded on the foreign board of trade that are comparable to such reports on aggregate trader positions for the 1 or more contracts against which the agreement, contract, or transaction traded on the foreign board of trade settles.

(C) EXISTING FOREIGN BOARDS OF TRADE.—Subparagraphs (A) and (B) shall not be effective with respect to any foreign board of trade to which, prior to the date of enactment of this paragraph, the Commission granted direct access permission until the date that is 180 days after that date of enactment.

(2) PERSONS LOCATED IN THE UNITED STATES.—

(A) IN GENERAL.—The Commission may adopt rules and regulations proscribing fraud and requiring minimum financial standards, the disclosure of risk, the filing of reports, the keeping of books and records, the safeguarding of customers' funds, and registration with the Commission

by any person located in the United States, its territories or possessions, who engages in the offer or sale of any contract of sale of a commodity for future delivery that is made or to be made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions.

(B) DIFFERENT REQUIREMENTS.—Rules and regulations described in subparagraph (A) may impose different requirements for such persons depending upon the particular foreign board of trade, exchange, or market involved.

(C) PROHIBITION.—Except as provided in paragraphs (1) and (2), no rule or regulation may be adopted by the Commission under this subsection that—

(i) requires Commission approval of any contract, rule, regulation, or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market; or

(ii) governs in any way any rule or contract term or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market.

(c)(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated **[**or registered**]** as a contract market **[**or derivatives transaction execution facility**]** for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that—

(A) unless the Commission is expressly authorized by any provision described in this subparagraph to grant exemptions, *or except as necessary to effectuate the purposes of the Commodity End-User Relief Act,* with respect to amendments made by subtitle A of the Wall Street Transparency and Accountability Act of 2010—

(i) with respect to—

(I) paragraphs (2), (3), (4), (5), and **[**(7), paragraph (18)(A)(vii)(III), paragraphs (23), (24), (31), (32), (38), (39), (41), (42), (46), (47), (48), and (49)**]** *(8), paragraph (19)(A)(vii)(III), paragraphs (24), (25), (32), (33), (39), (40), (42), (43), (47), (48), (49), and (50)* of section 1a, and sections 2(a)(13), 2(c)(1)(D), 4a(a), 4a(b), 4d(c), 4d(d), 4r, 4s, 5b(a), 5b(b), 5(d), 5(g), 5(h), 5b(c), 5b(i), 8e, and 21; and

(II) section 206(e) of the Gramm-Leach-Bliley Act (Public Law 106–102; 15 U.S.C. 78c note); and

(ii) in sections 721(c) and 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(B) the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)) if the Commissions determine that the exemption would be consistent with the public interest.

(2) The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) unless the Commission determines that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

(3) For purposes of this subsection, the term "appropriate person" shall be limited to the following persons or classes thereof:

(A) A bank or trust company (acting in an individual or fiduciary capacity).

(B) A savings association.

(C) An insurance company.

(D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.).

(E) A commodity pool formed or operated by a person subject to regulation under this Act.

(F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph.

(G) An employee benefit plan with assets exceeding $1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80a–1 et seq.), or a commodity trading advisor subject to regulation under this Act.

(H) Any governmental entity (including the United States, any [state] *State*, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.

(I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another appropriate person.

(J) A futures commission merchant, floor broker, or floor trader subject to regulation under this Act acting on its own behalf or on behalf of another appropriate person.

(K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

(4) During the pendency of an application for an order granting an exemption under paragraph (1), the Commission may limit the public availability of any information received from the applicant if the applicant submits a written request to limit disclosure contemporaneous with the application, and the Commission determines that—

(A) the information sought to be restricted constitutes a trade secret; or

(B) public disclosure of the information would result in material competitive harm to the applicant.

(5) The Commission may—

(A) promptly following the enactment of this subsection, or upon application by any person, exercise the exemptive authority granted under paragraph (1) with respect to classes of hybrid instruments that are predominantly securities or depository instruments, to the extent that such instruments may be regarded as subject to the provisions of this Act; or

(B) promptly following the enactment of this subsection, or upon application by any person, exercise the exemptive authority granted under paragraph (1) effective as of October 23, 1974, with respect to classes of swap agreements (as defined in section 101 of title 11, United States Code) that are not part of a fungible class of agreements that are standardized as to their material economic terms, to the extent that such agreements may be regarded as subject to the provisions of this Act.

Any exemption pursuant to this paragraph shall be subject to such terms and conditions as the Commission shall determine to be appropriate pursuant to paragraph (1).

(6) If the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into—

(A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;

(B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or

(C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

(d) The granting of an exemption under this section shall not affect the authority of the Commission under any other provision of this Act to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of this Act or

any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.

(e) LIABILITY OF REGISTERED PERSONS TRADING ON A FOREIGN BOARD OF TRADE.—

(1) IN GENERAL.—A person registered with the Commission, or exempt from registration by the Commission, under this Act may not be found to have violated subsection (a) with respect to a transaction in, or in connection with, a contract of sale of a commodity for future delivery if the person—

(A) has reason to believe that the transaction and the contract is made on or subject to the rules of a foreign board of trade that is—

(i) legally organized under the laws of a foreign country;

(ii) authorized to act as a board of trade by a foreign futures authority; and

(iii) subject to regulation by the foreign futures authority; and

(B) has not been determined by the Commission to be operating in violation of subsection (a).

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed as implying or creating any presumption that a board of trade, exchange, or market is located outside the United States, or its territories or possessions, for purposes of subsection (a).

SEC. 4a. (a)

(1) IN GENERAL.—Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets **[**or derivatives transaction execution facilities**]**, or swaps that perform or affect a significant price discovery function with respect to registered entities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the Commission shall, from time to time, after due notice and opportunity for hearing, by rule, regulation, or order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person, including any group or class of traders, under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market **[**or derivatives transaction execution facility**]**, swaps traded on or subject to the rules of a designated contract market or a swap execution facility, or swaps not traded on or subject to the rules of a designated contract market or a swap execution facility that performs a significant price discovery function with respect to a registered entity, as the Commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an ex-

pressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the Commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different trading limits for buying and selling operations, or different limits for the purposes of paragraphs (1) and (2) of subsection (b) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as a "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) ESTABLISHMENT OF LIMITATIONS.—

(A) IN GENERAL.—In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to physical commodities other than excluded commodities as defined by the Commission, the Commission shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.

(B) TIMING.—

(i) EXEMPT COMMODITIES.—For exempt commodities, the limits required under subparagraph (A) shall be established within 180 days after the date of the enactment of this paragraph.

(ii) AGRICULTURAL COMMODITIES.—For agricultural commodities, the limits required under subparagraph (A) shall be established within 270 days after the date of the enactment of this paragraph.

(C) GOAL.—In establishing the limits required under subparagraph (A), the Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits to be imposed by the Commission will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.

(3) SPECIFIC LIMITATIONS.—In establishing the limits required in paragraph (2), the Commission, as appropriate, shall set limits—

(A) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions that may be held by any person for all months; and

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

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

(ii) to deter and prevent market manipulation, squeezes, and corners;

(iii) to ensure sufficient market liquidity for bona fide hedgers; and

(iv) to ensure that the price discovery function of the underlying market is not disrupted.

(4) SIGNIFICANT PRICE DISCOVERY FUNCTION.—In making a determination whether a swap performs or affects a significant price discovery function with respect to regulated markets, the Commission shall consider, as appropriate:

(A) PRICE LINKAGE.—The extent to which the swap uses or otherwise relies on a daily or final settlement price, or other major price parameter, of another contract traded on a regulated market based upon the same underlying commodity, to value a position, transfer or convert a position, financially settle a position, or close out a position.

(B) ARBITRAGE.—The extent to which the price for the swap is sufficiently related to the price of another contract traded on a regulated market based upon the same underlying commodity so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the swaps on a frequent and recurring basis.

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

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

(E) OTHER MATERIAL FACTORS.—Such other material factors as the Commission specifies by rule or regulation as relevant to determine whether a swap serves a significant price discovery function with respect to a regulated market.

(5) ECONOMICALLY EQUIVALENT CONTRACTS.—

(A) Notwithstanding any other provision of this section, the Commission shall establish limits on the amount of positions, including aggregate position limits, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to swaps that are economically equivalent to contracts of sale for future delivery or to options on the contracts or commodities traded on or subject to the rules of a designated contract market subject to paragraph (2).

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

(i) develop the limits concurrently with limits established under paragraph (2), and the limits shall have similar requirements as under paragraph (3)(B); and

(ii) establish the limits simultaneously with limits established under paragraph (2).

(6) AGGREGATE POSITION LIMITS.—The Commission shall, by rule or regulation, establish limits (including related hedge exemption provisions) on the aggregate number or amount of positions in contracts based upon the same underlying commodity (as defined by the Commission) that may be held by any person, including any group or class of traders, for each month across—

(A) contracts listed by designated contract markets;

(B) with respect to an agreement contract, or transaction that settles against any price (including the daily or final settlement price) of 1 or more contracts listed for trading on a registered entity, contracts traded on a foreign board of trade that provides members or other participants located in the United States with direct access to its electronic trading and order matching system; and

(C) swap contracts that perform or affect a significant price discovery function with respect to regulated entities.

(7) EXEMPTIONS.—The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.

(b) The Commission shall, in such rule, regulation, or order, fix a reasonable time (not to exceed ten days) after the promulgation of the rule, regulation, or order; after which, and until such rule, regulation, or order is suspended, modified, or revoked, it shall be unlawful for any person—

(1) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets, or swap execution facility or facilities with respect to a significant price discovery contract, to which the rule, regulation, or order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the Commission in such rule, regulation, or order for or with respect to such commodity; or

(2) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market or swap execution facility with respect to a significant price discovery contract in excess of any position limit fixed by the Commission for or with respect to such commodity: *Provided,* That such position limit shall not apply to a position acquired in good faith prior to the effective date of such rule, regulation, or order.

(c)(1) No rule, regulation, or order issued under subsection (a) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions, as such terms shall be defined by the Commission by rule, regulation, or order consistent with the purposes of this Act. Such terms **[**may**]** *shall* be defined to permit producers, purchasers, sellers, middlemen, and users of a commodity or a product derived therefrom to hedge their legitimate anticipated business needs for that period of time into the **[**future for which**]** *future, to be determined by the*

Commission, for which either an appropriate swap is available or an appropriate futures contract is open and available on an exchange. To determine the adequacy of this Act and the powers of the Commission acting thereunder to prevent unwarranted price pressures by large hedgers, the Commission shall monitor and analyze the trading activities of the largest hedgers, as determined by the Commission, operating in the cattle, hog, or pork belly markets and shall report its findings and recommendations to the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture in its annual reports for at least two years following the date of enactment of the Futures Trading Act of 1982.

(2) For the purposes of implementation of [subsection (a)(2) for contracts of sale for future delivery or options on the contracts or commodities, the Commission shall define what constitutes a bona fide hedging transaction or position as] *paragraphs (2) and (5) of subsection (a) for swaps, contracts of sale for future delivery, or options on the contracts or commodities, a bona fide hedging transaction or position is* a transaction or position that—

(A)(i) represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;

(ii) is economically appropriate to the reduction [of risks] *or management of current or anticipated risks* in the conduct and management of a commercial enterprise; and

(iii) arises from the potential change in the value of—

(I) assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

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

(III) services that a person provides, purchases, or anticipates providing or purchasing; or

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

(i) was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to subparagraph (A); or

(ii) meets the requirements of subparagraph (A).

(3) The Commission may further define, by rule or regulation, what constitutes a bona fide hedging transaction, provided that the rule or regulation is consistent with the requirements of subparagraphs (A) and (B) of paragraph (2).

(d) This section shall apply to a person that is registered as a futures commission merchant, an introducing broker, or a floor broker under authority of this Act only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

(e) Nothing in this section shall prohibit or impair the adoption by any contract market[, derivatives transaction execution facility,] or by any other board of trade licensed, designated, or reg-

istered by the Commission [or by any electronic trading facility] of any bylaw, rule, regulation, or resolution fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery traded on or subject to the rules of such contract market [or derivatives transaction execution facility] [or on an electronic trading facility], or under options on such contracts or commodities traded on or subject to the rules of such contract market[, derivatives transaction execution facility,][or electronic trading facility] or such board of trade: *Provided,* That if the Commission shall have fixed limits under this section for any contract or under section 4c of this Act for any commodity option, then the limits fixed by the bylaws, rules, regulations, and resolutions adopted by such contract market[, derivatives transaction execution facility,][or electronic trading facility] or such board of trade shall not be higher than the limits fixed by the Commission. It shall be a violation of this Act for any person to violate any bylaw, rule, regulation, or resolution of any contract market[, derivatives transaction execution facility,] or other board of trade licensed, designated, or registered by the Commission [or electronic trading facility with respect to a significant price discovery contract] fixing limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of any commodity for future delivery or under options on such contracts or commodities, if such bylaw, rule, regulation, or resolution has been approved by the Commission or certified by a registered entity pursuant to section 5c(c)(1): *Provided,* That the provisions of section 9(a)(5) of this Act shall apply only to those who knowingly violate such limits.

* * * * * * *

SEC. 4c. PROHIBITED TRANSACTIONS.

(a) IN GENERAL.—

(1) PROHIBITION.—It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving the purchase or sale of any commodity for future delivery (or any option on such a transaction or option on a commodity) or swap if the transaction is used or may be used to—

(A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;

(B) determine the price basis of any such transaction in interstate commerce in the commodity; or

(C) deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

(2) TRANSACTION.—A transaction referred to in paragraph (1) is a transaction that—

(A)(i) is, of the character of, or is commonly known to the trade as, a "wash sale" or "accommodation trade"; or

(ii) is a fictitious sale; or

(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.

(3) CONTRACT OF SALE.—It shall be unlawful for any employee or agent of any department or agency of the Federal

Government or any Member of Congress or employee of Congress (as such terms are defined under section 2 of the STOCK Act) or any judicial officer or judicial employee (as such terms are defined, respectively, under section 2 of the STOCK Act) who, by virtue of the employment or position of the Member, officer, employee or agent, acquires information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information or by Congress or by the judiciary in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, to use the information in his personal capacity and for personal gain to enter into, or offer to enter into—

(A) a contract of sale of a commodity for future delivery (or option on such a contract);

(B) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(C) a swap.

(4) NONPUBLIC INFORMATION.—

(A) IMPARTING OF NONPUBLIC INFORMATION.—It shall be unlawful for any employee or agent of any department or agency of the Federal Government or any Member of Congress or employee of Congress or any judicial officer or judicial employee who, by virtue of the employment or position of the Member, officer, employee or agent, acquires information that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, and which information has not been disseminated by the department or agency of the Federal Government holding or creating the information or by Congress or by the judiciary in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, to impart the information in his personal capacity and for personal gain with intent to assist another person, directly or indirectly, to use the information to enter into, or offer to enter into—

(i) a contract of sale of a commodity for future delivery (or option on such a contract);

(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(iii) a swap.

(B) KNOWING USE.—It shall be unlawful for any person who receives information imparted by any employee or agent of any department or agency of the Federal Government or any Member of Congress or employee of Congress

or any judicial officer or judicial employee as described in subparagraph (A) to knowingly use such information to enter into, or offer to enter into—

(i) a contract of sale of a commodity for future delivery (or option on such a contract);

(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(iii) a swap.

(C) THEFT OF NONPUBLIC INFORMATION.—It shall be unlawful for any person to steal, convert, or misappropriate, by any means whatsoever, information held or created by any department or agency of the Federal Government or by Congress or by the judiciary that may affect or tend to affect the price of any commodity in interstate commerce, or for future delivery, or any swap, where such person knows, or acts in reckless disregard of the fact, that such information has not been disseminated by the department or agency of the Federal Government holding or creating the information or by Congress or by the judiciary in a manner which makes it generally available to the trading public, or disclosed in a criminal, civil, or administrative hearing, or in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, and to use such information, or to impart such information with the intent to assist another person, directly or indirectly, to use such information to enter into, or offer to enter into—

(i) a contract of sale of a commodity for future delivery (or option on such a contract);

(ii) an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(iii) a swap, provided, however, that nothing in this subparagraph shall preclude a person that has provided information concerning, or generated by, the person, its operations or activities, to any employee or agent of any department or agency of the Federal Government, to Congress, any Member of Congress, any employee of Congress, any judicial officer, or any judicial employee, voluntarily or as required by law, from using such information to enter into, or offer to enter into, a contract of sale, option, or swap described in clauses (i), (ii), or (iii).

(5) DISRUPTIVE PRACTICES.—It shall be unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—

(A) violates bids or offers;

(B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

(6) RULEMAKING AUTHORITY.—The Commission may make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices described in paragraph (5) and any other trading practice that is disruptive of fair and equitable trading.

(7) USE OF SWAPS TO DEFRAUD.—It shall be unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party.

(b) No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this Act which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe. Any such order, rule, or regulation may be made only after notice and opportunity for hearing, and the Commission may set different terms and conditions for different markets.

[(c) Not later than 90 days after the date of the enactment of the Futures Trading Act of 1986, the Commission shall issue regulations—

[(1) to eliminate the pilot status of its program for commodity option transactions involving the trading of options on contract markets, including any numerical restrictions on the number of commodities or option contracts for which a contract market may be designated; and

[(2) otherwise to continue to permit the trading of such commodity options under such terms and conditions that the Commission from time to time may prescribe.

[(d) Notwithstanding the provisions of subsection (c) of this section—

[(1) any person domiciled in the United States who on May 1, 1978, was in the business of granting an option on a physical commodity, other than a commodity specifically set forth in section 2(a) of this Act prior to enactment of the Commodity Futures Trading Commission Act of 1974, and was in the business of buying, selling, producing, or otherwise using that commodity, may continue to grant or issue options on that commodity in accordance with Commission regulations in effect on August 17, 1978, until thirty days after the effective date of regulations issued by the Commission under clause (2) of this subsection: *Provided,* That if such person files an application for registration under the regulations issued under clause (2) of this subsection within thirty days after the effective date of such regulations, that person may continue to grant or issue options pending a final determination by the Commission on the application; and

[(2) the Commission shall issue regulations that permit grantors and futures commission merchants to offer to enter into, enter into, or confirm the execution of, any commodity op-

tion transaction on a physical commodity subject to the provisions of subsection (b) of this section, other than a commodity specifically set forth in section 2(a) of this Act prior to enactment of the Commodity Futures Trading Commission Act of 1974, if—

[(A) the grantor is a person domiciled in the United States who—

[(i) is in the business of buying, selling, producing, or otherwise using the underlying commodity;

[(ii) at all times has a net worth of at least $5,000,000 certified annually by an independent public accountant using generally accepted accounting principles;

[(iii) notifies the Commission and every futures commission merchant offering the grantor's option if the grantor knows or has reason to believe that the grantor's net worth has fallen below $5,000,000;

[(iv) segregates daily, exclusively for the benefit of purchasers, money, exempted securities (within the meaning of section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(12)), commercial paper, bankers' acceptances, commercial bills, or unencumbered warehouse receipts, equal to an amount by which the value of each transaction exceeds the amount received or to be received by the grantor for such transaction;

[(v) provides an identification number for each transaction; and

[(vi) provides confirmation of all orders for such transactions executed, including the execution price and a transaction identification number;

[(B) the futures commission merchant is a person who—

[(i) has evidence that the grantor meets the requirements specified in subclause (A) of this clause;

[(ii) treats and deals with all money, securities, or property received from its customers as payment of the purchase price in connection with such transactions, as belonging to such customers until the expiration of the term of the option, or, if the customer exercises the option, until all rights of the customer under the commodity option transaction have been fulfilled;

[(iii) records each transaction in its customer's name by the transaction identification number provided by the grantor;

[(iv) provides a disclosure statement to its customers, under regulations of the Commission, that discloses, among other things, all costs, including any markups or commissions involved in such transaction; and

[(C) the grantor and futures commission merchant comply with any additional uniform and reasonable terms and conditions the Commission may prescribe, including registration with the Commission.

The Commission may permit persons not domiciled in the United States to grant options under this subsection, other than options on a commodity specifically set forth in section 2(a) of this Act prior to enactment of the Commodity Futures Trading Commission Act of 1974, under such additional rules, regulations, and orders as the Commission may adopt to provide protection to purchasers that are substantially the equivalent of those applicable to grantors domiciled in the United States. The Commission may terminate the right of any person to grant, offer, or sell options under this subsection only after a hearing, including a finding that the continuation of such right is contrary to the public interest: *Provided,* That pending the completion of such termination proceedings, the Commission may suspend the right to grant, offer, or sell options of any person whose activities in the Commission's judgment present a substantial risk to the public interest.

[(e) The Commission may adopt rules and regulations, after public notice and opportunity for a hearing on the record, prohibiting the granting, issuance, or sale of options permitted under subsection (d) of this section if the Commission determines that such options are contrary to the public interest.**]**

(c) The Commission shall issue regulations to continue to permit the trading of options on contract markets under such terms and conditions that the Commission from time to time may prescribe.

[(f)**]** *(d)* Nothing in this Act shall be deemed to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.

[(g)**]** *(e)* The Commission shall adopt rules requiring that a contemporaneous written record be made, as practicable, of all orders for execution on the floor or subject to the rules of each contract market **[**or derivatives transaction execution facility**]** placed by a member of the contract market **[**or derivatives transaction execution facility**]** who is present on the floor at the time such order is placed.

SEC. 4d. (a) *(1)* It shall be unlawful for any person to be a futures commission merchant unless—

[(1)**]** *(A)* such person shall have registered, under this Act, with the Commission as such futures commission merchant and such registration shall not have expired nor been suspended nor revoked; and

[(2)**]** *(B)* such person shall, whether a member or nonmember of a contract market **[**or derivatives transaction execution facility**]**, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such commission merchant or be used to margin or guarantee the trades or contracts, or to secure or extend the credit, of any customer or person other than the one for whom the same are held: *Provided, however,* That such money, securities, and property of the customers of such futures commission merchant may, for convenience, be commingled and deposited in the same account or accounts

with any bank or trust company or with the clearing house organization of such contract market [or derivatives transaction execution facility], and that such share thereof as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle the contracts or trades of such customers, or resulting market positions, with the clearing-house organization of such contract market [or derivatives transaction execution facility] or with any member of such contract market [or derivatives transaction execution facility], may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with such contracts and trades: *Provided further,* That in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, such money, securities, and property of the customers of such futures commission merchant may be commingled and deposited as provided in this section with any other money, securities, and property received by such futures commission merchant and required by the Commission to be separately accounted for and treated and dealt with as belonging to the customers of such futures commission merchant: *Provided further,* That such money may be invested in obligations of the United States, in general obligations of any State or of any political subdivision thereof, and in obligations fully guaranteed as to principal and interest by the United States, such investments to be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

(2) Any rules or regulations requiring a futures commission merchant to maintain a residual interest in accounts held for the benefit of customers in amounts at least sufficient to exceed the sum of all uncollected margin deficits of such customers shall provide that a futures commission merchant shall meet its residual interest requirement as of the end of each business day calculated as of the close of business on the previous business day.

(b) It shall be unlawful for any person, including but not limited to any clearing agency of a contract market [or derivatives transaction execution facility] and any depository, that has received any money, securities, or property for deposit in a separate account as provided in [paragraph (2) of this section] *subsection (a)(2)*, to hold, dispose of, or use any such money, securities, or property as belonging to the depositing futures commission merchant or any person other than the customers of such futures commission merchant.

(c) CONFLICTS OF INTEREST.—The Commission shall require that futures commission merchants and introducing brokers implement conflict-of-interest systems and procedures that—

(1) establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of per-

sons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons; and

(2) address such other issues as the Commission determines to be appropriate.

(d) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—Each futures commission merchant shall designate an individual to serve as its Chief Compliance Officer and perform such duties and responsibilities as shall be set forth in regulations to be adopted by the Commission or rules to be adopted by a futures association registered under section 17.

(e) Consistent with this Act, the Commission, in consultation with the Securities and Exchange Commission, shall issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to any futures commission merchant registered with the Commission pursuant to section 4f(a) (except paragraph (2) thereof), that is also registered with the Securities and Exchange Commission pursuant to section 15(b) of the Securities Exchange Act (except paragraph (11) thereof), involving the application of—

(1) section 8, section 15(c)(3), and section 17 of the Securities Exchange Act of 1934 and the rules and regulations thereunder related to the treatment of customer funds, securities, or property, maintenance of books and records, financial reporting or other financial responsibility rules (as defined in section 3(a)(40) of the Securities Exchange Act of 1934), involving security futures products; and

(2) similar provisions of this Act and the rules and regulations thereunder involving security futures products.

(f) SWAPS.—

(1) REGISTRATION REQUIREMENT.—It shall be unlawful for any person to accept any money, securities, or property (or to extend any credit in lieu of money, securities, or property) from, for, or on behalf of a swaps customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization (including money, securities, or property accruing to the customer as the result of such a swap), unless the person shall have registered under this Act with the Commission as a futures commission merchant, and the registration shall not have expired nor been suspended nor revoked.

(2) CLEARED SWAPS.—

(A) SEGREGATION REQUIRED.—A futures commission merchant shall treat and deal with all money, securities, and property of any swaps customer received to margin, guarantee, or secure a swap cleared by or though a derivatives clearing organization (including money, securities, or property accruing to the swaps customer as the result of such a swap) as belonging to the swaps customer.

(B) COMMINGLING PROHIBITED.—Money, securities, and property of a swaps customer described in subparagraph (A) shall be separately accounted for and shall not be commingled with the funds of the futures commission merchant or be used to margin, secure, or guarantee any trades or contracts of any swaps customer or person other than the person for whom the same are held.

