108TH CONGRESS
*2d Session*
HOUSE OF REPRESENTATIVES
REPT. 108–724
Part 3

# 9/11 RECOMMENDATIONS IMPLEMENTATION ACT

OCTOBER 4, 2004.—Ordered to be printed

Mr. OXLEY, from the Committee on Financial Services, submitted the following

# R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 10]

The Committee on Financial Services, to whom was referred the bill (H.R. 10) to provide for reform of the intelligence community, terrorism prevention and prosecution, border security, and international cooperation and coordination, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS



## AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "9/11 Recommendations Implementation Act".

**SEC. 2. TABLE OF CONTENTS.**

The table of contents for this Act is as follows:

# TITLE I—REFORM OF THE INTELLIGENCE COMMUNITY

[Title I of the Amendment in the Nature of a Substitute consists of title I of the bill H.R. 10, as introduced on September 24, 2004]

# TITLE II—TERRORISM PREVENTION AND PROSECUTION

[Subtitles A through D of title II of the Amendment in the Nature of a Substitute consist of subtitles A through D of title II of the bill H.R. 10, as introduced on September 24, 2004]

## Subtitle E—Money Laundering and Terrorist Financing

### CHAPTER 1—FUNDING TO COMBAT FINANCIAL CRIMES INCLUDING TERRORIST FINANCING

**SEC. 2101. ADDITIONAL AUTHORIZATION FOR FINCEN.**

Subsection (d) of section 310 of title 31, United States Code, is amended——

(1) by striking "APPROPRIATIONS.—There are authorized" and inserting "APPROPRIATIONS.—

"(1) IN GENERAL.—There are authorized"; and

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

"(2) AUTHORIZATION FOR FUNDING KEY TECHNOLOGICAL IMPROVEMENTS IN MISSION-CRITICAL FINCEN SYSTEMS.—There are authorized to be appropriated for fiscal year 2005 the following amounts, which are authorized to remain available until expended:

"(A) BSA DIRECT.—For technological improvements to provide authorized law enforcement and financial regulatory agencies with Web-based access to FinCEN data, to fully develop and implement the highly secure network required under section 362 of Public Law 107–56 to expedite the filing of, and reduce the filing costs for, financial institution reports, including suspicious activity reports, collected by FinCEN under chapter 53 and related provisions of law, and enable FinCEN to immediately alert financial institutions about suspicious activities that warrant immediate and enhanced scrutiny, and to provide and upgrade advanced information-sharing technologies to materially improve the Government's ability to exploit the information in the FinCEN databanks, $16,500,000.

"(B) ADVANCED ANALYTICAL TECHNOLOGIES.—To provide advanced analytical tools needed to ensure that the data collected by FinCEN under chapter 53 and related provisions of law are utilized fully and appropriately in safeguarding financial institutions and supporting the war on terrorism, $5,000,000.

"(C) DATA NETWORKING MODERNIZATION.—To improve the telecommunications infrastructure to support the improved capabilities of the FinCEN systems, $3,000,000.

"(D) ENHANCED COMPLIANCE CAPABILITY.—To improve the effectiveness of the Office of Compliance in FinCEN, $3,000,000.

"(E) DETECTION AND PREVENTION OF FINANCIAL CRIMES AND TERRORISM.—To provide development of, and training in the use of, technology to detect and prevent financial crimes and terrorism within and without the United States, $8,000,000.".

**SEC. 2102. MONEY LAUNDERING AND FINANCIAL CRIMES STRATEGY REAUTHORIZATION.**

(a) PROGRAM.—Section 5341(a)(2) of title 31, United States Code, is amended by striking "and 2003," and inserting "2003, and 2005,".

(b) REAUTHORIZATION OF APPROPRIATIONS.—Section 5355 of title 31, United States Code, is amended by adding at the end the following:

| | |
|---|---|
| "2004 | $15,000,000. |
| "2005 | $15,000,000.". |

### CHAPTER 2—ENFORCEMENT TOOLS TO COMBAT FINANCIAL CRIMES INCLUDING TERRORIST FINANCING

#### Subchapter A—Money laundering abatement and financial antiterrorism technical corrections

**SEC. 2111. SHORT TITLE.**

This subchapter may be cited as the "Money Laundering Abatement and Financial Antiterrorism Technical Corrections Act of 2004".

**SEC. 2112. TECHNICAL CORRECTIONS TO PUBLIC LAW 107–56.**

(a) The heading of title III of Public Law 107–56 is amended to read as follows:

**"TITLE III—INTERNATIONAL MONEY LAUNDERING ABATEMENT AND FINANCIAL ANTITERRORISM ACT OF 2001".**

(b) The table of contents of Public Law 107–56 is amended by striking the item relating to title III and inserting the following new item:

"TITLE III—INTERNATIONAL MONEY LAUNDERING ABATEMENT AND FINANCIAL ANTITERRORISM ACT OF 2001".

(c) Section 302 of Public Law 107–56 is amended—

(1) in subsection (a)(4), by striking the comma after "movement of criminal funds";

(2) in subsection (b)(7), by inserting "or types of accounts" after "classes of international transactions"; and

(3) in subsection (b)(10), by striking "subchapters II and III" and inserting "subchapter II".

(d) Section 303(a) of Public Law 107–56 is amended by striking "Anti-Terrorist Financing Act" and inserting "Financial Antiterrorism Act".

(e) The heading for section 311 of Public Law 107–56 is amended by striking "or international transactions" and inserting "international transactions, or types of accounts".

(f) Section 314 of Public Law 107–56 is amended—

(1) in paragraph (1)—

(A) by inserting a comma after "organizations engaged in"; and

(B) by inserting a comma after "credible evidence of engaging in";

(2) in paragraph (2)(A)—

(A) by striking "and" after "nongovernmental organizations,"; and

(B) by inserting a comma after "unwittingly involved in such finances";

(3) in paragraph (3)(A)—

(A) by striking "to monitor accounts of" and inserting "monitor accounts of,"; and

(B) by striking the comma after "organizations identified"; and

(4) in paragraph (3)(B), by inserting "financial" after "size, and nature of the".

(g) Section 321 of Public Law 107–56 is amended by striking "5312(2)" and inserting "5312(a)(2)".

(h) Section 325 of Public Law 107–56 is amended by striking "as amended by section 202 of this title," and inserting "as amended by section 352,".

(i) Subsections (a)(2) and (b)(2) of section 327 of Public Law 107–56 are each amended by inserting a period after "December 31, 2001" and striking all that follows through the period at the end of each such subsection.

(j) Section 356(c)(4) of Public Law 107–56 is amended by striking "or business or other grantor trust" and inserting ", business trust, or other grantor trust".

(k) Section 358(e) of Public Law 107–56 is amended—

(1) by striking "Section 123(a)" and inserting "That portion of section 123(a)";

(2) by striking "is amended to read" and inserting "that precedes paragraph (1) of such section is amended to read"; and

(3) by striking "." at the end of such section and inserting "—'".

(l) Section 360 of Public Law 107–56 is amended—

(1) in subsection (a), by inserting "the" after "utilization of the funds of"; and

(2) in subsection (b), by striking "at such institutions" and inserting "at such institution".

(m) Section 362(a)(1) of Public Law 107–56 is amended by striking "subchapter II or III" and inserting "subchapter II".

(n) Section 365 of Public Law 107–56 is amended—

(1) by redesignating the 2nd of the 2 subsections designated as subsection (c) (relating to a clerical amendment) as subsection (d); and

(2) by redesignating subsection (f) as subsection (e).

(o) Section 365(d) of Public Law 107–56 (as so redesignated by subsection (n) of this section) is amended by striking "section 5332 (as added by section 112 of this title)" and inserting "section 5330".

**SEC. 2113. TECHNICAL CORRECTIONS TO OTHER PROVISIONS OF LAW.**

(a) Section 310(c) of title 31, United States Code, is amended by striking "the Network" each place such term appears and inserting "FinCEN".

(b) Section 5312(a)(3)(C) of title 31, United States Code, is amended by striking "sections 5333 and 5316" and inserting "sections 5316 and 5331".

(c) Section 5318(i) of title 31, United States Code, is amended—

(1) in paragraph (3)(B), by inserting a comma after "foreign political figure" the 2nd place such term appears; and

(2) in the heading of paragraph (4), by striking "DEFINITION" and inserting "DEFINITIONS".

(d) Section 5318(k)(1)(B) of title 31, United States Code, is amended by striking "section 5318A(f)(1)(B)" and inserting "section 5318A(e)(1)(B)".

(e) The heading for section 5318A of title 31, United States Code, is amended to read as follows:

**"§ 5318A. Special measures for jurisdictions, financial institutions, international transactions, or types of accounts of primary money laundering concern"**.

(f) Section 5318A of title 31, United States Code, is amended—

(1) in subsection (a)(4)(A), by striking ", as defined in section 3 of the Federal Deposit Insurance Act," and inserting " (as defined in section 3 of the Federal Deposit Insurance Act)";

(2) in subsection (a)(4)(B)(iii), by striking "or class of transactions" and inserting "class of transactions, or type of account";

(3) in subsection (b)(1)(A), by striking "or class of transactions to be" and inserting "class of transactions, or type of account to be"; and

(4) in subsection (e)(3), by inserting "or subsection (i) or (j) of section 5318" after "identification of individuals under this section".

(g) Section 5324(b) of title 31, United States Code, is amended by striking "5333" each place such term appears and inserting "5331".

(h) Section 5332 of title 31, United States Code, is amended—

(1) in subsection (b)(2), by striking ", subject to subsection (d) of this section"; and

(2) in subsection (c)(1), by striking ", subject to subsection (d) of this section,".

(i) The table of sections for subchapter II of chapter 53 of title 31, United States Code, is amended by striking the item relating to section 5318A and inserting the following new item:

"5318A. Special measures for jurisdictions, financial institutions, international transactions, or types of accounts of primary money laundering concern.".

(j) Section 18(w)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1828(w)(3)) is amended by inserting a comma after "agent of such institution".

(k) Section 21(a)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1829b(a)(2)) is amended by striking "recognizes that" and inserting "recognizing that".

(l) Section 626(e) of the Fair Credit Reporting Act (15 U.S.C. 1681v(e)) is amended by striking "governmental agency" and inserting "government agency".

**SEC. 2114. REPEAL OF REVIEW.**

Title III of Public Law 107–56 is amended by striking section 303 (31 U.S.C. 5311 note).

**SEC. 2115. EFFECTIVE DATE.**

The amendments made by this subchapter to Public Law 107–56, the United States Code, the Federal Deposit Insurance Act, and any other provision of law shall take effect as if such amendments had been included in Public Law 107–56, as of the date of the enactment of such Public Law, and no amendment made by such Public Law that is inconsistent with an amendment made by this subchapter shall be deemed to have taken effect.

## Subchapter B—Additional enforcement tools

**SEC. 2121. BUREAU OF ENGRAVING AND PRINTING SECURITY PRINTING.**

(a) PRODUCTION OF DOCUMENTS.—Section 5114(a) of title 31, United States Code (relating to engraving and printing currency and security documents), is amended—

(1) by striking "(a) The Secretary of the Treasury" and inserting:

"(a) AUTHORITY TO ENGRAVE AND PRINT.—

"(1) IN GENERAL.—The Secretary of the Treasury"; and

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

"(2) ENGRAVING AND PRINTING FOR OTHER GOVERNMENTS.—The Secretary of the Treasury may produce currency, postage stamps, and other security documents for foreign governments if—

"(A) the Secretary of the Treasury determines that such production will not interfere with engraving and printing needs of the United States; and

"(B) the Secretary of State determines that such production would be consistent with the foreign policy of the United States.

"(3) PROCUREMENT GUIDELINES.—Articles, material, and supplies procured for use in the production of currency, postage stamps, and other security documents for foreign governments pursuant to paragraph (2) shall be treated in the same manner as articles, material, and supplies procured for public use within the United States for purposes of title III of the Act of March 3, 1933 (41 U.S.C. 10a et seq.; commonly referred to as the Buy American Act).".

(b) REIMBURSEMENT.—Section 5143 of title 31, United States Code (relating to payment for services of the Bureau of Engraving and Printing), is amended—

(1) in the first sentence, by inserting "or to a foreign government under section 5114" after "agency";

(2) in the second sentence, by inserting "and other" after "including administrative"; and

(3) in the last sentence, by inserting ", and the Secretary shall take such action, in coordination with the Secretary of State, as may be appropriate to ensure prompt payment by a foreign government of any invoice or statement of account submitted by the Secretary with respect to services rendered under section 5114" before the period at the end.

**SEC. 2122. CONDUCT IN AID OF COUNTERFEITING.**

(a) IN GENERAL.—Section 474(a) of title 18, United States Code, is amended by inserting after the paragraph beginning "Whoever has in his control, custody, or possession any plate" the following:

" Whoever, with intent to defraud, has in his custody, control, or possession any material that can be used to make, alter, forge or counterfeit any obligations and other securities of the United States or any part of such securities and obligations, except under the authority of the Secretary of the Treasury; or".

(b) FOREIGN OBLIGATIONS AND SECURITIES.—Section 481 of title 18, United States Code, is amended by inserting after the paragraph beginning "Whoever, with intent to defraud" the following:

" Whoever, with intent to defraud, has in his custody, control, or possession any material that can be used to make, alter, forge or counterfeit any obligation or other security of any foreign government, bank or corporation; or".

(c) COUNTERFEIT ACTS.—Section 470 of title 18, United States Code, is amended by striking "or 474" and inserting "474, or 474A".

(d) MATERIALS USED IN COUNTERFEITING.—Section 474A(b) of title 18, United States Code, is amended by striking "any essentially identical" and inserting "any thing or material made after or in the similitude of any".

**SEC. 2123. REPORTING OF CROSS-BORDER TRANSMITTAL OF FUNDS.**

Section 5318 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(n) REPORTING OF CROSS-BORDER TRANSMITTAL OF FUNDS.—

"(1) IN GENERAL.—Subject to paragraph (3), the Secretary shall prescribe regulations requiring such financial institutions as the Secretary determines to be appropriate to report to the Financial Crimes Enforcement Network certain cross-border electronic transmittals of funds relevant to efforts of the Secretary against money laundering and terrorist financing.

"(2) FORM AND MANNER OF REPORTS.—In prescribing the regulations required under paragraph (1), the Secretary shall determine the appropriate form, manner, content and frequency of filing of the required reports.

"(3) FEASIBILITY REPORT.—Before prescribing the regulations required under paragraph (1), and as soon as is practicable after the date of enactment of the 9/11 Recommendations Implementation Act, the Secretary shall delegate to the Bank Secrecy Act Advisory Group established by the Secretary the task of producing a report for the Secretary and the Congress that—

"(A) identifies the information in cross-border electronic transmittals of funds that is relevant to efforts against money laundering and terrorist financing;

"(B) makes recommendations regarding the appropriate form, manner, content and frequency of filing of the required reports; and

"(C) identifies the technology necessary for the Financial Crimes Enforcement Network to receive, keep, exploit and disseminate information from reports of cross-border electronic transmittals of funds to law enforcement and other entities engaged in efforts against money laundering and terrorist financing.

The report shall be submitted to the Secretary and the Congress no later than the end of the 1-year period beginning on the date of enactment of such Act.

"(4) REGULATIONS.—

"(A) IN GENERAL.—Subject to subparagraph (B), the regulations required by paragraph (1) shall be prescribed in final form by the Secretary, in consultation with the Board of Governors of the Federal Reserve System, before the end of the 3-year period beginning on the date of the enactment of the 9/11 Recommendations Implementation Act.

"(B) TECHNOLOGICAL FEASIBILITY.—No regulations shall be prescribed under this subsection before the Secretary certifies to the Congress that the Financial Crimes Enforcement Network has the technological systems in place to effectively and efficiently receive, keep, exploit, and disseminate information from reports of cross-border electronic transmittals of funds to law enforcement and other entities engaged in efforts against money laundering and terrorist financing.

"(5) RECORDKEEPING.—No financial institution required to submit reports on certain cross-border electronic transmittals of funds to the Financial Crimes Enforcement Network under this subsection shall be subject to the recordkeeping requirement under section 21(b)(3) of the Federal Deposit Insurance Act with respect to such transmittals of funds.".

**SEC. 2124. ENHANCED EFFECTIVENESS OF EXAMINATIONS, INCLUDING ANTI-MONEY LAUNDERING PROGRAMS.**

(a) DEPOSITORY INSTITUTIONS AND DEPOSITORY INSTITUTION HOLDING COMPANIES.—Section 10 of the Federal Deposit Insurance Act (12 U.S.C. 1820) is amended by adding at the end the following new subsection:

"(k) POST-EMPLOYMENT LIMITATIONS ON LEADING BANK EXAMINERS.—

"(1) IN GENERAL.—In the case of any person who—

"(A) was an officer or employee (including any special Government employee) of a Federal banking agency or a Federal reserve bank; and

"(B) served 2 or more months during the final 18 months of such person's employment with such agency or entity as the examiner-in-charge (or a functionally equivalent position) of a depository institution or depository institution holding company with dedicated, overall, continuous, and ongoing responsibility for the examination (or inspection) and supervision of that depository institution or depository institution holding company,

such person may not hold any office, position, or employment at any such depository institution or depository institution holding company, become a controlling shareholder in, a consultant for, a joint-venture partner with, or an independent contractor for (including as attorney, appraiser, or accountant) any such depository institution or holding company, or any other company that controls such depository institution, or otherwise participate in the conduct of the affairs of any such depository institution or holding company, during the 1-year period beginning on such date.

"(2) VIOLATORS SUBJECT TO INDUSTRY-WIDE PROHIBITION ORDERS.—

"(A) IN GENERAL.—In addition to any other penalty which may apply, whenever the appropriate Federal banking agency determines that a person subject to paragraph (1) has violated the prohibition in such paragraph with respect to any insured depository institution or depository institution holding company or any other company, the agency shall serve a written notice or order, in accordance with and subject to the provisions of section 8(e)(4) for written notices under paragraphs (1) or (2) of section 8(e), upon such person of the agency's intention to—

"(i) remove such person from office in any capacity described in paragraph (1); and

"(ii) prohibit any further participation by such person, in any manner, in the conduct of the affairs of any insured depository institution or depository institution holding company for a period of 5 years.

"(B) SCOPE OF PROHIBITION ORDER.—Any person subject to an order issued under this subsection shall be subject to paragraphs (6) and (7) of section 8(e) in the same manner and to the same extent as a person subject to an order issued under such section and subsections (i) and (j) of section 8 and any other provision of this Act applicable to orders issued under subsection (e) or (g) shall apply with respect to such order.

"(3) REGULATIONS.—

"(A) IN GENERAL.—The Federal banking agencies shall prescribe regulations to implement this subsection, including the manner for determining which persons are referred to in paragraph 1(B) taking into account—

"(i) the manner in which examiners and other persons who participate in the regulation, examination, or monitoring of depository institutions or depository institution holding companies are distributed among such institutions or companies by such agency, including the number of examiners and other persons assigned to each institution or holding

company, the depth and structure of any group so assigned within such distribution, and the factors giving rise to that distribution;

"(ii) the number of institutions or companies each such examiner or other person is so involved with in any given period of assignment;

"(iii) the period of time for which each such examiner or other person is assigned to an institution or company, or a group of institutions or companies, before reassignment;

"(iv) the size of the institutions or holding companies for which each such person is responsible and the amount of time devoted to each such institution or holding company during each examination period; and

"(v) such other factors as the agency determines to be appropriate.

"(B) DETERMINATION OF APPLICABILITY.—The regulations prescribed or orders issued under this subparagraph by an appropriate Federal banking agency shall include a process, initiated by application or otherwise, for determining whether any person who ceases to be, or intends to cease to be, an examiner of, or a person having supervisory authority over, insured depository institutions or depository institution holding companies for or on behalf of such agency is subject to the limitations of this subsection with respect to any particular insured depository institution or depository institution holding company.

"(C) CONSULTATION.—The Federal banking agencies shall consult with each other for the purpose of assuring that the rules and regulations issued by the agencies under subparagraph (A) are, to the extent possible, consistent, comparable, and practicable, taking into account any differences in the supervisory programs utilized by the agencies for the supervision of depository institutions and depository institution holding companies.

"(4) WAIVER.—A Federal banking agency may waive, on a case-by-case basis, the restrictions imposed by this subsection if—

"(A) the head of the agency certifies in writing that the grant of such waiver would be not inconsistent with the public interest; and

"(B) the waiver is provided in advance before the person becomes affiliated in any way with the depository institution or depository institution holding company.

"(5) DEFINITIONS AND RULES OF CONSTRUCTION.—For purposes of this subsection, the following definitions and rules shall apply:

"(A) DEPOSITORY INSTITUTION.—The term 'depository institution' includes an uninsured branch or agency of a foreign bank if such branch or agency is located in any State.

"(B) DEPOSITORY INSTITUTION HOLDING COMPANY.—The term 'depository institution holding company' includes any foreign bank or company described in section 8(a) of the International Banking Act of 1978.

