

111TH CONGRESS
1ST SESSION

H. R. 3300

To provide increased transparency and regulatory requirements for the trading
of certain derivative financial instruments.

IN THE HOUSE OF REPRESENTATIVES

JULY 22, 2009

Mr. McMAHON (for himself, Ms. BEAN, Mr. MOORE of Kansas, Mr. HIMES, Mr. CROWLEY, Mr. KIND, Mr. SMITH of Washington, Mrs. MCCARTHY of New York, Ms. SCHWARTZ, Mr. ADLER of New Jersey, Ms. KOSMAS, Mr. PETERS, and Mr. MURPHY of New York) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on Agriculture, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide increased transparency and regulatory requirements for the trading of certain derivative financial instruments.

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

3 **SECTION 1. SHORT TITLE; FINDINGS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Derivative Trading Accountability and Disclosure Act”.

6 (b) FINDINGS.—Congress finds the following:

1 (1) Derivatives are financial instruments used
2 by companies to manage and mitigate risk and are
3 widely used by American companies.

4 (2) Derivatives are bilateral contracts that ex-
5 change financial risk. Over the counter (OTC) de-
6 rivatives are customized to a particular company's or
7 investor's situation and needs.

8 (3) Many exchange traded products are not
9 customizable, and as a result, companies are unable
10 to match their risks to the products that are offered
11 on exchanges, which are, by necessity, highly stand-
12 ardized.

13 (4) Clearinghouses require that participants
14 pledge only liquid collateral, such as cash or short-
15 term government securities, to support their posi-
16 tions in the market without regard to the credit
17 quality of the company. However, companies need
18 their most liquid assets for their working capital and
19 investment purposes. Requiring a company to post
20 cash as collateral means removing cash from the
21 company's core business, which hurts the company
22 and its employees, as well as the overall economy of
23 the United States.

24 (5) Lack of transparency, inadequate margin
25 and capital requirements, and poor coordination of

1 regulatory agencies to identify risks in the trading of
2 derivatives, have all led to intense and unexpected
3 pressure on individual financial service companies,
4 and the American financial system as a whole.

5 (6) The lack of oversight over the mortgage-
6 backed credit default swap (CDS) market and the
7 challenge corporate executives, business partners, in-
8 vestors and regulators had in identifying the value
9 of and risks associated with various derivative mar-
10 kets played a central role in the near collapse of
11 global financial and insurance giant American Inter-
12 national Group, Inc. in late 2008.

13 (7) Increased regulation and oversight of the
14 derivatives market is critical to achieving the goals
15 of—

16 (A) lowering systemic risk to the financial
17 system as a whole;

18 (B) promoting the efficiency and trans-
19 parency of derivative markets;

20 (C) promoting market integrity by pre-
21 venting fraud, manipulation, and other market
22 abuses; and

23 (D) protecting the public from improper
24 marketing practices.

1 **SEC. 2. DEFINITIONS.**

2 As used in this Act—

3 (1) the term “clearinghouse” means a deriva-
4 tives clearing organization as such term is defined in
5 section 1a(9) of the Commodity Exchange Act (7
6 U.S.C. 1a(9) and a clearing agency as such term is
7 defined in section 3(a)(23) of the Securities Ex-
8 change Act of 1934 (15 U.S.C. 78c(a)(23));

9 (2) the term “derivative” means any financial
10 instrument, traded on or off an exchange, the price
11 of which, at least in part, is directly dependent upon
12 the value of one or more underlying securities, eq-
13 uity indices, debt instruments, commodities, other
14 derivative instruments, or any agreed upon pricing
15 index or arrangement;

16 (3) the term “derivatives trader” means any
17 person engaged in the business of buying and selling
18 any type of derivative as part of its market making
19 activity but does not include a person who buys or
20 sells any type of derivative primarily for purposes of
21 hedging an exposure or making an investment;

22 (4) the term “exchange” has the meaning given
23 such term in section 3(a)(1) of the Securities Ex-
24 change Act of 1934 (15 U.S.C. 78c(a)(1)) and in-
25 cludes a board of trade as such term is defined in

1 section 1a(2) of the Commodity Exchange Act (7
2 U.S.C. 1a(2));

3 (5) the term “major market participant” means
4 any entity which engages in not fewer than such
5 number of such kinds of transactions, or trades not
6 fewer than such number of such kinds of derivatives,
7 as the Commodities Future Trading Commission or
8 the Securities and Exchange Commission, as appro-
9 priate, determines to qualify such entity as a finan-
10 cial institution (or other entity) of significant rel-
11 evance to the national financial system as a whole,
12 including all subsidiaries or affiliates of such entity
13 whose activities fall under the jurisdiction of the
14 Commodities Future Trading Commission or the Se-
15 curities and Exchange Commission, as appropriate;

16 (6) the term “the Office” means the Office of
17 Derivatives Supervision established in the Depart-
18 ment of the Treasury under section 3; and

19 (7) the term “over-the-counter derivatives trade
20 depository” means any person who acts as a custo-
21 dian for the primary record of an over-the-counter
22 derivative transaction or who provides facilities for
23 central processing and reconciliation of transaction
24 information relating to over-the-counter derivative
25 transactions.

