

The Wall Street Transparency and Accountability Act of 2010

Senate Committee on Agriculture, Nutrition, and Forestry, Chairman Blanche Lincoln

Section-by-Section Analysis

Section 1. Short Title; Table of Contents

This section provides that this Act shall be cited as The Wall Street Transparency and Accountability Act of 2010.

Title I-Regulation Of Over-The-Counter Swaps Markets

Subtitle A — Regulatory Authority

- **Section 101. Definitions**

This section states that the definitions used in this subtitle shall be given the same meaning as set forth in Section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

- **Section 102. Review of Regulatory Authority**

The Commodity Futures Trading Commission (“CFTC”) must consult with the Securities and Exchange Commission (“SEC”) and the Prudential Regulators on the development of certain rules and orders. The CFTC will not have jurisdiction over security-based swaps or associated entities unless specifically mentioned in legislation, while the SEC will not have jurisdiction over other swaps or associated entities unless specifically mentioned in the legislation. Similarly, no futures association registered under the Commodity Exchange Act (“CEA”) has authority over any security-based swap and no national securities association registered under the Securities Exchange Act of 1934 has jurisdiction over any swap. The SEC and the CFTC may appeal to the DC Circuit Court if either determines that the other has issued a rule or order that conflicts with their authority. The CFTC and SEC must consult with each other and adopt rules regarding the maintenance of records of all activities pertaining to uncleared swaps and sharing with each other information regarding swaps or security-based swaps under their respective jurisdictions. The CFTC or the SEC shall individually (not jointly) promulgate rules and regulations required due to enactment of this Act within 180 days. The CFTC and SEC may use emergency and expedited procedures to carry out this title if, in its discretion, it deems it necessary to do so.

- **Section 103. Recommendations to Changes in Portfolio Margining Laws**

The SEC, CFTC, and Prudential Regulators are directed to make recommendations to Congress on laws intended to facilitate portfolio margining of securities and commodity futures and options, commodity options, swaps, and other financial instruments within 180 days after the date of enactment.

- **Section 104. Abusive Swaps**

This section empowers the CFTC and SEC to investigate and report on any swap or security-based swap that is found to be detrimental to the stability of financial markets or their participants. The CFTC and SEC may by rule or order collect any information they find necessary to conduct these investigations.

- **Section 105. Authority to Prohibit Participation in Swap Activities**

Except as provided in CEA Section 4 and section 127 of this Act, the CFTC and SEC, in consultation with the Secretary of the Treasury, can ban foreign entities from participating in US swaps or security-based swaps markets if it is determined that the regulation in the foreign entity’s country undermines the US financial system.

- **Section 106. Prohibition against Federal Government Bailouts of Swaps Entities**

This section prohibits federal assistance (including federal deposit insurance, and access to the Federal Reserve discount window) to swaps entities in connection with their trading in swaps or securities-based swaps.

Subtitle B — Regulation of Swaps Markets

- **Section 111. Definitions**

Section 111 provides definitions for terms used in the CEA, including:

“Appropriate Federal Banking Agency” means the Comptroller of the Currency, in the case of any national banking association, or any Federal branch or agency of a foreign bank; the Board of Governors of the Federal Reserve System, in the case of any State member insured bank or any branch or agency of a foreign bank with respect to any provision of the Federal Reserve Act which is made applicable under the International Banking Act of 1978, any foreign bank which does not operate an insured branch, any agency or commercial lending company other than a Federal agency, supervisory or regulatory proceedings arising from the authority given to the Board of Governors under section 7(c)(1) of the International Banking Act of 1978, including such proceedings under the Financial Institutions Supervisory Act of 1966, and any bank holding company and any subsidiary of a bank holding company (other than a bank); the Federal Deposit Insurance Corporation in the case of a State nonmember insured bank, or a foreign bank having an insured branch; and the Director of the Office of Thrift Supervision in the case of any savings association or any savings and loan holding company. More than one agency may be an appropriate Federal banking agency with respect to any given institution.

“Associated Person of a Swap Dealer or Major Swap Participant” means any partner, officer, director, or branch manager of a swap dealer or major swap participant (including any individual who holds a similar status or performs a similar function) as well as any person that directly or indirectly controls, is controlled by, or is under common control with, a swap dealer or major swap participant; and any employee of a swap dealer or major swap participant. Any employee that performs a clerical or ministerial function is excluded from the definition.