(3) EXCEPTIONS.—

(A) USE OF FUNDS.—

(i) IN GENERAL.—Notwithstanding paragraph (2), money, securities, and property of swap customers of a futures commission merchant described in paragraph (2) may, for convenience, be commingled and deposited in the same account or accounts with any bank or trust company or with a derivatives clearing organization.

(ii) WITHDRAWAL.—Notwithstanding paragraph (2), such share of the money, securities, and property described in clause (i) as in the normal course of business shall be necessary to margin, guarantee, secure, transfer, adjust, or settle a cleared swap with a derivatives clearing organization, or with any member of the derivatives clearing organization, may be withdrawn and applied to such purposes, including the payment of commissions, brokerage, interest, taxes, storage, and other charges, lawfully accruing in connection with the cleared swap.

(B) COMMISSION ACTION.—Notwithstanding paragraph (2), in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, any money, securities, or property of the swaps customers of a futures commission merchant described in paragraph (2) may be commingled and deposited in customer accounts with any other money, securities, or property received by the futures commission merchant and required by the Commission to be separately accounted for and treated and dealt with as belonging to the swaps customer of the futures commission merchant.

(4) PERMITTED INVESTMENTS.—Money described in paragraph (2) may be invested in obligations of the United States, in general obligations of any State or of any political subdivision of a State, and in obligations fully guaranteed as to principal and interest by the United States, or in any other investment that the Commission may by rule or regulation prescribe, and such investments shall be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.

(5) COMMODITY CONTRACT.—A swap cleared by or through a derivatives clearing organization shall be considered to be a commodity contract as such term is defined in section 761 of title 11, United States Code, with regard to all money, securities, and property of any swaps customer received by a futures commission merchant or a derivatives clearing organization to margin, guarantee, or secure the swap (including money, securities, or property accruing to the customer as the result of the swap).

(6) PROHIBITION.—It shall be unlawful for any person, including any derivatives clearing organization and any depository institution, that has received any money, securities, or property for deposit in a separate account or accounts as provided in paragraph (2) to hold, dispose of, or use any such money, securities, or property as belonging to the depositing

futures commission merchant or any person other than the swaps customer of the futures commission merchant.

(g) It shall be unlawful for any person to be an introducing broker unless such person shall have registered under this Act with the Commission as an introducing broker and such registration shall not have expired nor been suspended nor revoked.

(h) [Notwithstanding subsection (a)(2)] *Notwithstanding subsection (a)(1)(B)* or the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 4(c) of this Act or pursuant to a rule or regulation, a futures commission merchant that is registered pursuant to section 4f(a)(1) of this Act and also registered as a broker or dealer pursuant to section 15(b)(1) of the Securities Exchange Act of 1934 may, pursuant to a portfolio margining program approved by the Securities and Exchange Commission pursuant to section 19(b) of the Securities Exchange Act of 1934, hold in a portfolio margining account carried as a securities account subject to section 15(c)(3) of the Securities Exchange Act of 1934 and the rules and regulations thereunder, a contract for the purchase or sale of a commodity for future delivery or an option on such a contract, and any money, securities or other property received from a customer to margin, guarantee or secure such a contract, or accruing to a customer as the result of such a contract. The Commission shall consult with the Securities and Exchange Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practical for similar products.

SEC. 4e. It shall be unlawful for any person to act as floor trader in executing purchases and sales, or as floor broker in executing any orders for the purchase or sale, of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market [or derivatives transaction execution facility] unless such person shall have registered, under this Act, with the Commission as such floor trader or floor broker and such registration shall not have expired nor been suspended nor revoked.

SEC. 4f. (a)(1) Any person desiring to register as a futures commission merchant, introducing broker, floor broker, or floor trader hereunder shall be registered upon application to the Commission. The application shall be made in such form and manner as prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the business in which the applicant is or will be engaged, including in the case of an application of a futures commission merchant or an introducing broker, the names and addresses of the managers of all branch offices, and the names of such officers and partners, if a partnership, and of such officers, directors, and stockholders, if a corporation, as the Commission may direct. Such person, when registered hereunder, shall likewise continue to report and furnish to the Commission the above-mentioned information and such other information pertaining to such person's business as the Commission may require. Each registration shall expire on December 31 of the year for which issued or at such other time, not less than one year from the date of issuance, as the Commission may by rule, regulation, or order prescribe, and shall be renewed upon application therefor unless the registration has been suspended (and the period of such

suspension has not expired) or revoked pursuant to the provisions of this Act.

(2) Notwithstanding paragraph (1), and except as provided in paragraph (3), any broker or dealer that is registered with the Securities and Exchange Commission shall be registered as a futures commission merchant or introducing broker, as applicable, if—

(A) the broker or dealer limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market or registered derivatives transaction execution facility to security futures products;

(B) the broker or dealer files written notice with the Commission in such form as the Commission, by rule, may prescribe containing such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors;

(C) the registration of the broker or dealer is not suspended pursuant to an order of the Securities and Exchange Commission; and

(D) the broker or dealer is a member of a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934.

The registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission.

(3) A floor broker or floor trader shall be exempt from the registration requirements of section 4e and paragraph (1) of this subsection if—

(A) the floor broker or floor trader is a broker or dealer registered with the Securities and Exchange Commission;

(B) the floor broker or floor trader limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market to security futures products; and

(C) the registration of the floor broker or floor trader is not suspended pursuant to an order of the Securities and Exchange Commission.

(4)(A) A broker or dealer that is registered as a futures commission merchant or introducing broker pursuant to paragraph (2), or that is a floor broker or floor trader exempt from registration pursuant to paragraph (3), shall be exempt from the following provisions of this Act and the rules thereunder:

(i) Subsections (b)**[**, (d), (e), and (g)**]** *and (e)* of section 4c.

(ii) Sections 4d, 4e, and 4h.

(iii) Subsections (b) and (c) of this section.

(iv) Section 4j.

(v) Section 4k(1).

(vi) Section 4p.

(vii) Section 6d.

(viii) Subsections (d) and (g) of section 8.

(ix) Section 16.

(B)(i) Except as provided in clause (ii) of this subparagraph, but notwithstanding any other provision of this Act, the Commission, by rule, regulation, or order, may conditionally or unconditionally

exempt any broker or dealer subject to the registration requirement of paragraph (2), or any broker or dealer exempt from registration pursuant to paragraph (3), from any provision of this Act or of any rule or regulation thereunder, to the extent the exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.

(ii) The Commission shall, by rule or regulation, determine the procedures under which an exemptive order under this section shall be granted and may, in its sole discretion, decline to entertain any application for an order of exemption under this section.

(C)(i) A broker or dealer that is registered as a futures commission merchant or introducing broker pursuant to paragraph (2) or an associated person thereof, or that is a floor broker or floor trader exempt from registration pursuant to paragraph (3), shall not be required to become a member of any futures association registered under section 17.

(ii) No futures association registered under section 17 shall limit its members from carrying an account, accepting an order, or transacting business with a broker or dealer that is registered as a futures commission merchant or introducing broker pursuant to paragraph (2) or an associated person thereof, or that is a floor broker or floor trader exempt from registration pursuant to paragraph (3).

(b) Notwithstanding any other provisions of this Act, no person desiring to register as futures commission merchant or as introducing broker shall be so registered unless he meets such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligations as a registrant, and each person so registered shall at all times continue to meet such prescribed minimum financial requirements: *Provided,* That such minimum financial requirements will be considered met if the applicant for registration or registrant is a member of a contract market **[**or derivatives transaction execution facility**]** and conforms to minimum financial standards and related reporting requirements set by such contract market **[**or derivatives transaction execution facility**]** in its bylaws, rules, regulations, or resolutions and approved by the Commission as adequate to effectuate the purposes of this subsection.

(c)(1) As used in this subsection:

(i) The term "affiliated person" means any person directly or indirectly controlling, controlled by, or under common control with a futures commission merchant, as the Commission, by rule or regulation, may determine will effectuate the purposes of this subsection.

(ii) The term "Federal banking agency" shall have the same meaning as the term "appropriate Federal banking agency" in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(2)(A) Each registered futures commission merchant shall obtain such information and make and keep such records as the Commission, by rule or regulation, prescribes concerning the registered futures commission merchant's policies, procedures, or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons, other than a natural person.

(B) The records required under subparagraph (A) shall describe, in the aggregate, each of the futures and other financial activities conducted by, and the customary sources of capital and funding of, those of its affiliated persons whose business activities are reasonably likely to have a material impact on the financial or operational condition of the futures commission merchant, including its adjusted net capital, its liquidity, or its ability to conduct or finance its operations.

(C) The Commission, by rule or regulation, may require summary reports of such information to be filed by the futures commission merchant with the Commission no more frequently than quarterly.

(3)(A) ⟦,⟧ If, as a result of adverse market conditions or based on reports provided to the Commission pursuant to paragraph (2) or other available information, the Commission reasonably concludes that the Commission has concerns regarding the financial or operational condition of any registered futures commission merchant, the Commission may require the futures commission merchant to make reports concerning the futures and other financial activities of any of such person's affiliated persons, other than a natural person, whose business activities are reasonably likely to have a material impact on the financial or operational condition of the futures commission merchant.

(B) The Commission, in requiring reports pursuant to this paragraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission or to a contract market or derivatives transaction execution facility or other self-regulatory organization with primary responsibility for examining the registered futures commission merchant's financial and operational condition.

(4)(A) ⟦in developing⟧ *In developing* and implementing reporting requirements pursuant to paragraph (2) with respect to affiliated persons subject to examination by or reporting requirements of a Federal banking agency, the Commission shall consult with and consider the views of each such Federal banking agency. If a Federal banking agency comments in writing on a proposed rule of the Commission under this subsection that has been published for comment, the Commission shall respond in writing to the written comment before adopting the proposed rule. The Commission shall, at the request of the Federal banking agency, publish the comment and response in the Federal Register at the time of publishing the adopted rule.

(B)(i) Except as provided in clause (ii), a registered futures commission merchant shall be considered to have complied with a recordkeeping or reporting requirement adopted pursuant to paragraph (2) concerning an affiliated person that is subject to examination by, or reporting requirements of, a Federal banking agency if the futures commission merchant utilizes for the recordkeeping or reporting requirement copies of reports filed by the affiliated person with the Federal banking agency pursuant to section 5211 of the Revised Statutes (12 U.S.C. 161), section 9 of the Federal Reserve Act (12 U.S.C. 321 et seq.), section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. ⟦1817(a)⟧ *1817(a))*, section 10(b) of the Home Owners' Loan Act (12 U.S.C. 1467a(b)), or section 5 of the Bank Holding Company Act of 1956 (12 U.S.C. 1844).

(ii) The Commission may, by rule adopted pursuant to paragraph (2), require any futures commission merchant filing the reports with the Commission to obtain, maintain, or report supplemental information if the Commission makes an explicit finding that the supplemental information is necessary to inform the Commission regarding potential risks to the futures commission merchant. Prior to requiring any such supplemental information, the Commission shall first request the Federal banking agency to expand its reporting requirements to include the information.

(5) Prior to making a request pursuant to paragraph (3) for information with respect to an affiliated person that is subject to examination by or reporting requirements of a Federal banking agency, the Commission shall—

(A) notify the agency of the information required with respect to the affiliated person; and

(B) consult with the agency to determine whether the information required is available from the agency and for other purposes, unless the Commission determines that any delay resulting from the consultation would be inconsistent with ensuring the financial and operational condition of the futures commission merchant or the stability or integrity of the futures markets.

(6) Nothing in this subsection shall be construed to permit the Commission to require any futures commission merchant to obtain, maintain, or furnish any examination report of any Federal banking agency or any supervisory recommendations or analysis contained in the report.

(7) No information provided to or obtained by the Commission from any Federal banking agency pursuant to a request under paragraph (5) regarding any affiliated person that is subject to examination by or reporting requirements of a Federal banking agency may be disclosed to any other person (other than as provided in section 8 or section 8a(6)), without the prior written approval of the Federal banking agency.

(8) The Commission shall notify a Federal banking agency of any concerns of the Commission regarding significant financial or operational risks resulting from the activities of any futures commission merchant to any affiliated person thereof that is subject to examination by or reporting requirements of the Federal banking agency.

(9) The Commission, by rule, regulation, or order, may exempt any person or class of persons under such terms and conditions and for such periods as the Commission shall provide in the rule, regulation, or order, from this subsection and the rules and regulations issued under this subsection. In granting the exemption, the Commission shall consider, among other factors—

(A) whether information of the type required under this subsection is available from a supervisory agency (as defined in section 1101(7) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401(7))), a State insurance commission or similar State agency, the Securities and Exchange Commission, or a similar foreign regulator;

(B) the primary business of any affiliated person;

(C) the nature and extent of domestic or foreign regulation of the affiliated person's activities;

(D) the nature and extent of the registered futures commission merchant's commodity futures and options activities; and

(E) with respect to the registered futures commission merchant and its affiliated persons, on a consolidated basis, the amount and proportion of assets devoted to, and revenues derived from activities in the United States futures markets.

(10) Information required to be provided pursuant to this subsection shall be subject to section 8. Except as specifically provided in section 8 and notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be reported under this subsection, or any information supplied to the Commission by any domestic or foreign regulatory agency that relates to the financial or operational condition of any affiliated person of a registered futures commission merchant.

(11) Nothing in paragraphs (1) through (10) shall be construed to supersede or to limit in any way the authority or powers of the Commission pursuant to any other provision of this Act or regulations issued under this Act.

SEC. 4g. (a) Every person registered hereunder as futures commission merchant, introducing broker, floor broker, or floor trader shall make such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere, and in **[**any significant price discovery contract traded or executed on an electronic trading facility or**]** any agreement, contract, or transaction that is treated by a derivatives clearing organization, whether registered or not registered, as fungible with a significant price discovery contract; shall keep books and records pertaining to such transactions and positions in such form and manner and for such period as may be required by the Commission; and shall keep such books and records open to inspection by any representative of the Commission or the United States Department of Justice.

(b) Every registered entity shall maintain daily trading records. The daily trading records shall include such information as the Commission shall prescribe by rule.

(c) Floor brokers, introducing brokers, and futures commission merchants shall maintain daily trading records for each customer in such manner and form as to be identifiable with the trades referred to in subsection (b).

(d) Daily trading records shall be maintained in a form suitable to the Commission for such period as may be required by the Commission. Reports shall be made from the records maintained at such times and at such places and in such form as the Commission may prescribe by rule, order, or regulation in order to protect the public interest and the interest of persons trading in commodity futures.

(e) Before the beginning of trading each day, the **[**exchange**]** *each designated contract market and swap execution facility* shall, insofar as is practicable and under terms and conditions specified by the Commission, make public the volume of trading on each type of contract for the previous day and such other information as the Commission deems necessary in the public interest and prescribes by rule, order, or regulation.

(f) Nothing contained in this section shall be construed to prohibit the Commission from making separate determinations for different registered entities when such determinations are warranted in the judgment of the Commission.

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SEC. 4i. It shall be unlawful for any person to make any contract for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market [or derivatives transaction execution facility, or any significant price discovery contract traded or executed on an electronic trading facility or any agreement, contract, or transaction that is treated by a derivatives clearing organization, whether registered or not registered, as fungible with a significant price discovery contract]—

(1) if such person shall directly or indirectly make such contracts with respect to any commodity or any future of such commodity during any one day in an amount equal to or in excess of such amount as shall be fixed from time to time by the Commission, and

(2) if such person shall directly or indirectly have or obtain a long or short position in any commodity or any future of such commodity equal to or in excess of such amount as shall be fixed from time to time by the Commission,

unless such person files or causes to be filed with the properly designated officer of the Commission such reports regarding any transactions or positions described in clauses (1) and (2) hereof as the Commission may by rule or regulation require and unless, in accordance with rules and regulations of the Commission, such person shall keep books and records of all such transactions and positions and transactions and positions in any such commodity traded on or subject to the rules of any other board of trade [or electronic trading facility], and of cash or spot transactions in, and inventories and purchase and sale commitments of such commodity. Such books and records shall show complete details concerning all such transactions, positions, inventories, and commitments, including the names and addresses of all persons having any interest therein, and shall be open at all times to inspection by any representative of the Commission or the Department of Justice. For the purposes of this section, the futures and cash or spot transactions and positions of any person shall include such transactions and positions of any persons directly or indirectly controlled by such person.

SEC. 4j. RESTRICTIONS ON DUAL TRADING IN SECURITY FUTURES PRODUCTS ON DESIGNATED CONTRACT MARKETS AND REGISTERED DERIVATIVES TRANSACTION EXECUTION FACILITIES.

(a) The Commission shall issue regulations to prohibit the privilege of dual trading in security futures products on each contract market [and registered derivatives transaction execution facility]. The regulations issued by the Commission under this section—

(1) shall provide that the prohibition of dual trading thereunder shall take effect upon issuance of the regulations; and

(2) shall provide exceptions, as the Commission determines appropriate, to ensure fairness and orderly trading in security futures product markets, including—

(A) exceptions for spread transactions and the correction of trading errors;

(B) allowance for a customer to designate in writing not less than once annually a named floor broker to execute orders for such customer, notwithstanding the regulations to prohibit the privilege of dual trading required under this section; and

(C) other measures reasonably designed to accommodate unique or special characteristics of individual boards of trade or contract markets, to address emergency or unusual market conditions, or otherwise to further the public interest consistent with the promotion of market efficiency, innovation, and expansion of investment opportunities, the protection of investors, and with the purposes of this section.

(b) As used in this section, the term "dual trading" means the execution of customer orders by a floor broker during the same trading session in which the floor broker executes any trade in the same contract market or registered derivatives transaction execution facility for—

(1) the account of such floor broker;

(2) an account for which such floor broker has trading discretion; or

(3) an account controlled by a person with whom such floor broker has a relationship through membership in a broker association.

(c) As used in this section, the term "broker association" shall include two or more contract market members or registered derivatives transaction execution facility members with floor trading privileges of whom at least one is acting as a floor broker, who—

(1) engage in floor brokerage activity on behalf of the same employer,

(2) have an employer and employee relationship which relates to floor brokerage activity,

(3) share profits and losses associated with their brokerage or trading activity, or

(4) regularly share a deck of orders.

SEC. 4k. (1) It shall be unlawful for any person to be associated with a futures commission merchant as a partner, officer, or employee, or to be associated with an introducing broker as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such futures commission merchant or of such introducing broker and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a futures commission merchant or introducing broker to permit such a person to become or remain associated with the futures commission merchant or introducing broker in any such capacity if such futures commission merchant or introducing broker knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspen-

sion has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, or introducing broker (and such registration is not suspended or revoked) need not also register under this subsection.

(2) It shall be unlawful for any person to be associated with a commodity pool operator as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such commodity pool operator and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a commodity pool operator to permit such a person to become or remain associated with the commodity pool operator in any such capacity if the commodity pool operator knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, introducing broker, commodity pool operator, or as an associated person of another category of registrant under this section (and such registration is not suspended or revoked) need not also register under this subsection. The Commission may exempt any person or class of persons from having to register under this subsection by rule, regulation, or order.

(3) It shall be unlawful for any person to be associated with a commodity trading advisor as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of a client's or prospective client's discretionary account or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this Act as an associated person of such commodity trading advisor and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a commodity trading advisor to permit such a person to become or remain associated with the commodity trading advisor in any such capacity if the commodity trading advisor knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, introducing broker, commodity trading advisor, or as an associated person of another category of registrant under this section (and such registration is not suspended or revoked) need not also register under this subsection. The Commission may exempt any person or class of persons from having to register under this subsection by rule, regulation, or order.

(4) Any person desiring to be registered as an associated person of a futures commission merchant, of an introducing broker, of a commodity pool operator, or of a commodity trading advisor shall make application to the Commission in the form and manner prescribed by the Commission, giving such information and facts as

the Commission may deem necessary concerning the applicant. Such person, when registered hereunder, shall likewise continue to report and furnish to the Commission such information as the Commission may require. Such registration shall expire at such time as the Commission may by rule, regulation, or order prescribe.

(5) Any associated person of a broker or dealer that is registered with the Securities and Exchange Commission, and who limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any commodity for future delivery or any option on such a contract, on or subject to the rules of any contract market or registered derivatives transaction execution facility to security futures products, shall be exempt from the following provisions of this Act and the rules thereunder:

(A) Subsections (b)[, (d), (e), and (g)] *and (e)* of section 4c.
(B) Sections 4d, 4e, and 4h.
(C) Subsections (b) and (c) of section 4f.
(D) Section 4j.
(E) Paragraph (1) of this section.
(F) Section 4p.
(G) Section 6d.
(H) Subsections (d) and (g) of section 8.
(I) Section 16.

(6) It shall be unlawful for any registrant to permit a person to become or remain an associated person of such registrant, if the registrant knew or should have known of facts regarding such associated person that are set forth as statutory disqualifications in section 8a(2) of this Act, unless such registrant has notified the Commission of such facts and the Commission has determined that such person should be registered or temporarily licensed.

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SEC. 4m. (1) It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this Act, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided,* That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor. The provisions of this section shall not apply to any commodity trading advisor who is a (1) dealer, processor, broker, or seller in cash market transactions of any commodity specifically set forth in section 2(a) of this Act prior to the enactment of the Commodity Futures Trading Commission Act of 1974 (or products thereof) or (2) nonprofit, voluntary membership, general farm organization, who provides advice on the sale or purchase of any commodity specifically set forth in section 2(a) of this Act prior to the enactment of the Commodity Futures Trading Commission Act of 1974; if the advice by the person described in clause (1) or (2) of this sentence as a commodity trading advisor is solely incidental to the conduct of that person's business: *Provided,* That such person shall be subject to proceedings under section 14 of this Act*: Provided further, That the provisions of this section shall not apply to any commodity trading advisor that is: (A) a*

charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940, or a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of the employment or duties of the person with the organization, whose trading advice is provided only to, or with respect to, 1 or more of the following: (i) any such charitable organization, or (ii) an investment trust, syndicate or similar form of enterprise excluded from the definition of "investment company" pursuant to section 3(c)(10) of the Investment Company Act of 1940; or (B) any plan, company, or account described in section 3(c)(14) of the Investment Company Act of 1940, any person or entity who establishes or maintains such a plan, company, or account, or any trustee, director, officer, employee, or volunteer for any of the foregoing plans, persons, or entities acting within the scope of the employment or duties of the person with the organization, whose trading advice is provided only to, or with respect to, any investment trust, syndicate, or similar form of enterprise excluded from the definition of "investment company" pursuant to section 3(c)(14) of the Investment Company Act of 1940.

(2) Nothing in this Act shall relieve any person of any obligation or duty, or affect the availability of any right or remedy available to the Securities and Exchange Commission or any private party arising under the Securities Act of 1933 or the Securities Exchange Act of 1934 governing the issuance, offer, purchase, or sale of securities of a commodity pool, or of persons engaged in transactions with respect to such securities, or reporting by a commodity pool.

(3) EXCEPTION.—

(A) IN GENERAL.—Paragraph (1) shall not apply to any commodity trading advisor that is registered with the Securities and Exchange Commission as an investment adviser whose business does not consist primarily of acting as a commodity trading advisor, as defined in section 1a, and that does not act as a commodity trading advisor to any commodity pool that is engaged primarily in trading commodity interests.

(B) ENGAGED PRIMARILY.—For purposes of subparagraph (A), a commodity trading advisor or a commodity pool shall be considered to be "engaged primarily" in the business of being a commodity trading advisor or commodity pool if it is or holds itself out to the public as being engaged primarily, or proposes to engage primarily, in the business of advising on commodity interests or investing, reinvesting, owning, holding, or trading in commodity interests, respectively.

(C) COMMODITY INTERESTS.—For purposes of this paragraph, commodity interests shall include contracts of sale of a commodity for future delivery, options on such contracts, security futures, swaps, leverage contracts, foreign exchange, spot and forward contracts on physical commodities, and any monies held in an account used for trading commodity interests.

(4) DISCLOSURE CONCERNING EXCLUDED CHARITABLE ORGANIZATIONS.—The operator of or advisor to any investment trust, syndicate, or similar form of enterprise excluded from the definition of "commodity pool" by reason of section 1a(10)(C) shall provide, to each donor to the fund, trust, syndicate, or similar form of enterprise, at the time of the donation or within 90 days after the date of the enactment of this subsection, whichever is later, written infor-

mation describing the material terms of the operation of the fund, trust, syndicate, or similar form of enterprise.

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SEC. 4p. (a) The Commission may specify by rules and regulations appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable to insure the fitness of persons required to be registered with the Commission. In connection therewith, the Commission may prescribe by rules and regulations the adoption of written proficiency examinations to be given to applicants for registration and the establishment of reasonable fees to be charged to such applicants to cover the administration of such examinations. The Commission may further prescribe by rules and regulations that, in lieu of examinations administered by the Commission, futures associations registered under section 17 of this Act, contract markets**[**, or derivatives transaction execution facilities**]** may adopt written proficiency examinations to be given to applicants for registration and charge reasonable fees to such applicants to cover the administration of such examinations. Notwithstanding any other provision of this section, the Commission may specify by rules and regulations such terms and conditions as it deems appropriate to protect the public interest wherein exception to any written proficiency examination shall be made with respect to individuals who have demonstrated, through training and experience, the degree of proficiency and skill necessary to protect the interests of customers, clients, pool participants, or other members of the public with whom such individuals deal.

(b) The Commission shall issue regulations to require new registrants, within six months after receiving such registration, to attend a training session, and all other registrants to attend periodic training sessions, to ensure that registrants understand their responsibilities to the public under this Act, including responsibilities to observe just and equitable principles of trade, any rule or regulation of the Commission, any rule of any appropriate contract market, **[**derivatives transaction execution facility,**]** registered futures association, or other self-regulatory organization, or any other applicable Federal or state law, rule or regulation.

