

111TH CONGRESS
1ST SESSION

S. 1682

To provide the Commodity Futures Trading Commission with clear
antimarket manipulation authority, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 17, 2009

Ms. CANTWELL (for herself and Mr. NELSON of Florida) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

A BILL

To provide the Commodity Futures Trading Commission with
clear antimarket manipulation authority, and for other
purposes.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Derivatives Market
5 Manipulation Prevention Act of 2009”.

6 **SEC. 2. CIVIL PENALTIES FOR MARKET MANIPULATION.**

7 Subsection (c) of section 6 of the Commodity Ex-
8 change Act (7 U.S.C. 9, 15) is amended to read as follows:

1 “(c) PROHIBITION REGARDING MARKET MANIPULA-
2 TION AND FALSE INFORMATION.—

3 “(1) PROHIBITION REGARDING MARKET MANIP-
4 ULATION.—It shall be unlawful for any person, di-
5 rectly or indirectly, to use or employ, or attempt to
6 use or employ, in connection with a swap, or a con-
7 tract of sale of a commodity, in interstate commerce,
8 or for future delivery on or subject to the rules of
9 any registered entity, any manipulative or deceptive
10 device or contrivance, in contravention of such rules
11 and regulations as the Commission shall promulgate
12 by not later than 1 year after the date of enactment
13 of the Derivatives Market Manipulation Prevention
14 Act of 2009.

15 “(2) PROHIBITION REGARDING FALSE INFOR-
16 MATION.—It shall be unlawful for any person to re-
17 port information relating to any registration applica-
18 tion, any report filed with the Commission, or any
19 other information relating to a swap, or a contract
20 of sale of a commodity, in interstate commerce, or
21 for future delivery on or subject to the rules of any
22 registered entity, or to omit any material fact that
23 is required to be stated in any application or report
24 if the person knew, or reasonably should have
25 known, the information to be false or misleading.

1 “(3) ENFORCEMENT.—

2 “(A) AUTHORITY OF COMMISSION.—If the
3 Commission has reason to believe that any per-
4 son is violating or has violated this subsection,
5 or any other provision of this Act (including
6 any rule, regulation, or order promulgated in
7 accordance with this subsection or any other
8 provision of this Act), the Commission may
9 serve upon the person a complaint.

10 “(B) CONTENTS OF COMPLAINT.—A com-
11 plaint under subparagraph (A) shall—

12 “(i) contain a description of the
13 charges against the person that is the sub-
14 ject of the complaint; and

15 “(ii) have attached or contain a notice
16 of hearing that specifies the date and loca-
17 tion of the hearing regarding the com-
18 plaint.

19 “(C) HEARING.—A hearing described in
20 subparagraph (B)(ii)—

21 “(i) shall be held not later than 3
22 days after the date on which the person
23 described in subparagraph (A) receives the
24 complaint;

1 “(ii) shall require the person to show
2 cause regarding why—

3 “(I) an order should not be
4 made—

5 “(aa) to prohibit the person
6 from trading on, or subject to the
7 rules of, any registered entity;
8 and

9 “(bb) to direct all registered
10 entities to refuse all privileges to
11 the person until further notice of
12 the Commission; and

13 “(II) the registration of the per-
14 son, if registered with the Commission
15 in any capacity, should not be sus-
16 pended or revoked; and

17 “(iii) may be held before—

18 “(I) the Commission; or

19 “(II) an administrative law judge
20 designated by the Commission, under
21 which the administrative law judge
22 shall ensure that all evidence is re-
23 corded in written form and submitted
24 to the Commission.

1 “(4) SUBPOENA.—For the purpose of securing
2 effective enforcement of the provisions of this chap-
3 ter, for the purpose of any investigation or pro-
4 ceeding under this chapter, and for the purpose of
5 any action taken under section 12(f) of this title,
6 any member of the Commission or any Administra-
7 tive Law Judge or other officer designated by the
8 Commission (except as provided in paragraph (6))
9 may administer oaths and affirmations, subpoena
10 witnesses, compel their attendance, take evidence,
11 and require the production of any books, papers,
12 correspondence, memoranda, or other records that
13 the Commission deems relevant or material to the
14 inquiry.

15 “(5) WITNESSES.—The attendance of witnesses
16 and the production of any such records may be re-
17 quired from any place in the United States, any
18 State, or any foreign country or jurisdiction at any
19 designated place of hearing.