1 **SEC. 3. OFFICE OF DERIVATIVES SUPERVISION IN THE**
2 **TREASURY.**

3 (a) ESTABLISHMENT.—There is hereby established
4 within the Department of the Treasury an office to be
5 known as the Office of Derivatives Supervision.

6 (b) DUTIES.—

7 (1) OVERSIGHT OF REGISTRATION OF DERIVA-
8 TIVES TRADERS.—The Office shall oversee the reg-
9 istration of derivatives traders as required under
10 section 4 and issue such rules or regulations as re-
11 quired to implement the requirements of such sec-
12 tion.

13 (2) COORDINATION ON DERIVATIVES REGULA-
14 TIONS.—The Office shall provide support and co-
15 ordination to the Securities and Exchange Commis-
16 sion and the Commodity Futures Trading Commis-
17 sion in developing a comprehensive and standardized
18 set of regulations for the sale, purchase, exchange,
19 or trade of derivatives. In particular, the Office shall
20 harmonize substantive futures and securities regula-
21 tion for economically equivalent instruments and re-
22 quire the development of consistent procedures for
23 reviewing and approving proposals for new products
24 and rulemakings by self-regulatory organizations.

25 (3) INFORMATION FACILITATION.—The Office
26 shall facilitate the exchange of information related to

1 the development of derivatives regulations described
2 in paragraph (1) between—

3 (A) the Securities and Exchange Commis-
4 sion;

5 (B) the Commodity Futures Trading Com-
6 mission;

7 (C) the Office of the Comptroller of the
8 Currency;

9 (D) the Office of Thrift Supervision;

10 (E) the Federal Reserve System; and

11 (F) such other Federal agencies or depart-
12 ments as the Office may prescribe.

13 (4) DISAPPROVAL POWER OVER DERIVATIVES
14 REGULATIONS.—

15 (A) IN GENERAL.—If, within 30 days of
16 the prescription of a rule or regulation with re-
17 spect to the sale, purchase, exchange, or trade
18 of derivatives prescribed by the Securities and
19 Exchange Commission or the Commodity Fu-
20 tures Trading Commission, the Secretary of the
21 Treasury, acting through the Office, determines
22 that such rule or regulation does not harmonize
23 substantive commodities and securities regula-
24 tion for economically equivalent instruments be-
25 tween the Securities and Exchange Commission

1 and the Commodity Futures Trading Commis-
2 sion, such rule or regulation shall not take ef-
3 fect.

4 (B) EXCEPTION.—Subparagraph (A) shall
5 not apply to a rule or regulation if such rule or
6 regulation is expressly required to be prescribed
7 by law.

8 (c) REPORT.—Not later than June 30, 2010, and
9 each year thereafter, the Office shall transmit a report to
10 Congress that—

11 (1) identifies and details the rules promulgated
12 under this Act;

13 (2) evaluates the number, percentage, volume or
14 notional size, and economic exposure of derivative in-
15 struments that are—

16 (A) traded on exchanges;

17 (B) cleared through clearinghouses; and

18 (C) traded on the over-the-counter market;

19 and

20 (3) assesses the effect of changes in mark-to-
21 market fair value accounting rules, hedge accounting
22 rules, and other related regulations on the deriva-
23 tives market.

24 **SEC. 4. REGISTRATION OF DERIVATIVES TRADERS.**

25 (a) UNLAWFUL CONDUCT.—

1 (1) IN GENERAL.—It shall be unlawful for any
2 derivatives trader to make use of the mails or any
3 means or instrumentality of interstate commerce to
4 effect any transactions in, or to induce or attempt
5 to induce the purchase or sale of, any type of deriva-
6 tive unless such derivatives trader is registered in
7 accordance with subsection (b).

8 (2) EXEMPTION.—The Secretary of the Treas-
9 ury, acting through the Office (referred to in this
10 section as “the Secretary”), by rule or order, after
11 consultation with the Securities and Exchange Com-
12 mission and the Commodities Futures Trading Com-
13 mission, as applicable, may conditionally or uncondi-
14 tionally exempt from paragraph (1) any derivatives
15 trader or class of derivatives traders specified in
16 such rule or order.

17 (b) REGISTRATION.—

18 (1) IN GENERAL.—A derivatives trader may be
19 registered by filing with the Secretary an application
20 for registration in such form and containing such in-
21 formation and documents concerning such deriva-
22 tives trader and any persons associated with such
23 derivatives trader as the Secretary, by rule, may pre-
24 scribe as necessary or appropriate in the public in-
25 terest or for the protection of investors. Within 45

1 days of the date of the filing of such application (or
2 within such longer period as to which the applicant
3 consents), the Secretary shall—

4 (A) by order grant registration, or

5 (B) institute proceedings to determine
6 whether registration should be denied.

