S. 1971

At the request of Mr. KERRY, the name of the Senator from Missouri (Mrs. MCCASKILL) was added as a cosponsor of S. 1971, a bill to authorize a competitive grant program to assist members of the National Guard and Reserve and former and current members of the Armed Forces in securing employment in the private sector, and for other purposes.

S. 1998

At the request of Mr. DURBIN, the names of the Senator from California (Mrs. BOXER) and the Senator from Maine (Ms. SNOWE) were added as cosponsors of S. 1998, a bill to reduce child marriage, and for other purposes.

S. 2017

At the request of Mr. BINGAMAN, the name of the Senator from Colorado (Mr. SALAZAR) was added as a cosponsor of S. 2017, a bill to amend the Energy Policy and Conservation Act to provide for national energy efficiency standards for general service incandescent lamps, and for other purposes.

S. 2020

At the request of Mr. LUGAR, the name of the Senator from Kansas (Mr. BROWNBACK) was added as a cosponsor of S. 2020, a bill to reauthorize the Tropical Forest Conservation Act of 1998 through fiscal year 2010, to rename the Tropical Forest Conservation Act of 1998 as the ''Tropical Forest and Coral Conservation Act of 2007'', and for other purposes.

S.J. RES. 13

At the request of Mr. LEAHY, the names of the Senator from Massachusetts (Mr. KERRY) and the Senator from Rhode Island (Mr. WHITEHOUSE) were added as cosponsors of S.J. Res. 13, a joint resolution granting the consent of Congress to the International Emergency Management Assistance Memorandum of Understanding.

S. CON. RES. 39

At the request of Mr. DODD, the name of the Senator from Mississippi (Mr. COCHRAN) was added as a cosponsor of S. Con. Res. 39, a concurrent resolution supporting the goals and ideals of a world day of remembrance for road crash victims.

S. RES. 201

At the request of Mr. CHAMBLISS, the names of the Senator from New Hampshire (Mr. SUNUNU) and the Senator from Arkansas (Mr. PRYOR) were added as cosponsors of S. Res. 201, a resolution supporting the goals and ideals of ''National Life Insurance Awareness Month''.

S. RES. 222

At the request of Mrs. CLINTON, the name of the Senator from Washington (Mrs. MURRAY) was added as a cosponsor of S. Res. 222, a resolution supporting the goals and ideals of Pancreatic Cancer Awareness Month.

S. RES. 224

At the request of Mrs. FEINSTEIN, the name of the Senator from Wisconsin (Mr. FEINGOLD) was added as a cosponsor of S. Res. 224, a resolution expressing the sense of the Senate regarding the Israeli-Palestinian peace process.

AMENDMENT NO. 2000

At the request of Mr. NELSON of Nebraska, the names of the Senator from Massachusetts (Mr. KERRY), the Senator from Iowa (Mr. HARKIN), the Senator from Alabama (Mr. SESSIONS), the Senator from Connecticut (Mr. DODD) and the Senator from Maryland (Mr. CARDIN) were added as cosponsors of amendment No. 2000 intended to be proposed to H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

AMENDMENT NO. 2049

At the request of Mr. CHAMBLISS, the name of the Senator from Alabama (Mr. SESSIONS) was added as a cosponsor of amendment No. 2049 intended to be proposed to H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

AMENDMENT NO. 2067

At the request of Mr. KENNEDY, the name of the Senator from California (Mrs. BOXER) was added as a cosponsor of amendment No. 2067 intended to be proposed to H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

AMENDMENT NO. 2072

At the request of Mrs. LINCOLN, the name of the Senator from Alabama (Mr. SESSIONS) was added as a cosponsor of amendment No. 2072 intended to be proposed to H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

AMENDMENT NO. 2074

At the request of Mrs. LINCOLN, the name of the Senator from Alabama (Mr. SESSIONS) was added as a cosponsor of amendment No. 2074 intended to be proposed to H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

AMENDMENT NO. 2086

At the request of Mr. OBAMA, the name of the Senator from Massachusetts (Mr. KERRY) was added as a cosponsor of amendment No. 2086 intended to be proposed to H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mrs. FEINSTEIN (for herself, Mr. SPECTER, and Mr. FEINGOLD):

S. 2052. A bill to allow for certiorari review of certain cases denied relief or review by the United States Court of Appeals for the Armed Forces; to the Committee on the Judiciary.

Mrs. FEINSTEIN. Mr. President, today I am pleased to join with Senators SPECTER and FEINGOLD in introducing the Equal Justice for U.S. Service Members Act. The act would eliminate an inequity in current law by allowing all court-martialed U.S. service-members who face dismissal, discharge or confinement for a year or more to petition the U.S. Supreme Court for discretionary review through a writ of certiorari.

The bill is a simple one, and would do the following: It would allow a writ of certiorari to be filed in any case in which the U.S. Court of Appeals for the Armed Forces has denied review; and it would allow a writ of certiorari to be filed in any case in which the U.S. Court of Appeals for the Armed Forces has denied a petition for extraordinary relief.

All persons convicted of a crime in U.S. civilian courts today, including illegal aliens, and regardless of the crime they may have committed, have an absolute right to petition the U.S. Supreme Court for discretionary review if they lose in the court of appeals. By contrast, however, our men and women in uniform do not share this same right as their civilian counterparts. Our military personnel can apply to our highest court on direct appeal for a writ of certiorari only if the U.S. Court of Appeals for the Armed Forces actually conducts a review of their case, or grants a petition for extraordinary relief. That happens only about 10 percent of the time.

In other words, the other 90 percent of the time, our U.S. servicemembers are precluded from ever seeking or obtaining direct review from the highest court of the country that they fight and die for.

A disparity not only exists between our civilian and military court systems. A similar disparity exists even within our military court system itself. The Government routinely has

the opportunity to petition the Supreme Court for review of adverse court-martial rulings in any case where the charges are severe enough to make a punitive discharge possible. But our military personnel do not share these same rights to petition the Supreme Court as their opponents, even on the other side of the same case.

That is wrong, and this inequity was recently noted by the American Bar Association. At its annual meeting in August 2006, the ABA House of Delegates passed a resolution calling on Congress to fix this long-standing ''disparity in our laws governing procedural due process.''

That is perhaps reason enough to fix this problem, but I also must note that this existing disparity has only become more acute now that Congress has enacted the Military Commission Act. Section 950g(d) of that law, which Congress passed last September, gives the Supreme Court the ability to review by writ of certiorari any final judgment issued by the U.S. Court of Appeals for the D.C. Circuit, in an appeal filed by terrorists and war criminals who get convicted by U.S. military commissions.

So the worst of the worst at Guantanamo will have a right to petition our Supreme Court to hear their case. Yet unless we act, those same Supreme Court doors will continue to be closed to almost all of our U.S. service personnel who would seek direct review in their own highest Court. Even servicemembers who apprehended those same terrorists, or served in judgment on their military commissions, or who guard them at Guantanamo, will continue to be treated as second-class citizens, deprived of the opportunity to seek Supreme Court review if they ever need it themselves.

Our U.S. service personnel regularly place their lives on the line in defense of American rights. It is simply unacceptable for us to continue to routinely deprive our men and women in uniform of one of those basic rights, the ability to petition their Nation's highest court for direct relief, that is given to all convicted persons in our civilian courts, that is given to their prosecutorial adversaries in our military courts, and that we have now given even to the terrorists we expect to prosecute as war criminals in our upcoming military commission process.

It is time to give equal justice to our U.S. servicemembers. That is what this act does.

I urge my colleagues to support this legislation.

I ask unanimous consent the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 2052

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Equal Justice for United States Military Personnel Act of 2007''.

SEC. 2. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES.

(a) IN GENERAL.—Section 1259 of title 28, United States Code, is amended—

(1) in paragraph (3), by inserting ''or denied'' after ''granted''; and

(2) in paragraph (4), by inserting ''or denied'' after ''granted''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 867a(a) of title 10, United States Code, is amended by striking ''The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.''.

By Mr. FEINGOLD (for himself and Mr. LEAHY):

S. 2053. A bill to amend part A of title I of the Elementary and Secondary Education Act of 1965 to improve elementary and secondary education; to the Committee on Health, Education, Labor, and Pensions.

Mr. FEINGOLD. Mr. President, this month millions of American schoolchildren are returning to classrooms to begin the new school year, making this a time of hope and possibilities. Students in my State of Wisconsin and around the country are meeting new teachers, getting reacquainted with old friends, joining clubs or athletic teams, and embarking on the next step in their educational careers. Teachers and administrators around the country are starting a new school year with fresh lesson plans and high goals for all the students in their schools. And many educators, parents, and school officials are continuing to work diligently toward the goal of closing the achievement gap that continues to exist throughout many communities across the country.

These students, teachers, and administrators will also face their sixth year under the Federal No Child Left Behind Act, NCLB, the centerpiece of President Bush's domestic agenda. NCLB, which is 2001–2002 reauthorization of the Elementary and Secondary Education Act, ESEA, requires that students be tested annually in reading and math, and starting this school year, in science. The law is up for reauthorization this year and it remains unknown how much change students, teachers, parents, and administrators can expect as Congress works to reauthorize the law.

I voted against No Child Left Behind in 2001 in large part because of the law's new Federal testing mandate. The comments that I heard from Wisconsinites during the 2001 debate and that I continue to hear 6 years later have been almost universally negative. While Wisconsinites support holding their schools accountable for results and closing the achievement gap, they are concerned about the Federal law's primary focus on standardized testing.

Let me make clear at the outset that this country has a long way to go toward ensuring that all students, regardless of their backgrounds, have a chance to get a good education. I remain troubled by the inequality in funding and resources provided to our Nation's schools and by the persistent segregation that schools around the country, including those in Wisconsin, continue to face. Moreover, I am deeply concerned that NCLB's testing and sanctions approach has forced some schools, particularly those in our inner cities and rural areas, to become places where students are not taught, but are drilled with workbooks and test-taking strategies, while in wealthy suburban schools, these tests do not greatly impact school curriculums rich in social studies, civics, arts, music, and other important subjects.

All levels of government—local, State, and Federal—need to act to ensure that equal educational opportunities are afforded to every student in our country.

I do not necessarily oppose the use of standardized testing in our Nation's schools. I agree that some tests are needed to ensure that our children are keeping pace and that schools, districts, and States are held accountable for closing the persistent achievement gap that continues to exist among different groups of students, including among students in Wisconsin. But the Federal one-size-fits-all testing-and-punishment approach that NCLB takes is not providing an equal education for all, eradicating the achievement gap that exists in our country or ensuring that each student reaches his or her full potential.

Rather, the reauthorized ESEA needs to recognize that States and local communities have the primary responsibility for providing a good public education to our students. The reauthorized ESEA should also encourage States and local districts to pursue innovative reform efforts including utilizing more robust accountability systems that can measure student academic growth from year to year and measure student academic growth using multiple forms of assessment, rather than just standardized tests.

Today, I am introducing the Improving Student Testing Act to overhaul the Federal testing mandate and provide States and local districts flexibility to determine the frequency and use of standardized testing in their accountability systems. My legislation is fully offset, while providing approximately $200 million in deficit reduction over the next 5 years.

Nothing in my legislation would force States to alter their accountability systems in recognition of the fact that different States are at different stages of their education reform efforts and may wish to maintain their current assessment systems. However, my legislation says that for Federal accountability purposes, States can choose to test once in grades 3 to 5, 6 to 9, and 10 to 12 rather than the current Federal requirement for annual testing in grades 3 through 8 and once in high school.

For States that choose to test in grade spans instead of annually, my

legislation encourages them to use more than high-stakes standardized tests in their accountability systems. By removing the Federal requirement to test annually, Congress can encourage States and local districts to lead innovative school reform efforts, including developing more robust assessment systems that use a range of academic assessments, such as valid and reliable performance-based assessments, formative assessments that provide meaningful and timely feedback to both students and teachers, and portfolio assessments that allow students to accumulate a broad range of student work and assess their own learning as they progress through school.

I have heard from a number of teachers and administrators who are concerned about the testing burden NCLB imposed on our Nation's educational system. The Federal mandate to test annually has strapped State and local districts' financial resources. Congress promised States specific funding levels for Title I, part A in NCLB, but Congress has failed to live up to those promised resources every year since NCLB was enacted. Despite the lack of adequate resources, our schools continue to be forced to test and to ratchet up the consequences associated with these tests.

NCLB's testing mandates have also led to a substantial demand for increased numbers of standardized tests and I have heard from some Wisconsinites concerned that the testing industry cannot keep up with this demand. There have been stories coming in from around the country documenting the burden faced by the testing industry, including incorrectly scored tests, test scores arriving much later than expected, and schools given incorrect testing booklets and supplies by the testing companies.

My legislation would help alleviate this testing burden by providing States with the option to reduce the number of grades tested for Federal accountability purposes. Eighteen States would then be able to dedicate more of their critical Title I dollars toward efforts that will help close the achievement including improving teacher quality through professional development and providing more targeted instruction to disadvantaged students in critical subject areas.

Some may say that with a Federal requirement to test in grade spans and not every year, the students in the nontested years will be ignored. I have more faith in Wisconsin's teachers and other dedicated teachers around the country than to assume that because there is no external, federally required test, teachers will not teach their kids or ensure that their students make academic progress. Effective schools contain teachers who work collaboratively within grade levels and across grades to raise the academic achievement of every student. Good teachers know that they are responsible for ensuring all their students make substantial academic progress in a given year regardless of whether those students must take a federally imposed standardized test.

My legislation also provides States with the flexibility and resources to develop high-quality assessments that can be used to give a more accurate picture of student achievement. I have heard a number of criticisms of the standardized tests used in Wisconsin and around the country—namely, that they may not measure higher–order thinking skills and that the results are returned to teachers too late in the school year, preventing teachers from receiving feedback that could help inform their instructional techniques to increase student learning. It is important that Congress listen to the feedback provided by teachers and administrators from around the country and provide States and local districts with the flexibility to develop and use other types of assessments in their accountability systems.