20 “(6) SERVICE.—A subpoena issued under this
21 section may be served upon any person who is not
22 to be found within the territorial jurisdiction of any
23 court of the United States in such manner as the
24 Federal Rules of Civil Procedure prescribe for serv-
25 ice of process in a foreign country, except that a

1 subpoena to be served on a person who is not to be
2 found within the territorial jurisdiction of any court
3 of the United States may be issued only on the prior
4 approval of the Commission.

5 “(7) REFUSAL TO OBEY.—In case of contumacy
6 by, or refusal to obey a subpoena issued to, any per-
7 son, the Commission may invoke the aid of any
8 court of the United States within the jurisdiction in
9 which the investigation or proceeding is conducted,
10 or where such person resides or transacts business,
11 in requiring the attendance and testimony of wit-
12 nesses and the production of books, papers, cor-
13 respondence, memoranda, and other records. Such
14 court may issue an order requiring such person to
15 appear before the Commission or member or Admin-
16 istrative Law Judge or other officer designated by
17 the Commission, there to produce records, if so or-
18 dered, or to give testimony touching the matter
19 under investigation or in question.

20 “(8) FAILURE TO OBEY.—Any failure to obey
21 such order of the court may be punished by the
22 court as a contempt thereof. All process in any such
23 case may be served in the judicial district wherein
24 such person is an inhabitant or transacts business or
25 wherever such person may be found.

1 “(9) EVIDENCE.—On the receipt of evidence
2 under paragraph (3)(C)(iii)(II), the Commission
3 may—

4 “(A) prohibit the person that is the subject
5 of the hearing from trading on, or subject to
6 the rules of, any registered entity and require
7 all registered entities to refuse the person all
8 privileges on the registered entities for such pe-
9 riod as the Commission may require in the
10 order;

11 “(B) if the person is registered with the
12 Commission in any capacity, suspend, for a pe-
13 riod not to exceed 180 days, or revoke, the reg-
14 istration of the person;

15 “(C) assess such person—

16 “(i) a civil penalty of not more than
17 an amount equal to the greater of—

18 “(I) \$140,000; or

19 “(II) triple the monetary gain to
20 such person for each such violation; or

21 “(ii) in any case of manipulation or
22 attempted manipulation in violation of this
23 subsection, subsection (d), or section
24 9(a)(2), a civil penalty of not more than an
25 amount equal to the greater of—

1 “(I) \$1,000,000; or

2 “(II) triple the monetary gain to
3 the person for each such violation;
4 and

5 “(D) through an order of the Commission,
6 require restitution to customers of damages
7 proximately caused by violations of the person.

8 “(10) ORDERS.—

9 “(A) NOTICE.—The Commission shall pro-
10 vide to a person described in paragraph (9)(A)
11 and the appropriate governing board of the reg-
12 istered entity notice of the order described in
13 paragraph (9)(A) by—

14 “(i) registered mail;

15 “(ii) certified mail; or

16 “(iii) personal delivery.

17 “(B) REVIEW.—

18 “(i) IN GENERAL.—A person that has
19 received notice of an order by the Commis-
20 sion may obtain a review of the order or
21 such other equitable relief as determined to
22 be appropriate by a court described in
23 clause (ii).

24 “(ii) PETITION.—To obtain a review
25 or other relief under clause (i), a person

1 may, not later than 15 days after the date
 2 of receipt of a notice under clause (i), file
 3 a written petition to set aside the order
 4 with the United States Court of Appeals—

5 “(I) for the circuit in which the
 6 petitioner carries out the business of
 7 the petitioner; or

8 “(II) in the case of an order de-
 9 nying registration, the circuit in which
 10 the principal place of business of the
 11 petitioner is located, as listed on the
 12 application of the petitioner.

13 “(C) PROCEDURE.—

14 “(i) DUTY OF CLERK OF APPRO-
 15 PRIATE COURT.—The clerk of the appro-
 16 priate court under subparagraph (B)(ii)
 17 shall transmit to the Commission a copy of
 18 a petition filed under subparagraph (B)(ii).

19 “(ii) DUTY OF COMMISSION.—In ac-
 20 cordance with section 2112 of title 28,
 21 United States Code, the Commission shall
 22 file in the appropriate court described in
 23 subparagraph (B)(ii) the record theretofore
 24 made.

