

**Summary  
of  
Financial Contract Provisions of the 2005 Act (§§ 901-911)**

**Bankruptcy Code Amendments (§ 907)**

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**§ 101. Definitions**

Section 101(22) of the Code is amended to add to the definition of "financial institution" ... a federally-insured credit union and a liquidating agent for any of the institutions included therein. The new definition also includes as a "financial institution" ... a customer of a liquidating agent when the liquidating agent is acting as agent or custodian for that customer in connection with a securities contract (as defined in Code § 741).

New Section 101(22A) of the Code adds a defined term, "financial participant", to the Code that refers to (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 the petition is filed, has one or more agreements or transactions described in §§ 561(a)(1) through (6) 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; and (B) a clearing organization (as defined in § 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

Section 101(25) amends the defined term, "forward contract", to include any similar agreement (§ 101(25)(A)) or option contract (§ 101(25)(C)) and any combination of such agreements or transactions.

New § 101(25)(D) adds a defined term, "master agreement", that includes an agreement that provides for an agreement or transaction referred to in §§ 101(25)(A) through (C), together with all supplements to any such master agreement, even if it includes an agreement that does not constitute a "forward contract", and provides that the master agreement will only constitute a forward contract with respect those agreements or transactions that satisfy §§ 101(25)(A), (B) or (C).

New § 101(25)(E) adds to the defined term, "forward contract", a security agreement or arrangement, or other credit enhancement, related to the foregoing agreements or transactions, including any guarantee or reimbursement obligation (as used in this summary, "Credit Enhancement") by or to a forward contract merchant or financial participant in connection with any such agreement or transaction, "but not to exceed the

damages in connection with any such agreement or transaction, measured in accordance with § 562."

Section 101(26) amends the defined term, "forward contract merchant", to include a Federal reserve bank or other entity dealing in forward contracts, and clarifies that the definition of "commodity" is set forth in Code § 761.

New § 101(38A) adds a new definition, "master netting agreement", which refers to (A) 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 §§ 561(a)(1) through (5), or any related Credit Enhancement, and states that the master netting agreement will apply only to those agreements that satisfy any one or more of §§ 561(a)(1) through (5).

New § 101(38B) adds a new defined term, "master netting agreement participant", which means an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor.

Section 101(46) amends the definition of "repo participant" to delete the requirement that the repurchase agreement to which it was a party be entered into within 90 days of the filing date. Instead, a "repo participant" refers to an entity that has an outstanding repurchase agreement with the debtor "at any time before the filing date".

Section 101(47)(A)(i) amends the definition of "repurchase agreement" to include an agreement that provides for the transfer or one or more mortgage-related securities (as defined in § 3 of the Securities Exchange Act of 1934 (as referred to in this summary, the "Exchange Act")), mortgage loans, interests in mortgage related securities or mortgage loans, 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 ("OECD")), 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 mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof mortgage loans, or interests of the kind described above. New subsection 101(47)(B) specifies that a "repurchase agreement" does not include a repurchase obligation under a participation in a commercial mortgage loan.

Section 101(47)(A)(ii) expands the defined term, "repurchase agreement", to include any combination of such agreements or transactions or option contracts therefor (§ 101(47)(A)(iii)).

New § 101(47)(A)(iv) adds a defined term, "master agreement", meaning an agreement that provides for an agreement or transaction referred to in §§ 101(47)(A)(i) through (iii), together with all supplements to any such master agreement, even if it includes an agreement that does not constitute a "repurchase agreement", with the caveat that the

master agreement will only constitute a repurchase agreement with respect to each agreement or transaction thereunder that satisfies §§ 101(47)(A)(i), (ii) or (iii).

New § 101(47)(A)(v) adds a Credit Enhancement (as defined above for the purposes of this summary) related to the foregoing agreements or transactions, "but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with § 562."

Section 101(48) amends the defined term, "securities clearing agency" to clarify that it includes a person exempt from registration as a clearing agency under § 17A of the Exchange Act pursuant to an order of the United States Securities and Exchange Commission ("SEC").