"(C) HEAD OF THE AGENCY.—The term 'the head of agency' means—

"(i) the Comptroller of the Currency, in the case of the Office of the Comptroller of the Currency;

"(ii) the Chairman of the Board of Governors of the Federal Reserve System, in the case of the Board of Governors of the Federal Reserve System;

"(iii) the Chairperson of the Board of Directors, in the case of the Federal Deposit Insurance Corporation; and

"(iv) the Director, in the case of the Office of Thrift Supervision.

"(D) RULE OF CONSTRUCTION FOR CONSULTANTS AND INDEPENDENT CONTRACTORS.—A person shall be deemed to act as a consultant or independent contractor (including as an attorney, appraiser, or accountant) for a depository institution or a depository holding company only if such person directly works on matters for, or on behalf of, such depository institution or depository holding company.

"(E) APPROPRIATE AGENCY FOR CERTAIN OTHER COMPANIES.—The term 'appropriate Federal banking agency' means, with respect to a company that is not a depository institution or depository institution holding company, the Federal banking agency on whose behalf the person described in paragraph (1) performed the functions described in paragraph (3).".

(b) CREDIT UNIONS.—Section 206 of the Federal Credit Union Act (12 U.S.C. 1786) is amended by adding at the end the following new subsection:

"(w) POST-EMPLOYMENT LIMITATIONS ON EXAMINERS.—

"(1) REGULATIONS REQUIRED.—The Board shall consult with the Federal banking agencies and prescribe regulations imposing the same limitations on persons employed by or on behalf of the Board as leading examiners of, or functionally equivalent positions with respect to, credit unions as are applicable under sec-

tion 10(k) of the Federal Deposit Insurance Act, taking into account all the requirements and factors described in paragraphs (3) and (4) of such section.

"(2) ENFORCEMENT.—The Board shall issue orders under subsection (g) with respect to any person who violates any regulation prescribed pursuant to paragraph (1) to—

"(A) remove such person from office in any capacity with respect to a credit union; and

"(B) prohibit any further participation by such person, in any manner, in the conduct of the affairs of any credit union for a period of 5 years.

"(3) SCOPE OF PROHIBITION ORDER.—Any person subject to an order issued under this subsection shall be subject to paragraphs (5) and (7) of subsection (g) in the same manner and to the same extent as a person subject to an order issued under such subsection and subsection (l) and any other provision of this Act applicable to orders issued under subsection (g) shall apply with respect to such order.".

(c) STUDY OF EXAMINER HIRING AND RETENTION.—

(1) STUDY REQUIRED.—The Board of Directors of the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration Board, acting through the Financial Institutions Examination Council, shall conduct a study of efforts and proposals for—

(A) retaining the services of experienced and highly qualified examiners and supervisors already employed by such agencies; and

(B) continuing to attract such examiners and supervisors on an-ongoing basis to the extent necessary to fulfill the agencies' obligations to maintain the safety and soundness of the Nation's depository institutions.

(2) REPORT.—Before the end of the 1-year period beginning on the date of the enactment of this Act, the agencies conducting the study under paragraph (1) shall submit a report containing the findings and conclusions of such agencies with respect to such study, together with such recommendations for administrative or legislative changes as the agencies determine to be appropriate.

## Subchapter C—Unlawful Internet Gambling Funding Prohibition

**SEC. 2131. SHORT TITLE.**

This subchapter may be cited as the "Unlawful Internet Gambling Funding Prohibition Act".

**SEC. 2132. FINDINGS.**

The Congress finds as follows:

(1) Internet gambling is primarily funded through personal use of bank instruments, including credit cards and wire transfers.

(2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent them.

(3) Internet gambling is a major cause of debt collection problems for insured depository institutions and the consumer credit industry.

(4) Internet gambling conducted through offshore jurisdictions has been identified by United States law enforcement officials as a significant money laundering vulnerability.

**SEC. 2133. POLICIES AND PROCEDURES REQUIRED TO PREVENT PAYMENTS FOR UNLAWFUL INTERNET GAMBLING.**

(a) REGULATIONS.—Before the end of the 6-month period beginning on the date of the enactment of this subchapter, the Federal functional regulators shall prescribe regulations requiring any designated payment system to establish policies and procedures reasonably designed to identify and prevent restricted transactions in any of the following ways:

(1) The establishment of policies and procedures that—

(A) allow the payment system and any person involved in the payment system to identify restricted transactions by means of codes in authorization messages or by other means; and

(B) block restricted transactions identified as a result of the policies and procedures developed pursuant to subparagraph (A).

(2) The establishment of policies and procedures that prevent the acceptance of the products or services of the payment system in connection with a restricted transaction.

(b) REQUIREMENTS FOR POLICIES AND PROCEDURES.—In prescribing regulations pursuant to subsection (a), the Federal functional regulators shall—

(1) identify types of policies and procedures, including nonexclusive examples, which would be deemed to be "reasonably designed to identify" and "reasonably designed to block" or to "prevent the acceptance of the products or services" with respect to each type of transaction, such as, should credit card transactions be so designated, identifying transactions by a code or codes in the authorization message and denying authorization of a credit card transaction in response to an authorization message;

(2) to the extent practical, permit any participant in a payment system to choose among alternative means of identifying and blocking, or otherwise preventing the acceptance of the products or services of the payment system or participant in connection with, restricted transactions; and

(3) consider exempting restricted transactions from any requirement under subsection (a) if the Federal functional regulators find that it is not reasonably practical to identify and block, or otherwise prevent, such transactions.

(c) COMPLIANCE WITH PAYMENT SYSTEM POLICIES AND PROCEDURES.—A creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, or money transmitting service, or a participant in such network, meets the requirement of subsection (a) if—

(1) such person relies on and complies with the policies and procedures of a designated payment system of which it is a member or participant to—

(A) identify and block restricted transactions; or

(B) otherwise prevent the acceptance of the products or services of the payment system, member, or participant in connection with restricted transactions; and

(2) such policies and procedures of the designated payment system comply with the requirements of regulations prescribed under subsection (a).

(d) ENFORCEMENT.—

(1) IN GENERAL.—This section shall be enforced by the Federal functional regulators and the Federal Trade Commission under applicable law in the manner provided in section 505(a) of the Gramm-Leach-Bliley Act.

(2) FACTORS TO BE CONSIDERED.—In considering any enforcement action under this subsection against any payment system, or any participant in a payment system that is a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, or money transmitting service, or a participant in such network, the Federal functional regulators and the Federal Trade Commission shall consider the following factors:

(A) The extent to which such person is extending credit or transmitting funds knowing the transaction is in connection with unlawful Internet gambling.

(B) The history of such person in extending credit or transmitting funds knowing the transaction is in connection with unlawful Internet gambling.

(C) The extent to which such person has established and is maintaining policies and procedures in compliance with regulations prescribed under this subsection.

(D) The feasibility that any specific remedy prescribed can be implemented by such person without substantial deviation from normal business practice.

(E) The costs and burdens the specific remedy will have on such person.

**SEC. 2134. DEFINITIONS.**

For purposes of this subchapter, the following definitions shall apply:

(1) RESTRICTED TRANSACTION.—The term "restricted transaction" means any transaction or transmittal to any person engaged in the business of betting or wagering, in connection with the participation of another person in unlawful Internet gambling, of—

(A) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(B) an electronic fund transfer or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of the other person;

(C) any check, draft, or similar instrument which is drawn by or on behalf of the other person and is drawn on or payable at or through any financial institution; or

(D) the proceeds of any other form of financial transaction as the Federal functional regulators may prescribe by regulation which involves a financial

institution as a payor or financial intermediary on behalf of or for the benefit of the other person.

(2) BETS OR WAGERS.—The term "bets or wagers"—

(A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of greater value than the amount staked or risked in the event of a certain outcome;

(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

(C) includes any scheme of a type described in section 3702 of title 28, United States Code;

(D) includes any instructions or information pertaining to the establishment or movement of funds in an account by the bettor or customer with the business of betting or wagering; and

(E) does not include—

(i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) for the purchase or sale of securities (as that term is defined in section 3(a)(10) of such Act);

(ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade pursuant to the Commodity Exchange Act;

(iii) any over-the-counter derivative instrument;

(iv) any other transaction that—

(I) is excluded or exempt from regulation under the Commodity Exchange Act; or

(II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;

(v) any contract of indemnity or guarantee;

(vi) any contract for insurance;

(vii) any deposit or other transaction with a depository institution (as defined in section 3(c) of the Federal Deposit Insurance Act);

(viii) any participation in a simulation sports game or an educational game or contest that—

(I) is not dependent solely on the outcome of any single sporting event or nonparticipant's singular individual performance in any single sporting event;

(II) has an outcome that reflects the relative knowledge and skill of the participants with such outcome determined predominantly by accumulated statistical results of sporting events; and

(III) offers a prize or award to a participant that is established in advance of the game or contest and is not determined by the number of participants or the amount of any fees paid by those participants; and

(ix) any lawful transaction with a business licensed or authorized by a State, and for purposes of this clause, the term "lawful transaction" means any transaction that is lawful under all applicable Federal laws and all applicable State laws of both the State in which the licensed or authorized business is located and the State where the bet is initiated.

(3) DESIGNATED PAYMENT SYSTEM DEFINED.—The term "designated payment system" means any system utilized by any creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, or money transmitting service, or any participant in such network, that the Federal functional regulators determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction.

(4) FEDERAL FUNCTIONAL REGULATOR.—The term "Federal functional regulator" has the same meaning as in section 509(2) of the Gramm-Leach-Bliley Act.

(5) INTERNET.—The term "Internet" means the international computer network of interoperable packet switched data networks.

(6) UNLAWFUL INTERNET GAMBLING.—The term "unlawful Internet gambling" means to place, receive, or otherwise transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager

is unlawful under any applicable Federal or State law in the State in which the bet or wager is initiated, received, or otherwise made.

(7) OTHER TERMS.—

(A) CREDIT; CREDITOR; AND CREDIT CARD.—The terms "credit", "creditor", and "credit card" have the meanings given such terms in section 103 of the Truth in Lending Act.

(B) ELECTRONIC FUND TRANSFER.—The term "electronic fund transfer"—

(i) has the meaning given such term in section 903 of the Electronic Fund Transfer Act; and

(ii) includes any fund transfer covered by Article 4A of the Uniform Commercial Code, as in effect in any State.

(C) FINANCIAL INSTITUTION.—The term "financial institution"—

(i) has the meaning given such term in section 903 of the Electronic Fund Transfer Act; and

(ii) includes any financial institution, as defined in section 509(3) of the Gramm-Leach-Bliley Act.

(D) MONEY TRANSMITTING BUSINESS AND MONEY TRANSMITTING SERVICE.—The terms "money transmitting business" and "money transmitting service" have the meanings given such terms in section 5330(d) of title 31, United States Code.

**SEC. 2135. COMMON SENSE RULE OF CONSTRUCTION.**

No provision of this subchapter shall be construed as altering, limiting, extending, changing the status of, or otherwise affecting any law relating to, affecting, or regulating gambling within the United States.

## Subtitle F—Criminal History Background Checks

[Subtitles F through H of title II of the Amendment in the Nature of a Substitute consist of subtitles F through H of title II of the bill H.R. 10, as introduced on September 24, 2004]

# TITLE III—BORDER SECURITY AND TERRORIST TRAVEL

[Title III of the Amendment in the Nature of a Substitute consists of title III of the bill H.R. 10, as introduced on September 24, 2004]

# TITLE IV—INTERNATIONAL COOPERATION AND COORDINATION

[Subtitle A of title IV of the Amendment in the Nature of a Substitute consists of subtitle A of title IV of the bill H.R. 10, as introduced on September 24, 2004]

## Subtitle B—Prevent the Continued Growth of Terrorism

### CHAPTER 1—UNITED STATES PUBLIC DIPLOMACY

[Chapter 1 of title IV of the Amendment in the Nature of a Substitute consists of chapter 1 of title IV of the bill H.R. 10, as introduced on September 24, 2004]

### CHAPTER 2—UNITED STATES MULTILATERAL DIPLOMACY

[Sections 4031 and 4032 of chapter 2 of subtitle B of title IV of the Amendment in the Nature of a Substitute consist of sections 4031 and 4032 of chapter 2 of subtitle B of title IV of the bill H.R. 10, as introduced on September 24, 2004]

**SEC. 4033. LEADERSHIP AND MEMBERSHIP OF INTERNATIONAL ORGANIZATIONS.**

(a) UNITED STATES POLICY.—The President, acting through the Secretary of State, the relevant United States chiefs of mission, and, where appropriate, the Secretary of the Treasury, shall use the voice, vote, and influence of the United States to—

(1) where appropriate, reform the criteria for leadership and, in appropriate cases, for membership, at all United Nations bodies and at other international

organizations and multilateral institutions to which the United States is a member so as to exclude countries that violate the principles of the specific organization;

(2) make it a policy of the United Nations and other international organizations and multilateral institutions of which the United States is a member that a member country may not stand in nomination for membership or in nomination or in rotation for a leadership position in such bodies if the member country is subject to sanctions imposed by the United Nations Security Council; and

(3) work to ensure that no member country stand in nomination for membership, or in nomination or in rotation for a leadership position in such organizations, or for membership on the United Nations Security Council, if the member country is subject to a determination under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)).

(b) REPORT TO CONGRESS.—Not later than 15 days after a country subject to a determination under one or more of the provisions of law specified in subsection (a)(3) is selected for membership or a leadership post in an international organization of which the United States is a member or for membership on the United Nations Security Council, the Secretary of State shall submit to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate a report on any steps taken pursuant to subsection (a)(3).

**SEC. 4034. INCREASED TRAINING IN MULTILATERAL DIPLOMACY.**

[Section 4034 of title IV of the Amendment in the Nature of a Substitute consists of section 4034 of title IV of the bill H.R. 10, as introduced on September 24, 2004]

**SEC. 4035. IMPLEMENTATION AND ESTABLISHMENT OF OFFICE ON MULTILATERAL NEGOTIATIONS.**

(a) ESTABLISHMENT OF OFFICE.—The Secretary of State is authorized to establish, within the Bureau of International Organizational Affairs, an Office on Multilateral Negotiations to be headed by a Special Representative for Multilateral Negotiations (in this section referred to as the "Special Representative").

(b) APPOINTMENT.—The Special Representative shall be appointed by the President and shall have the rank of Ambassador-at-Large. At the discretion of the President another official at the Department may serve as the Special Representative.

(c) STAFFING.—The Special Representative shall have a staff of Foreign Service and civil service officers skilled in multilateral diplomacy.

(d) DUTIES.—The Special Representative shall have the following responsibilities:

(1) IN GENERAL.—The primary responsibility of the Special Representative shall be to assist in the organization of, and preparation for, United States participation in multilateral negotiations, including advocacy efforts undertaken by the Department of State and other United States Government agencies.

(2) CONSULTATIONS.—The Special Representative shall consult with Congress, international organizations, nongovernmental organizations, and the private sector on matters affecting multilateral negotiations.

(3) ADVISORY ROLE.—The Special Representative shall advise the Assistant Secretary for International Organizational Affairs and, as appropriate, the Secretary of State, regarding advocacy at international organizations, multilateral institutions, and negotiations, and shall make recommendations regarding—

(A) effective strategies (and tactics) to achieve United States policy objectives at multilateral negotiations;

(B) the need for and timing of high level intervention by the President, the Secretary of State, the Deputy Secretary of State, and other United States officials to secure support from key foreign government officials for United States positions at such organizations, institutions, and negotiations; and

(C) the composition of United States delegations to multilateral negotiations.

(4) ANNUAL DIPLOMATIC MISSIONS OF MULTILATERAL ISSUES.—The Special Representative, in coordination with the Assistant Secretary for International Organizational Affairs, shall organize annual diplomatic missions to appropriate foreign countries to conduct consultations between principal officers responsible for advising the Secretary of State on international organizations and high-level representatives of the governments of such foreign countries to promote the United States agenda at the United Nations General Assembly and other key international fora (such as the United Nations Human Rights Commission).

(5) LEADERSHIP AND MEMBERSHIP OF INTERNATIONAL ORGANIZATIONS.—The Special Representative, in coordination with the Assistant Secretary of Inter-

national Organizational Affairs, shall direct the efforts of the United States to reform the criteria for leadership of and membership in international organizations as described in section 4033.

(6) PARTICIPATION IN MULTILATERAL NEGOTIATIONS.—The Secretary of State may direct the Special Representative to serve as a member of a United States delegation to any multilateral negotiation.

(7) COORDINATION WITH THE DEPARTMENT OF THE TREASURY.—

(A) COORDINATION AND CONSULTATION.—The Special Representative shall coordinate and consult with the relevant staff at the Department of the Treasury in order to prepare recommendations for the Secretary of State regarding multilateral negotiations involving international financial institutions and other multilateral financial policymaking bodies.

(B) NEGOTIATING AUTHORITY CLARIFIED.—Notwithstanding any other provision of law, the Secretary of the Treasury shall remain the lead representative and lead negotiator for the United States within the international financial institutions and other multilateral financial policymaking bodies.

(C) DEFINITIONS.—In this paragraph:

(i) INTERNATIONAL FINANCIAL INSTITUTIONS.—The term "international financial institutions" has the meaning given in section 1701(c)(2) of the International Financial Institutions Act.

(ii) OTHER MULTILATERAL FINANCIAL POLICYMAKING BODIES.—The term "other multilateral financial policymaking bodies" means—

(I) the Financial Action Task Force at the Organization for Economic Cooperation and Development;

(II) the international network of financial intelligence units known as the "Egmont Group";

(III) the United States, Canada, the United Kingdom, France, Germany, Italy, Japan, and Russia, when meeting as the Group of Eight; and

(IV) any other multilateral financial policymaking group in which the Secretary of the Treasury represents the United States.

(iii) FINANCIAL ACTION TASK FORCE.—The term "Financial Action Task Force" means the international grouping of countries that meets periodically to address issues related to money laundering, terrorist financing, and other financial crimes.

### CHAPTER 3—OTHER PROVISIONS

[Chapter 3 of subtitle B of title IV of the Amendment in the Nature of a Substitute consists of chapter 3 of subtitles B of title IV of the bill H.R. 10, as introduced on September 24, 2004]

## Subtitle C—Reform of Designation of Foreign Terrorist Organizations

[Subtitle C of title IV of the Amendment in the Nature of a Substitute consists of subtitle C of title IV of the bill H.R. 10, as introduced on September 24, 2004]

## Subtitle D—Afghanistan Freedom Support Act Amendments of 2004

**SEC. 4061. SHORT TITLE.**

This subtitle may be cited as the "Afghanistan Freedom Support Act Amendments of 2004".

**SEC. 4062. COORDINATION OF ASSISTANCE FOR AFGHANISTAN.**

(a) FINDINGS.—Congress finds that—

(1) the Final Report of the National Commission on Terrorist Attacks Upon the United States criticized the provision of United States assistance to Afghanistan for being too inflexible; and

(2) the Afghanistan Freedom Support Act of 2002 (Public Law 107–327; 22 U.S.C. 7501 et seq.) contains provisions that provide for flexibility in the provision of assistance for Afghanistan and are not subject to the requirements of typical foreign assistance programs and provide for the designation of a coordinator to oversee United States assistance for Afghanistan.

(b) DESIGNATION OF COORDINATOR.—Section 104(a) of the Afghanistan Freedom Support Act of 2002 (22 U.S.C. 7514(a)) is amended in the matter preceding paragraph (1) by striking "is strongly urged to" and inserting "shall".

(c) OTHER MATTERS.—Section 104 of such Act (22 U.S.C. 7514) is amended by adding at the end the following:

"(c) PROGRAM PLAN.—The coordinator designated under subsection (a) shall annually submit to the Committees on International Relations and Appropriations of the House of Representatives and the Committees on Foreign Relations and Appropriations of the Senate the Administration's plan for assistance to Afghanistan together with a description of such assistance in prior years.

"(d) COORDINATION WITH INTERNATIONAL COMMUNITY.—The coordinator designated under subsection (a) shall work with the international community and the Government of Afghanistan to ensure that assistance to Afghanistan is implemented in a coherent, consistent, and efficient manner to prevent duplication and waste. The coordinator designated under subsection (a) shall work through the Secretary of the Treasury and the United States Executive Directors at the international financial institutions in order to effectuate these responsibilities within the international financial institutions. The term 'international financial institution' has the meaning given in section 1701(c)(2) of the International Financial Institutions Act.".