1 “(iii) JURISDICTION OF APPROPRIATE
2 COURT.—Upon the filing of a petition
3 under subparagraph (B)(ii), the appro-
4 priate court described in subparagraph
5 (B)(ii) shall have jurisdiction to affirm, set
6 aside, or modify the order of the Commis-
7 sion, and the findings of the Commission
8 as to the facts, if supported by the weight
9 of evidence, shall in like manner be conclu-
10 sive.”.

11 **SEC. 3. CEASE AND DESIST ORDERS, FINES.**

12 Section 6(d) of the Commodity Exchange Act (7
13 U.S.C. 13b) is amended to read as follows:

14 “(d) If any person (other than a registered entity),
15 directly or indirectly, is using or employing, or attempting
16 to use or employ, in connection with a swap, or a contract
17 of sale of a commodity, in interstate commerce, or for fu-
18 ture delivery on or subject to the rules of any registered
19 entity, any manipulative or deceptive device or contriv-
20 ance, in contravention of such rules and regulations as the
21 Commission shall promulgate by not later than 1 year
22 after the date of enactment of the Derivatives Market Ma-
23 nipulation Prevention Act of 2009, the Commission may,
24 upon notice and hearing, and subject to appeal as in other
25 cases provided for in sections 9 and 15 of this title, make

1 and enter an order directing that such person shall cease
2 and desist therefrom and, if such person thereafter and
3 after the lapse of the period allowed for appeal of such
4 order or after the affirmance of such order, shall fail or
5 refuse to obey or comply with such order, such person
6 shall be guilty of a misdemeanor and, upon conviction
7 thereof, shall be fined not more than the higher of
8 \$140,000 or triple the monetary gain to such person, or
9 imprisoned for not less than six months nor more than
10 one year, or both, except that if such failure or refusal
11 to obey or comply with such order involves any offense
12 within subsection (a) or (b) of section 13 of this title, such
13 person shall be guilty of a felony and, upon conviction
14 thereof, shall be subject to the penalties of said subsection
15 (a) or (b): Provided, That any such cease and desist order
16 against any respondent in any case of under this sub-
17 section shall be issued only in conjunction with an order
18 issued against such respondent under sections 9 and 15
19 of this title. Each day during which such failure or refusal
20 to obey or comply with such order continues shall be
21 deemed a separate offense.”.

22 **SEC. 4. MANIPULATIONS; PRIVATE RIGHTS OF ACTION.**

23 Section 22(a)(1) of the Commodity Exchange Act (7
24 U.S.C. 25(a)(1)) is amended by striking subparagraph
25 (D) and inserting the following:

“(D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes 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 manipulative 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 Derivatives Market Manipulation Prevention Act of 2009.”.

SEC. 5. DEFINITION OF SWAP.

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

“(35) SWAP.—

“(A) IN GENERAL.—Except as provided in subparagraph (B), the term ‘swap’ means any agreement, contract, or transaction that—

“(i) is a put, call, cap, floor, collar, or similar option of any kind for the purchase or sale of, or based on the value of, one or more interest or other rates, currencies, commodities, securities, instruments of in-

1 debtedness, indices, quantitative measures,
2 or other financial or economic interests or
3 property of any kind;

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

11 “(iii) provides on an executory basis
12 for the exchange, on a fixed or contingent
13 basis, of one or more payments based on
14 the value or level of one or more interest
15 or other rates, currencies, commodities, se-
16 curities, instruments of indebtedness, indi-
17 ces, quantitative measures, or other finan-
18 cial or economic interests or property of
19 any kind, or any interest therein or based
20 on the value thereof, and that transfers, as
21 between the parties to the transaction, in
22 whole or in part, the financial risk associ-
23 ated with a future change in any such
24 value or level without also conveying a cur-
25 rent or future direct or indirect ownership

1 interest in an asset (including any enter-
 2 prise or investment pool) or liability that
 3 incorporates the financial risk so trans-
 4 ferred, including any agreement, contract,
 5 or transaction commonly known as an in-
 6 terest rate swap, a rate floor, rate cap,
 7 rate collar, cross-currency rate swap, basis
 8 swap, currency swap, foreign exchange
 9 swap, total return swap, equity index swap,
 10 equity swap, debt index swap, debt swap,
 11 credit spread, credit default swap, credit
 12 swap, weather swap, energy swap, metal
 13 swap, agricultural swap, emissions swap,
 14 or commodity swap;

15 “(iv) is an agreement, contract, or
 16 transaction that is, or in the future be-
 17 comes, commonly known to the trade as a
 18 swap; or

19 “(v) is any combination or permuta-
 20 tion of, or option on, any agreement, con-
 21 tract, or transaction described in any of
 22 clauses (i) through (iv).