New § 101(48A) defines a "securities self regulatory organization" as a securities association registered with the SEC under § 15A of the Exchange Act or a national securities exchange registered with the SEC under § 6 of the Exchange Act.

Section 101(53B) amends the term "swap agreement" so as to include all of the following agreements (and any terms and conditions incorporated by reference therein): (A)(i)(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.

New subsection § 101(53B)(A)(ii) adds to the defined term "swap agreement", 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.

Section 101(53B)(A)(iii) amends the defined term, "swap agreement", to include any combination of such agreements or transactions or option contracts therefor 101(47)(A)(iv).

New § 101(53B)(A)(v) expands the definition by including a "master agreement", *i.e.*, an agreement that provides for an agreement or transaction referred to in §§ 101(53)(A)(i)

through (iv), together with all supplements to any such master agreement, even if it includes an agreement that does not constitute a "swap agreement", with the caveat that the master agreement will only constitute a swap agreement with respect to each agreement or transaction thereunder that satisfies §§ 101(53B)(A)(i), (ii), (iii) or (iv).

New § 101(53B)(A)(vi) adds a related Credit Enhancement (as defined above), "but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with § 562."

New § 101(53B)(A)(vi) expressly limits this definition of "swap agreement" to the Code, and states that it shall not apply to any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Exchange Act, 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.

### **§ 362. Automatic stay**

Amended Section 362(b)(6) permits a "financial participant" (see § 101(22A)) to effect a set off, without violating or seeking relief from the automatic stay, of any mutual debt and claim under or in connection with commodity contracts (as defined in Code § 761), forward contracts, or securities contracts (as defined in Code § 741), and clarifies that the setoff may be exercised against cash, securities or other property pledged to or under control of the persons referred to thereunder that constitutes the setoff of a claim against the debtor for a margin payment (as defined in Code §§ 101, 741, or 761), or settlement payment (as defined in Code §§ 101 or 741), arising out of commodity, forward, or securities contracts against cash, securities, or other property pledged to or under the control of such person to margin, guarantee, secure, or settle such contracts.

Amended § 362(b)(7) permits a "financial participant" to effect a setoff of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in Code § 741 or 761, or settlement payment as defined in Code § 741, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, under the control of, or due from such repo participant or financial participant to margin, guarantee, secure or settle repurchase agreements.

Amended § 362(b)(17) permits a "financial participant" to effect a setoff with respect to a swap agreement. It also clarifies that the setoff may be under or in connection with one or more swap agreements, and relate to a claim for any payment or other transfer of property.

Under new § 362(b)(27), a "master netting agreement participant" may set off 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 to the extent that such

participant is eligible to exercise such offset rights under §§ 362(b)(6), (b)(7), or (b)(17) for each individual contract covered by the master netting agreement in issue. The setoff may be exercised with respect to any cash, securities or other property held by, pledged to, under the control of, or due from such participant to margin, guarantee, secure or settle such agreements.

Under new § 362(o), the exercise of rights under §§ 362(b)(6), (b)(7), (b)(17), or (b)(27) may not be stayed by any order of a court or administrative agency in any proceeding under the Code.

### **§ 502. Allowance of claims or interests**

New § 502(g)(2) provides that a claim for damages calculated in accordance with § 562 shall be allowed under Code § 502(a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the petition date.

### **§ 546. Limitations on avoiding powers**

Sections 546(e) through 546(g) were amended so as to apply to a "financial participant", in addition to the other persons referred to therein.

New § 546(j) makes clear that, except under § 548(a)(1) and except to the extent that the trustee could otherwise avoid a transfer under an individual contract covered under a master netting agreement, 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 prior to the filing date (regardless of §§ 544, 545, 547, 548(a)(1)(B) and 548(b)).

### **§ 548. Fraudulent transfers and obligations**

Sections 548(d)(2)(B), (d)(2)(C) and (d)(2)(D) are amended to include a financial participant.