My bill authorizes a competitive grant program to help States and local districts develop multiple forms of high-quality assessments, including formative assessments, performance-based assessments, and portfolio assessments. These assessments can give a more accurate and detailed picture of student achievement than a single standardized test. These assessments can also be designed to provide more immediate feedback to teachers and students than the statewide standardized tests used for Federal accountability purposes. By incorporating these richer assessments, teachers can better assess student learning throughout the school year and continuously modify their instruction to ensure all students continue to learn.

These high-quality, multiple measures can be more expensive for States to develop and my bill recognizes that cost by authorizing a competitive grant program to assist States in developing these assessments. States and local districts can use these funds for a variety of purposes, including training teachers in how to use these assessments, creating the assessments, aligning the assessments with State standards, and collaborating with other States to share information about assessment creation.

My legislation makes clear that these funds are not to be used for the purchase of additional test preparation materials. I have long been concerned that NCLB could result in a generation of students who know how to take tests, but who do not have the skills necessary to become successful adults. This grant program will help innovative States develop higher quality assessments to better ensure that the students in their State are prepared for careers in the 21st century, including the ability to think critically, analyze new situations, and work collaboratively with others.

My legislation also makes clear that these multiple forms of assessment are not a loophole for States and local districts to avoid accountability. Rather, my legislation recognizes that these multiple measures can provide a more accurate and more complete picture of student achievement. My legislation makes clear that these assessments must: be aligned with States' academic and content standards, be peer reviewed by the Federal Department of Education, produce timely evidence about student learning and achievement, and provide teachers with meaningful feedback so that teachers can modify and improve their classroom instruction to address specific student needs.

Congress also needs to reform NCLB's accountability provisions during the reauthorization process, including providing credit to schools that demonstrate their students have made substantial growth from year to year. Right now, NCLB measures students' achievement based primarily on reading and math tests, and students either achieve the cut score on the NCLB tests or they do not. A number of teachers and parents in Wisconsin have expressed concerned that NCLB's current approach leads schools to focus on students who are closest to achieving the cut score on tests so as to continue to boost the number of kids passing the test each year. As a result, parents and teachers are concern that the lowest achieving students who are not yet proficient and the highest performing students who are already proficient may be ignored in the effort to meet AYP each year.

My legislation seeks to address this concern by providing flexibility for States that maintain annual testing to develop accountability models capable of tracking student growth from year to year to better ensure that every student, regardless of his or her current academic level, continues to make academic progress. States seeking to use growth models in their accountability systems would have to prove that such growth models meet a number of minimum technical requirements, including ensuring the growth model: is of sufficient technical capacity to function fairly and accurately for all students, uses valid, reliable, and accurate measures, has a statewide privacy-protected data system capable of tracking student growth, does not set performance measures based on a student's background, and is capable of tracking student progress in at least reading and math. I am pleased there is substantial agreement in Congress that growth models should be part of a reauthorized ESEA, and I will work with my colleagues to ensure that any growth models included in the ESEA can be fairly implemented and are flexible enough for States and local districts to utilize in their accountability systems.

NCLB set the ambitious goal that all children will be proficient on State reading and math tests by the year 2014. I have heard from a number of

educators and administrators in Wisconsin and around the country who are concerned that very few States will be able to meet NCLB's 2014 deadline. I understand their concern, particularly in light of the fact that Congress has failed to provide the promised financial resources to meet NCLB's mandates. Our Nation needs to have high academic expectations for all of our students, but if Congress is going to set such ambitious goals for our schools to meet, we need to provide our schools with the resources to meet those goals.

So far, the Federal Government has not lived up to the funding promises it made when Congess passed NCLB in late 2001. The appropriated levels for title I, part A have failed to match the authorized levels for title I, part A every year from 2002 to 2007, resulting in an underfunding of title I, part A by over $40 billion since 2002. It is one thing to set ambitious targets for our Nation's schools with adequate resources provided to reach those targets. It is something entirely different to hold our schools accountable for ensuring all students are proficient by 2014 and providing our schools with less resources than were promised to them when NCLB passed. My legislation includes a funding trigger that will waive the 2014 deadline unless Congress fully funds title I, part A from now until 2014. If Congress maintains the 2014 deadline and does not provide additional resources to our Nation's schools, we are only setting our schools up for further failure as we approach 2014.

My legislation also reforms the peer-review provisions of NCLB to ensure that there is more transparency and consistency in the peer-review process. States are currently required to submit their State plans for approval by the Department of Education, and I have heard a number of concerns from my State and others that States do not receive consistent or timely information from the Department of Education during peer review. States have also voiced concern about their inability to speak directly with peer reviewers during the peer-review process in order to clarify reviewers' comments made about their State plans.

My bill would amend the peer-review language to ensure that the peer-review teams contain balanced representation from State education agencies, local education agencies, and practicing educators. My legislation also includes language that requires the Secretary to provide consistency in peer-review decisions among the States and requires the Department's inspector general to conduct independent evaluations every 2 years to ensure consistency of approval and denial decisions by the Department of Education from State to State. My bill would also require the Secretary to ensure that States are given the opportunity to receive timely feedback from peer-review teams as well as directly interact with peer-review panels on issues that need clarification during the peer-review process.

Despite my concerns regarding the testing provisions of NCLB, there are other provisions of the law that I continue to support. I have consistently heard from educators and other interested parties in my State of Wisconsin in favor of NCLB's requirement to disaggregate data by specific groups of children, including students from major racial and ethnic groups, students with disabilities, economically disadvantaged students, and English language learners. Teachers have told me that these provisions have added more transparency to school data and help to ensure that schools continue to remain focused on closing the achievement gap among these various groups of students and remain attentive to the academic needs of all students. My legislation builds on the requirement to disaggregate data by also requiring States to disaggregate high school graduation rates on the State report cards required under NCLB.

Justice Louis Brandeis once said, "sunlight is said to be the best of disinfectants," and I think his statement can be properly applied to NCLB's requirement to disaggregate and report academic data by student subgroups. Information about the achievement gaps that exist throughout our Nation's schools, whether they are gaps in academic achievement or graduation rates, can help parents, educators, local school board members, and others continue to advocate for education reform at the local level. Some States already have the ability to disaggregate graduation rates by NCLB's subgroups, and my legislation provides funding to all States to comply with this public reporting requirement.

Tracking students' achievement and disaggregating student data are fundamental components of No Child Left Behind and require States to maintain large data systems containing detailed information about students. The bill that I am introducing will also ensure that these data systems are maintained in a way that safeguards individual privacy. Use of the data by educational entities, as well as disclosures of student-level data to third parties, will be carefully limited, and individuals will have a right to know who is inspecting their information and for what purpose.

My legislation also provides additional funding for States to build additional infrastructure at the State and local level in order to improve their educational accountability systems. States and local districts will have to secure additional resources in order to implement growth models or utilize multiple forms of assessment in their accountability systems. My bill creates a competitive and flexible grant program to help ensure the Federal Government does its part in assisting States in accessing these resourses.

States have varying capacity needs and funds under this program can help States build their privacy-protected educational databases, train individuals in how to use multiple measures of student achievement in State accountability systems, and provide additional professional development opportunities for both state education agency and local education agency staff members. I have heard from a number of State and local administrators who are trying diligently to reconcile increased Federal and State mandates with less financial resources. Providing additional resources will help build State and local educational infrastructure and will help encourage States to move to accountability systems that can measure student growth and use more than standardized test scores when making decisions about students and schools.

There are a number of other issues that we need to address in the NCLB reauthorization. My bill seeks to address some of the top concerns I have heard about from constituents around the State related to testing. During the reauthorization process, we need to examine and modify NCLB sanctions structure to address implementation problems that rural and large urban districts have faced. We also need to recognize that every school and every school district is different and the rigid sanctions of NCLB may not allow States and local districts the opportunity to implement a variety of other innvative school reform efforts.

We also need to address the diverse learning needs of students with disabilities and English language learners. We need to ensure that NCLB works in concert with the Individuals with Disabilities Education Act, IDEA, and that students with disabilities are provided with proper modifications on assessments without holding lower academic expectations for these students. I have long supported full funding for IDEA and strongly support high academic expectations for students with disabilities. I was disappointed the final NCLB conference report in 2001 dropped the Senate language on full funding of the Federal share of IDEA, and I hope we can be successful during this reauthorization process in efforts to fully fund IDEA.

The number of English language learners is growing around the country, including in my State of Wisconsin. I have heard concerns from educators around Wisconsin that NCLB does not properly address the unique learning needs of English language learners. Teachers are concerned about the lack of valid and reliable assessments for English language learners and the unfairness of testing these students when they may not yet have learned English well enough to take standardized tests in English. During the reauthorization, we need to ensure that additional resources are provided to develop valid and reliable assessments for English language learners so that these students are fairly assessed while learning the English language.

There are many issues that need to be addressed during the reauthorization process, and my bill seeks to address some of the issues related to testing under NCLB. I am pleased this bill is cosponsored by my friend and colleague, Senator PATRICK LEAHY, and that it has the support of the American Association of School Administrators, the National Education Association, the National Association of Elementary School Principals, the School Social Work Association of America, the Wisconsin Department of Public Instruction, the Wisconsin Education Association Council, the Milwaukee Teachers Education Association, the Wisconsin National Board Network of Wisconsin National Board Certified Teachers, and the Wisconsin School Administrator's Alliance, which includes the Association of Wisconsin School Administrators, the Wisconsin Association of School District Administrators, the Wisconsin Association of School Business Officials, and the Wisconsin Council of Administrators of Special Services.

The Elementary and Secondary Education Act of 1965 is the key Federal law impacting our nation's schools, and I have long supported the law's commitment to improving the quality of education provided to our Nation's most disadvantaged students. I strongly support holding schools accountable for both providing equal educational opportunities to all our students and for continuing to work to close the achievement gaps that exist in our Nation's schools.

I also strongly support ensuring that classroom teachers, local school districts, and States have the primary responsibility for making decisions regarding day-to-day classroom instruction. Unfortunately, under NCLB, too much of the activity in classrooms is being dictated by the Federal one-size-fits-all testing mandates and accountability provisions. The Federal Government should leave decisions about the frequency of standardized testing up to the States and local school districts that a bear the responsibility for educating our children. While standardized testing does have a role to play in measuring and improving student achievement, one high-stakes test alone cannot accurately or responsibly measure our students or our schools.

NCLB was based on a flawed premise—that the way to hold schools accountable and close the achievement gap was for the Federal Government to pile on more tests and use the tests as the primary tool to evaluate schools. Now, 5 years into the law's implementation, we have evidence showing the need to reduce NCLB's burden on schools, by providing real support for students and teachers and by providing flexibility to Sates to use more than standardized tests to measure the achievement of students. This country has a long way to go before the opportunity for an equal education is afforded to all of America's students and Congress can take a step toward helping to ensure that opportunity by substantially reforming the mandates of NCLB. It is time to fix No Child Left Behind, and to get back to learning—not just testing—in all of our Nation's public schools.

By Mr. DODD:

S. 2055. A bill for the relief of Alejandro Gomez and Juan Sebastian Gomez; to the Committee on the Judiciary.

Mr. DODD. Mr. President, today I send to the desk a private relief bill to provide permanent resident status to Juan and Alejandro Gomez, and ask that it be appropriately referred.

Juan, 18, and Alejandro, 20, are natives of Colombia who came to the U.S. with their parents in August 1990 on B–2 visitors visas. They currently reside in Miami, FL with their parents. They are now the subjects of an October 14, 2007, voluntary departure date under an order of deportation. The date of their departure has been extended from September 14, 2007. Juan and Alejandro have lived continuously in the U.S. for the last 17 years. They have both graduated from Miami Killian High School and are currently enrolled in Miami Dade Community College. They have the strong support of their community. It would be an extreme hardship to uproot Juan and Alejandro from their community, which has wholeheartedly embraced them, to send them back to Colombia where there lives could be in serious danger.

We all know that the circumstances of Juan and Alejandro aren't unique. Just like many other children here illegally, they had no control over their parents' decision to overstay their visas a number of years ago. Most of these young people work hard to complete school and contribute to their communities. Cases like Juan's and Alejandro's are the reason why the so called DREAM Act was attached to the comprehensive immigration reform legislation that the Senate attempted to pass earlier this year, only to face a filibuster from opponents of any comprehensive immigration reform proposal.

The DREAM Act has broad partisan support and is not the reason that the immigration bill has stalled in the Senate. I would hope that consideration could be given to de-linking the DREAM Act from the larger bill so that we can put in place a legal framework for dealing with young people who are caught in this unfortunate immigration status. But that is not likely to happen soon enough to address the problems confronting Juan and Alejandro.

That is why I have decided to introduce a private bill on their behalf. I will also be writing to Senator EDWARD KENNEDY, Chairman of the Subcommittee on Immigration to request, pursuant to the Subcommittee's Rules of Procedure, that the Subcommittee formally request an expedited departmental report from the Bureau of Citizenship and Immigration Services regarding the Gomez brothers so that the Subcommittee can then move forward to give consideration to this bill as soon as possible.

I had an opportunity to meet Juan and Alejandro recently. They believe that America is their home. They love our country and want to have an opportunity to fulfill their dreams of becoming full participants in this country. Passage of the private bill would give them that opportunity. I look forward to working with the Subcommittee to facilitate its passage.

By Mr. ROCKEFELLER (for himself, Mr. KYL, Mrs. MCCASKILL, Mr. VITTER, Ms. SNOWE, Mr. COBURN, Mrs. DOLE, Mr. DOMENICI, Mr. INHOFE, Mr. COLEMAN, Mr. CORNYN, Mr. MARTINEZ, Mr. HAGEL, Mr. COCHRAN, and Mr. LOTT):

S. 2056. A bill to amend title XVIII of the Social Security Act to restore financial stability to Medicare anesthesiology teaching programs for resident physicians; to the Committee on Finance.