**SEC. 4063. GENERAL PROVISIONS RELATING TO THE AFGHANISTAN FREEDOM SUPPORT ACT OF 2002.**

[Section 4063 and the remaining sections of subtitle D of title IV of the Amendment in the Nature of a Substitute consist of section 4063 and the remaining sections of subtitle D of title IV of the bill H.R. 10, as introduced on September 24, 2004]

# Subtitle E—Provisions Relating to Saudi Arabia and Pakistan

[Subtitles E through G of title IV of the Amendment in the Nature of a Substitute consist of subtitles E through G of title IV of the bill H.R. 10, as introduced on September 24, 2004]

# Subtitle H—Improving International Standards and Cooperation to Fight Terrorist Financing

**SEC. 4111. SENSE OF THE CONGRESS REGARDING SUCCESS IN MULTILATERAL ORGANIZATIONS.**

(a) FINDINGS.—The Congress finds as follows:

(1) The global war on terrorism and cutting off terrorist financing is a policy priority for the United States and its partners, working bilaterally and multilaterally through the United Nations (UN), the UN Security Council and its Committees, such as the 1267 and 1373 Committees, the Financial Action Task Force (FATF) and various international financial institutions, such as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), and the regional multilateral development banks, and other multilateral fora.

(2) The Secretary of the Treasury has engaged the international financial community in the global fight against terrorist financing. Specifically, the Department of the Treasury helped redirect the focus of the Financial Action Task Force on the new threat posed by terrorist financing to the international financial system, resulting in the establishment of the FATF's Eight Special Recommendations on Terrorist Financing as the international standard on combating terrorist financing. The Secretary of the Treasury has engaged the Group of Seven and the Group of Twenty Finance Ministers to develop action plans to curb the financing of terror. In addition, other economic and regional fora, such as the Asia-Pacific Economic Cooperation (APEC) Forum, the Western Hemisphere Financial Ministers, have been used to marshal political will and actions in support of countering the financing of terrorism (CFT) standards.

(3) FATF's Forty Recommendations on Money Laundering and the Eight Special Recommendations on Terrorist Financing are the recognized global standards for fighting money laundering and terrorist financing. The FATF has engaged in an assessment process for jurisdictions based on their compliance with these standards.

(4) In March 2004, the IMF and IBRD Boards agreed to make permanent a pilot program of collaboration with the FATF to assess global compliance with the FATF Forty Recommendations on Money Laundering and the Eight Special Recommendations on Terrorist Financing. As a result, anti-money laundering (AML) and combating the financing of terrorism (CFT) assessments are now a regular part of their Financial Sector Assessment Progam (FSAP) and Offshore Financial Center assessments, which provide for a comprehensive analysis of the strength of a jurisdiction's financial system. These reviews assess potential systemic vulnerabilities, consider sectoral development needs and priorities, and review the state of implementation of and compliance with key financial codes and regulatory standards, among them the AML and CFT standards.

(5) To date, 70 FSAPs have been conducted, with over 24 of those incorporating AML and CFT assessments. The international financial institutions (IFIs), the FATF, and the FATF-style regional bodies together are expected to assess AML and CFT regimes in up to 40 countries or jurisdictions per year. This will help countries and jurisdictions identify deficiencies in their AML and CFT regimes and help focus technical assistance (TA) efforts.

(6) TA programs from the United States and other nations, coordinated with the Department of State and other departments and agencies, are playing an important role in helping countries and jurisdictions address shortcomings in their AML and CFT regimes and bringing their regimes into conformity with international standards. Training is coordinated within the United States Government, which leverages multilateral organizations and bodies and international financial institutions to internationalize the conveyance of technical assistance.

(7) In fulfilling its duties in advancing incorporation of AML and CFT standards into the IFIs as part of the IFIs' work on protecting the integrity of the international monetary system, the Department of the Treasury, under the guidance of the Secretary of the Treasury, has effectively brought together all of the key United States Government agencies. In particular, United States Government agencies continue to work together to foster broad support for this important undertaking in various multilateral fora, and United States Government agencies recognize the need for close coordination and communication within our own government.

(b) SENSE OF THE CONGRESS.—It is the sense of the Congress that the Secretary of the Treasury should continue to promote the dissemination of international AML and CFT standards, and to press for full implementation of the FATF 40 + 8 Recommendations by all countries in order to curb financial risks and hinder terrorist financing around the globe.

**SEC. 4112. EXPANDED REPORTING AND TESTIMONY REQUIREMENTS FOR THE SECRETARY OF THE TREASURY.**

(a) REPORTING REQUIREMENTS.—Section 1503(a) of the International Financial Institutions Act (22 U.S.C. 262o–2(a)) is amended by adding at the end the following new paragraph:

"(15) Work with the International Monetary Fund to—

"(A) foster strong global anti-money laundering (AML) and combat the financing of terrorism (CFT) regimes;

"(B) ensure that country performance under the Financial Action Task Force anti-money laundering and counter-terrorist financing standards is effectively and comprehensively monitored;

"(C) ensure note is taken of AML and CFT issues in Article IV reports, International Monetary Fund programs, and other regular reviews of country progress;

"(D) ensure that effective AML and CFT regimes are considered to be indispensable elements of sound financial systems; and

"(E) emphasize the importance of sound AML and CFT regimes to global growth and development.".

(b) TESTIMONY.—Section 1705(b) of such Act (22 U.S.C. 262r-4(b)) is amended—

(1) by striking "and" at the end of paragraph (2);

(2) by striking the period at the end of paragraph (3) and inserting "; and" and

(3) by adding at the end the following:

"(4) the status of implementation of international anti-money laundering and counter-terrorist financing standards by the International Monetary Fund, the multilateral development banks, and other multilateral financial policymaking bodies.".

**SEC. 4113. COORDINATION OF UNITED STATES GOVERNMENT EFFORTS.**

The Secretary of the Treasury, or the designee of the Secretary as the lead United States Government official to the Financial Action Task Force (FATF), shall continue to convene the interagency United States Government FATF working group. This group, which includes representatives from all relevant federal agencies, shall meet at least once a year to advise the Secretary on policies to be pursued by the United States regarding the development of common international AML and CFT standards, to assess the adequacy and implementation of such standards, and to recommend to the Secretary improved or new standards as necessary.

**SEC. 4114. DEFINITIONS.**

In this subtitle:

(1) INTERNATIONAL FINANCIAL INSTITUTIONS.—The term "international financial institutions" has the meaning given in section 1701(c)(2) of the International Financial Institutions Act.

(2) FINANCIAL ACTION TASK FORCE.—The term "Financial Action Task Force" means the international policy-making and standard-setting body dedicated to combating money laundering and terrorist financing that was created by the Group of Seven in 1989.

# TITLE V—GOVERNMENT RESTRUCTURING

[Subtitles A through F of title V of the Amendment in the Nature of a Substitute consist of subtitles A through F of title V of the bill H.R. 10, as introduced on September 24, 2004]

## Subtitle G—Emergency Financial Preparedness

### CHAPTER 1—EMERGENCY PREPAREDNESS FOR FISCAL AUTHORITIES

**SEC. 5081. DELEGATION AUTHORITY OF THE SECRETARY OF THE TREASURY.**

Subsection (d) of section 306 of title 31, United States Code, is amended by inserting "or employee" after "another officer".

**SEC. 5081A. TREASURY SUPPORT FOR FINANCIAL SERVICES INDUSTRY PREPAREDNESS AND RESPONSE.**

(a) CONGRESSIONAL FINDING.—The Congress finds that the Secretary of the Treasury—

(1) has successfully communicated and coordinated with the private-sector financial services industry about counter-terrorist financing activities and preparedness;

(2) has successfully reached out to State and local governments and regional public-private partnerships, such as ChicagoFIRST, that protect employees and critical infrastructure by enhancing communication and coordinating plans for disaster preparedness and business continuity; and

(3) has set an example for the Department of Homeland Security and other Federal agency partners, whose active participation is vital to the overall success of the activities described in paragraphs (1) and (2).

(b) FURTHER EDUCATION AND PREPARATION EFFORTS.—It is the sense of Congress that the Secretary of the Treasury, in consultation with the Secretary of Homeland Security and other Federal agency partners, should—

(1) furnish sufficient personnel and technological and financial resources to foster the formation of public-private sector coalitions, similar to ChicagoFIRST, that, in collaboration with the Department of Treasury, the Department of Homeland Security, and other Federal agency partners, would educate consumers and employees of the financial services industry about domestic counter-terrorist financing activities, including—

(A) how the public and private sector organizations involved in counter-terrorist financing activities can help to combat terrorism and simultaneously protect and preserve the lives and civil liberties of consumers and employees of the financial services industry; and

(B) how consumers and employees of the financial services industry can assist the public and private sector organizations involved in counter-terrorist financing activities; and

(2) submit annual reports to the Congress on Federal efforts, in conjunction with public-private sector coalitions, to educate consumers and employees of the financial services industry about domestic counter-terrorist financing activities.

## CHAPTER 2—MARKET PREPAREDNESS

### Subchapter A—Netting of Financial Contracts

**SEC. 5082. SHORT TITLE.**

This subchapter may be cited as the "Financial Contracts Bankruptcy Reform Act of 2004".

**SEC. 5082A. TREATMENT OF CERTAIN AGREEMENTS BY CONSERVATORS OR RECEIVERS OF INSURED DEPOSITORY INSTITUTIONS.**

(a) DEFINITION OF QUALIFIED FINANCIAL CONTRACT.—

(1) FDIC-INSURED DEPOSITORY INSTITUTIONS.—Section 11(e)(8)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)) is amended—

(A) by striking "subsection—" and inserting "subsection, the following definitions shall apply:"; and

(B) in clause (i), by inserting ", resolution, or order" after "any similar agreement that the Corporation determines by regulation".

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

(A) by striking "subsection—" and inserting "subsection, the following definitions shall apply:"; and

(B) in clause (i), by inserting ", resolution, or order" after "any similar agreement that the Board determines by regulation".

(b) DEFINITION OF SECURITIES CONTRACT.—

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

"(ii) SECURITIES CONTRACT.—The term 'securities contract'—

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

"(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

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

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

"(V) means any margin loan;

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

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

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

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

"(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.".

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

"(ii) SECURITIES CONTRACT.—The term 'securities contract'—

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

"(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Board determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

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

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

"(V) means any margin loan;

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

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

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

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

"(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.".

(c) DEFINITION OF COMMODITY CONTRACT.—

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

"(iii) COMMODITY CONTRACT.—The term 'commodity contract' means—

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

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

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

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

by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

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

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

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

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

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

"(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.".

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

"(iii) COMMODITY CONTRACT.—The term 'commodity contract' means—

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

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

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

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

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

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

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

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

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

"(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.".

(d) DEFINITION OF FORWARD CONTRACT.—

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

"(iv) FORWARD CONTRACT.—The term 'forward contract' means—

"(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or by-product thereof, with a maturity date more than 2 days after the date the contract is entered into, including, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

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

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

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

"(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.".

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

"(iv) FORWARD CONTRACT.—The term 'forward contract' means—

"(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or by-product thereof, with a maturity date more than 2 days after the date the contract is entered into, including, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

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

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

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

"(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.".

(e) DEFINITION OF REPURCHASE AGREEMENT.—

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

"(v) REPURCHASE AGREEMENT.—The term 'repurchase agreement' (which definition also applies to a reverse repurchase agreement)—

"(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified for-

eign government securities or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

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

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

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

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

"(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

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

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

"(v) REPURCHASE AGREEMENT.—The term 'repurchase agreement' (which definition also applies to a reverse repurchase agreement)—

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

"(II) does not include any repurchase obligation under a participation in a commercial mortgage loan unless the Board determines by regulation, resolution, or order to include any such participation within the meaning of such term;

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

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

"(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement

or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

"(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

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

(f) DEFINITION OF SWAP AGREEMENT.—

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

"(vi) SWAP AGREEMENT.—The term 'swap agreement' means—

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

"(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

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

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

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

"(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

Such term is applicable for purposes of this subsection only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act

of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000.".

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

"(vi) SWAP AGREEMENT.—The term 'swap agreement' means—

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

"(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

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

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

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

"(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

Such term is applicable for purposes of this subsection only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000.".

(g) DEFINITION OF TRANSFER.—

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

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

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

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

(h) TREATMENT OF QUALIFIED FINANCIAL CONTRACTS.—

(1) FDIC-INSURED DEPOSITORY INSTITUTIONS.—Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)) is amended—

(A) in subparagraph (A)—

(i) by striking "paragraph (10)" and inserting "paragraphs (9) and (10)";

(ii) in clause (i), by striking "to cause the termination or liquidation" and inserting "such person has to cause the termination, liquidation, or acceleration"; and

(iii) by striking clause (ii) and inserting the following new clause:

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

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

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

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

(A) in subparagraph (A)—

(i) by striking "paragraph (12)" and inserting "paragraphs (9) and (10)";

(ii) in clause (i), by striking "to cause the termination or liquidation" and inserting "such person has to cause the termination, liquidation, or acceleration"; and

(iii) by striking clause (ii) and inserting the following new clause:

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

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

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

(i) AVOIDANCE OF TRANSFERS.—

(1) FDIC-INSURED DEPOSITORY INSTITUTIONS.—Section 11(e)(8)(C)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(C)(i)) is amended by inserting "section 5242 of the Revised Statutes of the United States or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers," before "the Corporation".

(2) INSURED CREDIT UNIONS.—Section 207(c)(8)(C)(i) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)(C)(i)) is amended by inserting "section 5242 of the Revised Statutes of the United States or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers," before "the Board".

**SEC. 5082B. AUTHORITY OF THE FDIC AND NCUAB WITH RESPECT TO FAILED AND FAILING INSTITUTIONS.**

(a) FEDERAL DEPOSIT INSURANCE CORPORATION.—

(1) IN GENERAL.—Section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)) is amended—

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

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

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

"(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

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

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

(2) TECHNICAL AND CONFORMING AMENDMENT.—Section 11(e)(12)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(12)(A)) is amended by inserting "or the exercise of rights or powers by" after "the appointment of".

(b) NATIONAL CREDIT UNION ADMINISTRATION BOARD.—

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

(A) in subparagraph (E) (as amended by section 2(h)), by striking "other than paragraph (12) of this subsection, subsection (b)(9)" and inserting "other than subsections (b)(9) and (c)(10)"; and

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

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

"(G) WALKAWAY CLAUSES NOT EFFECTIVE.—

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

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

(2) TECHNICAL AND CONFORMING AMENDMENT.—Section 207(c)(12)(A) of the Federal Credit Union Act (12 U.S.C. 1787(c)(12)(A)) is amended by inserting "or the exercise of rights or powers by" after "the appointment of".

**SEC. 5082C. AMENDMENTS RELATING TO TRANSFERS OF QUALIFIED FINANCIAL CONTRACTS.**

(a) FDIC-INSURED DEPOSITORY INSTITUTIONS.—

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

"(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—

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

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

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

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

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

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

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

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

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

"(D) DEFINITIONS.—For purposes of this paragraph, the term 'financial institution' means a broker or dealer, a depository institution, a futures commission merchant, or any other institution, as determined by the Corporation by regulation to be a financial institution, and the term 'clearing organization' has the same meaning as in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991.".

(2) NOTICE TO QUALIFIED FINANCIAL CONTRACT COUNTERPARTIES.—Section 11(e)(10)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(10)(A)) is amended in the material immediately following clause (ii) by striking "the conservator" and all that follows through the period and inserting the following: "the conservator or receiver shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver in the case of a receivership, or the business day following such transfer in the case of a conservatorship.".

(3) RIGHTS AGAINST RECEIVER AND CONSERVATOR AND TREATMENT OF BRIDGE BANKS.—Section 11(e)(10) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(10)) is amended—

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

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

"(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

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

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

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

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

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

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

"(i) A bridge bank.

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

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

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

(b) INSURED CREDIT UNIONS.—

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

"(9) TRANSFER OF QUALIFIED FINANCIAL CONTRACTS.—

"(A) IN GENERAL.—In making any transfer of assets or liabilities of a credit union in default which includes any qualified financial contract, the conservator or liquidating agent for such credit union shall either—

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

"(I) all qualified financial contracts between any person or any affiliate of such person and the credit union in default;

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

"(III) all claims of such credit union against such person or any affiliate of such person under any such contract; and

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

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

"(B) TRANSFER TO FOREIGN BANK, FOREIGN FINANCIAL INSTITUTION, OR BRANCH OR AGENCY OF A FOREIGN BANK OR FINANCIAL INSTITUTION.—In transferring any qualified financial contracts and related claims and property under subparagraph (A)(i), the conservator or liquidating agent for the credit union shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to 1 or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

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

"(D) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'financial institution' means a broker or dealer, a depository institution, a futures commission merchant, a credit union, or any

other institution, as determined by the Board by regulation to be a financial institution; and

"(ii) the term 'clearing organization' has the same meaning as in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991.".

(2) NOTICE TO QUALIFIED FINANCIAL CONTRACT COUNTERPARTIES.—Section 207(c)(10)(A) of the Federal Credit Union Act (12 U.S.C. 1787(c)(10)(A)) is amended in the material immediately following clause (ii) by striking "the conservator" and all that follows through the period and inserting the following: "the conservator or liquidating agent shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the liquidating agent in the case of a liquidation, or the business day following such transfer in the case of a conservatorship.".

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

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

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

"(B) CERTAIN RIGHTS NOT ENFORCEABLE.—

"(i) LIQUIDATION.—A person who is a party to a qualified financial contract with an insured credit union may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or section 403 or 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991, solely by reason of or incidental to the appointment of a liquidating agent for the credit union institution (or the insolvency or financial condition of the credit union for which the liquidating agent has been appointed)—

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

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

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

"(iii) NOTICE.—For purposes of this paragraph, the Board as conservator or liquidating agent of an insured credit union shall be deemed to have notified a person who is a party to a qualified financial contract with such credit union if the Board has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

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

"(i) A bridge bank.

"(ii) A credit union organized by the Board, for which a conservator is appointed either—

"(I) immediately upon the organization of the credit union; or

"(II) at the time of a purchase and assumption transaction between the credit union and the Board as receiver for a credit union in default.".

**SEC. 5082D. AMENDMENTS RELATING TO DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.**

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

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

(2) by inserting after paragraph (10) the following new paragraph:

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

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

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

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

"(ii) the depository institution in default; or

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

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

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

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

(1) by redesignating paragraphs (11), (12), and (13) as paragraphs (12), (13), and (14), respectively;

(2) by inserting after paragraph (10) the following new paragraph:

"(11) DISAFFIRMANCE OR REPUDIATION OF QUALIFIED FINANCIAL CONTRACTS.—In exercising the rights of disaffirmance or repudiation of a conservator or liquidating agent with respect to any qualified financial contract to which an insured credit union is a party, the conservator or liquidating agent for such credit union shall either—

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

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

"(ii) the credit union in default; or

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

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

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

**SEC. 5082E. CLARIFYING AMENDMENT RELATING TO MASTER AGREEMENTS.**

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

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

(b) INSURED CREDIT UNIONS.—Section 207(c)(8)(D) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)(D)) is amended by inserting after clause (vi) (as added by section 5082A(f) of this subchapter) the following new clause:

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

**SEC. 5082F. FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF 1991.**

(a) DEFINITIONS.—Section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4402) is amended—

(1) in paragraph (2)—

(A) in subparagraph (A)(ii), by inserting before the semicolon ", or is exempt from such registration by order of the Securities and Exchange Commission"; and

(B) in subparagraph (B), by inserting before the period ", that has been granted an exemption under section 4(c)(1) of the Commodity Exchange Act, or that is a multilateral clearing organization (as defined in section 408 of this Act)";

(2) in paragraph (6)—

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

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

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

(C) by amending subparagraph (C) (as redesignated) to read as follows:

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

(3) in paragraph (11), by inserting before the period "and any other clearing organization with which such clearing organization has a netting contract";

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

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

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

"(15) PAYMENT.—The term 'payment' means a payment of United States dollars, another currency, or a composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.".

(b) ENFORCEABILITY OF BILATERAL NETTING CONTRACTS.—Section 403 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4403) is amended—

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

"(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).."; and

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

"(f) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).".

(c) ENFORCEABILITY OF CLEARING ORGANIZATION NETTING CONTRACTS.—Section 404 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4404) is amended—

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

"(a) GENERAL RULE.—Notwithstanding any other provision of State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a clearing

organization to and from all other members of a clearing organization shall be netted in accordance with and subject to the conditions of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).''; and

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

''(h) ENFORCEABILITY OF SECURITY AGREEMENTS.—The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 members of a clearing organization shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than paragraphs (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal Deposit Insurance Act, paragraphs (8)(E), (8)(F), and (10)(B) of section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).''.

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

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

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

**''SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED NATIONAL BANKS, UNINSURED FEDERAL BRANCHES AND AGENCIES, CERTAIN UNINSURED STATE MEMBER BANKS, AND EDGE ACT CORPORATIONS.**

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

''(1) any reference to the 'Corporation as receiver' or 'the receiver or the Corporation' shall refer to the receiver appointed by the Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency, or to the receiver appointed by the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act or an uninsured State member bank;

''(2) any reference to the 'Corporation' (other than in section 11(e)(8)(D) of such Act), the 'Corporation, whether acting as such or as conservator or receiver', a 'receiver', or a 'conservator' shall refer to the receiver or conservator appointed by the Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency, or to the receiver or conservator appointed by the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act or an uninsured State member bank; and

''(3) any reference to an 'insured depository institution' or 'depository institution' shall refer to an uninsured national bank, an uninsured Federal branch or Federal agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act.

