

Union Calendar No. 297

108TH CONGRESS
2D SESSION

H. R. 2120

[Report No. 108-277, Part I]

To revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 15, 2003

Mr. TOOMEY (for himself, Mr. OXLEY, Mr. KANJORSKI, Mr. LEACH, Mr. BAKER, Mr. BACHUS, Mr. SHERMAN, Mrs. MALONEY, Mr. SHAYS, Mrs. BIGGERT, Ms. HART, Mrs. KELLY, Mr. NEY, Mr. ACKERMAN, Mr. CROWLEY, Mr. MURPHY, Mr. SESSIONS, Mr. FOSSELLA, Mr. EMANUEL, and Mr. ISRAEL) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

SEPTEMBER 17, 2003

Reported from the Committee on Financial Services

SEPTEMBER 18, 2003

Referral to the Committee on the Judiciary extended for a period ending not later than October 3, 2003

OCTOBER 3, 2003

Referral to the Committee on the Judiciary extended for a period ending not later than October 31, 2003

OCTOBER 31, 2003

Referral to the Committee on the Judiciary extended for a period ending not later than November 7, 2003

NOVEMBER 7, 2003

Referral to the Committee on the Judiciary extended for a period ending not later than November 21, 2003

NOVEMBER 21, 2003

Referral to the Committee on the Judiciary extended for a period ending not later than January 31, 2004

JANUARY 31, 2004

Referral to the Committee on the Judiciary extended for a period ending not later than March 2, 2004

FEBRUARY 26, 2004

Referral to the Committee on the Judiciary extended for a period ending not later than June 1, 2004

JUNE 1, 2004

Additional sponsors: Mr. HINOJOSA, Mr. WATT, Mr. BOUCHER, and Mr. DREIER

JUNE 1, 2004

The Committee on the Judiciary discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes.

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

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
 5 “Financial Contracts Bankruptcy Reform Act of 2003”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for
 7 this Act is as follows:

Sec. 1. Short title; table of contents.

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

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

Sec. 4. Amendments relating to transfers of qualified financial contracts.

- Sec. 5. Amendments relating to disaffirmance or repudiation of qualified financial contracts.
- Sec. 6. Clarifying amendment relating to master agreements.
- Sec. 7. Federal Deposit Insurance Corporation Improvement Act of 1991.
- Sec. 8. Bankruptcy code amendments.
- Sec. 9. Recordkeeping requirements.
- Sec. 10. Exemptions from contemporaneous execution requirement.
- Sec. 11. Damage measure.
- Sec. 12. SIPC stay.
- Sec. 13. Applicability of other sections to chapter 9.
- Sec. 14. Effective date; application of amendments.
- Sec. 15. Savings clause.

1 **SEC. 2. TREATMENT OF CERTAIN AGREEMENTS BY CON-**
 2 **SERVATORS OR RECEIVERS OF INSURED DE-**
 3 **POSITORY INSTITUTIONS.**

4 (a) DEFINITION OF QUALIFIED FINANCIAL CON-
 5 TRACT.—

6 (1) FDIC-INSURED DEPOSITORY INSTITU-
 7 TIONS.—Section 11(e)(8)(D) of the Federal Deposit
 8 Insurance Act (12 U.S.C. 1821(e)(8)(D)) is amend-
 9 ed—

10 (A) by striking “subsection—” and insert-
 11 ing “subsection, the following definitions shall
 12 apply.”; and

13 (B) in clause (i), by inserting “, resolution,
 14 or order” after “any similar agreement that the
 15 Corporation determines by regulation”.

16 (2) INSURED CREDIT UNIONS.—Section
 17 207(c)(8)(D) of the Federal Credit Union Act (12
 18 U.S.C. 1787(c)(8)(D)) is amended—

1 (A) by striking “subsection—” and insert-
2 ing “subsection, the following definitions shall
3 apply:”; and

4 (B) in clause (i), by inserting “, resolution,
5 or order” after “any similar agreement that the
6 Board determines by regulation”.

7 (b) DEFINITION OF SECURITIES CONTRACT.—

8 (1) FDIC-INSURED DEPOSITORY INSTITU-
9 TIONS.—Section 11(e)(8)(D)(ii) of the Federal De-
10 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(ii)) is
11 amended to read as follows:

12 “(ii) SECURITIES CONTRACT.—The
13 term ‘securities contract’—

14 “(I) means a contract for the
15 purchase, sale, or loan of a security, a
16 certificate of deposit, a mortgage loan,
17 or any interest in a mortgage loan, a
18 group or index of securities, certifi-
19 cates of deposit, or mortgage loans or
20 interests therein (including any inter-
21 est therein or based on the value
22 thereof) or any option on any of the
23 foregoing, including any option to
24 purchase or sell any such security,
25 certificate of deposit, mortgage loan,

1 interest, group or index, or option,
2 and including any repurchase or re-
3 verse repurchase transaction on any
4 such security, certificate of deposit,
5 mortgage loan, interest, group or
6 index, or option;

7 “(II) does not include any pur-
8 chase, sale, or repurchase obligation
9 under a participation in a commercial
10 mortgage loan unless the Corporation
11 determines by regulation, resolution,
12 or order to include any such agree-
13 ment within the meaning of such
14 term;

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

18 “(IV) means the guarantee by or
19 to any securities clearing agency of
20 any settlement of cash, securities, cer-
21 tificates of deposit, mortgage loans or
22 interests therein, group or index of se-
23 curities, certificates of deposit, or
24 mortgage loans or interests therein
25 (including any interest therein or

1 based on the value thereof) or option
2 on any of the foregoing, including any
3 option to purchase or sell any such se-
4 curity, certificate of deposit, mortgage
5 loan, interest, group or index, or op-
6 tion;

7 “(V) means any margin loan;

8 “(VI) means any other agree-
9 ment or transaction that is similar to
10 any agreement or transaction referred
11 to in this clause;

12 “(VII) means any combination of
13 the agreements or transactions re-
14 ferred to in this clause;

15 “(VIII) means any option to
16 enter into any agreement or trans-
17 action referred to in this clause;

18 “(IX) means a master agreement
19 that provides for an agreement or
20 transaction referred to in subclause
21 (I), (III), (IV), (V), (VI), (VII), or
22 (VIII), together with all supplements
23 to any such master agreement, with-
24 out regard to whether the master
25 agreement provides for an agreement

1 or transaction that is not a securities
2 contract under this clause, except that
3 the master agreement shall be consid-
4 ered to be a securities contract under
5 this clause only with respect to each
6 agreement or transaction under the
7 master agreement that is referred to
8 in subclause (I), (III), (IV), (V), (VI),
9 (VII), or (VIII); and

10 “(X) means any security agree-
11 ment or arrangement or other credit
12 enhancement related to any agree-
13 ment or transaction referred to in this
14 clause, including any guarantee or re-
15 imbursement obligation in connection
16 with any agreement or transaction re-
17 ferred to in this clause.”.

18 (2) INSURED CREDIT UNIONS.—Section
19 207(c)(8)(D)(ii) of the Federal Credit Union Act
20 (12 U.S.C. 1787(c)(8)(D)(ii)) is amended to read as
21 follows:

22 “(ii) SECURITIES CONTRACT.—The
23 term ‘securities contract’—

24 “(I) means a contract for the
25 purchase, sale, or loan of a security, a

1 certificate of deposit, a mortgage loan,
2 or any interest in a mortgage loan, a
3 group or index of securities, certifi-
4 cates of deposit, or mortgage loans or
5 interests therein (including any inter-
6 est therein or based on the value
7 thereof) or any option on any of the
8 foregoing, including any option to
9 purchase or sell any such security,
10 certificate of deposit, mortgage loan,
11 interest, group or index, or option,
12 and including any repurchase or re-
13 verse repurchase transaction on any
14 such security, certificate of deposit,
15 mortgage loan, interest, group or
16 index, or option;

17 “(II) does not include any pur-
18 chase, sale, or repurchase obligation
19 under a participation in a commercial
20 mortgage loan unless the Board deter-
21 mines by regulation, resolution, or
22 order to include any such agreement
23 within the meaning of such term;

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

4 “(IV) means the guarantee by or
5 to any securities clearing agency of
6 any settlement of cash, securities, cer-
7 tificates of deposit, mortgage loans or
8 interests therein, group or index of se-
9 curities, certificates of deposit, or
10 mortgage loans or interests therein
11 (including any interest therein or
12 based on the value thereof) or option
13 on any of the foregoing, including any
14 option to purchase or sell any such se-
15 curity, certificate of deposit, mortgage
16 loan, interest, group or index, or op-
17 tion;

18 “(V) means any margin loan;

19 “(VI) means any other agree-
20 ment or transaction that is similar to
21 any agreement or transaction referred
22 to in this clause;

23 “(VII) means any combination of
24 the agreements or transactions re-
25 ferred to in this clause;

1 “(VIII) means any option to
2 enter into any agreement or trans-
3 action referred to in this clause;

4 “(IX) means a master agreement
5 that provides for an agreement or
6 transaction referred to in subclause
7 (I), (III), (IV), (V), (VI), (VII), or
8 (VIII), together with all supplements
9 to any such master agreement, with-
10 out regard to whether the master
11 agreement provides for an agreement
12 or transaction that is not a securities
13 contract under this clause, except that
14 the master agreement shall be consid-
15 ered to be a securities contract under
16 this clause only with respect to each
17 agreement or transaction under the
18 master agreement that is referred to
19 in subclause (I), (III), (IV), (V), (VI),
20 (VII), or (VIII); and

21 “(X) means any security agree-
22 ment or arrangement or other credit
23 enhancement related to any agree-
24 ment or transaction referred to in this
25 clause, including any guarantee or re-

1 imbursement obligation in connection
2 with any agreement or transaction re-
3 ferred to in this clause.”.

4 (c) DEFINITION OF COMMODITY CONTRACT.—

5 (1) FDIC-INSURED DEPOSITORY INSTITU-
6 TIONS.—Section 11(e)(8)(D)(iii) of the Federal De-
7 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(iii)) is
8 amended to read as follows:

9 “(iii) COMMODITY CONTRACT.—The
10 term ‘commodity contract’ means—

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

17 “(II) with respect to a foreign fu-
18 tures commission merchant, a foreign
19 future;

20 “(III) with respect to a leverage
21 transaction merchant, a leverage
22 transaction;

23 “(IV) with respect to a clearing
24 organization, a contract for the pur-
25 chase or sale of a commodity for fu-

1 ture delivery on, or subject to the
2 rules of, a contract market or board
3 of trade that is cleared by such clear-
4 ing organization, or commodity option
5 traded on, or subject to the rules of,
6 a contract market or board of trade
7 that is cleared by such clearing orga-
8 nization;

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

11 “(VI) any other agreement or
12 transaction that is similar to any
13 agreement or transaction referred to
14 in this clause;

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

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

21 “(IX) a master agreement that
22 provides for an agreement or trans-
23 action referred to in subclause (I),
24 (II), (III), (IV), (V), (VI), (VII), or
25 (VIII), together with all supplements

1 to any such master agreement, with-
2 out regard to whether the master
3 agreement provides for an agreement
4 or transaction that is not a com-
5 modity contract under this clause, ex-
6 cept that the master agreement shall
7 be considered to be a commodity con-
8 tract under this clause only with re-
9 spect to each agreement or trans-
10 action under the master agreement
11 that is referred to in subclause (I),
12 (II), (III), (IV), (V), (VI), (VII), or
13 (VIII); or

14 “(X) any security agreement or
15 arrangement or other credit enhance-
16 ment related to any agreement or
17 transaction referred to in this clause,
18 including any guarantee or reimburse-
19 ment obligation in connection with
20 any agreement or transaction referred
21 to in this clause.”.

22 (2) INSURED CREDIT UNIONS.—Section
23 207(c)(8)(D)(iii) of the Federal Credit Union Act
24 (12 U.S.C. 1787(c)(8)(D)(iii)) is amended to read as
25 follows:

1 “(iii) COMMODITY CONTRACT.—The
2 term ‘commodity contract’ means—

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

9 “(II) with respect to a foreign fu-
10 tures commission merchant, a foreign
11 future;

12 “(III) with respect to a leverage
13 transaction merchant, a leverage
14 transaction;

15 “(IV) with respect to a clearing
16 organization, a contract for the pur-
17 chase or sale of a commodity for fu-
18 ture delivery on, or subject to the
19 rules of, a contract market or board
20 of trade that is cleared by such clear-
21 ing organization, or commodity option
22 traded on, or subject to the rules of,
23 a contract market or board of trade
24 that is cleared by such clearing orga-
25 nization;

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

3 “(VI) any other agreement or
4 transaction that is similar to any
5 agreement or transaction referred to
6 in this clause;

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

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

13 “(IX) a master agreement that
14 provides for an agreement or trans-
15 action referred to in subclause (I),
16 (II), (III), (IV), (V), (VI), (VII), or
17 (VIII), together with all supplements
18 to any such master agreement, with-
19 out regard to whether the master
20 agreement provides for an agreement
21 or transaction that is not a com-
22 modity contract under this clause, ex-
23 cept that the master agreement shall
24 be considered to be a commodity con-
25 tract under this clause only with re-

1 spect to each agreement or trans-
2 action under the master agreement
3 that is referred to in subclause (I),
4 (II), (III), (IV), (V), (VI), (VII), or
5 (VIII); or

6 “(X) any security agreement or
7 arrangement or other credit enhance-
8 ment related to any agreement or
9 transaction referred to in this clause,
10 including any guarantee or reimburse-
11 ment obligation in connection with
12 any agreement or transaction referred
13 to in this clause.”.