SEC. 4q. SPECIAL PROCEDURES TO ENCOURAGE AND FACILITATE BONA FIDE HEDGING BY AGRICULTURAL PRODUCERS.

(a) AUTHORITY.—The Commission shall consider issuing rules or orders which—

(1) prescribe procedures under which each contract market is to provide for orderly delivery, including temporary storage costs, of any agricultural commodity enumerated in section **[**1a(9)**]** *1a(10)* which is the subject of a contract for purchase or sale for future delivery;

(2) increase the ease with which domestic agricultural producers may participate in contract markets, including by addressing cost and margin requirements, so as to better enable the producers to hedge price risk associated with their production;

(3) provide flexibility in the minimum quantities of such agricultural commodities that may be the subject of a contract for purchase or sale for future delivery that is traded on a contract

market, to better allow domestic agricultural producers to hedge such price risk; and

(4) encourage contract markets to provide information and otherwise facilitate the participation of domestic agricultural producers in contract markets.

(b) REPORT.—Within 1 year after the date of the enactment of this section, the Commission shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a report on the steps it has taken to implement this section and on the activities of contract markets pursuant to this section.

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SEC. 4s. REGISTRATION AND REGULATION OF SWAP DEALERS AND MAJOR SWAP PARTICIPANTS.

(a) REGISTRATION.—

(1) SWAP DEALERS.—It shall be unlawful for any person to act as a swap dealer unless the person is registered as a swap dealer with the Commission.

(2) MAJOR SWAP PARTICIPANTS.—It shall be unlawful for any person to act as a major swap participant unless the person is registered as a major swap participant with the Commission.

(b) REQUIREMENTS.—

(1) IN GENERAL.—A person shall register as a swap dealer or major swap participant by filing a registration application with the Commission.

(2) CONTENTS.—

(A) IN GENERAL.—The application shall be made in such form and manner as prescribed by the Commission, and shall contain such information, as the Commission considers necessary concerning the business in which the applicant is or will be engaged.

(B) CONTINUAL REPORTING.—A person that is registered as a swap dealer or major swap participant shall continue to submit to the Commission reports that contain such information pertaining to the business of the person as the Commission may require.

(3) EXPIRATION.—Each registration under this section shall expire at such time as the Commission may prescribe by rule or regulation.

(4) RULES.—Except as provided in subsections (d) and (e), the Commission may prescribe rules applicable to swap dealers and major swap participants, including rules that limit the activities of swap dealers and major swap participants.

(5) TRANSITION.—Rules under this section shall provide for the registration of swap dealers and major swap participants not later than 1 year after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

(6) STATUTORY DISQUALIFICATION.—Except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or a major swap participant to permit any person associated with a swap dealer or a major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer

or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification.

(c) DUAL REGISTRATION.—

(1) SWAP DEALER.—Any person that is required to be registered as a swap dealer under this section shall register with the Commission regardless of whether the person also is a depository institution or is registered with the Securities and Exchange Commission as a security-based swap dealer.

(2) MAJOR SWAP PARTICIPANT.—Any person that is required to be registered as a major swap participant under this section shall register with the Commission regardless of whether the person also is a depository institution or is registered with the Securities and Exchange Commission as a major security-based swap participant.

(d) RULEMAKINGS.—

(1) IN GENERAL.—The Commission shall adopt rules for persons that are registered as swap dealers or major swap participants under this section.

(2) EXCEPTION FOR PRUDENTIAL REQUIREMENTS.—

(A) IN GENERAL.—The Commission may not prescribe rules imposing prudential requirements on swap dealers or major swap participants for which there is a prudential regulator.

(B) APPLICABILITY.—Subparagraph (A) does not limit the authority of the Commission to prescribe rules as directed under this section.

(e) CAPITAL AND MARGIN REQUIREMENTS.—

(1) IN GENERAL.—

(A) SWAP DEALERS AND MAJOR SWAP PARTICIPANTS THAT ARE BANKS.—Each registered swap dealer and major swap participant for which there is a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the prudential regulator shall by rule or regulation prescribe under paragraph (2)(A).

(B) SWAP DEALERS AND MAJOR SWAP PARTICIPANTS THAT ARE NOT BANKS.—Each registered swap dealer and major swap participant for which there is not a prudential regulator shall meet such minimum capital requirements and minimum initial and variation margin requirements as the Commission shall by rule or regulation prescribe under paragraph (2)(B).

(2) RULES.—

(A) SWAP DEALERS AND MAJOR SWAP PARTICIPANTS THAT ARE BANKS.—The prudential regulators, in consultation with the Commission and the Securities and Exchange Commission, shall jointly adopt rules for swap dealers and major swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is a prudential regulator imposing—

(i) capital requirements; and

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

(B) SWAP DEALERS AND MAJOR SWAP PARTICIPANTS THAT ARE NOT BANKS.—The Commission *in consultation with the prudential regulators and the Securities and Exchange Commission* shall adopt rules for swap dealers and major swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is not a prudential regulator imposing—

(i) capital requirements; and

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

(C) CAPITAL.—In setting capital requirements for a person that is designated as a swap dealer or a major swap participant for a single type or single class or category of swap or activities, the prudential regulator and the Commission shall take into account the risks associated with other types of swaps or classes of swaps or categories of swaps engaged in and the other activities conducted by that person that are not otherwise subject to regulation applicable to that person by virtue of the status of the person as a swap dealer or a major swap participant.

(3) STANDARDS FOR CAPITAL AND MARGIN.—

(A) IN GENERAL.—To offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared, the requirements imposed under paragraph (2) shall—

(i) help ensure the safety and soundness of the swap dealer or major swap participant; and

(ii) be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.

(B) RULE OF CONSTRUCTION.—

(i) IN GENERAL.—Nothing in this section shall limit, or be construed to limit, the authority—

(I) of the Commission to set financial responsibility rules for a futures commission merchant or introducing broker registered pursuant to section 4f(a) (except for section 4f(a)(3)) in accordance with section 4f(b); or

(II) of the Securities and Exchange Commission to set financial responsibility rules for a broker or dealer registered pursuant to section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)) (except for section 15(b)(11) of that Act (15 U.S.C. 78o(b)(11)) in accordance with section 15(c)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(3)).

(ii) FUTURES COMMISSION MERCHANTS AND OTHER DEALERS.—A futures commission merchant, introducing broker, broker, or dealer shall maintain sufficient capital to comply with the stricter of any applicable capital requirements to which such futures commission merchant, introducing broker, broker, or dealer is subject to under this Act or the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).

(C) MARGIN REQUIREMENTS.—In prescribing margin requirements under this subsection, the prudential regulator with respect to swap dealers and major swap participants for which it is the prudential regulator and the Commission with respect to swap dealers and major swap participants for which there is no prudential regulator shall permit the use of noncash collateral, as the regulator or the Commission determines to be consistent with—

(i) preserving the financial integrity of markets trading swaps; and

(ii) preserving the stability of the United States financial system.

(D) COMPARABILITY OF CAPITAL AND MARGIN REQUIREMENTS.—

(i) IN GENERAL.—The prudential regulators, the Commission, and the Securities and Exchange Commission shall periodically (but not less frequently than annually) consult on minimum capital requirements and minimum initial and variation margin requirements.

(ii) COMPARABILITY.—The entities described in clause (i) [shall, to the maximum extent practicable,] *shall* establish and maintain comparable minimum capital requirements and minimum initial and variation margin requirements, including the use of non cash collateral, for—

(I) swap dealers; and

(II) major swap participants.

(iii) FINANCIAL MODELS.—To the extent that swap dealers and major swap participants that are banks are permitted to use financial models approved by the prudential regulators or the Securities and Exchange Commission to calculate minimum capital requirements and minimum initial and variation margin requirements, including the use of non-cash collateral, the Commission shall, in consultation with the prudential regulators and the Securities and Exchange Commission, permit the use of comparable financial models by swap dealers and major swap participants that are not banks.

(4) APPLICABILITY WITH RESPECT TO COUNTERPARTIES.—The requirements of paragraphs (2)(A)(ii) and (2)(B)(ii), including the initial and variation margin requirements imposed by rules adopted pursuant to paragraphs (2)(A)(ii) and (2)(B)(ii), shall not apply to a swap in which a counterparty qualifies for an exception under section 2(h)(7)(A), or an exemption issued under section 4(c)(1) from the requirements of section 2(h)(1)(A) for cooperative entities as defined in such exemption, or satisfies the criteria in section 2(h)(7)(D).

(f) REPORTING AND RECORDKEEPING.—

(1) IN GENERAL.—Each registered swap dealer and major swap participant—

(A) shall make such reports as are required by the Commission by rule or regulation regarding the transactions

and positions and financial condition of the registered swap dealer or major swap participant;

(B)(i) for which there is a prudential regulator, shall keep books and records of all activities related to the business as a swap dealer or major swap participant in such form and manner and for such period as may be prescribed by the Commission by rule or regulation; and

(ii) for which there is no prudential regulator, shall keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation;

(C) shall keep books and records described in subparagraph (B) open to inspection and examination by any representative of the Commission; and

(D) shall keep any such books and records relating to swaps defined in section [1a(47)(A)(v)] *1a(48)(A)(v)* open to inspection and examination by the Securities and Exchange Commission.

(2) RULES.—The Commission shall adopt rules governing reporting and recordkeeping for swap dealers and major swap participants.

(g) DAILY TRADING RECORDS.—

(1) IN GENERAL.—Each registered swap dealer and major swap participant shall maintain daily trading records of the swaps of the registered swap dealer and major swap participant and all related records (including related cash or forward transactions) and recorded communications, including electronic mail, instant messages, and recordings of telephone calls, for such period as may be required by the Commission by rule or regulation.

(2) INFORMATION REQUIREMENTS.—The daily trading records shall include such information as the Commission shall require by rule or regulation.

(3) COUNTERPARTY RECORDS.—Each registered swap dealer and major swap participant shall maintain daily trading records for each counterparty in a manner and form that is identifiable with each swap transaction.

(4) AUDIT TRAIL.—Each registered swap dealer and major swap participant shall maintain a complete audit trail for conducting comprehensive and accurate trade reconstructions.

(5) RULES.—The Commission shall adopt rules governing daily trading records for swap dealers and major swap participants.

(h) BUSINESS CONDUCT STANDARDS.—

(1) IN GENERAL.—Each registered swap dealer and major swap participant shall conform with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation that relate to—

(A) fraud, manipulation, and other abusive practices involving swaps (including swaps that are offered but not entered into);

(B) diligent supervision of the business of the registered swap dealer and major swap participant;

(C) adherence to all applicable position limits; and

(D) such other matters as the Commission determines to be appropriate.

(2) RESPONSIBILITIES WITH RESPECT TO SPECIAL ENTITIES.—

(A) ADVISING SPECIAL ENTITIES.—A swap dealer or major swap participant that acts as an advisor to a special entity regarding a swap shall comply with the requirements of subparagraph (4) with respect to such Special Entity.

(B) ENTERING OF SWAPS WITH RESPECT TO SPECIAL ENTITIES.—A swap dealer that enters into or offers to enter into swap with a Special Entity shall comply with the requirements of subparagraph (5) with respect to such Special Entity.

(C) SPECIAL ENTITY DEFINED.—For purposes of this subsection, the term "special entity" means—

(i) a Federal agency;

(ii) a State, State agency, city, county, municipality, or other political subdivision of a State;

(iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or

(v) any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

(D) UTILITY SPECIAL ENTITY.—For purposes of this Act, the term "utility special entity" means a special entity, or any instrumentality, department, or corporation of or established by a State or political subdivision of a State, that—

(i) owns or operates, or anticipates owning or operating, an electric or natural gas facility or an electric or natural gas operation;

(ii) supplies, or anticipates supplying, natural gas and or electric energy to another utility special entity;

(iii) has, or anticipates having, public service obligations under Federal, State, or local law or regulation to deliver electric energy or natural gas service to customers; or

(iv) is a Federal power marketing agency, as defined in section 3 of the Federal Power Act.

(3) BUSINESS CONDUCT REQUIREMENTS.—Business conduct requirements adopted by the Commission shall—

(A) establish a duty for a swap dealer or major swap participant to verify that any counterparty meets the eligibility standards for an eligible contract participant;

(B) require disclosure by the swap dealer or major swap participant to any counterparty to the transaction (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of—

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

(ii) any material incentives or conflicts of interest that the swap dealer or major swap participant may have in connection with the swap; and

(iii)(I) for cleared swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and

(II) for uncleared swaps, receipt of the daily mark of the transaction from the swap dealer or the major swap participant;

(C) establish a duty for a swap dealer or major swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith; and

(D) establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

(4) SPECIAL REQUIREMENTS FOR SWAP DEALERS ACTING AS ADVISORS.—

(A) IN GENERAL.—It shall be unlawful for a swap dealer or major swap participant—

(i) to employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(ii) to engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(iii) to engage in any act, practice, or course of business that is fraudulent, deceptive or manipulative.

(B) DUTY.—Any swap dealer that acts as an advisor to a Special Entity shall have a duty to act in the best interests of the Special Entity.

(C) REASONABLE EFFORTS.—Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap recommended by the swap dealer is in the best interests of the Special Entity, including information relating to—

(i) the financial status of the Special Entity;

(ii) the tax status of the Special Entity;

(iii) the investment or financing objectives of the Special Entity; and

(iv) any other information that the Commission may prescribe by rule or regulation.

(5) SPECIAL REQUIREMENTS FOR SWAP DEALERS AS COUNTERPARTIES TO SPECIAL ENTITIES.—

(A) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity shall—

(i) comply with any duty established by the Commission for a swap dealer or major swap participant, with respect to a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of clause (vii) of section [1a(18)] *1a(19)* of this Act,

that requires the swap dealer or major swap participant to have a reasonable basis to believe that the counterparty that is a Special Entity has an independent representative that—

(I) has sufficient knowledge to evaluate the transaction and risks;

(II) is not subject to a statutory disqualification;

(III) is independent of the swap dealer or major swap participant;

(IV) undertakes a duty to act in the best interests of the counterparty it represents;

(V) makes appropriate disclosures;

(VI) will provide written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction; and

(VII) in the case of employee benefit plans subject to the Employee Retirement Income Security act of 1974, is a fiduciary as defined in section 3 of that Act (29 U.S.C. 1002); and

(ii) before the initiation of the transaction, disclose to the Special Entity in writing the capacity in which the swap dealer is acting; and

(B) the Commission may establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act.

(6) RULES.—The Commission shall prescribe rules under this subsection governing business conduct standards for swap dealers and major swap participants.

(7) APPLICABILITY.—This section shall not apply with respect to a transaction that is—

(A) initiated by a Special Entity on an exchange or swap execution facility; and

(B) one in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction.

(i) DOCUMENTATION STANDARDS.—

(1) IN GENERAL.—Each registered swap dealer and major swap participant shall conform with such standards as may be prescribed by the Commission by rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.

(2) RULES.—The Commission shall adopt rules governing documentation standards for swap dealers and major swap participants.

(j) DUTIES.—Each registered swap dealer and major swap participant at all times shall comply with the following requirements:

(1) MONITORING OF TRADING.—The swap dealer or major swap participant shall monitor its trading in swaps to prevent violations of applicable position limits.

(2) RISK MANAGEMENT PROCEDURES.—The swap dealer or major swap participant shall establish robust and professional risk management systems adequate for managing the day-to-day business of the swap dealer or major swap participant.

(3) DISCLOSURE OF GENERAL INFORMATION.—The swap dealer or major swap participant shall disclose to the Commission and to the prudential regulator for the swap dealer or major swap participant, as applicable, information concerning—

(A) terms and conditions of its swaps;

(B) swap trading operations, mechanisms, and practices;

(C) financial integrity protections relating to swaps; and

(D) other information relevant to its trading in swaps.

(4) ABILITY TO OBTAIN INFORMATION.—The swap dealer or major swap participant shall—

(A) establish and enforce internal systems and procedures to obtain any necessary information to perform any of the functions described in this section; and

(B) provide the information to the Commission and to the prudential regulator for the swap dealer or major swap participant, as applicable, on request.

(5) CONFLICTS OF INTEREST.—The swap dealer and major swap participant shall implement conflict-of-interest systems and procedures that—

(A) establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity or swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the core principles of open access and the business conduct standards described in this Act; and

(B) address such other issues as the Commission determines to be appropriate.

(6) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, a swap dealer or major swap participant shall not—

(A) adopt any process or take any action that results in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading or clearing.

(7) RULES.—The Commission shall prescribe rules under this subsection governing duties of swap dealers and major swap participants.

(k) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each swap dealer and major swap participant shall designate an individual to serve as a chief compliance officer.

(2) DUTIES.—The chief compliance officer shall—

(A) report directly to the board or to the senior officer of the swap dealer or major swap participant;

(B) review the compliance of the swap dealer or major swap participant with respect to the swap dealer and major swap participant requirements described in this section;

(C) in consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the organization, resolve any conflicts of interest that may arise;

(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(E) ensure compliance with this Act (including regulations) relating to swaps, including each rule prescribed by the Commission under this section;

(F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(i) compliance office review;

(ii) look-back;

(iii) internal or external audit finding;

(iv) self-reported error; or

(v) validated complaint; and

(G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) ANNUAL REPORTS.—

(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(i) the compliance of the swap dealer or major swap participant with respect to this Act (including regulations); and

(ii) each policy and procedure of the swap dealer or major swap participant of the chief compliance officer (including the code of ethics and conflict of interest policies).

[(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

[(i) accompany each appropriate financial report of the swap dealer or major swap participant that is required to be furnished to the Commission pursuant to this section; and

[(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.]

(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

(i) include a certification that, under penalty of law, the compliance report is materially accurate and complete; and

(ii) be furnished at such time as the Commission determines by rule, regulation, or order, to be appropriate.

(l) SEGREGATION REQUIREMENTS.—

(1) SEGREGATION OF ASSETS HELD AS COLLATERAL IN UNCLEARED SWAP TRANSACTIONS.—

(A) NOTIFICATION.—A swap dealer or major swap participant shall be required to notify the counterparty of the swap dealer or major swap participant at the beginning of

a swap transaction that the counterparty has the right to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty.

(B) SEGREGATION AND MAINTENANCE OF FUNDS.—At the request of a counterparty to a swap that provides funds or other property to a swap dealer or major swap participant to margin, guarantee, or secure the obligations of the counterparty, the swap dealer or major swap participant shall—

(i) segregate the funds or other property for the benefit of the counterparty; and

(ii) in accordance with such rules and regulations as the Commission may promulgate, maintain the funds or other property in a segregated account separate from the assets and other interests of the swap dealer or major swap participant.

(2) APPLICABILITY.—The requirements described in paragraph (1) shall—

(A) apply only to a swap between a counterparty and a swap dealer or major swap participant that is not submitted for clearing to a derivatives clearing organization; and

(B)(i) not apply to variation margin payments; or

(ii) not preclude any commercial arrangement regarding—

(I) the investment of segregated funds or other property that may only be invested in such investments as the Commission may permit by rule or regulation; and

(II) the related allocation of gains and losses resulting from any investment of the segregated funds or other property.

(3) USE OF INDEPENDENT THIRD-PARTY CUSTODIANS.—The segregated account described in paragraph (1) shall be—

(A) carried by an independent third-party custodian; and

(B) designated as a segregated account for and on behalf of the counterparty.

(4) REPORTING REQUIREMENT.—If the counterparty does not choose to require segregation of the funds or other property supplied to margin, guarantee, or secure the obligations of the counterparty, the swap dealer or major swap participant shall report to the counterparty of the swap dealer or major swap participant on a quarterly basis that the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties.

SEC. 4t. LARGE SWAP TRADER REPORTING.

(a) PROHIBITION.—

(1) IN GENERAL.—Except as provided in paragraph (2), it shall be unlawful for any person to enter into any swap that the Commission determines to perform a significant price discovery function with respect to registered entities if—

(A) the person directly or indirectly enters into the swap during any 1 day in an amount equal to or in excess of

such amount as shall be established periodically by the Commission; and

(B) the person directly or indirectly has or obtains a position in the swap equal to or in excess of such amount as shall be established periodically by the Commission.

(2) EXCEPTION.—Paragraph (1) shall not apply if—

(A) the person files or causes to be filed with the properly designated officer of the Commission such reports regarding any transactions or positions described in subparagraphs (A) and (B) of paragraph (1) as the Commission may require by rule or regulation; and

(B) in accordance with the rules and regulations of the Commission, the person keeps books and records of all such swaps and any transactions and positions in any related commodity traded on or subject to the rules of any designated contract market or swap execution facility, and of cash or spot transactions in, inventories of, and purchase and sale commitments of, such a commodity.

(b) REQUIREMENTS.—

(1) IN GENERAL.—Books and records described in subsection (a)(2)(B) shall—

(A) show such complete details concerning all transactions and positions as the Commission may prescribe by rule or regulation;

(B) be open at all times to inspection and examination by any representative of the Commission; and

(C) be open at all times to inspection and examination by the Securities and Exchange Commission, to the extent such books and records relate to transactions in swaps (as that term is defined in section ⟦1a(47)(A)(v)⟧ *1a(48)(A)(v)*), and consistent with the confidentiality and disclosure requirements of section 8.

(2) JURISDICTION.—Nothing in paragraph (1) shall affect the exclusive jurisdiction of the Commission to prescribe recordkeeping and reporting requirements for large swap traders under this section.

(c) APPLICABILITY.—For purposes of this section, the swaps, futures, and cash or spot transactions and positions of any person shall include the swaps, futures, and cash or spot transactions and positions of any persons directly or indirectly controlled by the person.

(d) SIGNIFICANT PRICE DISCOVERY FUNCTION.—In making a determination as to whether a swap performs or affects a significant price discovery function with respect to registered entities, the Commission shall consider the factors described in section 4a(a)(3).

SEC. 4u. RECORDKEEPING REQUIREMENTS APPLICABLE TO NON-REGISTERED MEMBERS OF CERTAIN REGISTERED ENTITIES.

Except as provided in section 4(a)(3), a member of a designated contract market or a swap execution facility that is not registered with the Commission and not required to be registered with the Commission in any capacity shall satisfy the recordkeeping requirements of this Act and any recordkeeping rule, order, or regulation under this Act by maintaining a written record of each transaction in a contract for future delivery, option on a future, swap, swaption, trade option, or related cash or forward transaction. The written

record shall be sufficient if it includes the final agreement between the parties and the material economic terms of the transaction.

SEC. 5. DESIGNATION OF BOARDS OF TRADE AS CONTRACT MARKETS.

(a) APPLICATIONS.—A board of trade applying to the Commission for designation as a contract market shall submit an application to the Commission that includes any relevant materials and records the Commission may require consistent with this Act.

[(c)**]** *(b)* EXISTING CONTRACT MARKETS.—A board of trade that is designated as a contract market on the date of the enactment of the Commodity Futures Modernization Act of 2000 shall be considered to be a designated contract market under this section.

[(d)**]** *(c)* CORE PRINCIPLES FOR CONTRACT MARKETS.—

(1) DESIGNATION AS CONTRACT MARKET.—

(A) IN GENERAL.—To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—

(i) any core principle described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF CONTRACT MARKET.—Unless otherwise determined by the Commission by rule or regulation, a board of trade described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

(2) COMPLIANCE WITH RULES.—

(A) IN GENERAL.—The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including—

(i) access requirements;

(ii) the terms and conditions of any contracts to be traded on the contract market; and

(iii) rules prohibiting abusive trade practices on the contract market.

(B) CAPACITY OF CONTRACT MARKET.—The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(C) REQUIREMENT OF RULES.—The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

(3) CONTRACTS NOT READILY SUBJECT TO MANIPULATION.—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

(4) PREVENTION OF MARKET DISRUPTION.—The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including—

(A) methods for conducting real-time monitoring of trading; and

(B) comprehensive and accurate trade reconstructions.

(5) POSITION LIMITATIONS OR ACCOUNTABILITY.—

(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) MAXIMUM ALLOWABLE POSITION LIMITATION.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(6) EMERGENCY AUTHORITY.—The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority—

(A) to liquidate or transfer open positions in any contract;

(B) to suspend or curtail trading in any contract; and

(C) to require market participants in any contract to meet special margin requirements.

(7) AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public accurate information concerning—

(A) the terms and conditions of the contracts of the contract market; and

(B)(i) the rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market; and

(ii) the rules and specifications describing the operation of the contract market's—

(I) electronic matching platform; or

(II) trade execution facility.

(8) DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

(9) EXECUTION OF TRANSACTIONS.—

(A) IN GENERAL.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

(B) RULES.—The rules of the board of trade may authorize, for bona fide business purposes—

(i) transfer trades or office trades;

(ii) an exchange of—

(I) futures in connection with a cash commodity transaction;

(II) futures for cash commodities; or

(III) futures for swaps; or

(iii) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution

of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

(10) TRADE INFORMATION.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information—

(A) to assist in the prevention of customer and market abuses; and

(B) to provide evidence of any violations of the rules of the contract market.

(11) FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce—

(A) rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(B) rules to ensure—

(i) the financial integrity of any—

(I) futures commission merchant; and

(II) introducing broker; and

(ii) the protection of customer funds.

(12) PROTECTION OF MARKETS AND MARKET PARTICIPANTS.—The board of trade shall establish and enforce rules—

(A) to protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(B) to promote fair and equitable trading on the contract market.

(13) DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

(14) DISPUTE RESOLUTION.—The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

(15) GOVERNANCE FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

(16) CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules—

(A) to minimize conflicts of interest in the decision-making process of the contract market; and

(B) to establish a process for resolving conflicts of interest described in subparagraph (A).