''(b) LIABILITY.—The liability of a receiver or conservator of an uninsured national bank, uninsured Federal branch or agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, shall be determined in the same manner and subject to the same limitations that apply to receivers and conservators of insured depository institutions under section 11(e) of the Federal Deposit Insurance Act.

''(c) REGULATORY AUTHORITY.—

''(1) IN GENERAL.—The Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency and the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank that operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, in consultation with the Federal Deposit Insurance Corporation, may each promulgate regulations solely to implement this section.

''(2) SPECIFIC REQUIREMENT.—In promulgating regulations, limited solely to implementing paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System each shall ensure that the regulations generally are consistent with the regulations and policies of the Federal Deposit Insurance Corporation adopted pursuant to the Federal Deposit Insurance Act.

"(d) DEFINITIONS.—For purposes of this section, the terms 'Federal branch', 'Federal agency', and 'foreign bank' have the same meanings as in section 1(b) of the International Banking Act of 1978.".

**SEC. 5082G. BANKRUPTCY CODE AMENDMENTS.**

(a) DEFINITIONS OF FORWARD CONTRACT, REPURCHASE AGREEMENT, SECURITIES CLEARING AGENCY, SWAP AGREEMENT, COMMODITY CONTRACT, AND SECURITIES CONTRACT.—Title 11, United States Code, is amended—

(1) in section 101—

(A) in paragraph (25)—

(i) by striking "means a contract" and inserting "means—

"(A) a contract";

(ii) by striking ", or any combination thereof or option thereon;" and inserting ", or any other similar agreement;"; and

(iii) by adding at the end the following:

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

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

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

"(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title;";

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

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

"(47) 'repurchase agreement' (which definition also applies to a reverse repurchase agreement)—

"(A) means—

"(i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptance, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds;

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

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

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

"(v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), including any guarantee or reimbursement obligation by or to a repo participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and

"(B) does not include a repurchase obligation under a participation in a commercial mortgage loan;";

(D) in paragraph (48), by inserting ", or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission," after "1934"; and

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

"(53B) 'swap agreement'—

"(A) means—

"(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is—

"(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;

"(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

"(III) a currency swap, option, future, or forward agreement;

"(IV) an equity index or equity swap, option, future, or forward agreement;

"(V) a debt index or debt swap, option, future, or forward agreement;

"(VI) a total return, credit spread or credit swap, option, future, or forward agreement;

"(VII) a commodity index or a commodity swap, option, future, or forward agreement; or

"(VIII) a weather swap, weather derivative, or weather option;

"(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that—

"(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference therein); and

"(II) is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

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

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

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

"(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and

"(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust In-

denture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000;";

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

"(7) 'securities contract'—

"(A) means—

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

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

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

"(iv) any margin loan;

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

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

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

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

"(ix) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title; and

"(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;"; and

(3) in section 761(4)—

(A) by striking "or" at the end of subparagraph (D); and

(B) by adding at the end the following:

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

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

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

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

"(J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, including any guarantee or reimbursement obligation by or to a commodity broker or financial participant in connection with any agreement or transaction referred to in this paragraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of this title;".

(b) DEFINITIONS OF FINANCIAL INSTITUTION, FINANCIAL PARTICIPANT, AND FORWARD CONTRACT MERCHANT.—Section 101 of title 11, United States Code, is amended—

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

"(22) 'financial institution' means—

"(A) a Federal reserve bank, or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver or conservator for such entity and, when any such Federal reserve bank, receiver, conservator or entity is acting as agent or custodian for a customer in connection with a securities contract (as defined in section 741) such customer; or

"(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940;";

(2) by inserting after paragraph (22) the following:

"(22A) 'financial participant' means—

"(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period; or

"(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991);"; and

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

"(26) 'forward contract merchant' means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;".

(c) DEFINITION OF MASTER NETTING AGREEMENT AND MASTER NETTING AGREEMENT PARTICIPANT.—Section 101 of title 11, United States Code, is amended by inserting after paragraph (38) the following new paragraphs:

"(38A) 'master netting agreement'—

"(A) means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a), or any security agreement or arrangement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing; and

"(B) if the agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any one or more of paragraphs (1) through (5) of section 561(a);

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

(d) SWAP AGREEMENTS, SECURITIES CONTRACTS, COMMODITY CONTRACTS, FORWARD CONTRACTS, REPURCHASE AGREEMENTS, AND MASTER NETTING AGREEMENTS UNDER THE AUTOMATIC-STAY.—

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

(A) in paragraph (6), by inserting ", pledged to, under the control of," after "held by";

(B) in paragraph (7), by inserting ", pledged to, under the control of," after "held by";

(C) by striking paragraph (17) and inserting the following:

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

(D) in paragraph (18) by striking the period at the end and inserting "; or"; and

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

"(19) under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such agreements or against cash, securities, or other property held by, pledged to, under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that such participant is eligible to exercise such offset rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue.".

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

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

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

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

(A) by striking "under a swap agreement";

(B) by striking "in connection with a swap agreement" and inserting "under or in connection with any swap agreement"; and

(C) by inserting "or financial participant" after "swap participant" each place such term appears; and

(2) by adding at the end the following:

"(i) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.".

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

(1) in subparagraph (C), by striking "and" at the end;

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

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

"(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.".

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

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

**"§ 555. Contractual right to liquidate, terminate, or accelerate a securities contract"**;

(2) in the first sentence, by striking "liquidation" and inserting "liquidation, termination, or acceleration".

(h) TERMINATION OR ACCELERATION OF COMMODITIES OR FORWARD CONTRACTS.—Section 556 of title 11, United States Code, is amended—

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

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

(2) in the first sentence, by striking "liquidation" and inserting "liquidation, termination, or acceleration"; and

(3) in the second sentence, by striking "As used" and all that follows through "right," and inserting "As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right,".

(i) TERMINATION OR ACCELERATION OF REPURCHASE AGREEMENTS.—Section 559 of title 11, United States Code, is amended—

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

**"§ 559. Contractual right to liquidate, terminate, or accelerate a repurchase agreement"**;

(2) in the first sentence, by striking "liquidation" and inserting "liquidation, termination, or acceleration"; and

(3) in the third sentence, by striking "As used" and all that follows through "right," and inserting "As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right,".

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

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

**"§ 560. Contractual right to liquidate, terminate, or accelerate a swap agreement"**;

(2) in the first sentence, by striking "termination of a swap agreement" and inserting "liquidation, termination, or acceleration of one or more swap agreements";

(3) by striking "in connection with any swap agreement" and inserting "in connection with the termination, liquidation, or acceleration of one or more swap agreements"; and

(4) in the second sentence, by striking "As used" and all that follows through "right," and inserting "As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof and a right,".

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

(1) IN GENERAL.—Title 11, United States Code, is amended by inserting after 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**

"(a) Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment amounts, or

other transfer obligations arising under or in connection with one or more (or the termination, liquidation, or acceleration of one or more)—

"(1) securities contracts, as defined in section 741(7);

"(2) commodity contracts, as defined in section 761(4);

"(3) forward contracts;

"(4) repurchase agreements;

"(5) swap agreements; or

"(6) master netting agreements,

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

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

"(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7—

"(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a) except to the extent that the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

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

"(3) No provision of subparagraph (A) or (B) of paragraph (2) shall prohibit the offset of claims and obligations that arise under—

"(A) a cross-margining agreement or similar arrangement that has been approved by the Commodity Futures Trading Commission or submitted to the Commodity Futures Trading Commission under paragraph (1) or (2) of section 5c(c) of the Commodity Exchange Act and has not been abrogated or rendered ineffective by the Commodity Futures Trading Commission; or

"(B) any other netting agreement between a clearing organization (as defined in section 761) and another entity that has been approved by the Commodity Futures Trading Commission.

"(c) As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof, and a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

"(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under section 304, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).".

(2) CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 11, United States Code, is amended by inserting after the item relating 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.".

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

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

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

(m) STOCKBROKER LIQUIDATIONS.—Title 11, United States Code, is amended by inserting after 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**

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

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

(1) in subsection (a)(2)(B)(ii), by inserting before the semicolon the following: "(except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(19), 555, 556, 559, 560, or 561)";

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

(3) in subsection (b)(1), by striking "362(b)(14)," and inserting "362(b)(17), 362(b)(19), 555, 556, 559, 560, 561,".

(o) SECURITIES CONTRACTS, COMMODITY CONTRACTS, AND FORWARD CONTRACTS.—Title 11, United States Code, is amended—

(1) in section 362(b)(6), by striking "financial institutions," each place such term appears and inserting "financial institution, financial participant,";

(2) in sections 362(b)(7) and 546(f), by inserting "or financial participant" after "repo participant" each place such term appears;

(3) in section 546(e), by inserting "financial participant," after "financial institution,";

(4) in section 548(d)(2)(B), by inserting "financial participant," after "financial institution,";

(5) in section 548(d)(2)(C), by inserting "or financial participant" after "repo participant";

(6) in section 548(d)(2)(D), by inserting "or financial participant" after "swap participant";

(7) in section 555—

(A) by inserting "financial participant," after "financial institution,"; and

(B) by striking the second sentence and inserting the following: "As used in this section, the term 'contractual right' includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act), or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice";

(8) in section 556, by inserting ", financial participant," after "commodity broker";

(9) in section 559, by inserting "or financial participant" after "repo participant" each place such term appears; and

(10) in section 560, by inserting "or financial participant" after "swap participant".

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

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

(A) by amending the items relating to sections 555 and 556 to read as follows:

"555. Contractual right to liquidate, terminate, or accelerate a securities contract.
"556. Contractual right to liquidate, terminate, or accelerate a commodities contract or forward contract.";

and

(B) by amending the items relating to sections 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 agreement.";

and

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

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

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

and

(B) by inserting after the item relating to 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.".

**SEC. 5082H. RECORDKEEPING REQUIREMENTS.**

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

"(H) RECORDKEEPING REQUIREMENTS.—The Corporation, in consultation with the appropriate Federal banking agencies and the National Credit Union Administration Board, may prescribe regulations requiring more detailed recordkeeping by any insured depository institution with respect to qualified financial contracts (including market valuations) only if such insured depository institution is in a troubled condition (as such term is defined by the Corporation pursuant to section 32).".

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

"(H) RECORDKEEPING REQUIREMENTS.—The Board, in consultation with the appropriate Federal banking agencies, may prescribe regulations requiring more detailed recordkeeping by any insured credit union with respect to qualified financial contracts (including market valuations) only if such insured credit union is in a troubled condition (as such term is defined by the Board pursuant to section 212).".

**SEC. 5082I. EXEMPTIONS FROM CONTEMPORANEOUS EXECUTION REQUIREMENT.**

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

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

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

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

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

"(D) one or more qualified financial contracts, as defined in section 11(e)(8)(D),

shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.".

**SEC. 5082J. DAMAGE MEASURE.**

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

(1) by inserting after section 561, as added by section 5082G(k)(1) of this subchapter, the following:

**"§ 562. Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements**

"(a) If the trustee rejects a swap agreement, securities contract (as defined in section 741), forward contract, commodity contract (as defined in section 761), repurchase agreement, or master netting agreement pursuant to section 365(a), or if a

forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant liquidates, terminates, or accelerates such contract or agreement, damages shall be measured as of the earlier of—

"(1) the date of such rejection; or

"(2) the date or dates of such liquidation, termination, or acceleration.

"(b) If there are not any commercially reasonable determinants of value as of any date referred to in paragraph (1) or (2) of subsection (a), damages shall be measured as of the earliest subsequent date or dates on which there are commercially reasonable determinants of value.

"(c) For the purposes of subsection (b), if damages are not measured as of the date or dates of rejection, liquidation, termination, or acceleration, and the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant or the trustee objects to the timing of the measurement of damages—

"(1) the trustee, in the case of an objection by a forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant; or

"(2) the forward contract merchant, stockbroker, financial institution, securities clearing agency, repo participant, financial participant, master netting agreement participant, or swap participant, in the case of an objection by the trustee,

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

(2) in the table of sections for chapter 5, by inserting after the item relating to section 561 (as added by section 5082G(k)(2) of this subchapter) the following new item:

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

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

(1) by inserting "(1)" after "(g)"; and

(2) by adding at the end the following:

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

**SEC. 5082K. SIPC STAY.**

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

"(C) EXCEPTION FROM STAY.—

"(i) Notwithstanding section 362 of title 11, United States Code, neither the filing of an application under subsection (a)(3) nor any order or decree obtained by SIPC from the court shall operate as a stay of any contractual rights of a creditor to liquidate, terminate, or accelerate a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, as those terms are defined in sections 101, 741, and 761 of title 11, United States Code, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more of such contracts or agreements, or to foreclose on any cash collateral pledged by the debtor, whether or not with respect to one or more of such contracts or agreements.

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

"(iii) As used in this subparagraph, the term 'contractual right' includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency, a right set forth in a bylaw of a clearing organization or contract market or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.".

**SEC. 5082L. APPLICABILITY OF OTHER SECTIONS TO CHAPTER 9.**

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

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

(2) by inserting "559, 560, 561, 562" after "557,".

**SEC. 5082M. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.**

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

(b) APPLICATION OF AMENDMENTS.—The amendments made by this subchapter shall apply with respect to cases commenced or appointments made under any Federal or State law on or after the date of enactment of this Act, but shall not apply with respect to cases commenced or appointments made under any Federal or State law before the date of enactment of this Act.

**SEC. 5082N. SAVINGS CLAUSE.**

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

## Subchapter B—Emergency Securities Response

**SEC. 5086. SHORT TITLE.**

This subchapter may be cited as the "Emergency Securities Response Act of 2004".

**SEC. 5087. EXTENSION OF EMERGENCY ORDER AUTHORITY OF THE SECURITIES AND EXCHANGE COMMISSION.**

(a) EXTENSION OF AUTHORITY.—Paragraph (2) of section 12(k) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*(k)(2)) is amended to read as follows:

"(2) EMERGENCY.—(A) The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under the securities laws, as the Commission determines is necessary in the public interest and for the protection of investors—

"(i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities);

"(ii) to ensure prompt, accurate, and safe clearance and settlement of transactions in securities (other than exempted securities); or

"(iii) to reduce, eliminate, or prevent the substantial disruption by the emergency of (I) securities markets (other than markets in exempted securities), investment companies, or any other significant portion or segment of such markets, or (II) the transmission or processing of securities transactions (other than transactions in exempted securities).

"(B) An order of the Commission under this paragraph (2) shall continue in effect for the period specified by the Commission, and may be extended. Except as provided in subparagraph (C), the Commission's action may not continue in effect for more than 30 business days, including extensions.

"(C) An order of the Commission under this paragraph (2) may be extended to continue in effect for more than 30 business days if, at the time of the extension, the Commission finds that the emergency still exists and determines that the continuation of the order beyond 30 business days is necessary in the public interest and for the protection of investors to attain an objective described in clause (i), (ii), or (iii) of subparagraph (A). In no event shall an order of the Commission under this paragraph (2) continue in effect for more than 90 calendar days.

"(D) If the actions described in subparagraph (A) involve a security futures product, the Commission shall consult with and consider the views of the Commodity Futures Trading Commission. In exercising its authority under this paragraph, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code, or with the provisions of section 19(c) of this title.

"(E) Notwithstanding the exclusion of exempted securities (and markets therein) from the Commission's authority under subparagraph (A), the Commission may use such authority to take action to alter, supplement, suspend, or impose requirements or restrictions with respect to clearing agencies for trans-

actions in such exempted securities. In taking any action under this subparagraph, the Commission shall consult with and consider the views of the Secretary of the Treasury.".

(b) CONSULTATION; DEFINITION OF EMERGENCY.—Section 12(k) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*(k)) is further amended by striking paragraph (6) and inserting the following:

"(6) CONSULTATION.—Prior to taking any action described in paragraph (1)(B), the Commission shall consult with and consider the views of the Secretary of the Treasury, Board of Governors of the Federal Reserve System, and the Commodity Futures Trading Commission, unless such consultation is impracticable in light of the emergency.

"(7) DEFINITIONS.—

"(A) EMERGENCY.—For purposes of this subsection, the term 'emergency' means—

"(i) a major market disturbance characterized by or constituting—

"(I) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or

"(II) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or

"(ii) a major disturbance that substantially disrupts, or threatens to substantially disrupt—

"(I) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or

"(II) the transmission or processing of securities transactions.

"(B) SECURITIES LAWS.—Notwithstanding section 3(a)(47), for purposes of this subsection, the term 'securities laws' does not include the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.).".

**SEC. 5088. PARALLEL AUTHORITY OF THE SECRETARY OF THE TREASURY WITH RESPECT TO GOVERNMENT SECURITIES.**

Section 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*–5) is amended by adding at the end the following new subsection:

"(h) EMERGENCY AUTHORITY.—The Secretary may by order take any action with respect to a matter or action subject to regulation by the Secretary under this section, or the rules of the Secretary thereunder, involving a government security or a market therein (or significant portion or segment of that market), that the Commission may take under section 12(k)(2) of this title with respect to transactions in securities (other than exempted securities) or a market therein (or significant portion or segment of that market).".

**SEC. 5089. JOINT REPORT ON IMPLEMENTATION OF FINANCIAL SYSTEM RESILIENCE RECOMMENDATIONS.**

(a) REPORT REQUIRED.—Not later than April 30, 2006, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Securities and Exchange Commission shall prepare and submit to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a joint report on the efforts of the private sector to implement the Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System.

(b) CONTENTS OF REPORT.—The report required by subsection (a) shall—

(1) examine the efforts to date of covered private sector financial services firms to implement enhanced business continuity plans;

(2) examine the extent to which the implementation of business continuity plans has been done in a geographically dispersed manner, including an analysis of the extent to which such firms have located their main and backup facilities in separate electrical networks, in different watersheds, in independent transportation systems, and using separate telecommunications centers;

(3) examine the need to cover more financial services entities than those covered by the Interagency Paper; and

(4) recommend legislative and regulatory changes that will—

(A) expedite the effective implementation of the Interagency Paper by all covered financial services entities; and

(B) maximize the effective implementation of business continuity planning by all participants in the financial services industry.

(c) CONFIDENTIALITY.—Any information provided to the Federal Reserve Board, the Comptroller of the Currency, or the Securities and Exchange Commission for the purposes of the preparation and submission of the report required by subsection (a)

shall be treated as privileged and confidential. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(d) DEFINITION.—The Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System is the interagency paper prepared by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Securities and Exchange Commission that was announced in the Federal Register on April 8, 2003.

**SEC. 5089A. PRIVATE SECTOR PREPAREDNESS.**

It is the sense of the Congress that the insurance industry and credit-rating agencies, where relevant, should carefully consider a company's compliance with standards for private sector disaster and emergency preparedness in assessing insurability and creditworthiness, to ensure that private sector investment in disaster and emergency preparedness is appropriately encouraged.

**SEC. 5089B. REPORT ON PUBLIC/PRIVATE PARTNERSHIPS.**

Before the end of the 6-month period beginning on the date of the enactment of this Act, the Secretary of the Treasury shall submit a report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate containing—

(1) information on the efforts the Department of the Treasury has made to encourage the formation of public/private partnerships to protect critical financial infrastructure and the type of support that the Department has provided to these partnerships; and

(2) recommendations for administrative or legislative action regarding these partnerships as the Secretary may determine to be appropriate.

## Subtitle H—Other Matters

[Subtitle H of title V of the Amendment in the Nature of a Substitute consists of subtitle H of title V of the bill H.R. 10, as introduced on September 24, 2004]

### PURPOSE AND SUMMARY

The portions of H.R. 10 within the jurisdiction of the Financial Services Committee will authorize new funding for the fight against the financing of terror, give the government new tools to fight the funding of terrorism, take steps both to help prevent an attack on the financial system and to make the system and markets more resilient in case of another attack, and establish tools to improve international cooperation in the fight against terror funding. Among the major elements of the legislation are: additional authorizations for the Treasury Department's Financial Crimes Enforcement Network (FinCEN), to reduce the Bank Secrecy Act compliance burden on financial institutions while significantly increasing the usefulness of FinCEN's data to law enforcement; a series of purely technical corrections to the anti-terror finance title of the USA PATRIOT Act; language to tighten laws governing the counterfeiting of U.S. currency; authority for the Treasury Department to help countries strengthen their own currencies against counterfeiting; tools to close the Internet gambling loophole which provides a dangerous opportunity for the financing of terror; legislation to provide for the orderly unwinding of certain financial contracts where one party becomes insolvent, thus minimizing the risk of market disruption in the case of attack; and language aimed at improving international cooperation to combat the financing of terror, including a requirement for the Treasury Secretary to report annually on anti-terrorist financing initiatives and language supporting codification of interagency cooperation before international sessions held to set standards for anti-terrorist financing.