“Associated Person of a Security-Based Swap Dealer or Major Security-Based Swap Participant” has the meaning given the term in section 3(a) of the Securities Exchange Act of 1934.

“Board” means the Board of Governors of the Federal Reserve System.

“Broad-based security index” means an index (i) which is not a “narrow-based security index” (as defined in Section 1a); (ii) which the CFTC and SEC have jointly determined should not be treated as a “narrow-based security index”; or (iii) which the CFTC has determined to be a “broad-based security index.”

“Cleared Swap” means any swap that is directly or indirectly submitted to and cleared by a Derivatives Clearing Organization (“DCO”) registered with the CFTC.

“Commodity” is amended to exclude motion picture box office receipt and related contracts.

“Commodity Pool” is defined to include entities engaged in trading commodity interests, including futures and swaps activities and the Commission is authorized to further define the term.

“Commodity Pool Operator” is updated to include persons engaged in swaps activities and the Commission is authorized to further define the term.

“Eligible Contract Participant” (“ECP”) is redefined in Section 1a of the CEA by requiring governmental (and related) entities to have at least \$50 million in investments on a discretionary basis and requiring individuals to have at least \$10 million in assets invested on a discretionary basis.

“Floor Broker” is updated to include persons engaged in swaps activities and the Commission is authorized to further define the term.

“Floor Trader” is updated to include persons engaged in swaps activities and the Commission is authorized to further define the term.

“Foreign Exchange Forward” means a transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate agreed upon at the inception of the contract/transaction and is physically settled.

“Foreign Exchange Swap” means a transaction that solely involves an exchange of two different currencies on a specific date at a fixed rate that is agreed upon at the inception of the contract as well as a reverse exchange of those two currencies at a later date and at a fixed rate that is agreed upon at the inception of the contract.

“Futures Commission Merchant” is updated to include persons engaged in swaps activities and the Commission is authorized to further define the term. Persons who only act as swap counterparties and do not otherwise engage in the activities of a futures commission merchant are excluded.

“Introducing Broker” is updated to include persons engaged in swaps activities and the Commission is authorized to further define the term.

“Major Security-Based Swap Participant” has the meaning give the term in Section 3(a) of the Securities Exchange Act of 1934.

“Major Swap Participant” (“MSP”) means any person who is not a swap dealer, and 1) maintains a substantial position in swaps for any of the major swap categories as determined by the Commission (excluding positions held for hedging or mitigating commercial risk); or 2) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or 3) is a financial entity that is highly leveraged relative to the amount of capital it holds and maintains a substantial position in outstanding swaps in any major swap category as determined by the Commission. The CFTC shall define the term “substantial position” at the threshold that the CFTC determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. A person may be designated a major swap participant for one or more categories of swaps without being classified as a major swap participant for all classes of swaps.

“Mixed Swap” means a contract that combines the elements of a swap and a securities-based swap. It is regulated as a swap unless its swap elements constitute a minimal portion of the transaction.

“Prudential Regulator” means the Board of Governors of the Federal Reserve System for any swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is a state-chartered bank that is a member of the Federal Reserve System or a State-chartered branch or agency of a foreign bank. It means the Office of the Comptroller of the Currency, for any swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is a national bank or a federally-chartered branch or agency of a foreign bank. It means the Federal Deposit Insurance Corporation for any swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is a State-chartered bank that is not a member of the Federal Reserve System. It means the

Farm Credit Administration for a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant that is an institution chartered under the Farm Credit Act of 1971.

“Registered Entity” is expanded to include “a swap execution facility registered under section 5h” and “a swap data repository” as registered entities for purposes of this Act.

“Security-Based Swap” has the meaning given in section 3(a) of the Securities Exchange Act of 1934.

“Security-Based Swap Dealer” has the meaning give in section 3(a) of the Securities Exchange Act of 1934.

“Swap” is defined as any agreement, contract, or transaction with various characteristics and gives various examples of swaps, including foreign exchange swaps, mixed swaps, and those transactions that use swap master agreements. It also includes in the definition for future transactions which became known as a swap, for current transactions that are permutations of the definition of a swap in this section. It excludes futures, forwards, securities options, single-name securities, security-based swaps, certain transactions involving securities, other securities as defined, and any agreement where the Fed, the U.S. government, or a federal agency is a counterparty.