(17) COMPOSITION OF GOVERNING BOARDS OF CONTRACT MARKETS.—The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

(18) RECORDKEEPING.—The board of trade shall maintain records of all activities relating to the business of the contract market—

(A) in a form and manner that is acceptable to the Commission; and

(B) for a period of at least 5 years.

(19) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not—

(A) adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading on the contract market.

(20) SYSTEM SAFEGUARDS.—The board of trade shall—

(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(C) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

(21) FINANCIAL RESOURCES.—

(A) IN GENERAL.—The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(B) DETERMINATION OF ADEQUACY.—The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

(22) DIVERSITY OF BOARD OF DIRECTORS.—The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

(23) SECURITIES AND EXCHANGE COMMISSION.—The board of trade shall keep any such records relating to swaps defined in section ⟦1a(47)(A)(v)⟧ *1a(48)(A)(v)* open to inspection and examination by the Securities and Exchange Commission.

[(e)] *(d)* CURRENT AGRICULTURAL COMMODITIES.—

(1) Subject to paragraph (2) of this subsection, a contract for purchase or sale for future delivery of an agricultural commodity enumerated in section [1a(9)] *1a(10)* that is available for trade on a contract market, as of the date of the enactment of this subsection, may be traded only on a contract market designated under this section.

(2) In order to promote responsible economic or financial innovation and fair competition, the Commission, on application by any person, after notice and public comment and opportunity for hearing, may prescribe rules and regulations to provide for the offer and sale of contracts for future delivery or options on such contracts to be conducted on a derivatives transaction execution facility.

SEC. 5b. DERIVATIVES CLEARING ORGANIZATIONS.

(a) REGISTRATION REQUIREMENT.—

(1) IN GENERAL.—Except as provided in paragraph (2), it shall be unlawful for a derivatives clearing organization, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a derivatives clearing organization with respect to—

(A) a contract of sale of a commodity for future delivery (or an option on the contract of sale) or option on a commodity, in each case, unless the contract or option is—

(i) excluded from this Act by subsection (a)(1)(C)(i), (c), or (f) of section 2; or

(ii) a security futures product cleared by a clearing agency registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); or

(B) a swap.

(2) EXCEPTION.—Paragraph (1) shall not apply to a derivatives clearing organization that is registered with the Commission.

(b) VOLUNTARY REGISTRATION.—A person that clears 1 or more agreements, contracts, or transactions that are not required to be cleared under this Act may register with the Commission as a derivatives clearing organization.

(c) REGISTRATION OF DERIVATIVES CLEARING ORGANIZATIONS.—

(1) APPLICATION.—A person desiring to register as a derivatives clearing organization shall submit to the Commission an application in such form and containing such information as the Commission may require for the purpose of making the determinations required for approval under paragraph (2).

(2) CORE PRINCIPLES FOR DERIVATIVES CLEARING ORGANIZATIONS.—

(A) COMPLIANCE.—

(i) IN GENERAL.—To be registered and to maintain registration as a derivatives clearing organization, a derivatives clearing organization shall comply with each core principle described in this paragraph and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(ii) DISCRETION OF DERIVATIVES CLEARING ORGANIZATION.—Subject to any rule or regulation prescribed by

the Commission, a derivatives clearing organization shall have reasonable discretion in establishing the manner by which the derivatives clearing organization complies with each core principle described in this paragraph.

(B) FINANCIAL RESOURCES.—

(i) IN GENERAL.—Each derivatives clearing organization shall have adequate financial, operational, and managerial resources, as determined by the Commission, to discharge each responsibility of the derivatives clearing organization.

(ii) MINIMUM AMOUNT OF FINANCIAL RESOURCES.—Each derivatives clearing organization shall possess financial resources that, at a minimum, exceed the total amount that would—

(I) enable the organization to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions; and

(II) enable the derivatives clearing organization to cover the operating costs of the derivatives clearing organization for a period of 1 year (as calculated on a rolling basis).

(C) PARTICIPANT AND PRODUCT ELIGIBILITY.—

(i) IN GENERAL.—Each derivatives clearing organization shall establish—

(I) appropriate admission and continuing eligibility standards (including sufficient financial resources and operational capacity to meet obligations arising from participation in the derivatives clearing organization) for members of, and participants in, the derivatives clearing organization; and

(II) appropriate standards for determining the eligibility of agreements, contracts, or transactions submitted to the derivatives clearing organization for clearing.

(ii) REQUIRED PROCEDURES.—Each derivatives clearing organization shall establish and implement procedures to verify, on an ongoing basis, the compliance of each participation and membership requirement of the derivatives clearing organization.

(iii) REQUIREMENTS.—The participation and membership requirements of each derivatives clearing organization shall—

(I) be objective;

(II) be publicly disclosed; and

(III) permit fair and open access.

(D) RISK MANAGEMENT.—

(i) IN GENERAL.—Each derivatives clearing organization shall ensure that the derivatives clearing organization possesses the ability to manage the risks associated with discharging the responsibilities of the de-

rivatives clearing organization through the use of appropriate tools and procedures.

(ii) MEASUREMENT OF CREDIT EXPOSURE.—Each derivatives clearing organization shall—

(I) not less than once during each business day of the derivatives clearing organization, measure the credit exposures of the derivatives clearing organization to each member and participant of the derivatives clearing organization; and

(II) monitor each exposure described in subclause (I) periodically during the business day of the derivatives clearing organization.

(iii) LIMITATION OF EXPOSURE TO POTENTIAL LOSSES FROM DEFAULTS.—Each derivatives clearing organization, through margin requirements and other risk control mechanisms, shall limit the exposure of the derivatives clearing organization to potential losses from defaults by members and participants of the derivatives clearing organization to ensure that—

(I) the operations of the derivatives clearing organization would not be disrupted; and

(II) nondefaulting members or participants would not be exposed to losses that nondefaulting members or participants cannot anticipate or control.

(iv) MARGIN REQUIREMENTS.—The margin required from each member and participant of a derivatives clearing organization shall be sufficient to cover potential exposures in normal market conditions.

(v) REQUIREMENTS REGARDING MODELS AND PARAMETERS.—Each model and parameter used in setting margin requirements under clause (iv) shall be—

(I) risk-based; and

(II) reviewed on a regular basis.

(E) SETTLEMENT PROCEDURES.—Each derivatives clearing organization shall—

(i) complete money settlements on a timely basis (but not less frequently than once each business day);

(ii) employ money settlement arrangements to eliminate or strictly limit the exposure of the derivatives clearing organization to settlement bank risks (including credit and liquidity risks from the use of banks to effect money settlements);

(iii) ensure that money settlements are final when effected;

(iv) maintain an accurate record of the flow of funds associated with each money settlement;

(v) possess the ability to comply with each term and condition of any permitted netting or offset arrangement with any other clearing organization;

(vi) regarding physical settlements, establish rules that clearly state each obligation of the derivatives clearing organization with respect to physical deliveries; and

(vii) ensure that each risk arising from an obligation described in clause (vi) is identified and managed.

(F) TREATMENT OF FUNDS.—

(i) REQUIRED STANDARDS AND PROCEDURES.—Each derivatives clearing organization shall establish standards and procedures that are designed to protect and ensure the safety of member and participant funds and assets.

(ii) HOLDING OF FUNDS AND ASSETS.—Each derivatives clearing organization shall hold member and participant funds and assets in a manner by which to minimize the risk of loss or of delay in the access by the derivatives clearing organization to the assets and funds.

(iii) PERMISSIBLE INVESTMENTS.—Funds and assets invested by a derivatives clearing organization shall be held in instruments with minimal credit, market, and liquidity risks.

(G) DEFAULT RULES AND PROCEDURES.—

(i) IN GENERAL.—Each derivatives clearing organization shall have rules and procedures designed to allow for the efficient, fair, and safe management of events during which members or participants—

(I) become insolvent; or

(II) otherwise default on the obligations of the members or participants to the derivatives clearing organization.

(ii) DEFAULT PROCEDURES.—Each derivatives clearing organization shall—

(I) clearly state the default procedures of the derivatives clearing organization;

(II) make publicly available the default rules of the derivatives clearing organization; and

(III) ensure that the derivatives clearing organization may take timely action—

(aa) to contain losses and liquidity pressures; and

(bb) to continue meeting each obligation of the derivatives clearing organization.

(H) RULE ENFORCEMENT.—Each derivatives clearing organization shall—

(i) maintain adequate arrangements and resources for—

(I) the effective monitoring and enforcement of compliance with the rules of the derivatives clearing organization; and

(II) the resolution of disputes;

(ii) have the authority and ability to discipline, limit, suspend, or terminate the activities of a member or participant due to a violation by the member or participant of any rule of the derivatives clearing organization; and

(iii) report to the Commission regarding rule enforcement activities and sanctions imposed against members and participants as provided in clause (ii).

(I) SYSTEM SAFEGUARDS.—Each derivatives clearing organization shall—

(i) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures, and automated systems, that are reliable, secure, and have adequate scalable capacity;

(ii) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for—

(I) the timely recovery and resumption of operations of the derivatives clearing organization; and

(II) the fulfillment of each obligation and responsibility of the derivatives clearing organization; and

(iii) periodically conduct tests to verify that the backup resources of the derivatives clearing organization are sufficient to ensure daily processing, clearing, and settlement.

(J) REPORTING.—Each derivatives clearing organization shall provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the derivatives clearing organization.

(K) RECORDKEEPING.—Each derivatives clearing organization shall maintain records of all activities related to the business of the derivatives clearing organization as a derivatives clearing organization—

(i) in a form and manner that is acceptable to the Commission; and

(ii) for a period of not less than 5 years.

(L) PUBLIC INFORMATION.—

(i) IN GENERAL.—Each derivatives clearing organization shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the derivatives clearing organization.

(ii) AVAILABILITY OF INFORMATION.—Each derivatives clearing organization shall make information concerning the rules and operating and default procedures governing the clearing and settlement systems of the derivatives clearing organization available to market participants.

(iii) PUBLIC DISCLOSURE.—Each derivatives clearing organization shall disclose publicly and to the Commission information concerning—

(I) the terms and conditions of each contract, agreement, and transaction cleared and settled by the derivatives clearing organization;

(II) each clearing and other fee that the derivatives clearing organization charges the members and participants of the derivatives clearing organization;

(III) the margin-setting methodology, and the size and composition, of the financial resource package of the derivatives clearing organization;

(IV) daily settlement prices, volume, and open interest for each contract settled or cleared by the derivatives clearing organization; and

(V) any other matter relevant to participation in the settlement and clearing activities of the derivatives clearing organization.

(M) INFORMATION-SHARING.—Each derivatives clearing organization shall—

(i) enter into, and abide by the terms of, each appropriate and applicable domestic and international information-sharing agreement; and

(ii) use relevant information obtained from each agreement described in clause (i) in carrying out the risk management program of the derivatives clearing organization.

(N) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, a derivatives clearing organization shall not—

(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or

(ii) impose any material anticompetitive burden.

(O) GOVERNANCE FITNESS STANDARDS.—

(i) GOVERNANCE ARRANGEMENTS.—Each derivatives clearing organization shall establish governance arrangements that are transparent—

(I) to fulfill public interest requirements; and

(II) to permit the consideration of the views of owners and participants.

(ii) FITNESS STANDARDS.—Each derivatives clearing organization shall establish and enforce appropriate fitness standards for—

(I) directors;

(II) members of any disciplinary committee;

(III) members of the derivatives clearing organization;

(IV) any other individual or entity with direct access to the settlement or clearing activities of the derivatives clearing organization; and

(V) any party affiliated with any individual or entity described in this clause.

(P) CONFLICTS OF INTEREST.—Each derivatives clearing organization shall—

(i) establish and enforce rules to minimize conflicts of interest in the decision-making process of the derivatives clearing organization; and

(ii) establish a process for resolving conflicts of interest described in clause (i).

(Q) COMPOSITION OF GOVERNING BOARDS.—Each derivatives clearing organization shall ensure that the composition of the governing board or committee of the derivatives clearing organization includes market participants.

(R) LEGAL RISK.—Each derivatives clearing organization shall have a well-founded, transparent, and enforceable legal framework for each aspect of the activities of the derivatives clearing organization.".

(3) ORDERS CONCERNING COMPETITION.—A derivatives clearing organization may request the Commission to issue an order concerning whether a rule or practice of the applicant is the least anticompetitive means of achieving the objectives, purposes, and policies of this Act.

(d) EXISTING DERIVATIVES CLEARING ORGANIZATIONS.—A derivatives clearing organization shall be deemed to be registered under this section to the extent that the derivatives clearing organization clears agreements, contracts, or transactions for a board of trade that has been designated by the Commission as a contract market for such agreements, contracts, or transactions before the date of the enactment of this section.

(e) APPOINTMENT OF TRUSTEE.—

(1) IN GENERAL.—If a proceeding under section 5e results in the suspension or revocation of the registration of a derivatives clearing organization, or if a derivatives clearing organization withdraws from registration, the Commission, on notice to the derivatives clearing organization, may apply to the appropriate United States district court where the derivatives clearing organization is located for the appointment of a trustee.

(2) ASSUMPTION OF JURISDICTION.—If the Commission applies for appointment of a trustee under paragraph (1)—

(A) the court may take exclusive jurisdiction over the derivatives clearing organization and the records and assets of the derivatives clearing organization, wherever located; and

(B) if the court takes jurisdiction under subparagraph (A), the court shall appoint the Commission, or a person designated by the Commission, as trustee with power to take possession and continue to operate or terminate the operations of the derivatives clearing organization in an orderly manner for the protection of participants, subject to such terms and conditions as the court may prescribe.

(f) LINKING OF REGULATED CLEARING FACILITIES.—

(1) IN GENERAL.—The Commission shall facilitate the linking or coordination of derivatives clearing organizations registered under this Act with other regulated clearance facilities for the coordinated settlement of cleared transactions. In order to minimize systemic risk, under no circumstances shall a derivatives clearing organization be compelled to accept the counterparty credit risk of another clearing organization.

(2) COORDINATION.—In carrying out paragraph (1), the Commission shall coordinate with the Federal banking agencies and the Securities and Exchange Commission.

(g) EXISTING DEPOSITORY INSTITUTIONS AND CLEARING AGENCIES.—

(1) IN GENERAL.—A depository institution or clearing agency registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) that is required to be registered as a derivatives clearing organization under this section is deemed to be registered

under this section to the extent that, before the date of enactment of this subsection—

(A) the depository institution cleared swaps as a multilateral clearing organization; or

(B) the clearing agency cleared swaps.

(2) CONVERSION OF DEPOSITORY INSTITUTIONS.—A depository institution to which this subsection applies may, by the vote of the shareholders owning not less than 51 percent of the voting interests of the depository institution, be converted into a State corporation, partnership, limited liability company, or similar legal form pursuant to a plan of conversion, if the conversion is not in contravention of applicable State law.

(3) SHARING OF INFORMATION.—The Securities and Exchange Commission shall make available to the Commission, upon request, all information determined to be relevant by the Securities and Exchange Commission regarding a clearing agency deemed to be registered with the Commission under paragraph (1).

(h) EXEMPTIONS.—The Commission may exempt, conditionally or unconditionally, a derivatives clearing organization from registration under this section for the clearing of swaps if the Commission determines that the derivatives clearing organization is subject to comparable, comprehensive supervision and regulation by the Securities and Exchange Commission or the appropriate government authorities in the home country of the organization. Such conditions may include, but are not limited to, requiring that the derivatives clearing organization be available for inspection by the Commission and make available all information requested by the Commission.

(i) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each derivatives clearing organization shall designate an individual to serve as a chief compliance officer.

(2) DUTIES.—The chief compliance officer shall—

(A) report directly to the board or to the senior officer of the derivatives clearing organization;

(B) review the compliance of the derivatives clearing organization with respect to the core principles described in subsection (c)(2);

(C) in consultation with the board of the derivatives clearing organization, a body performing a function similar to the board of the derivatives clearing organization, or the senior officer of the derivatives clearing organization, resolve any conflicts of interest that may arise;

(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(E) ensure compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

(F) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any—

(i) compliance office review;

(ii) look-back;
(iii) internal or external audit finding;
(iv) self-reported error; or
(v) validated complaint; and

(G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) ANNUAL REPORTS.—

(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(i) the compliance of the derivatives clearing organization of the compliance officer with respect to this Act (including regulations); and

(ii) each policy and procedure of the derivatives clearing organization of the compliance officer (including the code of ethics and conflict of interest policies of the derivatives clearing organization).

(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

(i) accompany each appropriate financial report of the derivatives clearing organization that is required to be furnished to the Commission pursuant to this section; and

(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

[(k)**]** *(j)* REPORTING REQUIREMENTS.—

(1) DUTY OF DERIVATIVES CLEARING ORGANIZATIONS.—Each derivatives clearing organization that clears swaps shall provide to the Commission all information that is determined by the Commission to be necessary to perform each responsibility of the Commission under this Act.

(2) DATA COLLECTION AND MAINTENANCE REQUIREMENTS.—The Commission shall adopt data collection and maintenance requirements for swaps cleared by derivatives clearing organizations that are comparable to the corresponding requirements for—

(A) swaps data reported to swap data repositories; and
(B) swaps traded on swap execution facilities.

(3) REPORTS ON SECURITY-BASED SWAP AGREEMENTS TO BE SHARED WITH THE SECURITIES AND EXCHANGE COMMISSION.—

(A) IN GENERAL.—A derivatives clearing organization that clears security-based swap agreements (as defined in section **[**1a(47)(A)(v)**]** *1a(48)(A)(v)*) shall, upon request, open to inspection and examination to the Securities and Exchange Commission all books and records relating to such security-based swap agreements, consistent with the confidentiality and disclosure requirements of section 8.

(B) JURISDICTION.—Nothing in this paragraph shall affect the exclusive jurisdiction of the Commission to prescribe recordkeeping and reporting requirements for a derivatives clearing organization that is registered with the Commission.

(4) INFORMATION SHARING.—Subject to section 8, and upon request, the Commission shall share information collected under paragraph (2) with—

(A) the Board;

(B) the Securities and Exchange Commission;

(C) each appropriate prudential regulator;

(D) the Financial Stability Oversight Council;

(E) the Department of Justice; and

(F) any other person that the Commission determines to be appropriate, including—

(i) foreign financial supervisors (including foreign futures authorities);

(ii) foreign central banks; and

(iii) foreign ministries.

[(5) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4)—

[(A) the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided; and

[(B) each entity shall agree to indemnify the Commission for any expenses arising from litigation relating to the information provided under section 8.]

(5) CONFIDENTIALITY AGREEMENT.—Before the Commission may share information with any entity described in paragraph (4), the Commission shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.

(6) PUBLIC INFORMATION.—Each derivatives clearing organization that clears swaps shall provide to the Commission (including any designee of the Commission) information under paragraph (2) in such form and at such frequency as is required by the Commission to comply with the public reporting requirements contained in section 2(a)(13).

SEC. 5c. COMMON PROVISIONS APPLICABLE TO REGISTERED ENTITIES.

(a) ACCEPTABLE BUSINESS PRACTICES UNDER CORE PRINCIPLES.—

(1) IN GENERAL.—Consistent with the purposes of this Act, the Commission may issue interpretations, or approve interpretations submitted to the Commission, of sections 5(d) and 5b(c)(2), to describe what would constitute an acceptable business practice under such sections.

(2) EFFECT OF INTERPRETATION.—An interpretation issued under paragraph (1) may provide the exclusive means for complying with each section described in paragraph (1).

(b) DELEGATION OF FUNCTIONS UNDER CORE PRINCIPLES.—

(1) IN GENERAL.—A [contract market, derivatives transaction execution facility, or electronic trading facility] *registered entity* with respect to a significant price discovery contract may comply with any applicable core principle through delegation of any relevant function to a registered futures association or a registered entity that is not an electronic trading facility.

(2) RESPONSIBILITY.—A [contract market, derivatives transaction execution facility, or electronic trading facility] *registered entity* that delegates a function under paragraph (1) shall remain responsible for carrying out the function.

(3) NONCOMPLIANCE.—If a [contract market, derivatives transaction execution facility, or electronic trading facility] *registered entity* that delegates a function under paragraph (1) becomes aware that a delegated function is not being performed as required under this Act, the [contract market, derivatives transaction execution facility, or electronic trading facility] *registered entity* shall promptly take steps to address the noncompliance.

(c) NEW CONTRACTS, NEW RULES, AND RULE AMENDMENTS.—

(1) IN GENERAL.—A registered entity may elect to list for trading or accept for clearing any new contract, or other instrument, or may elect to approve and implement any new rule or rule amendment, by providing to the Commission (and the Secretary of the Treasury, in the case of a contract of sale of a government security for future delivery (or option on such a contract) or a rule or rule amendment specifically related to such a contract) a written certification that the new contract or instrument or clearing of the new contract or instrument, new rule, or rule amendment complies with this Act (including regulations under this Act).

(2) RULE REVIEW.—The new rule or rule amendment described in paragraph (1) shall become effective, pursuant to the certification of the registered entity and notice of such certification to its members (in a manner to be determined by the Commission), on the date that is 10 business days after the date on which the Commission receives the certification (or such shorter period as determined by the Commission by rule or regulation) unless the Commission notifies the registered entity within such time that it is staying the certification because there exist novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with this Act (including regulations under this Act).

(3) STAY OF CERTIFICATION FOR RULES.—

(A) A notification by the Commission pursuant to paragraph (2) shall stay the certification of the new rule or rule amendment for up to an additional 90 days from the date of the notification.

(B) A rule or rule amendment subject to a stay pursuant to subparagraph (A) shall become effective, pursuant to the certification of the registered entity, at the expiration of the period described in subparagraph (A) unless the Commission—

(i) withdraws the stay prior to that time; or

(ii) notifies the registered entity during such period that it objects to the proposed certification on the grounds that it is inconsistent with this Act (including regulations under this Act).

(C) The Commission shall provide a not less than 30-day public comment period, within the 90-day period in which the stay is in effect as described in subparagraph (A),

whenever the Commission reviews a rule or rule amendment pursuant to a notification by the Commission under this paragraph.

(4) PRIOR APPROVAL.—

(A) IN GENERAL.—A registered entity may request that the Commission grant prior approval to any new contract or other instrument, new rule, or rule amendment.

(B) PRIOR APPROVAL REQUIRED.—Notwithstanding any other provision of this section, a designated contract market shall submit to the Commission for prior approval each rule amendment that materially changes the terms and conditions, as determined by the Commission, in any contract of sale for future delivery of a commodity specifically enumerated in section 1a(10) (or any option thereon) traded through its facilities if the rule amendment applies to contracts and delivery months which have already been listed for trading and have open interest.

(C) DEADLINE.—If prior approval is requested under subparagraph (A), the Commission shall take final action on the request not later than 90 days after submission of the request, unless the person submitting the request agrees to an extension of the time limitation established under this subparagraph.

(5) APPROVAL.—

(A) RULES.—The Commission shall approve a new rule, or rule amendment, of a registered entity unless the Commission finds that the new rule, or rule amendment, is inconsistent with this subtitle (including regulations).

(B) CONTRACTS AND INSTRUMENTS.—The Commission shall approve a new contract or other instrument unless the Commission finds that the new contract or other instrument would violate this Act (including regulations).

(C) SPECIAL RULE FOR REVIEW AND APPROVAL OF EVENT CONTRACTS AND SWAPS CONTRACTS.—

(i) EVENT CONTRACTS.—In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section **[**1a(2)(i)**]** *1a(19)(i)*, by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—

(I) activity that is unlawful under any Federal or State law;

(II) terrorism;

(III) assassination;

(IV) war;

(V) gaming; or

(VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.

(ii) PROHIBITION.—No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.

(iii) SWAPS CONTRACTS.—

(I) IN GENERAL.—In connection with the listing of a swap for clearing by a derivatives clearing organization, the Commission shall determine, upon request or on its own motion, the initial eligibility, or the continuing qualification, of a derivatives clearing organization to clear such a swap under those criteria, conditions, or rules that the Commission, in its discretion, determines.

(II) REQUIREMENTS.—Any such criteria, conditions, or rules shall consider—

(aa) the financial integrity of the derivatives clearing organization; and

(bb) any other factors which the Commission determines may be appropriate.

(iv) DEADLINE.—The Commission shall take final action under clauses (i) and (ii) in not later than 90 days from the commencement of its review unless the party seeking to offer the contract or swap agrees to an extension of this time limitation.

(e) RESERVATION OF EMERGENCY AUTHORITY.—Nothing in this section shall limit or in any way affect the emergency powers of the Commission provided in section 8a(9).

(f) Consistent with this Act, each designated contract market [and registered derivatives transaction execution facility] shall issue such rules as are necessary to avoid duplicative or conflicting rules applicable to any futures commission merchant registered with the Commission pursuant to section 4f(a) of this Act (except paragraph (2) thereof), that is also registered with the Securities and Exchange Commission pursuant to section 15(b) of the Securities Exchange Act of 1934 (except paragraph (11) thereof) with respect to the application of—

(1) rules of such designated contract market [or registered derivatives transaction execution facility] of the type specified in section 4d(e) involving security futures products; and

(2) similar rules of national securities associations registered pursuant to section 15A(a) of the Securities Exchange Act of 1934 and national securities exchanges registered pursuant to section 6(g) of such Act involving security futures products.

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SEC. 5f. DESIGNATION OF SECURITIES EXCHANGES AND ASSOCIATIONS AS CONTRACT MARKETS.

(a) Any board of trade that is registered with the Securities and Exchange Commission as a national securities exchange, is a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934, or is an alternative trading system shall be a designated contract market in security futures products if—

(1) such national securities exchange, national securities association, or alternative trading system lists or trades no other contracts of sale for future delivery, except for security futures products;

(2) such national securities exchange, national securities association, or alternative trading system files written notice with the Commission in such form as the Commission, by rule, may prescribe containing such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of customers; and

(3) the registration of such national securities exchange, national securities association, or alternative trading system is not suspended pursuant to an order by the Securities and Exchange Commission.