7 (2) DETERMINATION.—The Secretary shall
8 grant such registration if the Secretary finds that
9 the requirements of this section are satisfied. The
10 Secretary shall deny such registration if the Sec-
11 retary does not make such a finding or if the Sec-
12 retary finds that if the applicant were so registered,
13 its registration would be subject to suspension or
14 revocation under paragraph (4). If the Secretary in-
15 stitutes proceedings under paragraph (1)(B), such
16 proceedings shall include notice of the grounds for
17 denial under consideration and opportunity for hear-
18 ing and shall be concluded within 120 days of the
19 date of the filing of the application for registration.
20 At the conclusion of such proceedings, the Secretary,
21 by order, shall grant or deny such registration. The
22 Secretary may extend the time for conclusion of
23 such proceedings for up to 90 days if the Secretary
24 finds good cause for such extension and publishes its

1 reasons for so finding or for such longer period as
2 to which the applicant consents.

3 (3) APPLICATION.—An application for registra-
4 tion of a derivatives trader to be formed or orga-
5 nized may be made by a derivatives trader to which
6 the derivatives trader to be formed or organized is
7 to be the successor. Such application, in such form
8 as the Secretary, by rule, may prescribe, shall con-
9 tain such information and documents concerning the
10 applicant, the successor, and any persons associated
11 with the applicant or the successor, as the Secretary,
12 by rule, may prescribe as necessary or appropriate
13 in the public interest or for the protection of inves-
14 tors. The grant or denial of registration to such an
15 applicant shall be in accordance with the procedures
16 set forth in paragraph (1). If the Secretary grants
17 such registration, the registration shall terminate on
18 the 45th day after the effective date thereof, unless
19 prior thereto the successor shall, in accordance with
20 such rules and regulations as the Secretary may pre-
21 scribe, adopt the application for registration as its
22 own.

23 (4) CENSURE, SUSPENSION, REVOCATION.—The
24 Secretary, by order, shall censure, place limitations
25 on the activities, functions, or operations of, suspend

1 for a period not exceeding 12 months, or revoke the
2 registration of any derivatives trader if the Secretary
3 finds, on the record after notice and opportunity for
4 hearing, that such censure, placing of limitations,
5 suspension, or revocation is in the public interest
6 and that such derivatives trader, whether prior or
7 subsequent to becoming such, or any person associ-
8 ated with such derivatives trader, whether prior or
9 subsequent to becoming so associated—

10 (A) has willfully made or caused to be
11 made in any application for registration or re-
12 port required to be filed with the Secretary
13 under this Act, or in any proceeding before the
14 Secretary with respect to registration, any
15 statement which was at the time and in the
16 light of the circumstances under which it was
17 made false or misleading with respect to any
18 material fact, or has omitted any material fact
19 which is required to be stated therein;

20 (B) has been convicted within 10 years
21 preceding the filing of any application for reg-
22 istration or at any time thereafter of any felony
23 or misdemeanor or of a substantially equivalent
24 crime by a foreign court of competent jurisdic-
25 tion which the Secretary finds—

1 (i) involves the purchase or sale of
2 any security or derivative, the taking of a
3 false oath, the making of a false report,
4 bribery, perjury, burglary, any substan-
5 tially equivalent activity however denomi-
6 nated by the laws of the relevant foreign
7 government, or conspiracy to commit any
8 such offense;

9 (ii) arises out of the conduct of the
10 business of a derivatives trader, broker,
11 dealer, municipal securities dealer, govern-
12 ment securities broker, government securi-
13 ties dealer, investment adviser, bank, in-
14 surance company, fiduciary, transfer agent,
15 nationally recognized statistical rating or-
16 ganization, foreign person performing a
17 function substantially equivalent to any of
18 the above, or entity or person required to
19 be registered under the Commodity Ex-
20 change Act (7 U.S.C. 1 et seq.) or any
21 substantially equivalent foreign statute or
22 regulation;

23 (iii) involves the larceny, theft, rob-
24 bery, extortion, forgery, counterfeiting,
25 fraudulent concealment, embezzlement,

1 fraudulent conversion, or misappropriation
2 of funds, or securities or derivatives, or
3 substantially equivalent activity however
4 denominated by the laws of the relevant
5 foreign government; or

6 (iv) involves the violation of section
7 152, 1341, 1342, or 1343 or chapter 25 or
8 47 of title 18, United States Code, or a
9 violation of a substantially equivalent for-
10 eign statute;

11 (C) is permanently or temporarily enjoined
12 by order, judgment, or decree of any court of
13 competent jurisdiction from acting as a deriva-
14 tives trader, investment adviser, underwriter,
15 broker, dealer, municipal securities dealer, gov-
16 ernment securities broker, government securi-
17 ties dealer, transfer agent, nationally recognized
18 statistical rating organization, foreign person
19 performing a function substantially equivalent
20 to any of the above, or entity or person required
21 to be registered under the Commodity Ex-
22 change Act or any substantially equivalent for-
23 eign statute or regulation, or as an affiliated
24 person or employee of any investment company,
25 bank, insurance company, foreign entity sub-

1 stantially equivalent to any of the above, or en-
2 tity or person required to be registered under
3 the Commodity Exchange Act or any substan-
4 tially equivalent foreign statute or regulation or
5 from engaging in or continuing any conduct or
6 practice in connection with any such activity, or
7 in connection with the purchase or sale of any
8 security or derivative;