“Swap Data Repository” means any person that collects, calculates, prepares, or maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties.

“Swap Dealer” (“SD”) means any person who holds itself out as a dealer in swaps, makes a market in swaps, regularly engages in the purchase and sale of swaps to customers in the ordinary course of business, engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps, or regularly accepts either side of swaps transactions in the ordinary course of business. A person may be designated as a swap dealer for a single type or single class or category of swap and considered not to be a swap dealer for other types, classes, or categories of swaps.

“Swap Execution Facility” (“SEF”) means a trading facility providing multiple participants the ability to execute/trade swaps or a confirmation facility that facilitates the execution of swaps between persons and is not a designated contract market.

The CFTC is authorized to adopt a rule to define “commercial risk” and any other term added to the CEA by this Act. It has the authority to modify the definitions if an entity gets structured to evade the title. The CFTC also must adopt a rule as soon as practicable to further define the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant” in order to include transactions and entities that have been structured to evade this Act. The CFTC is prohibited from exercising its exemptive authority with respect to specified provisions except as expressly authorized.

- **Section 112. Jurisdiction**

This section reaffirms the CFTC’s exclusive jurisdiction excepting any restrictions in this Act and incorporates swaps into that jurisdiction under the CEA. The section also prohibits the CFTC from approving the listing or trading of gaming contracts, and instructs the CFTC to “review closely” specified contracts in excluded commodities to ensure compliance with this prohibition. This section further states that swaps cannot be regulated as insurance under state law. Swaps, other than security-based swaps, cannot be considered securities at the state or federal level, and cannot be regulated as securities under state or federal law. This section further provides that nothing in this Act applies to activities outside the United States unless they either have a direct and significant connection with the commercial activities of the United States, or violate rules promulgated by the Commission to prevent evasion of the requirements of this Act.

- **Section 113. Clearing**

This section reserves and applies certain provisions of the CEA to swaps. It also dramatically changes the treatment of transactions in excluded and exempt commodities. Swap transactions in these commodities will be regulated and the facilities which traded them will be required to be registered. The section also states that only Eligible Contract Participants may enter into an off-exchange swap. The section also requires DCOs to allow for offset among economically equivalent contracts, and provide for nondiscriminatory clearing of swaps executed bilaterally executed or through unaffiliated DCMs or SEFs. The CFTC has expedited rulemaking authority to define criteria for determining what swaps or class of swaps are required to clear, which may include certain factors including volume, open interest, impact on systemic risk mitigation, material differences with other cleared swaps, or such other factors as the CFTC determines to be appropriate. The CFTC must review any swap a DCO lists for clearing and then make a determination by order within 90 days from when the DCO certifies or receives approval from the CFTC to list the swap as to whether the swap or class of swaps is required to clear. It may review any swap not listed for clearing. Nothing in the mandatory clearing requirement affects the ability of a DCO to list for permissive clearing any swap or class of swaps. If a swap meets the criteria of the rules adopted by the CFTC, the CFTC determines by order that such swap is required to be cleared, and the swap is listed for clearing by a registered DCO, it must be submitted for clearing unless one of the counterparties qualifies for an end user clearing exemption. The CFTC can write rules to prevent evasion of the clearing requirements. If the CFTC finds that a swap otherwise would be subject to mandatory clearing but no DCO has listed the swap for clearing, it must investigate, report, and take action as necessary and in the public interest. Swaps entered into before the date of enactment are exempt from the clearing requirement. The CFTC may stay the clearing requirement on its own initiative to review a mandatory clearing determination or if there is an application of a counterparty from a swap that has been determined to be required to clear.

Commercial end users are exempted from mandatory swap clearing. Such end users are defined by nature of their primary business activity. Financial entities may not claim this exemption. These end users can opt out of the clearing requirement for the swaps only if they are hedging commercial risk. If they opt to clear, they can choose which DCO at which the swap is cleared. Affiliates of commercial end users may opt out of the clearing requirement for swaps if the affiliate is using the swap to hedge risk of the parent or affiliates of the parent. Affiliates cannot use the parent's exemption if they are themselves swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, issues that would be investment companies but for certain exemptions in the Investment Company Act, a commodity pool, a bank holding company with over \$50 billion in consolidated assets, or affiliates of certain of these entities.