Such designation shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission.

(b)(1) A national securities exchange, national securities association, or alternative trading system that is designated as a contract market pursuant to **[**section 5f**]** *this section* shall be exempt from the following provisions of this Act and the rules thereunder:

(A) Subsections (c)**[**, (e), and (g)**]** *and (e)* of section 4c.

(B) Section 4j.

(C) Section 5.

(D) Section 5c.

(E) Section 6a.

(F) Section 8(d).

(G) Section 9(f).

(H) Section 16.

(2) An alternative trading system that is a designated contract market under this section shall be required to be a member of a futures association registered under section 17 and shall be exempt from any provision of this Act that would require such alternative trading system to—

(A) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such alternative trading system; or

(B) discipline subscribers other than by exclusion from trading.

(3) To the extent that an alternative trading system is exempt from any provision of this Act pursuant to paragraph (2) of this subsection, the futures association registered under section 17 of which the alternative trading system is a member shall set rules governing the conduct of subscribers to the alternative trading system and discipline the subscribers.

(4)(A) Except as provided in subparagraph (B), but notwithstanding any other provision of this Act, the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any designated contract market in security futures subject to the designation requirement of this section from any provision of this Act or of any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.

(B) The Commission shall, by rule or regulation, determine the procedures under which an exemptive order under this section is

granted and may, in its sole discretion, decline to entertain any application for an order of exemption under this section.

(C) An alternative trading system shall not be deemed to be an exchange for any purpose as a result of the designation of such alternative trading system as a contract market under this section.

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SEC. 5h. SWAP EXECUTION FACILITIES.

(a) REGISTRATION.—

(1) IN GENERAL.—No person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market under this section.

(2) DUAL REGISTRATION.—Any person that is registered as a swap execution facility under this section shall register with the Commission regardless of whether the person also is registered with the Securities and Exchange Commission as a swap execution facility.

(b) TRADING AND TRADE PROCESSING.—

(1) IN GENERAL.—Except as specified in paragraph (2), a swap execution facility that is registered under subsection (a) may—

(A) make available for trading any swap; and

(B) facilitate trade processing of any swap.

(2) AGRICULTURAL SWAPS.—A swap execution facility may not list for trading or confirm the execution of any swap in an agricultural commodity (as defined by the Commission) except pursuant to a rule or regulation of the Commission allowing the swap under such terms and conditions as the Commission shall prescribe.

(c) IDENTIFICATION OF FACILITY USED TO TRADE SWAPS BY CONTRACT MARKETS.—A board of trade that operates a contract market shall, to the extent that the board of trade also operates a swap execution facility and uses the same electronic trade execution system for listing and executing trades of swaps on or through the contract market and the swap execution facility, identify whether the electronic trading of such swaps is taking place on or through the contract market or the swap execution facility.

(d) RULE-WRITING.—

(1) The Securities and Exchange Commission and Commodity Futures Trading Commission may promulgate rules defining the universe of swaps that can be executed on a swap execution facility. These rules shall take into account the price and nonprice requirements of the counterparties to a swap and the goal of this section as set forth in subsection (e).

(2) For all swaps that are not required to be executed through a swap execution facility as defined in paragraph (1), such trades may be executed through any other available means of interstate commerce.

(3) The Securities and Exchange Commission and Commodity Futures Trading Commission shall update these rules as necessary to account for technological and other innovation.

(e) RULE OF CONSTRUCTION.—The goal of this section is to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.

(f) CORE PRINCIPLES FOR SWAP EXECUTION FACILITIES.—

(1) COMPLIANCE WITH CORE PRINCIPLES.—

(A) IN GENERAL.—To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—

(i) the core principles described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF SWAP EXECUTION FACILITY.—Unless otherwise determined by the Commission by rule or regulation *except as described in this subsection*, a swap execution facility described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in this subsection.

(2) COMPLIANCE WITH RULES.—A swap execution facility shall—

(A) establish and enforce compliance with any rule of the swap execution facility, including—

(i) the terms and conditions of the swaps traded or processed on or through the swap execution facility; and

(ii) any limitation on access to the swap execution facility;

(B) establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means—

(i) to provide market participants with impartial access to the market; and

(ii) to capture information that may be used in establishing whether rule violations have occurred;

(C) establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

[(D) provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h), the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8).**]**

(D) have reasonable discretion in establishing and enforcing its rules related to trade practice surveillance, market surveillance, real-time marketing monitoring, and audit trail given that a swap execution facility may offer a trading system or platform to execute or trade swaps through any means of interstate commerce. A swap execution facility shall be responsible for monitoring trading in swaps only on its own facility.

(3) SWAPS NOT READILY SUSCEPTIBLE TO MANIPULATION.—The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(4) MONITORING OF TRADING AND TRADE PROCESSING.—The swap execution facility shall—

(A) establish and enforce rules or terms and conditions defining, or specifications detailing—

(i) trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(ii) procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(B) monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions. *A swap execution facility shall be responsible for monitoring trading in swaps only on its own facility.*

(5) ABILITY TO OBTAIN INFORMATION.—The swap execution facility shall—

(A) establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in this section;

(B) provide the information to the Commission on request; and

(C) have the capacity to carry out such international information-sharing agreements as the Commission may require.

(6) POSITION LIMITS OR ACCOUNTABILITY.—

(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) POSITION LIMITS.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the swap execution facility [shall—]

[(i) set its position limitation at a level no higher than the Commission limitation; and]

[(ii) monitor positions established on or through the swap execution facility for compliance with the] *shall monitor the trading activity on its facility for compliance with any* limit set by the Commission and the limit, if any, set by the swap execution facility. *A swap execution facility shall be responsible for monitoring positions only on its own facility.*

(7) FINANCIAL INTEGRITY OF TRANSACTIONS.—The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1).

(8) EMERGENCY AUTHORITY.—The swap execution facility shall adopt rules to provide for the exercise of emergency au-

thority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority [to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.] *to suspend or curtail trading in a swap on its own facility.*

(9) TIMELY PUBLICATION OF TRADING INFORMATION.—

(A) IN GENERAL.—The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(B) CAPACITY OF SWAP EXECUTION FACILITY.—The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

(10) RECORDKEEPING AND REPORTING.—

(A) IN GENERAL.—A swap execution facility shall—

(i) maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years;

(ii) report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under this Act; and

(iii) shall keep any such records relating to swaps defined in section [1a(47)(A)(v)] *1a(48)(A)(v)* open to inspection and examination by the Securities and Exchange Commission."

(B) REQUIREMENTS.—The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

(11) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the swap execution facility shall not—

(A) adopt any rules or taking any actions that result in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading or clearing.

(12) CONFLICTS OF INTEREST.—The swap execution facility shall—

(A) establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(B) establish a process for resolving the conflicts of interest.

(13) FINANCIAL RESOURCES.—

(A) IN GENERAL.—The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(B) DETERMINATION OF RESOURCE ADEQUACY.—The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial re-

sources exceeds the total amount that would enable the swap execution facility to [cover the operating costs of the swap execution facility for a 1-year period, as calculated on a rolling basis] *conduct an orderly wind-down of its operations*.

(14) SYSTEM SAFEGUARDS.—The swap execution facility shall—

(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that—

(i) are reliable and secure; and

(ii) have adequate scalable capacity;

(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for—

(i) the timely recovery and resumption of operations; and

(ii) the fulfillment of the responsibilities and obligations of the swap execution facility; and

(C) periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued—

(i) order processing and trade matching;

(ii) price reporting;

(iii) market surveillance and

(iv) maintenance of a comprehensive and accurate audit trail.

(15) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(A) IN GENERAL.—Each swap execution facility shall designate an individual to serve as a chief compliance officer. *The individual may also perform other responsibilities for the swap execution facility.*

(B) DUTIES.—The chief compliance officer shall—

(i) report directly to the board*, a committee of the board,* or to the senior officer of the facility;

(ii) review compliance with the core principles in this subsection;

[(iii) in consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

[(iv) be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

[(v) ensure compliance with this Act and the rules and regulations issued under this Act, including rules prescribed by the Commission pursuant to this section; and]

(iii) establish and administer policies and procedures that are reasonably designed to resolve any conflicts of interest that may arise;

(iv) establish and administer policies and procedures that reasonably ensure compliance with this Act and the rules and regulations issued under this Act, includ-

ing rules prescribed by the Commission pursuant to this section; and

[(vi)] *(v)* establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(C) REQUIREMENTS FOR PROCEDURES.—In establishing procedures under subparagraph [(B)(vi)] *(B)(v)*, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(D) ANNUAL REPORTS.—

(i) IN GENERAL.— [In accordance with rules prescribed by the Commission, the] *The* chief compliance officer shall annually prepare [and sign] a report that contains a description of—

(I) the compliance of the swap execution facility with this Act; and

(II) the policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(ii) REQUIREMENTS.—The chief compliance officer *or senior officer* shall—

[(I) submit each report described in clause (i) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to this section; and]

(I) submit each report described in clause (i) to the Commission; and

(II) include in the report a certification that, under penalty of law, the report is *materially* accurate and complete.

(g) EXEMPTIONS.—The Commission may exempt, conditionally or unconditionally, a swap execution facility from registration under this section if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the Securities and Exchange Commission, a prudential regulator, or the appropriate governmental authorities in the home country of the facility.

(h) RULES.—The Commission shall prescribe rules governing the regulation of [alternative] swap execution facilities under this section.

SEC. 6. (a) Any person desiring to be designated [or registered] as a contract market [or derivatives transaction execution facility] shall make application to the Commission for the designation [or registration] and accompany the same with a showing that it complies with the conditions set forth in this Act, and with a sufficient assurance that it will continue to comply with [the the] *the* requirements of this Act. The Commission shall approve or deny an application for designation [or registration] as a contract market [or derivatives transaction execution facility] within 180 days of the filing of the application. If the Commission notifies the person that its application is materially incomplete and specifies the deficiencies in the application, the running of the 180-day period shall

be stayed from the time of such notification until the application is resubmitted in completed form: *Provided,* That the Commission shall have not less than sixty days to approve or deny the application from the time the application is resubmitted in completed form. If the Commission denies an application, it shall specify the grounds for the denial. In the event of a refusal to designate or register as a contract market [or derivatives transaction execution facility] any person that has made application therefor, the person shall be afforded an opportunity for a hearing on the record before the Commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in subsection (b) of this section.

(b) The Commission is authorized to suspend for a period not to exceed 6 months or to revoke the designation [or registration] of any contract market [or derivatives transaction execution facility] on a showing that the contract market [or derivatives transaction execution facility] is not enforcing or has not enforced its rules of government, made a condition of its designation [or registration] as set forth in sections 5 through 5b or section 5f, or that the contract market [or derivatives transaction execution facility] [or electronic trading facility], or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Commission thereunder. Such suspension or revocation shall only be made after a notice to the officers of the contract market [or derivatives transaction execution facility] [or electronic trading facility] affected and upon a hearing on the record: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the Commission such person appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the Commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such person will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of title 28, United States Code. The testimony and evidence taken or submitted before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order. No such order of the Commission shall be modified or set aside by the court of appeals unless it is shown by the person that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such person for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Commission.

(c) PROHIBITION REGARDING MANIPULATION AND FALSE INFORMATION.—

(1) PROHIBITION AGAINST MANIPULATION.—It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a

contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, provided no rule or regulation promulgated by the Commission shall require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

(A) SPECIAL PROVISION FOR MANIPULATION BY FALSE REPORTING.—Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.

(B) EFFECT ON OTHER LAW.—Nothing in this paragraph shall affect, or be construed to affect, the applicability of section 9(a)(2).

(C) GOOD FAITH MISTAKES.—Mistakenly transmitting, in good faith, false or misleading or inaccurate information to a price reporting service would not be sufficient to violate subsection (c)(1)(A).

(2) PROHIBITION REGARDING FALSE INFORMATION.—It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this Act, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

(3) OTHER MANIPULATION.—In addition to the prohibition in paragraph (1), it shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.

(4) ENFORCEMENT.—

(A) AUTHORITY OF COMMISSION.—If the Commission has reason to believe that any person (other than a registered entity) is violating or has violated this subsection, or any other provision of this Act (including any rule, regulation, or order of the Commission promulgated in accordance

with this subsection or any other provision of this Act), the Commission may serve upon the person a complaint.

(B) CONTENTS OF COMPLAINT.—A complaint under subparagraph (A) shall—

(i) contain a description of the charges against the person that is the subject of the complaint; and

(ii) have attached or contain a notice of hearing that specifies the date and location of the hearing regarding the complaint.

(C) HEARING.—A hearing described in subparagraph (B)(ii)—

(i) shall be held not later than 3 days after service of the complaint described in subparagraph (A);

(ii) shall require the person to show cause regarding why—

(I) an order should not be made—

(aa) to prohibit the person from trading on, or subject to the rules of, any registered entity; and

(bb) to direct all registered entities to refuse all privileges to the person until further notice of the Commission; and

(II) the registration of the person, if registered with the Commission in any capacity, should not be suspended or revoked; and

(iii) may be held before—

(I) the Commission; or

(II) an administrative law judge designated by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form and submitted to the Commission.

[(5) SUBPOENA.—For**]**

(5) SUBPOENA.—

(A) IN GENERAL.—For the purpose of securing effective enforcement of the provisions of this Act, for the purpose of any investigation or proceeding under this Act, and for the purpose of any action taken under section 12(f), any member of the Commission or any Administrative Law Judge or other officer designated by the Commission (except as provided in paragraph (7)) may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

(B) OMNIBUS ORDERS OF INVESTIGATION.—

(i) DURATION AND RENEWAL.—An omnibus order of investigation shall not be for an indefinite duration and may be renewed only by Commission action.

(ii) DEFINITION.—In clause (i), the term "omnibus order of investigation" means an order of the Commission authorizing 1 of more members of the Commission or its staff to issue subpoenas under subparagraph (A)

to multiple persons in relation to a particular subject matter area.

(6) WITNESSES.—The attendance of witnesses and the production of any such records may be required from any place in the United States, any State, or any foreign country or jurisdiction at any designated place of hearing.

(7) SERVICE.—A subpoena issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country, except that a subpoena to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission.

(8) REFUSAL TO OBEY.—In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question.

(9) FAILURE TO OBEY.—Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

(10) EVIDENCE.—On the receipt of evidence under paragraph (4)(C)(iii), the Commission may—

(A) prohibit the person that is the subject of the hearing from trading on, or subject to the rules of, any registered entity and require all registered entities to refuse the person all privileges on the registered entities for such period as the Commission may require in the order;

(B) if the person is registered with the Commission in any capacity, suspend, for a period not to exceed 180 days, or revoke, the registration of the person;

(C) assess such person—

(i) a civil penalty of not more than an amount equal to the greater of—

(I) $140,000; or

(II) triple the monetary gain to such person for each such violation; or

(ii) in any case of manipulation or attempted manipulation in violation of this subsection or section 9(a)(2), a civil penalty of not more than an amount equal to the greater of—

(I) $1,000,000; or

(II) triple the monetary gain to the person for each such violation; and

(D) require restitution to customers of damages proximately caused by violations of the person.

(11) ORDERS.—

(A) NOTICE.—The Commission shall provide to a person described in paragraph (10) and the appropriate governing board of the registered entity notice of the order described in paragraph (10) by—

(i) registered mail;

(ii) certified mail; or

(iii) personal delivery.

(B) REVIEW.—

(i) IN GENERAL.—A person described in paragraph (10) may obtain a review of the order or such other equitable relief as determined to be appropriate by a court described in clause (ii).

(ii) PETITION.—To obtain a review or other relief under clause (i), a person may, not later than 15 days after notice is given to the person under clause (i), file a written petition to set aside the order with the United States Court of Appeals—

(I) for the circuit in which the petitioner carries out the business of the petitioner; or

(II) in the case of an order denying registration, the circuit in which the principal place of business of the petitioner is located, as listed on the application for registration of the petitioner.

(C) PROCEDURE.—

(i) DUTY OF CLERK OF APPROPRIATE COURT.—The clerk of the appropriate court under subparagraph (B)(ii) shall transmit to the Commission a copy of a petition filed under subparagraph (B)(ii).

(ii) DUTY OF COMMISSION.—In accordance with section 2112 of title 28, United States Code, the Commission shall file in the appropriate court described in subparagraph (B)(ii) the record theretofore made.

(iii) JURISDICTION OF APPROPRIATE COURT.—Upon the filing of a petition under subparagraph (B)(ii), the appropriate court described in subparagraph (B)(ii) may affirm, set aside, or modify the order of the Commission.

(d) If any person (other than a registered entity), is violating or has violated subsection (c) or any other provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in subsection (c), make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall knowingly fail or refuse to obey or comply with such order, such person, upon conviction thereof, shall be fined not more than the higher of $140,000 or triple the monetary gain to such person, or imprisoned for not more than 1 year, or both, except that if such knowing failure or refusal to obey or comply with such order involves any offense within subsection (a) or (b) of section 9, such person, upon conviction thereof, shall be subject to the penalties of

said subsection (a) or (b): *Provided*, That any such cease and desist order under this subsection against any respondent in any case of manipulation shall be issued only in conjunction with an order issued against such respondent under subsection (c).

(e)(1) In determining the amount of the money penalty assessed under subsection (c), the Commission shall consider the appropriateness of such penalty to the gravity of the violation.

(2) Unless the person against whom a money penalty is assessed under subsection (c) shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for payment of such penalty that either an appeal as authorized by subsection (c) has been taken or payment of the full amount of the penalty then due has been made, at the end of such fifteen-day period and until such person shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made—

(A) such person shall be prohibited automatically from the privileges of all registered entities; and

(B) if such person is registered with the Commission, such registration shall be suspended automatically.

(3) If a person against whom a money penalty is assessed under subsection (c) takes an appeal and if the Commission prevails or the appeal is dismissed, unless such person shows to the satisfaction of the Commission that payment of the full amount of the penalty then due has been made by the end of thirty days from the date of entry of judgment on the appeal—

(A) such person shall be prohibited automatically from the privileges of all registered entities; and

(B) if such person is registered with the Commission, such registration shall be suspended automatically.

If the person against whom the money penalty is assessed fails to pay such penalty after the lapse of the period allowed for appeal or after the affirmance of such penalty, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(4) Any designated clearing organization that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 2(h).

(5) Any swap dealer or major swap participant that knowingly or recklessly evades or participates in or facilitates an evasion of the requirements of section 2(h) shall be liable for a civil money penalty in twice the amount otherwise available for a violation of section 2(h).

(f)(1) Except as provided in paragraph (2), not later than six months after the effective date of rules promulgated by the Federal Trade Commission under section 3(a) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Commission shall promulgate, or require each registered futures association to promulgate, rules substantially similar to such rules to prohibit deceptive and other abusive telemarketing acts or practices by any person registered or exempt from registration under this Act in connection with such person's business as a futures commission merchant, introducing broker, commodity trading advisor, commodity

pool operator, leverage transaction merchant, floor broker, or floor trader, or a person associated with any such person.

(2) The Commission is not required to promulgate rules under paragraph (1) if it determines that—

(A) rules adopted by the Commission under this Act provide protection from deceptive and abusive telemarketing by persons described under paragraph (1) substantially similar to that provided by rules promulgated by the Federal Trade Commission under section 3(a) of the Telemarketing and Consumer Fraud and Abuse Prevention Act; or

(B) such a rule promulgated by the Commission is not necessary or appropriate in the public interest, or for the protection of customers in the futures and options markets, or would be inconsistent with the maintenance of fair and orderly markets.

If the Commission determines that an exception described in subparagraph (A) or (B) applies, the Commission shall publish in the Federal Register its determination with the reasons for it.

(g) The Commission shall provide the Securities and Exchange Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission pursuant to subsections (c) and (d) of this section against any futures commission merchant or introducing broker registered pursuant to section 4f(a)(2), any floor broker or floor trader exempt from registration pursuant to section 4f(a)(3), any associated person exempt from registration pursuant to section 4k(6), or any board of trade designated as a contract market pursuant to section 5f.

SEC. 6a. (a) No board of trade which has been designated [or registered] as a contract market [or a derivatives transaction execution facility] *shall* exclude from membership in, and all privileges on, such board of trade, any association or corporation engaged in cash commodity business having adequate financial responsibility which is organized under the cooperative laws of any State, or which has been recognized as a cooperative association of producers by the United States Government or by any agency thereof, if such association or corporation complies and agrees to comply with such terms and conditions as are or may be imposed lawfully upon other members of such board, and as are or may be imposed lawfully upon a cooperative association of producers engaged in cash commodity business, unless such board of trade is authorized by the Commission to exclude such association or corporation from membership and privileges after hearing held upon at least three days' notice subsequent to the filing of complaint by the board of trade: *Provided, however,* That if any such association or corporation shall fail to meet its obligations with any established clearing house or clearing agency of any contract market, such association or corporation shall be ipso facto debarred from further trading on such contract market, except such trading as may be necessary to close open trades and to discharge existing contracts in accordance with the rules of such contract market applicable in such cases. Such Commission may prescribe that such association or corporation shall have and retain membership and privileges, with or without imposing conditions, or it may permit such board of trade immediately to bar such association or corporation from membership and privileges. Any order of said Commission entered hereunder shall

be reviewable by the court of appeals for the circuit in which such association or corporation, or such board of trade, has its principal place of business, on written petition either of such association or corporation, or of such board of trade, under the procedure provided in section 6(b) of this Act, but such order shall not be stayed by the court pending review.

(b) No rule of any board of trade designated [or registered] as a contract market [or a derivatives transaction execution facility] shall forbid or be construed to forbid the payment of compensation on a commodity-unit basis, or otherwise, by any federated cooperative association to its regional member-associations for services rendered or to be rendered in connection with any organization work, educational activity, or procurement of patronage, provided no part of any such compensation is returned to patrons (whether members or nonmembers) of such cooperative association, or of its regional or local member-associations, otherwise than as a dividend on capital stock or as a patronage dividend out of the net earnings or surplus of such federated cooperative association.

SEC. 6b. If any registered entity is not enforcing or has not enforced its rules of government made a condition of its designation or registration [as set forth in sections 5 through 5c], or if any registered entity, or any director, officer, agent, or employee of any registered entity otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in section 6(b) of this Act, make and enter an order directing that such registered entity, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than $500,000 for each such violation, or, in any case of manipulation or attempted manipulation in violation of section 6(c), 6(d), or 9(a)(2), a civil penalty of not more than $1,000,000 for each such violation. If such registered entity, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such registered entity, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $500,000 or imprisoned for not less than six months nor more than one year, or both, except that if the failure or refusal to obey or comply with the order involved any offense under section 9(a)(2), the registered entity, director, officer, agent, or employee shall be guilty of a felony and, on conviction, shall be subject to penalties under section 9(a)(2). Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending registered entity or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider the gravity of the offense, and in the case of a registered entity shall further consider whether the amount of the

penalty will materially impair the ability of the registered entity to carry on its operations and duties.

* * * * * * *

SEC. 6d. (1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, [derivatives transaction execution facility,] clearinghouse, floor broker, or floor trader) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this Act, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this Act or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this Act, or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this Act or of any such rule, regulation, or order. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or action, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the Commission shall have the right to (A) intervene in the suit or action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this Act shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal antifraud statute of such State.

(8)(A) Nothing in this Act shall prohibit an authorized State official from proceeding in a State court against any person registered under this Act (other than a floor broker, floor trader, or registered futures association) for an alleged violation of any antifraud provision of this Act or any antifraud rule, regulation, or order issued pursuant to the Act.

(B) The State shall give the Commission prior written notice of its intent to proceed before instituting a proceeding in State court as described in this subsection and shall furnish the Commission with a copy of its complaint immediately upon instituting any such proceeding. The Commission shall have the right to (i) intervene in the proceeding and, upon doing so, shall be heard on all matters arising therein, and (ii) file a petition for appeal. The Commission or the defendant may remove such proceeding to the district court of the United States for the proper district by following the procedure for removal otherwise provided by law, except that the petition for removal shall be filed within sixty days after service of the summons and complaint upon the defendant. The Commission shall have the right to appear as amicus curiae in any such proceeding.

* * * * * * *

SEC. 8. (a)(1) For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Commission may make such investigations as it deems necessary to ascertain the facts regarding the operations of boards of trade and other persons subject to the provisions of this Act. The Commission may publish from time to time the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public: *Provided,* That except as otherwise specifically authorized in this Act, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers: *Provided further,* That the Commission may withhold from public disclosure any data or information concerning or obtained in connection with any pending investigation of any person. The Commission shall not be compelled to disclose any information or data obtained from a foreign futures authority if—

(A) the foreign futures authority has in good faith determined and represented to the Commission that disclosure of such information or data by that foreign futures authority would violate the laws applicable to that foreign futures authority; and

(B) the Commission obtains such information pursuant to—

(i) such procedure as the Commission may authorize for use in connection with the administration or enforcement of this Act; or

(ii) a memorandum of understanding with that foreign futures authority;

except that nothing in this subsection shall prevent the Commission from disclosing publicly any information or data obtained by the Commission from a foreign futures authority when such disclosure is made in connection with a congressional proceeding, an administrative or judicial proceeding commenced by the United States or the Commission, in any receivership proceeding involving a receiver appointed in a judicial proceeding commenced by the United States or the Commission, or in any proceeding under title 11 of the United States Code in which the Commission has intervened or in which the Commission has the right to appear and be heard. Nothing in this subsection shall be construed to authorize the Commission to withhold information or data from Congress. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of section 552.