9 (D) has willfully violated any provision of
10 the securities laws (as such term is defined in
11 section 3(a)(47) of the Securities Exchange Act
12 of 1934 (15 U.S.C. 78c(a)(47)), the Commodity
13 Exchange Act (7 U.S.C. 1a et seq.), any rule or
14 regulation issued under this Act or under any
15 of such Acts, or is unable to comply with any
16 such provision;

17 (E) has willfully aided, abetted, counseled,
18 commanded, induced, or procured the violation
19 by any other person of any provision of the se-
20 curities laws (as such term is defined in section
21 3(a)(47) of the Securities Exchange Act of
22 1934 (15 U.S.C. 78c(a)(47)), the Commodity
23 Exchange Act (7 U.S.C. 1a et seq.), any rule or
24 regulation issued under this Act or under any
25 of such Acts, the rules or regulations under this

1 Act or any of such Acts, or has failed reason-
2 ably to supervise, with a view to preventing vio-
3 lations of the provisions of such Acts, rules, and
4 regulations, another person who commits such a
5 violation, if such other person is subject to his
6 supervision. For the purposes of this subpara-
7 graph, no person shall be deemed to have failed
8 reasonably to supervise any other person, if—

9 (i) there have been established proce-
10 dures, and a system for applying such pro-
11 cedures, which would reasonably be ex-
12 pected to prevent and detect, insofar as
13 practicable, any such violation by such
14 other person; and

15 (ii) such person has reasonably dis-
16 charged the duties and obligations incum-
17 bent upon him by reason of such proce-
18 dures and system without reasonable cause
19 to believe that such procedures and system
20 were not being complied with;

21 (F) is subject to any order of the Secretary
22 barring or suspending the right of the person to
23 be associated with a derivatives trader;

24 (G) has been found by a foreign financial
25 regulatory authority to have—

1 (i) made or caused to be made in any
2 application for registration or report re-
3 quired to be filed with a foreign financial
4 regulatory authority, or in any proceeding
5 before a foreign financial regulatory au-
6 thority with respect to registration, any
7 statement that was at the time and in the
8 light of the circumstances under which it
9 was made false or misleading with respect
10 to any material fact, or has omitted to
11 state in any application or report to the
12 foreign financial regulatory authority any
13 material fact that is required to be stated
14 therein;

15 (ii) violated any foreign statute or
16 regulation regarding transactions in securi-
17 ties, or contracts of sale of a commodity
18 for future delivery, traded on or subject to
19 the rules of a contract market or any
20 board of trade;

21 (iii) aided, abetted, counseled, com-
22 manded, induced, or procured the violation
23 by any person of any provision of any stat-
24 utory provisions enacted by a foreign gov-
25 ernment, or rules or regulations there-

1 under, empowering a foreign financial reg-
2 ulatory authority regarding transactions in
3 securities, or contracts of sale of a com-
4 modity for future delivery, traded on or
5 subject to the rules of a contract market or
6 any board of trade, or has been found, by
7 a foreign financial regulatory authority, to
8 have failed reasonably to supervise, with a
9 view to preventing violations of such statu-
10 tory provisions, rules, and regulations, an-
11 other person who commits such a violation,
12 if such other person is subject to his super-
13 vision; or

14 (H) is subject to any final order of a State
15 securities commission (or any agency or officer
16 performing like functions), State authority that
17 supervises or examines banks, savings associa-
18 tions, or credit unions, State insurance commis-
19 sion (or any agency or office performing like
20 functions), an appropriate Federal banking
21 agency (as defined in section 3 of the Federal
22 Deposit Insurance Act (12 U.S.C. 1813)), or
23 the National Credit Union Administration,
24 that—

1 (i) bars such person from association
2 with an entity regulated by such commis-
3 sion, authority, agency, or officer, or from
4 engaging in the business of securities, in-
5 surance, banking, savings association ac-
6 tivities, or credit union activities; or

7 (ii) constitutes a final order based on
8 violations of any laws or regulations that
9 prohibit fraudulent, manipulative, or de-
10 ceptive conduct.

11 (5) TEMPORARY SUSPENSION.—Pending final
12 determination whether any registration under this
13 subsection shall be revoked, the Secretary, by order,
14 may suspend such registration, if such suspension
15 appears to the Secretary, after notice and oppor-
16 tunity for hearing, to be necessary or appropriate in
17 the public interest or for the protection of investors.
18 Any registered derivatives trader may, upon such
19 terms and conditions as the Secretary deems nec-
20 essary or appropriate in the public interest or for
21 the protection of investors, withdraw from registra-
22 tion by filing a written notice of withdrawal with the
23 Secretary. If the Secretary finds that any registered
24 derivatives trader is no longer in existence or has
25 ceased to do business as a derivatives trader, the

1 Secretary, by order, shall cancel the registration of
2 such derivatives trader.

3 (6) STANDARDS OF COMPETENCE.—No reg-
4 istered derivatives trader shall act as such unless it
5 meets such standards of operational capability and
6 such derivatives trader and all natural persons asso-
7 ciated with such derivatives trader meet such stand-
8 ards of training, experience, competence, and such
9 other qualifications as the Secretary finds necessary
10 or appropriate in the public interest or for the pro-
11 tection of investors. The Secretary shall establish
12 such standards by rules and regulations, which
13 may—