Mr. ROCKEFELLER. Mr. President, I rise today with Senators KYL and MCCASKILL, as well as 12 original cosponsors, to introduce an important piece of legislation, the Medicare Teaching Anesthesiology Funding Restoration Act of 2007. This legislation would restore equitable Medicare reimbursement for teaching anesthesiologists and address our nation's growing shortage of trained anesthesiologists.

As many of my colleagues are aware, in 1991, the Centers for Medicare & Medicaid Services, CMS, rolled out a new rule that singled out academic anesthesiology programs for a 50 percent reduction in Medicare reimbursement when teaching anesthesiologists supervise residents in two concurrent cases. The rule took effect in 1994. No other medical specialties or nonphysician providers were affected by this policy change. In fact, payments to non-anesthesiology teaching physicians continue to be paid using the conventional Medicare Physician Fee Schedule. All teaching physicians, except anesthesiologists, can collect the full Medicare fee for working with one resident and also collect an additional full Medicare fee for working with a second resident on an overlapping case as long as the teaching physician is present during the ''critical and key'' portions of each procedure and is immediately available to return to a case when not physically present.

This arbitrary and unfair payment reduction has had a devastating impact on the training of anesthesiologists across the country, anesthesiologists who we rely on daily for safe surgical procedures, cesarean deliveries during childbirth, emergency and critical care procedures, pain management, and care of our wounded warriors. Because of this policy change, teaching hospitals

receive only half the cost of anesthesiology treatment for Medicare patients. This shortchanges academic anesthesiology programs an average of $400,000 annually, with some programs losing more than $1 million per year. As a result, academic anesthesiology programs have experienced increased difficulty filling faculty appointments and sustaining vital research and development programs. But even more disturbing is the fact that this inconsistent and arbitrary payment policy has forced 28 academic anesthesiology programs to close since 1994, leaving only 129 programs nationwide.

In my home State, we have only one academic anesthesiology program, at the West Virginia University in Morgantown. This program is losing nearly $700,000 per year because of this unfair Medicare payment policy. When you take into account the fact that many private insurance companies follow Medicare's lead on reimbursement, the final dollar impact is even greater. Other departments within the medical school are being called upon to subsidize these losses instead of using their resources to advance important research initiatives or recruit highly qualified faculty.

West Virginia students interested in studying anesthesiology are also at risk. Because this is the only academic anesthesiology program in the State, far fewer West Virginians will have the opportunity to enter the specialty of anesthesiology if this program is forced to close. This will have a direct impact on our State's health care infrastructure because the majority of graduates from West Virginia University's anesthesiology residency program stay in West Virginia. If this program closes, the number of qualified anesthesiologists in West Virginia could plummet, leaving residents with severe access problems for surgery, emergency care, and other high risk procedures.

This is not just a West Virginia problem. This is a national problem with severe implications in every community. Academic anesthesiology programs treat the sickest of the sick, patients with multiple diagnoses, unusual conditions and/or in need of highly complex and sophisticated surgeries. The arbitrary Medicare payment reductions for teaching anesthesiologists could mean that patients of all ages and in all communities could see increased anesthesiology shortages in operating rooms, pain clinics, the military, critical care units, labor and delivery rooms, and emergency rooms.

In order to address this problem, the Medicare Anesthesiology Teaching Funding Restoration Act eliminates the Medicare payment inequity for physicians who teach anesthesiology. It restores Medicare reimbursement for academic anesthesiology programs to the level in existence before 1994 and subjects teaching anesthesiologists to the same ''critical and key'' portion rule as other physicians under Medicare. This payment restoration will provide physician residents with sufficient opportunities to pursue the specialty of anesthesiology. It will also provide patients, especially high risk patients, with continued access to quality anesthesia care when they need it. And, finally, this vital legislation will allow academic anesthesiology programs to continue making advances in patient safety through research and development.

I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 2056

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Medicare Anesthesiology Teaching Funding Restoration Act of 2007''.

SEC. 2. SPECIAL PAYMENT RULE FOR TEACHING ANESTHESIOLOGISTS.

Section 1848(a) of the Social Security Act (42 U.S.C. 1395w–4(a)) is amended—

(1) in paragraph (4)(A), by inserting ''except as provided in paragraph (5),'' after ''anesthesia cases,''; and

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

''(5) SPECIAL RULE FOR TEACHING ANESTHESIOLOGISTS.—With respect to physicians' services furnished on or after January 1, 2008, in the case of teaching anesthesiologists involved in the training of physician residents in a single anesthesia case or two concurrent anesthesia cases, the fee schedule amount to be applied shall be 100 percent of the fee schedule amount otherwise applicable under this section if the anesthesia services were personally performed by the teaching anesthesiologist alone and paragraph (4) shall not apply if—

''(A) the teaching anesthesiologist is present during all critical or key portions of the anesthesia service or procedure involved; and

''(B) the teaching anesthesiologist (or another anesthesiologist with whom the teaching anesthesiologist has entered into an arrangement) is immediately available to furnish anesthesia services during the entire procedure.''.

Mr. KYL. Mr. President, today Senator ROCKEFELLER and I introduce the Medicare Anesthesiology Teaching Funding Restoration Act of 2007.

I want to thank Senator ROCKEFELLER for his leadership, as well as Senator VITTER who introduced a similar bill last Congress.

As my colleagues may be aware, Arizona is the Nation's fastest growing State, and as its population grows, so does the demand for health care services. Yet Arizona suffers from a critical shortage of health care professionals.

Inadequate Medicare reimbursement exacerbates physician shortages and disrupts patient access to care. In fact, each year Medicare shortchanges academic anesthesiology programs nearly $40 million.

Currently, a teaching physician may receive the full Medicare fee schedule if he or she is involved in two concurrent cases with residents.

In 1994 the Centers for Medicare and Medicaid Services, CMS, singled out anesthesiology teaching programs and implemented a payment change. The payment change required that teaching anesthesiologists receive only 50 percent of the Medicare fee schedule if he or she is involved in two concurrent cases with residents.

As a result, 28 academic anesthesiology programs have closed, leaving 129 academic anesthesiology programs in existence today.

As one of the remaining teaching programs, the University of Arizona loses over $300,000 each year.

This is likely a conservative estimate as private payers are increasingly adopting Medicare's payment policy, compounding a teaching program's total financial loss. Medicare's policy challenges a teaching program's ability to fill vacant faculty positions, retain expert faculty, and train residents, particularly in rural and underserved communities.

Additionally, and perhaps most importantly, as training I programs close, patients will increasingly encounter anesthesiologist shortages.

In Arizona alone, the Health Resources and Services Administration, HRSA, projects that between 2000 and 2020 the State's population will grow 18 percent and the population 65 and older will grow 72 percent.

The Medicare Anesthesiology Teaching Funding Restoration Act of 2007 repeals the 1994 payment change and restores Medicare payment to teaching anesthesiologists.

Under this bill, the clear winners are patients. Restoring funding helps preserve patient access to safe, quality health care and alleviate growing health professional shortages.

I urge my colleagues to cosponsor this critical legislation.

By Mr. AKAKA:

S. 2057. A bill to reauthorize the Merit Sytems Protection Board and the Office of Special Counsel, to modify the procedures of the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

● Mr. AKAKA. Mr. President, today I rise to introduce the Federal Merit System Reauthorization Act of 2007 to reauthorize the Office of Special Counsel, OSC, and the Merit Systems Protection Board, MSPB, and make other changes to improve the performance of both agencies. I am pleased to note that Representative DANNY DAVIS, Chairman of the House Federal Workforce Subcommittee, is introducing companion legislation today as well.

Both MSPB and OSC were created by the Civil Service Reform Act of 1978 to safeguard the merit system principles and to help ensure that federal employees are free from discriminatory, arbitrary, and retaliatory actions, especially against those who step forward to disclose government waste, fraud,

and abuse. These protections are essential so that employees can perform their duties in the best interests of the American public, which, in turn, helps ensure that the federal government is an employer of choice.

MSPB is charged with monitoring the Federal Government's merit-based system of employment by hearing and deciding appeals from Federal employees regarding job removal and other major personnel actions. The board also reviews regulations of the Office of Personnel Management, OPM, and conducts studies of the merit systems.

OSC is charged with protecting Federal employees and job applicants from reprisal for whistleblowing and other prohibited personnel practices. OSC is to serve as a safe and secure channel for Federal workers who wish to disclose violations of law, gross mismanagement or waste of funds, abuse of authority, and a specific danger to the public health and safety. In addition, OSC enforces the Hatch Act, which restricts the political activities of Federal employees, and the Uniformed Services Employment and Reemployment Rights Act of 1994.

OSC and MSPB are to be the stalwarts of the merit system. However, both agencies have been criticized for failing to live up to their mission.

For example, as the author of the Federal Employee Protection of Disclosures Act, S. 274, I am deeply concerned by the fact that no Federal whistleblower has won on the merits of their claim before the Board since 2003. At the Federal Circuit Court of Appeals, whistleblowers have won on the merits twice since October 1994, when Congress last strengthened the Whistleblower Protection Act.

In addition, testimony provided at the House and Senate reauthorization hearings earlier this year raised several concerns about the structure of the MPSB and the rights and responsibilities of the Chairman of the MSPB compared to the other Members. This raises concerns about the structure of the MSPB and warrants a closer review.

At OSC, the most recent Federal employee satisfaction survey shows that less than five percent of the respondents reported any degree of satisfaction with the results obtained by OSC while over 92 percent were dissatisfied. Moreover, in the past few years, OSC has become subject to numerous allegations by employees, good government groups, and employee unions who allege that OSC is acting counter to its mission by: ignoring whistleblower complaints, failing to protect employees subjected to sexual orientation discrimination, and retaliating against whistleblowers at OSC.

If true, these practices violate OSC's legal responsibility to be the protector of civil service employees. Given the fact that OSC employees could not make their disclosure to the Special Counsel, the alleged individual who engaged in the wrongdoing and retaliated against them, the employees and stakeholders filed a complaint with the President's Council on Integrity and Efficiency, PCIE. Unfortunately, the investigation is still ongoing.

As such, the Federal Merit System Reauthorization Act would reauthorize OSC and MSPB for a period of three years instead of the 5 years requested by both agencies in order to give Congress a chance to take a closer review of the two agencies. The bill would also legislatively establish a process for OSC employees to bring allegations of retaliation against the Special Counsel or the Deputy Special Counsel to the PCIE and clarify that Federal employees are protected from discrimination based on their sexual orientation. Finally the bill would make procedural changes at OSC and MSPB to improve agency operations and customer service and impose new reporting requirements on both agencies.

Both OSC and MSPB must be free from allegations of wrongdoing and the appearance of any activity that would question their independence. I believe that the provisions in this bill will make needed improvements in both agencies to build trust in the Federal workforce and the American people. I ask unanimous consent that the text of the bill be printed in the RECORD.●

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 2057

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Merit System Reauthorization Act of 2007".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Authorization of appropriations.
Sec. 3. Allegations of wrongdoing against Special Counsel or Deputy Special Counsel.
Sec. 4. Discrimination on the basis of sexual orientation prohibited.
Sec. 5. Procedures of the Merit Systems Protection Board.
Sec. 6. Procedures of the Office of Special Counsel.
Sec. 7. Reporting requirements.

SEC. 2. AUTHORIZATION OF APPROPRIATIONS.

(a) MERIT SYSTEMS PROTECTION BOARD.—Section 8(a)(1) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note) is amended by striking "2003, 2004, 2005, 2006, and 2007" and inserting "2008, 2009, and 2010".

(b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note) is amended by striking "2003, 2004, 2005, 2006, and 2007" and inserting "2008, 2009, and 2010".

(c) EFFECTIVE DATE.—This section shall take effect as of October 1, 2007.

SEC. 3. ALLEGATIONS OF WRONGDOING AGAINST SPECIAL COUNSEL OR DEPUTY SPECIAL COUNSEL.

(a) DEFINITIONS.—In this section—

(1) the term "Special Counsel" refers to the Special Counsel appointed under section 1211(b) of title 5, United States Code;

(2) the term "Integrity Committee" refers to the Integrity Committee described in Executive Order 12993 (relating to administrative allegations against inspectors general) or its successor in function (as identified by the President); and

(3) the terms "wrongdoing" and "Inspector General" have the same respective meanings as under the Executive order cited in paragraph (2).

(b) AUTHORITY OF INTEGRITY COMMITTEE.—

(1) IN GENERAL.—An allegation of wrongdoing against the Special Counsel (or the Deputy Special Counsel) may be received, reviewed, and referred for investigation by the Integrity Committee to the same extent and in the same manner as in the case of an allegation against an Inspector General (or a member of the staff of an Office of Inspector General), subject to the requirement that the Special Counsel recuse himself or herself from the consideration of any allegation brought under this subsection.

(2) COORDINATION WITH EXISTING PROVISIONS OF LAW.—This section does not eliminate access to the Merit Systems Protection Board for review under section 7701 of title 5, United States Code. To the extent that an allegation brought under this subsection involves section 2302(b)(8) of such title, a failure to obtain corrective action within 120 days after the date on which that allegation is received by the Integrity Committee shall, for purposes of section 1221 of such title, be considered to satisfy section 1214(a)(3)(B) of such title.

(c) REGULATIONS.—The Integrity Committee may prescribe any rules or regulations necessary to carry out this section, subject to such consultation or other requirements as might otherwise apply.

SEC. 4. DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION PROHIBITED.

(a) REPUDIATION.—In order to dispel any public confusion, Congress repudiates any assertion that Federal employees are not protected from discrimination on the basis of sexual orientation.

(b) AFFIRMATION.—It is the sense of Congress that, in the absence of the amendment made by subsection (c), discrimination against Federal employees and applicants for Federal employment on the basis of sexual orientation is prohibited by section 2302(b)(10) of title 5, United States Code.