New § 548(d)(2)(E) adds that a master netting agreement participant who receives a transfer under or in connection with any master netting agreement or any individual contract covered thereby takes for value to the extent of that transfer; except, however, with respect to a transfer under an individual contract in which the participant "otherwise did not take (or is otherwise not deemed to have taken) such transfer for value".

### **§ 553. Setoff**

Section 553 is amended to except from subsections (a)(2)(B)(ii) and (a)(3)(C), a setoff regarding financial contracts (*i.e.*, a setoff of a kind described in any of Code §§ 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561).

Section 553(b)(1) is amended to exclude from its coverage setoffs described in §§ 362(b)(17), 362(b)(27), 555, 556, 559, 560, and 561.

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

Code § 555 is amended to apply to a financial participant (in addition to the other persons entitled to exercise contractual rights thereunder), and expands those rights to include rights of termination and acceleration. The term "contractual right" is amended (in this section and in §§ 556, 559, 560 and 561) to include 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 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, in addition to a national securities exchange, a national securities association, and a securities clearing agency as provided earlier. This term also includes a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice.

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

Code § 556 is amended to apply to a financial participant (in addition to the other persons entitled to exercise contractual rights thereunder), and expands those rights to include rights of termination and acceleration. The term "contractual right" conforms to the definition in §§ 555, 559, 560 and 561.

#### **§ 559. Contractual right to liquidate, termination, or accelerate a repurchase agreement**

Code § 559 is amended to apply to a financial participant (in addition to the other persons entitled to exercise contractual rights thereunder), and expands those rights to include rights of termination and acceleration. The definition of "contractual right" conforms to §§ 555, 556, 560 and 561.

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

Code § 560 is amended to apply to a financial participant (in addition to the other persons entitled to exercise contractual rights thereunder), and expands those rights to include rights of liquidation and acceleration with respect to multiple swap contracts. The definition of "contractual right" conforms to §§ 555, 556, 559 and 561.

#### **§ 561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts; proceedings under chapter 15**

This section is new. Section 561(a) permits a contract party to exercise termination, liquidation, acceleration, offset and netting of termination values, payment amounts or other transfer obligations, of one or more securities, commodity or forward contracts, and repurchase, swap, or master netting agreements. Those rights may be exercised notwithstanding the prohibition otherwise applicable to *ipso facto* clauses under § 365(e), and may not be stayed, avoided, or otherwise limited by operation of the Code or any court or administrative agency order in any Code proceeding.

Under § 561(b)(1), however, such rights may be exercised only to the extent exercisable with respect to an individual contract under §§ 555, 556, 559, or 560.

Section 561(b) (2) applies if the debtor is a commodity broker subject to subchapter IV of chapter 7. In that event, § 561(b)(2)(A) limits a party's right to 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" referred to in § 561(a) to the party's positive net equity in the commodity accounts at the debtor, as calculated under subchapter IV of chapter 7. Section 561(b)(2) (B) applies if the non-debtor party is a commodity broker. The commodity broker is prohibited from netting or offsetting obligations under § 561(a) agreements against 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. Notwithstanding §§ 561(b)(2)(A) or (B), however, claims and obligations may be offset and netted under § 561(b)(3)(A) if they arise under (i) 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 § 5c(c) of the Commodity Exchange Act and has not been abrogated or rendered ineffective by the Commodity Futures Trading Commission. Under § 561(b)(3)(B), claims and obligations may be offset and netted if they arise under any other netting agreement between a clearing organization (as defined in § 761) and another entity that has been approved by the Commodity Futures Trading Commission.

The definition of "contractual right" under Section 561(c) conforms to the definition used in §§ 555, 556, 559 and 560.

Section 561(d) makes all of the provisions of the Code relating to financial contracts apply in a proceeding under chapter 15 that is ancillary to a non-United States insolvency proceeding, so that contract enforcement will not be stayed or otherwise limited by the Code or court order. This section also limits avoidance powers to the same extent as in a chapter 7 or 11 case (without regard to the presence or absence of assets of the debtor in the United States).