14 (A) specify that all or any portion of such
15 standards shall be applicable to any class of de-
16 rivatives traders and persons associated with
17 derivatives traders;

18 (B) require persons in any such class to
19 pass tests prescribed in accordance with such
20 rules and regulations, which tests shall, with re-
21 spect to any class of partners, officers, or su-
22 pervisory employees (which latter term may be
23 defined by the Secretary's rules and regula-
24 tions) engaged in the management of the de-
25 rivatives trader, include questions relating to

1 bookkeeping, accounting, supervision of employ-
2 ees, maintenance of records, and other appro-
3 priate matters; and

4 (C) provide that persons in any such class
5 other than derivatives traders and partners, of-
6 ficers, and supervisory employees of derivatives
7 traders, may be qualified solely on the basis of
8 compliance with such standards of training and
9 such other qualifications as the Secretary finds
10 appropriate.

11 The Secretary, by rule, may prescribe reasonable
12 fees and charges to defray its costs in carrying out
13 this paragraph, including, but not limited to, fees for
14 any test administered by the Secretary or under its
15 direction.

16 (c) ADDITIONAL PROHIBITIONS.—

17 (1) FRAUDULENT, DECEPTIVE, OR MANIPULA-
18 TIVE ACTS OR PRACTICES.—(A) No derivatives trad-
19 er shall make use of the mails or any means or in-
20 strumentality of interstate commerce in connection
21 with which such derivatives trader engages in any
22 fraudulent, deceptive, or manipulative act or practice
23 or violates such rules and regulations regarding con-
24 flicts of interest or fair practices, including but not
25 limited to rules and regulations related to political

1 contributions, as the Secretary shall prescribe in the
2 public interest or for the protection of investors or
3 to maintain fair and orderly markets.

4 (B) The Secretary shall, for the purposes of
5 this paragraph as the Secretary finds necessary or
6 appropriate in the public interest or for the protec-
7 tion of investors, by rules and regulations define,
8 and prescribe means reasonably designed to prevent,
9 such acts and practices as are fraudulent, deceptive,
10 or manipulative.

11 (2) ENFORCEMENT.—If the Secretary finds,
12 after notice and opportunity for a hearing, that any
13 person subject to the provisions of this section or
14 any rule or regulation thereunder has failed to com-
15 ply with any such provision, rule, or regulation in
16 any material respect, the Secretary may publish its
17 findings and issue an order requiring such person,
18 and any person who was a cause of the failure to
19 comply due to an act or omission the person knew
20 or should have known would contribute to the failure
21 to comply, to comply, or to take steps to effect com-
22 pliance, with such provision or such rule or regula-
23 tion thereunder upon such terms and conditions and
24 within such time as the Secretary may specify in
25 such order.

1 (d) POLICIES AND PROCEDURES.—Every registered
2 derivatives trader shall establish, maintain, and enforce
3 written policies and procedures reasonably designed, tak-
4 ing into consideration the nature of such derivatives trad-
5 er’s business, to prevent the misuse in violation of this
6 Act, or the rules or regulations thereunder, of material,
7 nonpublic information by such derivatives trader or any
8 person associated with such derivatives trader. The Sec-
9 retary, as the Secretary deems necessary or appropriate
10 in the public interest or for the protection of investors,
11 shall adopt rules or regulations to require specific policies
12 or procedures reasonably designed to prevent misuse in
13 violation of this Act (or the rules or regulations there-
14 under) of material, nonpublic information.

15 **SEC. 5. RULEMAKING AUTHORITY RELATED TO DERIVA-**
16 **TIVES.**

17 (a) ISSUANCE OF PROPOSED REGULATIONS.—Not
18 later than 120 days after the date of the enactment of
19 this Act, the Commodity Futures Trading Commission
20 and the Securities and Exchange Commission shall each
21 issue separate proposed regulations imposing the following
22 kinds of requirements with respect to trading in the deriv-
23 ative instruments over which each Commission has juris-
24 diction as of such date of enactment:

1 (1) Requirements governing the disclosure to
2 the respective Commission of information about the
3 positions and trading in the instruments, and trans-
4 parency, including an audit trail of the record of
5 trading information identifying, for the derivatives
6 traders participating in each transaction, the firms
7 clearing the trade, the terms and time or sequence
8 of the trade, the order receipt and execution time,
9 as applicable and, ultimately, and as applicable, the
10 customers involved.

11 (2) Anti-fraud and truth-in-marketing require-
12 ments.

13 (3) Mandatory minimum initial margin require-
14 ments.

15 (4) Mandatory minimum variation margin re-
16 quirements.

17 (5) Acceptable or permissible types of collateral.

18 (b) FACTORS TO BE CONSIDERED.—The proposed
19 regulations that impose the requirements referred to in
20 paragraphs (3) through (5) of subsection (a) with respect
21 to trading in a derivative shall be based on an evaluation
22 of the following:

23 (1) The potential systemic risk posed by the
24 sale, purchase, exchange, or trade of the derivative,

1 determined after reviewing whether the trade is
2 being made by a major market participant.