The CFTC has the authority to write rules to prevent abuses of the clearing exemption.

Commercial end users which are public companies – that is issuers of securities which are registered under the federal securities laws - shall be required to have their audit committee review and approve their of use of the end user clearing and trading exemptions for their swaps which would be subject to the mandatory clearing and trading requirement.

Certain users of uncleared, bilateral swaps and security-based swaps that are registered issuers under the federal securities laws will be required to have audit committee review and approve their uncleared, bilateral positions.

A swap that is subject to mandatory clearing must be traded through a designated contract market (“DCM”) or SEF that makes the swap available for trading.

Agricultural swaps will continue to be limited as to participants and trading unless exempted by the CFTC. Swaps entered into under section 4(c) including Part 35 of the CFTC's rules as of the date of enactment remain binding and enforceable. The CFTC is given authority to write rules and regulations governing agricultural swaps.

- **Section 114. Swaps; Segregation and Bankruptcy Treatment**

This section requires any person that holds assets to guarantee DCO-cleared swaps for other customers to register as a Futures Commission Merchant (“FCM”). It also imposes segregation requirements for cleared and uncleared swaps, and restricts use and investment of segregated funds subject to rules, regulations or orders that the CFTC may promulgate. It deems swaps cleared by a DCO to be commodity contracts for bankruptcy purposes, and provides counterparties with the option in the case of uncleared swaps to require segregation of customer assets with independent third parties. If the counterparty chooses not to require third-party segregation of customer assets, the SD or MSP is required to report back office procedures and collateral requirements to the counterparty.

- **Section 115. Derivatives Clearing Organization**

This section requires any clearinghouse that clears non security-based swaps to register as a DCO. DCOs must register with CFTC even if they are a bank or SEC-registered clearing agency. However, existing banks and clearing agencies are deemed registered to the extent that before enactment the banks cleared swaps as multilateral clearing organizations or the clearing agencies cleared swaps. Any clearinghouse that clears swaps not required to clear by the CFTC voluntarily may register as a DCO. The CFTC may exempt conditionally or unconditionally a clearing agency from registration as a DCO if it finds that the clearing agency is subject to comparable, comprehensive supervision and regulation and is registered as a clearing agency under the Securities Exchange Act of 1934 with the Securities and Exchange Commission. Every DCO must have a Chief Compliance Officer who among other things must prepare and sign an annual report on compliance in accordance with rules prescribed by the CFTC.

Every DCO must comply with a series of core principles addressing the following areas: compliance, financial resources, participant and product eligibility, risk management, settlement procedures, treatment of funds and assets, default rules and procedures, rule enforcement, system safeguards, reporting, recordkeeping, public disclosure of information, information-sharing, antitrust considerations, governance fitness standards, conflicts of interest, composition of governing boards, and legal risk. A DCO must have objective, publicly disclosed participation requirements for membership that permit fair and open access. DCOs must keep records and provide information to the CFTC as determined by CFTC. CFTC must share this information with other regulators. Those regulators must keep the information confidential in accordance with the requirements of Section 8 of the Act.

The Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27 et seq.) is amended. This section excludes identified banking products from the definition of security-based swaps and bars the CFTC from regulating such products unless an appropriate federal banking agency, in consultation with the CFTC and the SEC, determines otherwise, or in instances where the product qualifies as a swap or security-based swap, is not under the regulation of an appropriate federal banking agency, and has been structured for the purpose of evading the commodity or securities laws.

- **Section 116. Public Reporting of Aggregate Swap Data**

This section authorizes the CFTC to promulgate rules for the public release of swap transaction and pricing data in as close to real-time as is technologically possible after execution for swaps subject to the mandatory clearing requirement and for swaps that are not subject to the mandatory clearing requirement but are cleared by a DCO. The CFTC must include provisions in the rule to ensure that participants are not identified and specify criteria for determining what constitutes a large notional swap transaction for particular markets, with appropriate time delays of the reporting of such large notional swap transactions. Additionally, the CFTC shall take into account when promulgating the rule whether the public disclosure would materially reduce market liquidity. For swaps that are not cleared by a DCO but are reported to a swap data repository or the CFTC, the CFTC shall make available to the public aggregate data on the trading volumes and positions but not disclose the business transactions and market positions of any person. The CFTC may require registered entities to publicly disseminate swap transaction and pricing data information required by this section. The

CFTC is required to issue semiannual and annual reports on the trading and clearing of major swap categories and the market participants and development of new products.