## BACKGROUND AND NEED FOR LEGISLATION

On November 27, 2002, President Bush signed legislation creating the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) (Public Law 107–306), which was directed to investigate the "facts and circumstances relating to the terrorist attacks of September 11, 2001," including those relating to intelligence agencies, law enforcement agencies, diplomacy, immigration issues and border control, the flow of assets to terrorist organizations, and the role of congressional oversight and resource allocation. To fulfill its mandate, the 9/11 Commission reviewed over 2.5 million pages of documents, conducted interviews of some 1,200 individuals in ten countries, and held 19 days of public hearings featuring testimony from 160 witnesses. On July 22, 2004, the 9/11 Commission issued a 567-page report on its investigation.

On August 23, 2004, the Committee held a hearing on those findings and recommendations of the 9/11 Commission that relate to terrorist financing and other matters within the Committee's purview. The Committee received testimony from 9/11 Commission Vice-Chairman Lee Hamilton, as well as representatives of the Treasury Department, the Department of Justice, and the Department of Homeland Security.

The bulk of the 9/11 Commission's final report centers on reorganizing and strengthening the Nation's intelligence capabilities to prevent another large-scale terrorist attack. While the 9/11 Commission made no specific legislative recommendations on terrorist financing issues, both its final report and Vice-Chairman Hamilton's August 23, 2004, testimony contained findings that are of legislative interest to the Committee, including the following:

- Vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts.
- Since 9/11, the U.S. financial services sector and some of its international counterparts have provided law enforcement agencies with "extraordinary cooperation" to support quickly developing counter-terrorism investigations. Because financial institutions are in the best position to understand and identify problematic transactions or accounts, continued enforcement of the Bank Secrecy Act (BSA) rules for financial institutions, particularly in the area of Suspicious Activity Reporting, is necessary.
- Investigators need the right tools to identify customers and trace financial transactions in fast-moving counterterrorism investigations.
- While the financial provisions enacted after 9/11, particularly those contained in title III of the USA PATRIOT Act and subsequent regulations, have succeeded in addressing obvious vulnerabilities in the domestic financial system, the U.S. has been less successful in persuading other countries to adopt financial regulations that would permit the tracing of financial transactions.

Enacted shortly after the September 11, 2001, attacks, title III of the USA PATRIOT Act (Public Law 107–56) represents easily the most far-reaching anti-money laundering legislation since the original Bank Secrecy Act was enacted in 1970. It gives U.S. law enforcement agencies new tools with which to attack the financial infrastructure of terrorism, and new authority, to share information and better coordinate their efforts with the intelligence com-

munity and the financial services industry. The law enlists a broad range of commercial entities beyond traditional depository institutions in the financial war against terrorism, through provisions requiring across-the-board implementation of anti-money laundering programs and enhanced regulatory and law enforcement scrutiny of informal or underground financial networks, such as the hawala system used by al Qaeda and other terrorist groups. Title III includes strong measures for tracking and interrupting the flow of criminal funds through off-shore secrecy havens, countries characterized by a lack of financial transparency and minimal cooperation with U.S. law enforcement efforts. The USA PATRIOT Act also imposes significant new identification requirements on individuals seeking to open accounts at financial institutions, designed to make it more difficult for terrorists to gain entry to the U.S. financial system.

The Committee has performed rigorous oversight of the implementation of title III and other aspects of the Government's efforts to combat terrorist financing, holding 14 full Committee and subcommittee hearings on those issues since 9/11. While the 9/11 Commission made no legislative recommendations on issues that fall within the Committee's jurisdiction, the Commission found that "vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts," and that new ways of fostering inter-agency and international cooperation are essential to the fight against terrorist financing. The Commission also found that "terrorists have shown considerable creativity in their methods for moving money." Expanding upon this point in his August 23, 2004 testimony, 9/11 Commission Vice-Chairman Hamilton stated:

> While we have spent significant resources examining the ways al Qaeda raised and moved money, we are under no illusions that the next attack will use similar methods. As the government has moved to close financial vulnerabilities and loopholes, al Qaeda adapts. We must continually examine our system for loopholes that al Qaeda can exploit, and close them as they are uncovered. This will require constant efforts on the part of this Committee, working with the financial industry, their regulators and the law enforcement and intelligence community.

The Committee believes that it is important to note the rationale for two provisions which are included in its recommended amendment which were not included in the introduced version of the bill. The first, a provision prohibiting the use of the payments system to conduct unlawful Internet gambling, is the text of H.R. 2143 as it passed the House. This provision responds to the 9/11 Commission's call for a continuous examination of the financial system for loopholes which terrorists such as al Qaeda can exploit. Enactment of this provision will close a specific loophole that the Federal Bureau of Investigation and the Department of Justice have both identified in testimony before the Committee as being vulnerable to use in terrorist financing schemes, largely because of the speed and anonymity with which Internet gambling can be conducted.

The second provision which deserves special mention is the inclusion of provisions addressing the "netting" of financial contracts. While these complicated but non-controversial provisions were originally imagined as an important tool in resolving the insolvency of financial firms, they have taken on greater importance in the period since the events of September 11, 2001 and the specific targeting of several large financial institutions by terrorists in recent months. The effects on the Nation's economy of a successful attack on any sizable financial firm could be catastrophic. With a single, well-placed attack, literally tens of billions of dollars could disappear from the Nation's economy. As Chairman of the Federal Reserve Alan Greenspan wrote in a recent letter to the Chairman of the Committee, "Should a terrorist attack result in the insolvency of one or more market participants, such uncertainty would unnecessarily place the financial system at greater risk in what unquestionably would be an especially dangerous period." Without the tools contained in these provisions, originally reported by the Committee as H.R. 2120, recovery from such an attack could be far from certain.

The Committee's amendment to H.R. 10 constitutes its response to the 9/11 Commission's call for constant vigilance, and builds on landmark provisions of the USA PATRIOT Act that the Commission concluded have significantly advanced efforts to combat the financing of terrorism.

## HEARINGS

The Committee on Financial Services held a hearing on September 22, 2004 entitled "Legislative Proposals to Implement the Recommendations of the 9/11 Commission." Those proposals formed the basis of the Committee's legislative contributions to the legislation introduced as H.R. 10, the 9/11 Recommendations mplementation Act. The following witnesses testified: The Honorable Stuart A. Levey, Under Secretary for the Office of Terrorism and Financial Intelligence, Department of the Treasury and The Honorable Brian C. Roseboro, Under Secretary for Domestic Finance, Department of the Treasury.

## COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on September 29, 2004, and ordered H.R. 10, the 9/11 Recommendations Implementation Act, favorably reported to the House, with an amendment, by a voice vote.

## COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The following amendments were considered by record vote. The names of members voting for and against follow.

An amendment to the amendment in the nature of a substitute by Mr. Paul, no. 1b, changing the standards under which a financial institution must file a suspicious activity report, was not agreed to by a record vote of 10 yeas and 58 nays (Record vote no. FC–22).

RECORD VOTE NO. FC–22

| Representative | Aye | Nay | Present | Representative | Aye | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Oxley | | X | | Mr. Frank (MA) | | X | |
| Mr. Leach | | | | Mr. Kanjorski | | X | |
| Mr. Baker | | X | | Ms. Waters | X | | |
| Mr. Bachus | | X | | Mr. Sanders | X | | |
| Mr. Castle | | X | | Mrs. Maloney | | X | |
| Mr. King | | X | | Mr. Gutierrez | | X | |
| Mr. Royce | | X | | Ms. Velázquez | | X | |
| Mr. Lucas (OK) | | | | Mr. Watt | X | | |
| Mr. Ney | | X | | Mr. Ackerman | | X | |
| Mrs. Kelly | | X | | Ms. Hooley (OR) | | X | |
| Mr. Paul | X | | | Ms. Carson (IN) | | X | |
| Mr. Gillmor | X | | | Mr. Sherman | | X | |
| Mr. Ryun (KS) | | X | | Mr. Meeks (NY) | | X | |
| Mr. LaTourette | | X | | Ms. Lee | X | | |
| Mr. Manzullo | X | | | Mr. Inslee | | X | |
| Mr. Jones (NC) | X | | | Mr. Moore | | X | |
| Mr. Ose | | X | | Mr. Capuano | | X | |
| Mrs. Biggert | | X | | Mr. Ford | | X | |
| Mr. Green (WI) | | X | | Mr. Hinojosa | | X | |
| Mr. Toomey | X | | | Mr. Lucas (KY) | | X | |
| Mr. Shays | | X | | Mr. Crowley | | X | |
| Mr. Shadegg | | X | | Mr. Clay | | X | |
| Mr. Fossella | | X | | Mr. Israel | | X | |
| Mr. Gary G. Miller (CA) | | X | | Mr. Ross | | X | |
| Ms. Hart | | X | | Mrs. McCarthy (NY) | | X | |
| Mrs. Capito | | X | | Mr. Baca | | X | |
| Mr. Tiberi | | X | | Mr. Matheson | | X | |
| Mr. Kennedy (MN) | | X | | Mr. Lynch | | X | |
| Mr. Feeney | | X | | Mr. Miller (NC) | | X | |
| Mr. Hensarling | | X | | Mr. Emanuel | | X | |
| Mr. Garrett (NJ) | X | | | Mr. Scott (GA) | | X | |
| Mr. Murphy | | X | | Mr. Davis (AL) | | X | |
| Ms. Ginny Brown-Waite (FL) | | X | | Mr. Bell | | X | |
| Mr. Barrett (SC) | | X | | | | | |
| Ms. Harris | | X | | | | | |
| Mr. Renzi | | X | | | | | |
| Mr. Gerlach | | X | | | | | |

*Mr. Sanders is an independent, but caucuses with the Democratic Caucus.

An amendment to the amendment in the nature of a substitute by Mr. Inslee, no. 1n, amending the Fair Credit Reporting Act to change the procedures under which officials of certain law enforcement and intelligence agencies may obtain credit reports, was not agreed to by a record vote of 33 yeas and 35 nays (Record vote no. FC–23).

RECORD VOTE NO. FC–23

| Representative | Aye | Nay | Present | Representative | Aye | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Oxley | | X | | Mr. Frank (MA) | X | | |
| Mr. Leach | | | | Mr. Kanjorski | X | | |
| Mr. Baker | | X | | Ms. Waters | X | | |
| Mr. Bachus | | X | | Mr. Sanders | X | | |
| Mr. Castle | | X | | Mrs. Maloney | X | | |
| Mr. King | | X | | Mr. Gutierrez | X | | |
| Mr. Royce | | X | | Ms. Velázquez | X | | |
| Mr. Lucas (OK) | | | | Mr. Watt | X | | |
| Mr. Ney | | X | | Mr. Ackerman | X | | |
| Mrs. Kelly | | X | | Ms. Hooley (OR) | X | | |
| Mr. Paul | | X | | Ms. Carson (IN) | X | | |
| Mr. Gillmor | | X | | Mr. Sherman | X | | |
| Mr. Ryun (KS) | | X | | Mr. Meeks (NY) | X | | |

RECORD VOTE NO. FC–23—Continued

| Representative | Aye | Nay | Present | Representative | Aye | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. LaTourette | | X | | Ms. Lee | X | | |
| Mr. Manzullo | | X | | Mr. Inslee | X | | |
| Mr. Jones (NC) | | X | | Mr. Moore | X | | |
| Mr. Ose | | X | | Mr. Capuano | X | | |
| Mrs. Biggert | | X | | Mr. Ford | X | | |
| Mr. Green (WI) | | X | | Mr. Hinojosa | X | | |
| Mr. Toomey | | X | | Mr. Lucas (KY) | X | | |
| Mr. Shays | | X | | Mr. Crowley | X | | |
| Mr. Shadegg | | X | | Mr. Clay | X | | |
| Mr. Fossella | | X | | Mr. Israel | X | | |
| Mr. Gary G. Miller (CA) | | X | | Mr. Ross | X | | |
| Ms. Hart | | X | | Mrs. McCarthy (NY) | X | | |
| Mrs. Capito | | X | | Mr. Baca | X | | |
| Mr. Tiberi | | X | | Mr. Matheson | X | | |
| Mr. Kennedy (MN) | | X | | Mr. Lynch | X | | |
| Mr. Feeney | | X | | Mr. Miller (NC) | X | | |
| Mr. Hensarling | | X | | Mr. Emanuel | X | | |
| Mr. Garrett (NJ) | | X | | Mr. Scott (GA) | X | | |
| Mr. Murphy | | X | | Mr. Davis (AL) | X | | |
| Ms. Ginny Brown-Waite (FL) | | X | | Mr. Bell | X | | |
| Mr. Barrett (SC) | | X | | | | | |
| Ms. Harris | | X | | | | | |
| Mr. Renzi | | X | | | | | |
| Mr. Gerlach | | X | | | | | |

*Mr. Sanders is an independent, but caucuses with the Democratic Caucus.

An amendment to the amendment in the nature of a substitute by Mr. Royce, no. 1o, limiting the forms of identification that may be accepted from non-United States persons by financial institutions, was not agreed to by a record vote of 22 yeas and 47 nays (Record vote no. FC–24).

RECORD VOTE NO. FC–24

| Representative | Aye | Nay | Present | Representative | Aye | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Oxley | | X | | Mr. Frank (MA) | | X | |
| Mr. Leach | | X | | Mr. Kanjorski | | X | |
| Mr. Baker | | X | | Ms. Waters | | X | |
| Mr. Bachus | | X | | Mr. Sanders | | X | |
| Mr. Castle | | X | | Mrs. Maloney | | X | |
| Mr. King | | X | | Mr. Gutierrez | | X | |
| Mr. Royce | X | | | Ms. Velázquez | | X | |
| Mr. Lucas (OK) | | | | Mr. Watt | | X | |
| Mr. Ney | X | | | Mr. Ackerman | | X | |
| Mrs. Kelly | X | | | Ms. Hooley (OR) | | X | |
| Mr. Paul | X | | | Ms. Carson (IN) | | X | |
| Mr. Gillmor | X | | | Mr. Sherman | | X | |
| Mr. Ryun (KS) | X | | | Mr. Meeks (NY) | | X | |
| Mr. LaTourette | X | | | Ms. Lee | | X | |
| Mr. Manzullo | X | | | Mr. Inslee | | X | |
| Mr. Jones (NC) | X | | | Mr. Moore | | X | |
| Mr. Ose | | X | | Mr. Capuano | | X | |
| Mrs. Biggert | | X | | Mr. Ford | | X | |
| Mr. Green (WI) | X | | | Mr. Hinojosa | | X | |
| Mr. Toomey | | X | | Mr. Lucas (KY) | | X | |
| Mr. Shays | X | | | Mr. Crowley | | X | |
| Mr. Shadegg | X | | | Mr. Clay | | X | |
| Mr. Fossella | | X | | Mr. Israel | | X | |
| Mr. Gary G. Miller (CA) | X | | | Mr. Ross | | X | |
| Ms. Hart | | X | | Mrs. McCarthy (NY) | | X | |
| Mrs. Capito | X | | | Mr. Baca | | X | |
| Mr. Tiberi | | X | | Mr. Matheson | | X | |
| Mr. Kennedy (MN) | | X | | Mr. Lynch | | X | |

RECORD VOTE NO. FC–24—Continued

| Representative | Aye | Nay | Present | Representative | Aye | Nay | Present |
|---|---|---|---|---|---|---|---|
| Mr. Feeney | X | | | Mr. Miller (NC) | | X | |
| Mr. Hensarling | | X | | Mr. Emanuel | | X | |
| Mr. Garrett (NJ) | X | | | Mr. Scott (GA) | | X | |
| Mr. Murphy | X | | | Mr. Davis (AL) | | X | |
| Ms. Ginny Brown-Waite (FL) | X | | | Mr. Bell | | X | |
| Mr. Barrett (SC) | X | | | | | | |
| Ms. Harris | X | | | | | | |
| Mr. Renzi | X | | | | | | |
| Mr. Gerlach | | X | | | | | |

*Mr. Sanders is an independent, but caucuses with the Democratic Caucus.

The following other amendments were also considered:

An amendment in the nature of a substitute by Mr. Oxley, containing the legislative recommendations of the Committee on Financial Services in response to the findings of the 9/11 Commission, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mr. Kanjorski, no. 1a, providing for a joint report on implementation of financial system resilience recommendations, was agreed to by a voice vote.

A substitute amendment to the amendment in the nature of a substitute by Mrs. Maloney, no. 1c, substituting the text of the bill H.R. 5150, the National Intelligence Reform Act of 2004, was ruled out of order by the Chair.

An amendment to the amendment in the nature of a substitute by Mrs. Biggert, no. 1d, providing for coordination with the Secretary of the Treasury regarding international financial institutions, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mr. Baca, no. 1e, expressing the sense of Congress with regard to private sector preparedness, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mrs. Biggert, no. 1f, expressing the sense of Congress with regard to support for financial services industry preparedness and response by the Department of the Treasury, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mrs. Maloney, no. 1g, establishing a critical infrastructure support program, was withdrawn.

An amendment to the amendment in the nature of a substitute by Ms. Harris, no. 1h, providing for an exclusion from the Fair Credit Reporting Act for certain information exchange networks, was withdrawn.

An amendment to the amendment in the nature of a substitute by Mr. Inslee, no. 1i, clarifying the definition of "lawful transaction", was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mr. Inslee, no. 1j, granting tribal authorities the same exception as State and local authorities, was withdrawn.

An amendment to the amendment in the nature of a substitute by Mrs. Kelly, no. 1k, requiring certain financial institutions to report certain cross-border electronic transmittals of funds, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mr. Emanuel, no. 1l, requiring a report on public/private partnerships, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mrs. Kelly, no. 1m, establishing the office of terrorism and financial intelligence in the Department of the Treasury, was not agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mr. Gutierrez, no. 1p, providing for post-employment limitations on leading bank examiners, was agreed to by a voice vote.

An amendment to the amendment in the nature of a substitute by Mrs. Kelly, no. 1q, regarding certification procedures to deter financial support for domestic or international terrorism, was withdrawn.

## COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a hearing and made findings that are reflected in this report.

## PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The Secretary of the Treasury and the appropriate financial regulators will use the authority granted by this legislation to improve the Nation's ability to detect, seize, and freeze assets used in the financing of terrorist activities directed at the United States at home and abroad.

## NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that this legislation would result in no new budget authority, entitlement authority, or tax expenditures or revenues.

## COMMITTEE AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATES

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The Chairman will cause such estimate to be printed in either a supplemental report or the Congressional Record when it is available.

## FEDERAL MANDATES STATEMENT

The estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act was not available for inclusion in this report. The Chairman will cause such estimate to be printed either in a supplemental report or the Congressional Record when it is available.

ADVISORY COMMITTEE STATEMENT

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

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional Authority of Congress to enact this legislation is provided by Article 1, section 8, clause 1 (relating to the general welfare of the United States) clause 3 (relating to the power to regulate interstate commerce) and clause 5 (relating to the power to coin money).

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

This section-by-section analysis contains only those provisions in H.R. 10, as introduced, which fall within the jurisdiction of the Committee on Financial Services, or added by the Committee's amendment.

## TITLE II—TERRORISM PREVENTION AND PROSECUTION

### Subtitle E—Money Laundering and Terrorist Financing

#### CHAPTER 1—FUNDING TO COMBAT FINANCIAL CRIMES INCLUDING TERRORIST FINANCING

*Section 2101. Additional authorization for FinCEN*

This section authorizes funding for a series of technology enhancements to (1) improve the usefulness of data maintained by the Financial Crimes Enforcement Network, the Treasury's anti-terror finance unit, while reducing the compliance burden on financial institutions; and (2) initiate an office to improve compliance with the requirements of the Bank Secrecy Act (BSA), as enhanced by the USA PATRIOT Act. Among the programs authorized by this section, the "BSA Direct" program completely redesigns the way FinCEN accepts data from financial institutions in compliance with the BSA, the way law enforcement queries the database, and the way FinCEN, acting with law enforcement, shares data with financial institutions about particular individuals or entities of interest.

*Section 2102. Money laundering and financial crimes strategy reauthorization*

This section contains a short-term reauthorization of provisions first enacted in 1998 (Public Law 105–310) which require the Secretary of the Treasury, in consultation with the Attorney General and a number of other Federal financial regulators and Federal and State law enforcement agencies, to submit to Congress a national strategy for combating money laundering and related finan-

cial crimes, to include efforts directed at the prevention, detection, and prosecution of the funding of acts of international terrorism.

The Committee believes that the potential exists for terror organizations to self-finance with counterfeit currency, and strongly encourages the Department of Treasury to consider that possibility as part of its implementation of a national money laundering strategy.

The section also authorizes the appropriation of $15 million in both fiscal years 2004 and 2005, to fund the designation of high risk money laundering areas that warrant enhanced scrutiny by Federal, State, and local law enforcement officials, as well as a grant program designed to support State and local law enforcement initiatives to detect and prevent money laundering and related financial crimes.

## CHAPTER 2—ENFORCEMENT TOOLS TO COMBAT FINANCIAL CRIMES INCLUDING TERRORIST FINANCING

### SUBCHAPTER A—MONEY LAUNDERING ABATEMENT AND FINANCIAL ANTITERRORISM TECHNICAL CORRECTIONS

*Section 2111. Short title*

This section establishes the short title of the subtitle, the "Money Laundering Abatement and Financial Antiterrorism Technical Corrections Act of 2004".