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

Section 562 is new. It provides that damages shall be measured as of the earlier of (1) the rejection date, if the trustee rejects a financial contract pursuant to § 365(a), or (2) the liquidation, termination or acceleration date(s), if the applicable counterparty terminates, liquidates or accelerates a financial contract.

Section 562(b) provides that if there are no commercially reasonable determinants of value on the dates specified in § 562(a), damages should be measured as of the earliest subsequent date or dates on which those determinants exist.

Section 562(c) provides that in the event of an objection to the timing of the measurement of damages, the non-objecting party bears the burden of proof that there were no commercially reasonable determinants of value as of such date(s).

## **SUBCHAPTER III – STOCKBROKER LIQUIDATION**

### **§ 741. Definitions for this subchapter**

The definition of "securities contract" in Code Section 741(7) is amended to include: (i) ... 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), and an 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 (§ 741(7)(A)(i)); (ii) the guarantee by or to a 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 thereon, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (§ 741(7)(A)(iii)); (iii) a margin loan (§ 741(7)(A)(iv)); and (iv) any similar agreement or transaction, combination thereof or option therefor (§§ 741(7)(A)(v)-(vii)). The definition also includes a "master agreement" for any such agreement or transaction and supplements thereto, regardless of whether the master agreement provides for an agreement or transaction that is not a "securities contract"; provided, however, that the master agreement constitutes a securities contract only with respect to each agreement or transaction thereunder that is referred to in one of the foregoing subsections, and a related Credit Enhancement (as defined above) "but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with § 562."

Section 741(7)(B) provides that a purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan does not constitute a "securities contract".

**§ 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**

New § 753 provides that, notwithstanding any other provision in the Code, 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 the Code shall not affect the priority of any unsecured claim it may have after the exercise of such rights.

**SUBCHAPTER III – COMMODITY BROKER LIQUIDATION**

**§ 761. Definitions for This Subchapter.**

The definition of "commodity contract" under Code § 761(4) is amended to include: (i) an agreement or transaction that is similar to another agreement or transaction referred to in this paragraph (§ 761(4)(F)); (ii) any combination of such agreements or transactions (§ 761(4)(G)); (iii) any option to enter into such an agreement or transaction (§ 761(4)(H)); and (iv) a related master agreement, together with all supplements thereto, without regard to whether the master agreement provides for another type of agreement or transaction, except that the master agreement shall be considered to be a "commodity contract" only with respect to each agreement or transaction thereunder that is referred to in one of the foregoing subsections (§ 761(4)(I)). A related Credit Enhancement (as defined in this summary) is also included to the extent of "the damages in connection with any such agreement or transaction, measured in accordance with § 562."

**Section 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**

New § 767 conforms the treatment of the priority of an unsecured claim to its treatment in a securities brokerage liquidation as set forth in § 753.

**CHAPTER 9 – ADJUSTMENT OF DEBTS OF A MUNICIPALITY  
SUBCHAPTER I – GENERAL PROVISIONS**

Section 901(a) of the Code is amended to cause §§ 555, 556, and 559 through 562 to apply in a chapter 9 case.

**Effective Date**

The foregoing amendments apply to cases filed on or after October 17, 2005.

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**NOTE REGARDING  
CORRESPONDING AMENDMENTS  
TO OTHER SELECT STATUTES**

Note that, in general, the foregoing Code amendments were made to conform the treatment of financial contracts under the Code to their treatment under the following statutes (each of which also was amended pursuant to the Act): the Federal Deposit Insurance Act (12 U.S.C. §§1821 et seq.) ("FDIA"); the Federal Credit Union Act (12 U.S.C. §§1787 et seq.) ("FCUA"), the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. §§4402 et seq.) ("FDICIA"); and the Securities Investor Protection Act of 1970 (15 U.S.C. §§ 78eee et seq.) ("SIPA").