(2) In conducting investigations authorized under this subsection or any other provision of this Act, the Commission shall continue, as the Commission determines necessary, to request the assistance of and cooperate with the appropriate Federal agencies in the conduct of such investigations, including undercover operations by such agencies. The Commission and the Department of Justice shall assess the effectiveness of such undercover operations and, within two years of the date of enactment of the Futures Trading Practices Act of 1992, shall recommend to Congress any additional undercover or other authority for the Commission that the Commission or the Department of Justice believes to be necessary.

(3) The Commission shall provide the Securities and Exchange Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any futures commission merchant or introducing broker registered pursuant to section 4f(a)(2), any floor broker or floor trader exempt from registration pursuant to section 4f(a)(3), any associated person exempt from registration pursuant to section 4k(6), or any board of trade designated as a contract market pursuant to section 5f.

(b) The Commission may disclose publicly any data or information that would separately disclose the market positions, business transactions, trade secrets, or names of customers of any person when such disclosure is made in connection with a congressional proceeding, in an administrative or judicial proceeding brought under this Act, in any receivership proceeding involving a receiver appointed in a judicial proceeding brought under this Act, or in any bankruptcy proceeding in which the Commission has intervened or in which the Commission has the right to appear and be heard under title 11 of the United States Code. This subsection shall not apply to the disclosure of data or information obtained by the Commission from a foreign futures authority.

(c) The Commission may make or issue such reports as it deems necessary, or such opinions or orders as may be required under other provisions of law, relative to the conduct of any registered entity or to the transactions of any person found guilty of violating the provisions of this Act or the rules, regulations, or orders of the Commission thereunder in proceedings brought under section 6 of

this Act. In any such report or opinion, the Commission may set forth the facts as to any actual transaction or any information referred to in subsection (b) of this section, if such facts or information have previously been disclosed publicly in connection with a congressional proceeding, or in an administrative or judicial proceeding brought under this Act.

(d) The Commission, upon its own initiative or in cooperation with existing governmental agencies, shall investigate the marketing conditions of commodities and commodity products and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. It shall also compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such other methods as it deems most effective, information respecting the commodity markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

(e) The Commission may disclose and make public, where such information has previously been disclosed publicly in accordance with the provisions of this section, the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Commission has information, and any other information in the possession of the Commission relating to the amount of commodities purchased or sold by each such trader. Upon the request of any committee of either House of Congress, acting within the scope of its jurisdiction, the Commission shall furnish to such committee the names and addresses of all traders on such boards of trade with respect to whom the Commission has information, and any other information in the possession of the Commission relating to the amount of any commodity purchased or sold by each such trader. Upon the request of any department or agency of the Government of the United States, acting within the scope of its jurisdiction, the Commission may furnish to such department or agency any information in the possession of the Commission obtained in connection with the administration of this Act. However, any information furnished under this subsection to any Federal department or agency shall not be disclosed by such department or agency except in any action or proceeding under the laws of the United States to which it, the Commission, or the United States is a party. Upon the request of any department or agency of any State or any political subdivision thereof, acting within the scope of its jurisdiction, any foreign futures authority, or any department or agency of any foreign government or any political subdivision thereof, acting within the scope of its jurisdiction, the Commission may furnish to such foreign futures authority, department or agency any information in the possession of the Commission obtained in connection with the administration of this Act. Any information furnished to any department or agency of any State or political subdivision thereof shall not be disclosed by such department or agency except in connection with an adjudicatory action or proceeding brought under this Act or the laws of such State or political subdivision to which such State or political subdivision or any department or agency thereof is a party. The Commission shall not furnish any information to a foreign futures authority or to a department, central bank and ministries, or agency of a foreign government or political subdivision thereof unless the Com-

mission is satisfied that the information will not be disclosed by such foreign futures authority, department, central bank and ministries, or agency except in connection with an adjudicatory action or proceeding brought under the laws of such foreign government or political subdivision to which such foreign government or political subdivision or any department or agency thereof, or foreign futures authority is a party.

(f) The Commission shall disclose information in its possession pursuant to a subpoena or summons only if—

(1) a copy of the subpoena or summons has been mailed to the last known home or business address of the person who submitted the information that is the subject of the subpoena or summons, if the address is known to the Commission, or, if such mailing would be unduly burdensome, the Commission provides other appropriate notice of the subpoena or summons to such person, and

(2) at least fourteen days have expired from the date of such mailing of the subpoena or summons, or such other notice.

This subsection shall not apply to congressional subpoenas or congressional requests for information.

(g) The Commission shall provide any registration information maintained by the Commission on any registrant upon reasonable request made by any department or agency of any State or any political subdivision thereof. Whenever the Commission determines that such information may be appropriate for use by any department or agency of a State or political subdivision thereof, the Commission shall provide such information without request.

(h) The Commission shall submit to Congress a written report within one hundred and twenty days after the end of each fiscal year detailing the operations of the Commission during such fiscal year. The Commission shall include in such report such information, data, and legislative recommendations as it deems advisable with respect to the administration of this Act and its powers and functions under this Act.

(i) The Comptroller General of the United States shall conduct reviews and audits of the Commission and make reports thereon. For the purpose of conducting such reviews and audits, the Comptroller General shall be furnished such information regarding the powers, duties, organizations, transactions, operations, and activities of the Commission as the Comptroller General may require and the Comptroller General and the duly authorized representatives of the Comptroller General shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of the Commission, except that in reports the Comptroller General shall not include data and information that would separately disclose the business transactions of any person and trade secrets or names of customers, although such data shall be provided upon request by any committee of either House of Congress acting within the scope of its jurisdiction.

(j) DISCLOSURE OF REQUIRED DATA OF OTHER REGISTERED ENTITIES.—

(1) Except as provided in this subsection, the Commission may not be compelled to disclose any proprietary information

provided to the Commission, except that nothing in this subsection—

(A) authorizes the Commission to withhold information from Congress; or

(B) prevents the Commission from—

(i) complying with a request for information from any other Federal department or agency, any State or political subdivision thereof, or any foreign government or any department, agency, or political subdivision thereof requesting the report or information for purposes within the scope of its jurisdiction, upon an agreement of confidentiality to protect the information in a manner consistent with this paragraph and subsection (e); or

(ii) making a disclosure made pursuant to a court order in connection with an administrative or judicial proceeding brought under this Act, in any receivership proceeding involving a receiver appointed in a judicial proceeding brought under this Act, or in any bankruptcy proceeding in which the Commission has intervened or in which the Commission has the right to appear and be heard under title 11 of the United States Code.

(2) Any proprietary information of a commodity trading advisor or commodity pool operator ascertained by the Commission in connection with Form CPO-PQR, Form CTA-PR, and any successor forms thereto, shall be subject to the same limitations on public disclosure, as any facts ascertained during an investigation, as provided by subsection (a); provided, however, that the Commission shall not be precluded from publishing aggregate information compiled from such forms, to the extent such aggregate information does not identify any individual person or firm, or such person's proprietary information.

(3) For purposes of section 552 of title 5, United States Code, this subsection, and the information contemplated herein, shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(4) For purposes of the definition of proprietary information in paragraph (5), the records and reports of any client account or commodity pool to which a commodity trading advisor or commodity pool operator registered under this title provides services that are filed with the Commission on Form CPO-PQR, CTA-PR, and any successor forms thereto, shall be deemed to be the records and reports of the commodity trading advisor or commodity pool operator, respectively.

(5) For purposes of this section, proprietary information of a commodity trading advisor or commodity pool operator includes sensitive, non-public information regarding—

(A) the commodity trading advisor, commodity pool operator or the trading strategies of the commodity trading advisor or commodity pool operator;

(B) analytical or research methodologies of a commodity trading advisor or commodity pool operator;

(C) trading data of a commodity trading advisor or commodity pool operator; and

(D) computer hardware or software containing intellectual property of a commodity trading advisor or commodity pool operator;

SEC. 8a. The Commission is authorized—

(1) to register futures commission merchants, associated persons of futures commission merchants, introducing brokers, associated persons of introducing brokers, commodity trading advisors, associated persons of commodity trading advisors, commodity pool operators, associated persons of commodity pool operators, floor brokers, and floor traders upon application in accordance with rules and regulations and in the form and manner to be prescribed by the Commission, which may require the applicant, and such persons associated with the applicant as the Commission may specify, to be fingerprinted and to submit, or cause to be submitted, such fingerprints to the Attorney General for identification and appropriate processing, and in connection therewith to fix and establish from time to time reasonable fees and charges for registrations and renewals thereof: *Provided,* That notwithstanding any provision of this Act, the Commission may grant a temporary license to any applicant for registration with the Commission pursuant to such rules, regulations, or orders as the Commission may adopt, except that the term of any such temporary license shall not exceed six months from the date of its issuance;

(2) upon notice, but without a hearing and pursuant to such rules, regulations, or orders as the Commission may adopt, to refuse to register, to register conditionally, or to suspend or place restrictions upon the registration of, any person and with such a hearing as may be appropriate to revoke the registration of any person—

(A) if a prior registration of such person in any capacity has been suspended (and the period of such suspension has not expired) or has been revoked;

(B) if registration of such person in any capacity has been refused under the provisions of paragraph (3) of this section within five years preceding the filing of the application for registration or at any time thereafter;

(C) if such person is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction (except that registration may not be revoked solely on the basis of such temporary order, judgment, or decree), including an order entered pursuant to an agreement of settlement to which the Commission or any Federal or State agency or other governmental body is a party, from (i) acting as a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, associated person of any registrant under this Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investment adviser, investment company, or affiliated person or employee of any of the foregoing or (ii) engaging in or continuing any activity where such activity involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of

funds, securities or property, forgery, counterfeiting, false pretenses, bribery, gambling, or any transaction in or advice concerning contracts of sale of a commodity for future delivery, concerning matters subject to Commission regulation under section 4c or 19, or concerning securities;

(D) if such person has been convicted within ten years preceding the filing of the application for registration or at any time thereafter of any felony that (i) involves any transactions or advice concerning any contract of sale of a commodity for future delivery, or any activity subject to Commission regulation under section 4c or 19 of this Act, or concerning a security, (ii) arises out of the conduct of the business of a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, associated person of any registrant under this Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investment adviser, investment company, or an affiliated person or employee of any of the foregoing, (iii) involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, or (iv) involves the violation of section 152, 1001, 1341, 1342, 1343, 1503, 1623, 1961, 1962, 1963, or 2314, or chapter 25, 47, 95, or 96 of title 18, United States Code, or section 7201 or 7206 of the Internal Revenue Code of 1986;

(E) if such person, within ten years preceding the filing of the application or at any time thereafter, has been found in a proceeding brought by the Commission or any Federal or State agency or other governmental body, or by agreement of settlement to which the Commission or any Federal or State agency or other governmental body is a party, (i) to have violated any provision of this Act, 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 Advisers Act of 1940, the Investment Company Act of 1940, the Securities [Investors] *Investor* Protection Act of 1970, the Foreign Corrupt Practices Act of 1977, chapter 96 of title 18 of the United States Code, or any similar statute of a State or foreign jurisdiction, or any rule, regulation, or order under any such statutes, or the rules of the Municipal Securities Rulemaking Board where such violation involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, or (ii) to have willfully aided, abetted, counseled, commanded, induced, or procured such violation by any other person;

(F) if such person is subject to an outstanding order of the Commission denying privileges on any registered entity to such person, denying, suspending, or revoking such person's membership in any registered entity or registered futures association, or barring or suspending such person

from being associated with a registrant under this Act or with a member of a registered entity or with a member of a registered futures association;

(G) if, as to any of the matters set forth in this paragraph and paragraph (3), such person willfully made any materially false or misleading statement or omitted to state any material fact in such person's application or any update thereto; or

(H) if refusal, suspension, or revocation of the registration of any principal of such person would be warranted because of a statutory disqualification listed in this paragraph:

Provided, That such person may appeal from a decision to refuse registration, condition registration, suspend, revoke or to place restrictions upon registration made pursuant to the provisions of this paragraph in the manner provided in section 6(c) of this Act; and

Provided, further, That for the purposes of paragraphs (2) and (3) of this section, "principal" shall mean, if the person is a partnership, any general partner or, if the person is a corporation, any officer, director, or beneficial owner of at least 10 per centum of the voting shares of the corporation, and any other person that the Commission by rule, regulation, or order determines has the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over the activities of such person which are subject to regulation by the Commission;

(3) to refuse to register or to register conditionally any person, if it is found, after opportunity for hearing, that—

(A) such person has been found by the Commission or by any court of competent jurisdiction to have violated, or has consented to findings of a violation of, any provision of this Act, or any rule, regulation, or order thereunder (other than a violation set forth in paragraph (2) of this section), or to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any such provision;

(B) such person has been found by any court of competent jurisdiction or by any Federal or State agency or other governmental body, or by agreement of settlement to which any Federal or State agency or other governmental body is a party, (i) to have violated any provision of 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 Advisers Act of 1940, the Investment Company Act of 1940, the Securities [Investors] *Investor* Protection Act of 1970, the Foreign Corrupt Practices Act of 1977, or any similar statute of a State or foreign jurisdiction, or any rule, regulation, or order under any such statutes, or the rules of the Municipal Securities Rulemaking Board or (ii) to have willfully aided, abetted, counseled, commanded, induced, or procured such violation by any other person;

(C) such person failed reasonably to supervise another person, who is subject to such person's supervision, with a

view to preventing violations of this Act, or of any of the statutes set forth in subparagraph (B) of this paragraph, or of any of the rules, regulations, or orders thereunder, and the person subject to supervision committed such a violation: *Provided,* That no person shall be deemed to have failed reasonably to supervise another person, within the meaning of this subparagraph if (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person and (ii) such person has reasonably discharged the duties and obligations incumbent upon that person, as supervisor, by reason of such procedures and system, without reasonable cause to believe that such procedures and system were not being complied with;

(D) such person pleaded guilty to or was convicted of a felony other than a felony of the type specified in paragraph (2)(D) of this section, or was convicted of a felony of the type specified in paragraph (2)(D) of this section more than ten years preceding the filing of the application;

(E) such person pleaded guilty to or was convicted of any misdemeanor which (i) involves any transaction or advice concerning any contract of sale of a commodity for future delivery or any activity subject to Commission regulation under section 4c or 19 of this Act or concerning a security, (ii) arises out of the conduct of the business of a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, associated person of any registrant under this Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investment adviser, investment company, or an affiliated person or employee of any of the foregoing, (iii) involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, (iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25, 47, 95, or 96 of title 18, United States Code, or section 7203, 7204, 7205, or 7207 of the Internal Revenue Code of 1986;

(F) such person was debarred by any agency of the United States from contracting with the United States;

(G) such person willfully made any materially false or misleading statement or willfully omitted to state any material fact in such person's application or any update thereto, in any report required to be filed with the Commission by this Act or the regulations thereunder, in any proceeding before the Commission or in any registration disqualification proceeding;

(H) such person has pleaded nolo contendere to criminal charges of felonious conduct, or has been convicted in a State court, in a United States military court, or in a foreign court of conduct which would constitute a felony

under Federal law if the offense had been committed under Federal jurisdiction;

(I) in the case of an applicant for registration in any capacity for which there are minimum financial requirements prescribed under this Act or under the rules or regulations of the Commission, such person has not established that such person meets such minimum financial requirements;

(J) such person is subject to an outstanding order denying, suspending, or expelling such person from membership in a registered entity, a registered futures association, any other self-regulatory organization, or any foreign regulatory body that the Commission recognizes as having a comparable regulatory program or barring or suspending such person from being associated with any member or members of such registered entity, association, self-regulatory organization, or foreign regulatory body;

(K) such person has been found by any court of competent jurisdiction or by any Federal or State agency or other governmental body, or by agreement of settlement to which any Federal or State agency or other governmental body is a party, (i) to have violated any statute or any rule, regulation, or order thereunder which involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling or (ii) to have willfully aided, abetted, counseled, commanded, induced or procured such violation by any other person;

(L) such person has associated with such person any other person and knows, or in the exercise of reasonable care should know, of facts regarding such other person that are set forth as statutory disqualifications in paragraph (2) of this section, unless such person has notified the Commission of such facts and the Commission has determined that such other person should be registered or temporarily licensed;

(M) there is other good cause; or

(N) any principal, as defined in paragraph (2) of this section, of such person has been or could be refused registration:

Provided, That pending final determination under this paragraph, registration shall not be granted: *Provided further,* That such person may appeal from a decision to refuse registration or to condition registration made pursuant to this paragraph in the manner provided in section 6(c) of this Act;

(4) in accordance with the procedure provided for in section 6(c) of this Act, to suspend, revoke, or place restrictions upon the registration of any person registered under this Act if cause exists under paragraph (3) of this section which would warrant a refusal of registration of such person, and to suspend or revoke the registration of any futures commission merchant or introducing broker who shall knowingly accept any order for the purchase or sale of any commodity for future delivery on or subject to the rules of any registered entity from any person if such person has been denied trading privileges

on any registered entity by order of the Commission under section 6(c) of this Act and the period of denial specified in such order shall not have expired: *Provided,* That such person may appeal from a decision to suspend, revoke, or place restrictions upon registration made pursuant to this paragraph in the manner provided in section 6(c) of this Act;

(5) to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this Act;

(6) to communicate to the proper committee or officer of any registered entity, registered futures association, or self-regulatory organization as defined in section 3(a)(26) of the Securities Exchange Act of 1934, notwithstanding the provisions of section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Commission disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors, or which is necessary or appropriate to effectuate the purposes of this Act: *Provided,* That any information furnished by the Commission under this paragraph shall not be disclosed by such registered entity, registered futures association, or self-regulatory organization except in any self-regulatory action or proceeding;

(7) to alter or supplement the rules of a registered entity insofar as necessary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a registered entity that such registered entity effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such registered entity has not made the changes so required, and that such changes are necessary or appropriate for *the protection of swaps traders and to assure fair dealing in swaps, for* the protection of persons producing, handling, processing, or consuming any commodity traded for future delivery on such registered entity, or the product or by-product thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such registered entity. Such rules, regulations, or orders may specify changes with respect to such matters as—

(A) terms or conditions in *swaps or* contracts of sale to be executed on or subject to the rules of such registered entity;

(B) the form or manner of execution of purchases and sales for future delivery *or swaps*;

(C) other trading requirements;

(D) margin requirements, provided that the rules, regulations, or orders shall—

(i) be limited to protecting the financial integrity of the derivatives clearing organization;

(ii) be designed for risk management purposes to protect the financial integrity of transactions; and

(iii) not set specific margin amounts;

(E) safeguards with respect to the financial responsibility of members;

(F) the manner, method, and place of soliciting business, including the content of such solicitations; and

(G) the form and manner of handling, recording, and accounting for customers' orders, transactions, and accounts;

(8) to make and promulgate such rules and regulations with respect to those persons registered under this Act, who are not members of a registered entity, as in the judgment of the Commission are reasonably necessary to protect the public interest and promote just and equitable principles of trade, including but not limited to the manner, method, and place of soliciting business, including the content of such solicitation;

(9) to direct the registered entity, whenever it has reason to believe that an emergency exists, to take such action as in the Commission's judgment is necessary to maintain or restore orderly trading in or liquidation of any *swap or* futures contract, including, but not limited to, the setting of temporary emergency margin levels on any *swap or* futures contract, and the fixing of limits that may apply to a market position acquired in good faith prior to the effective date of the Commission's action. The term "emergency" as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. Any action taken by the Commission under this paragraph shall be subject to review only in the United States Court of Appeals for the circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. Such review shall be based upon an examination of all the information before the Commission at the time the determination was made. The court reviewing the Commission's action shall not enter a stay or order of mandamus unless it has determined, after notice and hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Nothing herein shall be deemed to limit the meaning or interpretation given by a registered entity to the terms "market emergency", "emergency", or equivalent language in its own bylaws, rules, regulations, or resolutions;

(10) to authorize any person to perform any portion of the registration functions under this Act, in accordance with rules, notwithstanding any other provision of law, adopted by such person and submitted to the Commission for approval or, if applicable, for review pursuant to section 17(j) of this Act, and subject to the provisions of this Act applicable to registrations granted by the Commission; and

(11)(A) by written notice served on the person and pursuant to such rules, regulations, and orders as the Commission may adopt, to suspend or modify the registration of any person registered under this Act who is charged (in any information, indictment, or complaint authorized by a United States attorney or an appropriate official of any State) with the commission of or participation in a crime involving a violation of this Act, or

a violation of any other provision of Federal or State law that would reflect on the honesty or the fitness of the person to act as a fiduciary (including an offense specified in subparagraph (D) or (E) of paragraph (2)) that is punishable by imprisonment for a term exceeding one year, if the Commission determines that continued registration of the person may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission.

(B) Prior to the suspension or modification of the registration of a person under this paragraph, the person shall be afforded an opportunity for a hearing at which the Commission shall have the burden of showing that the continued registration of the person does, or is likely to, pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission.

(C) Any notice of suspension or modification issued under this paragraph shall remain in effect until such information, indictment, or complaint is disposed of or until terminated by the Commission.

(D) On disposition of such information, indictment, or complaint, the Commission may issue and serve on such person an order pursuant to paragraph (2) or (4) to suspend, restrict, or revoke the registration of such person.

(E) A finding of not guilty or other disposition of the charge shall not preclude the Commission from thereafter instituting any other proceedings under this Act.

(F) A person aggrieved by an order issued under this paragraph may obtain review of such order in the same manner and on the same terms and conditions as are provided in section 6(b).

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SEC. 9. (a) It shall be a felony punishable by a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for:

(1) Any person registered or required to be registered under this Act, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to such person's use or to the use of another, any money, securities, or property having a value in excess of $100, which was received by such person or any employee or agent thereof to margin, guarantee, or secure the trades or contracts of any customer or accruing to such customer as a result of such trades or contracts or which otherwise was received from any customer, client, or pool participant in connection with the business of such person. The word "value" as used in this paragraph means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning

crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 4, section 4b, subsections (a) [through (e)] *and (c)* of [subsection 4c] *section 4c*, section 4h, section 4o(1), or section 19.

(3) Any person knowingly to make, or cause to be made, any statement in any application, report, or document required to be filed under this Act or any rule or regulation thereunder or any undertaking contained in a registration statement required under this Act, or by any registered entity or registered futures association in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, or knowingly to omit any material fact required to be stated therein or necessary to make the statements therein not misleading.

(4) Any person willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, swap data repository, or futures association designated or registered under this Act acting in furtherance of its official duties under this Act.

(5) Any person willfully to violate any other provision of this Act, or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Act, but no person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation.

(6) Any person to abuse the end user clearing exemption under section 2(h)(4), as determined by the Commission.

(b) Any person convicted of a felony under this section shall be suspended from registration under this Act and shall be denied registration or reregistration for five years or such longer period as the Commission may determine, and barred from using, or participating in any manner in, any market regulated by the Commission for five years or such longer period as the Commission shall determine, on such terms and conditions as the Commission may prescribe, unless the Commission determines that the imposition of such suspension, denial of registration or reregistration, or market bar is not required to protect the public interest. The Commission may upon petition later review such disqualification and market bar and for good cause shown reduce the period thereof.

(c) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any Commissioner of the Commission or any employee or agent thereof, to participate, directly or indirectly, in any transaction in commodity futures or any transaction of the character of or which is commonly known to the trade as an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”, or any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin

contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract, or for any such person to participate, directly or indirectly, in any investment transaction in an actual commodity if nonpublic information is used in the investment transaction, if the investment transaction is prohibited by rule or regulation of the Commission, or if the investment transaction is effected by means of any instrument regulated by the Commission. The foregoing prohibitions shall not apply to any transaction or class of transactions that the Commission, by rule or regulation, has determined would not be contrary to the public interest or otherwise inconsistent with the purposes of this subsection.

(d) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution—(1) for any Commissioner of the Commission or any employee or agent thereof who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract; and (2) for any person to acquire such information from any Commissioner of the Commission or any employee or agent thereof and to use such information in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract.

(e) It shall be a felony for any person—

(1) who is an employee, member of the governing board, or member of any committee of a board of trade, registered entity, swap data repository, or registered futures association, in violation of a regulation issued by the Commission, willfully and knowingly to trade for such person's own account, or for or on

behalf of any other account, in contracts for future delivery or options thereon, or swaps, on the basis of, or willfully and knowingly to disclose for any purpose inconsistent with the performance of such person's official duties as an employee or member, any material nonpublic information obtained through special access related to the performance of such duties; or

(2) willfully and knowingly to trade for such person's own account, or for or on behalf of any other account, in contracts for future delivery or options thereon on the basis of any material nonpublic information that such person knows was obtained in violation of paragraph (1) from an employee, member of the governing board, or member of any committee of a board of trade, registered entity, or registered futures association.

Such felony shall be punishable by a fine of not more than $500,000, plus the amount of any profits realized from such trading or disclosure made in violation of this subsection, or imprisonment for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

SEC. 12. (a) The Commission may cooperate with any Department or agency of the Government, any State, territory, district, or possession, or department, agency, or political subdivision thereof, any foreign futures authority, any department or agency of a foreign government or political subdivision thereof, or any person.

(b)(1) The Commission shall have the authority to employ such investigators, special experts, Administrative Law Judges, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

(2) The Commission may employ experts and consultants in accordance with section 3109 of title 5 of the United States Code, and compensate such persons at rates not in excess of the maximum daily rate prescribed for GS–18 under section 5332 of title 5 of the United States Code.

(3) The Commission shall also have authority to make and enter into contracts with respect to all matters which in the judgment of the Commission are necessary and appropriate to effectuate the purposes and provisions of this Act, including, but not limited to, the rental of necessary space at the seat of Government and elsewhere.