14 (d) DEFINITION OF FORWARD CONTRACT.—

15 (1) FDIC-INSURED DEPOSITORY INSTITU-
16 TIONS.—Section 11(e)(8)(D)(iv) of the Federal De-
17 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(iv)) is
18 amended to read as follows:

19 “(iv) FORWARD CONTRACT.—The
20 term ‘forward contract’ means—

21 “(I) a contract (other than a
22 commodity contract) for the purchase,
23 sale, or transfer of a commodity or
24 any similar good, article, service,
25 right, or interest which is presently or

1 in the future becomes the subject of
2 dealing in the forward contract trade,
3 or product or byproduct thereof, with
4 a maturity date more than 2 days
5 after the date the contract is entered
6 into, including, a repurchase trans-
7 action, reverse repurchase transaction,
8 consignment, lease, swap, hedge
9 transaction, deposit, loan, option, allo-
10 cated transaction, unallocated trans-
11 action, or any other similar agree-
12 ment;

13 “(II) any combination of agree-
14 ments or transactions referred to in
15 subclauses (I) and (III);

16 “(III) any option to enter into
17 any agreement or transaction referred
18 to in subclause (I) or (II);

19 “(IV) a master agreement that
20 provides for an agreement or trans-
21 action referred to in subclauses (I),
22 (II), or (III), together with all supple-
23 ments to any such master agreement,
24 without regard to whether the master
25 agreement provides for an agreement

1 or transaction that is not a forward
2 contract under this clause, except that
3 the master agreement shall be consid-
4 ered to be a forward contract under
5 this clause only with respect to each
6 agreement or transaction under the
7 master agreement that is referred to
8 in subclause (I), (II), or (III); or

9 “(V) any security agreement or
10 arrangement or other credit enhance-
11 ment related to any agreement or
12 transaction referred to in subclause
13 (I), (II), (III), or (IV), including any
14 guarantee or reimbursement obliga-
15 tion in connection with any agreement
16 or transaction referred to in any such
17 subclause.”.

18 (2) INSURED CREDIT UNIONS.—Section
19 207(c)(8)(D)(iv) of the Federal Credit Union Act
20 (12 U.S.C. 1787(c)(8)(D)(iv)) is amended to read as
21 follows:

22 “(iv) FORWARD CONTRACT.—The
23 term ‘forward contract’ means—

24 “(I) a contract (other than a
25 commodity contract) for the purchase,

1 sale, or transfer of a commodity or
2 any similar good, article, service,
3 right, or interest which is presently or
4 in the future becomes the subject of
5 dealing in the forward contract trade,
6 or product or byproduct thereof, with
7 a maturity date more than 2 days
8 after the date the contract is entered
9 into, including, a repurchase trans-
10 action, reverse repurchase transaction,
11 consignment, lease, swap, hedge
12 transaction, deposit, loan, option, allo-
13 cated transaction, unallocated trans-
14 action, or any other similar agree-
15 ment;

16 “(II) any combination of agree-
17 ments or transactions referred to in
18 subclauses (I) and (III);

19 “(III) any option to enter into
20 any agreement or transaction referred
21 to in subclause (I) or (II);

22 “(IV) a master agreement that
23 provides for an agreement or trans-
24 action referred to in subclauses (I),
25 (II), or (III), together with all supple-

1 ments to any such master agreement,
2 without regard to whether the master
3 agreement provides for an agreement
4 or transaction that is not a forward
5 contract under this clause, except that
6 the master agreement shall be consid-
7 ered to be a forward contract under
8 this clause only with respect to each
9 agreement or transaction under the
10 master agreement that is referred to
11 in subclause (I), (II), or (III); or

12 “(V) any security agreement or
13 arrangement or other credit enhance-
14 ment related to any agreement or
15 transaction referred to in subclause
16 (I), (II), (III), or (IV), including any
17 guarantee or reimbursement obliga-
18 tion in connection with any agreement
19 or transaction referred to in any such
20 subclause.”.

21 (e) DEFINITION OF REPURCHASE AGREEMENT.—

22 (1) FDIC-INSURED DEPOSITORY INSTITU-
23 TIONS.—Section 11(e)(8)(D)(v) of the Federal De-
24 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(v)) is
25 amended to read as follows:

1 “(v) REPURCHASE AGREEMENT.—The
2 term ‘repurchase agreement’ (which defini-
3 tion also applies to a reverse repurchase
4 agreement)—

5 “(I) means an agreement, includ-
6 ing related terms, which provides for
7 the transfer of one or more certifi-
8 cates of deposit, mortgage-related se-
9 curities (as such term is defined in
10 the Securities Exchange Act of 1934),
11 mortgage loans, interests in mortgage-
12 related securities or mortgage loans,
13 eligible bankers’ acceptances, qualified
14 foreign government securities or secu-
15 rities that are direct obligations of, or
16 that are fully guaranteed by, the
17 United States or any agency of the
18 United States against the transfer of
19 funds by the transferee of such certifi-
20 cates of deposit, eligible bankers’ ac-
21 ceptances, securities, mortgage loans,
22 or interests with a simultaneous
23 agreement by such transferee to
24 transfer to the transferor thereof cer-
25 tificates of deposit, eligible bankers’

1 acceptances, securities, mortgage
2 loans, or interests as described above,
3 at a date certain not later than 1 year
4 after such transfers or on demand,
5 against the transfer of funds, or any
6 other similar agreement;

7 “(II) does not include any repur-
8 chase obligation under a participation
9 in a commercial mortgage loan unless
10 the Corporation determines by regula-
11 tion, resolution, or order to include
12 any such participation within the
13 meaning of such term;

14 “(III) means any combination of
15 agreements or transactions referred to
16 in subclauses (I) and (IV);

17 “(IV) means any option to enter
18 into any agreement or transaction re-
19 ferred to in subclause (I) or (III);

20 “(V) means a master agreement
21 that provides for an agreement or
22 transaction referred to in subclause
23 (I), (III), or (IV), together with all
24 supplements to any such master
25 agreement, without regard to whether

1 the master agreement provides for an
2 agreement or transaction that is not a
3 repurchase agreement under this
4 clause, except that the master agree-
5 ment shall be considered to be a re-
6 purchase agreement under this sub-
7 clause only with respect to each agree-
8 ment or transaction under the master
9 agreement that is referred to in sub-
10 clause (I), (III), or (IV); and

11 “(VI) means any security agree-
12 ment or arrangement or other credit
13 enhancement related to any agreement
14 or transaction referred to in subclause
15 (I), (III), (IV), or (V), including any
16 guarantee or reimbursement obligation
17 in connection with any agreement or
18 transaction referred to in any such
19 subclause.

20 For purposes of this clause, the term
21 ‘qualified foreign government security’
22 means a security that is a direct obligation
23 of, or that is fully guaranteed by, the cen-
24 tral government of a member of the Orga-
25 nization for Economic Cooperation and

1 Development (as determined by regulation
2 or order adopted by the appropriate Fed-
3 eral banking authority).”.

4 (2) INSURED CREDIT UNIONS.—Section
5 207(c)(8)(D)(v) of the Federal Credit Union Act (12
6 U.S.C. 1787(c)(8)(D)(v)) is amended to read as fol-
7 lows:

8 “(v) REPURCHASE AGREEMENT.—The
9 term ‘repurchase agreement’ (which defini-
10 tion also applies to a reverse repurchase
11 agreement)—

12 “(I) means an agreement, includ-
13 ing related terms, which provides for
14 the transfer of one or more certifi-
15 cates of deposit, mortgage-related se-
16 curities (as such term is defined in
17 the Securities Exchange Act of 1934),
18 mortgage loans, interests in mortgage-
19 related securities or mortgage loans,
20 eligible bankers’ acceptances, qualified
21 foreign government securities or secu-
22 rities that are direct obligations of, or
23 that are fully guaranteed by, the
24 United States or any agency of the
25 United States against the transfer of

1 funds by the transferee of such certifi-
2 cates of deposit, eligible bankers' ac-
3 ceptances, securities, mortgage loans,
4 or interests with a simultaneous
5 agreement by such transferee to
6 transfer to the transferor thereof cer-
7 tificates of deposit, eligible bankers'
8 acceptances, securities, mortgage
9 loans, or interests as described above,
10 at a date certain not later than 1 year
11 after such transfers or on demand,
12 against the transfer of funds, or any
13 other similar agreement;

14 “(II) does not include any repur-
15 chase obligation under a participation
16 in a commercial mortgage loan unless
17 the Board determines by regulation,
18 resolution, or order to include any such
19 participation within the meaning of
20 such term;

21 “(III) means any combination of
22 agreements or transactions referred to
23 in subclauses (I) and (IV);

1 “(IV) means any option to enter
2 into any agreement or transaction re-
3 ferred to in subclause (I) or (III);

4 “(V) means a master agreement
5 that provides for an agreement or
6 transaction referred to in subclause
7 (I), (III), or (IV), together with all
8 supplements to any such master
9 agreement, without regard to whether
10 the master agreement provides for an
11 agreement or transaction that is not a
12 repurchase agreement under this
13 clause, except that the master agree-
14 ment shall be considered to be a re-
15 purchase agreement under this sub-
16 clause only with respect to each agree-
17 ment or transaction under the master
18 agreement that is referred to in sub-
19 clause (I), (III), or (IV); and

20 “(VI) means any security agree-
21 ment or arrangement or other credit
22 enhancement related to any agree-
23 ment or transaction referred to in
24 subclause (I), (III), (IV), or (V), in-
25 cluding any guarantee or reimburse-

1 ment obligation in connection with
2 any agreement or transaction referred
3 to in any such subclause.

4 For purposes of this clause, the term
5 ‘qualified foreign government security’
6 means a security that is a direct obligation
7 of, or that is fully guaranteed by, the cen-
8 tral government of a member of the Orga-
9 nization for Economic Cooperation and
10 Development (as determined by regulation
11 or order adopted by the appropriate Fed-
12 eral banking authority).”.

13 (f) DEFINITION OF SWAP AGREEMENT.—

14 (1) FDIC-INSURED DEPOSITORY INSTITU-
15 TIONS.—Section 11(e)(8)(D)(vi) of the Federal De-
16 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(vi)) is
17 amended to read as follows:

18 “(vi) SWAP AGREEMENT.—The term
19 ‘swap agreement’ means—

20 “(I) any agreement, including the
21 terms and conditions incorporated by
22 reference in any such agreement,
23 which is an interest rate swap, option,
24 future, or forward agreement, includ-
25 ing a rate floor, rate cap, rate collar,

1 cross-currency rate swap, and basis
2 swap; a spot, same day-tomorrow, to-
3 morrow-next, forward, or other for-
4 eign exchange or precious metals
5 agreement; a currency swap, option,
6 future, or forward agreement; an eq-
7 uity index or equity swap, option, fu-
8 ture, or forward agreement; a debt
9 index or debt swap, option, future, or
10 forward agreement; a total return,
11 credit spread or credit swap, option,
12 future, or forward agreement; a com-
13 modity index or commodity swap, op-
14 tion, future, or forward agreement; or
15 a weather swap, weather derivative, or
16 weather option;

17 “(II) any agreement or trans-
18 action that is similar to any other
19 agreement or transaction referred to
20 in this clause and that is of a type
21 that has been, is presently, or in the
22 future becomes, the subject of recur-
23 rent dealings in the swap markets (in-
24 cluding terms and conditions incor-
25 porated by reference in such agree-

1 ment) and that is a forward, swap, fu-
2 ture, or option on one or more rates,
3 currencies, commodities, equity securi-
4 ties or other equity instruments, debt
5 securities or other debt instruments,
6 quantitative measures associated with
7 an occurrence, extent of an occur-
8 rence, or contingency associated with
9 a financial, commercial, or economic
10 consequence, or economic or financial
11 indices or measures of economic or fi-
12 nancial risk or value;

13 “(III) any combination of agree-
14 ments or transactions referred to in
15 this clause;

16 “(IV) any option to enter into
17 any agreement or transaction referred
18 to in this clause;

19 “(V) a master agreement that
20 provides for an agreement or trans-
21 action referred to in subclause (I),
22 (II), (III), or (IV), together with all
23 supplements to any such master
24 agreement, without regard to whether
25 the master agreement contains an

1 agreement or transaction that is not a
2 swap agreement under this clause, ex-
3 cept that the master agreement shall
4 be considered to be a swap agreement
5 under this clause only with respect to
6 each agreement or transaction under
7 the master agreement that is referred
8 to in subclause (I), (II), (III), or (IV);
9 and

10 “(VI) any security agreement or
11 arrangement or other credit enhance-
12 ment related to any agreements or
13 transactions referred to in subclause
14 (I), (II), (III), (IV), or (V), including
15 any guarantee or reimbursement obli-
16 gation in connection with any agree-
17 ment or transaction referred to in any
18 such subclause.

19 Such term is applicable for purposes of
20 this subsection only and shall not be con-
21 strued or applied so as to challenge or af-
22 fect the characterization, definition, or
23 treatment of any swap agreement under
24 any other statute, regulation, or rule, in-
25 cluding the Securities Act of 1933, the Se-

1 securities Exchange Act of 1934, the Public
2 Utility Holding Company Act of 1935, the
3 Trust Indenture Act of 1939, the Invest-
4 ment Company Act of 1940, the Invest-
5 ment Advisers Act of 1940, the Securities
6 Investor Protection Act of 1970, the Com-
7 modity Exchange Act, the Gramm-Leach-
8 Bliley Act, and the Legal Certainty for
9 Bank Products Act of 2000.”.

10 (2) INSURED CREDIT UNIONS.—Section
11 207(c)(8)(D) of the Federal Credit Union Act (12
12 U.S.C. 1787(c)(8)(D)) is amended by adding at the
13 end the following new clause:

14 “(vi) SWAP AGREEMENT.—The term
15 ‘swap agreement’ means—

16 “(I) any agreement, including the
17 terms and conditions incorporated by
18 reference in any such agreement,
19 which is an interest rate swap, option,
20 future, or forward agreement, includ-
21 ing a rate floor, rate cap, rate collar,
22 cross-currency rate swap, and basis
23 swap; a spot, same day-tomorrow, to-
24 morrow-next, forward, or other for-
25 eign exchange or precious metals

1 agreement; a currency swap, option,
2 future, or forward agreement; an equity
3 index or equity swap, option, future,
4 or forward agreement; a debt
5 index or debt swap, option, future, or
6 forward agreement; a total return,
7 credit spread or credit swap, option,
8 future, or forward agreement; a commodity
9 index or commodity swap, option,
10 future, or forward agreement; or
11 a weather swap, weather derivative, or
12 weather option;

13 “(II) any agreement or transaction
14 that is similar to any other
15 agreement or transaction referred to
16 in this clause and that is of a type
17 that has been, is presently, or in the
18 future becomes, the subject of recurrent
19 dealings in the swap markets (including
20 terms and conditions incorporated
21 by reference in such agreement) and
22 that is a forward, swap, future, or
23 option on one or more rates,
24 currencies, commodities, equity securities
25 or other equity instruments, debt

1 securities or other debt instruments,
2 quantitative measures associated with
3 an occurrence, extent of an occur-
4 rence, or contingency associated with
5 a financial, commercial, or economic
6 consequence, or economic or financial
7 indices or measures of economic or fi-
8 nancial risk or value;

9 “(III) any combination of agree-
10 ments or transactions referred to in
11 this clause;

12 “(IV) any option to enter into
13 any agreement or transaction referred
14 to in this clause;

15 “(V) a master agreement that
16 provides for an agreement or trans-
17 action referred to in subclause (I),
18 (II), (III), or (IV), together with all
19 supplements to any such master
20 agreement, without regard to whether
21 the master agreement contains an
22 agreement or transaction that is not a
23 swap agreement under this clause, ex-
24 cept that the master agreement shall
25 be considered to be a swap agreement

1 under this clause only with respect to
2 each agreement or transaction under
3 the master agreement that is referred
4 to in subclause (I), (II), (III), or (IV);
5 and

6 “(VI) any security agreement or
7 arrangement or other credit enhance-
8 ment related to any agreements or
9 transactions referred to in subclause
10 (I), (II), (III), (IV), or (V), including
11 any guarantee or reimbursement obli-
12 gation in connection with any agree-
13 ment or transaction referred to in any
14 such subclause.