(c) DISCRIMINATION BASED ON SEXUAL ORIENTATION PROHIBITED.—Section 2302(b)(1) of title 5, United States Code, is amended—

(1) in subparagraph (D), by striking "or" at the end;

(2) in subparagraph (E), by inserting "or" at the end; and

(3) by adding at the end the following:

"(F) on the basis of sexual orientation;".

SEC. 5. PROCEDURES OF THE MERIT SYSTEMS PROTECTION BOARD.

(a) PROOF OF EXHAUSTION FOR INDIVIDUAL RIGHT OF ACTION.—Section 1221(a) of title 5, United States Code, is amended—

(1) by striking "(a)" and inserting "(a)(1)"; and

(2) by adding at the end the following:

"(2) For purposes of paragraph (1), an employee, former employee, or applicant for employment may demonstrate compliance with section 1214(a)(3)(B) by—

"(A) submitting a copy of the complaint or other pleading pursuant to which such employee, former employee, or applicant sought corrective action from the Special Counsel with respect to the personnel action involved; and

"(B) certifying that the Special Counsel did not provide notice of intent to seek such corrective action to such employee, former employee, or applicant within the 120-day period described in such section 1214(a)(3)(B).".

(b) INDIVIDUAL REQUESTS FOR STAYS.—Section 1221(c) of title 5, United States Code, is amended by striking paragraph (2) and inserting the following:

''(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that the employee, former employee, or applicant has demonstrated that protected activity described under section 2302(b)(8) was a contributing factor to the personnel action involved. If the stay request is denied, the employee, former employee, or applicant may submit an interlocutory appeal for expedited review by the Board.''.

(c) JOINING SUBSEQUENT AND RELATED CLAIMS WITH PENDING LITIGATION.—

(1) IN GENERAL.—Section 1221 of title 5, United States Code, is amended—

(A) by redesignating subsections (h), (i), and (j) as subsections (i), (j), and (k), respectively; and

(B) inserting after subsection (g) the following:

''(h) During a pending proceeding, subsequent personnel actions may be joined if the employee, former employee, or applicant for employment demonstrates that retaliation for protected activity at issue in the pending proceeding was a contributing factor to subsequent alleged prohibited personnel practices.''.

(2) CONFORMING AMENDMENT.—Section 1222 of title 5, United States Code, is amended by striking ''section 1221(i)'' and inserting ''section 1221(j)''.

(d) PROCEDURAL DUE PROCESS.—Section 1204(b)(1) of title 5, United States Code, is amended by inserting ''in accordance with regulations consistent with the Federal Rules of Civil Procedure, so far as practicable'' before the period.

(e) ATTORNEY FEES.—Section 7701(g)(1) of title 5, United States Code, is amended by striking ''if the employee or applicant is the prevailing party and'' and inserting ''if the claim or claims raised by the employee or applicant were not frivolous, unreasonable, or groundless; the case was a substantial or significant factor in the agency's action providing some relief or benefit to the employee or applicant; and''.

SEC. 6. PROCEDURES OF THE OFFICE OF SPECIAL COUNSEL.

(a) INVESTIGATIONS OF ALLEGED PROHIBITED PERSONNEL PRACTICES.—Section 1212(e) of title 5, United States Code, is amended by striking ''may prescribe such regulations as may be necessary to perform the functions'' and inserting ''shall prescribe such regulations as may be necessary to carry out subsection (a)(2) and may prescribe any regulations necessary to carry out any of the other functions''.

(b) MANDATORY COMMUNICATIONS WITH COMPLAINANTS.—

(1) CONTACT INFORMATION.—Section 1214(a)(1)(B) of title 5, United States Code, is amended by striking clause (ii) and inserting the following:

''(ii) shall include the name and contact information of a person at the Office of Special Counsel who—

''(I) shall be responsible for interviewing the complainant and making recommendations to the Special Counsel regarding the allegations of the complainant; and

''(II) shall be available to respond to reasonable questions from the complainant regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the allegations of the complainant.''.

(2) STATEMENT AFTER TERMINATION OF INVESTIGATION.—Section 1214(a)(2)(A)(iv) of title 5, United States Code, is amended by striking ''a response'' and inserting ''specific responses''.

(c) QUALIFICATIONS OF SPECIAL COUNSEL.—The third sentence of section 1211(b) of title 5, United States Code, is amended by striking ''position.'' and inserting ''position and has professional experience that demonstrates an understanding of and a commitment to protecting the merit based civil service.''.

(d) ALTERNATIVE DISPUTE RESOLUTION PROGRAM OF THE OFFICE OF SPECIAL COUNSEL.—Section 1212 of title 5, United States Code, is amended by adding at the end the following:

''(h) The Office of Special Counsel shall by regulation provide for one or more alternative methods for settling matters subject to the jurisdiction of the Office which shall be applicable at the election of an employee, former employee, or applicant for employment or at the direction of the Special Counsel with the consent of the employee, former employee, or applicant concerned. In order to carry out this subsection, the Special Counsel shall provide for appropriate offices in the District of Columbia and other appropriate locations.''.

(e) SUBSTANTIAL LIKELIHOOD DETERMINATIONS.—Section 1213 of title 5, United States Code, is amended—

(1) in subsection (b), by striking ''15 days'' and inserting ''45 days''; and

(2) in subsection (c)(1), by inserting '', after consulting with the person who made the disclosure on how to characterize the issues,'' after ''appropriate agency head''.

(f) DETERMINATION OF STATUTORY REQUIREMENTS MET.—Section 1213(e) of title 5, United States Code, is amended—

(1) in paragraph (3), by striking ''subsection (e)(1)'' and inserting ''paragraph (1)'';

(2) by redesignating paragraphs (3) and (4) as paragraphs (4) and (5), respectively; and

(3) by inserting after paragraph (2) the following:

''(3) Upon receipt of any report of the head of an agency required under subsection (c), if the Special Counsel is unable to make a determination under paragraph (2)(A) or (B), the Special Counsel shall require the agency head to submit any additional information necessary for the Special Counsel to make such determinations before any information is transmitted under paragraph (4).''.

(g) PUBLIC AND INTERNET ACCESS FOR AGENCY INVESTIGATIONS.—Section 1219 of title 5, United States Code, is amended by striking subsections (a) and (b) and inserting the following:

''(a) The Special Counsel shall maintain and make available to the public (including on the website of the Office of Special Counsel)—

''(1) a list of noncriminal matters referred to heads of agencies under subsection (c) of section 1213, together with—

''(A) reports from heads of agencies under subsection (c)(1)(B) of such section relating to such matters;

''(B) comments submitted under subsection (e)(1) of such section relating to such matters, if the person making the disclosure consents; and

''(C) comments or recommendations by the Special Counsel under subsection (e)(4) of such section relating to such matters;

''(2) a list of matters referred to heads of agencies under section 1215(c)(2);

''(3) a list of matters referred to heads of agencies under subsection (e) of section 1214, together with certifications from heads of agencies under such subsection; and

''(4) reports from heads of agencies under section 1213(g)(1).

''(b) The Special Counsel shall take steps to ensure that any list or report made available to the public or placed on the website of the Office of Special Counsel under this section does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.''.

SEC. 7. REPORTING REQUIREMENTS.

(a) MERIT SYSTEMS PROTECTION BOARD.—Each annual report submitted by the Merit Systems Protection Board under section 1206 of title 5, United States Code, shall, with respect to the period covered by such report, include—

(1) the number of cases and alleged violations of section 2302 of such title 5 filed with the Board for each agency, itemized for each prohibited personnel practice;

(2) the number of cases and alleged violations of section 2302 of such title 5 that the Board determines for each agency, itemized for each prohibited personnel practice and compared to the total number of cases and allegations filed with the Board for each, both with respect to the initial decisions by administrative judges and final Board decisions;

(3) the number of cases and allegations in which corrective action was provided, compared to the total number of cases and allegations filed with the Board for each, itemized separately for settlements and final Board decisions; and

(4) with respect to paragraphs (8) and (9) of section 2302 (b) of such title 5, the number of cases in which the Board has ruled in favor of the employee on the merits of the claim compared to the total number of cases and allegations filed with the Board for each, where findings of fact and conclusions of law were issued on whether those provisions were violated, independent from cases disposed by procedural determinations, including a separate itemization of both initial decisions by administrative judges and final Board decisions for each category.

(b) OFFICE OF SPECIAL COUNSEL.—Each annual report submitted under section 1218 of title 5, United States Code, by the Special Counsel or an employee designated by the Special Counsel shall, with respect to the period covered by such report, include—

(1) the number of cases and allegations for each prohibited personnel practice, delineated by type of prohibited personnel practice;

(2) for each type of prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel found reasonable grounds to believe section 2302 of such title 5 had been violated;

(3) for each type of prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel referred the complaint for full field investigation;

(4) for each prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel recommended corrective action;

(5) for each prohibited personnel practice, the number of cases and allegations as to which the Office of Special Counsel conducted a mediation or other form of alternative dispute resolution, with statistics and illustrative examples describing the results with particularity;

(6) the number of instances in which the Office of Special Counsel referred disclosures submitted under section 1213 of such title 5 to an agency head, without any finding under subsection (c) or (g) of such section;

(7) a statistical tabulation of results for each customer satisfaction survey question, both with respect to allegations of prohibited personnel practice submitted under section 1214 of such title 5 and disclosures submitted under section 1213 of such title; and

(8) for each provision under section 1216(a)(1) through (5) and (c) of such title 5, the number of cases and allegations, the number of field investigations opened, the number of instances in which corrective action was sought, and the number of instances in which corrective action was obtained.

(c) ANNUAL SURVEY.—Section 13(a) of the Act entitled ''An Act to reauthorize the Office of Special Counsel, and for other purposes'', approved October 29, 1994 (5 U.S.C. 1212 note; Public Law 103–424) is amended in the first sentence by inserting '', including individuals who disclose information to the Office of Special Counsel under section 1213'' before the period.

By Mr. LEVIN:

S. 2058. A bill to amend the Commodity Exchange Act to close the Enron loophole, prevent price manipulation and excessive speculation in the trading of energy commodities, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

Mr. LEVIN. Mr. President, today I am introducing the Close the Enron Loophole Act to help prevent price manipulation and dampen the excessive speculation that have unfairly increased the cost of energy in the U.S.

This legislation is the product of more than 4 years of work examining U.S. energy commodity markets by the Senate Permanent Subcommittee on Investigations, which I chair. That work has shown that U.S. market prices for crude oil, natural gas, jet fuel, diesel fuel and other energy commodities are more unpredictable and variable than ever before, and too often are imposing huge cost increases on the backs of working American families and businesses. The legislation I am introducing today is essential to help ensure that our energy markets provide prices that reflect the fundamentals of supply and demand for energy instead of prices boosted by manipulation or excessive speculation. It is also essential to close an egregious loophole in the law that was championed by Enron and other large energy traders in the heyday of deregulation and that continues to haunt our energy markets and harm American consumers through inflated and distorted energy prices.

The ''Enron loophole'' is a provision that was inserted at the last-minute, without opportunity for debate, into commodity legislation that was attached to an omnibus appropriations bill and passed by Congress in late December 2000, in the waning hours of the 106 Congress. This loophole exempted from U.S. Government regulation the electronic trading of energy commodities by large traders. The loophole has helped foster the explosive growth of trading on unregulated electronic energy exchanges. It has also rendered U.S. energy markets more vulnerable to price manipulation and excessive speculation with resulting price distortions. This legislation is necessary to close the Enron loophole and reduce our vulnerability to manipulation and excessive speculation by providing for regulation of the electronic trading of energy commodities by large traders.

A stable and affordable supply of energy is vital to the national and economic security of the United States. We need energy to heat and cool our homes and offices, to generate electricity for lighting, manufacturing, and vital services, and to power our transportation sector—automobiles, trucks, boats, and airplanes.

Over 80 percent of our energy comes from fossil fuels—oil, natural gas, and coal. About 50 percent is from oil and natural gas. The U.S. consumes around 20 million barrels of crude oil each day, over half of which is imported. About 90 percent of this oil is refined into products such as gasoline, home heating oil, jet fuel, and diesel fuel.

The crude oil market is the largest commodity market in the world, and hundreds of millions of barrels are traded daily in the various crude oil futures, over-the-counter, and spot markets. The world's leading exchanges for crude oil futures contracts are the New York Mercantile Exchange, NYMEX, and the Intercontinental Exchange, known as ICE Futures in London. Futures contracts for gasoline, heating oil, and diesel fuel are also traded on these exchanges. Presently, regulatory authority over the U.S. crude oil market is split between British and U.S. regulators.

Natural gas heats the majority of American homes, is used to harvest crops, powers 20 percent of our electrical plants, and plays a critical role in many industries, including manufacturers of fertilizers, paints, medicines, and chemicals. It is one of the cleanest fuels we have, and we produce most of it ourselves with only 15 percent being imported, primarily from Canada. In 2005 alone, U.S. consumers and businesses spent about $200 billion on natural gas.

Only part of the natural gas futures market is regulated. Natural gas produced in the United States is traded on NYMEX and on an unregulated ICE electronic trading platform located in Georgia. The price of natural gas in both the futures market and in the spot or physical market depends on the prices on both of these U.S. exchanges.

Trading abuses plague existing energy markets. The key federal regulator, the Commodity Futures Trading Commission, CFTC, reports that overall in recent years it has issued several hundred million dollars in fines for trading abuses in the energy markets. Several major enforcement actions are pending.

Since 2001, the Senate Permanent Subcommittee on Investigations has been examining the vulnerability of U.S. energy markets to price manipulation and excessive speculation due to the lack of regulation of electronic energy exchanges under the so called ''Enron loophole.'' Although the CFTC and Federal Energy Regulatory Commission have brought a number of enforcement cases against energy traders, the CFTC's ability to prevent abuses before they occur is severely hampered by its lack of regulatory authority over key energy markets.