23 “(B) EXCLUSIONS.—The term ‘swap’ does
 24 not include:

1 “(i) any contract of sale of a com-
2 modity for future delivery or security fu-
3 tures product traded on or subject to the
4 rules of any board of trade designated as
5 a contract market under section 5 or 5f;

6 “(ii) any sale of a nonfinancial com-
7 modity for deferred shipment or delivery,
8 so long as such transaction is physically
9 settled;

10 “(iii) any put, call, straddle, option, or
11 privilege on any security, certificate of de-
12 posit, or group or index of securities, in-
13 cluding any interest therein or based on
14 the value thereof, that is subject to the Se-
15 curities Act of 1933 (15 U.S.C. 77a et
16 seq.) and the Securities Exchange Act of
17 1934 (15 U.S.C. 78a et seq.);

18 “(iv) any put, call, straddle, option, or
19 privilege relating to foreign currency en-
20 tered into on a national securities exchange
21 registered pursuant to section 6(a) of the
22 Securities Exchange Act of 1934 (15
23 U.S.C. 78f(a));

24 “(v) any agreement, contract, or
25 transaction providing for the purchase or

1 sale of one or more securities on a fixed
2 basis that is subject to the Securities Act
3 of 1933 (15 U.S.C. 77a et seq.) and the
4 Securities Exchange Act of 1934 (15
5 U.S.C. 78a et seq.);

6 “(vi) any agreement, contract, or
7 transaction providing for the purchase or
8 sale of one or more securities on a contin-
9 gent basis that is subject to the Securities
10 Act of 1933 (15 U.S.C. 77a et seq.) and
11 the Securities Exchange Act of 1934 (15
12 U.S.C. 78a et seq.), unless such agree-
13 ment, contract, or transaction predicates
14 such purchase or sale on the occurrence of
15 a bona fide contingency that might reason-
16 ably be expected to affect or be affected by
17 the creditworthiness of a party other than
18 a party to the agreement, contract, or
19 transaction;

20 “(vii) any note, bond, or evidence of
21 indebtedness that is a security as defined
22 in section 2(a) of the Securities Act of
23 1933 (15 U.S.C. 77b(a));

24 “(viii) any agreement, contract, or
25 transaction that is—

1 “(I) based on a security; and

2 “(II) entered into directly or
3 through an underwriter (as defined in
4 section 2(a) of the Securities Act of
5 1933) (15 U.S.C. 77b(a)) by the
6 issuer of such security for the pur-
7 poses of raising capital, unless such
8 agreement, contract, or transaction is
9 entered into to manage a risk associ-
10 ated with capital raising; or

11 “(ix) any agreement, contract, or
12 transaction a counterparty of which is a
13 Federal Reserve bank, the United States
14 Government or an agency of the United
15 States Government that is expressly
16 backed by the full faith and credit of the
17 United States.

18 “(C) RULE OF CONSTRUCTION REGARDING
19 MASTER AGREEMENTS.—The term ‘swap’ shall
20 be construed to include a master agreement
21 that provides for an agreement, contract, or
22 transaction that is a swap pursuant to subpara-
23 graph (A), together with all supplements to any
24 such master agreement, without regard to
25 whether the master agreement contains an

1 agreement, contract, or transaction that is not
2 a swap pursuant to subparagraph (A), except
3 that the master agreement shall be considered
4 to be a swap only with respect to each agree-
5 ment, contract, or transaction under the master
6 agreement that is a swap pursuant to subpara-
7 graph (A).”.

8 **SEC. 6. EFFECTIVE DATE.**

9 (a) IN GENERAL.—The amendments made by sec-
10 tions 2, 3, and 4 shall take effect on the date on which
11 the final rule promulgated by the Commodity Futures
12 Trading Commission pursuant to the Derivatives Market
13 Manipulation Prevention Act of 2009 takes effect.

14 (b) DEFINITION OF SWAP.—The amendment made
15 by section 5 shall take effect on the date of enactment
16 of this Act.

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