15 Such term is applicable for purposes of
16 this subsection only and shall not be con-
17 strued or applied so as to challenge or af-
18 fect the characterization, definition, or
19 treatment of any swap agreement under
20 any other statute, regulation, or rule, in-
21 cluding the Securities Act of 1933, the Se-
22 curities Exchange Act of 1934, the Public
23 Utility Holding Company Act of 1935, the
24 Trust Indenture Act of 1939, the Invest-
25 ment Company Act of 1940, the Invest-

1 ment Advisers Act of 1940, the Securities
2 Investor Protection Act of 1970, the Com-
3 modity Exchange Act, the Gramm-Leach-
4 Bliley Act, and the Legal Certainty for
5 Bank Products Act of 2000.”.

6 (g) DEFINITION OF TRANSFER.—

7 (1) FDIC-INSURED DEPOSITORY INSTITU-
8 TIONS.—Section 11(e)(8)(D)(viii) of the Federal De-
9 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(viii))
10 is amended to read as follows:

11 “(viii) TRANSFER.—The term ‘trans-
12 fer’ means every mode, direct or indirect,
13 absolute or conditional, voluntary or invol-
14 untary, of disposing of or parting with
15 property or with an interest in property,
16 including retention of title as a security in-
17 terest and foreclosure of the depository in-
18 stitution’s equity of redemption.”.

19 (2) INSURED CREDIT UNIONS.—Section
20 207(c)(8)(D) of the Federal Credit Union Act (12
21 U.S.C. 1787(c)(8)(D)) (as amended by subsection
22 (f) of this section) is amended by adding at the end
23 the following new clause:

24 “(viii) TRANSFER.—The term ‘trans-
25 fer’ means every mode, direct or indirect,

1 absolute or conditional, voluntary or invol-
2 untary, of disposing of or parting with
3 property or with an interest in property,
4 including retention of title as a security in-
5 terest and foreclosure of the depository in-
6 stitution's equity of redemption.”.

7 (h) TREATMENT OF QUALIFIED FINANCIAL CON-
8 TRACTS.—

9 (1) FDIC-INSURED DEPOSITORY INSTITU-
10 TIONS.—Section 11(e)(8) of the Federal Deposit In-
11 surance Act (12 U.S.C. 1821(e)(8)) is amended—

12 (A) in subparagraph (A)—

13 (i) by striking “paragraph (10)” and
14 inserting “paragraphs (9) and (10)”;

15 (ii) in clause (i), by striking “to cause
16 the termination or liquidation” and insert-
17 ing “such person has to cause the termi-
18 nation, liquidation, or acceleration”; and

19 (iii) by striking clause (ii) and insert-
20 ing the following new clause:

21 “(ii) any right under any security
22 agreement or arrangement or other credit
23 enhancement related to one or more quali-
24 fied financial contracts described in clause
25 (i);” and

1 (B) in subparagraph (E), by striking
2 clause (ii) and inserting the following:

3 “(ii) any right under any security
4 agreement or arrangement or other credit
5 enhancement related to one or more quali-
6 fied financial contracts described in clause
7 (i);”.

8 (2) INSURED CREDIT UNIONS.—Section
9 207(c)(8) of the Federal Credit Union Act (12
10 U.S.C. 1787(c)(8)) is amended—

11 (A) in subparagraph (A)—

12 (i) by striking “paragraph (12)” and
13 inserting “paragraphs (9) and (10)”;

14 (ii) in clause (i), by striking “to cause
15 the termination or liquidation” and insert-
16 ing “such person has to cause the termi-
17 nation, liquidation, or acceleration”; and

18 (iii) by striking clause (ii) and insert-
19 ing the following new clause:

20 “(ii) any right under any security
21 agreement or arrangement or other credit
22 enhancement related to 1 or more qualified
23 financial contracts described in clause
24 (i);” and

1 (B) in subparagraph (E), by striking
2 clause (ii) and inserting the following new
3 clause:

4 “(ii) any right under any security
5 agreement or arrangement or other credit
6 enhancement related to 1 or more qualified
7 financial contracts described in clause
8 (i);”.

9 (i) AVOIDANCE OF TRANSFERS.—

10 (1) FDIC-INSURED DEPOSITORY INSTITU-
11 TIONS.—Section 11(e)(8)(C)(i) of the Federal De-
12 posit Insurance Act (12 U.S.C. 1821(e)(8)(C)(i)) is
13 amended by inserting “section 5242 of the Revised
14 Statutes of the United States or any other Federal
15 or State law relating to the avoidance of preferential
16 or fraudulent transfers,” before “the Corporation”.

17 (2) INSURED CREDIT UNIONS.—Section
18 207(c)(8)(C)(i) of the Federal Credit Union Act (12
19 U.S.C. 1787(c)(8)(C)(i)) is amended by inserting
20 “section 5242 of the Revised Statutes of the United
21 States or any other Federal or State law relating to
22 the avoidance of preferential or fraudulent trans-
23 fers,” before “the Board”.

1 **SEC. 3. AUTHORITY OF THE FDIC AND NCUAB WITH RE-**
2 **SPECT TO FAILED AND FAILING INSTITU-**
3 **TIONS.**

4 (a) FEDERAL DEPOSIT INSURANCE CORPORATION.—

5 (1) IN GENERAL.—Section 11(e)(8) of the Fed-
6 eral Deposit Insurance Act (12 U.S.C. 1821(e)(8))
7 is amended—

8 (A) in subparagraph (E), by striking
9 “other than paragraph (12) of this subsection,
10 subsection (d)(9)” and inserting “other than
11 subsections (d)(9) and (e)(10)”; and

12 (B) by adding at the end the following new
13 subparagraphs:

14 “(F) CLARIFICATION.—No provision of law
15 shall be construed as limiting the right or
16 power of the Corporation, or authorizing any
17 court or agency to limit or delay, in any man-
18 ner, the right or power of the Corporation to
19 transfer any qualified financial contract in ac-
20 cordance with paragraphs (9) and (10) of this
21 subsection or to disaffirm or repudiate any such
22 contract in accordance with subsection (e)(1) of
23 this section.

24 “(G) WALKAWAY CLAUSES NOT EFFEC-
25 TIVE.—

1 “(i) IN GENERAL.—Notwithstanding
2 the provisions of subparagraphs (A) and
3 (E), and sections 403 and 404 of the Fed-
4 eral Deposit Insurance Corporation Im-
5 provement Act of 1991, no walkaway
6 clause shall be enforceable in a qualified fi-
7 nancial contract of an insured depository
8 institution in default.

9 “(ii) WALKAWAY CLAUSE DEFINED.—
10 For purposes of this subparagraph, the
11 term ‘walkaway clause’ means a provision
12 in a qualified financial contract that, after
13 calculation of a value of a party’s position
14 or an amount due to or from 1 of the par-
15 ties in accordance with its terms upon ter-
16 mination, liquidation, or acceleration of the
17 qualified financial contract, either does not
18 create a payment obligation of a party or
19 extinguishes a payment obligation of a
20 party in whole or in part solely because of
21 such party’s status as a nondefaulting
22 party.”.

23 (2) TECHNICAL AND CONFORMING AMEND-
24 MENT.—Section 11(e)(12)(A) of the Federal Deposit
25 Insurance Act (12 U.S.C. 1821(e)(12)(A)) is amend-

1 ed by inserting “or the exercise of rights or powers
2 by” after “the appointment of”.

3 (b) NATIONAL CREDIT UNION ADMINISTRATION
4 BOARD.—

5 (1) IN GENERAL.—Section 207(c)(8) of the
6 Federal Credit Union Act (12 U.S.C. 1787(c)(8)) is
7 amended—

8 (A) in subparagraph (E) (as amended by
9 section 2(h)), by striking “other than para-
10 graph (12) of this subsection, subsection
11 (b)(9)” and inserting “other than subsections
12 (b)(9) and (c)(10)”; and

13 (B) by adding at the end the following new
14 subparagraphs:

15 “(F) CLARIFICATION.—No provision of law
16 shall be construed as limiting the right or
17 power of the Board, or authorizing any court or
18 agency to limit or delay, in any manner, the
19 right or power of the Board to transfer any
20 qualified financial contract in accordance with
21 paragraphs (9) and (10) of this subsection or to
22 disaffirm or repudiate any such contract in ac-
23 cordance with subsection (c)(1) of this section.

24 “(G) WALKAWAY CLAUSES NOT EFFEC-
25 TIVE.—

1 “(i) IN GENERAL.—Notwithstanding
2 the provisions of subparagraphs (A) and
3 (E), and sections 403 and 404 of the Fed-
4 eral Deposit Insurance Corporation Im-
5 provement Act of 1991, no walkaway
6 clause shall be enforceable in a qualified fi-
7 nancial contract of an insured credit union
8 in default.

9 “(ii) WALKAWAY CLAUSE DEFINED.—
10 For purposes of this subparagraph, the
11 term ‘walkaway clause’ means a provision
12 in a qualified financial contract that, after
13 calculation of a value of a party’s position
14 or an amount due to or from 1 of the par-
15 ties in accordance with its terms upon ter-
16 mination, liquidation, or acceleration of the
17 qualified financial contract, either does not
18 create a payment obligation of a party or
19 extinguishes a payment obligation of a
20 party in whole or in part solely because of
21 such party’s status as a nondefaulting
22 party.”.

23 (2) TECHNICAL AND CONFORMING AMEND-
24 MENT.—Section 207(c)(12)(A) of the Federal Credit
25 Union Act (12 U.S.C. 1787(c)(12)(A)) is amended

1 by inserting “or the exercise of rights or powers by”
2 after “the appointment of”.

3 **SEC. 4. AMENDMENTS RELATING TO TRANSFERS OF QUALI-**
4 **FIED FINANCIAL CONTRACTS.**

5 (a) FDIC-INSURED DEPOSITORY INSTITUTIONS.—

6 (1) TRANSFERS OF QUALIFIED FINANCIAL
7 CONTRACTS TO FINANCIAL INSTITUTIONS.—Section
8 11(e)(9) of the Federal Deposit Insurance Act (12
9 U.S.C. 1821(e)(9)) is amended to read as follows:

10 “(9) TRANSFER OF QUALIFIED FINANCIAL CON-
11 TRACTS.—

12 “(A) IN GENERAL.—In making any trans-
13 fer of assets or liabilities of a depository institu-
14 tion in default which includes any qualified fi-
15 nancial contract, the conservator or receiver for
16 such depository institution shall either—

17 “(i) transfer to one financial institu-
18 tion, other than a financial institution for
19 which a conservator, receiver, trustee in
20 bankruptcy, or other legal custodian has
21 been appointed or which is otherwise the
22 subject of a bankruptcy or insolvency pro-
23 ceeding—

24 “(I) all qualified financial con-
25 tracts between any person or any af-

1 filiate of such person and the deposi-
2 tory institution in default;

3 “(II) all claims of such person or
4 any affiliate of such person against
5 such depository institution under any
6 such contract (other than any claim
7 which, under the terms of any such
8 contract, is subordinated to the claims
9 of general unsecured creditors of such
10 institution);

11 “(III) all claims of such deposi-
12 tory institution against such person or
13 any affiliate of such person under any
14 such contract; and

15 “(IV) all property securing or
16 any other credit enhancement for any
17 contract described in subclause (I) or
18 any claim described in subclause (II)
19 or (III) under any such contract; or

20 “(ii) transfer none of the qualified fi-
21 nancial contracts, claims, property or other
22 credit enhancement referred to in clause (i)
23 (with respect to such person and any affil-
24 iate of such person).

1 “(B) TRANSFER TO FOREIGN BANK, FOR-
2 EIGN FINANCIAL INSTITUTION, OR BRANCH OR
3 AGENCY OF A FOREIGN BANK OR FINANCIAL IN-
4 STITUTION.—In transferring any qualified fi-
5 nancial contracts and related claims and prop-
6 erty under subparagraph (A)(i), the conservator
7 or receiver for the depository institution shall
8 not make such transfer to a foreign bank, fi-
9 nancial institution organized under the laws of
10 a foreign country, or a branch or agency of a
11 foreign bank or financial institution unless,
12 under the law applicable to such bank, financial
13 institution, branch or agency, to the qualified
14 financial contracts, and to any netting contract,
15 any security agreement or arrangement or other
16 credit enhancement related to one or more
17 qualified financial contracts, the contractual
18 rights of the parties to such qualified financial
19 contracts, netting contracts, security agree-
20 ments or arrangements, or other credit en-
21 hancements are enforceable substantially to the
22 same extent as permitted under this section.

23 “(C) TRANSFER OF CONTRACTS SUBJECT
24 TO THE RULES OF A CLEARING ORGANIZA-
25 TION.—In the event that a conservator or re-

1 ceiver transfers any qualified financial contract
2 and related claims, property, and credit en-
3 hancements pursuant to subparagraph (A)(i)
4 and such contract is cleared by or subject to the
5 rules of a clearing organization, the clearing or-
6 ganization shall not be required to accept the
7 transferee as a member by virtue of the trans-
8 fer.