3 (2) The extent to which the instrument has
4 been customized, determined after reviewing the fol-
5 lowing:

6 (A) The volume of transactions involving
7 the derivative.

8 (B) The similarity of the terms of the de-
9 rivative to the terms in derivatives that are
10 more standardized in the industry.

11 (C) Whether the differences between the
12 terms of the derivative and the terms of such
13 standardized derivatives are of economic signifi-
14 cance.

15 (D) The extent to which any of the terms
16 in the derivative are disseminated to third par-
17 ties.

18 (c) FINAL REGULATIONS.—Within 180 days after
19 the date of the enactment of this Act, the Commodity Fu-
20 tures Trading Commission and the Securities and Ex-
21 change Commission shall each promulgate in final form,
22 with the approval of the Secretary, the regulations devel-
23 oped under this section.

1 **SEC. 6. REGULATIONS REGARDING THE TRADING AND**
2 **CLEARING OF DERIVATIVES.**

3 (a) IN GENERAL.—The Securities and Exchange
4 Commission and the Commodities Futures Trading Com-
5 mission shall jointly determine, in coordination with the
6 Office, which derivatives or class of derivatives shall be—

7 (1) required to be traded on an exchange;

8 (2) required to be cleared through a clearing-
9 house; and

10 (3) permitted to be traded through the over-the-
11 counter market.

12 (b) GUIDELINES.—Such determinations shall be
13 made in accordance with the following guidelines:

14 (1) All standardized derivatives shall be per-
15 mitted to be traded on an exchange, including those
16 derivatives excluded or exempt from such trading on
17 Organized Exchanges under the Commodities and
18 Exchange Act.

19 (2) Standardized derivatives sold, purchased,
20 traded, or exchanged between major market partici-
21 pants shall be cleared through clearinghouses.

22 (3) Derivatives that continue to be traded in
23 the over-the-counter market that are not cleared
24 through a clearinghouse shall be processed through
25 an over-the-counter derivatives trade depository.

1 (c) UNIFORM REGULATIONS.—Regardless of whether
2 a transaction is made on an exchange, through a clearing-
3 house, or through the over-the-counter market, all trades
4 shall be subject to the disclosure, transparency, anti-fraud,
5 truth-in-marketing, and reporting requirements set jointly
6 by the Securities and Exchange Commission, the Com-
7 modities Futures Trading Commission, and the Office.

8 (d) ADDITIONAL REQUIREMENTS.—Regulations
9 issued under this section shall require that—

10 (1) derivatives that are not traded on exchanges
11 or cleared through clearinghouses and are made by
12 major market participants be subject to higher total
13 capital requirements (either through higher initial
14 margin, higher variation margin, or other higher col-
15 lateral positions) than those derivatives traded on
16 exchanges or through clearinghouses; and

17 (2) derivatives that are sold, purchased, traded,
18 or exchanged between a major market participant
19 and a non-major market participant that is able to
20 borrow funds in the debt markets on an
21 uncollateralized basis, or is able to obtain other
22 sources of credit without posting cash or cash
23 equivalents to secure funds borrowed, shall be per-
24 mitted to be sold, purchased, traded, or exchanged

1 with limited or no required initial margin, variation
2 margin or other capital or collateral positions.

3 (e) SUBSEQUENT DETERMINATIONS.—Nothing in
4 this Act shall prevent the Securities and Exchange Com-
5 mission, the Commodities Futures Trading Commission,
6 or the Office from making a subsequent determination, or
7 amendment of, an initial determination of which class of
8 derivatives may be traded on an exchange, cleared through
9 a clearinghouse, or permitted to be traded through the
10 over-the-counter market.

11 (f) REPORT.—Not later than 45 days following the
12 date of enactment of this Act, the Securities and Ex-
13 change Commission and the Commodities Futures Trad-
14 ing Commission shall jointly prepare and transmit a re-
15 port to Congress that identifies all conflicts in statutes
16 and regulations with respect to similar types of financial
17 instruments and either explains why those differences are
18 essential to achieve underlying policy objectives with re-
19 spect to investor protection, market integrity, and price
20 transparency or makes recommendations for changes to
21 statutes and regulations that would eliminate the dif-
22 ferences.

23 **SEC. 7. CIVIL PENALTY AUTHORITY OF THE SEC AND CFTC.**

24 (a) AUTHORITY TO ASSESS CIVIL PENALTIES.—The
25 Securities and Exchange Commission or the Commodity

1 Futures Trading Commission, as appropriate, may impose
2 a civil penalty on any person over which each respective
3 Commission has jurisdiction under this Act and the regu-
4 lations issued under this Act, if it finds, on the record
5 after notice and opportunity for hearing, that such per-
6 son—

7 (1) has violated any requirement of this Act
8 and the regulations issued under this Act with re-
9 spect to derivatives trading,

10 (2) has willfully aided, abetted, counseled, com-
11 manded, induced, or procured such a violation by
12 any other person,

13 (3) has willfully made or caused to be made in
14 any application for registration or report required to
15 be filed with the Office or with each respective Com-
16 mission, or

17 (4) has failed reasonably to supervise another
18 person who commits such a violation, if such other
19 person is subject to such supervision,

20 and that such penalty is in the public interest.