*Section 2112. Technical corrections to Public Law 107–56*

This section makes a number of typographical and grammatical corrections to title III of the USA PATRIOT Act (relating to terrorist financing and money laundering) to ensure that those provisions work as intended and can be enforced by the relevant Federal agencies.

*Section 2113. Technical corrections to other provisions of law*

This section makes a number of typographical and grammatical corrections to title 31 of the U.S. Code and other provisions of Federal law, as amended by title III of the USA PATRIOT Act (relating to terrorist financing and money laundering), to ensure that those provisions work as intended and can be enforced by the relevant Federal agencies.

Among other changes, this section corrects a typographical error in 31 U.S.C. § 5324. Subsection (b) of that statute makes it an offense to evade the currency reporting requirements set forth in "section 5333." There is in fact no such section. The intended reference was to section 5331. That section requires any person who receives more than $10,000 in coins or currency, in one transaction or in two or more related transactions in the course of that person's trade or business, to file a report with respect to that transaction with the Financial Crimes Enforcement Network (FinCEN). Correcting the typographical error would make it possible for any person who violates this requirement to be subject to criminal and civil forfeitures under 31 U.S.C. § 5317(c)(2), in addition to civil and criminal penalties.

The U.S. Supreme Court's decision in *United States* v. *Bajakajian*, 524 U.S. 321 (1998) established legal precedents that protect against potentially unfair civil forfeitures. The Committee notes that these precedents now form the basis for more fair civil

and criminal forfeitures and serve as guiding principles that Federal prosecutors should observe when enforcing failure-to-file violations under 31 U.S.C. § 5331. The Committee also notes that all of the due process protections enacted as part of the Civil Asset Forfeiture Reform Act of 2000 apply to forfeitures under 31 U.S.C. § 5317(c), including the protection against forfeitures that are grossly disproportional to the gravity of the offense. See 18 U.S.C. § 983(g), which codified the Supreme Court's decision in *Bajakajian*.

In the *Bajakajian* case, the Court ruled it unconstitutional under the Eighth Amendment's Excessive Fines Clause for the government to seize $357,144 in currency that an individual attempted to transport out of the United States without filing a report required by law. As the majority opinion stated, "The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed on innocent owners." *Bajakajian*, 524 U.S. at 332.

The Court found that the failure to file a report required by Federal law was the only offense committed by the respondent. The forfeiture of the entire amount of the currency in question "would be grossly disproportional to the gravity of his offense." Bajakajian, 524 U.S. at 339–40. It is permissible to move currency out of the country as long as it is reported. Moreover, the majority opinion also stated that the money came from legal activity and was to be used to repay a lawful debt. Lastly, the Court majority argued that the harm caused by the defendant's failure to file was minimal, in that there was no fraud on the Federal government, and no cost to the taxpayers of the failure to file. "Had his crime gone undetected," wrote the Court, "the Government would have been deprived only of the information that $357,144 had left the country." Bajakajian, 524 U.S. at 339.

The Committee therefore notes that the civil and criminal forfeitures provided for under 31 U.S.C. § 5317(c) for violations of 31 U.S.C. § 5331 are governed by the legal precedents established in *United States* v. *Bajakajian*.

*Section 2114. Repeal of review*

This section makes permanent the provisions of title III of the USA PATRIOT Act by repealing section 303 of the Act. Section 303 provides that the provisions of title III will terminate after September 30, 2004, if both Houses of Congress enact a joint resolution to that effect.

*Section 2115. Effective date*

This section provides that the amendments made by this subtitle to Public Law 107–56, the United States Code, the Federal Deposit Insurance Act, and any other provision of law shall take effect as if such amendments had been included in Public Law 107–56, as of the date of the enactment of that public law, and no amendment made by that public law that is inconsistent with an amendment made by this subtitle will be deemed to have taken effect.

SUBCHAPTER B—ADDITIONAL ENFORCEMENT TOOLS

*Section 2121. Bureau of Engraving and Printing security printing*

This section authorizes the Secretary of the Treasury to produce currency and other security documents at the request of foreign governments on a reimbursable basis, as a way of strengthening those currencies and the economies of developing countries that do not have the capacity to print secure notes themselves.

*Section 2122. Conduct in aid of counterfeiting*

This section amends the criminal code to equate the possession of anti-counterfeiting technology or components thereof, with the actual act of counterfeiting. It takes into account the fact that as currency anti-counterfeiting technology is improved, traditional counterfeiters may have to "subcontract" the manufacture of a necessary component.

*Section 2123. Reporting of cross-border transmittal of funds*

This section directs the Secretary of the Treasury, in consultation with the Federal Reserve Board of Governors, to prescribe regulations requiring those financial institutions the Secretary deems appropriate to report certain crossborder transmittals of funds relevant to Treasury's anti-money laundering and anti-terrorist financing efforts to the Financial Crimes Enforcement Network (FinCEN). Before prescribing the regulations, the Secretary is required to delegate the task of producing a report to the Secretary and the Congress to the Bank Secrecy Act Advisory Group. The report, due within one year of the date of enactment, must identify the information in cross-border electronic transmittals of funds relevant to anti-money laundering and counter-terrorist financing efforts, recommend the appropriate form, manner, content and frequency of filing of the required reports, and identify the technology necessary for FinCEN to receive, maintain, exploit and disseminate information from reports of cross-border electronic transmittals of funds.

The Secretary must prescribe final regulations pursuant to this section within 3 years of the date of enactment of this Act. The Secretary may not prescribe regulations before certifying to Congress that FinCEN has the technological systems in place to receive, maintain, exploit and disseminate information from reports of cross-border electronic transmittals of funds to law enforcement and other entities engaged in efforts against money laundering and terrorist financing.

Financial institutions required to submit reports on certain crossborder electronic transmittals of funds pursuant to this section are relieved of the recordkeeping requirements regarding such transmittals imposed by section 21(b)(3) of the Federal Deposit Insurance Act.

*Section 2124. Enhanced effectiveness of examinations, including anti-money laundering programs*

This section amends section 10 of the Federal Deposit Insurance Act (12 U.S.C. § 1820) by imposing post-employment restrictions on leading bank examiners. Specifically, this section prohibits an officer or employee of a Federal banking agency or Federal Reserve

Bank, who has served as the examiner-in-charge, or a functionally equivalent position, for two or more months during the final eighteen months of his employment for a particular depository institution or depository institution holding company, from holding any office or position, or becoming a consultant or controlling shareholder, at this institution for a period of one year. Violators of this section are subject to suspension or an industry-wide prohibition, among other penalties which may apply to Federal employees.

The Federal banking regulators are charged with developing regulations that determine what constitutes a leading examiner. In prescribing the regulations, the agencies are directed to take into account the manner in which the examiners are distributed among institutions and holding companies; the number of institutions an examiner is involved with; the period of time an examiner is assigned to an institution or holding company; the size of the institutions or holding companies for which each examiner is responsible; and any other factors the agency determines to be appropriate.

A Federal banking agency may waive the restrictions of this section on a case-by-case basis if the agency head certifies in writing that such a waiver would not be inconsistent with the public interest and if the waiver is provided in advance of the examiner becoming affiliated with the institution or holding company.

This section also amends the Federal Credit Union Act to require similar post-employment limitations on examiners of Federally insured credit unions.

This section also requires the Federal banking and credit union regulators to study efforts and proposals for the retention of experienced and highly qualified examiners. The regulators must also study continuing efforts to attract examiners and supervisors. A report on the results of this study is required within one year of the enactment of this legislation.

SUBCHAPTER C—UNLAWFUL INTERNET GAMBLING FUNDING PROHIBITION

*Section 2131. Short title*

This section provides the short title of the subchapter, the "Unlawful Internet Gambling Funding Prohibition Act".

*Section 2132. Findings*

This section provides certain Congressional findings. In particular, Congress finds that: (1) Internet gambling is primarily funded through the use of personal banking instruments and plays a large role in the creation of ultimately uncollectible personal debt; and (2) Internet gambling is susceptible to abuse by money launderers.

*Section 2133. Policies and procedures required to prevent payments for unlawful internet gambling*

Subsection (a) requires the Federal functional regulators to prescribe regulations within six months requiring any designated payment system to establish policies and procedures reasonably designed to identify and prevent restricted transactions.

Subsection (b) requires the Federal functional regulators, in prescribing regulations, to identify types of policies and procedures

which would be reasonably designed to identify, block or prevent a restricted transaction; to the extent practical permit any participant in a payment system to choose among alternative means of compliance; and consider exempting restricted transactions where it is not reasonably practical to identify and block, or otherwise prevent, such transactions.

Subsection (c) provides that a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, or money transmitting service, or a participant in such network, is in compliance with subsection (a) if such person operates in reliance on procedures established by the payment system pursuant to subsection (a).

Subsection (d) requires that this section be enforced by the Federal functional regulators and the Federal Trade Commission, and sets out factors to be considered in any enforcement action against any payment system, or any participant in a payment system that is a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local network utilized to effect a credit transaction, electronic fund transfer, or money transmitting service, or a participant in such network.

*Section 2134. Definitions*

This section defines the terms "restricted transaction", "designated payment system", "Federal functional regulator", "Internet", "unlawful Internet gambling", "credit", "creditor" and "credit card", "electronic fund transfer", "financial institution", and "money transmitting business" and "money transmitting service." Paragraph (2) defines the term "bets or wagers" as the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance with the agreement that the winner will receive something of greater value than the amount staked or risked. This subsection clarifies that "bets or wagers" does not include a bona fide business transaction governed by the securities laws; a transaction subject to the Commodity Exchange Act; an over-the-counter derivative instrument and any other transaction exempt from State gaming or bucket shop laws pursuant to the Commodity Exchange Act or Securities Exchange Act; a contract of indemnity or guarantee; a contract for life, health, or accident insurance; a deposit with a depository institution; certain participation in a simulation sports game or education game; or a lawful transaction with a business licensed or authorized by a State, defined for these purposes as any transaction that is lawful under all applicable Federal laws and all applicable State laws of both the State in which the licensed or authorized business is located and the State where the bet is initiated.

*Section 2135. Common sense rule of construction*

This section provides that no provision of this legislation may be construed as altering, limiting, extending, changing the status of,

or otherwise affecting any law relating to, affecting, or regulating gambling within the United States.

## TITLE IV—INTERNATIONAL COOPERATION AND COORDINATION

### Subtitle B—Prevent the Continued Growth of Terrorism

#### CHAPTER 2—UNITED STATES MULTILATERAL DIPLOMACY

*Section 4033. Leadership and membership of international organizations*

This section requires that the President, acting through the Secretary of State, the relevant United States chiefs of mission, and, where appropriate, the Secretary of the Treasury, use the voice, vote, and influence of the United States to prevent countries subject to United Nations Security Council sanctions from becoming members or serving in leadership roles in all United Nation bodies and at other international organizations and multilateral institutions of which the United States is a member. The purpose of including the Secretary of the Treasury is to enable the Secretary to direct conforming action through instructions to U.S. Executive Directors to the International Monetary Fund, the International Bank for Reconstruction and Development, the regional development banks, and other more informal multilateral financial policymaking bodies in which the Department of the Treasury is the lead representative and lead negotiator for the United States.

*Section 4035. Implementation and establishment of office of multilateral negotiations*

This section creates an office within the State Department and a Special Representative for Multilateral Negotiations, appointed by the President and carrying Ambassador-at-large status. The duties of the Special Representative include assisting in the organization of, and preparation for, United States participation in multilateral negotiations and, at the direction of the Secretary of State, serving as a member of a United States delegation to any multilateral negotiation. The section further requires the Special Representative to coordinate and consult with the Secretary of the Treasury regarding initiatives associated with international financial institutions and multilateral financial policymaking bodies, and clarifies that the Secretary of the Treasury is the lead representative and negotiator for those entities, including the International Monetary Fund, the development banks, the Financial Action Task Force, and the Group of Eight.

### Subtitle D—Afghanistan Freedom Support Act Amendments of 2004

*Section 4061. Short title*

This section establishes the short title of the subtitle, the "Afghanistan Freedom Support Act Amendments of 2004".

*Section 4062. Coordination of assistance for Afghanistan*

This section creates a coordinator to unify and create assistance plans for Afghanistan. The coordinator is required to work with the

international community, including multilateral organizations and international financial institutions, and the government of Afghanistan to ensure that assistance to Afghanistan is implemented in a coherent, consistent, and efficient manner to prevent duplication and waste. To effectuate these responsibilities within the international financial institutions, as defined in section 1701(c)(2) of the International Financial Institutions Act, the coordinator is required to work through the Secretary of the Treasury and the U.S. Executive Directors at the international financial institutions.

It is expected that the U.S. Executive Directors and the Department of the Treasury will provide all necessary assistance to the coordinator in order to ensure that bilateral U.S. aid packages are designed and delivered to Afghanistan in the most efficient and effective manner possible. There may be cases in which it the coordinator will need to meet with staff of relevant multilateral financial institutions. This provision is not intended to rule out the possibility of such meetings. However, the provision makes clear that any such meetings should be undertaken in consultation with the appropriate Treasury officials.

## Subtitle H—Improving International Standards and Cooperation To Fight Terrorist Financing

### *Section 4111. Sense of the Congress regarding success in multilateral organizations*

Subsection (a) sets forth findings that detail United States successes in creating a set of international standards for fighting terrorist financing through the Financial Action Task Force (FATF). They also describe the success of United States leadership in providing a mechanism in the International Monetary Fund and the development banks for identifying deficiencies in financial systems and for directing development funds to support changes in emerging market financial systems that want to comply with the international FATF standards.

Subsection (b) expresses the sense of Congress that the Secretary of the Treasury should continue to promote the dissemination of international anti-money laundering (AML) and counter-terrorist financing (CTF) standards, and to press for full implementation of the FATF 40 + 8 recommendations by all countries.

### *Section 4112. Expanded reporting and testimony requirements for the Secretary of the Treasury*

This section amends the International Financial Institutions Act to require the Secretary of the Treasury to work with the International Monetary Fund (IMF) to foster strong global AML/CTF regimes and ensure that country performance under the FATF AML/CTF standards is monitored effectively. The section also directs the Secretary to work with the IMF to ensure that AML/CTF issues are a part of regular reviews of country progress and these measures are to be considered indispensable elements of sound financial systems. Finally, the section requires the Treasury Department to emphasize the importance of sound AML/CTF regimes to global growth and development. The Committee notes that all of these actions currently are undertaken and, thus, the section seeks only to codify existing practice.

Section 1503(a) of the International Financial Institutions Act (22 U.S.C. 262o–2(a)) requires the Secretary of the Treasury to report to Congress during the first quarter of each year on the state of the international financial system. This section adds one more specific item to be included in the annual report: a progress report on the Secretary's efforts to fight terrorist financing through international financial institutions and multilateral policymaking bodies.

Since the events of September 11, 2001, the Secretary of the Treasury has provided these status reports, thus this section codifies existing practice. This section also defines the term "other multilateral policymaking bodies" in order to ensure that Group of Eight and FATF initiatives are included in the annual report in addition to international financial institution initiatives. In establishing this additional requirement, the Committee does not intend to diminish the importance of the development and financial stability work undertaken by the international institutions. Rather, the provision will ensure that the efforts to strengthen standards against money laundering and terrorist financing are properly understood within the overall context of strengthening financial system resilience and institutional strength.

*Section 4113. Coordination of United States government efforts*

This section codifies existing practice by authorizing the Secretary of the Treasury to continue convening the interagency U.S. Government FATF working group. The Committee notes that since the events of September 11, 2001, the Department of the Treasury has spearheaded efforts to cooperate with other agencies of the United States government to ensure that its negotiations within FATF, the Group of Eight, and other international fora are consistent and compatible with broader U.S. government objectives. The 9/11 Commission Report and the accompanying staff Monograph on terrorist financing acknowledge the unprecedented level of cooperation within the Federal government on anti-terrorist financing measures since September 11, 2001, but also express concern that such cooperation could wane "as memories fade" and as relevant personnel move on to other projects. In addition, the 9/11 Commission Report recommended that "information procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge * * *. We propose that information be shared horizontally, across new networks that transcend individual agencies."

By including this provision, the Committee intends to make the strong interagency cooperation and communication on international financial standard-setting matters related to anti-terrorist financing where the Treasury Department is in the lead permanent. Currently, the Secretary of the Treasury, or his designee, acts as the lead United States Government official to FATF. The section makes clear that the Secretary will continue to convene the interagency United States Government FATF working group.

This interagency working group has a flexible membership that permits the Secretary of the Treasury to draw on the resources of a range of U.S. government agencies for the purposes of preparing for international financial policy standard-setting negotiations at the multilateral level. For example, if FATF were considering es-

tablishing international standards concerning law enforcement-related issues, the Secretary would have formal authority under this section to incorporate into pre-negotiation meetings law enforcement agencies within the U.S. Federal government so that the Treasury Department position is consistent with U.S. government practice or priorities. If the issue for consideration relates instead to a specific financial sector, such as banking, securities, or insurance, the Secretary has the formal authority under this section to include financial regulators.

The Committee anticipates that in some years there will be no major standard-setting activities within the various international groups in which the Secretary of the Treasury has the lead. In those instances, the section requires that the interagency working group meet annually to advise the Secretary on policies to be pursued by the United States regarding the development of common international anti-money laundering and counter-terrorist financing standards.

*Section 4114. Definitions*

This section clarifies terms used throughout this title. It incorporates by reference the definition of the term "international financial institution" which already exists in section 1701(c)(2) of the International Financial Institutions Act. This section also defines the term "Financial Action Task Force."

## TITLE V—GOVERNMENT RESTRUCTURING

### Subtitle G—Emergency Financial Preparedness

#### CHAPTER 1—EMERGENCY PREPAREDNESS FOR FISCAL AUTHORITIES

*Section 5081. Delegation authority of the Secretary of the Treasury*

This section authorizes Treasury's Fiscal Assistant Secretary, which operates as the U.S. government's money manager, to delegate to subordinates the authority to authorize cash movements and approve and sign changes to debt security terms and conditions.

*Section 5081A. Treasury support for financial services preparedness and response*

Subsection (a) provides a finding that the Secretary of the Treasury has successfully communicated and coordinated with the private-sector financial services industry about counter-terrorist financing activities and preparedness; successfully reached out to State and local governments and regional public-private partnerships that protect employees and critical infrastructure by enhancing communication and coordinating plans for disaster preparedness and business continuity; and has set an example for the Department of Homeland Security and other Federal agency partners, whose active participation is vital on these issues.

Subsection (b) expresses the sense of the Congress that the Secretary of the Treasury, in consultation with the Secretary of Homeland Security and other Federal agency partners, should furnish resources and submit annual reports to Congress on Federal efforts to educate consumers and employees of the financial services industry about domestic counter-terrorist financing activities, includ-

ing how the public and private sector organizations involved in counter-terrorist financing activities can help to combat terrorism and simultaneously protect the lives and civil liberties of consumers and financial services employees, and how those consumers and employees can assist the public and private sector organizations involved in counter-terrorist financing activities.

## CHAPTER 2—MARKET PREPAREDNESS

### SUBCHAPTER A—NETTING OF FINANCIAL CONTRACTS

*Section 5082. Short title*

This section provides the short title of the subchapter, the "Financial Contracts Bankruptcy Reform Act of 2002."

*Section 5082A. Treatment of certain agreements by conservators or receivers of insured depository institutions*

Subsections (a) through (f) of this section amend the Federal Deposit Insurance Act's (FDIA) definitions of "qualified financial contract," "securities contract," "commodity contract," "forward contract," "repurchase agreement" and "swap agreement" to make them consistent with the definitions in the Bankruptcy Code and to reflect the enactment of the Commodity Futures Modernization Act of 2000 (CFMA). It is intended that the legislative history and case law surrounding those terms, to the date of this amendment, be incorporated into the legislative history of the FDIA.

Subsection (b) amends the definition of "securities contract" expressly to encompass margin loans, to clarify the coverage of securities options and to clarify the coverage of repurchase and reverse repurchase transactions. The inclusion of "margin loans" in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans," such as arrangements where a securities broker or dealer extends credit to a customer in connection with the purchase, sale, or trading of securities, and does not include loans that are not commonly referred to as "margin loans." The reference in subsection (b) to a "guarantee by or to any securities clearing agency" is intended to cover other arrangements, such as novation, that have an effect similar to a guarantee. The reference to a "loan" of a security in the definition is intended to apply to loans of securities, whether or not for a "permitted purpose" under margin regulations. The reference to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under the qualified financial contract provisions of the FDIA as to whether a repurchase or reverse repurchase transaction is a purchase and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the FDIA (and a regulation of the Federal Deposit Insurance Corporation (FDIC)). Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securities, corporate bonds and commercial paper) are included under the definition of "securities contract." Subsection (b) also specifies that purchase, sale and repurchase obligations under a participation in a commercial mortgage loan do not constitute "securities contracts." While a contract for the purchase, sale or repurchase of a participation may constitute a "securities contract,"

the purchase, sale or repurchase obligation embedded in a participation agreement does not make that agreement a "securities contract."