9 “(D) DEFINITIONS.—For purposes of this
10 paragraph, the term ‘financial institution’
11 means a broker or dealer, a depository institu-
12 tion, a futures commission merchant, or any
13 other institution, as determined by the Corpora-
14 tion by regulation to be a financial institution,
15 and the term ‘clearing organization’ has the
16 same meaning as in section 402 of the Federal
17 Deposit Insurance Corporation Improvement
18 Act of 1991.”.

19 (2) NOTICE TO QUALIFIED FINANCIAL CON-
20 TRACT COUNTERPARTIES.—Section 11(e)(10)(A) of
21 the Federal Deposit Insurance Act (12 U.S.C.
22 1821(e)(10)(A)) is amended in the material imme-
23 diately following clause (ii) by striking “the conser-
24 vator” and all that follows through the period and
25 inserting the following: “the conservator or receiver

1 shall notify any person who is a party to any such
2 contract of such transfer by 5:00 p.m. (eastern time)
3 on the business day following the date of the ap-
4 pointment of the receiver in the case of a receiver-
5 ship, or the business day following such transfer in
6 the case of a conservatorship.”.

7 (3) RIGHTS AGAINST RECEIVER AND CONSER-
8 VATOR AND TREATMENT OF BRIDGE BANKS.—Sec-
9 tion 11(e)(10) of the Federal Deposit Insurance Act
10 (12 U.S.C. 1821(e)(10)) is amended—

11 (A) by redesignating subparagraph (B) as
12 subparagraph (D); and

13 (B) by inserting after subparagraph (A)
14 the following new subparagraphs:

15 “(B) CERTAIN RIGHTS NOT ENFORCE-
16 ABLE.—

17 “(i) RECEIVERSHIP.—A person who is
18 a party to a qualified financial contract
19 with an insured depository institution may
20 not exercise any right that such person has
21 to terminate, liquidate, or net such con-
22 tract under paragraph (8)(A) of this sub-
23 section or section 403 or 404 of the Fed-
24 eral Deposit Insurance Corporation Im-
25 provement Act of 1991, solely by reason of

1 or incidental to the appointment of a re-
2 ceiver for the depository institution (or the
3 insolvency or financial condition of the de-
4 pository institution for which the receiver
5 has been appointed)—

6 “(I) until 5:00 p.m. (eastern
7 time) on the business day following
8 the date of the appointment of the re-
9 ceiver; or

10 “(II) after the person has re-
11 ceived notice that the contract has
12 been transferred pursuant to para-
13 graph (9)(A).

14 “(ii) CONSERVATORSHIP.—A person
15 who is a party to a qualified financial con-
16 tract with an insured depository institution
17 may not exercise any right that such per-
18 son has to terminate, liquidate, or net such
19 contract under paragraph (8)(E) of this
20 subsection or section 403 or 404 of the
21 Federal Deposit Insurance Corporation
22 Improvement Act of 1991, solely by reason
23 of or incidental to the appointment of a
24 conservator for the depository institution
25 (or the insolvency or financial condition of

1 the depository institution for which the
2 conservator has been appointed).

3 “(iii) NOTICE.—For purposes of this
4 paragraph, the Corporation as receiver or
5 conservator of an insured depository insti-
6 tution shall be deemed to have notified a
7 person who is a party to a qualified finan-
8 cial contract with such depository institu-
9 tion if the Corporation has taken steps
10 reasonably calculated to provide notice to
11 such person by the time specified in sub-
12 paragraph (A).

13 “(C) TREATMENT OF BRIDGE BANKS.—
14 The following institutions shall not be consid-
15 ered to be a financial institution for which a
16 conservator, receiver, trustee in bankruptcy, or
17 other legal custodian has been appointed or
18 which is otherwise the subject of a bankruptcy
19 or insolvency proceeding for purposes of para-
20 graph (9):

21 “(i) A bridge bank.

22 “(ii) A depository institution orga-
23 nized by the Corporation, for which a con-
24 servator is appointed either—

1 “(I) immediately upon the orga-
2 nization of the institution; or

3 “(II) at the time of a purchase
4 and assumption transaction between
5 the depository institution and the Cor-
6 poration as receiver for a depository
7 institution in default.”.

8 (b) INSURED CREDIT UNIONS.—

9 (1) TRANSFERS OF QUALIFIED FINANCIAL CON-
10 TRACTS TO FINANCIAL INSTITUTIONS.—Section
11 207(c)(9) of the Federal Credit Union Act (12
12 U.S.C. 1787(c)(9)) is amended to read as follows:

13 “(9) TRANSFER OF QUALIFIED FINANCIAL CON-
14 TRACTS.—

15 “(A) IN GENERAL.—In making any trans-
16 fer of assets or liabilities of a credit union in
17 default which includes any qualified financial
18 contract, the conservator or liquidating agent
19 for such credit union shall either—

20 “(i) transfer to 1 financial institution,
21 other than a financial institution for which
22 a conservator, receiver, trustee in bank-
23 ruptcy, or other legal custodian has been
24 appointed or which is otherwise the subject
25 of a bankruptcy or insolvency proceeding—

1 “(I) all qualified financial con-
2 tracts between any person or any af-
3 filiate of such person and the credit
4 union in default;

5 “(II) all claims of such person or
6 any affiliate of such person against
7 such credit union under any such con-
8 tract (other than any claim which,
9 under the terms of any such contract,
10 is subordinated to the claims of gen-
11 eral unsecured creditors of such credit
12 union);

13 “(III) all claims of such credit
14 union against such person or any af-
15 filiate of such person under any such
16 contract; and

17 “(IV) all property securing or
18 any other credit enhancement for any
19 contract described in subclause (I) or
20 any claim described in subclause (II)
21 or (III) under any such contract; or

22 “(ii) transfer none of the qualified fi-
23 nancial contracts, claims, property or other
24 credit enhancement referred to in clause (i)

1 (with respect to such person and any affil-
2 iate of such person).

3 “(B) TRANSFER TO FOREIGN BANK, FOR-
4 EIGN FINANCIAL INSTITUTION, OR BRANCH OR
5 AGENCY OF A FOREIGN BANK OR FINANCIAL IN-
6 STITUTION.—In transferring any qualified fi-
7 nancial contracts and related claims and prop-
8 erty under subparagraph (A)(i), the conservator
9 or liquidating agent for the credit union shall
10 not make such transfer to a foreign bank, fi-
11 nancial institution organized under the laws of
12 a foreign country, or a branch or agency of a
13 foreign bank or financial institution unless,
14 under the law applicable to such bank, financial
15 institution, branch or agency, to the qualified
16 financial contracts, and to any netting contract,
17 any security agreement or arrangement or other
18 credit enhancement related to 1 or more quali-
19 fied financial contracts, the contractual rights
20 of the parties to such qualified financial con-
21 tracts, netting contracts, security agreements or
22 arrangements, or other credit enhancements are
23 enforceable substantially to the same extent as
24 permitted under this section.

1 “(C) TRANSFER OF CONTRACTS SUBJECT
2 TO THE RULES OF A CLEARING ORGANIZA-
3 TION.—In the event that a conservator or liqui-
4 dating agent transfers any qualified financial
5 contract and related claims, property, and cred-
6 it enhancements pursuant to subparagraph
7 (A)(i) and such contract is cleared by or subject
8 to the rules of a clearing organization, the clear-
9 ing organization shall not be required to accept
10 the transferee as a member by virtue of the
11 transfer.

12 “(D) DEFINITIONS.—For purposes of this
13 paragraph—

14 “(i) the term ‘financial institution’
15 means a broker or dealer, a depository in-
16 stitution, a futures commission merchant,
17 a credit union, or any other institution, as
18 determined by the Board by regulation to
19 be a financial institution; and

20 “(ii) the term ‘clearing organization’
21 has the same meaning as in section 402 of
22 the Federal Deposit Insurance Corporation
23 Improvement Act of 1991.”.

24 (2) NOTICE TO QUALIFIED FINANCIAL CON-
25 TRACT COUNTERPARTIES.—Section 207(c)(10)(A) of

1 the Federal Credit Union Act (12 U.S.C.
2 1787(c)(10)(A)) is amended in the material imme-
3 diately following clause (ii) by striking “the conser-
4 vator” and all that follows through the period and
5 inserting the following: “the conservator or liqui-
6 dating agent shall notify any person who is a party
7 to any such contract of such transfer by 5:00 p.m.
8 (eastern time) on the business day following the date
9 of the appointment of the liquidating agent in the
10 case of a liquidation, or the business day following
11 such transfer in the case of a conservatorship.”.

12 (3) RIGHTS AGAINST LIQUIDATING AGENT AND
13 CONSERVATOR AND TREATMENT OF BRIDGE
14 BANKS.—Section 207(c)(10) of the Federal Credit
15 Union Act (12 U.S.C. 1787(c)(10)) is amended—

16 (A) by redesignating subparagraph (B) as
17 subparagraph (D); and

18 (B) by inserting after subparagraph (A)
19 the following new subparagraphs:

20 “(B) CERTAIN RIGHTS NOT ENFORCE-
21 ABLE.—

22 “(i) LIQUIDATION.—A person who is
23 a party to a qualified financial contract
24 with an insured credit union may not exer-
25 cise any right that such person has to ter-

1 minate, liquidate, or net such contract
2 under paragraph (8)(A) of this subsection
3 or section 403 or 404 of the Federal De-
4 posit Insurance Corporation Improvement
5 Act of 1991, solely by reason of or inci-
6 dental to the appointment of a liquidating
7 agent for the credit union institution (or
8 the insolvency or financial condition of the
9 credit union for which the liquidating
10 agent has been appointed)—

11 “(I) until 5:00 p.m. (eastern
12 time) on the business day following
13 the date of the appointment of the liq-
14 uidating agent; or

15 “(II) after the person has re-
16 ceived notice that the contract has
17 been transferred pursuant to para-
18 graph (9)(A).

19 “(ii) CONSERVATORSHIP.—A person
20 who is a party to a qualified financial con-
21 tract with an insured credit union may not
22 exercise any right that such person has to
23 terminate, liquidate, or net such contract
24 under paragraph (8)(E) of this subsection
25 or section 403 or 404 of the Federal De-

1 posit Insurance Corporation Improvement
2 Act of 1991, solely by reason of or inci-
3 dental to the appointment of a conservator
4 for the credit union or the insolvency or fi-
5 nancial condition of the credit union for
6 which the conservator has been appointed).

7 “(iii) NOTICE.—For purposes of this
8 paragraph, the Board as conservator or
9 liquidating agent of an insured credit
10 union shall be deemed to have notified a
11 person who is a party to a qualified finan-
12 cial contract with such credit union if the
13 Board has taken steps reasonably cal-
14 culated to provide notice to such person by
15 the time specified in subparagraph (A).

16 “(C) TREATMENT OF BRIDGE BANKS.—
17 The following institutions shall not be consid-
18 ered to be a financial institution for which a
19 conservator, receiver, trustee in bankruptcy, or
20 other legal custodian has been appointed or
21 which is otherwise the subject of a bankruptcy
22 or insolvency proceeding for purposes of para-
23 graph (9):

24 “(i) A bridge bank.

1 “(ii) A credit union organized by the
2 Board, for which a conservator is ap-
3 pointed either—

4 “(I) immediately upon the orga-
5 nization of the credit union; or

6 “(II) at the time of a purchase
7 and assumption transaction between
8 the credit union and the Board as re-
9 ceiver for a credit union in default.”.

10 **SEC. 5. AMENDMENTS RELATING TO DISAFFIRMANCE OR**
11 **REPUDIATION OF QUALIFIED FINANCIAL**
12 **CONTRACTS.**

13 (a) FDIC-INSURED DEPOSITORY INSTITUTIONS.—
14 Section 11(e) of the Federal Deposit Insurance Act (12
15 U.S.C. 1821(e)) is amended—

16 (1) by redesignating paragraphs (11) through
17 (15) as paragraphs (12) through (16), respectively;

18 (2) by inserting after paragraph (10) the fol-
19 lowing new paragraph:

20 “(11) DISAFFIRMANCE OR REPUDIATION OF
21 QUALIFIED FINANCIAL CONTRACTS.—In exercising
22 the rights of disaffirmance or repudiation of a con-
23 servator or receiver with respect to any qualified fi-
24 nancial contract to which an insured depository in-

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

3 “(A) disaffirm or repudiate all qualified fi-
4 nancial contracts between—

5 “(i) any person or any affiliate of
6 such person; and

7 “(ii) the depository institution in de-
8 fault; or

9 “(B) disaffirm or repudiate none of the
10 qualified financial contracts referred to in sub-
11 paragraph (A) (with respect to such person or
12 any affiliate of such person).”; and

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

15 “(17) SAVINGS CLAUSE.—The meanings of
16 terms used in this subsection are applicable for pur-
17 poses of this subsection only, and shall not be con-
18 strued or applied so as to challenge or affect the
19 characterization, definition, or treatment of any
20 similar terms under any other statute, regulation, or
21 rule, including the Gramm-Leach-Bliley Act, the
22 Legal Certainty for Bank Products Act of 2000, the
23 securities laws (as that term is defined in section
24 3(a)(47) of the Securities Exchange Act of 1934),
25 and the Commodity Exchange Act.”.

1 (b) INSURED CREDIT UNIONS.—Section 207(c) of
2 the Federal Credit Union Act (12 U.S.C. 1787(c)) is
3 amended—

4 (1) by redesignating paragraphs (11), (12), and
5 (13) as paragraphs (12), (13), and (14), respec-
6 tively;

7 (2) by inserting after paragraph (10) the fol-
8 lowing new paragraph:

9 “(11) DISAFFIRMANCE OR REPUDIATION OF
10 QUALIFIED FINANCIAL CONTRACTS.—In exercising
11 the rights of disaffirmance or repudiation of a con-
12 servator or liquidating agent with respect to any
13 qualified financial contract to which an insured cred-
14 it union is a party, the conservator or liquidating
15 agent for such credit union shall either—

16 “(A) disaffirm or repudiate all qualified fi-
17 nancial contracts between—

18 “(i) any person or any affiliate of
19 such person; and

20 “(ii) the credit union in default; or

21 “(B) disaffirm or repudiate none of the
22 qualified financial contracts referred to in sub-
23 paragraph (A) (with respect to such person or
24 any affiliate of such person).”; and

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

3 “(15) SAVINGS CLAUSE.—The meanings of
4 terms used in this subsection are applicable for pur-
5 poses of this subsection only, and shall not be con-
6 strued or applied so as to challenge or affect the
7 characterization, definition, or treatment of any
8 similar terms under any other statute, regulation, or
9 rule, including the Gramm-Leach-Bliley Act, the
10 Legal Certainty for Bank Products Act of 2000, the
11 securities laws (as that term is defined in section
12 (a)(47) of the Securities Exchange Act of 1934),
13 and the Commodity Exchange Act.”.