- **Section 117. Swap Data Repositories**

This section lays out requirements for Swap Data Repositories. These repositories must register with the CFTC and are subject to inspection and examination. The Commission will set standards for data identification, collection, and maintenance. The data standards for Swap Data Repositories must be comparable standards for DCOs that clear swaps. The Swap Data Repository must accept data, confirm data to both counterparties, maintain that information according to standards set by the CFTC, provide direct electronic access to the CFTC in form/frequency determined by CFTC, establish systems for monitoring and analyzing data, maintain privacy, and make data available to regulators. Each data repository must have a chief compliance officer. The Swap Data Repository must abide by core principles including antitrust considerations, governance arrangements, conflicts of interest, and public information. Swap Data Repositories must register with CFTC regardless of their registration status elsewhere.

- **Section 118. Reporting and Recordkeeping**

This section imposes requirements on uncleared swaps. All uncleared swaps must be reported to a swap data repository or the CFTC if a swap data repository is unavailable. Swaps entered into before enactment, the terms of which have not expired as of the date of enactment, shall be reported to a swap data repository or the CFTC no later than 30 days after issuance of an interim final rule or such other period as the CFTC determines is appropriate. If a transaction involves only one Swap Dealer or Major Swap Participant, the Swap Dealer or Major Swap Participant must report the transaction. If a transaction involves a Swap Dealer and a Major Swap Participant, the dealer must report the transaction. In all other swaps, the counterparties choose the reporting party. All counterparties entering into swaps that are not cleared or accepted by a Swap Data Repository must maintain books and records, which are open to inspection by regulators, regarding their swaps and provide reports upon request as the CFTC determines.

- **Section 119. Large Swap Trader Reporting**

This section requires traders that enter into swaps that perform a significant price discovery function to file reports as required or directed by the CFTC for positions in excess of amounts determined by the CFTC. If the traders meet certain recordkeeping and filing requirements, they may be exempted from the restrictions.

- **Section 120. Registration and Regulation of Swap Dealers and Major Swap Participants**

Swap Dealers and Major Swap Participants must register with CFTC within 1 year of the date of enactment regardless of whether they register with other regulators. They will have reporting and recordkeeping requirements, business conduct standards, documentation and back office standards, as well as capital and margin requirements. A Swap Dealer will be subject to a fiduciary duty to any governmental entity, a state, state agency, city, county, municipality, or other political subdivision or a Federal agency as well to pension plans, endowments, and retirement plans. The CFTC and the SEC cannot impose prudential requirements if there is a Prudential Regulator but can impose business conduct, reporting, and recordkeeping requirements to protect investors. The Prudential Regulator sets capital and margin for bank Swap Dealers and Major Swap Participants, and the CFTC sets capital and margin for non-bank Swap Dealers and Major Swap Participants. Capital and margin should be comparable under all regulators and set within 180 days of the date of enactment. Non-cash collateral is permitted but may be restricted by appropriate regulators. Capital and margin must be set to ensure the safety and soundness of the Swap Dealer or Major Swap Participant and be set significantly higher for uncleared swaps as opposed to cleared swaps. Transactions are exempt from initial and variation margin requirements if one of the counterparties is not a Swap Dealer or Major Swap Participant. Swap Dealers and Major Swap Participants must perform certain duties, including monitoring of trading, establishing risk management procedures, disclosing certain information to regulators, establishing systems and procedures to obtain any necessary information, implementing conflicts of interest procedures,

and avoiding certain anticompetitive practices. Swap Dealers and Major Swap Participants shall have a chief compliance officer with certain duties, including annual reporting.

- **Section 121. Conflicts of Interest**

This section requires FCMs and Introducing Brokers (“IB”) to implement conflict-of-interest systems and procedures separating clearing and trading functions from advisory functions and such other issues as the CFTC determines appropriate. It further requires FCMs to have chief compliance officers and imposes duties to be performed with an annual requirement for filing reports with the CFTC.