(4) The Commission may request (in accordance with the procedures set forth in subchapter II of chapter 31 of title 5, United States Code) and the Office of Personnel Management shall authorize pursuant to the request, eight positions in the Senior Executive Service in addition to the number of such positions authorized for the Commission on the date of enactment of this sentence.

(c) All of the expenses of the Commissioners, including all necessary expenses for transportation incurred by them while on official business of the Commission, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Commission.

(d) There are authorized to be appropriated such sums as are necessary to carry out this Act for each of the fiscal years 2008 through [2013] *2019*.

(e) RELATION TO OTHER LAW, DEPARTMENTS, OR AGENCIES.—

(1) Nothing in this Act shall supersede or preempt—

(A) criminal prosecution under any Federal criminal statute;

(B) the application of any Federal or State statute (except as provided in paragraph (2)), including any rule or regulation thereunder, to any transaction in or involving any commodity, product, right, service, or interest—

(i) that is not conducted on or subject to the rules of a registered entity [or exempt board of trade];

(ii) (except as otherwise specified by the Commission by rule or regulation) that is not conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, its territories or possessions; or

(iii) that is not subject to regulation by the Commission under section 4c or 19; or

(C) the application of any Federal or State statute, including any rule or regulation thereunder, to any person required to be registered or designated under this Act who shall fail or refuse to obtain such registration or designation.

(2) This Act shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability) [in the case of—]

[(A) an electronic trading facility excluded under section 2(e) of this Act; and

[(B) an agreement, contract, or transaction that is excluded from this Act under section 2(c) or 2(f) of this Act or title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 4(c) of this Act (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act).] *in the case of an agreement, contract, or transaction that is excluded from this Act under section 2(c) or 2(f) of this Act or title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 4(c) of this Act (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act).*

(f)(1) On request from a foreign futures authority, the Commission may, in its discretion, provide assistance in accordance with this section if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws, rules or regulations relating to futures or options matters that the requesting authority administers or enforces. The Commission may conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States.

(2) In deciding whether to provide assistance under this subsection, the Commission shall consider whether—

(A) the requesting authority has agreed to provide reciprocal assistance to the Commission in futures and options matters; and

(B) compliance with the request would prejudice the public interest of the United States.

(3) Notwithstanding any other provision of law, the Commission may accept payment and reimbursement, in cash or in kind, from a foreign futures authority, or made on behalf of such authority, for necessary expenses incurred by the Commission, its members, and employees in carrying out any investigation, or in providing any other assistance to a foreign futures authority, pursuant to this section. Any payment or reimbursement accepted shall be considered a reimbursement to the appropriated funds of the Commission.

(g) Consistent with its responsibilities under section 18, the Commission is directed to facilitate the development and operation of computerized trading as an adjunct to the open outcry auction system. The Commission is further directed to cooperate with the Office of the United States Trade Representative, the Department of the Treasury, the Department of Commerce, and the Department of State in order to remove any trade barriers that may be imposed by a foreign nation on the international use of electronic trading systems.

(h) REGULATION OF SWAPS AS INSURANCE UNDER STATE LAW.—A swap—

(1) shall not be considered to be insurance; and

(2) may not be regulated as an insurance contract under the law of any State.

SEC. 13. (a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations, or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, or orders may be held responsible for such violation as a principal.

(b) Any person who, directly or indirectly, controls any person who has violated any provision of this Act or any of the rules, regulations, or orders issued pursuant to this Act may be held liable for such violation in any action brought by the Commission to the same extent as such controlled person. In such action, the Commission has the burden of proving that the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.

(c) Nothing in this Act shall be construed as requiring the Commission [or the Commission] to report minor violations of this Act for prosecution, whenever it appears that the public interest does not require such action.

SEC. 14. (a)(1) Any person complaining of any violation of any provision of this Act, or any rule, regulation, or order issued pursuant to this Act, by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding—

(A) actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award; and

(B) in the case of any action arising from a willful and intentional violation in the execution of an order on the floor of a registered entity, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(2)(A) An action may be brought under this subsection by any one or more persons described in this subsection for and in behalf of such person or persons and other persons similarly situated, if the Commission permits such actions pursuant to a final rule issued by the Commission.

(B) Not later than two hundred and seventy days after the date of enactment of this paragraph, the Commission shall propose and publish for public comment such rules as are necessary to carry out subparagraph (A). In developing such rules, the Commission shall consider the potential impact of such actions on resources available to the reparations system established under this Act and the relative merits of bringing such actions in Federal court.

(b) The Commission may promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section. Notwithstanding any other provision of law, such rules, regulations, and orders may prescribe, or otherwise condition, without limitation, the form, filing, and service of pleadings or orders, the nature and scope of discovery, counterclaims, motion practice (including the grounds for dismissal of any claim or counterclaim), hearings (including the waiver thereof, which may relate to the amount in controversy), rights of appeal, if any, and all other matters governing proceedings before the Commission under this section.

(c) In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided,* That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a

country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(d)(1) If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under subsection (e) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(2) A reparation award shall be directly enforceable in district court as if it were a judgment pursuant to section 1963 of title 28, United States Code. This paragraph shall operate retroactively from the effective date of its enactment, and shall apply to all reparation awards for which a proceeding described in paragraph (1) is commenced within 3 years of the date of the Commission's order.

(e) Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 6(c) of this Act. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(f) Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all registered entities and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of pay-

ment has been made: *Provided,* That if on appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(g) PREDISPUTE RESOLUTION AGREEMENTS FOR INSTITUTIONAL CUSTOMERS.—Nothing in this section prohibits a registered futures commission merchant from requiring a customer that is an eligible contract participant, as a condition to the commission merchant's conducting a transaction for the customer, to enter into an agreement waiving the right to file a claim under this section.

SEC. 15. CONSIDERATION OF COSTS AND BENEFITS AND ANTITRUST LAWS.

(a) COSTS AND BENEFITS.—

[(1) IN GENERAL.—Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission shall consider the costs and benefits of the action of the Commission.

[(2) CONSIDERATIONS.—The costs and benefits of the proposed Commission action shall be evaluated in light of—

[(A) considerations of protection of market participants and the public;

[(B) considerations of the efficiency, competitiveness, and financial integrity of futures markets;

[(C) considerations of price discovery;

[(D) considerations of sound risk management practices; and

[(E) other public interest considerations.]

(1) IN GENERAL.—Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission, through the Office of the Chief Economist, shall assess and publish in the regulation or order the costs and benefits, both qualitative and quantitative, of the proposed regulation or order, and the proposed regulation or order shall state its statutory justification.

(2) CONSIDERATIONS.—In making a reasoned determination of the costs and the benefits, the Commission shall evaluate—

(A) considerations of protection of market participants and the public;

(B) considerations of the efficiency, competitiveness, and financial integrity of futures and swaps markets;

(C) considerations of the impact on market liquidity in the futures and swaps markets;

(D) considerations of price discovery;

(E) considerations of sound risk management practices;

(F) available alternatives to direct regulation;

(G) the degree and nature of the risks posed by various activities within the scope of its jurisdiction;

(H) the costs of complying with the proposed regulation or order by all regulated entities, including a methodology for quantifying the costs (recognizing that some costs are difficult to quantify);

(I) whether the proposed regulation or order is inconsistent, incompatible, or duplicative of other Federal regulations or orders;

(J) the cost to the Commission of implementing the proposed regulation or order by the Commission staff, including a methodology for quantifying the costs;

(K) whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits (including potential economic and other benefits, distributive impacts, and equity); and

(L) other public interest considerations.

(3) APPLICABILITY.—This subsection does not apply to the following actions of the Commission:

(A) An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission.

(B) An emergency action.

(C) A finding of fact regarding compliance with a requirement of the Commission.

(4) JUDICIAL REVIEW.—Notwithstanding section 24(d), a court shall affirm a Commission assessment of costs and benefits under this subsection, unless the court finds the assessment to be an abuse of discretion.

(b) ANTITRUST LAWS.—The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this Act, as well as the policies and purposes of this Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act.

* * * * * * *

SEC. 17. (a) Any association of persons may be registered with the Commission as a registered futures association pursuant to subsection (b) of this section, under the terms and conditions hereinafter provided in this section, by filing with the Commission for review and approval a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this section collectively referred to as the "rules of the association".

(b) An applicant association shall not be registered as a futures association unless the Commission finds, under standards established by the Commission, that—

(1) such association is in the public interest and that it will be able to comply with the provisions of this section and the

rules and regulations thereunder and to carry out the purposes of this section;

(2) the rules of the association provide that any person registered under this Act, registered entity, or any other person designated pursuant to the rules of the Commission as eligible for membership may become a member of such association, except such as are excluded pursuant to paragraph (3) or (4) of this subsection, or a rule of the association permitted under this paragraph. The rules of the association may restrict membership in such association on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest and to carry out the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to, or refuse to continue in such association any person if (i) such person, whether prior or subsequent to becoming registered as such, or (ii) any person associated within the meaning of "associated person" as set forth in section 4k of this Act, whether prior or subsequent to becoming so associated, has been and is suspended or expelled from a registered entity or has been and is barred or suspended from being associated with all members of such registered entity, for violation of any rule of such registered entity;

(3) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall be admitted to or continued in membership in such association, if such person—

(A) has been and is suspended or expelled from a registered futures association or from a registered entity or has been and is barred or suspended from being associated with all members of such association or from being associated with all members of such registered entity, for violation of any rule of such association or registered entity which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade;

(B) is subject to an order of the Commission denying, suspending, or revoking his registration pursuant to section 6(c) of this Act, or expelling or suspending him from membership in a registered futures association or a registered entity, or barring or suspending him from being associated with a futures commission merchant;

(C) whether prior or subsequent to becoming a member, by his conduct while associated with a member, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such member, and in entering such a suspension, expulsion, or order, the Commission or any such registered entity or association shall have jurisdiction to determine whether or not any person was a cause thereof; or

(D) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person who would be ineligible for admission to or continuance in membership under clause (A), (B), or (C) of this paragraph;

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall become a member and no natural person shall become a person associated with a member, unless such person is qualified to become a member or a person associated with a member in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and in the case of a member, the financial responsibility of such a member. For the purpose of defining such standards and the application thereof, such rules may—

(A) appropriately classify prospective members (taking into account relevant matters, including type or nature of business done) and persons proposed to be associated with members;

(B) specify that all or any portion of such standard shall be applicable to any such class;

(C) require persons in any such class to pass examinations prescribed in accordance with such rules;

(D) provide that persons in any such class other than prospective members and partners, officers and supervisory employees (which latter term may be defined by such rules and as so defined shall include branch managers of members) of members, may be qualified solely on the basis of compliance with specified standards of training and such other qualifications as the association finds appropriate;

(E) provide that applications to become a member or a person associated with a member shall set forth such facts as the association may prescribe as to the training, experience, and other qualifications (including, in the case of an applicant for membership, financial responsibility) of the applicant and that the association shall adopt procedures for verification of qualifications of the applicant, which may require the applicant to be fingerprinted and to submit, or cause to be submitted, such fingerprints to the Attorney General for identification and appropriate processing. Notwithstanding any other provision of law, such an association may receive from the Attorney General all the results of such identification and processing; and

(F) require any class of persons associated with a member to be registered with the association in accordance with procedures specified by such rules (and any application or document supplemental thereto required by such rules of a person seeking to be registered with such association shall, for the purposes of section 6(c) of the Act, be deemed an application required to be filed under this section);

(5) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs;

(6) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration;

(7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, in general, to protect the public interest, and to remove impediments to and perfect the mechanism of free and open futures trading;

(8) the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or being suspended or barred from being associated with all members, or any other fitting penalty, for any violation of its rules;

(9) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and persons associated with members and the denial of membership to any person seeking membership therein or the barring of any person from being associated with a member. In any proceeding to determine whether any member or other person shall be disciplined, such rules shall require that specific charges be brought; that such member or person shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include—

(A) a statement setting forth any act or practice in which such member or other person may be found to have engaged, or which such member or other person may be found to have omitted;

(B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation;

(C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade; and

(D) a statement setting forth the penalty imposed**[**;**]**.

In any proceeding to determine whether a person shall be denied membership or whether any person shall be barred from being associated with a member, such rules shall provide that the person shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial or bar which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial or bar is based;

(10) the rules of the association provide a fair, equitable, and expeditious procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (A) the use of such procedure by a customer shall be voluntary, (B) the term "customer" as used in this paragraph shall not include another member of the association, and (C) in the case of a claim aris-

ing from a violation in the execution of an order on the floor of a registered entity, such procedure shall provide, to the extent appropriate—

(i) for payment of actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award; and

(ii) where the violation is willful and intentional, for payment to the customer of punitive or exemplary damages, in addition to losses proximately caused by the violation, in an amount equal to no more than two times the amount of such losses. If punitive or exemplary damages are awarded against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of such order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy the award of punitive or exemplary damages if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation; **[**and**]**

(11) such association provides for meaningful representation on the governing board of such association of a diversity of membership interests and provides that no less than 20 percent of the regular voting members of such board be comprised of qualified nonmembers of or persons who are not regulated by such association**[**.**]***;*

(12)**[**(A)**]** such association provides on all major disciplinary committees for a diversity of membership sufficient to ensure fairness and to prevent special treatment or preference for any person in the conduct of disciplinary proceedings and the assessment of penalties**[**.**]***; and*

(13) **[**A**]** *a* major disciplinary committee hearing a disciplinary matter shall include—

(A) qualified persons representing segments of the association membership other than that of the subject of the proceeding; and

(B) where appropriate to carry out the purposes of this paragraph, qualified persons who are not members of the association.

(c) The Commission may, after notice and opportunity for hearing, suspend the registration of any futures association if it finds that the rules thereof do not conform to the requirements of the Commission, and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements.

(d) In addition to the fees and charges authorized by section 8a(1) of this Act, each person registered under this Act, who is not a member of a futures association registered pursuant to this sec-

tion, shall pay to the Commission such reasonable fees and charges as may be necessary to defray the costs of additional regulatory duties required to be performed by the Commission because such person is not a member of a registered futures association. The Commission shall establish such additional fees and charges by rules and regulations.

(e) Any person registered under this Act, who is not a member of a futures association registered pursuant to this section, in addition to the other requirements and obligations of this Act and the regulations thereunder shall be subject to such other rules and regulations as the Commission may find necessary to protect the public interest and promote just and equitable principles of trade.

(f) Upon filing of an application for registration pursuant to subsection (a), the Commission may by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration.

(g) A registered futures association may, upon such reasonable notice as the Commission may deem necessary in the public interest, withdraw from registration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe.

(h)(1) If any registered futures association takes any final disciplinary action against a member of the association or a person associated with a member, denies admission to any person seeking membership therein, or bars any person from being associated with a member, the association promptly shall give notice thereof to such member or person and file notice thereof with the Commission. The notice shall be in such form and contain such information as the Commission, by rule or regulation, may prescribe as necessary or appropriate to carry out the purposes of this Act.

(2) Any action with respect to which a registered futures association is required by paragraph (1) to file notice shall be subject to review by the Commission on its motion, or on application by any person aggrieved by the action. Such application shall be filed within 30 days after the date such notice is filed with the Commission and received by the aggrieved person, or within such longer period as the Commission may determine.

(3)(A) Application to the Commission for review, or the institution of review by the Commission on its own motion, shall not operate as a stay of such action unless the Commission otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments).

(B) The Commission shall establish procedures for expedited consideration and determination of the question of a stay.

(i)(1) In a proceeding to review a final disciplinary action taken by a registered futures association against a member thereof or a person associated with a member, after appropriate notice and opportunity for a hearing (which hearing may consist solely of consideration of the record before the association and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction imposed by the association)—

(A) if the Commission finds that—

(i) the member or person associated with a member has engaged in the acts or practices, or has omitted the acts, that the association has found the member or person to have engaged in or omitted;

(ii) the acts or practices, or omissions to act, are in violation of the rules of the association specified in the determination of the association; and

(iii) such rules are, and were applied in a manner, consistent with the purposes of this Act,

the Commission, by order, shall so declare and, as appropriate, affirm the sanction imposed by the association, modify the sanction in accordance with paragraph (2), or remand the case to the association for further proceedings; or

(B) if the Commission does not make any such finding, the Commission, by order, shall set aside the sanction imposed by the association and, if appropriate, remand the case to the association for further proceedings.

(2) If, after a proceeding under paragraph (1), the Commission finds that any penalty imposed on a member or person associated with a member is excessive or oppressive, having due regard for the public interest, the Commission, by order, shall cancel, reduce, or require the remission of the penalty.

(3) In a proceeding to review the denial of membership in a registered futures association or the barring of any person from being associated with a member, after appropriate notice and opportunity for a hearing (which hearing may consist solely of consideration of the record before the association and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the action of the association)—

(A) if the Commission finds that—

(i) the specific grounds on which the denial or bar is based exist in fact;

(ii) the denial or bar is in accordance with the rules of the association; and

(iii) such rules are, and were applied in a manner, consistent with the purposes of this Act,

the Commission, by order, shall so declare and, as appropriate, affirm or modify the action of the association, or remand the case to the association for further proceedings; or

(B) if the Commission does not make any such finding, the Commission, by order, shall set aside the action of the association and require the association to admit the applicant to membership or permit the person to be associated with a member, or, as appropriate, remand the case to the association for further proceedings.

(4) Any person aggrieved by a final order of the Commission entered under this subsection may file a petition for review with a United States court of appeals in the same manner as provided in section 6(c).

(j) Every registered futures association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registra-

tion statement and documents filed pursuant to subsection (a) of this section. A registered futures association shall submit to the Commission any change in or addition to its rules and may make such rules effective ten days after receipt of such submission by the Commission unless, within the ten-day period, the registered futures association requests review and approval thereof by the Commission or the Commission notifies such registered futures association in writing of its determination to review such rules for approval. The Commission shall approve such rules if such rules are determined by the Commission to be consistent with the requirements of this section and not otherwise in violation of this Act or the regulations issued pursuant to this Act, and the Commission shall disapprove, after appropriate notice and opportunity for hearing, any such rule which the Commission determines at any time to be inconsistent with the requirements of this section or in violation of this Act or the regulations issued pursuant to this Act. If the Commission does not approve or institute disapproval proceedings with respect to any rule within one hundred and eighty days after receipt or within such longer period of time as the registered futures association may agree to, or if the Commission does not conclude a disapproval proceeding with respect to any rule within one year after receipt or within such longer period as the registered futures association may agree to, such rule may be made effective by the registered futures association until such time as the Commission disapproves such rule in accordance with this subsection.

(k)(1) The Commission is authorized by order to abrogate any rule of a registered futures association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or effectuate the purposes of this section.

(2) The Commission may in writing request any registered futures association to adopt any specified alteration or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested, or with such modifications of such alteration or supplement as it deems necessary if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or to effectuate the purposes of this section, with respect to—

(A) the basis for, and procedure in connection with, the denial of membership or the barring from being associated with a member or the disciplining of members or persons associated with members, or the qualifications required for members or natural persons associated with members or any class thereof:

(B) the method for adoption of any change in or addition to the rules of the association;

(C) the method of choosing officers and directors.

(l) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to revoke the registration of a registered futures association, if the Commission finds that such association has violated any provisions of this Act or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this Act;

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered futures association any member thereof, or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof, if the Commission finds that such member or person—

(A) has violated any provision of this Act or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this Act or any rule or regulation thereunder; or

(B) has willfully violated any provision of this Act, as amended, or of any rule, regulation, or order thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule, regulation, or order; and

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered futures association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Notwithstanding any other provision of law, the Commission may approve rules of futures associations that, directly or indirectly, require persons eligible for membership in such associations to become members of at least one such association, upon a determination by the Commission that such rules are necessary or appropriate to achieve the purposes and objectives of this Act.

(n) The Commission shall include in its annual reports to Congress information concerning any futures associations registered pursuant to this section and the effectiveness of such associations in regulating the practices of the members.

(o)(1) The Commission may require any futures association registered pursuant to this section to perform any portion of the registration functions under this Act with respect to each member of the association other than a registered entity and with respect to each associated person of such member, in accordance with rules, notwithstanding any other provision of law, adopted by such futures association and submitted to the Commission pursuant to section 17(j) of this Act, and subject to the provisions of this Act applicable to registrations granted by the Commission.

(2) In performing any Commission registration function authorized by the Commission under section 8a(10), this section, or any other applicable provisions of this Act, a futures association may

issue orders (A) to refuse to register any person, (B) to register conditionally any person, (C) to suspend the registration of any person, (D) to place restrictions on the registration of any person, or (E) to revoke the registration of any person. If such an order is the final decision of the futures association, any person against whom the order has been issued may petition the Commission to review the decision. The Commission may on its own initiative or upon petition decline review or grant review and affirm, set aside, or modify such an order of the futures association; and the findings of the futures association as to the facts, if supported by the weight of the evidence, shall be conclusive. Unless the Commission grants review under this section of an order concerning registration issued by a futures association, the order of the futures association shall be considered to be an order issued by the Commission.

(3) Nothing in this section shall affect the Commission's authority to review the granting of a registration application by a registered futures association that is performing any Commission registration function authorized by the Commission under section 8a(10), this section, or any other applicable provision of this Act.

(4) If a person against whom a futures association has issued a registration order under this subsection petitions the Commission to review that order and the Commission declines to take review, such person may file a petition for review with a United States court of appeals, in accordance with section 6(c) of this Act.

(p) Notwithstanding any other provision of this section, each futures association registered under this section on the date of enactment of the Futures Trading Act of 1982, shall adopt and submit for Commission approval not later than ninety days after such date of enactment, and each futures association that applies for registration after such date shall adopt and include with its application for registration, rules of the association that require the association to—

(1) establish training standards and proficiency testing for persons involved in the solicitation of transactions subject to the provisions of this Act, supervisors of such persons, and all persons for which it has registration responsibilities, and a program to audit and enforce compliance with such standards;

(2) establish minimum capital, segregation, and other financial requirements applicable to its members for which such requirements are imposed by the Commission and implement a program to audit and enforce compliance with such requirements, except that such requirements may not be less stringent an those imposed on such firms by this Act or by Commission regulation;

(3) establish minimum standards governing the sales practices of its members and persons associated therewith for transactions subject to the provisions of this Act; and

(4) establish special supervisory guidelines to protect the public interest relating to the solicitation by telephone of new futures or options accounts and make such guidelines applicable to those members determined to require such guidelines in accordance with standards established by the Commission consistent with this Act. Such guidelines may include a requirement that, with respect to a customer with no previous futures or commodity options trading experience, the member may not

enter an order for the account of such customer for a period of three days following opening of the account and receipt of a signed acknowledgment by the customer of receipt of a risk disclosure statement.

(q) (1) The Commission shall issue regulations requiring each registered futures association to establish and make available to the public a schedule of major violations of any rule within the disciplinary jurisdiction of such registered futures association.

(2) The regulations issued by the Commission pursuant to this subsection shall prohibit, for a period of time to be determined by the Commission, any member of a registered futures association who is found to have committed any major violation from service on the governing board of any registered futures association or registered entity, or on any disciplinary committee thereof.

[(q)**]** *(r)* Each futures association registered under this section shall develop a comprehensive program that fully implements the rules approved by the Commission under this section as soon as practicable but not later than September 30, 1985, in the case of any futures association registered on the date of enactment of the Futures Trading Act of 1982, and not later than two and one-half years after the date of registration in the case of any other futures association registered under this section.

[(r)**]** *(s)* Consistent with this Act, each futures association registered under this section shall issue such rules as are necessary to avoid duplicative or conflicting rules applicable to any futures commission merchant registered with the Commission pursuant to section 4f(a) of this Act (except paragraph (2) thereof), that is also registered with the Securities and Exchange Commission pursuant to section 15(b) of the Securities and Exchange Act of 1934 (except paragraph (11) thereof), with respect to the application of—

(1) rules of such futures association of the type specified in section 4d(e) involving security futures products; and

(2) similar rules of national securities associations registered pursuant to section 15A(a) of the Securities and Exchange Act of 1934 involving security futures products.

(t) A registered futures association shall—

(1) require each member of the association that is a futures commission merchant to maintain written policies and procedures regarding the maintenance of—

(A) the residual interest of the member, as described in section 1.23 of title 17, Code of Federal Regulations, in any customer segregated funds account of the member, as identified in section 1.20 of such title, and in any foreign futures and foreign options customer secured amount funds account of the member, as identified in section 30.7 of such title; and

(B) the residual interest of the member, as described in section 22.2(e)(4) of such title, in any cleared swaps customer collateral account of the member, as identified in section 22.2 of such title; and

(2) establish rules to govern the withdrawal, transfer or disbursement by any member of the association, that is a futures commission merchant, of the member's residual interest in customer segregated funds as provided in such section 1.20, in foreign futures and foreign options customer secured amount

funds, identified as provided in such section 30.7, and from a cleared swaps customer collateral, identified as provided in such section 22.2.

(u) A registered futures association shall require any member of the association that is a futures commission merchant to—

(1) use an electronic system or systems to report financial and operational information to the association or another party designated by the registered futures association, including information related to customer segregated funds, foreign futures and foreign options customer secured amount funds accounts, and cleared swaps customer collateral, in accordance with such terms, conditions, documentation standards, and regular time intervals as are established by the registered futures association;

(2) instruct each depository, including any bank, trust company, derivatives clearing organization, or futures commission merchant, holding customer segregated funds under section 1.20 of title 17, Code of Federal Regulations, foreign futures and foreign options customer secured amount funds under section 30.7 of such title, or cleared swap customer funds under section 22.2 of such title, to report balances in the futures commission merchant's section 1.20 customer segregated funds, section 30.7 foreign futures and foreign options customer secured amount funds, and section 22.2 cleared swap customer funds, to the registered futures association or another party designated by the registered futures association, in the form, manner, and interval prescribed by the registered futures association; and

(3) hold section 1.20 customer segregated funds, section 30.7 foreign futures and foreign options customer secured amount funds and section 22.2 cleared swaps customer funds in a depository that reports the balances in these accounts of the futures commission merchant held at the depository to the registered futures association or another party designated by the registered futures association in the form, manner, and interval prescribed by the registered futures association.