The Subcommittee first documented the weaknesses in the regulation of our energy markets in a 2003 staff report I initiated called, ''U.S. Strategic Petroleum Reserve: Recent Policy Has Increased Costs to Consumers But Not Overall U.S. Energy Security.'' The report found that crude oil prices were ''affected by trading not only regulated exchanges like the NYMEX, but also on unregulated 'over-the-counter', OTC, markets which have become major trading centers for energy contracts and derivatives. The lack of information on prices and large positions in these OTC markets makes it difficult in many instances, if not impossible in practice, to determine whether traders have manipulated crude oil prices.''

In June 2006, the Subcommittee issued a staff report entitled, ''The Role of Market Speculation in Rising Oil and Gas Prices: A Need To Put the Cop Back on the Beat.'' This bipartisan staff report analyzed the extent to which the increasing amount of financial speculation in energy markets had contributed to the steep rise in energy prices over the past few years. The report concluded that ''[s]peculation has contributed to rising U.S. energy prices,'' and endorsed the estimate of various analysts that the influx of speculative investments into crude oil futures accounted for approximately $20 of the then-prevailing crude oil price of approximately $70 per barrel.

The 2006 report recommended that the CFTC be provided with the same authority to regulate and monitor electronic energy exchanges, such as ICE, as it has with respect to the fully regulated futures markets, such as NYMEX, to ensure that excessive speculation in the energy markets did not adversely effect the availability and affordability of vital energy commodities through unwarranted price increases.

In June 2007, the Subcommittee released another report, ''Excessive Speculation in the Natural Gas Market.'' Our report found that a single hedge fund named Amaranth dominated the natural gas market during the spring and summer of 2006, and Amaranth's large-scale trading significantly distorted natural gas prices from their fundamental values based on supply and demand.

The report concluded that the current regulatory system was unable to prevent these distortions because much of Amaranth's trading took place on an unregulated electronic market. The report recommended that Congress close the ''Enron loophole'' that exempted such markets from regulation.

The Subcommittee's Report describes how Amaranth used the major unregulated electronic market, ICE, to amass huge positions in natural gas contracts, outside regulatory scrutiny, and beyond any regulatory authority. During the spring and summer of 2006, Amaranth held by far the largest positions of any trader in the natural gas market. According to traders interviewed by the Subcommittee, during this period natural gas prices for the following winter were ''clearly out of whack,'' at ''ridiculous levels,'' and unrelated to supply and demand. At the

Subcommittee's hearing in June of this year, natural gas purchasers, such as the American Public Gas Association and the Industrial Energy Consumers of America, explained how these price distortions increased the cost of hedging for natural gas consumers, which ultimately led to increased costs for American industries and households. The Municipal Gas Authority of Georgia calculated that Amaranth's excesses increased the cost of their winter gas purchases by $18 million.

Finally, when Amaranth's positions on the regulated futures market, NYMEX, became so large that NYMEX directed Amaranth to reduce the size of its positions on NYMEX, Amaranth simply switched those positions to ICE, an unregulated market that is beyond the reach of the CFTC. In other words, in response to NYMEX's order, Amaranth did not reduce its size; it merely moved it from a regulated market to an unregulated market.

This regulatory system makes no sense. It is as if a cop on the beat tells a liquor store owner that he must obey the law and stop selling liquor to minors, yet the store owner is allowed to move his store across the street and sell to whomever he wants because the cop has no jurisdiction on the other side of the street and none of the same laws apply. The Amaranth case history shows it is clearly time to put the cop on the beat in all of our energy exchanges.

The Subcommittee held two days of hearings relating to issues covered in its 2007 report. Both of the major energy exchanges, NYMEX and ICE, testified that they would support a change in the law that would eliminate the current exemption from regulation for electronic energy markets, in order to reduce the potential for manipulation and excessive speculation. Consumers and users of natural gas and other energy commodities—the American Public Gas Association, the New England Fuel Institute, the Petroleum Marketers Association of America, and the Industrial Energy Consumers of America—also testified in favor of closing the Enron loophole.

The legislation I am introducing today is intended to end the exemption from regulation that electronic energy trading facilities now have. The bill includes suggestions made by the exchanges, the CFTC, and natural gas users, and I will continue to seek their input as the legislative process moves forward.

Essentially, this bill would restore the CFTC's ability to police all U.S. energy exchanges to prevent price manipulation and excessive speculation from hiking energy prices. In particular, it would restore CFTC oversight of large-trader energy exchanges that were exempted from regulation in the 2000 Commodity Futures Modernization Act by means of the Enron loophole. The bill would require the CFTC to oversee these facilities in the same manner and according to the same standards that currently apply to futures exchanges like NYMEX. Because these energy exchanges currently restrict trading to large traders, however, the bill would not require them to comply with rules applicable to retail trading or trading by brokers on behalf of smaller traders. In all other respects, however, including the rules that create position limits and accountability levels to stop price manipulation and excessive speculation, the bill would apply the same rules to energy exchanges like ICE as currently apply to futures exchanges like NYMEX.

The bill also would require large trades in U.S. energy commodities conducted from within the United States on a foreign board of trade to be reported to the CFTC. This provision is intended to ensure that the CFTC has a more complete view of the positions of U.S. energy traders buying or selling energy commodities for delivery in the United States. This provision could be waived by the CFTC if the CFTC reaches agreement with the foreign board of trade to obtain the same information.

Preventing price manipulation and excessive speculation in U.S. energy markets is not an easy undertaking. I welcome good-faith comments on how this bill can be improved. I want to make it clear, however, that in my opinion the Enron loophole has got to be closed. Recent cases have shown us that market abuses and failures did not stop with the fall of Enron. They are still with us. We cannot afford to let the current situation continue, allowing energy traders to use unregulated markets to avoid regulated markets. It's time to put the cop back on the beat in all U.S. energy markets. The stakes for our energy security and for competition in the market place are too high to do otherwise.

I ask unanimous consent that the text of the bill, a bill summary, and a section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 2058

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Close the Enron Loophole Act''.

SEC. 2. ENERGY TRADING FACILITIES.

(a) DEFINITIONS.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended by redesignating paragraphs (13) through (33) as paragraphs (15) through (35), respectively, and by inserting after paragraph (12) the following:

''(13) ENERGY COMMODITY.—The term 'energy commodity' means a commodity (other than an excluded commodity, a metal, or an agricultural commodity) that is—

''(A) used as a source of energy, including but not limited to—

''(i) crude oil;

''(ii) gasoline, diesel fuel, heating oil, and any other product derived or refined from crude oil;

''(iii) natural gas, including methane, propane, and any other gas or liquid derived from natural gas; and

''(iv) electricity; or

''(B) results from the burning of fossil fuels to produce energy, including but not limited to carbon dioxide and sulfur dioxide.

''(14) ENERGY TRADING FACILITY.—The term 'energy trading facility' means a trading facility that—

''(A) is not a designated contract market; and

''(B) facilitates the execution or trading of agreements, contracts, or transactions in an energy commodity that are not spot sales of a cash commodity or sales of a cash commodity for deferred shipment or delivery, and that are entered into on a principal-to-principal basis solely between persons that are eligible commercial entities at the time the persons enter into the agreement, contract, or transaction; and

''(i) facilitates the clearance and settlement of such agreements, contracts, or transactions; or

''(ii) the Commission determines performs a significant price discovery function in relation to an energy commodity listed for trading on a trading facility or in the cash market for the energy commodity. In making a determination whether a trading facility performs a significant price discovery function the Commission may consider, as appropriate—

''(I) the extent to which the price of an agreement, contract, or transaction traded or executed on the trading facility is derived from or linked to the price of a contract in an energy commodity listed for trading on a designated contract market;

''(II) the extent to which cash market bids, offers, or transactions in an energy commodity are directly based on, or quoted at a differential to, the prices generated by agreements, contracts, or transactions in the same energy commodity being traded or executed on the trading facility;

''(III) the volume of agreements, contracts, or transactions in the energy commodity being traded on the trading facility;

''(IV) the extent to which data regarding completed transactions are posted, disseminated, or made available immediately after completion of such transactions, with or without a fee, to other market participants and other persons;

''(V) the extent to which an arbitrage market exists between the agreements, contracts, or transactions traded or executed on the trading facility and a contract in an energy commodity listed for trading on a designated contract market; and

''(VI) such other factors as the Commission determines appropriate.''.

(b) COMMISSION OVERSIGHT OF ENERGY TRADING FACILITIES.—Section 2(h) of the Commodity Exchange Act (7 U.S.C. 2(h)) is amended—

(1) in paragraph (3)(B) after ''an electronic trading facility'' by inserting ''that is not an energy trading facility''; and

(2) by adding at the end the following:

''(7) ENERGY TRADING FACILITIES.—Notwithstanding any other provision of this Act, an energy trading facility shall be subject to the provisions of section 2(j) of this Act.''.

(c) STANDARDS APPLICABLE TO ENERGY TRADING FACILITIES.—Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended by adding the following new subsection:

''(j) REGISTRATION OF ENERGY TRADING FACILITIES.—

''(1) IN GENERAL.—It shall be unlawful for any person to enter into an agreement, contract, or transaction for future delivery of an energy commodity that is not a spot sale of a cash commodity or a sale of a cash commodity for deferred shipment or delivery, on

or through an energy trading facility unless such facility is registered with the Commission as an energy trading facility.

''(2) APPLICATIONS.—Any trading facility applying to the Commission for registration as an energy trading facility shall submit an application to the Commission that includes any relevant materials and records, consistent with the Act, that the Commission may require.

''(3) COMMISSION ACTION.—The Commission shall make a determination whether to approve an application for registration as an energy trading facility within 120 days after such application is submitted.

''(4) CRITERIA FOR REGISTRATION.—To be registered as an energy trading facility, the applicant shall demonstrate to the Commission that the trading facility meets the criteria specified in this paragraph.

''(A) PREVENTION OF PRICE MANIPULATION AND EXCESSIVE SPECULATION.—The trading facility shall have the capacity to prevent price manipulation, excessive speculation, price distortion, and disruption of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

''(B) MONITORING OF TRADING.—The trading facility shall monitor trading to prevent price manipulation, excessive speculation, price distortion, and disruption of the delivery or cash-settlement process.

''(C) CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION.—The trading facility shall list for trading only contracts that are not readily susceptible to manipulation.

''(D) FINANCIAL INTEGRITY OF TRANSACTIONS.—A trading facility that facilitates the clearance and settlement of agreements, contracts, or transactions by a derivatives clearing organization shall establish and enforce rules and procedures for ensuring the financial integrity of such agreements, contracts, and transactions.

''(E) ABILITY TO OBTAIN INFORMATION.—The trading facility shall establish and enforce rules that will allow the trading facility to obtain any necessary information to perform any of the functions described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

''(F) POSITION LIMITS OR ACCOUNTABILITY LEVELS.—To reduce the threat of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process, the trading facility shall adopt position limits or position accountability levels for speculators, where necessary and appropriate.

''(G) EMERGENCY AUTHORITY.—The trading facility shall adopt rules to provide for the exercise of emergency authority, in consultation and cooperation with the Commission, where necessary and appropriate, including the authority to—

''(i) liquidate open positions in any contract;

''(ii) suspend or curtail trading in any contract; and

''(iii) require market participants in any contract to meet special margin requirements.

''(H) DAILY PUBLICATION OF TRADING INFORMATION.—The trading facility shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the facility.

''(I) DETERRENCE OF ABUSES.—The trading facility shall establish and enforce trading and participation rules that will deter abuses and shall have the capacity to detect, investigate violations of, and enforce those rules, including means to—

''(i) obtain information necessary to perform the functions required under this section; or

''(ii) use technological means to capture information that may be used in establishing whether rule violations have occurred.

''(J) TRADE INFORMATION.—The trading facility shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the facility to use the information for the purposes of assisting in the prevention of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process, and providing evidence of any violations of the rules of the facility.

''(K) TRADING PROCEDURES.—The trading facility shall establish and enforce rules or terms and conditions defining, or specifications detailing, trading procedures to be used in entering and executing orders traded on the facility, including procedures to provide participants with impartial access to the trading facility.

''(L) COMPLIANCE WITH RULES.—The trading facility shall monitor and enforce the rules of the facility, including any terms and conditions of any contracts traded on or through the facility and any limitations on access to the facility.

''(M) DISCLOSURE OF GENERAL INFORMATION.—The trading facility shall disclose publicly and to the Commission information concerning—

''(i) contract terms and conditions;

''(ii) trading conventions, mechanisms, and practices;

''(iii) financial integrity protections; and

''(iv) other information relevant to participation in trading on the facility.

''(N) FITNESS STANDARDS.—The trading facility shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, and any other persons with direct access to the facility, including any parties affiliated with any of the persons described in this paragraph.

''(O) CONFLICTS OF INTEREST.—The trading facility shall establish and enforce rules to minimize conflicts of interest in the decision making process of the facility and establish a process for resolving such conflicts of interest.

''(P) RECORDKEEPING.—The trading facility shall maintain records of all activities related to the business of the facility in a form and manner acceptable to the Commission for a period of 5 years.

''(Q) ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the trading facility shall endeavor to avoid—

''(i) adopting any rules or taking any actions that result in any unreasonable restraint of trade; or

''(ii) imposing any material anticompetitive burden on trading on the facility.

''(5) CRITERIA FOR ENERGY TRADING FACILITIES.—To maintain the registration as an energy trading facility, the trading facility shall comply with all of the criteria in paragraph (4). Failure to comply with any of these criteria shall constitute a violation of this Act. The trading facility shall have reasonable discretion in establishing the manner in which it complies with the criteria in paragraph (4).

''(6) POSITION LIMITS AND ACCOUNTABILITY LEVELS.—

''(A) DUTY OF COMMISSION.—The Commission shall ensure that the position limits and accountability levels applicable to contracts in an energy commodity listed for trading on a designated contract market and the position limits and accountability levels applicable to similar contracts in the same energy commodity listed for trading on an energy trading facility—

''(i) appropriately prevent price manipulation, excessive speculation, price distortion, and disruption of the delivery or cash-settlement process; and

''(ii) are on a parity with each other and applied in a functionally equivalent manner.