- **Section 122. Swap Execution Facilities**

This section provides for the registration and regulation of SEFs by the CFTC. It establishes self-regulatory core principles for the operation of SEFs that are similar to those for DCMs. These core principles address matters including compliance with rules, swaps not readily susceptible to manipulation, monitoring of trading and trade processing, ability to obtain information, position limits or accountability, financial integrity of transactions, emergency authority, timely publication of trading information, recordkeeping and reporting, antitrust considerations, conflicts of interest, financial resources, and system safeguards. It grants the CFTC regulatory authority, including exemptive authority, over SEFs. It also requires the appointment of a chief compliance officer and imposes duties to be carried out by such officer, including annual reporting. To the extent that a DCM and a SEF use the same electronic system, they must make it clear whether the swaps transactions are done on the SEF or the DCM.

- **Section 123. Derivatives Transaction Execution Facilities and Exempt Boards of Trade**

This section repeals sections 5a and 5d of the Commodity Exchange Act concerning derivatives transaction execution facilities and exempt boards of trade.

- **Section 124. Designated Contract Markets**

This section revises the core principles that govern DCM operations. New core principles address systems safeguards, financial resources, disciplinary procedures, and the prevention of market disruption. Core principles also address rules compliance, manipulation, monitoring of trading, position limits and accountability, emergency authority, availability of general information, daily publication of trading information, execution of transactions, trade information, financial integrity of transactions, protection of markets and market participants, dispute resolution, governance fitness standards, conflicts of interest, composition of governing boards, recordkeeping, and antitrust provisions.

- **Section 125. Margin**

This section grants the CFTC rulemaking authority over futures margins, and imposes specific criteria for margin setting to the CFTC but they may not set margin for specific contracts.

- **Section 126. Position Limits**

The CFTC may impose position limits on swaps that perform or affect a significant price discovery function with respect to registered entities and require aggregate limits across markets, including DCM-traded futures and swaps, swaps traded on a SEF, swaps not traded on a SEF that affect significant price discovery, and contracts that settle against or in relation to one or more contracts listed on a registered entity that are traded on Foreign Boards of Trade (“FBOT”) that provide direct access to U.S. participants. In determining if swaps perform a significant price discovery function, the CFTC must consider a swap’s price linkage to traded contracts, potential for price arbitrage between the swap and a contract on a traded platform, whether the price is frequently referenced, whether the contracts are significantly liquid, or any other factor the Commission determines is relevant. The CFTC has broad authority to exempt persons or swaps from position limits.

- **Section 127. Foreign Boards of Trade**

This section amends CEA Section 4 to prohibit foreign boards of trade from providing the members or other participants located in the United States direct access to its trade systems for contracts that settle against prices for contracts traded on CFTC-registered entities, unless that foreign board of trade adheres to regulatory standards such as: covering daily publication of pricing information, position limits, and authority over market participants comparable to U.S. standards. The foreign board of trade also must promptly notify the CFTC of changes to these standards. The foreign board of trade further must provide large trader information comparable to that provided by registered entities, and provide the CFTC with aggregate trader data comparable to the data provided by registered entities.

This section further amends CEA Section 4 to provide that existing foreign boards of trade may continue to provide direct access under existing standards until 180 days after that date of enactment, and provides relief for certain registered persons and for certain foreign futures contracts. Registered entities trading on a FBOT are not liable for FBOT's violations and those contracts cannot be voided.

- **Section 128. Legal Certainty for Swaps**

This section prohibits the rescission of hybrid instrument or swaps transactions under certain circumstances, and clarifies the legal status of long-term transactions entered into before enactment of this Act as legal.

- **Section 129. Multilateral Clearing Organizations**

This section repeals certain provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991 governing multilateral clearing organizations.

- **Section 130. Enforcement**

This section grants the CFTC exclusive enforcement authority over swaps except for certain prudential provisions relevant to swaps entered into by banks or branches or agencies of foreign banks that are swap dealers or major swap participants. The section provides the CFTC and the prudential authority with referral authority to each other for violations within the other regulator's jurisdiction. If either regulator does not act on such referral, the other regulator then has the authority to act on the violation. Conforming amendments are made to the anti-fraud and anti-manipulation enforcement provisions of the CEA to extend those provisions to swaps.