A number of terms used in the qualified financial contract provisions, but not defined therein, are intended to have the meanings set forth in the analogous provisions of the Bankruptcy Code or Federal Deposit Insurance Corporation Improvement Act (FDICIA), such as, for example, "securities clearing agency". The term "person," however, is intended to have the meaning set forth in section 1 of title 1 of the United States Code.

Subsection (c) amends the definition of "commodity contract" in section 11(e)(8)(D)(iii) of the Federal Deposit Insurance Act. Subsection (d) amends section 11(e)(8)(D)(iv) of the Federal Deposit Insurance Act with respect to its definition of a "forward contract."

Subsection (e) amends the definition of "repurchase agreement" to codify the substance of the FDIC's 1995 regulation defining repurchase agreement to include those on qualified foreign government securities. The term "qualified foreign government securities" is defined to include those that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD), as determined by rule of the appropriate Federal banking agency. Subsection (e) reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. The securities are limited to those issued by or guaranteed by full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund associated with the Fund's General Arrangements to Borrow. (See 12 C.F.R. 360.5.) Subsection (e) also amends the definition of "repurchase agreement" to include those on mortgage-related securities, mortgage loans and interests therein, and to include principal and interest-only U.S. government and agency securities as securities that can be the subject of a "repurchase agreement." The reference in the definition to United States government- and agency-issued or fully guaranteed securities is intended to include obligations issued or guaranteed by Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as all obligations eligible for purchase by Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act. This amendment is not intended to affect the status of repos involving securities or commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under the qualified financial contract provisions. In particular, an agreement for the sale and repurchase of a security would continue to be a securities contract as defined in the FDIA, even if not a "repurchase agreement" as defined in the FDIA. Similarly, an agreement for the sale and repurchase of a commodity, even though not a "repurchase agreement" as defined in the FDIA, would continue to be a forward contract for purposes of the FDIA.

Subsection (e), like subsection (b) for "securities contracts," specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." Such repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do

not constitute a "repurchase agreement." A repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date certain 1 year or less after such transfer, however, would constitute a "repurchase agreement" as well as a "securities contract".

Subsection (f) amends the definition of "swap agreement" to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option." As amended, the definition of "swap agreement" will update the statutory definition and achieve contractual netting across economically similar transactions that are the subject of recurring dealings in the swap agreements.

The definition of "swap agreement" was originally intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. (The phrase "or any similar agreement" has been added to the definitions of "forward contract," "commodity contract," "repurchase agreement" and "securities contract" for the same reason.) To clarify this, subsection (f) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [section 11(e)(8)(D)(vi) of the FDIA] and is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets * * * and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value."

The definition of "swap agreement," however, should not be interpreted to permit parties to document non-swaps as swap transactions. Traditional commercial arrangements, such as supply agreements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under either the FDIA or the Bankruptcy Code simply because the parties purport to document or label the transactions as "swap agreements." In addition, these definitions apply only for purposes of the FDIA and the Bankruptcy Code. These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f). Similarly, a new paragraph of section 11(e) of the FDIA provides that the definitions of "securities

contract," "repurchase agreement," "forward contract," and "commodity contract," and the characterization of certain transactions as such a contract or agreement, are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (f).

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement, including any guarantee or reimbursement obligation related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the FDIA and the Bankruptcy Code. Similar changes are made in the definitions of "forward contract," "commodity contract," "repurchase agreement" and "securities contract."

The use of the term "forward" in the definition of "swap agreement" is not intended to refer only to transactions that fall within the definition of "forward contract." Instead, a "forward" transaction could be a "swap agreement" even if not a "forward contract."

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

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

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

*Section 5082B. Authority of the FDIC and NCUAB with respect to failed and failing institutions*

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

This section denies enforcement to "walkaway" clauses in QFCs. A walkaway clause is defined as a provision that, after calculation of a value of a party's position or an amount due to or from one

of the parties upon termination, liquidation or acceleration of the QFC, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a non-defaulting party.

*Section 5082C. Amendments relating to transfers of qualified financial contracts*

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

The new FDIA provision specifies that when the FDIC transfers QFCs that are cleared on or subject to the rules of a particular clearing organization, the transfer will not require the clearing organization tion to accept the transferee as a member of the organization. This provision gives the FDIC flexibility in resolving QFCs cleared on or subject to the rules of a clearing organization, while preserving the ability of such organizations to enforce appropriate risk reducing membership requirements. The amendment does not require the clearing organization to accept for clearing any QFCs from the transferee, except on the terms and conditions applicable to other parties permitted to clear through that clearing organization. "Clearing organization" is defined to mean a "clearing organization" within the meaning of FDICIA (as amended both by the CFMA and by section 5082F of this Act).

The new FDIA provision also permits transfers to an eligible financial institution that is a non-U.S. person, or the branch or agency of a non-U.S. person or a U.S. financial institution that is not an FDIC-insured institution if, following the transfer, the contractual rights of the parties would be enforceable substantially to the same extent as under the FDIA. It is expected that the FDIC would not transfer QFCs to such a financial institution if there were an impending change of law that would impair the enforceability of the parties' contractual rights.

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

Subsection (c) amends the FDIA to clarify the relationship between the FDIA and FDICIA. There has been some uncertainty whether FDICIA permits counterparties to terminate or liquidate a QFC before the expiration of the time period provided by the FDIA during which the FDIC may repudiate or transfer a QFC in a conservatorship or receivership. Subsection (c) provides that a party may not terminate a QFC based solely on the appointment of the FDIC as receiver until 5 p.m. (Eastern Time) on the business day following the appointment of the receiver or after the person has received notice of a transfer under FDIA section 11(d)(9), or based solely on the appointment of the FDIC as conservator, not-

withstanding the provisions of FDICIA. This provides the FDIC with an opportunity to undertake an orderly resolution of the insured depository institution.

Subsection (c) also prohibits the enforcement of rights of termination or liquidation that arise solely because of the insolvency of the institution or are based on the "financial condition" of the depository institution in receivership or conservatorship. For example, termination based on a cross-default provision in a QFC that is triggered upon a default under another contract could be rendered ineffective if such other default was caused by an acceleration of amounts due under that other contract, and such acceleration was based solely on the appointment of a conservator or receiver for that depository institution. Similarly, a provision in a QFC permitting termination of the QFC based solely on a downgraded credit rating of a party will not be enforceable in an FDIC receivership or conservatorship because the provision is based solely on the financial condition of the depository institution in default. However, any payment, delivery or other performance-based default, or breach of a representation or covenant putting in question the enforceability of the agreement, will not be deemed to be based solely on financial condition for purposes of this provision. The amendment is not intended to prevent counterparties from taking all actions permitted and recovering all damages authorized upon repudiation of any QFC by a conservator or receiver, or from taking actions based upon a receivership or other financial condition-triggered default in the absence of a transfer (as contemplated in Section 11(e)(10) of the FDIA). The amendment allows the FDIC to meet its obligation to provide notice to parties to transferred QFCs by taking steps reasonably calculated to provide notice to such parties by the required time. This is consistent with the existing policy statement on QFCs issued by the FDIC on December 12, 1989.

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

*Section 5082D. Amendments relating to disaffirmance or repudiation of qualified financial contracts*

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

*Section 5082E. Clarifying amendment relating to master agreements*

This section specifies that a master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA (but only with respect to underlying agreements that are themselves QFCs). This provision ensures that cross-product netting pursuant to a master agreement, or pursuant to an umbrella agreement for separate master agreements between the same parties, each of which is used to document one or more qualified financial contracts, will be enforceable under the FDIA. Cross-product netting permits a wide variety of financial transactions between two parties to be netted, thereby maximizing the present and potential future risk-reducing benefits of the netting arrangement between the parties. Express recognition of the enforceability of such cross-product master agreements furthers the policy of increasing legal certainty and reducing systemic risks in the case of an insolvency of a large financial participant.

*Section 5082F. Federal Deposit Insurance Corporation Improvement Act of 1991*

Subsection (a)(1) amends the definition of "clearing organization" to include clearinghouses that are subject to exemptions pursuant to orders of the Securities and Exchange Commission or the Commodity Futures Trading Commission and to include multilateral clearing organizations (the definition of which was added to FDICIA by the CFMA).

FDICIA provides that a netting arrangement will be enforced pursuant to its terms, notwithstanding the failure of a party to the agreement. The current netting provisions of FDICIA, however, limit this protection to "financial institutions," which include depository institutions. Subsection (a)(2) amends the FDICIA definition of covered institutions to include (i) uninsured national and State member banks, irrespective of their eligibility for deposit insurance and (ii) foreign banks (including the foreign bank and its branches or agencies as a combined group, or only the foreign bank parent of a branch or agency). The latter change will extend the protections of FDICIA to ensure that U.S. financial organizations participating in netting agreements with foreign banks are covered by the bill, thereby enhancing the safety and soundness of these arrangements. It is intended that a non-defaulting foreign bank and its branches and agencies be considered to be a single financial institution for purposes of the bilateral netting provisions of FDICIA (except to the extent that the non-defaulting foreign bank and its branches and agencies on the one hand, and the defaulting financial institution, on the other, have entered into agreements that clearly evidence an intention that the non-defaulting foreign bank and its branches and agencies be treated as separate financial institutions for purposes of the bilateral netting provisions of FDICIA).

Subsection (a)(3) amends FDICIA to provide that, for purposes of FDICIA, two or more clearing organizations that enter into a netting contract are considered "members" of each other. This assures the enforceability of netting arrangements involving two or more clearing organizations and a member common to all such organiza-

tions, thus reducing systemic risk in the event of the failure of such a member. Under the current FDICIA provisions, the enforceability of such arrangements depends on a case-by-case determination that clearing organizations could be regarded as members of each other for purposes of FDICIA.

Subsection (a)(4) amends the FDICIA definition of netting contract and the general rules applicable to netting contracts. The current FDICIA provisions require that the netting agreement must be governed by the law of the United States or a State to receive the protections of FDICIA. Many of these agreements, however, particularly netting arrangements covering positions taken in foreign exchange dealings, are governed by the laws of a foreign country. This subsection broadens the definition of "netting contract" to include those agreements governed by foreign law, and preserves the FDICIA requirement that a netting contract not be invalid under, or precluded by, Federal law.

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

The second exception provides that FDICIA does not override a stay order under SIPA with respect to foreclosure on securities (but not cash) collateral of a debtor (section 5082(k) makes a conforming change to the Securities Investor Protection Act (SIPA)). There is also an exception relating to insolvent commodity brokers. Subsections (b) and (c) also clarify that a security agreement or other credit enhancement related to a netting contract is enforceable to the same extent as the underlying netting contract.

Subsection (d) adds a new section 407 to FDICIA. This new section provides that, notwithstanding any other law, QFCs with uninsured national banks, an uninsured Federal branch or agency or Edge Act corporation, or an uninsured State member bank that operates, or operates as, a multilateral clearing organization will be treated in the same manner as if the contract were with an insured national bank or insured Federal branch for which a receiver or conservator was appointed. This provision will ensure that parties to QFCs with these institutions will have the same rights and obligations as parties entering into the same agreements with insured depository institutions. The new section also specifically limits the powers of a receiver or conservator for such an institution to those contained in 12 U.S.C. 1821(e)(8), (9), (10), and (11), which address QFCs.

While the amendment would apply the same rules as apply to insured institutions, the provision would not change the rules that

apply to insured institutions. Nothing in this section would amend the International Banking Act, the Federal Deposit Insurance Act, the National Bank Act, or other statutory provisions with respect to receiverships of insured national banks or Federal branches.

*Section 5082G. Bankruptcy code amendments*

This section makes a series of amendments to the Bankruptcy Code. Subsection (a)(1) amends the Bankruptcy Code definitions of "repurchase agreement" and "swap agreement" to conform with the amendments to the FDIA contained in subsections 5082A (e) and (f).

In connection with the definition of "repurchase agreement," the term "qualified foreign government securities" is defined to include securities that are direct obligations of, or fully guaranteed by, central governments of members of the Organization for Economic Cooperation and Development (OECD). This language reflects developments in the repurchase agreement markets, which increasingly use foreign government securities as the underlying asset. The securities are limited to those issued by or guaranteed by full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund associated with the Fund's General Arrangements to Borrow.

Subsection (a)(1) also amends the definition of "repurchase agreement" to include those on mortgage-related securities, mortgage loans and interests therein, and to include principal and interest-only U.S. Government and agency securities as securities that can be the subject of a "repurchase agreement." The reference in the definition to United States government- and agency-issued or fully guaranteed securities is intended to include obligations issued or guaranteed by Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac) as well as all obligations eligible for purchase by Federal Reserve banks under the similar language of section 14(b) of the Federal Reserve Act.

This amendment is not intended to affect the status of repos involving securities or commodities as securities contracts, commodity contracts, or forward contracts, and their consequent eligibility for similar treatment under other provisions of the Bankruptcy Code. In particular, an agreement for the sale and repurchase of a security would continue to be a securities contract as defined in the Bankruptcy Code and thus also would be subject to the Bankruptcy Code provisions pertaining to securities contracts, even if not a "repurchase agreement" as defined in the Bankruptcy Code. Similarly, an agreement for the sale and repurchase of a commodity, even though not a "repurchase agreement" as defined in the Bankruptcy Code, would continue to be a forward contract for purposes of the Bankruptcy Code and would be subject to the Bankruptcy Code provisions pertaining to forward contracts.

Subsection (a)(1) specifies that repurchase obligations under a participation in a commercial mortgage loan do not make the participation agreement a "repurchase agreement." These repurchase obligations embedded in participations in commercial loans (such as recourse obligations) do not constitute a "repurchase agreement." However, a repurchase agreement involving the transfer of participations in commercial mortgage loans with a simultaneous agreement to repurchase the participation on demand or at a date

certain 1 year or less after such transfer would constitute a "repurchase agreement" (as well as a "securities contract").

The definition of "swap agreement" is amended to include an "interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option." As amended, the definition of "swap agreement" will update the statutory definition and achieve contractual netting across economically similar transactions.

The definition of "swap agreement" was originally intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. (The phrase "or any similar agreement" has been added to the definitions of "forward contract," "commodity contract," "repurchase agreement," and "securities contract" for the same reason.) To clarify this, subsection (a)(1) expands the definition of "swap agreement" to include "any agreement or transaction that is similar to any other agreement or transaction referred to in [section 101(53B) of the Bankruptcy Code] and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets" and that "is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value."

The definition of "swap agreement" in this subsection should not be interpreted to permit parties to document non-swaps as swap transactions. Traditional commercial arrangements, such as supply agreements, or other non-financial market transactions, such as commercial, residential or consumer loans, cannot be treated as "swaps" under either the FDIA or the Bankruptcy Code because the parties purport to document or label the transactions as "swap agreements." These definitions, and the characterization of a certain transaction as a "swap agreement," are not intended to affect the characterization, definition, or treatment of any instruments under any other statute, regulation, or rule including, but not limited to, the statutes, regulations or rules enumerated in subsection (a)(1)(C). Similarly, the definitions of "securities contract", "repurchase agreement", and "commodity contract" and the characterization of certain transactions as such a contract or agreement, are not intended to affect the characterization, definition, or treatment of any instrument under any other statute regulation, or rule including, but not limited to, the statutes, regulations, or rules enumerated in subsection (f).

The definition also includes any security agreement or arrangement, or other credit enhancement, related to a swap agreement, including any guarantee or reimbursement obligation related to a swap agreement. This ensures that any such agreement, arrangement or enhancement is itself deemed to be a swap agreement, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code and the FDIA. Similar changes are made in the definitions of "forward contract," "commodity contract," "repurchase agreement," and "securities contract." An example of a security arrangement is a right of setoff; examples of other credit enhancements are letters of credit and other similar agreements. A security agreement or arrangement or guarantee or reimbursement obligation related to a "swap agreement," "forward contract," "commodity contract," "repurchase agreement" or "securities contract" will be such an agreement or contract only to the extent of the damages in connection with such agreement measured in accordance with Section 562 of the Bankruptcy Code (added by the bill). This limitation does not affect, however, the other provisions of the Bankruptcy Code (including section 362(b)) relating to security arrangements in connection with agreements or contracts that otherwise qualify as "swap agreements," "forward contracts," "commodity contracts," "repurchase agreements" or "securities contracts."

The use of the term "forward" in the definition of "swap agreement" is not intended to refer only to transactions that fall within the definition of "forward contract." Instead, a "forward" transaction could be a "swap agreement" even if not a "forward contract."

Subsections (a)(2) and (a)(3) amend the Bankruptcy Code definitions of "securities contract" and "commodity contract," respectively, to conform them to the definitions in the FDIA.

Subsection (a)(2), like the amendments to the FDIA, amends the definition of "securities contract" expressly to encompass margin loans, to clarify the coverage of securities options and to clarify the coverage of repurchase and reverse repurchase transactions. The inclusion of "margin loans" in the definition is intended to encompass only those loans commonly known in the securities industry as "margin loans", such as arrangements where a securities broker or dealer extends credit to a customer in connection with the purchase, sale, or trading of securities, and does not include loans that are not commonly referred to as "margin loans." The reference in subsection (b) to a "guarantee" by or to a "securities clearing agency" is intended to cover other arrangements, such as novation, that have an effect similar to a guarantee. The reference to a "loan" of a security in the definition is intended to apply to loans of securities, whether or not for a "permitted purpose" under margin regulations. The reference to "repurchase and reverse repurchase transactions" is intended to eliminate any inquiry under section 555 of the Bankruptcy Code and related provisions as to whether a repurchase or reverse repurchase transaction is a purchase and sale transaction or a secured financing. Repurchase and reverse repurchase transactions meeting certain criteria are already covered under the definition of "repurchase agreement" in the Bankruptcy Code. Repurchase and reverse repurchase transactions on all securities (including, for example, equity securities, asset-backed securi-

ties, corporate bonds and commercial paper) are included under the definition of "securities contract". A repurchase or reverse repurchase transaction which is a "securities contract" but not a "repurchase agreement" would thus be subject to the "counterparty limitations" contained in section 555 of the Bankruptcy Code (i.e., only stockbrokers, financial institutions, securities clearing agencies and financial participants can avail themselves of section 555 and related provisions).

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

Subsection (b) amends the Bankruptcy Code definitions of "financial institution" and "forward contract merchant." The definition of "financial institution" adds Federally insured credit unions to the list of existing financial institutions.

Subsection (b) also adds a new definition of "financial participant" to limit the potential impact of insolvencies upon other major market participants. This definition will allow such market participants to close out and net agreements with insolvent entities under sections 362(b)(6), 555, and 556 of the Bankruptcy Code even if the creditor could not qualify as, for example, a commodity broker. Sections 362(b)(6), 555 and 556 preserve the limitations of the right to close-out and net such contracts, in most cases, to entities who qualify under the Bankruptcy Code's counterparty limitations. However, where the counterparty has transactions with a total gross dollar value of at least $1 billion in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of at least $100 million (aggregated across counterparties) in one or more agreements or transactions on any day during the previous 15-month period, sections 362(b)(6), 555 and 556 and corresponding amendments would permit it to exercise netting and related rights irrespective of its inability otherwise to satisfy those counterparty limitations. This change will help prevent systemic impact upon the markets from a single failure, and is derived from threshold tests contained in Regulation EE promulgated by the Federal Reserve Board in implementing the netting provisions of the Federal Deposit Insurance Corporation Improvement Act. It is intended that the 15-month period be measured with reference to the 15 months preceding the filing of a petition by or against the debtor.

"Financial participant" is also defined to include "clearing organizations" within the meaning of FDICIA (as amended by the CFMA and section 5082F). This amendment, together with the inclusion of "financial participants" as eligible counterparties in connection with "commodity contracts," "forward contracts" and "securities contracts" and the amendments made in other sections of the bill to include "financial participants" as counterparties eligible for the protections in respect of "swap agreements" and "repurchase agreements", take into account the CFMA and will allow clearing organizations to benefit from the protections of all of the provisions of the

Bankruptcy Code relating to these contracts and agreements. This will further the goal of promoting the clearing of derivatives and other transactions as a way to reduce systemic risk. The definition of "financial participant" (as with the other provisions of the Bankruptcy Code relating to "securities contracts," "forward contracts," "commodity contracts," "repurchase agreements" and "swap agreements") is not mutually exclusive, i.e., an entity that qualifies as a "financial participant" could also be a "swap participant," "repo participant," "forward contract merchant," "commodity broker," "stockbroker," "securities clearing agency" and/or "financial institution."