''(B) COMMISSION REVIEW.—Upon learning that a person has exceeded an applicable position limit or accountability level in an energy commodity, the Commission shall obtain such information as it determines to be necessary and appropriate regarding all of the positions held by such person in such energy commodity and take such action as may be necessary and appropriate, in addition to any action taken by an energy trading facility or a designated contract market, to require, or direct an energy trading facility or a designated contract market to require, such person to limit, reduce, or liquidate any position to prevent or reduce the threat of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process.

''(C) INFORMATION TO COMMISSION.—In order to make any determination required under this section, the Commission may request all relevant information regarding all of the positions held by any person in the energy commodity for which the person has exceeded a position limit or accountability level, including positions held or controlled or transactions executed on or through a designated contract market, an energy trading facility, an exempt commercial markets operating pursuant to sections 2(h)(3) through paragraph (5) of this Act, an exempt board of trade operating pursuant to section 5d of this Act, a derivative transaction execution facility, a foreign board of trade, over-the-counter pursuant to sections 2(g), or 2(h)(1) and (2) of this Act, and in the cash market for the commodity. Any person entering into or executing an agreement, contract, or transaction with respect to an energy commodity on a designated contract market or on an energy trading facility shall retain such books and records as the Commission may require in order to provide such information upon request, and upon request shall promptly provide such information to the Commission or the Department of Justice. Notwithstanding this requirement to retain and provide position information, the Commission may alternatively choose to obtain any of the position information specified in this paragraph from the trading facility at which such positions are maintained.

''(D) CRITERIA FOR COMMISSION DETERMINATION.—In making any determination to require a limitation, reduction, or liquidation of any position with respect to an energy commodity, the Commission may consider, as appropriate—

''(i) the person's open interest in a contract, agreement, or transaction involving an energy commodity relative to the total open interest in such contracts, agreements, or transactions;

''(ii) the daily volume of trading in such contracts, agreements or transactions;

''(iii) the person's overall position in related contracts, including options, and the overall open interest or liquidity in such related contracts and options;

''(iv) the potential for such positions to cause or allow price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process;

''(v) the person's record of compliance with rules, regulations, and orders of the Commission, a designated contract market, or an energy trading facility, as appropriate;

''(vi) the person's financial ability to support such positions on an ongoing basis;

''(vii) any justification provided by the person for such positions; and

''(viii) other such factors determined to be appropriate by the Commission.''.

(d) INFORMATION FOR PRICE DISCOVERY DETERMINATION.—

(1) Section 2(h)(5)(B) of the Commodity Exchange Act (7 U.S.C. 2(h)(5)(B)) is amended by adding the following new clause:

''(iv) to the extent that the electronic trading facility provides for the trading of agreements, contracts, or transactions in an energy commodity, provide the Commission with such information as the Commission determines necessary to evaluate whether the energy trading facility performs a significant price discovery function in relation to a contract in an energy commodity listed for trading on a trading facility or in the cash market for the energy commodity, including the provision of such requested information on a continuous basis.''.

(2) Section 5a(b) of the Commodity Exchange Act (7 U.S.C. 7a(b)) is amended by adding the following new paragraph:

''(5) PRICE DISCOVERY FOR ENERGY COMMODITY.—A registered derivatives transaction execution facility shall, to the extent that it provides for the trading of any contract of sale of a commodity for future delivery (or option on such contract) based on an energy commodity, provide the Commission with such information as the Commission determines necessary to evaluate whether the registered derivatives transaction execution facility performs a significant price discovery function in relation to a contract in an energy commodity listed for trading on a trading facility or in the cash market for the energy commodity, including the provision of such requested information on a continuous basis.''.

(e) CONFORMING AMENDMENTS.—The Commodity Exchange Act is amended—

(1) in paragraph 29 of section 1a (7 U.S.C. 1a)—

(A) in subparagraph (C) by deleting ''and'';

(B) in subparagraph (D) by deleting the period and inserting ''; and'';

(C) by adding at the end the following:

''(E) an energy trading facility registered under section 2(j).'';

(2) in subsection (a) of section 4 (7 U.S.C. 6(a))—

(A) in paragraph (1) by inserting ''registered energy trading facility or a'' after ''subject to the rules of a''; and

(B) in paragraph (2) by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'';

(3) in subsection (c) of section 4 (7 U.S.C. 6(c)), by inserting ''registered energy trading facility or'' in the parenthetical after ''including any'';

(4) in subsection (a) of section 4a (7 U.S.C. 6a)—

(A) in the first sentence by inserting ''or energy trading facilities'' after ''derivatives transaction execution facilities''; and

(B) in the second sentence by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'';

(5) in subsection (b) of section 4a (7 U.S.C. 6a), by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'' wherever it appears;

(6) in subsection (e) of section 4a (7 U.S.C. 6a)—

(A) in the first sentence—

(i) by inserting ''or by any energy trading facility'' after ''registered by the Commission'';

(ii) by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'' the second time it appears;

(iii) by inserting ''energy trading facility'' before ''or such board of trade'' each time it appears; and

(B) in the second sentence, by inserting ''or energy trading facility'' after ''registered by the Commission'';

(7) in section 4e (7 U.S.C. 6e), by inserting ''or energy trading facility'' after ''or derivatives transaction execution facility'';

(8) in section 4i (7 U.S.C. 6i), by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'';

(9) in section 4l (7 U.S.C. 6l), by inserting ''or energy trading facilities'' after ''derivatives transaction execution facilities'' wherever it appears in paragraphs (2) and (3);

(10) in section 5c(b) (7 U.S.C. 7a–2(b)), by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'' wherever it appears in paragraphs (1), (2), and (3);

(11) in section 6(b) (7 U.S.C. 8(b))—

(A) by inserting ''or energy trading facility'' after ''derivatives transaction execution facility'' wherever it appears; and

(B) by inserting ''section 2(j) or'' before ''sections 5 through 5b''; and

(12) in section 6d(1) (7 U.S.C. 13a–2(1)), by inserting ''energy trading facility'' after ''derivatives transaction execution facility''.

SEC. 3. REPORTING OF U.S. ENERGY TRADES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 1a) is amended by adding at the end the following:

''(k) DOMESTIC ENERGY TRADES ON A FOREIGN BOARD OF TRADE.—

''(1) DEFINITIONS.—In this subsection:

''(A) DOMESTIC TERMINAL.—The term 'domestic terminal' means a technology, software, or other means of providing electronic access within the United States to a contract, agreement, or transaction traded on a foreign board of trade.

''(B) REPORTABLE CONTRACT.—The term 'reportable contract' means a contract, agreement, or transaction for future delivery of an energy commodity (or option thereon), or an option on an energy commodity, for which the underlying commodity has a physical delivery point within the United States and that is executed through a domestic terminal.

''(2) RECORD KEEPING.—The Commission, by rule, shall require any person holding, maintaining, or controlling any position in any reportable contract under this section—

''(A) to maintain such records as directed by the Commission for a period of 5 years, or longer, if directed by the Commission; and

''(B) to provide such records upon request to the Commission or the Department of Justice.

''(3) REPORTING.—The Commission shall prescribe rules requiring such regular or continuous reporting of positions in a reportable contract in accordance with such requirements regarding size limits for reportable contracts and the form, timing, and manner of filing such reports under this paragraph, as the Commission shall determine.

''(4) EQUIVALENT MEANS OF OBTAINING INFORMATION.—The Commission may waive the requirement under paragraph (3) if the Commission determines that the foreign board of trade is providing the Commission with equivalent information in a usable format pursuant to an agreement between the Commission and the foreign board of trade or a foreign futures authority, department or agency of a foreign government, or political subdivision thereof.

''(5) OTHER RULES NOT AFFECTED.—

''(A) IN GENERAL.—Except as provided in clause (ii), this paragraph does not prohibit or impair the adoption by any board of trade or energy trading facility licensed, designated, or registered by the Commission of any bylaw, rule, regulation, or resolution requiring reports of positions in any agreement, contract, or transaction for future delivery of an energy commodity (or option thereon), or option on an energy commodity, including any bylaw, rule, regulation, or resolution pertaining to filing or recordkeeping, which may be held by any person subject to the rules of the board of trade or energy trading facility.

''(B) EXCEPTION.—Any bylaw, rule, regulation, or resolution established by a board of trade or energy trading facility described in clause (i) shall not be inconsistent with any requirement prescribed by the Commission under this paragraph.''.

SEC. 4. ANTIFRAUD AUTHORITY.

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

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by striking ''**SEC. 4b.**'' and all that follows through the end of subsection (a) and inserting the following:

''SEC. 4b. CONTRACTS DESIGNED TO DEFRAUD OR MISLEAD.

''(a) UNLAWFUL ACTIONS.—It shall be unlawful—

''(1) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person; or

''(2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 5a(g), that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market—

''(A) to cheat or defraud or attempt to cheat or defraud the other person;

''(B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record;

''(C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person; or

''(D)(i) to bucket an order if the order is represented by the person as an order to be executed, or is required to be executed, on or subject to the rules of a designated contract market; or

''(ii) to fill an order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of the other person to become the buyer in respect to any selling order of the other person, or become the seller in respect to any buying order of the other person, if the order is represented by the person as an order to be executed, or is required to be executed, on or subject to the rules of a designated contract market unless the order is executed in accordance with the rules of the designated contract market.

''(b) CLARIFICATION.—Subsection (a)(2) of this section shall not obligate any person, in or in connection with a transaction in a contract of sale of a commodity for future delivery, or other agreement, contract or transaction subject to paragraphs (1) and (2) of section 5a(g), with another person, to disclose to the other person nonpublic information that may be material to the market price, rate, or level of the commodity or 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.''.

SEC. 5. COMMISSION RULEMAKING.

Not later than 180 days after the date of enactment of this Act, the Commission shall issue a proposed rule regarding the requirements for an application for registration for an energy trading facility, and not later than 270 days after the date of enactment of this Act, shall issue a final rule.

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in this section, this Act shall become effective immediately upon enactment.

(b) TRADING FACILITIES.—With respect to any trading facility operating on the date of enactment of this Act in reliance upon the exemption set forth in section 2(h)(3) of the Commodity Exchange Act with respect to an energy commodity, the prohibition in section 2(j)(1) of the Commodity Exchange Act, as added by this Act, shall not apply, if the trading facility submits an application to the Commission for registration as an energy trading facility within 180 days after the Commission promulgates a final rule regarding the requirements for an application for registration for an energy trading facility, prior to a determination by the Commission on whether to approve such application.

(c) EXTENSIONS.—(1) At the time the Commission approves an application by a trading facility operating on the date of enactment of this Act in reliance on the exemption set forth in section 2(h)(3) of the Commodity Exchange Act for registration as an energy trading facility, the Commission shall, upon the written request of the facility, grant an extension of up to 180 days to fully implement a requirement applicable under this Act to an energy trading facility.

(2) The Commission may in its discretion, upon the written request of the facility and for good cause, grant an additional extension of up to 6 months to fully implement a requirement for which an initial extension has been granted under paragraph (1).

(3) The Commission may not grant any extension under paragraphs (1) or (2) for any information reporting or recordkeeping requirement.

(d) DOMESTIC TRADING ON FOREIGN BOARDS OF TRADE.—Section 3 of this Act shall take effect 180 days after the date of the enactment of this Act.

SUMMARY OF THE CLOSE THE ENRON LOOPHOLE ACT

Closes the ''Enron Loophole.'' The bill would close the Enron loophole and require government oversight of the trading of energy commodities by large traders to prevent price manipulation and excessive speculation.

Since 2000, the ''Enron loophole'' in §2(h)(3) of the Commodity Exchange Act has exempted from oversight the electronic trading of energy commodities by large traders. As a hedge fund known as Amaranth Advisors demonstrated in the natural gas market in 2006, the Enron loophole makes it impossible to prevent traders from distorting energy prices through large trades on these unregulated exchanges. Under this bill, a trading facility that functions as an energy exchange would be subject to Commodity Futures Trading Commission (CFTC) oversight to prevent price manipulation and excessive speculation. The bill would:

Require oversight of Energy Trading Facilities (ETFs). ETFs would have to comply with the same standards that apply to futures exchanges, like NYMEX, to prevent price manipulation and excessive speculation. The only difference would be that regulatory provisions governing retail trading and brokers on a futures exchange would not apply because trading on an ETF is restricted to large traders trading amongst themselves. ETFs would function as self-regulatory organizations under CFTC oversight in the same manner as futures exchanges.

Require ETFs to establish trading limits on traders, such as position limits or accountability levels, to prevent price manipulation and excessive speculation, subject to CFTC approval, in the same manner as futures exchanges. Position limits set a ceiling on the number of contracts that a trader can hold at one time on a trading facility; accountability levels, when exceeded, trigger a review by regulators of a trader's holdings in order to prevent price manipulation and excessive speculation. The CFTC would ensure that position limits and accountability levels for similar contracts on different exchanges are on parity with each other and applied in a functionally equivalent manner. The CFTC would also ensure that a trader's positions on multiple exchanges and other markets, when combined, are not excessive.

Define ''energy commodity'' as a commodity used as a source of energy, including crude oil, gasoline, heating oil, diesel fuel, natural gas, and electricity, or results from the burning of fossil fuels, including carbon dioxide and sulfur dioxide.

Define ''energy trading facility'' as a trading facility that trades contracts in an energy commodity (other than in the cash or spot market) between large traders (''eligible commercial entities''), and provides either for the clearing of those contracts or a price discovery function in the futures or cash market for that energy commodity. Clearing services, which are already subject to CFTC oversight, generally guarantee the performance of a contract, and facilitate the trading of those contracts. A trading facility performs a price discovery function when the price of transactions are publicly disseminated and can affect the prices of subsequent transactions.

Require large-trader reporting for domestic trades on foreign exchanges. Large trades of U.S. energy commodities taking place from the United States on foreign exchanges would have to be reported to the CFTC. Traders would be relieved of this reporting requirement if the CFTC reached agreement with a foreign board of trade to obtain the same information.