14 **SEC. 6. CLARIFYING AMENDMENT RELATING TO MASTER**
15 **AGREEMENTS.**

16 (a) FDIC-INSURED DEPOSITORY INSTITUTIONS.—
17 Section 11(e)(8)(D)(vii) of the Federal Deposit Insurance
18 Act (12 U.S.C. 1821(e)(8)(D)(vii)) is amended to read as
19 follows:

20 “(vii) TREATMENT OF MASTER
21 AGREEMENT AS ONE AGREEMENT.—Any
22 master agreement for any contract or
23 agreement described in any preceding
24 clause of this subparagraph (or any master
25 agreement for such master agreement or

1 agreements), together with all supplements
2 to such master agreement, shall be treated
3 as a single agreement and a single quali-
4 fied financial contract. If a master agree-
5 ment contains provisions relating to agree-
6 ments or transactions that are not them-
7 selves qualified financial contracts, the
8 master agreement shall be deemed to be a
9 qualified financial contract only with re-
10 spect to those transactions that are them-
11 selves qualified financial contracts.”.

12 (b) INSURED CREDIT UNIONS.—Section
13 207(c)(8)(D) of the Federal Credit Union Act (12 U.S.C.
14 1787(c)(8)(D)) is amended by inserting after clause (vi)
15 (as added by section 2(f)) the following new clause:

16 “(vii) TREATMENT OF MASTER
17 AGREEMENT AS ONE AGREEMENT.—Any
18 master agreement for any contract or
19 agreement described in any preceding
20 clause of this subparagraph (or any master
21 agreement for such master agreement or
22 agreements), together with all supplements
23 to such master agreement, shall be treated
24 as a single agreement and a single quali-
25 fied financial contract. If a master agree-

1 ment contains provisions relating to agree-
2 ments or transactions that are not them-
3 selves qualified financial contracts, the
4 master agreement shall be deemed to be a
5 qualified financial contract only with re-
6 spect to those transactions that are them-
7 selves qualified financial contracts.”.

8 **SEC. 7. FEDERAL DEPOSIT INSURANCE CORPORATION IM-**
9 **PROVEMENT ACT OF 1991.**

10 (a) DEFINITIONS.—Section 402 of the Federal De-
11 posit Insurance Corporation Improvement Act of 1991 (12
12 U.S.C. 4402) is amended—

13 (1) in paragraph (2)—

14 (A) in subparagraph (A)(ii), by inserting
15 before the semicolon “, or is exempt from such
16 registration by order of the Securities and Ex-
17 change Commission”; and

18 (B) in subparagraph (B), by inserting be-
19 fore the period “, that has been granted an ex-
20 emption under section 4(c)(1) of the Com-
21 modity Exchange Act, or that is a multilateral
22 clearing organization (as defined in section 408
23 of this Act)”; and

24 (2) in paragraph (6)—

1 (A) by redesignating subparagraphs (B)
2 through (D) as subparagraphs (C) through (E),
3 respectively;

4 (B) by inserting after subparagraph (A)
5 the following new subparagraph:

6 “(B) an uninsured national bank or an un-
7 insured State bank that is a member of the
8 Federal Reserve System, if the national bank or
9 State member bank is not eligible to make ap-
10 plication to become an insured bank under sec-
11 tion 5 of the Federal Deposit Insurance Act;”;
12 and

13 (C) by amending subparagraph (C) (as re-
14 designated) to read as follows:

15 “(C) a branch or agency of a foreign bank,
16 a foreign bank and any branch or agency of the
17 foreign bank, or the foreign bank that estab-
18 lished the branch or agency, as those terms are
19 defined in section 1(b) of the International
20 Banking Act of 1978;”;

21 (3) in paragraph (11), by inserting before the
22 period “and any other clearing organization with
23 which such clearing organization has a netting con-
24 tract”;

1 (4) by amending paragraph (14)(A)(i) to read
2 as follows:

3 “(i) means a contract or agreement
4 between 2 or more financial institutions,
5 clearing organizations, or members that
6 provides for netting present or future pay-
7 ment obligations or payment entitlements
8 (including liquidation or close out values
9 relating to such obligations or entitle-
10 ments) among the parties to the agree-
11 ment; and”;

12 (5) by adding at the end the following new
13 paragraph:

14 “(15) PAYMENT.—The term ‘payment’ means a
15 payment of United States dollars, another currency,
16 or a composite currency, and a noncash delivery, in-
17 cluding a payment or delivery to liquidate an
18 unmatured obligation.”.

19 (b) ENFORCEABILITY OF BILATERAL NETTING CON-
20 TRACTS.—Section 403 of the Federal Deposit Insurance
21 Corporation Improvement Act of 1991 (12 U.S.C. 4403)
22 is amended—

23 (1) by striking subsection (a) and inserting the
24 following:

1 “(a) GENERAL RULE.—Notwithstanding any other
2 provision of State or Federal law (other than paragraphs
3 (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal
4 Deposit Insurance Act, paragraphs (8)(E), (8)(F), and
5 (10)(B) of section 207(e) of the Federal Credit Union Act,
6 or any order authorized under section 5(b)(2) of the Secu-
7 rities Investor Protection Act of 1970), the covered con-
8 tractual payment obligations and the covered contractual
9 payment entitlements between any 2 financial institutions
10 shall be netted in accordance with, and subject to the con-
11 ditions of, the terms of any applicable netting contract (ex-
12 cept as provided in section 561(b)(2) of title 11, United
13 States Code).”; and

14 (2) by adding at the end the following new sub-
15 section:

16 “(f) ENFORCEABILITY OF SECURITY AGREE-
17 MENTS.—The provisions of any security agreement or ar-
18 rangement or other credit enhancement related to one or
19 more netting contracts between any 2 financial institu-
20 tions shall be enforceable in accordance with their terms
21 (except as provided in section 561(b)(2) of title 11, United
22 States Code), and shall not be stayed, avoided, or other-
23 wise limited by any State or Federal law (other than para-
24 graphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the
25 Federal Deposit Insurance Act, paragraphs (8)(E),

1 (8)(F), and (10)(B) of section 207(c) of the Federal Cred-
2 it Union Act, and section 5(b)(2) of the Securities Investor
3 Protection Act of 1970).”.

4 (c) ENFORCEABILITY OF CLEARING ORGANIZATION
5 NETTING CONTRACTS.—Section 404 of the Federal De-
6 posit Insurance Corporation Improvement Act of 1991 (12
7 U.S.C. 4404) is amended—

8 (1) by striking subsection (a) and inserting the
9 following:

10 “(a) GENERAL RULE.—Notwithstanding any other
11 provision of State or Federal law (other than paragraphs
12 (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal
13 Deposit Insurance Act, paragraphs (8)(E), (8)(F), and
14 (10)(B) of section 207(c) of the Federal Credit Union Act,
15 and any order authorized under section 5(b)(2) of the Se-
16 curities Investor Protection Act of 1970), the covered con-
17 tractual payment obligations and the covered contractual
18 payment entitlements of a member of a clearing organiza-
19 tion to and from all other members of a clearing organiza-
20 tion shall be netted in accordance with and subject to the
21 conditions of any applicable netting contract (except as
22 provided in section 561(b)(2) of title 11, United States
23 Code).”; and

24 (2) by adding at the end the following new sub-
25 section:

1 “(h) ENFORCEABILITY OF SECURITY AGREE-
2 MENTS.—The provisions of any security agreement or ar-
3 rangement or other credit enhancement related to one or
4 more netting contracts between any 2 members of a clear-
5 ing organization shall be enforceable in accordance with
6 their terms (except as provided in section 561(b)(2) of
7 title 11, United States Code), and shall not be stayed,
8 avoided, or otherwise limited by any State or Federal law
9 (other than paragraphs (8)(E), (8)(F), and (10)(B) of sec-
10 tion 11(e) of the Federal Deposit Insurance Act, para-
11 graphs (8)(E), (8)(F), and (10)(B) of section 207(e) of
12 the Federal Credit Union Act, and section 5(b)(2) of the
13 Securities Investor Protection Act of 1970).”.

14 (d) ENFORCEABILITY OF CONTRACTS WITH UNIN-
15 SURED NATIONAL BANKS, UNINSURED FEDERAL
16 BRANCHES AND AGENCIES, CERTAIN UNINSURED STATE
17 MEMBER BANKS, AND EDGE ACT CORPORATIONS.—The
18 Federal Deposit Insurance Corporation Improvement Act
19 of 1991 (12 U.S.C. 4401 et seq.) is amended—

20 (1) by redesignating section 407 as section
21 407A; and

22 (2) by inserting after section 406 the following
23 new section:

1 **“SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED**
2 **NATIONAL BANKS, UNINSURED FEDERAL**
3 **BRANCHES AND AGENCIES, CERTAIN UNIN-**
4 **SURED STATE MEMBER BANKS, AND EDGE**
5 **ACT CORPORATIONS.**

6 “(a) IN GENERAL.—Notwithstanding any other pro-
7 vision of law, paragraphs (8), (9), (10), and (11) of section
8 11(e) of the Federal Deposit Insurance Act shall apply
9 to an uninsured national bank or uninsured Federal
10 branch or Federal agency, a corporation chartered under
11 section 25A of the Federal Reserve Act, or an uninsured
12 State member bank which operates, or operates as, a mul-
13 tilateral clearing organization pursuant to section 409 of
14 this Act, except that for such purpose—

15 “(1) any reference to the ‘Corporation as re-
16 ceiver’ or ‘the receiver or the Corporation’ shall refer
17 to the receiver appointed by the Comptroller of the
18 Currency in the case of an uninsured national bank
19 or uninsured Federal branch or agency, or to the re-
20 ceiver appointed by the Board of Governors of the
21 Federal Reserve System in the case of a corporation
22 chartered under section 25A of the Federal Reserve
23 Act or an uninsured State member bank;

24 “(2) any reference to the ‘Corporation’ (other
25 than in section 11(e)(8)(D) of such Act), the ‘Cor-
26 poration, whether acting as such or as conservator

1 or receiver’, a ‘receiver’, or a ‘conservator’ shall refer
2 to the receiver or conservator appointed by the
3 Comptroller of the Currency in the case of an unin-
4 sured national bank or uninsured Federal branch or
5 agency, or to the receiver or conservator appointed
6 by the Board of Governors of the Federal Reserve
7 System in the case of a corporation chartered under
8 section 25A of the Federal Reserve Act or an unin-
9 sured State member bank; and

10 “(3) any reference to an ‘insured depository in-
11 stitution’ or ‘depository institution’ shall refer to an
12 uninsured national bank, an uninsured Federal
13 branch or Federal agency, a corporation chartered
14 under section 25A of the Federal Reserve Act, or an
15 uninsured State member bank which operates, or op-
16 erates as, a multilateral clearing organization pursu-
17 ant to section 409 of this Act.

18 “(b) LIABILITY.—The liability of a receiver or conser-
19 vator of an uninsured national bank, uninsured Federal
20 branch or agency, a corporation chartered under section
21 25A of the Federal Reserve Act, or an uninsured State
22 member bank which operates, or operates as, a multilat-
23 eral clearing organization pursuant to section 409 of this
24 Act, shall be determined in the same manner and subject
25 to the same limitations that apply to receivers and con-

1 servators of insured depository institutions under section
2 11(e) of the Federal Deposit Insurance Act.

3 “(c) REGULATORY AUTHORITY.—

4 “(1) IN GENERAL.—The Comptroller of the
5 Currency in the case of an uninsured national bank
6 or uninsured Federal branch or agency and the
7 Board of Governors of the Federal Reserve System
8 in the case of a corporation chartered under section
9 25A of the Federal Reserve Act, or an uninsured
10 State member bank that operates, or operates as, a
11 multilateral clearing organization pursuant to sec-
12 tion 409 of this Act, in consultation with the Fed-
13 eral Deposit Insurance Corporation, may each pro-
14 mulgate regulations solely to implement this section.

15 “(2) SPECIFIC REQUIREMENT.—In promul-
16 gating regulations, limited solely to implementing
17 paragraphs (8), (9), (10), and (11) of section 11(e)
18 of the Federal Deposit Insurance Act, the Comp-
19 troller of the Currency and the Board of Governors
20 of the Federal Reserve System each shall ensure
21 that the regulations generally are consistent with the
22 regulations and policies of the Federal Deposit In-
23 surance Corporation adopted pursuant to the Fed-
24 eral Deposit Insurance Act.

1 “(d) DEFINITIONS.—For purposes of this section, the
2 terms ‘Federal branch’, ‘Federal agency’, and ‘foreign
3 bank’ have the same meanings as in section 1(b) of the
4 International Banking Act of 1978.”.