21 (b) MAXIMUM AMOUNT OF PENALTY.—

22 (1) FIRST TIER.—The maximum amount of
23 penalty for each act or omission described in sub-
24 section (a) of this section shall be \$15,000 for a nat-
25 ural person or \$150,000 for any other person.

1 (2) SECOND TIER.—Notwithstanding paragraph
2 (1), the maximum amount of penalty for each such
3 act or omission shall be \$150,000 for a natural per-
4 son or \$750,000 for any other person if the act or
5 omission described in subsection (a) of this section
6 involved fraud, deceit, manipulation, or deliberate or
7 reckless disregard of a regulatory requirement.

8 (3) THIRD TIER.—Notwithstanding paragraphs
9 (1) and (2), the maximum amount of penalty for
10 each such act or omission shall be \$300,000 for a
11 natural person or \$1,500,000 for any other person
12 if—

13 (A) the act or omission described in sub-
14 section (a) of this section involved fraud, deceit,
15 manipulation, or deliberate or reckless dis-
16 regard of a regulatory requirement; and

17 (B) such act or omission directly or indi-
18 rectly resulted in substantial losses or created a
19 significant risk of substantial losses to other
20 persons or resulted in substantial pecuniary
21 gain to the person who committed the act or
22 omission.

23 (c) DETERMINATION OF PUBLIC INTEREST.—In con-
24 sidering under this section whether a penalty is in the pub-
25 lic interest, the appropriate Commission may consider—

1 (1) whether the act or omission for which such
2 penalty is assessed involved fraud, deceit, manipula-
3 tion, or deliberate or reckless disregard of a regu-
4 latory requirement;

5 (2) the harm to other persons resulting either
6 directly or indirectly from such act or omission;

7 (3) the extent to which any person was unjustly
8 enriched, taking into account any restitution made
9 to persons injured by such behavior;

10 (4) whether such person previously has been
11 found by the appropriate Commission to have vio-
12 lated any provision of the Federal securities laws,
13 State securities laws, or the Commodities Futures
14 Trading Act, has been enjoined by a court of com-
15 petent jurisdiction from violations of such laws or
16 rules, or has been convicted by a court of competent
17 jurisdiction of violations of such laws;

18 (5) the need to deter such person and other
19 persons from committing such acts or omissions;
20 and

21 (6) such other matters as justice may require.

22 (d) EVIDENCE CONCERNING ABILITY TO PAY.—In
23 any proceeding in which a Commission may impose a pen-
24 alty under this section, a respondent may present evidence
25 of the respondent's ability to pay such penalty. The appro-

1 puate Commission may, in its discretion, consider such
2 evidence in determining whether such penalty is in the
3 public interest. Such evidence may relate to the extent of
4 such person's ability to continue in business and the col-
5 lectability of a penalty, taking into account any other
6 claims of the United States or third parties upon such per-
7 son's assets and the amount of such person's assets.

8 (e) **AUTHORITY TO ENTER ORDER REQUIRING AC-**
9 **COUNTING AND DISGORGEMENT.**—In any proceeding in
10 which a Commission may impose a penalty under this sec-
11 tion, the appropriate Commission may enter an order re-
12 quiring accounting and disgorgement, including reason-
13 able interest. Each Commission is authorized to adopt
14 rules, regulations, and orders concerning payments to in-
15 vestors, rates of interest, periods of accrual, and such
16 other matters with respect to those derivatives over which
17 each respective Commission has jurisdiction under this
18 Act and the regulations issued under this Act, as the ap-
19 propriate Commission deems appropriate to implement
20 this subsection.

21 **SEC. 8. CEASE-AND-DESIST PROCEEDINGS.**

22 (a) **AUTHORITY OF COMMISSION.**—If the Securities
23 and Exchange Commission or the Commodity Futures
24 Trading Commission, as appropriate, finds that any per-
25 son over which each respective Commission has jurisdic-

1 tion under this Act is violating, has violated, or is about
2 to violate any provision of this Act, or any rule or regula-
3 tion thereunder, the appropriate Commission may publish
4 its findings and enter an order requiring such person, and
5 any other person that is, was, or would be a cause of the
6 violation, due to an act or omission the person knew or
7 should have known would contribute to such violation, to
8 cease and desist from committing or causing such violation
9 and any future violation of the same provision, rule, or
10 regulation. Such order may, in addition to requiring a per-
11 son to cease and desist from committing or causing a vio-
12 lation, require such person to comply, or to take steps to
13 effect compliance, with such provision, rule, or regulation,
14 upon such terms and conditions and within such time as
15 the appropriate Commission may specify in such order.
16 Any such order may, as such Commission deems appro-
17 priate, require future compliance or steps to effect future
18 compliance, either permanently or for such period of time
19 as such Commission may specify, with such provision,
20 rule, or regulation with respect to any security, any issuer,
21 or any other person.