CLOSE THE ENRON LOOPHOLE ACT SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

The title of this bill is the ''Close the Enron Loophole Act''.

Sec. 2. Energy trading facilities

This section amends the Commodity Exchange Act (CEA) to regulate energy trading facilities that are currently exempt from Commodity Futures Trading Commission (CFTC) oversight under section 2(h)(3) of the CEA. After defining the terms ''energy commodity'' and ''energy trading facility,'' this section delineates the criteria required for an energy trading facility to be registered with the CFTC. The specified criteria are based upon existing criteria in the CEA for futures markets (designated contract markets) and derivatives transaction execution facilities so that energy trading facilities will operate under a comparable degree of self-regulation and CFTC oversight as current facilities, taking into account certain differences between the types of markets.

Section 2(a). Definitions. This section defines the terms ''energy commodity'' and ''energy trading facility.''

The term ''energy commodity'' means a commodity (other than an excluded commodity, a metal, or an agricultural commodity) that is used as a source of energy or that results from the burning of fossil fuels to produce energy. Examples of energy commodities that are used as a source of energy include crude oil; gasoline, heating oil and other products refined from crude oil; natural gas; and electricity. Examples of energy commodities that result from the burning of fossil fuels to produce energy include carbon dioxide and sulfur dioxide.

The term ''energy trading facility'' means a trading facility (as defined in section la(33) of the CEA) that: (A) is not a designated contract market (DCM); and (B) facilitates the trading of energy commodities between eligible commercial entities (essentially large, sophisticated traders); and either (i) provides a clearing service for products traded on the facility or (ii) the CFTC determines that trading on the facility provides a price discovery function on a trading facility or in the cash market for an energy commodity.

The definition of ''energy trading facility'' represents a subset of trading facilities that would otherwise qualify as ''exempt commercial markets'' under current law. In essence, it requires the regulation of energy trading facilities that exhibit the key attributes of a futures exchange—the trading of standardized and cleared contracts for future delivery of a commodity having a finite supply.

The definition of ''energy trading facility'' excludes the trading of energy commodities that are ''spot sales of a cash commodity or sales of a cash commodity for deferred shipment or delivery,'' since the bill is not intended to apply to the cash market for energy commodities. This exclusion, however, does not encompass contracts that are commonly referred to as ''swaps,'' since swaps are not spot sales of a cash commodity or sales of a cash commodity for deferred shipment or delivery. Because swaps in the energy market are economically and functionally equivalent to futures contracts for energy commodities, this bill ensures that they will be regulated in a functionally equivalent manner.

The definition restricts the bill's application to energy trading facilities that allow only ''exempt commercial entities'' (ECEs) to participate, meaning large sophisticated traders who trade with each other on a principal-to-principal basis. This restriction is identical to the restriction in current law for trading facilities that qualify as exempt commercial markets under section 2(h)(3). A trading facility that permits brokered or intermediated transactions or participation by persons other than ECEs would not qualify as an energy trading facility subject to the type of regulation provided under this bill. Instead, as is the case under current law, a facility that allows the trading of futures contracts by persons other than ECEs must register with and be designated by the CFTC as a contract market subject to the regulations that apply to a DCM.

The definition also addresses the concern that, despite the advantages and widespread use of clearing services to facilitate trading, if the presence of a clearing function triggers regulatory oversight, then alternative trading platforms may develop that do not provide clearing services in order to avoid the reporting and monitoring requirements essential to an effective regulatory system. To address this concern, the bill provides that a trading facility that does not provide clearing services still may qualify as an energy trading facility subject to regulation if the CFTC determines the facility ''performs a significant price discovery function in relation to an energy commodity listed for trading on a trading facility or in the cash market for the energy commodity.'' Factors for the CFTC to consider in determining whether a trading facility performs such a significant price discovery function include the extent to which the prices of contracts traded on the facility are linked to or derived from

the prices of futures contracts traded on a DCM, the volume of trading on the facility, whether prices of completed transactions are immediately posted or disseminated, and the extent to which traders engage in arbitrage trading between the contracts traded on the facility and those traded on a regulated market.

Section 2(b). Oversight of Energy Trading Facilities. This section specifies that an energy trading facility, and any agreement, contract, or transaction traded on that facility, shall be subject to the regulatory requirements established in a new CEA section 2(j).

Section 2(b)(1) amends CEA section 2(h)(3) to exclude energy trading facilities from qualifying as an exempt commercial market in order to make it clear that those facilities must instead comply with the new CEA section 2(j).

Section 2(b)(2) adds a new section 2(h)(7) to the CEA. This new section provides that notwithstanding any other provision of the CEA, an energy trading facility and persons trading on an energy trading facility are subject to the new CEA section 2(j). This clarifying provision means, for example, that a trading facility that meets the criteria for an energy trading facility could not operate as a derivatives transaction execution facility (DTEF) under another provision of the CEA.

Section 2(c). Standards Applicable to Energy Trading Facilities. This section adds a new section 2(j) to the CEA, specifying the standards that an applicant must meet to register with the CFTC as an energy trading facility.

Commission Approval of Energy Trading Facilities. A new section 2(j)(1) makes it illegal for any person to enter into an agreement, contract, or transaction on an energy trading facility unless such facility has been registered with the Commission as an energy trading facility. Section 6 of this bill provides a timeline for facilities in operation on the date of enactment of this Act under CEA section 2(h)(3) to submit an application, obtain registration, and comply with these requirements.

Applications for Operation as Energy Trading Facility. New section 2(j)(2) provides that a facility must submit an application to the Commission for operation as an energy trading facility in order to register as an energy trading facility. The Commission is authorized to establish such application requirements as it deems appropriate. New section 2(j)(3) provides that the Commission shall make a determination on any such application within 120 days after receiving it.

Criteria for Approval of Applications. New section 2(j)(4) specifies the criteria that an applicant must meet for registration as an energy trading facility. Because an energy trading facility may trade instruments that possess the same characteristics as futures contracts traded on a designated contract market, several of the criteria, particularly those regarding prevention of price manipulation, excessive speculation, and price distortion, are identical to the criteria applicable to a designated contract market (DCM). Other DCM criteria are not used, such as those applicable to intermediated or brokered transactions, since those types of transactions are not permitted on an energy trading facility. In addition, because energy trading facilities conduct all trading on a principal-to-principal basis, a number of the criteria applicable to a derivatives transaction execution facility are included in the section. The criteria are as follows.

New section 2(j)(4)(A): PREVENTION OF PRICE MANIPULATION AND EXCESSIVE SPECULATION.—This section requires the facility to have the capacity to prevent price manipulation, excessive speculation, price distortion, and disruption through market surveillance, compliance, and enforcement practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions. The term ''excessive speculation'' as used in this bill has the same meaning as the term ''excessive speculation'' in section 4a(a) of the Act as ''causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity.'' [Equivalent to DCM Criteria: Prevention of Market Manipulation, CEA §5(b)(2)].

New Section 2(j)(4)(B): MONITORING OF TRADING.—This section requires the facility to monitor trading to prevent price manipulation, excessive speculation, price distortion, and disruption of the delivery or cash-settlement process. [Equivalent to DCM Core Principles: Monitoring of Trading, CEA §5(d)(4); see also DTEF Core Principles: Monitoring of Trading, CEA §5a(d)(3)].

New Section 2(j)(4)(C): CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION.—This section requires the facility to list for trading only contracts that are not readily susceptible to manipulation. [Equivalent to DCM Core Principles: Contracts Not Readily Susceptible to Manipulation, CEA §5(d)(3)].

New Section 2(j)(4)(D): FINANCIAL INTEGRITY OF TRANSACTIONS.—This section requires the facility to establish and enforce rules and procedures for ensuring the financial integrity of transactions cleared and settled through the facilities of the energy trading facility. [Based on DCM Criteria: Financial Integrity of Transactions, CEA §5(b)(5); and DTEF Registration Criteria: Transactional Financial Integrity, CEA §5a(c)(4)].

New Section 2(j)(4)(E): ABILITY TO OBTAIN INFORMATION.—This section requires the facility to establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require. [Equivalent to DCM Criteria: Ability to Obtain Information, CEA §5(b)(8)].

New Section 2(j)(4)(F): POSITION LIMITS OR ACCOUNTABILITY LEVELS.—This section requires the facility to reduce the potential threat of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process, by adopting position limits or position accountability levels for speculators, where necessary and appropriate. [Equivalent to DCM Core Principles: Position Limitation or Accountability, CEA §5(d)(5)].

New Section 2(j)(4)(G): EMERGENCY AUTHORITY.—This section requires the facility to adopt rules to provide for the exercise of emergency authority to liquidate or transfer open positions in any contract, suspend or curtail trading in any contract, and require market participants in any contract to meet special margin requirements. [Equivalent to DCM Core Principles: Emergency Authority, CEA §5(d)(6)].

New Section 2(j)(4)(H): DAILY PUBLICATION OF TRADING INFORMATION.—This section requires the facility to make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the facility. [Equivalent to DCM Core Principle: Daily Publication of Trading Information; CEA §5(d)(8); see also DTEF Core Principles: Daily Publication of Trading Information, CEA §5a(d)(5)].

New Section 2(j)(4)(I): DETERRENCE OF ABUSES.—This section requires the facility to establish and enforce trading and participation rules that will deter abuses and to maintain the capacity to detect, investigate, and enforce those rules. [Based on DTEF Registration Criteria: Deterrence of Abuses, CEA §5a(c)(2)].

New Section 2(j)(4)(J): TRADE INFORMATION.—This section requires the facility to maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the facility to use the information for the purposes of assisting in the prevention of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process, and providing evidence of any violations of the rules of the facility. [Based on DCM Core Principles: Trade Information, CEA §5(d)(10)].

New Section 2(j)(4)(K): TRADING PROCEDURES.—This section requires the facility to establish and enforce rules or terms and conditions defining, or specifications detailing, trading procedures to be used in entering and executing orders traded on the facility. [Based on DTEF Registration Criteria: Trading Procedures, CEA §5a(c)(3); see also DCM Criteria: Trade Execution Facility, CEA §5(b)(4)].

New Section 2(j)(4)(L): COMPLIANCE WITH RULES.—This section requires the facility to monitor and enforce the rules of the facility, including any terms and conditions of any contracts traded on or through the facility and any limitations on access to the facility. [Equivalent to DTEF Core Principles: Compliance with Rules, CEA §5a(d)(2); see also DCM Core Principles: Compliance with Rules, CEA §5(d)(2)].

New Section 2(j)(4)(M): DISCLOSURE OF GENERAL INFORMATION.—This section requires the facility to disclose publicly and to the Commission information concerning: (i) contract terms and conditions; (ii) trading conventions, mechanisms, and practices; (iii) financial integrity protections; and (iv) other information relevant to participation in trading on the facility. [Equivalent to DTEF Core Principles: Disclosure of General Information, CEA §5a(d)(4); see also DCM Core Principles: Availability of General Information, CEA §5(d)(7)].

New Section 2(j)(4)(N): FITNESS STANDARDS.—This section requires the facility to establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, and any other persons with direct access to the facility, including any parties affiliated with any of the persons described in this paragraph. [Equivalent to DTEF Core Principles: Fitness Standards, CEA §5a(d)(6); see also DCM Core Principles: Governance Fitness Standards, CEA §5(d)(14)].

New Section 2(j)(4)(O): CONFLICTS OF INTEREST.—This section requires the facility to establish and enforce rules to minimize conflicts of interest in the decision making process of the facility and establish a process for resolving such conflicts of interest. [Equivalent to DTEF Core Principles: Conflicts of Interest, CEA §5a(d)(7); and DCM Core Principles: Conflicts of Interest, CEA §5(d)(15)].

New Section 2(j)(4)(P): RECORDKEEPING.—This section requires the facility to maintain business records for a period of 5 years. [Equivalent to DTEF Core Principles: Recordkeeping, CEA §5a(d)(8); and DCM Core Principles: Recordkeeping, CEA §5(d)(17)].

New Section 2(j)(4)(Q): ANTITRUST CONSIDERATIONS.—This section requires the facility to endeavor to avoid: (i) adopting rules or taking any actions that result in any unreasonable restraint of trade; or (ii) imposing any material anticompetitive burden on trading on the facility. [Equivalent to DTEF Core Principles: Antitrust Considerations, CEA §5a(d)(9); and DCM Core Principles: Antitrust Considerations, CEA §5(d)(18)].

Compliance with Criteria. New section 2(j)(5) provides that an energy trading facility must continue to comply with all of the criteria in section 2(j)(4) to continue operation, and that violation of any of the criteria shall constitute a violation of the Commodity Exchange Act. The trading facility shall have reasonable discretion in establishing the manner in which it complies with these criteria.

Position Limits and Accountability Levels. New section 2(j)(6) directs the Commission to ensure that the position limits and accountability levels that are established for energy trading facilities are on a parity with the position limits and accountability levels established for similar contracts traded on a designated contract market and applied in a functionally equivalent manner. This provision is designed to ensure that there is no regulatory advantage to trading on an energy trading facility compared to a designated contract market, or vice versa.

Additionally, once a trader's position exceeds a position limit or an accountability level on a particular trading facility, this section directs the Commission to take such action as may be necessary and appropriate, in light of the trader's overall positions in that commodity, to reduce the potential threat of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process.

Such a comprehensive approach may have to be undertaken by the CFTC, since it may be beyond the authority of a particular trading facility to obtain information about or limit a trader's relevant positions when those positions are outside of the exchange itself. The Commission may direct a trader, or direct a trading facility to direct a trader, to limit, reduce or liquidate any position in any market, as the Commission determines necessary to reduce the potential threat of price manipulation, excessive speculation, price distortion or disruption of the delivery or cash-settlement process.