5 **SEC. 8. BANKRUPTCY CODE AMENDMENTS.**

6 (a) DEFINITIONS OF FORWARD CONTRACT, REPUR-
7 CHASE AGREEMENT, SECURITIES CLEARING AGENCY,
8 SWAP AGREEMENT, COMMODITY CONTRACT, AND SECU-
9 RITIES CONTRACT.—Title 11, United States Code, is
10 amended—

11 (1) in section 101—

12 (A) in paragraph (25)—

13 (i) by striking “means a contract”
14 and inserting “means—

15 “(A) a contract”;

16 (ii) by striking “, or any combination
17 thereof or option thereon;” and inserting
18 “, or any other similar agreement;”; and

19 (iii) by adding at the end the fol-
20 lowing:

21 “(B) any combination of agreements or
22 transactions referred to in subparagraphs (A)
23 and (C);

1 “(C) any option to enter into an agreement
2 or transaction referred to in subparagraph (A)
3 or (B);

4 “(D) a master agreement that provides for
5 an agreement or transaction referred to in sub-
6 paragraph (A), (B), or (C), together with all
7 supplements to any such master agreement,
8 without regard to whether such master agree-
9 ment provides for an agreement or transaction
10 that is not a forward contract under this para-
11 graph, except that such master agreement shall
12 be considered to be a forward contract under
13 this paragraph only with respect to each agree-
14 ment or transaction under such master agree-
15 ment that is referred to in subparagraph (A),
16 (B), or (C); or

17 “(E) any security agreement or arrange-
18 ment, or other credit enhancement related to
19 any agreement or transaction referred to in
20 subparagraph (A), (B), (C), or (D), including
21 any guarantee or reimbursement obligation by
22 or to a forward contract merchant or financial
23 participant in connection with any agreement or
24 transaction referred to in any such subpara-
25 graph, but not to exceed the damages in con-

1 nection with any such agreement or transaction,
2 measured in accordance with section 562 of this
3 title;”;

4 (B) in paragraph (46), by striking “on any
5 day during the period beginning 90 days before
6 the date of” and inserting “at any time before”;

7 (C) by amending paragraph (47) to read
8 as follows:

9 “(47) ‘repurchase agreement’ (which definition
10 also applies to a reverse repurchase agreement)—

11 “(A) means—

12 “(i) an agreement, including related
13 terms, which provides for the transfer of
14 one or more certificates of deposit, mort-
15 gage related securities (as defined in sec-
16 tion 3 of the Securities Exchange Act of
17 1934), mortgage loans, interests in mort-
18 gage related securities or mortgage loans,
19 eligible bankers’ acceptances, qualified for-
20 eign government securities (defined as a
21 security that is a direct obligation of, or
22 that is fully guaranteed by, the central
23 government of a member of the Organiza-
24 tion for Economic Cooperation and Devel-
25 opment), or securities that are direct obli-

1 gations of, or that are fully guaranteed by,
2 the United States or any agency of the
3 United States against the transfer of funds
4 by the transferee of such certificates of de-
5 posit, eligible bankers' acceptances, securi-
6 ties, mortgage loans, or interests, with a
7 simultaneous agreement by such transferee
8 to transfer to the transferor thereof certifi-
9 cates of deposit, eligible bankers' accept-
10 ance, securities, mortgage loans, or inter-
11 ests of the kind described in this clause, at
12 a date certain not later than 1 year after
13 such transfer or on demand, against the
14 transfer of funds;

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

18 “(iii) an option to enter into an agree-
19 ment or transaction referred to in clause
20 (i) or (ii);

21 “(iv) a master agreement that pro-
22 vides for an agreement or transaction re-
23 ferred to in clause (i), (ii), or (iii), together
24 with all supplements to any such master
25 agreement, without regard to whether such

1 master agreement provides for an agree-
2 ment or transaction that is not a repur-
3 chase agreement under this paragraph, ex-
4 cept that such master agreement shall be
5 considered to be a repurchase agreement
6 under this paragraph only with respect to
7 each agreement or transaction under the
8 master agreement that is referred to in
9 clause (i), (ii), or (iii); or

10 “(v) any security agreement or ar-
11 rangement or other credit enhancement re-
12 lated to any agreement or transaction re-
13 ferred to in clause (i), (ii), (iii), or (iv), in-
14 cluding any guarantee or reimbursement
15 obligation by or to a repo participant or fi-
16 nancial participant in connection with any
17 agreement or transaction referred to in
18 any such clause, but not to exceed the
19 damages in connection with any such
20 agreement or transaction, measured in ac-
21 cordance with section 562 of this title; and

22 “(B) does not include a repurchase obliga-
23 tion under a participation in a commercial
24 mortgage loan;”;

1 (D) in paragraph (48), by inserting “, or
2 exempt from such registration under such sec-
3 tion pursuant to an order of the Securities and
4 Exchange Commission,” after “1934”; and

5 (E) by amending paragraph (53B) to read
6 as follows:

7 “(53B) ‘swap agreement’—

8 “(A) means—

9 “(i) any agreement, including the
10 terms and conditions incorporated by ref-
11 erence in such agreement, which is—

12 “(I) an interest rate swap, op-
13 tion, future, or forward agreement, in-
14 cluding a rate floor, rate cap, rate col-
15 lar, cross-currency rate swap, and
16 basis swap;

17 “(II) a spot, same day-tomorrow,
18 tomorrow-next, forward, or other for-
19 eign exchange or precious metals
20 agreement;

21 “(III) a currency swap, option,
22 future, or forward agreement;

23 “(IV) an equity index or equity
24 swap, option, future, or forward
25 agreement;

1 “(V) a debt index or debt swap,
2 option, future, or forward agreement;

3 “(VI) a total return, credit
4 spread or credit swap, option, future,
5 or forward agreement;

6 “(VII) a commodity index or a
7 commodity swap, option, future, or
8 forward agreement; or

9 “(VIII) a weather swap, weather
10 derivative, or weather option;

11 “(ii) any agreement or transaction
12 that is similar to any other agreement or
13 transaction referred to in this paragraph
14 and that—

15 “(I) is of a type that has been, is
16 presently, or in the future becomes,
17 the subject of recurrent dealings in
18 the swap markets (including terms
19 and conditions incorporated by ref-
20 erence therein); and

21 “(II) is a forward, swap, future,
22 or option on one or more rates, cur-
23 rencies, commodities, equity securities,
24 or other equity instruments, debt se-
25 curities or other debt instruments,

1 quantitative measures associated with
2 an occurrence, extent of an occur-
3 rence, or contingency associated with
4 a financial, commercial, or economic
5 consequence, or economic or financial
6 indices or measures of economic or fi-
7 nancial risk or value;

8 “(iii) any combination of agreements
9 or transactions referred to in this subpara-
10 graph;

11 “(iv) any option to enter into an
12 agreement or transaction referred to in
13 this subparagraph;

14 “(v) a master agreement that provides
15 for an agreement or transaction referred to
16 in clause (i), (ii), (iii), or (iv), together
17 with all supplements to any such master
18 agreement, and without regard to whether
19 the master agreement contains an agree-
20 ment or transaction that is not a swap
21 agreement under this paragraph, except
22 that the master agreement shall be consid-
23 ered to be a swap agreement under this
24 paragraph only with respect to each agree-
25 ment or transaction under the master

1 agreement that is referred to in clause (i),
2 (ii), (iii), or (iv); or

3 “(vi) any security agreement or ar-
4 rangement or other credit enhancement re-
5 lated to any agreements or transactions re-
6 ferred to in clause (i) through (v), includ-
7 ing any guarantee or reimbursement obli-
8 gation by or to a swap participant or fi-
9 nancial participant in connection with any
10 agreement or transaction referred to in
11 any such clause, but not to exceed the
12 damages in connection with any such
13 agreement or transaction, measured in ac-
14 cordance with section 562 of this title; and

15 “(B) is applicable for purposes of this title
16 only, and shall not be construed or applied so
17 as to challenge or affect the characterization,
18 definition, or treatment of any swap agreement
19 under any other statute, regulation, or rule, in-
20 cluding the Securities Act of 1933, the Securi-
21 ties Exchange Act of 1934, the Public Utility
22 Holding Company Act of 1935, the Trust In-
23 denture Act of 1939, the Investment Company
24 Act of 1940, the Investment Advisers Act of
25 1940, the Securities Investor Protection Act of

1 1970, the Commodity Exchange Act, the
2 Gramm-Leach-Bliley Act, and the Legal Cer-
3 tainty for Bank Products Act of 2000;”;

4 (2) in section 741(7), by striking paragraph (7)
5 and inserting the following:

6 “(7) ‘securities contract’—

7 “(A) means—

8 “(i) a contract for the purchase, sale,
9 or loan of a security, a certificate of de-
10 posit, a mortgage loan or any interest in a
11 mortgage loan, a group or index of securi-
12 ties, certificates of deposit, or mortgage
13 loans or interests therein (including an in-
14 terest therein or based on the value there-
15 of), or option on any of the foregoing, in-
16 cluding an option to purchase or sell any
17 such security, certificate of deposit, mort-
18 gage loan, interest, group or index, or op-
19 tion, and including any repurchase or re-
20 verse repurchase transaction on any such
21 security, certificate of deposit, mortgage
22 loan, interest, group or index, or option;

23 “(ii) any option entered into on a na-
24 tional securities exchange relating to for-
25 eign currencies;

1 “(iii) the guarantee by or to any secu-
2 rities clearing agency of a settlement of
3 cash, securities, certificates of deposit,
4 mortgage loans or interests therein, group
5 or index of securities, or mortgage loans or
6 interests therein (including any interest
7 therein or based on the value thereof), or
8 option on any of the foregoing, including
9 an option to purchase or sell any such se-
10 curity, certificate of deposit, mortgage
11 loan, interest, group or index, or option;

12 “(iv) any margin loan;

13 “(v) any other agreement or trans-
14 action that is similar to an agreement or
15 transaction referred to in this subpara-
16 graph;

17 “(vi) any combination of the agree-
18 ments or transactions referred to in this
19 subparagraph;

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

23 “(viii) a master agreement that pro-
24 vides for an agreement or transaction re-
25 ferred to in clause (i), (ii), (iii), (iv), (v),

1 (vi), or (vii), together with all supplements
2 to any such master agreement, without re-
3 gard to whether the master agreement pro-
4 vides for an agreement or transaction that
5 is not a securities contract under this sub-
6 paragraph, except that such master agree-
7 ment shall be considered to be a securities
8 contract under this subparagraph only with
9 respect to each agreement or transaction
10 under such master agreement that is re-
11 ferred to in clause (i), (ii), (iii), (iv), (v),
12 (vi), or (vii); or

13 “(ix) any security agreement or ar-
14 rangement or other credit enhancement re-
15 lated to any agreement or transaction re-
16 ferred to in this subparagraph, including
17 any guarantee or reimbursement obligation
18 by or to a stockbroker, securities clearing
19 agency, financial institution, or financial
20 participant in connection with any agree-
21 ment or transaction referred to in this sub-
22 paragraph, but not to exceed the damages
23 in connection with any such agreement or
24 transaction, measured in accordance with
25 section 562 of this title; and

1 “(B) does not include any purchase, sale,
2 or repurchase obligation under a participation
3 in a commercial mortgage loan;” and

4 (3) in section 761(4)—

5 (A) by striking “or” at the end of subpara-
6 graph (D); and

7 (B) by adding at the end the following:

8 “(F) any other agreement or transaction
9 that is similar to an agreement or transaction
10 referred to in this paragraph;

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

13 “(H) any option to enter into an agree-
14 ment or transaction referred to in this para-
15 graph;

16 “(I) a master agreement that provides for
17 an agreement or transaction referred to in sub-
18 paragraph (A), (B), (C), (D), (E), (F), (G), or
19 (H), together with all supplements to such mas-
20 ter agreement, without regard to whether the
21 master agreement provides for an agreement or
22 transaction that is not a commodity contract
23 under this paragraph, except that the master
24 agreement shall be considered to be a com-
25 modity contract under this paragraph only with

1 respect to each agreement or transaction under
2 the master agreement that is referred to in sub-
3 paragraph (A), (B), (C), (D), (E), (F), (G), or
4 (H); or

5 “(J) any security agreement or arrange-
6 ment or other credit enhancement related to
7 any agreement or transaction referred to in this
8 paragraph, including any guarantee or reim-
9 bursement obligation by or to a commodity
10 broker or financial participant in connection
11 with any agreement or transaction referred to
12 in this paragraph, but not to exceed the dam-
13 ages in connection with any such agreement or
14 transaction, measured in accordance with sec-
15 tion 562 of this title;”.

16 (b) DEFINITIONS OF FINANCIAL INSTITUTION, FI-
17 NANCIAL PARTICIPANT, AND FORWARD CONTRACT MER-
18 CHANT.—Section 101 of title 11, United States Code, is
19 amended—

20 (1) by striking paragraph (22) and inserting
21 the following:

22 “(22) ‘financial institution’ means—

23 “(A) a Federal reserve bank, or an entity
24 (domestic or foreign) that is a commercial or
25 savings bank, industrial savings bank, savings

1 and loan association, trust company, federally-
2 insured credit union, or receiver or conservator
3 for such entity and, when any such Federal re-
4 serve bank, receiver, conservator or entity is
5 acting as agent or custodian for a customer in
6 connection with a securities contract (as defined
7 in section 741) such customer; or

8 “(B) in connection with a securities con-
9 tract (as defined in section 741) an investment
10 company registered under the Investment Com-
11 pany Act of 1940;”;

12 (2) by inserting after paragraph (22) the fol-
13 lowing:

14 “(22A) ‘financial participant’ means—

15 “(A) an entity that, at the time it enters
16 into a securities contract, commodity contract,
17 swap agreement, repurchase agreement, or for-
18 ward contract, or at the time of the filing of the
19 petition, has one or more agreements or trans-
20 actions described in paragraph (1), (2), (3), (4),
21 (5), or (6) of section 561(a) with the debtor or
22 any other entity (other than an affiliate) of a
23 total gross dollar value of not less than
24 \$1,000,000,000 in notional or actual principal
25 amount outstanding on any day during the pre-

1 vious 15-month period, or has gross mark-to-
2 market positions of not less than \$100,000,000
3 (aggregated across counterparties) in one or
4 more such agreements or transactions with the
5 debtor or any other entity (other than an affil-
6 iate) on any day during the previous 15-month
7 period; or

8 “(B) a clearing organization (as defined in
9 section 402 of the Federal Deposit Insurance
10 Corporation Improvement Act of 1991);”;

11 (3) by striking paragraph (26) and inserting
12 the following:

13 “(26) ‘forward contract merchant’ means a
14 Federal reserve bank, or an entity the business of
15 which consists in whole or in part of entering into
16 forward contracts as or with merchants in a com-
17 modity (as defined in section 761) or any similar
18 good, article, service, right, or interest which is pres-
19 ently or in the future becomes the subject of dealing
20 in the forward contract trade;”.

21 (c) DEFINITION OF MASTER NETTING AGREEMENT
22 AND MASTER NETTING AGREEMENT PARTICIPANT.—Sec-
23 tion 101 of title 11, United States Code, is amended by
24 inserting after paragraph (38) the following new para-
25 graphs:

1 “(38A) ‘master netting agreement’—

2 “(A) means an agreement providing for
3 the exercise of rights, including rights of net-
4 ting, setoff, liquidation, termination, accelera-
5 tion, or close out, under or in connection with
6 one or more contracts that are described in any
7 one or more of paragraphs (1) through (5) of
8 section 561(a), or any security agreement or ar-
9 rangement or other credit enhancement related
10 to one or more of the foregoing, including any
11 guarantee or reimbursement obligation related
12 to 1 or more of the foregoing; and

13 “(B) if the agreement contains provisions
14 relating to agreements or transactions that are
15 not contracts described in paragraphs (1)
16 through (5) of section 561(a), shall be deemed
17 to be a master netting agreement only with re-
18 spect to those agreements or transactions that
19 are described in any one or more of paragraphs
20 (1) through (5) of section 561(a);

21 “(38B) ‘master netting agreement participant’
22 means an entity that, at any time before the filing
23 of the petition, is a party to an outstanding master
24 netting agreement with the debtor;”.