Subsection (c) adds to the Bankruptcy Code new definitions for the terms "master netting agreement" and "master netting agreement participant." The definition of "master netting agreement" is designed to protect the termination and close-out netting provisions of cross-product master agreements between parties. Such an agreement may be used (i) to document a wide variety of securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements or (ii) as an umbrella agreement for separate master agreements between the same parties, each of which is used to document a discrete type of transaction. The definition includes security agreements or arrangements or other credit enhancements related to one or more such agreements and clarifies that a master netting agreement will be treated as such even if it documents transactions that are not within the enumerated categories of qualifying transactions (but the provisions of the Bankruptcy Code relating to master netting agreements and the other categories of transactions will not apply to such other transactions). A "master netting agreement participant" is any entity that is a party to an outstanding master netting agreement with a debtor before the filing of a bankruptcy petition.

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

Subsection (d) also clarifies that the provisions protecting setoff and foreclosure in relation to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agree-

ments, and master netting agreements free from the automatic stay apply to collateral pledged by the debtor but that cannot technically be "held by" the creditor, such as receivables and book-entry securities, and to collateral that has been repledged by the creditor and securities resold pursuant to repurchase agreements.

Subsections (e) and (f) amend sections 546 and 548(d) of the Bankruptcy Code to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud and not taken in good faith. This amendment provides the same protections for a transfer made under, or in connection with, a master netting agreement as currently is provided for margin payments, settlement payments and other transfers received by commodity brokers, forward contract merchants, stockbrokers, financial institutions, securities clearing agencies, repo participants, and swap participants under sections 546 and 548(d), except to the extent the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

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

Subsection (k) adds a new section 561 to the Bankruptcy Code to protect the contractual right of a master netting agreement participant to enforce any rights of termination, liquidation, acceleration, offset or netting under a master netting agreement. These rights include rights arising (i) from the rules of a derivatives clearing organization, multilateral clearing organization, securities clearing agency, securities exchange, securities association, contract market, derivatives transaction execution facility or board of trade, (ii) under common law, law merchant or (iii) by reason of normal business practice. This reflects the enactment of the CFMA and the current treatment of rights under swap agreements under section 560 of the Bankruptcy Code. Similar changes to reflect the enactment of the CFMA have been made to the definition of "contractual right" for purposes of sections 555, 556, 559 and 560 of the Bankruptcy Code.

Subsections (b)(2)(A) and (b)(2)(B) of new section 561 limit the exercise of contractual rights to net or to offset obligations where the debtor is a commodity broker and one leg of the obligations sought to be netted relates to commodity contracts traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act. Under subsection (b)(2)(A) netting or offsetting is not permitted in these circumstances if the party seeking to net or to offset has no positive net equity in the commodity accounts at the debtor. Subsection (b)(2)(B) applies only if the debtor is a commodity broker, acting on behalf of its own customer, and is in turn a customer of another commodity broker. In that case, the latter commodity broker may not net or offset obligations under such commodity contracts with other claims against its customer, the debtor. Subsections (b)(2)(A)

and (b)(2)(B) limit the depletion of assets available for distribution to customers of commodity brokers. Subsection (b)(2)(C) provides an exception to subsections (b)(2)(A) and (b)(2)(B) for cross-margining and other similar arrangements approved by, or submitted to and not rendered ineffective by, the Commodity Futures Trading Commission, as well as certain other netting arrangements.

For the purposes of Bankruptcy Code sections 555, 556, 559, 560 and 561, it is intended that the normal business practice in the event of a default of a party based on bankruptcy or insolvency is to terminate, liquidate or accelerate securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements with the bankrupt or insolvent party. The protection of netting and offset rights in sections 560 and 561 is in addition to the protections afforded in sections 362(b)(6), (b)(7), (b)(17) and (b)(28) of the Bankruptcy Code.

Under this Act, the termination, liquidation or acceleration rights of a master netting agreement participant are subject to limitations contained in other provisions of the Bankruptcy Code relating to securities contracts and repurchase agreements. In particular, if a securities contract or repurchase agreement is documented under a master netting agreement, a party's termination, liquidation and acceleration rights would be subject to the provisions of the Bankruptcy Code relating to orders authorized under the provisions of SIPA or any statute administered by the SEC. In addition, the netting rights of a party to a master netting agreement would be subject to any contractual terms between the parties limiting or waiving netting or setoff rights. Similarly, a waiver by a bank or a counterparty of netting or setoff rights in connection with QFCs would be enforceable under the FDIA.

New section 561 of the Bankruptcy Code clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a proceeding ancillary to a foreign insolvency proceeding under section 304 of the Bankruptcy Code.

Subsections (l) and (m) clarify that the exercise of termination and netting rights will not otherwise affect the priority of the creditor's claim after the exercise of netting, foreclosure and related rights.

Subsection (n) amends section 553 of the Bankruptcy Code to clarify that the acquisition by a creditor of setoff rights in connection with swap agreements, repurchase agreements, securities contracts, forward contracts, commodity contracts and master netting agreements cannot be avoided as a preference. This subsection also adds setoff of the kinds described in sections 555, 556, 559, 560, and 561 of the Bankruptcy Code to the types of setoff excepted from section 553(b).

Subsection (o), as well as other subsections of the Act, adds references to "financial participant" in all the provisions of the Bankruptcy Code relating to securities, forward and commodity contracts and repurchase and swap agreements.

*Section 5082H. Recordkeeping requirements*

This section amends section 11(e)(8) of the Federal Deposit Insurance Act to explicitly authorize the FDIC, in consultation with

appropriate Federal banking agencies, to prescribe regulations on recordkeeping by any insured depository institution with respect to QFCs only if the insured financial institution is in a troubled condition (as such term is defined in the FDIA).

*Section 5082I. Exemptions from contemporaneous execution requirement*

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

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

*Section 5082J. Damage measure*

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

Section 562 provides an exception to the rules in (i) and (ii) if there are no commercially reasonable determinants of value as of such date or dates, in which case damages are to be measured as of the earliest subsequent date or dates on which there are commercially reasonable determinants of value. Although it is expected that in most circumstances damages would be measured as of the date or dates of either rejection or liquidation, termination or acceleration, in certain unusual circumstances, such as dysfunctional markets or liquidation of very large portfolios, there may be no commercially reasonable determinants of value for liquidating any such agreements or contracts or for liquidating all such agreements and contracts in a large portfolio on a single day. It is expected that measuring damages as of a date or dates before the date of liquidation, termination, or acceleration, will occur only in very unusual circumstances.

The party determining damages is given limited discretion to determine the dates as of which damages are to be measured. Its actions are circumscribed unless there are no "commercially reasonable" determinants of value for it to measure damages on the date or dates of either rejection or liquidation, termination or acceleration. The references to "commercially reasonable" are intended to

reflect existing state law standards relating to a creditor's actions in determining damages. New section 562 provides that if damages are not measured as of either the date of rejection or the date or dates of liquidation, termination or acceleration and the trustee challenges the timing of the measurement of damages by the non-defaulting party determining the damages, the non-defaulting party, rather than the trustee, has the burden of proving the absence of any commercially reasonable determinants of value.

New section 562 is not intended to have any impact on the determination under the Bankruptcy Code of the timing of damages for contracts and agreements other than those specified in section 562. Also, section 562 does not apply to proceedings under the FDIA, and it is not intended that Section 562 have any impact on the interpretation of the provisions of the FDIA relating to timing of damages in respect of QFCs or other contracts.

*Section 5082K. SIPC stay*

This section amends SIPA to provide that an order or decree issued pursuant to SIPA shall not operate as a stay of any right of liquidation, termination, acceleration, offset or netting under one or more securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements (as defined in the Bankruptcy Code and including rights of foreclosure on collateral), except that such order or decree may stay any right to foreclose on or dispose of securities (but not cash) collateral pledged by the debtor or sold by the debtor under a repurchase agreement or lent by the debtor under a securities lending agreement. A corresponding amendment to FDICIA is made by section 5082F. A creditor that was stayed in exercising rights against such securities would be entitled to post-insolvency interest to the extent of the value of such securities.

*Section 5082L. Applicability of other sections to chapter 9*

This section clarifies that, with respect to municipal bankruptcies, all the provisions of the Bankruptcy Code relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements (which by their terms are intended to apply in all proceedings under title 11) will apply in a Chapter 9 proceeding for a municipality. Although sections 555, 556, 559 and 560 of the Bankruptcy Code provide that they apply in any proceeding under the Bankruptcy Code, Section 502 makes a technical amendment in Chapter 9 to clarify the applicability of these provisions.

*Section 5082M. Effective date; application of amendments*

Subsection (a) provides that the amendments made by the bill take effect on the date of enactment. Subsection (b) provides that the amendments made by the bill shall not apply with respect to cases commenced, or to conservator/receiver appointments made, before the date of enactment. The amendments would, however, apply to contracts entered into prior to the date of enactment, so long as a Bankruptcy Code case were commenced or a conservator/receiver appointment were made on or after the date of enactment under any Federal or State law.

*Section 5082N. Savings clause*

This section provides that the meaning of terms used in the Act are applicable for purposes of the Act only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as that term is defined in Section 3(a)(47) of the Securities Exchange Act of 1934), and the Commodity Exchange Act.

SUBCHAPTER B—EMERGENCY SECURITIES RESPONSE

*Section 5086. Short title*

This section states the short title of the subchapter, the "Emergency Securities Response Act of 2004."

*Section 5087. Extension of emergency order authority of the Securities Exchange Commission*

This section modifies the authority of the Securities and Exchange Commission to issue emergency orders under section 12(k)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(k)(2)). The section modifies section 12(k)(2) to grant the Commission authority to take emergency action with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under the securities laws, not just under the Securities Exchange Act of 1934. The Committee recognizes that emergency conditions can necessitate emergency relief under securities laws other than the Securities Exchange Act of 1934 and is broadening the emergency measures the Commission can take under section 12(k)(2) accordingly.

The section also modifies the findings required for the Commission to enter an emergency order by adding a third finding that may support emergency action. Under new section 12(k)(2)(A)(iii), the Commission may take emergency action if it determines that action is necessary in the public interest and for the protection of investors "to reduce, eliminate, or prevent the substantial disruption by the emergency of (I) securities markets, investment companies, or any other significant portion or segment of such markets, or (II) the transmission or processing of securities transactions."

The first of these two findings—section 12(k)(2)(A)(iii)(I)—covers situations in which emergency relief is warranted to reduce, eliminate or prevent the substantial disruption by the emergency of securities markets broadly defined, including investment companies or any other significant portion or segment of the securities markets (such as broker-dealers or investment advisers, or a class thereof). As illustrated by the aftermath of the terrorist attacks of September 11, 2001, the effects of transportation and communication problems, no less than market disruptions, can require emergency relief. If transportation or communication problems or other circumstances substantially disrupt or threaten to substantially disrupt the operation of investment companies, broker-dealers, or any other significant portion or segment of the securities markets, and constitute an "emergency" under section 12(k)(6) of the Securities Exchange Act of 1934 (15 U.S.C. 78l(k)(6)), section 12(k)(2)(A)(iii)(I) allows the Commission to take emergency action

under section 12(k)(2) even if the securities secondary-trading markets and the national system for clearance and settlement of securities transactions are not threatened or disrupted.

The second finding—section 12(k)(2)(A)(iii)(II)—covers situations in which emergency relief is warranted to reduce, eliminate or prevent the substantial disruption by the emergency of the transmission or processing of securities transactions. The Committee is aware that certain market participants experienced difficulties in transmitting and processing securities transactions, including government securities transactions, in the aftermath of the attacks of September 11, 2001. In the future, should these or other circumstances substantially disrupt or threaten to substantially disrupt the transmission or processing of securities transactions and constitute an "emergency" under section 12(k)(6), section 12(k)(2)(A)(iii)(II) allows the Commission to take emergency action under section 12(k)(2) even if the national system for clearance and settlement of securities transactions is not threatened or disrupted.

The section also modifies the statute's definition of "emergency" to reflect the broader scope of findings that may support an emergency order. Specifically, the definition of "emergency" in section 12(k)(6) of the Securities Exchange Act (15 U.S.C. 78l(k)(6)) is modified to include a major disturbance that substantially disrupts, or threatens to substantially disrupt, the functioning of securities markets, investment companies, or any other significant portion or segment of such markets, or the transmission or processing of securities transactions. This modification of section 12(k)(6) mirrors the changes to the findings under section 12(k)(2)(A) and, as discussed above, is designed to account for emergencies that substantially disrupt, or threaten to substantially disrupt, the securities markets broadly defined, including the functioning of investment companies or any other significant portion or segment of the securities markets or the transmission or processing of securities transactions, even in the absence of a major market disturbance under section 12(k)(6)(A).

The section also extends the duration of a Commission emergency order to 30 business days, from the current 10 business days. The section also allows the Commission to extend an emergency order for more than 30 business days, up to a total of 90 calendar days, based upon certain findings. Specifically, under new section 12(k)(2)(C) (15 U.S.C. 78l(k)(2)(C)), the Commission may extend the duration of an emergency order beyond 30 business days if the Commission finds, at the time of the extension, that the emergency still exists, and determines that the continuation is necessary in the public interest and for the protection of investors to attain one of the three objectives that may support the Commission's initial emergency action. The calendar day, as opposed to business day, limit on total extensions of an emergency order reflects the judgment that a total of approximately three months is a reasonable limit on Commission discretion, while providing sufficient latitude for the Commission to provide appropriate immediate relief.

Finally, the section provides that, as used in the subsection added by the legislation, the definition of "securities laws" excludes the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.).

*Section 5088. Parallel authority of the Secretary of the Treasury with respect to government securities*

This section amends the Securities Exchange Act to provide emergency authority for the Secretary of the Treasury to take any action by order, involving a government security or a market therein (or significant portion or segment of that market), that the Commission may take under section 12(k)(2) of this title with respect to transactions in securities (other than exempted securities) or a market therein (or significant portion or segment of that market).

*Section 5089. Joint report on implementation of financial system resilience recommendations*

This section requires the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission to prepare and submit to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a joint report on the efforts of the private sector to implement the Interagency Paper on Sound Practices to Strengthen the Resilience of the US Financial System. The report must be submitted no later than April 30, 2006.

The report is to examine (1) covered private sector financial services firms' efforts to implement enhanced business continuity plans; (2) the extent to which the implementation of business continuity plans has been done in a geographically dispersed manner; and (3) the need to cover more financial services entities than those covered by the Interagency Paper. The agencies are also directed to recommend legislative and regulatory changes that will maximize the effective implementation of business continuity planning by the financial services industry.

*Section 5089A. Private sector preparedness*

This section expresses the sense of the Congress that the insurance industry and credit-rating agencies, where relevant, should carefully consider a company's compliance with standards for private sector disaster and emergency preparedness in assessing insurability and creditworthiness, to ensure that private sector investment in disaster and emergency preparedness is appropriately encouraged.

*Section 5089B. Report on public/private partnerships*

This section requires the Secretary of the Treasury to submit a report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate providing information on the efforts that the Treasury Department has made to encourage the formation of public/private partnerships to protect critical financial infrastructure. The report shall discuss the type of support that the Treasury has provided to these partnerships and provide recommendations for administrative or legislative action regarding these partnerships as the Secretary may determine to be appropriate.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The comparative print required by clause 3(e)(2) of rule XIII of the Rules of the House was not available in time for the filing of this report.

## DISSENTING VIEWS

The Committee on Financial Services' 9/11 legislation is another attempt to address the threat of terrorism by giving more power and money to the federal bureaucracy. Should this legislation become law, Americans will not likely be significantly safer, but they will definitely be less free. Therefore, I urge my colleagues to vote against this bill. A particularly disturbing provision of this bill repeals the expedited procedure for Congress to debate repeal of the PATRIOT Act's money laundering provisions. Since the PATRIOT Act was rushed into law in the panicked atmosphere after the 9/11 attacks and the anthrax scare and before many members had a chance to even understand the PATRIOT Act, the ability to revisit this issue by debating a resolution of repeal is very important. This is especially so since many members, oftentimes under pressure from their constituents who are concerned that many provisions of the so-called PATRIOT Act threaten constitutional liberties, have expressed regret about hastily voting in favor of the act.

This legislation erodes one of the bulwarks of individual liberty—the presumption of innocence and the corresponding requirement that the government prove beyond a reasonable doubt that an individual committed a crime. It does this by criminalizing the mere possession of technology that may be used in counterfeiting. The committee claims this is necessary because of both improvements in counterfeiting technology and the increased practice of "contracting out" counterfeiting activities have made it more difficult to apprehend counterfeiters. However, this is no excuse for relieving the government of its obligation to prove that an individual was involved in a crime, rather than that he was merely in possession of technology that could be used in a crime, before depriving that individual of his liberty.

This bill further infringes on individual liberty by enacting an unconstitutional ban on internet gambling. Using the spurious pretext that terrorists may use internet gambling operations as a source of funds, supporters of banning internet gambling have snuck the ban into this bill. However, terrorists obtain funding from a wide variety of sources. During the committee's hearing on the 9/11 commission it was mentioned that some terrorists seek jobs in the mainstream economy to raise funds. Therefore, following the committee's logic to its natural conclusion, we should outlaw all private economic activity.

Furthermore, prohibiting internet gambling will make it more likely that criminal organizations, including groups dedicated to international terrorism, will control internet gambling. History, from the failed experiment of prohibition to today's futile "war on drugs," shows that the government cannot eliminate demand for something like internet gambling simply by passing a law. Instead,

this bill will force those who wish to gamble over the internet to patronize suppliers willing to flaunt the ban. In many cases, providers of services banned by the government will be members of criminal organizations. After all, since the owners and patrons of outlawed internet gambling could not rely on the police and courts to enforce contracts and resolve other disputes, they will be forced to rely on members of organized crime to perform those functions. Thus, the profits of internet gambling will flow into organized crime. Furthermore, outlawing an activity will raise the price vendors are able to charge consumers. Combined with the increased market share organized crime will gain over gambling granted organized crime by the ban. This could increase the profits flowing to organized crime. It is bitterly ironic that a bill masquerading as an attack on crime will actually increase organized crime's ability to control internet gambling!

Instead of trusting financial markets to make the necessary preparations and adjustments in the event of a terrorist attack, the committee gives the Securities and Exchange Commission (SEC) extended "emergency" powers to suspend trading and otherwise interfere in the securities market in the event of a terrorist attack. Granting the SEC this power assumes that SEC officials will know exactly when trading needs to be suspended and for how long. However, no individual or small group of individuals can have such knowledge. Instead, this knowledge is dispersed among all market actors and coordinated though the free market. In addition, shutting down trading after a terrorist attack, when markets need to adjust in response to new conditions, will induce distortions in the market and thus worsen the economic effects of a terrorist attack.

Perhaps the most disturbing feature of the committee's 9/11 bill is the failure to address a major intrusion into financial privacy, which also hinders an effective war on terrorism: the requirement that financial institutions file suspicious activity reports whenever a transaction's value exceeds $10,000. The suspicious activity report requirement buries law enforcement in a mountain of reports, making it difficult to identify the reports that indicate behavior truly threatening to our safety. There were over 300,000 suspicious activity reports filed in 2002 alone. Expecting law enforcement to shift through massive amounts of reports and identify the true threats to our safety is the equivalent of asking law enforcement to find a needle in a forest!

John Yoder, Director of the Department of Justice's Asset Forfeiture Office during the Reagan Administration, told investigative reporter John Berlau, for a story in Reason magazine, that, "It costs more to enforce and regulate them [financial institutions subject to the Bank Secrecy Act's reporting requirements] than the benefits that are received. You're getting so much data on people who are absolutely legitimate and who are doing nothing wrong. You have investigators running around chasing innocent people, trying to find something that they're doing wrong, rather than targeting real criminals."

Director Yoder also expressed concerns that this information overload contributed to the failure to identify the September 11 highjackers: "We already had so much information that we weren't really focusing on the right stuff. What good does it do to gather

more paperwork when you're already so awash in paperwork that you're not paying attention to your own currently existing intelligence gathering system?"

By expanding the reporting requirements to gold dealers, pawns shops, jewelers, and even convenience stores that process money orders, the PATRIOT Act increased the burden on law enforcment, while further diminishing the financial privacy of American citizens. The 9/11 commission expressed skepticism over whether making 7–11s and Stop-and-Gos subject to the Suspicious Activity Reports could help catch members of Al Queda, since terrorists do not use money orders!

The suspicious activity reports also violate the Fourth Amendment to the United States Constitution. The Fourth Amendment guarantees the people the right to be secure in their persons and papers, unless the government has probable cause to believe the person is involved in criminal activities. Requiring the filing of a suspicious activity report every time a transaction's value exceeds $10,000 shreds the Fourth Amendment. Government has no right or need to spy on the financial transactions of every Americans whenever the value of the transaction exceeds an arbitrary amount.

Justice William Douglas's criticism of suspicious activity reports still rings true today: "Delivery of the records without the requisite hearing of probable cause breaches the Fourth Amendment . . . . I am not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals."

The 9/11 Recommendations Implementation Act is yet another in a series of bills that expands government power and restrict individual liberty in the name of the war on terrorism. Outlawing internet gambling, increasing the SEC's power to suspend trading in the event of a terrorist attack, and continuing to violate the Fourth Amendment by burying law enforcement in suspicious activities reports will do little to keep Americana safe. Therefore, I urge my colleagues to reject this bill.

RON PAUL.

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