In order to make a determination on the appropriate action to take, the Commission is authorized to obtain from a trader information regarding all of the trader's exchange and off-exchange positions in that commodity. The Commission will be receiving on a regular basis, through its large trader reporting system, information regarding any trader's positions on a designated contract market or an energy trading facility that exceed the levels for reportable positions; the Commission may choose to request additional information on other positions in the commodity held by the trader if the Commission determines this additional information is necessary to make any determinations required by this section. The authority to obtain this position information parallels the Commission's existing authority under CEA sections 3(b), 4i, and 8a(5) to require traders to retain transaction records for commodities traded on CFTC-regulated facilities and provide them to the Commission upon request. The Commission recently described this authority in its proposed rulemaking ''Maintenance of Books, Records and Reports by Traders,'' 72 Fed. Reg. 34413 (June 22, 2007). The information specified to be provided to the Commission under the new section 2(j)(5)(C) is identical to the information specified to be provided to the Commission in that proposed rulemaking.

The Commission's review of a trader's entire position does not relieve an individual exchange of the authority and responsibility to review a trader's position on that exchange once a position limit or accountability level on that exchange has been exceeded. Rather, it is anticipated that the Commission's comprehensive review of the trader's entire position in a commodity will be undertaken in addition to the review conducted by the individual exchange on which the trader has taken a position in excess of an accountability level or position limit. Based on this comprehensive review, the Commission will then determine whether any additional action, beyond that initially taken by the exchange, is necessary to limit, reduce or liquidate the trader's position to reduce the potential threat of price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process. In making or implementing any such determinations, the Commission should continue to work in consultation and cooperation with the affected exchanges.

New section 2(j)(6)(D) specifies criteria the Commission or an exchange may consider when determining whether to require a trader to limit, reduce, or liquidate a position in an energy commodity in excess of an accountability level. In making any such determination with respect to an energy commodity, the Commission, a designated contract market, or an energy trading facility should consider, as appropriate: (i) the person's open interest in a contract, agreement, or transaction involving an energy commodity relative to the total open interest in such contracts, agreements or transactions; (ii) the daily volume of trading such contracts, agreements or transactions; (iii) the person's overall position in related contracts, including options, and the overall open interest or liquidity in such related contracts and options; (iv) the potential for such positions to cause or allow price manipulation, excessive speculation, price distortion, or disruption of the delivery or cash-settlement process; (v) the person's record of compliance with rules, regulations, and orders of the Commission, a designated contract market, or an energy trading facility, as appropriate; (vi) any justification provided by the person for such positions; and (vii) other such factors determined to be appropriate by the Commission.

The criteria specified in this section are not intended to be the exclusive criteria that may be applied, but are set forth to provide additional guidance to the Commission, the exchanges, and persons trading on the exchanges in addition to the general language pertaining to ''excessive speculation'' in section 4 of the CEA.

Section 2(d). Information for Price Discovery Determination. This section provides the Commission with the authority to obtain from an electronic trading facility or a derivatives transaction execution facility any information the Commission determines is necessary for the Commission to evaluate whether such a facility performs a price discovery function in relation to a contract in an energy commodity under the definition of energy trading facility.

Section 2(e). Conforming Amendments. This section amends the CEA in a variety of sections to provide the Commission with a comparable degree of authority over the operation of an energy trading facility that it possesses with respect to a designated contract market or a derivatives transaction execution facility.

Sec. 3. Reporting of Energy Trades

Section 3 of the bill adds a new CEA section 2(k) to require persons that trade from within the United States on a foreign board of trade a contract for future delivery of an energy commodity that has a physical delivery point within the United States to keep records of such trades and to report large trades in such contracts to the Commission. The Commission is authorized to waive the reporting requirement if the Commission determines that a foreign board of trade is providing the Commission with equivalent information in a usable format pursuant to an agreement between the Commission and the foreign board of trade. The purpose of this provision is to ensure that U.S. commodity regulators have full access to trading information from U.S. traders conducting transactions from U.S. locations involving U.S. energy commodities such as crude oil and gasoline.

Sec. 4. Antifraud authority

Section 4 of the bill amends Section 4b of the CEA, the CFTC's main anti-fraud authority. Section 4b is revised to clarify the CFTC's authority to bring fraud actions in off-exchange principal-to-principal futures transactions. In November 2000, the Seventh Circuit Court of Appeals ruled that the CFTC could only use Section 4b in intermediated transactions—those involving a broker. Commodity Trend Service, Inc. v. CFTC, 233 F.3d 981, 991–992 (7th Cir. 2000). As subsequently amended by the CFMA, the CEA now permits off-exchange futures and options transactions that are done on a principal-to-principal basis, such as energy transactions pursuant to CEA Sections 2(h)(1) and 2(h)(3).

Subsection 4b(a)(2) is amended by adding the words 'or with' to address the principal-to-principal transactions. This new language clarifies that the CFTC has the authority to bring anti-fraud actions in off-exchange principal-to-principal futures transactions, including exempt commodity transactions in energy under Section 2(h) as well as all transactions conducted on derivatives transaction execution facilities. The new Section 4b clarifies that market participants in these transactions are not required to disclose information that may be material to the market price, rate or level of the commodity in such off-exchange transactions. It also codifies existing law that prohibits market participants from using half-truths in negotiations and solicitations by requiring a person to disclose all necessary information to make any statement they have made not misleading in any material respect. The prohibitions in subparagraphs (A) through (D) of the new Section 4b(a) would apply to all transactions covered by paragraphs (1) and (2). Derivatives clearing organizations (DCOs) are not subject to fraud actions under Section 4b in connection with their clearing activities.

The amendments to Section 4b(a) of the CEA regarding transactions currently prohibited under subparagraph (iv) (found in paragraph 2(D) of this bill) are not intended to affect in any way the CFTC's historical ability to prosecute cases of indirect bucketing of orders executed on designated contract markets. See, e.g., Reddy v. CFTC, 191 F.3d 109 (2nd Cir. 1999); In re DeFrancesco, et al., CFTC Docket No. 02–09 (CFTC May 22, 2003) (Order Making Findings and Imposing Remedial Sanctions as to Respondent Brian Thornton).

This language clarifying the Commission's anti-fraud authority was included in bills in the previous Congress to reauthorize the Commodity Exchange Act, one of which was passed by the House of Representatives (H.R. 4473, passed by the House on Dec. 14, 2005) and the other of which was reported to the full Senate by the Senate Committee on Agriculture, Nutrition, and Forestry (S. 1566, S. Rpt. No. 109–119; 109th Cong., 1st Sess.).

Sec. 5. Commission rulemaking

Section 5 of the bill requires the CFTC, within 180 days after enactment of this Act, to issue a proposed rule setting forth the process for submitting an application for registration as an energy trading facility. The section requires the CFTC, within 270 days after the date of enactment, to finalize this rule.

Sec. 6. Effective date

Section 6(a) of the bill provides that it shall be immediately effective upon enactment, with several exceptions.

Existing trading facilities. The first exception applies to existing trading facilities. Section 6(b) provides that a trading facility operating under the exemption in CEA section 2(h)(3) on the date of enactment shall have 180 days after the Commission issues a final rule on registration applications to submit such an application. Section 5 of the bill authorizes the Commission to take 270 days to issue this rule. During this period (270 days plus 180 days), the prohibition on trading in the new section 2(j)(1) shall not apply. For any such facility in operation on the date of enactment of this Act that submits an application to the Commission for operation as an energy trading facility within the 180-day period, the suspension of the prohibition in section 2(j)(1) is extended until the Commission makes a determination on whether to approve that application.

Subsection (c) provides that if the Commission approves the registration as an energy trading facility of a facility operating under the exemption under CEA section 2(h)(3) on the date of enactment of this Act, the facility may submit a written request to the Commission for a 6-month extension to fully implement any requirement made applicable by this Act—other than an information reporting or recordkeeping requirement—and that the Commission shall grant any such request. The Commission, in its discretion, may grant an additional 6-month extension. The Commission may not grant any extension for any information reporting or recordkeeping requirement. This section is intended to ensure that facilities currently in operation that must register as an energy trading facility will have sufficient time to come into compliance with the new requirements of this Act, and that the operations of those facilities will not be disrupted during the transition period. Altogether, this section effectively provides existing trading facilities with over two years to come into compliance with the Act.

Requirements applicable to domestic use of a foreign board of trade. Section 6(d) of the bill states that the reporting requirements applicable to trades from domestic terminals on a foreign board of trade are effective 180 days after enactment.

SUBMITTED RESOLUTIONS

SENATE CONCURRENT RESOLUTION 45—COMMENDING THE ED BLOCK COURAGE AWARD FOUNDATION FOR ITS WORK IN AIDING CHILDREN AND FAMILIES AFFECTED BY CHILD ABUSE, AND DESIGNATING NOVEMBER 2007 AS NATIONAL COURAGE MONTH

Mr. CARDIN (for himself and Mr. CORNYN) submitted the following concurrent resolution; which was referred to the Committee on the Judiciary:

S. CON. RES. 45

Whereas the Ed Block Courage Award was established by Sam Lamantia in 1978 in honor of Ed Block, the head athletic trainer of the Baltimore Colts and a respected humanitarian;

Whereas each year in Baltimore, Maryland, the Foundation honors recipients from the National Football League who have been chosen by their teammates as exemplifying sportsmanship and courage;

Whereas the Ed Block Courage Award has become one of the most esteemed honors bestowed upon players in the NFL;

Whereas the Ed Block Courage Award Foundation has grown from a Baltimore-based local charity to the Courage House National Support Network for Kids operated in partnership with 17 NFL teams in their respective cities; and

Whereas Courage Houses are facilities that provide support and care for abused children and their families in these 17 locations across the country: Baltimore, Maryland, Pittsburgh, Pennsylvania, Chicago, Illinois, Miami, Florida, Detroit, Michigan, Dallas, Texas, Westchester County, New York, Oakland, California, Seattle, Washington, Charlotte, North Carolina, Cleveland, Ohio, Atlanta, Georgia, St. Louis, Missouri, Indianapolis, Indiana, Buffalo, New York, San Francisco, California, and Minneapolis, Minnesota: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That it is the sense of Congress that—

(1) National Courage Month provides an opportunity to educate the people of the United States about the positive role that professional athletes can play as inspirations for America's youth; and

(2) the Ed Block Courage Award Foundation should be recognized for its outstanding contributions toward helping those affected by child abuse.

SENATE CONCURRENT RESOLUTION 46—SUPPORTING THE GOALS AND IDEALS OF SICKLE CELL DISEASE AWARENESS MONTH

Mr. OBAMA submitted the following concurrent resolution; which was referred to the Committee on Health, Education, Labor, and Pensions:

S. CON. RES. 46

Whereas Sickle Cell Disease is an inherited blood disorder that is a major health problem in the United States, primarily affecting African Americans;

Whereas Sickle Cell Disease causes the rapid destruction of sickle cells, which results in multiple medical complications, including anemia, jaundice, gallstones, strokes, and restricted blood flow, damaging tissue in the liver, spleen, and kidneys, and death;

Whereas Sickle Cell Disease causes episodes of considerable pain in one's arms, legs, chest, and abdomen;

Whereas Sickle Cell Disease affects over 70,000 Americans;

Whereas approximately 1,000 babies are born with Sickle Cell Disease each year in the United States, with the disease occurring in approximately 1 in 300 newborn African American infants;

Whereas more than 2,000,000 Americans have the sickle cell trait, and 1 in 12 African Americans carry the trait;

Whereas there is a 1 in 4 chance that a child born to parents who both have the sickle cell trait will have the disease;

Whereas the life expectancy of a person with Sickle Cell Disease is severely limited, with an average life span for an adult being 45 years;

Whereas, though researchers have yet to identify a cure for this painful disease, advances in treating the associated complications have occurred;

Whereas researchers are hopeful that in less than two decades, Sickle Cell Disease may join the ranks of chronic illnesses that, when properly treated, do not interfere with the activity, growth, or mental development of affected children;

Whereas Congress recognized the importance of researching, preventing, and treating Sickle Cell Disease by authorizing treatment centers to provide medical intervention, education, and other services and by permitting the Medicaid program to cover some primary and secondary preventative medical strategies for children and adults with Sickle Cell Disease;

Whereas the Sickle Cell Disease Association of America, Inc. remains the preeminent advocacy organization that serves the sickle cell community by focusing its efforts on public policy, research funding, patient services, public awareness, and education related to developing effective treatments and a cure for Sickle Cell Disease; and

Whereas the Sickle Cell Disease Association of America, Inc. has requested that the Congress designate September as Sickle Cell Disease Awareness Month in order to educate communities across the Nation about sickle cell and the need for research funding, early detection methods, effective treatments, and prevention programs: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That the Congress supports the goals and ideals of Sickle Cell Disease Awareness Month.

AMENDMENTS SUBMITTED AND PROPOSED

SA 2864. Mr. NELSON of Nebraska (for himself and Mr. GRAHAM) submitted an amendment intended to be proposed by him to the bill H.R. 1585, to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes; which was ordered to lie on the table.

SA 2865. Mr. NELSON of Nebraska (for himself and Mr. GRAHAM) submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2866. Mr. NELSON of Nebraska (for himself, Mr. GRAHAM, and Mr. MCCAIN) submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2867. Mr. NELSON of Nebraska (for himself and Mr. GRAHAM) submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2868. Mr. NELSON of Nebraska (for himself and Mr. GRAHAM) submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2869. Mr. NELSON of Nebraska (for himself, Mr. GRAHAM, and Mr. WARNER) submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2870. Mrs. BOXER submitted an amendment intended to be proposed by her to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2871. Mr. AKAKA submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.

SA 2872. Mr. KENNEDY (for himself, Mr. SMITH, Mr. LIEBERMAN, Mr. BROWNBACK, Mr. BIDEN, Mr. HAGEL, Mr. LEAHY, Ms. SNOWE, Mr. DURBIN, Mrs . FEINSTEIN, Mr. OBAMA, Mr. MENENDEZ, Mr. LEVIN, and Mr. VOINOVICH) submitted an amendment intended to be proposed by him to the bill H.R. 1585, supra; which was ordered to lie on the table.