(v) A futures commission merchant that has adjusted net capital in an amount less than the amount required by regulations established by the Commission or a self-regulatory organization of which the futures commission merchant is a member shall immediately notify the Commission and the self-regulatory organization of this occurrence.

(w) A futures commission merchant that does not hold a sufficient amount of funds in segregated accounts for futures customers under section 1.20 of title 17, Code of Federal Regulations, in foreign futures and foreign options secured amount accounts for foreign futures and foreign options secured amount customers under section 30.7 of such title, or in segregated accounts for cleared swap customers under section 22.2 of such title, as required by regulations established by the Commission or a self-regulatory organization of which the futures commission merchant is a member, shall immediately notify the Commission and the self-regulatory organization of this occurrence.

(x) Within such time period established by the Commission after the end of each fiscal year, a futures commission merchant shall file with the Commission a report from the chief compliance officer of

the futures commission merchant containing an assessment of the internal compliance programs of the futures commission merchant.

* * * * * * *

SEC. 20. (a) Notwithstanding title 11 of the United States Code, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11 of the United States Code, by rule or regulation—

(1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property;

(2) that certain cash, securities, other property, or commodity contracts are to be specifically identifiable to a particular customer in a specific capacity;

(3) the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition under such chapter, including the payment and allocation of margin with respect to commodity contracts not specifically identifiable to a particular customer pending their orderly liquidation;

(4) any persons to which customer property and commodity contracts may be transferred under section 766 of title 11 of the United States Code; **[**and**]**

(5) how the net equity of a customer is to be determined**[**.**]***; and*

(6) that cash, securities, or other property of the estate of a commodity broker, including the trading or operating accounts of the commodity broker and commodities held in inventory by the commodity broker, shall be included in customer property, subject to any otherwise unavoidable security interest, or otherwise unavoidable contractual offset or netting rights of creditors (including rights set forth in a rule or bylaw of a derivatives clearing organization or a clearing agency) in respect of such property, but only to the extent that the property that is otherwise customer property is insufficient to satisfy the net equity claims of public customers (as such term may be defined by the Commission by rule or regulation) of the commodity broker.

(b) As used in this section, the terms "commodity broker", "commodity contract", "customer", "customer property", "member property", "net equity", and "security" have the meanings assigned such terms for the purposes of subchapter IV of chapter 7 of title 11 of the United States Code.

(c) The Commission shall exercise its authority to ensure that securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of subchapter IV of chapter 7 of title 11 of the United States Code.

SEC. 21. SWAP DATA REPOSITORIES.

(a) REGISTRATION REQUIREMENT.—

(1) REQUIREMENT; AUTHORITY OF DERIVATIVES CLEARING ORGANIZATION.—

(A) IN GENERAL.—It shall be unlawful for any person, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instru-

mentality of interstate commerce to perform the functions of a swap data repository.

(B) REGISTRATION OF DERIVATIVES CLEARING ORGANIZATIONS.—A derivatives clearing organization may register as a swap data repository.

(2) INSPECTION AND EXAMINATION.—Each registered swap data repository shall be subject to inspection and examination by any representative of the Commission.

(3) COMPLIANCE WITH CORE PRINCIPLES.—

(A) IN GENERAL.—To be registered, and maintain registration, as a swap data repository, the swap data repository shall comply with—

(i) the requirements and core principles described in this section; and

(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF SWAP DATA REPOSITORY.—Unless otherwise determined by the Commission by rule or regulation, a swap data repository described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the swap data repository complies with the core principles described in this section.

(b) STANDARD SETTING.—

(1) DATA IDENTIFICATION.—

(A) IN GENERAL.—In accordance with subparagraph (B), the Commission shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository.

(B) REQUIREMENT.—In carrying out subparagraph (A), the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.

(2) DATA COLLECTION AND MAINTENANCE.—The Commission shall prescribe data collection and data maintenance standards for swap data repositories.

(3) COMPARABILITY.—The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on derivatives clearing organizations in connection with their clearing of swaps.

(c) DUTIES.—A swap data repository shall—

(1) accept data prescribed by the Commission for each swap under subsection (b);

(2) confirm with both counterparties to the swap the accuracy of the data that was submitted;

(3) maintain the data described in paragraph (1) in such form, in such manner, and for such period as may be required by the Commission;

(4)(A) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity); and

(B) provide the information described in paragraph (1) in such form and at such frequency as the Commission may require to comply with the public reporting requirements contained in section 2(a)(13);

(5) at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing swap data, including compliance and frequency of end user clearing exemption claims by individual and affiliated entities;

(6) maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity; and

(7) on a confidential basis pursuant to section 8, upon request, and after notifying the Commission of the request, make available all data obtained by the swap data repository, including individual counterparty trade and position data, to—

(A) each appropriate prudential regulator;

(B) the Financial Stability Oversight Council;

(C) the Securities and Exchange Commission;

(D) the Department of Justice; and

(E) any other person that the Commission determines to be appropriate, including—

(i) foreign financial supervisors (including foreign futures authorities);

(ii) foreign central banks; and

(iii) foreign ministries; and

(8) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the organization.

[(d) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7)—

[(1) the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided; and

[(2) each entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 8.**]**

(d) CONFIDENTIALITY AGREEMENT.—Before the swap data repository may share information with any entity described in subsection (c)(7), the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 8 relating to the information on swap transactions that is provided.

(e) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—

(1) IN GENERAL.—Each swap data repository shall designate an individual to serve as a chief compliance officer.

(2) DUTIES.—The chief compliance officer shall—

(A) report directly to the board or to the senior officer of the swap data repository;

(B) review the compliance of the swap data repository with respect to the requirements and core principles described in this section;

(C) in consultation with the board of the swap data repository, a body performing a function similar to the board of the swap data repository, or the senior officer of the swap data repository, resolve any conflicts of interest that may arise;

(D) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(E) ensure compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

(F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(i) compliance office review;

(ii) look-back;

(iii) internal or external audit finding;

(iv) self-reported error; or

(v) validated complaint; and

(G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) ANNUAL REPORTS.—

(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(i) the compliance of the swap data repository of the chief compliance officer with respect to this Act (including regulations); and

(ii) each policy and procedure of the swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the swap data repository).

(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—

(i) accompany each appropriate financial report of the swap data repository that is required to be furnished to the Commission pursuant to this section; and

(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

(f) CORE PRINCIPLES APPLICABLE TO SWAP DATA REPOSITORIES.—

(1) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, a swap data repository shall not—

(A) adopt any rule or take any action that results in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.

(2) GOVERNANCE ARRANGEMENTS.—Each swap data repository shall establish governance arrangements that are transparent—

(A) to fulfill public interest requirements; and

(B) to support the objectives of the Federal Government, owners, and participants.

(3) CONFLICTS OF INTEREST.—Each swap data repository shall—

(A) establish and enforce rules to minimize conflicts of interest in the decision-making process of the swap data repository; and

(B) establish a process for resolving conflicts of interest described in subparagraph (A).

(4) ADDITIONAL DUTIES DEVELOPED BY COMMISSION.—

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

(B) CONSIDERATION OF EVOLVING STANDARDS.—In developing additional duties under subparagraph (A), the Commission may take into consideration any evolving standard of the United States or the international community.

(C) ADDITIONAL DUTIES FOR COMMISSION DESIGNEES.—The Commission shall establish additional duties for any registrant described in section [1a(48)] *1a(49)* in order to minimize conflicts of interest, protect data, ensure compliance, and guarantee the safety and security of the swap data repository.

(g) REQUIRED REGISTRATION FOR SWAP DATA REPOSITORIES.—Any person that is required to be registered as a swap data repository under this section shall register with the Commission regardless of whether that person is also licensed as a bank or registered with the Securities and Exchange Commission as a swap data repository.

(h) RULES.—The Commission shall adopt rules governing persons that are registered under this section.

SEC. 22. (a)(1) Any person (other than a registered entity or registered futures association) who violates this Act or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity) or any swap; or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract or any swap;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 4c of this Act (other than an option purchased or sold on a registered entity or other board of trade);

(ii) a contract subject to section 19 of this Act; or

(iii) an interest or participation in a commodity pool; or

(iv) a swap; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof or swap if the violation constitutes—

(i) the use or employment of, or an attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any ma-

nipulative device or contrivance in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act; or

(ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.

(2) Except as provided in subsection (b), the rights of action authorized by this subsection and by sections 5(d)(13), 5b(c)(2)(H), 14, and 17(b)(10) of this Act shall be the exclusive remedies under this Act available to any person who sustains loss as a result of any alleged violation of this Act. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.

(3) In any action arising from a violation in the execution of an order on the floor of a registered entity, the person referred to in paragraph (1) shall be liable for—

(A) actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award; and

(B) where the violation is willful and intentional, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(4) CONTRACT ENFORCEMENT BETWEEN ELIGIBLE COUNTERPARTIES.—

(A) IN GENERAL.—No hybrid instrument sold to any investor shall be void, voidable, or unenforceable, and no party to a hybrid instrument shall be entitled to rescind, or recover any payment made with respect to, the hybrid instrument under this section or any other provision of Federal or State law, based solely on the failure of the hybrid instrument to comply with the terms or conditions of section 2(f) or regulations of the Commission.

(B) SWAPS.—No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants shall be void, voidable, or unenforceable, and no party to such agreement, contract, or transaction shall be entitled to rescind, or recover any payment

made with respect to, the agreement, contract, or transaction under this section or any other provision of Federal or State law, based solely on the failure of the agreement, contract, or transaction—

(i) to meet the definition of a swap under section 1a; or

(ii) to be cleared in accordance with section 2(h)(1).

(5) LEGAL CERTAINTY FOR LONG-TERM SWAPS ENTERED INTO BEFORE THE DATE OF ENACTMENT OF THE WALL STREET TRANSPARENCY AND ACCOUNTABILITY ACT OF 2010.—

(A) EFFECT ON SWAPS.—Unless specifically reserved in the applicable swap, neither the enactment of the Wall Street Transparency and Accountability Act of 2010, nor any requirement under that Act or an amendment made by that Act, shall constitute a termination event, force majeure, illegality, increased costs, regulatory change, or similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend, or supplement 1 or more transactions under the swap.

(B) POSITION LIMITS.—Any position limit established under the Wall Street Transparency and Accountability Act of 2010 shall not apply to a position acquired in good faith prior to the effective date of any rule, regulation, or order under the Act that establishes the position limit; provided, however, that such positions shall be attributed to the trader if the trader's position is increased after the effective date of such position limit rule, regulation, or order.

(6) CONTRACT ENFORCEMENT FOR FOREIGN FUTURES CONTRACTS.—A contract of sale of a commodity for future delivery traded or executed on or through the facilities of a board of trade, exchange, or market located outside the United States for purposes of section 4(a) shall not be void, voidable, or unenforceable, and a party to such a contract shall not be entitled to rescind or recover any payment made with respect to the contract, based on the failure of the foreign board of trade to comply with any provision of this Act.

(b)(1)(A) A registered entity that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by section 5, 5b, 5c, 5h, or 21, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any registered entity that in enforcing any such bylaw, rule, regulation, or resolution violates this Act or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such registered entity to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

(2) A registered futures association that fails to enforce any bylaw or rule that is required under section 17 of this Act or in enforcing any such bylaw or rule violates this Act or any Commission rule, regulation, or order shall be liable for actual damages sustained by a person that engaged in any transaction specified in subsection (a) of this section to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaw or rule.

(3) Any individual who, in the capacity as an officer, director, governor, committee member, or employee [of registered] *of a registered* entity or a registered futures association willfully aids, abets, counsels, induces, or procures any failure by any such entity to enforce (or any violation of the Act in enforcing) any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, shall be liable for actual damages sustained by a person who engaged in any transaction specified in subsection (a) of this section on, or subject to the rules of, such registered entity or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure or violation.

(4) A person seeking to enforce liability under this section must establish that the registered entity, registered futures association, officer, director, governor, committee member, or employee acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss.

(5) The rights of action authorized by this subsection shall be the exclusive remedy under this Act available to any person who sustains a loss as a result of (A) the alleged failure by a registered entity or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this Act, or any Commission rule, regulation, or order.

(c) The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action shall be brought not later than two years after the date the cause of action arises. Any action brought under subsection (a) of this section may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or in the judicial district wherein any act or transaction constituting the violation occurs. Process in such action may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found.

(d) The provisions of this section shall become effective with respect to causes of action accruing on or after the date of enactment of the Futures Trading Act of 1982: *Provided,* That the enactment of the Futures Trading Act of 1982 shall not affect any right of any parties which may exist with respect to causes of action accruing prior to such date.

SEC. 23. COMMODITY WHISTLEBLOWER INCENTIVES AND PROTECTION.

(a) DEFINITIONS.—In this section:

(1) COVERED JUDICIAL OR ADMINISTRATIVE ACTION.—The term "covered judicial or administrative action" means any judicial or administrative action brought by the Commission under this Act that results in monetary sanctions exceeding $1,000,000.

(2) FUND.—The term "Fund" means the Commodity Futures Trading Commission Customer Protection Fund established under subsection (g).

(3) MONETARY SANCTIONS.—The term "monetary sanctions", when used with respect to any judicial or administrative action means—

(A) any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(4) ORIGINAL INFORMATION.—The term "original information" means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(5) RELATED ACTION.—The term "related action", when used with respect to any judicial or administrative action brought by the Commission under this Act, means any judicial or administrative action brought by an entity described in subclauses (I) through (VI) of subsection (h)(2)(C) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) SUCCESSFUL RESOLUTION.—The term "successful resolution", when used with respect to any judicial or administrative action brought by the Commission under this Act, includes any settlement of such action.

(7) WHISTLEBLOWER.—The term "whistleblower" means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission.

(b) AWARDS.—

(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) PAYMENT OF AWARDS.—Any amount paid under paragraph (1) shall be paid from the Fund.

(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—
(1) DETERMINATION OF AMOUNT OF AWARD.—
(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.
(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—
(i) shall take into consideration—
(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
(III) the programmatic interest of the Commission in deterring violations of the Act (including regulations under the Act) by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and
(IV) such additional relevant factors as the Commission may establish by rule or regulation; and
(ii) shall not take into consideration the balance of the Fund.
(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—
(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—
(i) a appropriate regulatory agency;
(ii) the Department of Justice;
(iii) a registered entity;
(iv) a registered futures association;
(v) a self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)); or
(vi) a law enforcement organization;
(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;
(C) to any whistleblower who submits information to the Commission that is based on the facts underlying the covered action submitted previously by another whistleblower;
(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule or regulation, require.
(d) REPRESENTATION.—
(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.
(2) REQUIRED REPRESENTATION.—
(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be

represented by counsel if the whistleblower submits the information upon which the claim is based.

(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) NO CONTRACT NECESSARY.—No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission, by rule or regulation.

(f) APPEALS.—

(1) IN GENERAL.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission.

(2) APPEALS.—Any determination described in paragraph (1) may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.

(3) REVIEW.—The court shall review the determination made by the Commission in accordance with [section 7064] *section 706* of title 5, United States Code.

(g) COMMODITY FUTURES TRADING COMMISSION CUSTOMER PROTECTION FUND.—

(1) ESTABLISHMENT.—There is established in the Treasury of the United States a revolving fund to be known as the "Commodity Futures Trading Commission Customer Protection Fund".

(2) USE OF FUND.—The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

(A) the payment of awards to whistleblowers as provided in subsection (a); and

(B) the funding of customer education initiatives designed to help customers protect themselves against fraud or other violations of this Act, or the rules and regulations thereunder.

(3) DEPOSITS AND CREDITS.—There shall be deposited into or credited to the Fund:

(A) MONETARY SANCTIONS.—Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed to victims of a violation of this Act or the rules and regulations thereunder underlying such action, unless the balance of the Fund at the time the monetary judgment is collected exceeds $100,000,000.

(B) ADDITIONAL AMOUNTS.—If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under this Act that is based on information provided by a whistleblower.

(C) INVESTMENT INCOME.—All income from investments made under paragraph (4).

(4) INVESTMENTS.—

(A) AMOUNTS IN FUND MAY BE INVESTED.—The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the Commission's judgment, required to meet the current needs of the Fund.

(B) ELIGIBLE INVESTMENTS.—Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission.

(C) INTEREST AND PROCEEDS CREDITED.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to, and form a part of, the Fund.

(5) REPORTS TO CONGRESS.—Not later than October 30 of each year, the Commission shall transmit to the Committee on Agriculture, Nutrition, and Forestry of the Senate, and the Committee on Agriculture of the House of Representatives a report on—

(A) the Commission's whistleblower award program under this section, including a description of the number of awards granted and the types of cases in which awards were granted during the preceding fiscal year;

(B) customer education initiatives described in paragraph (2)(B) that were funded by the Fund during the preceding fiscal year;

(C) the balance of the Fund at the beginning of the preceding fiscal year;

(D) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(E) the amount of earnings on investments of amounts in the Fund during the preceding fiscal year;

(F) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(G) the amount paid from the Fund during the preceding fiscal year for customer education initiatives described in paragraph (2)(B);

(H) the balance of the Fund at the end of the preceding fiscal year; and

(I) a complete set of audited financial statements, including a balance sheet, income statement, and cash flow analysis.

(h) PROTECTION OF WHISTLEBLOWERS.—

(1) PROHIBITION AGAINST RETALIATION.—

(A) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with subsection (b); or

(ii) in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.

(B) ENFORCEMENT.—

(i) CAUSE OF ACTION.—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C), unless the individual who is alleging discharge or other discrimination in violation of subparagraph (A) is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.

(ii) SUBPOENAS.—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this subsection may be served at any place in the United States.

(iii) STATUTE OF LIMITATIONS.—An action under this subsection may not be brought more than 2 years after the date on which the violation reported in subparagraph (A) is committed.

(C) RELIEF.—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

(2) CONFIDENTIALITY.—

(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), the Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, United States Code, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(B) EFFECT.—Nothing in this paragraph is intended to limit the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(C) AVAILABILITY TO GOVERNMENT AGENCIES.—

(i) IN GENERAL.—Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary or appropriate to accomplish the purposes of this Act and protect customers and in accordance with clause (ii), be made available to—

(I) the Department of Justice;

(II) an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;

(III) a registered entity, registered futures association, or self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

(IV) a State attorney general in connection with any criminal investigation;

(V) an appropriate department or agency of any State, acting within the scope of its jurisdiction; and

(VI) a foreign futures authority.

(ii) MAINTENANCE OF INFORMATION.—Each of the entities, agencies, or persons described in clause (i) shall maintain information described in that clause as confidential, in accordance with the requirements in subparagraph (A).

(iii) STUDY ON IMPACT OF FOIA EXEMPTION ON COMMODITY FUTURES TRADING COMMISSION.—

(I) STUDY.—The Inspector General of the Commission shall conduct a study—

(aa) on whether the exemption under section 552(b)(3) of title 5, United States Code (known as the Freedom of Information Act) established in paragraph (2)(A) aids whistleblowers in disclosing information to the Commission;

(bb) on what impact the exemption has had on the public's ability to access information about the Commission's regulation of commodity futures and option markets; and

(cc) to make any recommendations on whether the Commission should continue to use the exemption.

(II) REPORT.—Not later than 30 months after the date of enactment of this clause, the Inspector General shall—

(aa) submit a report on the findings of the study required under this clause to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives; and

(bb) make the report available to the public through publication of a report on the website of the Commission.

(3) RIGHTS RETAINED.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) RULEMAKING AUTHORITY.—The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

(j) IMPLEMENTING RULES.—The Commission shall issue final rules or regulations implementing the provisions of this section not later than 270 days after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

(k) ORIGINAL INFORMATION.—Information submitted to the Commission by a whistleblower in accordance with rules or regulations implementing this section shall not lose its status as original information solely because the whistleblower submitted such information prior to the effective date of such rules or regulations, provided such information was submitted after the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

(l) AWARDS.—A whistleblower may receive an award pursuant to this section regardless of whether any violation of a provision of this Act, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based occurred prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

(m) PROVISION OF FALSE INFORMATION.—A whistleblower who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to prosecution under section 1001 of title 18, United States Code.

(n) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

SEC. 24. JUDICIAL REVIEW OF COMMISSION RULES.

(a) A person adversely affected by a rule of the Commission promulgated under this Act may obtain review of the rule in the United States Court of Appeals for the District of Columbia Circuit or the United States Court of Appeals for the circuit where the party resides or has the principal place of business, by filing in the court, within 60 days after publication in the Federal Register of the entry of the rule, a written petition requesting that the rule be set aside.

(b) A copy of the petition shall be transmitted forthwith by the clerk of the court to an officer designated by the Commission for

that purpose. Thereupon the Commission shall file in the court the record on which the rule complained of is entered, as provided in section 2112 of title 28, United States Code, and the Federal Rules of Appellate Procedure.

(c) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm and enforce or to set aside the rule in whole or in part.

(d) The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

FUTURES TRADING ACT OF 1978

PLAN FOR USER FEES

SEC. 26. (a) Notwithstanding any other provision of law, the Commodity Futures Trading Commission may develop and implement a plan to charge and collect reasonable fees to cover the estimated cost of regulating transactions under the jurisdiction of the Commission. However, prior to implementing such a plan, the Commission shall report its intention to do so to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. The Commission shall include in its report the feasibility and desirability of collecting such fees. Any plan developed under this section shall not be implemented until approved by the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. Fees collected under any plan approved under this section shall be deposited in the Treasury of the United States as miscellaneous receipts.

[(b) The Commodity Futures Trading Commission shall submit to Congress a report containing the results of a study of the regulatory experience of the National Futures Association for the period beginning January 1, 1983 and ending September 30, 1985. The report shall be submitted not later than January 1, 1986. The report shall include (but not to be limited to) the following—

[(1) the extent to which the National Futures Association has fully implemented the program provided in the rules approved by the Commission under section 17(p) and (q) of the Commodity Exchange Act and the effectiveness of the operation of such program;

[(2) the actual and projected cost savings to the Federal Government, if any, resulting from operations of the National Futures Association;

[(3) the actual and projected costs which the Commission and the public would have incurred if the Association had not undertaken self-regulatory responsibility for certain areas under the Commission's jurisdiction;

[(4) problem areas, if any, encountered by the Association;

[(5) the nature of the working relationship between the Association and the Commission;

[(6) an assessment of the actual and projected efficiencies the Commission has achieved or expects to be achieved as a result of the continuing regulatory activities of the Association; and

[(7) the immediate and projected capabilities of the Commission at the time of submission of the study to turn its attention to more immediate problems of regulation, as a result of the activities of the Association.]

[(c)] *(b)* Nothing in this section shall limit the authority of the Commission to promulgate, after notice and opportunity for hearing, a schedule of appropriate fees to be charged for services rendered and activities and functions performed by the Commission in conjunction with its administration and enforcement of the Commodity Exchange Act: *Provided*, That the fees for any specified service or activity or function shall not exceed the actual cost thereof to the Commission.

COMMITTEE CORRESPONDENCE

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

May 15, 2015

The Honorable K. Michael Conaway
Chairman
Committee on Agriculture
1301 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Conaway,

I am writing with respect to H.R. 2289, the "Customer Protection and End-User Relief Act," which the Committee on Agriculture ordered reported favorably on May 14, 2015. As a result of your having consulted with us on provisions in H.R. 2289 that fall within the Rule X jurisdiction of the Committee on the Judiciary, I agree to forego consideration of this bill so that it may proceed expeditiously to the House floor for consideration.

The Judiciary Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 2289 at this time, we do not waive any jurisdiction over subject matter contained in this or similar legislation, and that our Committee will be appropriately consulted and involved as this bill or similar legislation moves forward so that we may address any remaining issues in our jurisdiction. Our Committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation, and asks that you support any such request.

I would appreciate a response to this letter confirming this understanding with respect to H.R. 2289, and would ask that a copy of our exchange of letters on this matter be included in the *Congressional Record* during Floor consideration of H.R. 2289.

Sincerely,

Bob Goodlatte
Chairman

cc: The Honorable John Conyers, Jr.
The Honorable Collin C. Peterson
The Honorable John Boehner, Speaker
Mr. Thomas J. Wickham, Jr., Parliamentarian

U.S. House of Representatives

Committee on Agriculture

Room 1301, Longworth House Office Building

Washington, DC 20515–0001

(202) 225-2171

May 19, 2015

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Goodlatte:

Thank you for your letter regarding H.R. 2289, "Customer Protection and End-User Relief Act." I appreciate your support in bringing this legislation before the House of Representatives, and accordingly, understand that the Committee on the Judiciary will forego action on the bill.

The Committee on Agriculture concurs in the mutual understanding that by foregoing consideration of the bill at this time, the Committee on the Judiciary does not waive any jurisdiction over the subject matter contained in this bill or similar legislation in the future. In addition, should a conference on this bill be necessary, I would support your request to have the Committee on the Judiciary represented on the conference committee.

I will insert copies of this exchange in the *Congressional Record* during Floor consideration. I appreciate your cooperation regarding this legislation and look forward to continuing to work the Committee on the Judiciary as this bill moves through the legislative process.

Sincerely,

K. Michael Conaway
Chairman

cc: The Honorable John Conyers, Jr., Ranking Member, Committee on the Judiciary
The Honorable Collin Peterson, Ranking Member, Committee on Agriculture
The Honorable John Boehner, Speaker
Mr. Thomas J. Wickham Jr., Parliamentarian