1 (d) SWAP AGREEMENTS, SECURITIES CONTRACTS,
2 COMMODITY CONTRACTS, FORWARD CONTRACTS, REPUR-
3 CHASE AGREEMENTS, AND MASTER NETTING AGREE-
4 MENTS UNDER THE AUTOMATIC-STAY.—

5 (1) IN GENERAL.—Section 362(b) of title 11,
6 United States Code, is amended—

7 (A) in paragraph (6), by inserting
8 “, pledged to, under the control of,” after “held
9 by”;

10 (B) in paragraph (7), by inserting
11 “, pledged to, under the control of,” after “held
12 by”;

13 (C) by striking paragraph (17) and insert-
14 ing the following:

15 “(17) under subsection (a), of the setoff by a
16 swap participant or financial participant of a mutual
17 debt and claim under or in connection with one or
18 more swap agreements that constitutes the setoff of
19 a claim against the debtor for any payment or other
20 transfer of property due from the debtor under or in
21 connection with any swap agreement against any
22 payment due to the debtor from the swap partici-
23 pant or financial participant under or in connection
24 with any swap agreement or against cash, securities,
25 or other property held by, pledged to, under the con-

1 trol of, or due from such swap participant or finan-
2 cial participant to margin, guarantee, secure, or set-
3 tle any swap agreement;”;

4 (D) in paragraph (18) by striking the pe-
5 riod at the end and inserting “; or”; and

6 (E) by inserting after paragraph (18) the
7 following new paragraph:

8 “(19) under subsection (a), of the setoff by a
9 master netting agreement participant of a mutual
10 debt and claim under or in connection with one or
11 more master netting agreements or any contract or
12 agreement subject to such agreements that con-
13 stitutes the setoff of a claim against the debtor for
14 any payment or other transfer of property due from
15 the debtor under or in connection with such agree-
16 ments or any contract or agreement subject to such
17 agreements against any payment due to the debtor
18 from such master netting agreement participant
19 under or in connection with such agreements or any
20 contract or agreement subject to such agreements or
21 against cash, securities, or other property held by,
22 pledged to, under the control of, or due from such
23 master netting agreement participant to margin,
24 guarantee, secure, or settle such agreements or any
25 contract or agreement subject to such agreements,

1 to the extent that such participant is eligible to exer-
2 cise such offset rights under paragraph (6), (7), or
3 (17) for each individual contract covered by the mas-
4 ter netting agreement in issue.”.

5 (2) LIMITATION.—Section 362 of title 11,
6 United States Code, is amended by adding at the
7 end the following:

8 “(i) The exercise of rights not subject to the stay
9 arising under subsection (a) pursuant to paragraph (6),
10 (7), (17), or (19) of subsection (b) shall not be stayed
11 by any order of a court or administrative agency in any
12 proceeding under this title.”.

13 (e) LIMITATION OF AVOIDANCE POWERS UNDER
14 MASTER NETTING AGREEMENT.—Section 546 of title 11,
15 United States Code, is amended—

16 (1) in subsection (g) (as added by section 103
17 of Public Law 101–311)—

18 (A) by striking “under a swap agreement”;

19 (B) by striking “in connection with a swap
20 agreement” and inserting “under or in connec-
21 tion with any swap agreement”; and

22 (C) by inserting “or financial participant”
23 after “swap participant” each place such term
24 appears; and

25 (2) by adding at the end the following:

1 “(j) Notwithstanding sections 544, 545, 547,
2 548(a)(1)(B), and 548(b) the trustee may not avoid a
3 transfer made by or to a master netting agreement partici-
4 pant under or in connection with any master netting
5 agreement or any individual contract covered thereby that
6 is made before the commencement of the case, except
7 under section 548(a)(1)(A) and except to the extent that
8 the trustee could otherwise avoid such a transfer made
9 under an individual contract covered by such master net-
10 ting agreement.”.

11 (f) FRAUDULENT TRANSFERS OF MASTER NETTING
12 AGREEMENTS.—Section 548(d)(2) of title 11, United
13 States Code, is amended—

14 (1) in subparagraph (C), by striking “and” at
15 the end;

16 (2) in subparagraph (D), by striking the period
17 and inserting “; and”; and

18 (3) by adding at the end the following new sub-
19 paragraph:

20 “(E) a master netting agreement participant
21 that receives a transfer in connection with a master
22 netting agreement or any individual contract covered
23 thereby takes for value to the extent of such trans-
24 fer, except that, with respect to a transfer under any
25 individual contract covered thereby, to the extent

1 that such master netting agreement participant oth-
2 erwise did not take (or is otherwise not deemed to
3 have taken) such transfer for value.”.

4 (g) TERMINATION OR ACCELERATION OF SECURITIES
5 CONTRACTS.—Section 555 of title 11, United States Code,
6 is amended—

7 (1) by amending the section heading to read as
8 follows:

9 **“§ 555. Contractual right to liquidate, terminate, or**
10 **accelerate a securities contract”;**

11 and

12 (2) in the first sentence, by striking “liquida-
13 tion” and inserting “liquidation, termination, or ac-
14 celeration”.

15 (h) TERMINATION OR ACCELERATION OF COMMOD-
16 ITIES OR FORWARD CONTRACTS.—Section 556 of title 11,
17 United States Code, is amended—

18 (1) by amending the section heading to read as
19 follows:

20 **“§ 556. Contractual right to liquidate, terminate, or**
21 **accelerate a commodities contract or for-**
22 **ward contract”;**

23 (2) in the first sentence, by striking “liquida-
24 tion” and inserting “liquidation, termination, or ac-
25 celeration”; and

1 (3) in the second sentence, by striking “As
2 used” and all that follows through “right,” and in-
3 serting “As used in this section, the term ‘contrac-
4 tual right’ includes a right set forth in a rule or
5 bylaw of a derivatives clearing organization (as de-
6 fined in the Commodity Exchange Act), a multilat-
7 eral clearing organization (as defined in the Federal
8 Deposit Insurance Corporation Improvement Act of
9 1991), a national securities exchange, a national se-
10 curities association, a securities clearing agency, a
11 contract market designated under the Commodity
12 Exchange Act, a derivatives transaction execution
13 facility registered under the Commodity Exchange
14 Act, or a board of trade (as defined in the Com-
15 modity Exchange Act) or in a resolution of the gov-
16 erning board thereof and a right,”.

17 (i) TERMINATION OR ACCELERATION OF REPUR-
18 CHASE AGREEMENTS.—Section 559 of title 11, United
19 States Code, is amended—

20 (1) by amending the section heading to read as
21 follows:

1 **“§ 559. Contractual right to liquidate, terminate, or**
2 **accelerate a repurchase agreement”;**

3 (2) in the first sentence, by striking “liquida-
4 tion” and inserting “liquidation, termination, or ac-
5 celeration”; and

6 (3) in the third sentence, by striking “As used”
7 and all that follows through “right,” and inserting
8 “As used in this section, the term ‘contractual right’
9 includes a right set forth in a rule or bylaw of a de-
10 rivatives clearing organization (as defined in the
11 Commodity Exchange Act), a multilateral clearing
12 organization (as defined in the Federal Deposit In-
13 surance Corporation Improvement Act of 1991), a
14 national securities exchange, a national securities as-
15 sociation, a securities clearing agency, a contract
16 market designated under the Commodity Exchange
17 Act, a derivatives transaction execution facility reg-
18 istered under the Commodity Exchange Act, or a
19 board of trade (as defined in the Commodity Ex-
20 change Act) or in a resolution of the governing
21 board thereof and a right,”.

22 (j) LIQUIDATION, TERMINATION, OR ACCELERATION
23 OF SWAP AGREEMENTS.—Section 560 of title 11, United
24 States Code, is amended—

25 (1) by amending the section heading to read as
26 follows:

1 **“§ 560. Contractual right to liquidate, terminate, or**
2 **accelerate a swap agreement”;**

3 (2) in the first sentence, by striking “termi-
4 nation of a swap agreement” and inserting “liquida-
5 tion, termination, or acceleration of one or more
6 swap agreements”;

7 (3) by striking “in connection with any swap
8 agreement” and inserting “in connection with the
9 termination, liquidation, or acceleration of one or
10 more swap agreements”; and

11 (4) in the second sentence, by striking “As
12 used” and all that follows through “right,” and in-
13 serting “As used in this section, the term ‘contrac-
14 tual right’ includes a right set forth in a rule or
15 bylaw of a derivatives clearing organization (as de-
16 fined in the Commodity Exchange Act), a multilat-
17 eral clearing organization (as defined in the Federal
18 Deposit Insurance Corporation Improvement Act of
19 1991), a national securities exchange, a national se-
20 curities association, a securities clearing agency, a
21 contract market designated under the Commodity
22 Exchange Act, a derivatives transaction execution fa-
23 cility registered under the Commodity Exchange Act,
24 or a board of trade (as defined in the Commodity Ex-
25 change Act) or in a resolution of the governing board
26 thereof and a right,”.

1 (k) LIQUIDATION, TERMINATION, ACCELERATION, OR
2 OFFSET UNDER A MASTER NETTING AGREEMENT AND
3 ACROSS CONTRACTS.—

4 (1) IN GENERAL.—Title 11, United States
5 Code, is amended by inserting after section 560 the
6 following:

7 **“§ 561. Contractual right to terminate, liquidate, ac-**
8 **celerate, or offset under a master netting**
9 **agreement and across contracts; pro-**
10 **ceedings under section 304**

11 “(a) Subject to subsection (b), the exercise of any
12 contractual right, because of a condition of the kind speci-
13 fied in section 365(e)(1), to cause the termination, liquida-
14 tion, or acceleration of or to offset or net termination val-
15 ues, payment amounts, or other transfer obligations aris-
16 ing under or in connection with one or more (or the termi-
17 nation, liquidation, or acceleration of one or more)—

18 “(1) securities contracts, as defined in section
19 741(7);

20 “(2) commodity contracts, as defined in section
21 761(4);

22 “(3) forward contracts;

23 “(4) repurchase agreements;

24 “(5) swap agreements; or

25 “(6) master netting agreements,

1 shall not be stayed, avoided, or otherwise limited by oper-
2 ation of any provision of this title or by any order of a
3 court or administrative agency in any proceeding under
4 this title.

5 “(b)(1) A party may exercise a contractual right de-
6 scribed in subsection (a) to terminate, liquidate, or accel-
7 erate only to the extent that such party could exercise such
8 a right under section 555, 556, 559, or 560 for each indi-
9 vidual contract covered by the master netting agreement
10 in issue.

11 “(2) If a debtor is a commodity broker subject to sub-
12 chapter IV of chapter 7—

13 “(A) a party may not net or offset an obligation
14 to the debtor arising under, or in connection with,
15 a commodity contract traded on or subject to the
16 rules of a contract market designated under the
17 Commodity Exchange Act or a derivatives trans-
18 action execution facility registered under the Com-
19modity Exchange Act against any claim arising
20 under, or in connection with, other instruments, con-
21 tracts, or agreements listed in subsection (a) except
22 to the extent that the party has positive net equity
23 in the commodity accounts at the debtor, as cal-
24 culated under such subchapter; and

1 “(B) another commodity broker may not net or
2 offset an obligation to the debtor arising under, or
3 in connection with, a commodity contract entered
4 into or held on behalf of a customer of the debtor
5 and traded on or subject to the rules of a contract
6 market designated under the Commodity Exchange
7 Act or a derivatives transaction execution facility
8 registered under the Commodity Exchange Act
9 against any claim arising under, or in connection
10 with, other instruments, contracts, or agreements
11 listed in subsection (a).

12 “(3) No provision of subparagraph (A) or (B) of
13 paragraph (2) shall prohibit the offset of claims and obli-
14 gations that arise under—

15 “(A) a cross-margining agreement or similar
16 arrangement that has been approved by the Com-
17 modity Futures Trading Commission or submitted
18 to the Commodity Futures Trading Commission
19 under paragraph (1) or (2) of section 5c(c) of the
20 Commodity Exchange Act and has not been abro-
21 gated or rendered ineffective by the Commodity Fu-
22 tures Trading Commission; or

23 “(B) any other netting agreement between a
24 clearing organization (as defined in section 761) and

1 another entity that has been approved by the Com-
2 modity Futures Trading Commission.

3 “(c) As used in this section, the term ‘contractual
4 right’ includes a right set forth in a rule or bylaw of a
5 derivatives clearing organization (as defined in the Com-
6 modity Exchange Act), a multilateral clearing organiza-
7 tion (as defined in the Federal Deposit Insurance Cor-
8 poration Improvement Act of 1991), a national securities
9 exchange, a national securities association, a securities
10 clearing agency, a contract market designated under the
11 Commodity Exchange Act, a derivatives transaction execu-
12 tion facility registered under the Commodity Exchange
13 Act, or a board of trade (as defined in the Commodity
14 Exchange Act) or in a resolution of the governing board
15 thereof, and a right, whether or not evidenced in writing,
16 arising under common law, under law merchant, or by rea-
17 son of normal business practice.

18 “(d) Any provisions of this title relating to securities
19 contracts, commodity contracts, forward contracts, repur-
20 chase agreements, swap agreements, or master netting
21 agreements shall apply in a case under section 304, so
22 that enforcement of contractual provisions of such con-
23 tracts and agreements in accordance with their terms will
24 not be stayed or otherwise limited by operation of any pro-
25 vision of this title or by order of a court in any case under

1 this title, and to limit avoidance powers to the same extent
2 as in a proceeding under chapter 7 or 11 of this title (such
3 enforcement not to be limited based on the presence or
4 absence of assets of the debtor in the United States).”.

5 (2) CONFORMING AMENDMENT.—The table of
6 sections for chapter 5 of title 11, United States
7 Code, is amended by inserting after the item relating
8 to section 560 the following:

“561. Contractual right to terminate, liquidate, accelerate, or offset under a
master netting agreement and across contracts; proceedings
under section 304.”.