This section further provides the CFTC with a special enforcement authority for futures, options, and swaps involving broad-based securities indexes.

- **Section 131. Retail Commodity Transactions**

This section grants CFTC anti-fraud authority over leveraged retail transactions, or those transactions entered into with persons who are not eligible contract participants or eligible commercial entities. It exempts securities, futures contracts, any sales contract that results in actual delivery within 28 days (or other time as determined by the CFTC), any sales contract that creates an enforceable obligation to deliver between a seller and buyer that have the ability to accept delivery in connection with the line of business of the seller and buyer or a contract listed on a national securities exchange. The section also states that actual delivery cannot include delivery to a third party where the commodity is held as collateral. In addition, this section amends the Gramm-Leach-Bliley Act to provide that an 'identified banking product' does not include a retail commodity transaction, unless exempted by banking agencies in consultation with the CFTC. This section requires that all U.S. regulators have similar regulatory requirements for retail forex futures sold in the U.S. and requires foreign retail forex dealers seeking to access the U.S. to be regulated comparably to U.S. dealers.

- **Section 132. Other Authority**

This section provides that no amendment made divests authority from appropriate federal banking agencies, the CFTC, the SEC, or other federal or state agency of any authority derived from any other applicable law unless otherwise specifically provided.

- **Section 133. Restitution Remedies**

This provision grants federal courts the authority to award restitution and disgorgement in actions for violations of the Act brought by the CFTC. It defines standards for restitution of losses proximately caused and for disgorgement of gains received.

- **Section 134. Enhanced Compliance by Registered Entities**

This section enhances the CFTC's rulemaking and interpretive authority over exchanges and clearing organizations regarding the DCO or DCM's compliance with core principles and clarifies standards for CFTC review of new contracts, new rules, and rule amendments. It provides a new process for prior approval of rules and rule amendments. Registered entities must provide a seven business day pre-certification notice to the CFTC regarding new rules and rule amendments and all relevant information. Once a new rule or rule amendment is officially certified, the CFTC has ten business days to review the rule or rule amendment for compliance with the CEA. The CFTC must approve the new rule unless it finds it is inconsistent with the CEA and must approve any new contract unless it violates the CEA. This section also repeals the procedures required of the CFTC before it can bring an enforcement action against a registered entity for violation of a core principle, so that such actions may be brought on the same basis as any other CFTC enforcement action. The section includes special procedures for the review and approval of event contracts by the CFTC and also allows the CFTC to determine a DCO's initial eligibility and continuing qualification to clear any swap deemed required to clear.

- **Section 135. Insider Trading**

This section prohibits: 1) government employees from trading in futures, options or swaps based upon insider information not yet available to the trading public or imparting such information in their personal capacity or for personal gain to others, and 2) any person from knowingly acquiring such information for trading purposes.

- **Section 136. Antidisruptive Practices Authority**

This section makes it unlawful for any person to engage in certain trading practices on a registered entity, including violating bids or offers, demonstrating intentional or reckless disregard of the orderly execution of transactions during the closing period, or spoofing (bidding or offering with the intent to cancel the bid or offer before execution).

This section further makes it unlawful to enter into a swap knowing that a counterparty could use the swap as a device to defraud either third parties or the public, or to violate any provision of law.

The CFTC is granted rulemaking authority to prohibit these practices and any other trading practice that is disruptive of fair and equitable trading.

- **Section 137. Whistleblower**

This section authorizes the CFTC to reward whistleblowers for original information that leads to the successful prosecution of certain enforcement actions, and establishes a process (including the review of award denials) and sets the criteria for determining the amount of payments. The CFTC is required to establish and manage a customer protection fund for the payment of whistleblowers and customer education initiatives. Whistleblowers are further granted protection against retaliation and afforded confidentiality protections. The CFTC is required to provide an annual report to Congress regarding its whistleblower program.

- **Section 139. Conforming Amendments**

This section makes various conforming amendments to the Commodity Exchange Act, including updating registrant definitions to include swaps.

- **Section 140. Effective Date**

The Act will take effect 180 days after the date of enactment unless otherwise stated.