22 (b) HEARING.—The notice instituting proceedings
23 pursuant to subsection (a) shall fix a hearing date not ear-
24 lier than 30 days not later than 60 days after service of
25 the notice unless an earlier or a later date is set by the

1 appropriate Commission with the consent of any respond-
2 ent so served.

3 (c) TEMPORARY ORDER.—Whenever the appropriate
4 Commission determines that the alleged violation or
5 threatened violation specified in the notice instituting pro-
6 ceedings pursuant to subsection (a) is likely to result in
7 significant dissipation or conversion of assets, significant
8 harm to investors, or substantial harm to the public inter-
9 est, such Commission may enter a temporary order requir-
10 ing the respondent to cease and desist from the violation
11 or threatened violation and to take such action to prevent
12 the violation or threatened violation and to prevent dis-
13 sipation or conversion of assets, significant harm to inves-
14 tors, or substantial harm to the public interest as such
15 Commission deems appropriate pending completion of
16 such proceedings. Such an order shall be entered only
17 after notice and opportunity for a hearing, unless the
18 Commission determines that notice and hearing prior to
19 entry would be impracticable or contrary to the public in-
20 terest. A temporary order shall become effective upon
21 service upon the respondent and, unless set aside, limited,
22 or suspended by the appropriate Commission or a court
23 of competent jurisdiction, shall remain effective and en-
24 forceable pending the completion of the proceedings.

25 (d) REVIEW OF TEMPORARY ORDERS.—

1 (1) COMMISSION REVIEW.—At any time after
2 the respondent has been served with a temporary
3 cease-and-desist order pursuant to subsection (c),
4 the respondent may apply to the Commission serving
5 the order to have the order set aside, limited, or sus-
6 pended. If the respondent has been served with a
7 temporary cease-and-desist order entered without a
8 prior Commission hearing, the respondent may,
9 within 10 days after the date on which the order
10 was served, request a hearing on such application
11 and such Commission shall hold a hearing and
12 render a decision on such application at the earliest
13 possible time.

14 (2) JUDICIAL REVIEW.—Within—

15 (A) 10 days after the date the respondent
16 was served with a temporary cease-and-desist
17 order entered with a prior Commission hearing,
18 or

19 (B) 10 days after the Commission renders
20 a decision on an application and hearing under
21 paragraph (1), with respect to any temporary
22 cease-and-desist order entered without a prior
23 Commission hearing,
24 the respondent may apply to the United States dis-
25 trict court for the district in which the respondent

1 resides or has its principal place of business, or for
2 the District of Columbia, for an order setting aside,
3 limiting, or suspending the effectiveness or enforce-
4 ment of the order, and the court shall have jurisdic-
5 tion to enter such an order. A respondent served
6 with a temporary cease-and-desist order entered
7 without a prior Commission hearing may not apply
8 to the court except after hearing and decision by the
9 Commission on the respondent's application under
10 paragraph (1).

11 (3) NO AUTOMATIC STAY OF TEMPORARY
12 ORDER.—The commencement of proceedings under
13 paragraph (2) shall not, unless specifically ordered
14 by the court, operate as a stay of the Commission's
15 order.

16 (e) AUTHORITY TO ENTER ORDER REQUIRING AC-
17 COUNTING AND DISGORGEMENT.—In any cease-and-desist
18 proceeding under subsection (a), the Commission may
19 enter an order requiring accounting and disgorgement, in-
20 cluding reasonable interest. Each Commission is author-
21 ized to adopt rules, regulations, and orders concerning
22 payments to investors, rates of interest, periods of accrual,
23 and such other matters as it deems appropriate to imple-
24 ment this subsection.

1 **SEC. 9. EXPEDITED RULEMAKING PROCEDURES.**

2 The Office, the Commodities Futures Trading Com-
3 mission, and the Securities and Exchange Commission
4 may issue the rules required under this Act through expe-
5 dited rulemaking procedures.

6 **SEC. 10. WORKING GROUP OF INTERNATIONAL REGU-**
7 **LATORS.**

8 (a) IN GENERAL.—Not later than 90 days after the
9 date of the enactment of this Act, the Office shall invite
10 representatives of the Securities and Exchange Commis-
11 sion, the Commodity Futures Trading Commission, regu-
12 lators of domestic and foreign boards of trade, and other
13 experts, to participate in a working group of international
14 regulators to review international reporting and regulatory
15 standards to evaluate international regulations regarding
16 the harmonization of substantive commodities and securi-
17 ties regulation for economically equivalent instruments.

18 (b) REPRESENTATION OF THE UNITED STATES.—
19 The representation of the United States in discussions
20 among and negotiations with other nations relating to the
21 international regulation of derivatives shall be composed
22 of the following:

23 (1) One individual appointed by the Secretary
24 of the Treasury acting through the Office.

25 (2) One individual appointed by the Chairman
26 of the Securities and Exchange Commission.

1 (3) One individual appointed by the Chairman
2 of the Commodity Futures Trading Commission.

3 **SEC. 11. AUTHORIZATION OF APPROPRIATIONS.**

4 There is authorized to be appropriated to each of the
5 Secretary of the Treasury, the Commodities Futures
6 Trading Commission, and the Securities and Exchange
7 Commission, such sums as may be necessary to carry out
8 this Act.

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