9 (1) COMMODITY BROKER LIQUIDATIONS.—Title 11,
10 United States Code, is amended by inserting after section
11 766 the following:

12 **“§ 767. Commodity broker liquidation and forward**
13 **contract merchants, commodity brokers,**
14 **stockbrokers, financial institutions, fi-**
15 **ancial participants, securities clearing**
16 **agencies, swap participants, repo partici-**
17 **pants, and master netting agreement par-**
18 **ticipants**

19 “Notwithstanding any other provision of this title,
20 the exercise of rights by a forward contract merchant,
21 commodity broker, stockbroker, financial institution, fi-
22 nancial participant, securities clearing agency, swap par-
23 ticipant, repo participant, or master netting agreement
24 participant under this title shall not affect the priority of

1 any unsecured claim it may have after the exercise of such
2 rights.”.

3 (m) STOCKBROKER LIQUIDATIONS.—Title 11,
4 United States Code, is amended by inserting after section
5 752 the following:

6 **“§ 753. Stockbroker liquidation and forward contract**
7 **merchants, commodity brokers, stock-**
8 **brokers, financial institutions, financial**
9 **participants, securities clearing agencies,**
10 **swap participants, repo participants, and**
11 **master netting agreement participants**

12 “Notwithstanding any other provision of this title,
13 the exercise of rights by a forward contract merchant,
14 commodity broker, stockbroker, financial institution, secu-
15 rities clearing agency, swap participant, repo participant,
16 financial participant, or master netting agreement partici-
17 pant under this title shall not affect the priority of any
18 unsecured claim it may have after the exercise of such
19 rights.”.

20 (n) SETOFF.—Section 553 of title 11, United States
21 Code, is amended—

22 (1) in subsection (a)(2)(B)(ii), by inserting be-
23 fore the semicolon the following: “(except for a
24 setoff of a kind described in section 362(b)(6),

1 362(b)(7), 362(b)(17), 362(b)(19), 555, 556, 559,
2 560, or 561”);

3 (2) in subsection (a)(3)(C), by inserting before
4 the period the following: “(except for a setoff of a
5 kind described in section 362(b)(6), 362(b)(7),
6 362(b)(17), 362(b)(19), 555, 556, 559, 560, or 561
7 of this title)”; and

8 (3) in subsection (b)(1), by striking
9 “362(b)(14),” and inserting “362(b)(17),
10 362(b)(19), 555, 556, 559, 560, 561.”.

11 (o) SECURITIES CONTRACTS, COMMODITY CON-
12 TRACTS, AND FORWARD CONTRACTS.—Title 11, United
13 States Code, is amended—

14 (1) in section 362(b)(6), by striking “financial
15 institutions,” each place such term appears and in-
16 serting “financial institution, financial participant,”;

17 (2) in sections 362(b)(7) and 546(f), by insert-
18 ing “or financial participant” after “repo partici-
19 pant” each place such term appears;

20 (3) in section 546(e), by inserting “financial
21 participant,” after “financial institution,”;

22 (4) in section 548(d)(2)(B), by inserting “fi-
23 nancial participant,” after “financial institution,”;

24 (5) in section 548(d)(2)(C), by inserting “or fi-
25 nancial participant” after “repo participant”;

1 (6) in section 548(d)(2)(D), by inserting “or fi-
2 nancial participant” after “swap participant”;

3 (7) in section 555—

4 (A) by inserting “financial participant,”
5 after “financial institution,”; and

6 (B) by striking the second sentence and in-
7 serting the following: “As used in this section,
8 the term ‘contractual right’ includes a right set
9 forth in a rule or bylaw of a derivatives clearing
10 organization (as defined in the Commodity Ex-
11 change Act), a multilateral clearing organiza-
12 tion (as defined in the Federal Deposit Insur-
13 ance Corporation Improvement Act of 1991), a
14 national securities exchange, a national securi-
15 ties association, a securities clearing agency, a
16 contract market designated under the Com-
17modity Exchange Act, a derivatives transaction
18 execution facility registered under the Com-
19modity Exchange Act, or a board of trade (as
20 defined in the Commodity Exchange Act), or in
21 a resolution of the governing board thereof, and
22 a right, whether or not in writing, arising under
23 common law, under law merchant, or by reason
24 of normal business practice”;

1 (8) in section 556, by inserting “, financial par-
2 ticipant,” after “commodity broker”;

3 (9) in section 559, by inserting “or financial
4 participant” after “repo participant” each place
5 such term appears; and

6 (10) in section 560, by inserting “or financial
7 participant” after “swap participant”.

8 (p) CONFORMING AMENDMENTS.—Title 11, United
9 States Code, is amended—

10 (1) in the table of sections for chapter 5—

11 (A) by amending the items relating to sec-
12 tions 555 and 556 to read as follows:

“555. Contractual right to liquidate, terminate, or accelerate a securities con-
tract.

“556. Contractual right to liquidate, terminate, or accelerate a commodities con-
tract or forward contract.”;

13 and

14 (B) by amending the items relating to sec-
15 tions 559 and 560 to read as follows:

“559. Contractual right to liquidate, terminate, or accelerate a repurchase
agreement.

“560. Contractual right to liquidate, terminate, or accelerate a swap agree-
ment.”;

16 and

17 (2) in the table of sections for chapter 7—

18 (A) by inserting after the item relating to
19 section 766 the following:

“767. Commodity broker liquidation and forward contract merchants, com-
modity brokers, stockbrokers, financial institutions, financial
participants, securities clearing agencies, swap participants,
repo participants, and master netting agreement participants.”;

1 and

2 (B) by inserting after the item relating to
3 section 752 the following:

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

4 **SEC. 9. RECORDKEEPING REQUIREMENTS.**

5 (a) FDIC-INSURED DEPOSITORY INSTITUTIONS.—
6 Section 11(e)(8) of the Federal Deposit Insurance Act (12
7 U.S.C. 1821(e)(8)) is amended by adding at the end the
8 following new subparagraph:

9 “(H) RECORDKEEPING REQUIREMENTS.—
10 The Corporation, in consultation with the ap-
11 propriate Federal banking agencies and the Na-
12 tional Credit Union Administration Board, may
13 prescribe regulations requiring more detailed
14 recordkeeping by any insured depository institu-
15 tion with respect to qualified financial contracts
16 (including market valuations) only if such in-
17 sured depository institution is in a troubled
18 condition (as such term is defined by the Cor-
19 poration pursuant to section 32).”.

20 (b) INSURED CREDIT UNIONS.—Section 207(c)(8) of
21 the Federal Credit Union Act (12 U.S.C. 1787(c)(8)) is
22 amended by adding at the end the following new subpara-
23 graph:

1 “(H) RECORDKEEPING REQUIREMENTS.—
2 The Board, in consultation with the appropriate
3 Federal banking agencies, may prescribe regula-
4 tions requiring more detailed recordkeeping by
5 any insured credit union with respect to quali-
6 fied financial contracts (including market valu-
7 ations) only if such insured credit union is in
8 a troubled condition (as such term is defined by
9 the Board pursuant to section 212).”.

10 **SEC. 10. EXEMPTIONS FROM CONTEMPORANEOUS EXECU-**
11 **TION REQUIREMENT.**

12 Section 13(e)(2) of the Federal Deposit Insurance
13 Act (12 U.S.C. 1823(e)(2)) is amended to read as follows:

14 “(2) EXEMPTIONS FROM CONTEMPORANEOUS
15 EXECUTION REQUIREMENT.—An agreement to pro-
16 vide for the lawful collateralization of—

17 “(A) deposits of, or other credit extension
18 by, a Federal, State, or local governmental enti-
19 ty, or of any depositor referred to in section
20 11(a)(2), including an agreement to provide col-
21 lateral in lieu of a surety bond;

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

1 “(C) extensions of credit, including any
2 overdraft, from a Federal reserve bank or Fed-
3 eral home loan bank; or

4 “(D) one or more qualified financial con-
5 tracts, as defined in section 11(e)(8)(D),
6 shall not be deemed invalid pursuant to paragraph
7 (1)(B) solely because such agreement was not exe-
8 cuted contemporaneously with the acquisition of the
9 collateral or because of pledges, delivery, or substi-
10 tution of the collateral made in accordance with such
11 agreement.”.

12 **SEC. 11. DAMAGE MEASURE.**

13 (a) IN GENERAL.—Title 11, United States Code, is
14 amended—

15 (1) by inserting after section 561, as added by
16 section 8(k) of this Act, the following:

17 **“§ 562. Timing of damage measurement in connection**
18 **with swap agreements, securities con-**
19 **tracts, forward contracts, commodity con-**
20 **tracts, repurchase agreements, and mas-**
21 **ter netting agreements**

22 “(a) If the trustee rejects a swap agreement, securi-
23 ties contract (as defined in section 741), forward contract,
24 commodity contract (as defined in section 761), repur-
25 chase agreement, or master netting agreement pursuant

1 to section 365(a), or if a forward contract merchant,
2 stockbroker, financial institution, securities clearing agen-
3 cy, repo participant, financial participant, master netting
4 agreement participant, or swap participant liquidates, ter-
5 minates, or accelerates such contract or agreement, dam-
6 ages shall be measured as of the earlier of—

7 “(1) the date of such rejection; or

8 “(2) the date or dates of such liquidation, ter-
9 mination, or acceleration.

10 “(b) If there are not any commercially reasonable de-
11 terminants of value as of any date referred to in para-
12 graph (1) or (2) of subsection (a), damages shall be meas-
13 ured as of the earliest subsequent date or dates on which
14 there are commercially reasonable determinants of value.

15 “(c) For the purposes of subsection (b), if damages
16 are not measured as of the date or dates of rejection, liq-
17 uidation, termination, or acceleration, and the forward
18 contract merchant, stockbroker, financial institution, secu-
19 rities clearing agency, repo participant, financial partici-
20 pant, master netting agreement participant, or swap par-
21 ticipant or the trustee objects to the timing of the meas-
22 urement of damages—

23 “(1) the trustee, in the case of an objection by
24 a forward contract merchant, stockbroker, financial
25 institution, securities clearing agency, repo partici-

1 pant, financial participant, master netting agree-
2 ment participant, or swap participant; or

3 “(2) the forward contract merchant, stock-
4 broker, financial institution, securities clearing agen-
5 cy, repo participant, financial participant, master
6 netting agreement participant, or swap participant,
7 in the case of an objection by the trustee,

8 has the burden of proving that there were no commercially
9 reasonable determinants of value as of such date or
10 dates.”; and

11 (2) in the table of sections for chapter 5, by in-
12 serting after the item relating to section 561 (as
13 added by section 8(k)(2) of this Act) the following
14 new item:

“562. Timing of damage measure in connection with swap agreements, securities
contracts, forward contracts, commodity contracts, repurchase
agreements, or master netting agreements.”.

15 (b) CLAIMS ARISING FROM REJECTION.—Section
16 502(g) of title 11, United States Code, is amended—

17 (1) by inserting “(1)” after “(g)”; and

18 (2) by adding at the end the following:

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

1 **SEC. 12. SIPC STAY.**

2 Section 5(b)(2) of the Securities Investor Protection
3 Act of 1970 (15 U.S.C. 78eee(b)(2)) is amended by adding
4 at the end the following new subparagraph:

5 “(C) EXCEPTION FROM STAY.—

6 “(i) Notwithstanding section 362 of
7 title 11, United States Code, neither the
8 filing of an application under subsection
9 (a)(3) nor any order or decree obtained by
10 SIPC from the court shall operate as a
11 stay of any contractual rights of a creditor
12 to liquidate, terminate, or accelerate a se-
13 curities contract, commodity contract, for-
14 ward contract, repurchase agreement, swap
15 agreement, or master netting agreement,
16 as those terms are defined in sections 101,
17 741, and 761 of title 11, United States
18 Code, to offset or net termination values,
19 payment amounts, or other transfer obliga-
20 tions arising under or in connection with
21 one or more of such contracts or agree-
22 ments, or to foreclose on any cash collat-
23 eral pledged by the debtor, whether or not
24 with respect to one or more of such con-
25 tracts or agreements.

1 “(ii) Notwithstanding clause (i), such
2 application, order, or decree may operate
3 as a stay of the foreclosure on, or disposi-
4 tion of, securities collateral pledged by the
5 debtor, whether or not with respect to one
6 or more of such contracts or agreements,
7 securities sold by the debtor under a repur-
8 chase agreement, or securities lent under a
9 securities lending agreement.

10 “(iii) As used in this subparagraph,
11 the term ‘contractual right’ includes a
12 right set forth in a rule or bylaw of a na-
13 tional securities exchange, a national secu-
14 rities association, or a securities clearing
15 agency, a right set forth in a bylaw of a
16 clearing organization or contract market or
17 in a resolution of the governing board
18 thereof, and a right, whether or not in
19 writing, arising under common law, under
20 law merchant, or by reason of normal busi-
21 ness practice.”.

22 **SEC. 13. APPLICABILITY OF OTHER SECTIONS TO**
23 **CHAPTER 9.**

24 Section 901(a) of title 11, United States Code, is
25 amended—

1 (1) by inserting “555, 556,” after “553,”; and

2 (2) by inserting “559, 560, 561, 562” after

3 “557,”.

4 **SEC. 14. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

5 (a) EFFECTIVE DATE.—This Act shall take effect on
6 the date of enactment of this Act.

7 (b) APPLICATION OF AMENDMENTS.—The amend-
8 ments made by this Act shall apply with respect to cases
9 commenced or appointments made under any Federal or
10 State law on or after the date of enactment of this Act,
11 but shall not apply with respect to cases commenced or
12 appointments made under any Federal or State law before
13 the date of enactment of this Act.

14 **SEC. 15. SAVINGS CLAUSE.**

15 The meanings of terms used in this Act are applicable
16 for purposes of this Act only, and shall not be construed
17 or applied so as to challenge or affect the characterization,
18 definition, or treatment of any similar terms under any
19 other statute, regulation, or rule, including the Gramm-
20 Leach-Bliley Act, the Legal Certainty for Bank Products
21 Act of 2000, the securities laws (as that term is defined
22 in section 3(a)(47) of the Securities Exchange Act of
23 1934), and the Commodity Exchange Act.

Union Calendar No. 297

108TH CONGRESS
2^D SESSION

H. R. 2120

[Report No. 108-277, Part I]

A BILL

To revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes.

JUNE 1, 2004

The Committee on the Judiciary discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed